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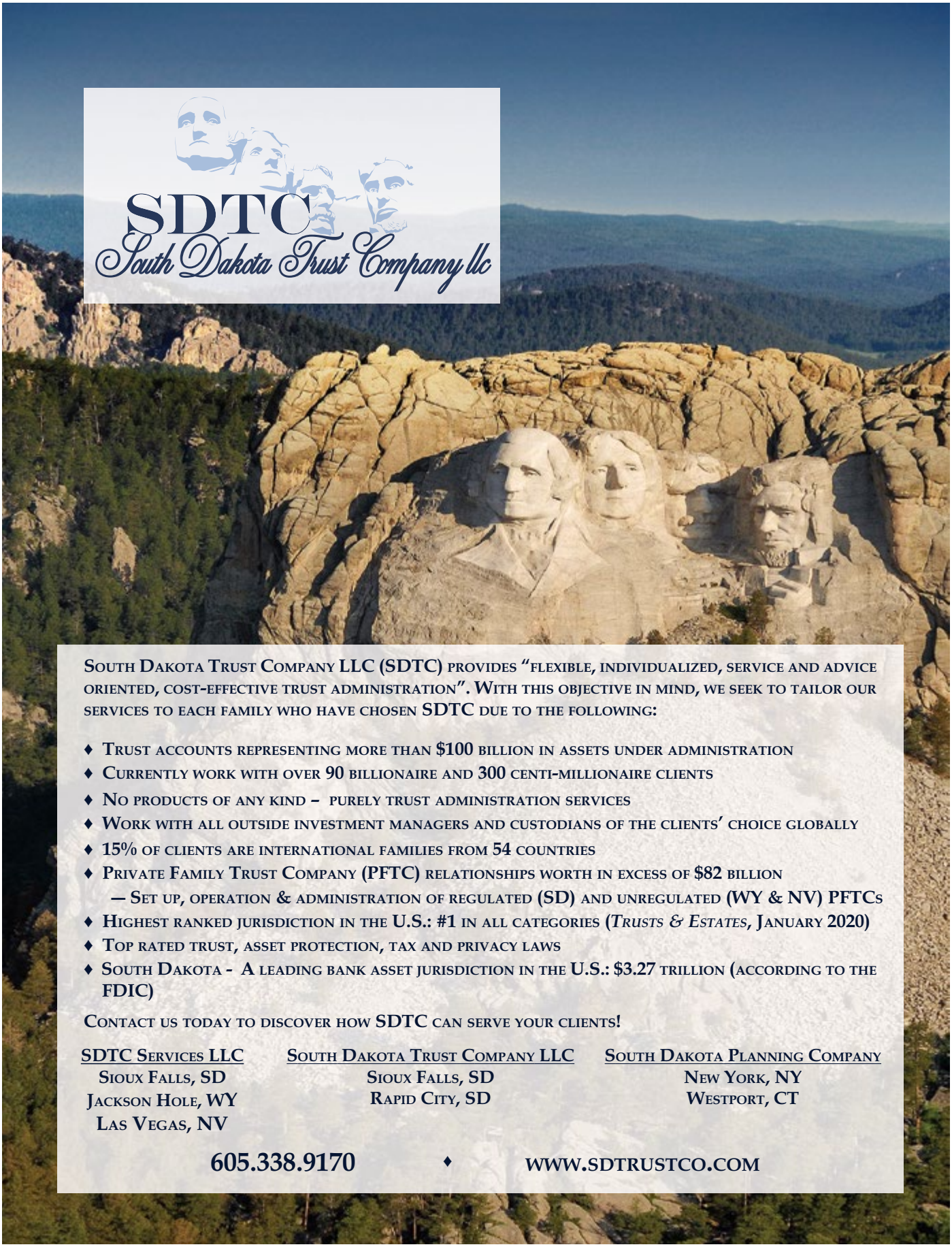
A publication of the Trusts and Estates Law Section of the New York State Bar Association

My Kidney to Yours: The Organ Shortage Crisis

The Little Known and Understood Living Benefits of Life Insurance

The Do's and Don'ts of Citations



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Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Nicholas Moneta (nmoneta@farrellfritz.com) in Microsoft Word. Please include biographical information.

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TRUSTS AND ESTATES LAW SECTION JOURNAL

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Message from the Section Chair

By Jennifer F. Hillman

Jennifer F. Hillman

As we embark into 2021, I wish us all brighter days this year. The way that we do business and interact has dramatically changed, but our membership remains vibrant and committed to the good and important work done by this Section. I am honored to serve our Section as chair this year, along with my fellow officers Laurence Keiser, chair-elect; Michael Schwartz, secretary; and Patricia Shevy, treasurer. We may be the first slate of officers elected via Zoom. On behalf of the officers, we look forward to working with each of you.

Thank you to Kathryn Madigan and David Bamdad for your excellent work as co-chairs of the annual meeting in January. Ellen Makofsky and Kevin Matz provided practical tips related to statute of limitations ten years after the notable *Schneider v. Finman*. Chief Clerks Deborah S. Kearns (Albany County), Debra Keller (Nassau County), and Diana Sanabria (New York County) delivered a "Behind the Scenes Look" at the courts during COVID-19. The virtual format only added to the entertaining remote witnessing vignette of Nicole Clouthier, Angelo Grasso, Christine Woodcock Dettor and Joseph La Ferlita. Who knew we had so many actors in our membership ranks? And the Oscar goes to….

Our virtual spring meeting is scheduled for May 6 and May 7. Holly Beecher and John Graffeo, co-chairs, have put together an interesting program that explores our expanding borders and its effect on our practice. With the implementation of the new power of attorney legislation in early summer, there will be an extended discussion on the new form and best practices. Issues related to capacity and undue influence will be analyzed by a psychologist and attorney husband/wife team. There will be some important issues addressed relating to diversity and ethics, and I anticipate a lively presentation from our panel of surrogates.

For our fall meeting, Co-chairs Tara Pleat and Lois Bladykas will focus on the intersection between trusts and estates and family law. There are endless synergies between these two practice areas, and a broader understanding of their inter-connectedness will benefit us all.

Several years ago, the Section began work on a New York Trust Code to codify New York common law related to trusts. This extensive project continues to be a Section legislative priority, as we continue to work with the Legislature to promote its enactment. The Section otherwise remains very active in advancing legislative priorities important to our area of law. Our various committees work tirelessly on issues such as posthumous annulments and the right of election, trustee commissions on charitable trusts, as well as creditor's rights and Crummey powers (to name just a few). The Section is also working jointly with other Sections to review proposed legislation related to remote notarization. The hard work and dedication of our committee members does not go unnoticed – thank you for all that you do.

Finally, I want to take this opportunity to thank our former chair, Jill Choate Beier, for her outstanding leadership during her atypical year as chair. Jill was an important conduit of vital information about the status of the courts and the ever-changing executive orders. While 2020 may not have been the year as chair that she initially envisioned, we are all grateful for her steady leadership.

Message from the Editor

By Nicholas G. Moneta

Nicholas G. Moneta

We hope that our members and their families continue to remain safe and healthy during these times. On behalf of our readers, I extend a heartfelt thank you to my colleague, Jaclene D'Agostino, who has stepped down as editor-in-chief of the *Journal* after eight successful years of service. Jackie, we are all grateful for your commitment to this publication. Congratulations and best wishes! I also congratulate Avigail Goldglancz of Pillsbury Winthrop Shaw Pittman LLP, who joins our editorial board as an associate editor. Ms. Goldglancz will also serve as vice chairperson of the Newsletter and Publications Committee. Welcome, Avigail!

In this issue, Henry Montag, CFP, and Bill Boersma, AEP, discuss the living benefits of life insurance; Hon. C. Raymond Radigan and Lisa Fenech address the organ shortage crisis, which has become exacerbated due to COVID-19, and Julian B. Modesti and Meaghan T. Feeman explain the do's and don'ts of citations in New York Surrogate's Courts.

Thank you to those who have contributed to this issue. We continue to urge Section members to participate in our publication. CLE credits may be obtained. Please consider submitting an article for publication in the *Journal*.

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

My Kidney to Yours: The Organ Shortage Crisis

By Hon. C. Raymond Radigan and Lisa Fenech

Although almost every citizen in the United States is aware of the organ donation program, generally because of the option to become one when renewing your license, very few people are aware of the crisis underlying that question. There is a steady demand for donated organs, with an ever-declining supply. The federal government and individual states have enacted various legislations in an attempt to offer more avenues for donations. However, as of April 2020, New York State has approximately 10,000 people awaiting an organ donation, and there are over 120,000 people waiting for an organ donation nationally. Every 10 minutes another person is added to the transplant list, and 22 people die each day waiting for a transplant.

Medical surgeries have been performed throughout the world for hundreds of years, but organ transplants are a relatively new concept. Organ transplants have been performed for only approximately 60 years, and the demand for organ donations has steadily increased since. Early common law writings found there was no value in a corpse.[1] Throughout judicial history, the courts have held there is no property right in a dead body for commercial purposes. However, as history developed, human body parts were found to be valuable for the study of medicine and anatomy, and many of the concepts we know today are based off these studies.[2]

In an effort to address the organ shortage, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Anatomical Gift Act (UAGA) in 1968.[3] The intention behind UAGA was to encourage voluntarism while still respecting the right to the proper disposition of the remains of a person. The UAGA gives individuals of sound mind, over 18 years old, the right to donate all or any part of their body for any purpose specified within UAGA. If an individual does not express the desire to donate during his or her lifetime, family members may donate the organs posthumously, but only if they know it is consistent with the decedent's wishes. In 1987, UAGA was revised to include a prohibition of the purchase or sale of organs, an increased emphasis on the wishes of the deceased over the surviving family's rights, and immunity for medical professionals acting in good faith.

The UAGA was revised again in 2006, in another effort to help the shortage.[4] The 2006 revisions include the permission to use life support systems at or near death for the purpose of maximizing the procurement of suitable organs. However, this may collide with an advanced health care directive of the individual to withhold or withdraw life-saving systems at end of life. The 2006 revision addresses this by providing for presumed consent to life-saving systems for the sole purpose of procuring suitable organs, but only if the individual has opted-in to be a donor. A donor can explicitly deny these life-saving systems in their advanced health care directive, but they will only be denied by an explicit instruction. Some variation of the revised UAGA was adopted by all 50 states.

As every state adopted the UAGA, the shortage of organs continued to grow, whereby the federal government instituted the National Organ Transplant Act (NOTA) in 1986. NOTA specifically covers the donation of living organs, and prohibits the purchase or sale of human organs if the transfer affects interstate commerce. NOTA provides a national registry for organ matching, known as the Organ Procurement and Transplantation Network, enabling easier matching for donors and donees.[5]

Although UAGA and NOTA taken together provide support for organ donation and transplants, there is still a severe shortage. The reasons for this may include religious or cultural views about the body, and the reluctance to "desecrate the body." Many also distrust the medical community, and fear the unsupported idea that the medical community may not make any effort to save them or allow their organs to be taken prior to their death. Some may not even be aware of the ability to donate an organ while still living. Additionally, the shortage is now exacerbated by the current COVID-19 pandemic. Prior to the pandemic, approximately 750 living-kidney transplants were performed a week in the United States. In March 2020, this number declined to 350 a week and continues to

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Special thanks to Marie Puntillo, who provided research for this article. She is a student at St. John's University School of Law.

decline. Organs which are infected with COVID-19 are not suitable for donation or transplant, therefore, donors who may have been viable for donation may no longer be due to COVID-19 exposure. In addition, those who seek to transplant their living organs to another may refrain for fear of going to the hospital and contracting COVID-19. There are fewer hospital beds and fewer ventilators for surgeries.

There are viable solutions that may help the organ shortage, but in the face of the current COVID-19 pandemic, these solutions may still fall short. For example, the United States currently runs under an opt-in system, where a person can only be designated as a donor if they "opt-in" to the system. The presumed consent model, which is utilized in Europe, presumes that everyone is a donor unless they "opt-out." This method provides a larger number of viable donors, and every single donor can save up to eight lives. However, "silence as consent" is contrary to basic American values and has yet to be adopted.

The organ donation system has many advocates, and laws, which provide for maximum exposure of the system in the hopes of maximum donations to it. However, the current state of the world, and the COVID-19 pandemic, do not provide any comfort to those waiting on the transplant lists. There is hope that the end of the current COVID-19 pandemic will signify the beginning of a renewed supply of viable donors.

Endnotes

1. *See* 3 Edward Coke, Institutes of the Laws of England, at 203 (1644).
2. *See generally, Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 50-51 (2006).
3. *Anatomical Gift Act—Uniform Law Commission*, The National Conference of Commissioners on Uniform State Laws, https://organdonationalliance.org/resources/uaga/ (last visited Sept. 3, 2020).
4. *Revised Uniform Anatomical Gift Act (2006)*, The National Conference of Commissioners on Uniform State Laws, https://www.donornetworkwest.org/wp-content/uploads/uaga_final_aug09.pdf (last revised 2009).
5. *Organ Donation Legislation and Policy*, Health Resources and Services Administration, https://www.organdonor.gov/about-dot/laws.html (last visited Sept. 3, 2020).

The Do's and Don'ts of Citations

By Julian B. Modesti and Meaghan T. Feenan

In Surrogate's Court, the citation is the equivalent of a summons in Supreme Court: it is the vehicle by which the court obtains jurisdiction over an individual, trust, or corporate entity. Accordingly, it is critical that the citation is drafted and executed in strict compliance with New York Surrogate's Court Procedure Act (SCPA) 306. Below is a brief outline of recommendations.

DO: Take the Time To Determine to Whom the Citation Needs To Be Issued.

Upon filing a petition, the petitioner is required to submit a proposed citation to the court. The court will review the papers, and if satisfied, will execute the citation and return it to the petitioner, often weeks after filing. The citation will set a return date for the proceeding. Upon doing so, the petitioner must serve the citation on the required parties.

The citation needs to be issued on all interested parties who have not yet appeared or who have not filed a waiver of service of process in the proceeding. An "interested party" is defined in SCPA 103(39) as "any person entitled or allegedly entitled to share as beneficiary in the estate, or the trustee in bankruptcy or receiver of such person." In practice, this means that in a probate proceeding, the nominated executor and persons entitled to an intestate share are "interested parties."[1] Any person who would be adversely affected if the will were probated would also be considered an interested party. For example, in a will context, the named executor, persons who would have taken a larger bequest under a prior will, and the decedent's intestate distributees, would all be "interested parties" required to be cited. Which persons or entities constitute "interested parties" in other contexts depends on the proceeding and relief sought.

In certain circumstances, additional persons must be named and served with the citation. For example, when a charitable institution's name has changed since the will was drafted, the charity no longer exists, or the charity receives a percentage of the residuary estate under the will, the New York Attorney General must be cited.[2] When a minor is an interested party, his or her parent or legal guardian must be named, unless he or she is also the petitioner,[3] and when an intellectually or developmentally disabled person must be cited, his or her guardian, caretaker, or the person he or she resides with (i.e., the facility director if he or she resides in an assisted living facility), must be named on the citation.[4]

Failing to list the names of all persons to be served on a citation is detrimental to your claim as the resulting decree issued by the court will not be binding on anyone not cited unless they waive service or otherwise appear in the proceeding.[5]

DO: Include All of the Required Information Pursuant to SCPA 306.

In format, the citation is similar to a summons or notice of motion, with some distinct differences. The citation must include the following information:

- The name and domicile of the person the proceeding relates to;
- The names of all persons who have not waived issuance and service of process;
- The time and date when the citation is returnable, which cannot exceed four months after the date the citation was issued;
- The object of the proceeding and relief sought;
- The date issued; and
- The name, address and telephone number of the petitioner's attorney.[6]

If the number of people to be cited exceeds 50, the citing party does not need to list all of the names. Instead, the citation can be issued generally to the "class."[7]

Importantly, the citation must "substantially" set forth the object of the proceeding and relief sought.[8] The description does not have to include every minute detail of the petition. Instead, it is sufficient to state that the petition seeks to, for example, construe a will, reform a will provision, or declare a testamentary trust null and void.[9] Without this description, the respondents have insufficient notice, and the court has no jurisdiction to grant the requested relief.[10]

DON'T: Forget To Include the Petition With the Citation.

Although not required at the time of service, it is best practice to include a copy of the petition, along with any exhibits or accompanying papers, with the citation. When filing a probate petition, respondents are

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also entitled to a copy of the will submitted for probate. Be sure to include copies of these documents with your citation.

DO: Take the Time To Properly Serve the Citation.

Once executed, the petitioner must serve the interested parties with the citation. Unlike in civil actions, service on a domiciliary *must* be made by personal delivery; the court will only direct another method of service where personal service is impracticable or has proved to be impossible.[11]

To request court direction, the petitioner must submit an affidavit or petition describing the due diligence efforts taken, and explain why personal service cannot be made. The court will often consider the size of the estate and the relationship of the person to be served to the estate in making this determination. Upon a finding that personal service is impossible, the court may direct service be made by:

- Publication;
- Registered or certified mail; or
- Delivery to a person of "suitable age and discretion" and mailing, pursuant to New York Civil Practice Law & Rules 308(2).[12]

For non-domiciliaries, service must be made by registered or certified mail, return receipt requested, or by special mail service.[13]

Lastly, and unlike in civil proceedings, service of process may be completed by a party to the proceeding.[14]

DON'T: Ignore Parties Added After Issuance of the Original Citation.

If a party who should have been cited (or who was not originally required to be made a party but obtains that status later on) was not, the petitioner must obtain a supplemental citation.[15] A supplemental citation should also be issued where new or different relief is sought.

To do so, follow the same procedure as in the original citation—file a proposed supplemental citation with the court naming the additional party(ies) for execution, as well as an attorney affirmation or client affidavit explaining why a supplemental citation is necessary. Be advised, however, that you may need to adjourn the return date if there is not enough time to properly serve the supplemental citation on the added respondent. In practice, most courts will require you to re-serve all of the interested parties, and not just the party(ies) added to the citation.

DON'T: Wait Until the Last Minute To Serve the Citation.

When to serve the citation depends on the method of service. When a person is served within New York State, the citation must be served at least *10 days* before the return date. When a person is served outside New York, but within the U.S., the District of Columbia, Puerto Rico or U.S. territories, the citation must be served at least *20 days* before the return date. In all other cases, the citation must be served at least *30 days* before the return date.[16]

Respondents have 60 days from service of their answer to move to dismiss the proceeding on the ground of improper service, or that defense will be waived.[17] Be sure to obtain an affidavit or admission of service for each named respondent, and file the same with the court prior to the return date to ensure proper service.[18] If service is made by publication, submission of the published notice is sufficient.

DO: Contact Your Local Surrogate's Court for Guidance.

Every county has specific local rules and preferences for citations. For example, Queens County will not accept citations listing respondents' addresses. By contrast, this is standard practice in Onondaga County. When in doubt, contact your local Surrogate's Court clerk and review the Surrogate's local rules before drafting and issuing citations.

Endnotes

1. N.Y. Surrogate's Court Procedure Act (SCPA) 103(39).
2. *Id.* 1409(1).
3. *Id.* 1705(1).
4. *Id.* 1753(1).
5. *See In re Killan*, 172 N.Y. 547 (1902); *In re McCoy*, 100 Misc. 2d 301 (Sur. Ct., N.Y. Co. 1979).
6. SCPA 306(1).
7. *Id.* 306(1)(b).
8. *Id.* 306(1)(d).
9. *See In re Axe*, 89 Misc. 2d 86 (Sur. Ct., Westchester Co. 1976).
10. *See In re Arnay*, 18 Misc. 2d 266 (Sur. Ct., N.Y. Co. 1959).
11. SCPA 307(3).
12. *Id.* 307(3)(a)–(e).
13. *Id.* 307(2).
14. *Id.* 310(1).
15. *Id.* 304(3), 315.
16. *Id.* 308(1)(a)(i)–(iii).
17. *In re Fishman*, 45 Misc. 3d 1209(A) (Sur. Ct., Nassau Co. 2014).
18. SCPA 314.

The Little Known and Understood Living Benefits of Life Insurance

By Henry Montag and Bill Boersma

Life insurance is one of those things many people think they understand—you pay a premium, you die, and your beneficiaries collect a death benefit from the insurance company. But in reality most people understand very little about the subject. In fact, while gathering survey information regarding what consumers know about their own life insurance, we noticed that many respondents changed their initial answer to the first question, which asked for a self-evaluation of their insurance knowledge, once they completed the 10 questions we asked. "I guess I don't know as much as I thought" was a very common response. Another interesting response we found from our sampling of questions was how few people knew that they could withdraw dollars from the death benefit of a life insurance policy to pay for their long-term care costs. More on that and the results of our opinion survey later. First, let us frame the intent of this article as seen through the lenses of the two authors who, with more than 75 years of combined experience, will discuss the lesser known benefits of life insurance that the attorney and ultimately his or her clients could benefit from being aware of.

Most people know that the major reason people buy life insurance is so that when they die, their family, business partners, or other beneficiaries will receive a check from the insurer. Most are aware that the proceeds from a life policy can be received tax free. Unfortunately, however, most people view life insurance as a stodgy document that you buy and put in a file drawer, only to be looked at when the insured passes away. That thinking worked up to the early 1980s when there were only two types of life insurance: term and whole life, which were both guaranteed. However, in the early 1980s when E.F Hutton created non-guaranteed Universal Life Insurance, everything changed. This article will focus on the fact that life insurance is also an "asset class" that can provide significant living benefits to an insured, and the owner, in addition to a death benefit that, with proper attention, is payable to their beneficiaries.

There are three specific types of living benefits that can be enjoyed by those aware and able to take advantage of them. As long-time practitioners we speak with experience when we say that only a small minority of policy owners and their advisors are aware of and understand many of the benefits we will be discussing. To further document this point, we created a short opinion poll to determine what the average consumer knows and doesn't know about his or her own life insurance policies. The results were very interesting, though not necessarily surprising. Realizing just how little policy owners understood about the basics may make it more compelling for you, their advisor, to realize the opportunity to not just draft the Irrevocable Life Insurance Trust (ILIT) and the Special Needs Trust (SNT), but to advocate for, and provide guidance to, the owner/trustee or insured of a life policy that's funding those vehicles.

It became apparent that so few understand this often misused financial tool that, as we'll see, is capable of so much more than just providing a death benefit. One of the most significant findings in our survey was the high percentage of individuals who purchased Universal Life Insurance policies and didn't know that there was a guaranteed and non-guaranteed version. Further, that many weren't aware that those life insurance policies were now in the process of expiring prematurely, as a result of reduced interest rates. Nor were a high percentage aware that they should have been actively managing those policies by increasing the premium paid to the life insurance company over the years.

The three living benefits we'll discuss are:

a. Life insurance and long- term care benefits resulting from the Pension Protection Act of 2006.

b. Utilizing tax-deferred accumulation benefits and tax-free distribution strategies to supplement retirement.

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Bill Boersma is the founder, owner and president of OC Consuling Group, a nationally operating life insurance consulting, audit, research and management practice in Grand Rapids, MI. Brought in by attorneys, CPAs, family offices, non-profits and financial professionals, OC offers expertise critical to proper procurement and ongoing management of life insurance assets as well as a track record of fixing problems.

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c. Utilizing Life Settlement strategies to maximize the value of an existing life insurance policy's living value.

Long-Term Care

The Pension Protection Act of 2006 (PPA), which was planned for in the early 2000s and first became effective in 2010, marked a change in public policy regarding paying for long-term care. Since the largest financial burden of paying for long-term care costs ultimately falls on state and federal governments, many governmental officials were seeking ways to increase the public's use of long- term care insurance, which had stalled out at a dismal 9-10% of market penetration. They were hoping to provide sufficient incentives to motivate their constituencies to procure private insurance themselves, rather than seek the counsel of an elder law attorney to help them shelter their own funds while going on the Medicaid rolls. In the early 2000s it was decided between the insurers and the federal and state governments that this would be accomplished by the creation of several new and significant tax benefits for those who purchased PPA-eligible hybrid, combo, or linked private long-term care, life insurance, and annuities.

The Pension Protection Act in 2010 allowed an individual to draw money from the death benefit of life insurance policies on a tax favorable basis for use in paying long-term care expenses. In addition, it allowed for the tax-free purchase of a long-term care insurance policy from the otherwise taxable gains of a life insurance policy's cash value, or an SPDA, single premium deferred annuity. The PPA also introduced a new crop of products that created significant leverage in creating a long-term care benefit that can turn $1 into three-five times greater than the initial lump sum deposited into one of these new classes of policies. These policies are referred to as asset based, combination, linked benefit or hybrid policies. In addition to the tax benefits and leverage, perhaps one of the most important benefits is that these products removed the "use it or lose it" mentality normally associated with a traditional stand-alone long-term care insurance policy. Right up there with costs, the most popular reason for not purchasing long-term care coverage was the fact that if they never needed the coverage, they would have lost all of the premium dollars they had paid in over the years.

A hybrid LTC policy can be either a life insurance or annuity contract with a rider that offers long-term care benefits. For example, say a consumer buys a $500,000 life insurance policy with an LTC rider. When the insured individual qualifies for LTC benefits (typically when he or she is unable to perform two of six activities of daily living [ADL] or becomes cognitively impaired), a given percentage of death benefit, 2% in this example, is available each month for LTC needs. This means that 2% of $500,000, or $10,000, is paid out monthly. An annuity-based LTC hybrid policy would also have a ratcheted-up benefit for LTC purposes. Additionally, inflation protection and return of premium may be added.

Before the PPA the last-in, first-out nature of taxation for annuities meant that accessing cash value to pay for LTC expenses or LTC premiums was a taxable transaction for contracts with a gain. In some situations the cost of an LTC rider was considered a distribution and taxed as ordinary income. The PPA changes this. For example, if an annuity with significant gain is rolled into a new PPA-compliant annuity, the entire value of the annuity could be used to pay for LTC costs, and the taxes on the gain would forever be avoided. Annuities still can't be exchanged into life insurance contracts, though life insurance contracts can be exchanged into annuity contracts.

Another new aspect of the PPA is the ability to do a full or partial tax-free Section 1035 exchange into a standalone long-term care policy from a life insurance policy or annuity. This is another way to eliminate income tax on gain in the policies when pursuing long-term care solutions. For example, someone with a $50,000 gain in a $100,000 annuity would normally first have to pay taxes on the $50,000 gain. However, if the money was transferred via a 1035 tax-free exchange into a hybrid product, they could eliminate the entire tax on the $50,000 gain while leveraging the $100,000 principal into a much higher pool of dollars available to pay for long-term care costs, a very significant benefit.

Individuals today are able to place new money, or transfer existing annuities with an otherwise taxable gain, into a Single Premium Immediate Annuity (SPIA) and use the full proceeds of that otherwise taxable flow of income from the SPIA to pay for an individual's or couple's long-term care premium's. These single premium immediate annuity payments can also pay an existing long-term care policy's premiums on a tax advantaged basis, assuming the premiums are paid directly to the insurer from the annuity with no concern as to an individual's health or insurability. Another very important benefit has been the ability to lock in costs for long-term care premiums, and avoid the significant premium increases the purchasers of long-term care insurance have experienced over the last decade. These benefits, all the direct result of the PPA, have been responsible for an increasing number of requests from wealthy clients seeking information about these strategies, as well as a significant number of new life policies sold with these LTCI features and riders. How well have these combo plans been accepted by the consumer? According to the Life Insurance Marketing Research Association (LIMRA), in 2017 there were approximately 66,000 traditional stand-alone long-term care policies sold, and approximately 260,000 hybrid plans. The only downside is indeed ironic: that these combo plans cannot take advantage of the various tax credits that traditional stand-alone plans are entitled to.

Accumulation Planning

The second form of living benefit generically involves retirement cash flow. These are often referred to as private pensions, deferred compensation, salary continuation, supplemental executive retirement plans, 162 bonus plans and others. Fundamentally, each version is a form of richly funding a life insurance policy to build cash value over and above the expenses in the contract to grow tax free until a point in time where the cash value can be withdrawn and/or borrowed as a loan. Assuming the withdrawal strategies are structured correctly, the loans never have to be paid back, meaning the withdrawals can be 100% income tax free as long as a minimum $10,000 of the death benefit survives the insured. This concept can be implemented through a variety of contracts with varying risk profiles.

Fixed interest whole and universal life insurance to securities-based variable life insurance to indexed life insurance, which is a bit of a hybrid product, can be used for accumulation purposes.

The benefits of using life insurance contracts for accumulation purposes include the fact that there aren't limits on contributions as there are in qualified plans; there is more flexibility in funding. Depending on product, plan design can be personalized and discriminatory; money can be accessed tax free and prior to age 59½ without penalties, and the death benefit itself is an obvious benefit. In many situations the policy's premium can be shared with the employer for a key person, or for the employer themselves through various cost-sharing strategies such as a split dollar arrangement. In a split dollar arrangement a corporate dollar, usually in a lower tax bracket, can be used instead of the individual's higher tax bracket.

Potential downsides include the inherent expenses of a life insurance contract and the need for active management. There are clashing mentalities regarding the benefit of insurance funding accumulation planning with reasonable pros and cons on each side. Too often we see it presented as a panacea and over marketed with scant attention paid to properly choosing, building and managing programs and accessing money without professional guidance. However, when thoroughly understood and managed appropriately, well-constructed plans can provide much needed benefits, especially when the tax-free death benefit is a needed benefit.

Businesses often use life insurance as incentive plans to reward valuable and loyal employees on a discriminatory basis with the ability to maintain control if desired. It cannot be overstated how important it is to choose appropriate products, properly build individuals' contracts, fund them richly, and manage them actively. Realistic expectations of returns and benefits are crucial or both employees and employers can be left disillusioned. In worst-case situations, misunderstanding and mismanaged policies can result in catastrophic income tax consequences that will leave participants wishing they had never heard of the concept.

In the declining interest rate markets over the past decades, many insurance-funded accumulation plans have failed to pan out. This is no different than a traditional retirement plan not panning out if returns do not meet original expectations; thus the need for management and a realignment of expectations. As opposed to traditional investments, where if returns and crediting rates are lower than expected there is still an account balance, with life insurance the entire contract may fail, wasting all monies that have been contributed.

None of this means the concept is bad, just that it is important to understand it thoroughly and work with skilled professionals to implement and manage strategies. Monies can be accessed through withdrawals as life insurance tax law allows basis to be extracted first, which is opposite to the rules regarding annuities. After basis is utilized, policy loans can be utilized to further access policy value and these loans, if in appropriate proportion to cash value, may not need to ever be paid back during life. While this is a major marketing feature of life insurance, great care must be taken to fully understand what this means, and the importance of modeling and managing the downside potential.

As with the long-term care options we discussed earlier, a life insurance policy that has outlived its purpose can also be exchanged tax free into an annuity product that may focus more directly on specific life insurance needs. Immediate annuities, deferred annuities, annuities with income riders, attractive death benefit features and long-term care options are all available. Furthermore, those not comfortable closely managing a life insurance policy to prevent some of the downsides from playing out can eliminate many of the risks through an annuity conversion.

College funding and any other potential need for asset accumulation where tax benefits and death benefit are advantageous could also be a consideration for the living benefits of a life insurance policy.

Life Settlements

Through our consulting practices, advisors are regularly asking us to analyze trust-owned life insurance for clients who previously purchased policies to provide liquidity to pay for their future estate tax liability. Many now feel that with the new federal tax law, which currently provides a $22,800,000 exemption for a couple, their existing life insurance policies are no longer needed, although there are potential state estate issues to be considered. Whether that's a wise strategy or not is beyond the scope of this article and deserves careful consideration as the current law sunsets in only 5½ more years, not to mention the current political climate that seems to favor a reduction in the current

exemption levels. Nonetheless, we do the performance evaluations as we're requested.

Life insurance policies can advance through seasons of need and provide differing benefits that policy owners and insured individuals need over time.

Life settlements are an outgrowth of the viatical settlement market. A viatical settlement is a clause in a life insurance policy that allows insureds to collect a percentage of their death benefit while alive but only if they are certified to have less than six to 12 months to live. Unlike a viatical, life settlements are the sale of a life insurance policy to a third party on the life of an individual who does not have a terminal illness. Generally speaking, candidates must be in their 70s and beyond and offers are more attractive when the health of the insured has deteriorated.

Sometimes the policies are inadequately funded with severely declining cash values and may never pay a death benefit, and other times the cash value and premiums prove to be an un-duplicable use of money. Either way, policy owners and trustees need to ask the necessary questions to make the proper decisions regarding the best use of their life insurance assets and the premiums that fund them. Sometimes the cash value from these policies is considered "found money" and redeployed into LTC protection. After all, the concept of risk shifting is still applicable to people with wealth.

When discussing life settlements the subject of legality needs to be clarified. Many consumers and advisors alike confuse Stranger Owned Life Insurance (STOLI), which is illegal, with a life settlement, which is legal. It's just like the sale of any other asset you own, a car, a house or a boat, etc.

Most of our work with life settlements has been the sale of non–guaranteed, underfunded and underperforming universal life policies where substantially more premium is required to keep the policies going or the death benefits must be cut. Let's say an older gentleman has a $1 million policy that isn't projected to go to normal life expectancy due to years of declining interest rates and neglect. Premiums may have to be doubled or more to have a decent chance of keeping the policy afloat through life expectancy. Whether or not the life insurance is still needed, it should always be in the mind of clients and advisors to manage assets as astutely and efficiently as possible. This policy may have $50,000 of remaining cash value and be continuously decreasing and on track to expire in a few years, well before the insured individual is expected to pass. If a third party offer is available, and obtained at an amount greater than the cash value, it should of course be considered as it will extract the greatest value from the disappointing contract. Depending on age, health, type of contract, premium load and other issues, such a policy may be salable for double or triple the cash value, or even more.

Recently we worked a case where the parents decided that the children and grandchildren could benefit from the cash value of the life insurance policy today more than they could from the death benefit years from now. They were about to cash in the policy for the cash surrender value when we were introduced by their attorney. The upshot of this was that we successfully sold the policy on the market for more than the cash value, which allowed the heirs to obtain a larger payout than the existing cash value. In this situation the policy was all paid for, was guaranteed for life and was an excellent use of money.

Whether or not a client wants to take advantage of such a strategy, bringing it to the table, when appropriate, is of paramount importance.

Even term insurance policies can be life settlement candidates on occasion. There is a narrow path to a successful term life settlement as in almost all situations the term policy will need to be convertible, which is usually up to age 70 and in rare occasions to age 75. For an individual to be a candidate at that age, it is pretty much mandatory for there to be a meaningful negative change in health. That being said, selling a term policy, with no residual value, for even a low percentage of face amount may be attractive. In some circumstances we have seen hundreds of thousands, or even seven figures, become available out of thin air for an expiring asset few thought had any value whatsoever. It is especially important for advisors to make their business owner clients aware of this concept regarding their corporate-owned policies. Too often an old key-person policy, or a forgotten buy-sell policy, is simply lapsed at the end of the term when substantial value could have been realized. When companies are being bought and sold this is another way to find buried value. It's important to ask the questions, rather than discovering later that an opportunity was squandered.

In closing it should be noted that the authors highly approve of the implementation of Regulation 187 intended to protect the New York State life insurance consumer. In July of 2018 the New York State Department of Financial Services promulgated regulations where for the first time the life insurance agent/broker will be required to not only do what is suitable for the consumer, but also do what's in the consumer's "best interest," and will also require full written disclosure regarding the risks of the purchase. (Regulation 187 has been re-named "Suitability and Best Interests in Life Insurance and Annuity Transactions.") The annuity provision became effective in August 2019, and the life insurance component became effective in February 2020. The authors feel it's high time that these new rules be imposed as they will provide more safeguards for the general public. It should be noted that credentialed members of Society of Financial Service Professionals and CFP certificants already have an imposed commitment to place the client's interest above their

own, regardless of any recommendations or how they get paid. The CFP Board of Standards began enforcing a heightened fiduciary standard on its members effective October 1, 2019, which requires the certificant to consider and analyze more than one potential course of action, and also requires any suggestions to include the advantages and disadvantages of their recommendations. The new rules also apply to all advice and not just planning advice.

Bonus Idea

In most circumstances, when a life insurance policy is surrendered or lapsed, there is no ability to take a loss if the basis in the contract is greater than the surrender value. However, there are circumstances where that loss may be salvaged rather than wasted. Tax law allows a carryover of basis from a life insurance policy to an annuity. The ensuing annuity may grow tax free to the original basis. Alternatively, under the right circumstances, the annuity may be surrendered and the realized loss may be taken advantage of. These are strategies we will not discuss in depth here and warrant working closely with your tax counsel.

Life insurance is an interesting and very efficient yet complex financial tool. It is misunderstood by most people yet on a risk adjusted, leveraged and tax adjusted basis, no other financial tool can compare to its benefits. It is unfortunate that this lack of understanding too often translates into both lost, or at least not optimized, capital and missed opportunity through the living benefits we have discussed today. As the industry and market continues to evolve and competition drives innovation, the consumer benefit available through properly vetted, implemented, managed and divested life insurance will continue to grow and flourish. As mentioned, the tools to properly manage and monitor these and other life policies to prevent their early expiration, and get the maximum value for one's premium dollars, are all available, they just have to be used. As good as life policies are, they don't come with a built-in self-management mechanism, as that's the responsibility of the owner/trustee. All too often these individuals, usually the eldest son or daughter, have little to no knowledge of their responsibilities or liabilities. These amateur trustees, your next generation client, could certainly use your guidance and advocacy in these matters.

(paid advertisement)

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

DEEDS

Language Making Conveyance "Void" on Breach of Condition Creates Possibility of Reverter

In 1896, grantor, a company, conveyed land by a deed executed by its president to the bishop of Ogdensburg "for church purposes only." The deed further provided that devoting the land to any other purpose would make the conveyance "void," at which time the grantor "shall have the right to reenter and take possession." In 1937, the will of the last surviving son of the president of the company who had executed the deed gave all of the company's assets to plaintiff. The parties to the instant case stipulated that this disposition included a deed, recorded in 1963, which transferred to the plaintiff "reversionary rights" and "rights of reentry" held by the grantor.

In 2015, the Bishop of Ogdensburg closed the church that had been constructed on the property. Plaintiff posted no trespassing signs and began an action under RPAPL article 15 seeking a determination that it owned the property in fee simple. The current Bishop of Ogdensburg counterclaimed for fee simple ownership. The Supreme Court held for the bishop, holding that the deed created a fee on a condition subsequent and therefore, a right of reentry, but the right of reentry was extinguished by the deed purportedly transferring that right.

Plaintiff appealed. On appeal, the Third Department reversed, holding that the language created what is traditionally a defeasible fee, which creates in the grantor a possibility of reverter. The possibility of reverter becomes fee simple ownership of the property subject to it as soon as the condition in the grant is broken. Under common law, the possibility of reverter, unlike a right of reentry, is descendible, devisable, and alienable and, therefore, was validly transferred to the plaintiff. Under current New York law, both interests can be transferred *inter vivos* or at death pursuant to EPTL 6-5.1. Although the language of the conveyance does mention the right to reenter, it also provides that should the condition of ecclesiastical use be broken, the conveyance is "void," which means that the return of title to the grantor or the grantor's successor in interest is automatic, thus creating a possibility of reverter. The violation of the condition occurred when, in accord

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with the canon law of the Roman Catholic Church, the bishop relegated the property to "profane but not sordid use," which can be done only when the property can no longer be used for divine worship. Finally, the court rejected the defendant's argument that the plaintiff should be required to destroy the church at its own expense in order to prevent unjust enrichment. The court held that in accord with well-established law, a structure is a fixture that passes with the property absent a statement to contrary in the deed.

***Paul Smith's College of Arts and Sciences v. Roman Catholic Diocese of Ogdensburg*, 186 A.D.3d 1817, 130 N.Y.S.3d 547 (3d Dep't 2020).**

DISCOVERY

Examinations Under SCPA 1404 Premature Where No Will Offered for Probate

Decedent's estate was the subject of a small estate proceeding under Article 13 of the SCPA. Persons other than those seeking voluntary administration then

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petitioned for authorization to carry out pre-objection examinations (under SCPA 1404) of the witnesses, the preparer of an alleged will and trust of the decedent, and document discovery. Petitioners sought a ruling that carrying out the examinations and the document discovery would not violate the no-contest clauses in the alleged will and trust. The petitioners alleged that "millions of dollars" of the decedent's assets would have been assets of the estate were it not for transfers of those assets to the alleged trust, transfers carried out by the decedent before death.

The Surrogate declined to entertain the petition because under SCPA 1404 pre-objection discovery and by extension, the safe harbor for such examinations under EPTL 3-3.5(b)(3)(D) that allows such examinations to go forward without fear of violating a no-contest clause in the will, is possible only after a purported will has been offered for probate. The statutory scheme is designed to allow potential objectants the opportunity to gather sufficient information to make an informed decision about filing objections to probate of the propounded instrument without running the risk of forfeiture of their interests through the operation of a no-contest clause. In addition, discovery related to any matters other than grounds for objection to the instrument offered for probate is not possible until after objections to probate have been filed.

Therefore, the court exercised its discretion to decline to entertain the petition and dismissed it without prejudice.

***In re Cardelli*, 69 Misc. 3d 383, 130 N.Y.S.3d 909 (Sur. Ct., Orange Co. 2020).**

Subpoenas Duces Tecum Related to Valuation Issues Upheld

Trust beneficiaries objected to the trustee's accounting. The objections related to the valuation of an interest in an LLC (Ohvata), the principal asset of which was a minority interest in a limited partnership (RH39), and to the propriety of a loan made by the trust to another trust created by the same grantor in exchange for a promissory note. The note was eventually exchanged for an interest in another entity (Taka). That interest was, in the words of the opinion, "retired as worthless." The objectants served a notice of deposition and a subpoena duces tecum on RH39. The Surrogate's Court quashed the subpoena on RH39's motion on grounds that the materials sought were irrelevant to the accounting proceeding.

The objectants also served a notice of deposition and a subpoena duces tecum on Empire Valuation Consultants LLP (Empire) which had appraised Ohvata for the trustee. This subpoena sought copies of Empire's appraisals of Ohvata and Taka and of any documents used in creating those appraisals. The entities made a motion for a protective order requiring redaction of "irrelevant information" from any documents produced by Empire. The court granted that motion and also granted a protective order with respect to the entire Empire subpoena, *sua sponte*. The court stated that many of the demands in that subpoena were "improper" and that the court would not separate the proper from the improper. The court also denied a motion by objectants to compel Taka to produce documents requested in a subpoena duces tecum served on it. The objectants appealed the denials of all three motions.

The Second Department in essence reversed all three dispositions. First, the subpoena to RH39 properly sought information relevant to the trustee's valuation of Ohvata, which is critical to deciding if the trustee received fair consideration when the grantor reacquired the interest in Ohvata. Second, the protective order was improvidently issued. The standard is indeed to deny the entire demand when the request for information is "palpably improper," but the record does not support reaching that conclusion with respect to the information sought from Empire, which relates to its valuation of Ohvata and Taka, the values of which are relevant to the propriety of the trustee's actions. Finally, the Surrogate's Court also acted improvidently in denying the request for information from Taka on the ground that the objectants did not comply with the requirement in 22 N.Y.C.R.R. 202.7, which requires with respect to a motion for disclosure an affirmation that counsel conferred with counsel for the opposing party in an effort to resolve the issues raised in the motion. The Second Department found that the submissions with the motion, including copies of emails between counsel for the objectants and counsel for the trustee showed good faith efforts to resolve the issues. The motion to compel disclosure was remitted to be decided on the merits.

***In re Hoppenstein 2005 Tr.*, 186 A.D.3d 1230, 130 N.Y.S.3d 530 (2d Dep't 2020).**

TRUSTS

Beneficiary Does Not Have Standing To Sue for Enforcement of Trust Absent Inaction by Trustee

Plaintiff and defendant (plaintiff's sibling) entered into an agreement to settle their long-standing dispute over the disposition of their late brother's extensive property. The settlement involved three agreements. One, the U.S. Agreement, is governed by New York law and provides that the plaintiff and the plaintiff's sibling will share equally in the distributions from United States entities that hold real estate. Disputes over the amount of distributions are to be settled by arbitration in New York and amounts due are to be paid by the party who received the excess distribution according to the second agreement, the London Agreement. The London Agreement is governed by the law of Greece and names the family's attorney as "trustee" for the

plaintiff and the plaintiff's sibling "in dealing with the transfers of various assets" under the settlement. The third agreement is a Letter of Instruction to the trustee named in the London Agreement. This agreement is also governed by the law of Greece.

It is probably not surprising that the plaintiff and defendant could not agree on the amount of distributions from the United States entities. Plaintiff commenced an arbitration in New York that found defendant had received excess distributions of more than $10.8 million. The arbitration award was confirmed by the Federal District Court for the Southern District of New York, but defendant made no payments either to plaintiff or to the named trustee under the London Agreement.

Plaintiff sued defendant in Supreme Court for breach of contract for failing to make the payments required under the U.S. Agreement either directly to the plaintiff or to the trustee under the London Agreement. The Supreme Court dismissed for lack of standing on the grounds that under the London Agreement and the Letter of Instruction, the payments are owed to a trust and it is up to the trustee to enforce payment. Plaintiff appealed, and the First Department affirmed. First, plaintiff's argument that the law of Greece governs the issue of standing is unavailing. Choice of law provisions apply to substantive issues, not procedural ones, and whether or not a party has standing is a procedural issue. The law of New York, therefore, governs the question. The family lawyer is described as "trustee" in all of the agreements, and by the plaintiff throughout the complaint. Plaintiff is, therefore, the beneficiary of a trust and, under well-established law, cannot sue to enforce the trust against a third party unless the beneficiary has asked the trustee to commence an appropriate action and the trustee has refused or the beneficiary can show that asking the trustee would be futile. Because the complaint does not allege a request and refusal or that a request indeed would be futile, dismissal for lack of standing is appropriate.

Plaintiff did argue that the London Agreement did not create a trust because the funds ordered by the arbitral award were not transferred to the trustee and, in fact, did not exist at the time of the creation of that agreement. It is established law that property that is the subject of the trust can be transferred to the trustee after the creation of the trust[1] and does not discuss nominal funding of the trust at the time of creation and in any event both the plaintiff and the defendant have made numerous transfers to the trustee for distribution to themselves under the agreements. As the court notes, a trust can be created by a transfer of property to another person as trustee for the person making the transfer or for a third person.[2]

The plaintiff, therefore, is the beneficiary of a trust and does indeed lack standing.

***Zachariou v. Manios*, 186 A.D.3d 442, 130 N.Y.S.3d 448 (1st Dep't 2020).**

Endnotes

1. The court cites *In re Doman*, 68 A.D.3d 862 (2d Dep't 2009).
2. The court cites Restatement (Second) of Trusts § 17.

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

By Ilene Sherwyn Cooper

Attorney's Fees

In a proceeding for the fixation of legal fees pursuant to SCPA 2110, the Surrogate's Court, Bronx County, denied the petitioner's application for anticipated fees in connection with the proceeding, holding that it was without authority to award fees for future services not yet incurred.

***In re Ferrin*, N.Y.L.J., Dec. 4, 2020, p. 21 (Sur. Ct., Bronx Co.)**

Constructive Trust

In *In re Tong,* the Surrogate's Court, New York County, addressed whether a constructive trust should be imposed on the assets held in a brokerage account. The discovery proceeding before the court was commenced by one of the decedent's two sons, the limited administrator of the estate, against his brother. Notably, in an earlier decision, the court dismissed a portion of the petition, without prejudice, which sought the recovery of an IRA for lack of subject matter jurisdiction.

The court observed that a constructive trust is comprised of four elements: a confidential relationship, a promise, which may be implied, a transfer made in reliance on that promise, and unjust enrichment. On the issue of confidential relationship, the court noted that a mother-son relationship does not constitute a confidential relationship in and of itself, nor does one party's dependence on another because of physical limitations. To this extent, the court found that while the decedent depended on the respondent for purchasing her food and medications, and for other household chores, it was insufficient to establish that she depended on him in other respects or that she was susceptible to his control. Indeed, the testimony indicated that the decedent had a laptop, which she used frequently to trade stocks, and that she was capable of living on her own.

On the issue of reliance on a promise, the court noted that the petitioner needed to show, at a minimum, that the respondent either promised or had an implicit agreement or understanding with his mother that she would retain control of her investment account after the account transfer, or would have access to the funds, and that such access would devolve upon her estate. However, the court concluded that unlike the circumstances in *Sharp v. Kosmalski*,[1] where the court implied a promise based on the plaintiff's continued need of the transferred asset to sustain herself, the decedent had ample funds and resources, principally through the assets of the IRA, to satisfy her living expenses, and did not require the assets of the subject brokerage account to do so.

Accordingly, in view of the foregoing, the court denied the relief requested in the petition.

***In re Tong*, N.Y.L.J., Oct. 19, 2020, p. 22 (Sur. Ct., N.Y. Co.)**

Electronic Discovery Authorized

In *In re Meixsell,* the Surrogate's Court, Bronx County, was confronted with a motion, pursuant to CPLR 3126, by the petitioner, the nominated executor under the propounded will, to dismiss the objections to probate filed by the decedent's brother and sole distributee of his estate, as a result of his failure to submit to an examination before trial. In opposition to the motion, the objectant maintained that he was 91 years old, resided in Florida, and had been diagnosed with cancer. Annexed to his papers was an affidavit from his treating oncologist indicating that the objectant should not travel to New York given his health and high risk of contracting COVID-19. In view thereof, the objectant offered to be deposed in Florida via video conference. The petitioner replied arguing, *inter alia,* that absent a stipulation of counsel, no basis existed for the court's ordering a deposition in Florida pursuant to CPLR 3113(d).

The court observed that the provisions of Article 31 afford it with broad discretion to supervise disclosure and to make such orders with regard to the failure or refusal to provide disclosure as are just. To this extent, the court noted that dismissal pursuant to CPLR 3126 is a drastic measure, particularly during such "extraordinary times" as wrought by the COVID-19 pandemic. Acknowledging that both practitioners and the courts

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have availed themselves of technology in order to conduct business, the court found that videoconferencing was a sound alternative to an in-person deposition and proper under the circumstances. Indeed, the court opined that while the petitioner was entitled to the objectant's deposition, causing him to travel to New York for this purpose, in view of his medical condition, strained common sense and decency. The court rejected the petitioner's contention that it was not otherwise authorized to direct electronic discovery pursuant to CPLR 3113 (d) absent a stipulation, and, under the circumstances, directed the objectant to submit to a video examination from Florida.

***In re Meixsell*, N.Y.L.J., Dec. 3, 2020, p. 23 (Sur. Ct., Bronx Co.)**

Eviction

In a contested accounting proceeding before the Surrogate's Court, Bronx County, in *In re Jenkins,* the petitioner requested leave, pursuant to SCPA 1902, to sell the decedent's interest in a parcel of realty, and to eject decedent's grandson from the property. The application was supported by two of the decedent's granddaughters. However, it was opposed by the decedent's grandson, who stated that he wished to buy the realty, but for a price less than the contract price. The court noted that courts have liberally granted SCPA 1902 (1), (6) and (7) applications to sell realty over the objections of some of the co-tenants in common who derived their interest in the realty from the decedent, provided that there is a sufficient nexus between the relief requested and the administration of the decedent's estate.

The record revealed that the decedent died on August 18, 2006, owning several parcels of realty. Letters of administration issued to her son on June 12, 2007. Thereafter, one of the decedent's granddaughters commenced a compulsory accounting proceeding in October, 2015, not only seeking an accounting for almost a decade of stagnation but, more importantly, for payment of her distributive share.

In view of the foregoing, and the delay in administering and distributing the estate for the 14-year period since the decedent's death, the court, although sympathetic to the decedent's grandson, granted the petitioner's application, and issued a warrant of eviction, which was stayed for 30 days in order to allow the grandson to vacate the premises voluntarily.

***In re Jenkins*, 2020 N.Y.L.J. LEXIS 1723 (Sur. Ct., Bronx Co.)**

Remotely Executed Will Probated

Before the Surrogate's Court, Broome County, in *In re Ryan,* was an uncontested proceeding requesting probate of a remotely executed will. The decedent died on June 3, 2020, with a purported will dated June 1, 2020, which was executed by the decedent while a patient at a hospital facility. COVID-19 restrictions implemented by the hospital precluded outside visitors from entering the hospital, and thus, arrangements were made for the instrument to be remotely signed.

Testimony at a SCPA 1404 examination revealed that prior to his hospitalization, the decedent communicated by telephone with counsel regarding the contents of the instrument, the members of his family, and his decision not to provide for his brother. Once prepared, counsel arranged for the decedent's social worker at the hospital to be with him for its execution.

Thereafter, the instrument was delivered in a sealed envelope to the social worker, who then delivered it to the decedent, and remained with him at the time of execution, serving as a "videographer" by utilizing a cell phone. Counsel and two of his staff participated in the ceremony via a computer at his office. According to the testimony, the decedent opened the sealed envelope and reviewed the will with counsel. The decedent was identified by those present through a driver's license that had been provided in advance to counsel's office.

Counsel then asked the decedent the requisite questions in conformity with the requirements of EPTL 3-2.1, and thereafter the decedent signed the will in the view of counsel and two members of his staff. Following the will execution, the instrument was immediately driven back to counsel's office, where his staff executed the attestation clause and the witness affidavit, which had been stapled with the original will in a will cover.

Based on the foregoing, the court found the propounded will to be duly executed in accordance with the statutory requirements. Moreover, the court noted that the execution ceremony coordinated by counsel more than satisfied the provisions for the virtual execution of wills set forth in N.Y. Executive Order 202.14.

***In re Ryan*, 2121 N.Y. Slip Op. 21010 (Sur. Ct., Broome Co. Jan. 25, 2021)**

Sanctions and Summary Judgment

Before the Surrogate's Court, New York County, in *In re Roberts,* was a motion by the proponent of the decedent's will and codicil for summary judgment dismissing the objections to probate filed by various relatives of the decedent. Additionally, proponent sought to vacate a 2007 preliminary injunction, and requested sanctions against objectants based upon the alleged spoliation of evidence by objectant's counsel. Objectants cross-moved to dismiss the probate petition with prejudice pursuant to CPLR 3126 for failure to prosecute, as well for costs and legal fees attendant to the motions.

The decedent died at the age of 94 survived by three siblings and nine children of post-deceased siblings. Prior to the filing of the motions *sub judice*, the public administrator was appointed temporary administrator of the estate, and proponent and objectants both moved and cross-moved for summary judgment, respectively. Objectant's cross-motion was denied and proponent's motion was granted in part and denied in part.

With respect to that part of the proponent's present motion seeking summary judgment, the court noted that the Appellate Division, First Department has repeatedly refused to entertain successive motions for summary relief absent "a showing of newly discovered evidence or other sufficient justification."[2] Inasmuch as the petitioner did not claim to have discovered new evidence since the making of her prior motion for summary judgment, or offer any justification permitting her to make a duplicative motion of this sort, her motion for summary judgment was denied.

With respect to proponent's request for vacatur of a 2007 preliminary injunction, the court noted that the injunction had been issued in a proceeding commenced by the public administrator pursuant to SCPA 2103 for discovery of information. In view thereof, the proponent's motion was denied without prejudice to renewal in the proceeding in which it was issued; i.e., the discovery proceeding commenced by the public administrator.

Finally, with respect to the proponent's request for sanctions based upon the alleged spoliation by objectant's counsel of relevant documents contained in the probate file of the deceased attorney-draftsperson, the court noted that sanctions for spoliation in New York may be ordered where a party destroys, discards or otherwise loses relevant evidence. To this extent, the moving party must establish that: (1) the party with control over potentially relevant evidence had an obligation to preserve it; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the movant's claim or defense.

Within this context, the record revealed that objectant's counsel had obtained the attorney-draftsperson's file by subpoena. Thereafter, at the request of the proponent, the file was copied and sent via overnight mail to the proponent's then lawyer, with a bill for copying charges, which was subsequently paid. Proponent did not dispute these statements, nor provide any evidence to support her allegations that objectant's counsel destroyed or withheld any evidence relevant to the proceeding. Accordingly, proponent's motion for sanctions was denied.

As for the objectant's cross-motion, the court concluded that dismissal was not warranted inasmuch as it would undercut the court's principal function and responsibility of determining the decedent's intentions with respect to the disposition of his/her property at death. Accordingly, objectant's cross-motion was denied.

***In re Roberts*, N.Y.L.J., Nov. 4, 2020, p. 18 (Sur. Ct., N.Y. Co.)**

Statute of Limitations

In *In re Capozza Irrevocable Trust,* the Surrogate's Court, Westchester County, denied the trustee's motion for summary judgment dismissing the objections to his account on the basis of the statute of limitations and the doctrine of "prior action pending."

The subject trust was created for the benefit of the grantor's grandson, i.e., the objectant, and provided, *inter alia,* for annual income payments to him, as well as the distribution of one-half of the principal thereof to him upon his attaining the age of 25, and the balance upon his attaining the age of 30. The objectant attained the age of 30 on March 29, 2002, at which time the trust terminated pursuant to its terms. During the pendency of the trust, the trustees thereof were the grantor, who was succeeded upon his death, by his wife, and then upon her death, by their son, the objectant's father, who was the petitioner in the pending accounting proceeding.

To the petitioner's knowledge, the only asset of the trust was a promissory note payable to the trust by a corporate entity, which had been created by the grantor and his spouse. The terms of the promissory note required payment of interest at 8% per annum on the principal balance, and for its repayment upon the corporation having sufficient cash with which to pay the principal and interest due.

According to the petitioner, he never had the original promissory note, was unaware of any interest payments made thereon, and never made any formal demands for repayment of the promissory note. A copy of the promissory note was given by the petitioner to the objectant in 2001, at which time he informed the objectant that he would have nothing further to do with the trust.

In 2010, an action was commenced by the objectant in Supreme Court against the trustee and the corporation requesting, *inter alia,* that the petitioner account as successor trustee, and that a constructive trust be imposed on the assets of the corporation sufficient to satisfy the promissory note. After the service of discovery demands by the objectant, the Supreme Court action remained dormant.

In 2018, the objectant instituted a compulsory accounting in the Surrogate's Court requesting that the trustee be directed to account. In response, the trustee filed his accounting, and objections were filed. Subse-

quent thereto, the trustee filed the motion, *sub judice,* requesting dismissal of the objections. Specifically, the trustee alleged that the objections were untimely on the grounds that he openly repudiated his role as trustee in 2001 or 2002, more than six years before the Supreme Court action, when he distributed the copy of the promissory note to the objectant, and informed him that he would not have anything further to do with the trust. With respect to the second argument, the trustee relied upon the Supreme Court action, which sought the same relief against him as in the pending accounting.

The court rejected the trustee's contention based on the statute of limitations holding that the trustee had waived the defense by failing to raise it in response to the compulsory accounting proceeding. Similarly, the court found that the trustee had waived the affirmative defense of prior action pending, concluding that it should have been raised in a pre-answer motion or answer to the compulsory accounting petition. Moreover, the court determined that triable issues of fact existed as to those objections alleging breach of fiduciary duty by the trustee for failing to attempt to enforce the promissory note during his stewardship. Nevertheless, the court found that these objections implicated conduct by the corporation, a nonparty to the proceeding. Inasmuch as such conduct was also at issue in the Supreme Court action, to which the corporation and trustee were both parties, the court held the accounting proceeding in abeyance, pending that action's resolution, in order to avoid inconsistent results.

***In re Capozza Irrevocable Tr.*, N.Y.L.J., Oct. 2, 2020, p. 37, col. 5 (Sur. Ct., Westchester Co.)**

Substitute Service

In *In re Pollina,* the Appellate Division, Second Department, in a case of first impression, held that substitute service on an out-of-state party by first-class mail under SCPA 307(3) was proper. More specifically, the Second Department framed the issue as whether the Surrogate's Court had the authority to determine, *nunc pro tunc,* the propriety of service of process on a non-resident.

Before the Second Department was an appeal of an order of the Surrogate's Court, Richmond County (Titone, S.), denying a petition by a daughter of the decedent to vacate the decree admitting the decedent's will to probate on the grounds that she had not been properly served with process in the underlying proceeding. The record revealed that numerous attempts had been made in the probate proceeding to serve a citation on the appellant, a resident of Ohio, by certified mail, return receipt requested, and Federal Express delivery, signature requested, pursuant to SCPA 307(2), and that all such mailings were returned as undelivered. As a result, the respondent-executor served the citation on the petitioner by regular first-class mail, without court authorization, which mailing was not returned.[3]

On the return date of the citation, the appellant failed to appear. On application by the respondent, the Surrogate determined that jurisdiction in the proceeding was complete, and admitted the propounded instrument to probate. Thereafter, the appellant petitioned to vacate the probate decree on the grounds that the court lacked personal jurisdiction over her at the time the decree was issued. The Surrogate's Court denied the petition, finding, *inter alia,* that the appellant had knowledge of the status of the proceeding and service on her had been "properly effected."

In affirming the Surrogate's Court's order, the Appellate Division noted that although SCPA 307(2) provides for the methods of service to be made on a non-resident, when diligent efforts to effectuate such service have been unsuccessful, the Surrogate's Court is authorized to direct a substituted form of service pursuant to SCPA 307(3). While the court observed that the interests of economy and efficiency generally dictate that such service be made only upon court order, it held that because the Supreme Court had the authority to approve substituted service, *nunc pro tunc,* it necessarily followed, by virtue of the provisions of SCPA 209, that the Surrogate's Court had comparable authority to issue such orders.

Further, the Second Department determined that the Surrogate properly found that the substituted service effected on the appellant was valid, i.e., satisfied the requirements of due process. Significantly, the Second Department found that the appellant acknowledged that she (1) received a copy of the citation at the commencement of the probate proceeding, (2) immediately retained an attorney to represent her interests therein, and (3) subsequently received a copy of the will. Further, it appeared that the appellant was aware of the scheduled return date of citation, in advance thereof, and neither she nor her attorney appeared.

Nevertheless, despite its conclusion, the Second Department cautioned that its determination should not be read as authorizing a party to engage in "self-help" by serving a citation without prior approval of the Surrogate's Court. Indeed, the Second Department made it clear that it anticipated that authorizing substituted service *nunc pro tunc* would not be the norm and would only be employed in circumstances such as those before it.

***In re Pollina*, 2020 N.Y. Slip Op. 08068 (2d Dep't Dec. 30, 2020)**

Standing

Standing served as the basis for a motion to dismiss objections to probate before the Surrogate's Court, New York County, in *In re Mengoni*. The decedent died at the age of 94 with a multi-million-dollar estate. His will was offered for probate by the attorney-draftsperson thereof, who was also the nominated executor thereunder. Objections to probate were filed by the beneficiaries under a penultimate will, who were adversely affected by the propounded will, and an alleged daughter of the decedent. Thereafter, the proponent moved to strike the respondent-daughter's notice of appearance and to dismiss her objections, alleging that she was not the decedent's child and, therefore not a person interested in the estate with standing to object. In support thereof, the proponent relied on a determination made more than 30 years earlier in the divorce action between the decedent and the respondent's mother, wherein the respondent was excluded as the decedent's child. The proponent argued that the respondent was bound by that determination, and moreover, that the presumption of legitimacy otherwise afforded to the respondent was rebutted.

In opposition, the respondent argued that the prior determination had no binding effect on her since she was never afforded an opportunity to be heard in the action, and that the doctrine of equitable estoppel should have been applied in the divorce action to prevent the ordering and/or introduction of the results of a paternity blood test.

The court concluded that, although the respondent was not bound by principles of collateral estoppel by the prior judicial determination in the divorce action, she could not avoid its consideration of the evidence introduced in such action or the legal conclusions to be drawn from such evidence. Within this context, the court held that the proponent had established that the presumption of legitimacy had been rebutted. The court explained that while the respondent's birth certificate, which indisputably indicated that she had been born during the marriage of her mother and the decedent, afforded her the presumption of legitimacy, clear and convincing evidence, including the results of a properly administered blood test excluding paternity (as well as judicial admissions in a divorce proceeding that there were no children of the marriage), the mother's admissions to her family, and the absence of any court-ordered child support, has been found sufficient to rebut that presumption. To this extent, the court found that the evidence of statements and admissions made during the decedent's divorce action as well as the results of a paternity test satisfied this standard.

Moreover, the court held that the respondent's reliance on principles of equitable estoppel was unavailing, concluding that it could not revisit or reopen the decades-old decision and judgment of another court. Further, it found no authority or rationale for extending those principles to the situation before it. The court noted that equitable estoppel in the context of paternity and support proceedings was only applied where its use furthered the best interests of a minor child, rather than an adult child seeking rights of inheritance from a putative father. Finally, the court opined that even if equitable estoppel was available to the respondent, the record was devoid of any evidence or allegations that she had a parent-child relationship with the decedent, or could establish paternity pursuant to EPTL 4-1.2, or that she relied to her detriment on decedent acting in such a manner.

Accordingly, in view of the foregoing, the proponent's motion to strike and to dismiss was granted.

***In re Mengoni*, N.Y.L.J., Mar. 12, 2020, p. 26, col. 3 (Sur. Ct., N.Y. Co.)**

Revocation of Letters

In *In re Lewner,* the Surrogate's Court, New York County, was confronted with an uncontested application by the petitioner, co-administrator with the respondent of the estate of decedent's post-deceased spouse, to revoke the preliminary letters testamentary issued to the respondent in the estate of the decedent, and appoint the public administrator in his place and stead. The propounded instrument left the decedent's entire estate to an *inter vivos* trust of which the respondent was the sole beneficiary to the exclusion of the decedent's spouse.

In support of the application, the petitioner alleged that respondent was unfit to serve as fiduciary to the extent that, *inter alia,* he failed to file estate and income tax returns for the estate since the decedent's death in 2016, thereby exposing the estate to considerable interest and penalties. Further, the court's own records confirmed that respondent had failed to prosecute the probate proceeding since it was commenced, and failed to file an estate inventory. Inasmuch as the respondent failed to oppose the application, the allegations were deemed admitted.[4]

Accordingly, based on the foregoing, the court found that the respondent's various actions and inactions seriously jeopardized the decedent's estate and warranted his removal.

***In re Lewner*, N.Y.L.J., Dec. 21, 2020, p. 22, col. 3 (Sur. Ct., N.Y. Co.)**

Endnotes

1. *Sharp v. Kosmalski,* 40 N.Y.2d 119 (1976).
2. *See Fleming and Assoc., CPA, PC v. Murray & Josephson, CPA, LLC,* 127 A.D.3d 428 (1st Dep't 2015).
3. *See* SCPA 307(3).
4. *See* SCPA 509.

Florida Update

By David Pratt and Brett Rosecan

LEGISLATION OF INTEREST

Community Property—Florida Community Property Trust Act of 2021 (Florida Senate Bill 1070)

On March 2, 2021, the Florida Senate introduced Senate Bill 1070 which would create a new Part XV of the Florida Trust Code and enact Sections 736.1501-736.1513 of the Florida Statutes, referred to as the "Florida Community Property Trust Act of 2021" (the "Proposed Act"). The Proposed Act would permit married residents to transfer separate property to a trust known as a "Florida Community Property Trust" (FCPT) and allow said spouses to receive a 100% step-up in basis on such property for federal income tax purposes, regardless of the order of the spouses' deaths.

Proposed Creation of FCPTs

In order to create a valid FCPT under the Proposed Act, one or both settlor spouses would need to transfer property to a trust that: (1) expressly declares that the trust is a FCPT within the meaning of the Proposed Act; (2) has at least one trustee who is a Florida resident (or a company authorized to act as a fiduciary in Florida) whose powers include, or are limited to, maintaining records for the trust on an exclusive or a nonexclusive basis and preparing or arranging for the preparation of, on an exclusive or a nonexclusive basis, any income tax returns that must be filed by the trust; (3) is signed by both settlor spouses; and (4) contains statute specific language in capitalized letters at the beginning of the FCPT.

Proposed Treatment of FCPT Property Upon Asset Distribution, Dissolution of Marriage and Death

All property owned by a FCPT created under the Proposed Act will be community property under the laws of Florida during the marriage of the settlor spouses. When property is distributed from a FCPT, said property will no longer constitute community property within the meaning of the Proposed Act.

Upon dissolution of the marriage of the settlor spouses, a FCPT created under the Proposed Act will terminate and the trustees will be required to distribute one-half of the FCPT assets to each spouse, with each spouse receiving one-half of each asset, unless otherwise agreed to in writing by both spouses. For purposes of the Proposed Act, equitable distributions of marital assets and liabilities under Section 61.075 of the Florida Statutes shall not apply to the disposition of the assets and liabilities held in a FCPT.

Upon the death of a settlor spouse, one-half of the assets of a FCPT created under the Proposed Act may be disposed of by the will of the deceased spouse. Unless otherwise provided under the FCPT, the trustee has the power to distribute assets of the trust in divided or undivided interests and to adjust resulting differences in valuation. Notably, the decedent's spouse's one-half share shall not be included in the elective estate.

Proposed Creditor Protection and Homestead Eligibility of FCPTs

A FCPT under the Proposed Act will not provide creditor protection benefits by its terms. An obligation incurred by only one spouse before or during the marriage may be satisfied from that spouse's one-half share of a FCPT. An obligation incurred by both spouses during the marriage may be satisfied from a FCPT of the settlor spouses. Unlike a FCPT, assets owned by spouses as tenants by the entirety are exempt from the claims of the creditors of one of the spouses. Therefore, if spouses have existing creditors or are involved in high-risk endeavors, careful consideration should be given to the creditor-protection benefits of assets held as tenants by the entirety as opposed to assets held in a FCPT.

Although a FCPT will not provide creditor protection by its terms, a residence owned by a FCPT under the Proposed Act can qualify as the spouses' homestead under Article X, Section 4(a)(1) of the Florida Constitution, provided that the property would qualify as the settlor spouses' homestead if title was held in on or both of the settlor spouses' individual names.

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The authors are admitted to practice in Florida and New York.

The settlor spouses shall be deemed to have beneficial title in equity to the homestead property subject to a FCPT for all purposes, including for purposes of homestead exemption under Section 196.031 of the Florida Statutes.

Outstanding Issues with FCPTs

In *Commissioner v. Harmon*, 323 U.S. 44 (1944), the United States Supreme Court ruled that a state statute allowing spouses to elect community property treatment under that state's law would not be recognized for federal income tax reporting. However, Revenue Ruling 77-359 concluded that the conversion of separate property to community property by residents of a community property state would be effective for gift tax purposes even though such conversion was deemed to be ineffective with respect to changing the income from such property. Further, there is limited case law and statutory guidance settling whether a community property trust, such as a FCPT, will obtain optimal tax results for residents of a separate property state.

If the Florida legislature approves the legislation, the Proposed Act would be effective July 1, 2021, and would apply to all FCPTs created on said date and thereafter.

DECISION OF INTEREST

Promissory Note—Lack of Due Care Prevents Rescission of Satisfaction and Release

Jeno F. Paulucci ("Jeno") executed a promissory note payable to his daughter, Gina Paulucci ("Gina") in the sum of $10,000,000. The note had a 6% interest rate and was to be repaid in three annual payments of $1,000,000 each, beginning in September 2008, with a balloon payment for all remaining principal and interest owed on the note to be paid on September 9, 2011. Each installment payment was to be applied first toward the accrued interest on the note, and then toward reducing the principal. Gina received $1,000,000 annual payments from Jeno in 2008, 2009, and 2010. Jeno passed away before the final balloon payment was made. Not long thereafter, Jeno's estate was opened. Gina's attorneys prepared a statement of claim against Jeno's estate, which stated that at the time of Jeno's death, the remaining balance due to Gina was $7,000,000, plus interest. On the advice of her attorneys, Gina executed a satisfaction and release of claim. Approximately 18 months after the execution of the satisfaction and release of claim, Gina's accountant noticed that the statement of claim mistakenly applied prior payments towards reducing the principal balance of the note instead of applying such payments first towards the accrued interest and then towards a reduction in the principal balance of the note, as required by the terms of the note. At an evidentiary hearing, the probate court found the unilateral mistakes committed by Gina's attorneys in preparing the statement of claim were not the result of an inexcusable lack of due care and rescinded the satisfaction and release of claim. However, the Fifth District Court of Appeal was not obligated to give deference to the probate court's findings because such findings were drawn from undisputed evidence and were thus deemed legal conclusions.[1] The Fifth District Court of Appeal reversed the probate court decision and refused to set aside Gina's satisfaction and release because the court held that Gina's attorneys' failure to review the promissory note and other relevant documents before preparing the statement of claim constituted a lack of due care instead of a minor, inadvertent, or clerical error.

***Mellini v. Paulucci*, 2020 WL 7410293 (Fla. 5th DCA Dec. 18, 2020) (not yet final).**

Endnote

1. *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).

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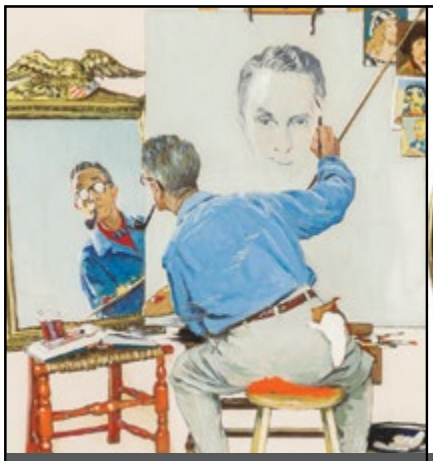

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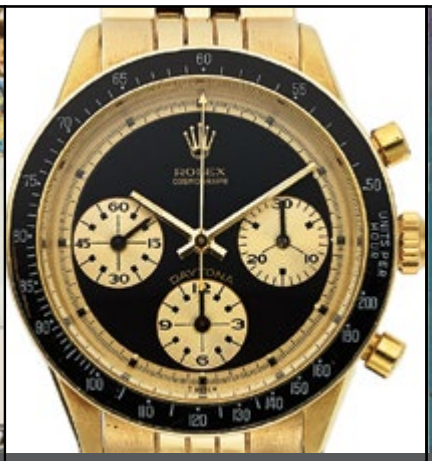

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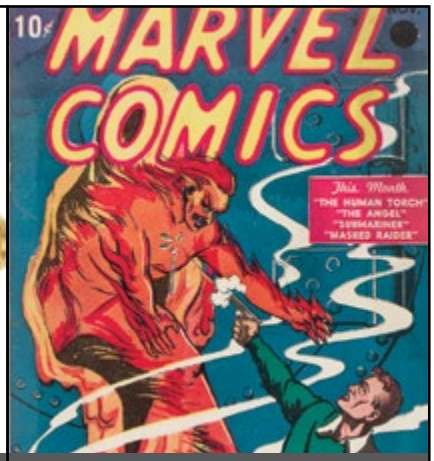

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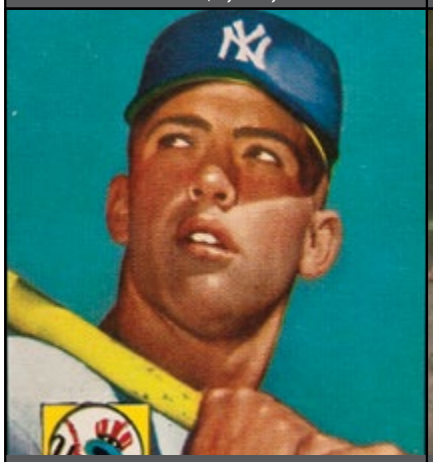

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