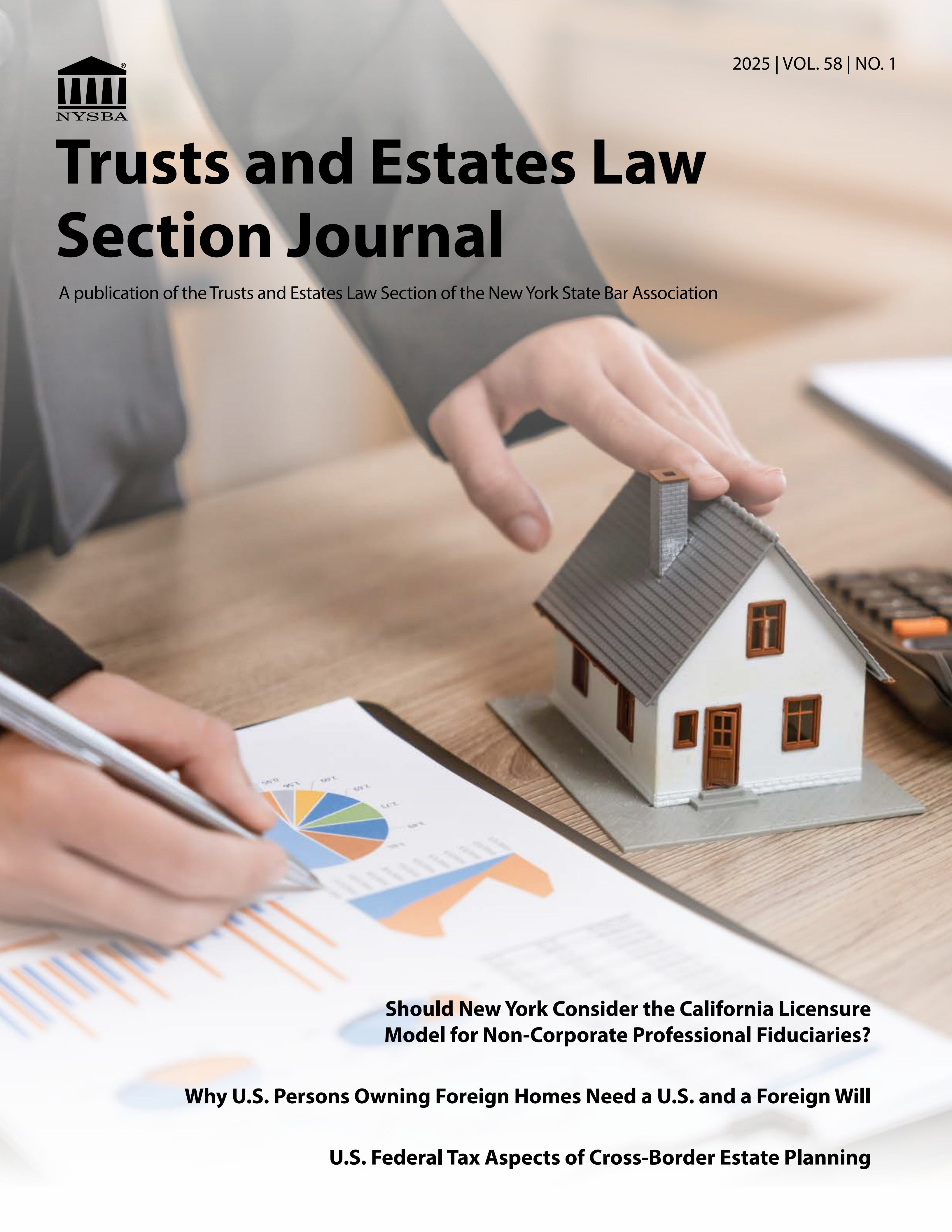

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NYSBA

Trusts and Estates Law Section Journal

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

Should New York Consider the California Licensure Model for Non-Corporate Professional Fiduciaries?

Why U.S. Persons Owning Foreign Homes Need a U.S. and a Foreign Will

U.S. Federal Tax Aspects of Cross-Border Estate Planning

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Publication of Articles

The Trusts and Estates Law Section Journal welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Avigail Goldglancz (avigail.goldglancz@pillsburylaw.com) in Microsoft Word. Please include biographical information.

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

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Message From the Section Chair

First and foremost, I would like to thank the members of the Trusts and Estates Law Section for the privilege of allowing me to serve as chair of the section for the year 2025. It is an absolute honor, and I look forward to our section having a great year. Thank you to outgoing chair Tricia Shevy for her fantastic leadership in 2024. I am excited to continue working with her and prior chair Michael Schwartz this year, together with Chair-Elect Tara Anne Pleat, Secretary Kevin Matz, and our newest officer, Treasurer Holly Beecher.

Congratulations to Emma Pletenycky, who is our section's Rising Star Fellow for 2025. Emma is an associate at Day Pitney LLP in Manhattan, and as a Rising Star is welcome to attend the section's Executive Committee meetings and come to the section's two destination meetings. Emma follows in the footsteps of last year's Rising Star, Brad Murray, who took full advantage of the fellowship to join us at our section's spring and fall meetings in Sonoma and the Finger Lakes, and is now a vice chair on the Older Adults and Persons with Disabilities Committee and the 4th District representative. The Rising Star Fellowship is a great opportunity for younger attorneys to work closely with the section's leaders: I encourage younger attorneys to apply for 2026, and feel free to contact the officers if they have any questions.

Thank you to everyone who joined us at the Annual Meeting on January 15. Lauren Sharkey and Ian MacLean put together a fantastic program that included discussions on DNA and surrogacy, malpractice in estate planning, and an engaging surrogate's panel. The terrific roster of presenters included Surrogates Rita Mella (New York County), Acea Mosey (Erie County), Stephen Cass (Chautauqua County), and Peter Kelly (Queens County), together with Casey DiPaola, Rob Harper, Laurie Keniry, Irma Nimetz, and Eric Penzer. Thank you to everyone for your hard work in making it a memorable and educational morning. The luncheon concluded with a scintillating presentation from Paul Unger on helping lawyers manage their stress and workload – a very pertinent topic for all practitioners.

I am already excited for our section's spring meeting at the Charleston Place Hotel in Charleston, South Carolina, on May 1-3. Program Chairs Amy Altman and Brian Corrigan have organized a terrific program titled "Bad Blood and Champagne Problems: Cutting Edge Challenges in Trusts & Estates," which will include presentations on timely topics applicable to everyone's practice, including electronic wills, artificial intelligence, multi-state planning, multi-state litigation, ethics, and the concept of digital resurrection, plus a breakfast with the surrogates.

Angelo M. Grasso

In addition to the stellar program, we have some fun events lined up for the spring meeting, including a dinner reception at the historic Thomas Bennett House, and a Kentucky Derby-themed cocktail party. We will also be offering group activities on afternoons such as tours of Fort Sumter, the African American Museum, and a walking tour of the Charleston food scene, as well as a few other surprises in the works.

Please save the date for the section's fall meeting at the Sagamore Resort in Bolton Landing on September 25-27. Program Co-Chairs Meaghan Feenan and Brooke Morris are hard at work preparing what will also be an excellent program, about which we will have more details in the next issue.

One of my goals for 2025 is to get the next generation of trusts and estates attorneys active with the section. I ask all practitioners to encourage their junior colleagues to become involved in the section. It is a rewarding experience that yields mentorship, friendship, knowledge, and the chance to make a difference in the legal community. It is the quintessential example of the more you put into the experience, the more you get out of it. As I can personally attest, it pays dividends for many years, both professionally and socially.

Cognizant of the fact that becoming active in the largest section of NYSBA can seem overwhelming to anyone, much less a younger attorney, in 2025 we are tailoring events for newer attorneys to help them meet surrogates and officers in more intimate settings to help "break the ice" and introduce them to their peers. Each of our spring and fall meetings will have a special event for younger and newer attorneys only, to help make attending a large program less intimidating. We are also planning section social events statewide throughout the year, including downstate, the Capital Region, and Western New York. Please keep an eye out for further announcements regarding these events.

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Message From the Editor-in-Chief

By Avigail Goldglancz

I would like to express our gratitude to Tricia Shevy for her outstanding work as outgoing chair and extend a very warm welcome to Angelo Grasso as the incoming chair. We are confident that 2025 will be a very productive year under his leadership!

Avigail Goldglancz

In our first issue of 2025, Diane Matero explores the statutory and evidentiary requirements, as well as some practical considerations, for successfully probating a lost or destroyed will; Francine Lee analyzes whether the regulatory and licensing requirements for professional fiduciaries in California should be considered by New York; Diane K. Roskies discusses why U.S. persons owning homes in other countries need both a U.S. and a foreign will; Brad Dillon and Katie Lynagh analyze the recent Colorado case *In re Marriage of Smith*; K. Eli Akhavan presents the U.S. federal tax rules that are implicated in the sphere of cross-border estate planning; Ilene Cooper provides us with the most recent decisions from the Supreme Court and Surrogate's Court and David Pratt, Farhaan Anjum and Alex Picard keep us informed on Florida legal developments.

Thank you to everyone who contributed to this issue. We look forward to a year filled with interesting articles that touch upon various aspects of our practice. We continue to urge section members to participate in our publication. Our next deadlines for submissions are March 24, 2025, for publication in the summer issue, May 26, 2025 for publication in the fall issue and August 25, 2025 for publication in our winter issue. Please consider submitting an article or column for publication in the *Journal*. CLE credits may be obtained.

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

Message From the Section Chair

Continued from page 3

Of course, it is not just younger lawyers we would love to see participating in the section. We have 19 active committees on subjects of interest to all trusts and estates practitioners, ranging from estate administration to estate litigation to practice and ethics to technology. Please reach out to any of our committee chairs to learn how to get more involved – if you are not sure how or what committee might be right for you, feel free to contact me and I will act as matchmaker.

Finally, as you will see, this journal has become the place for publishing timely, well-written articles on a variety of topics, and I thank Avigail Goldglancz and her team of associate editors for their hard work in making the *Trusts and Estates Law Section Journal* an excellent publication. We are always looking for articles, particularly from new voices – if you are interested, please contact Avigail, even if you are still looking for direction or a co-author.

Best wishes to all for a healthy and exciting 2025. If you have any questions, don't hesitate to reach out and contact me.

Probating a Lost or Destroyed Will in Surrogate's Court

By Diane Matero

Despite proper estate planning, a testator's testamentary scheme may be rendered ineffective if their last will and testament cannot be located after their death. The unfortunate, yet inevitable occurrence, of a lost or unintentionally destroyed will can cause uncertainty, delay, and additional expense to the estate, as often a hearing is required. This article explores the statutory and evidentiary requirements, as well as some practical considerations, for successfully probating a lost or destroyed will.

Lost will proceedings are governed by N.Y. Surrogate's Court Procedure Act (SCPA) 1407, which provides that "a lost or destroyed will may be admitted to probate only if (1) it is established that the will has not been revoked, (2) execution of the will is proved in the manner required for the probate of an existing will, and (3) all of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete."[1] The burden of proof always rests on the proponent regardless of whether any objections have been interposed.

Initial Considerations

The proceeding for offering a lost or destroyed will is commenced in the same manner as offering an original will, with the filing of a probate petition. The wherefore clause of the petition should, however, recite that the relief sought is for the probate of a copy of the original will. Additionally, the proponent should submit an affidavit and/or attorney affirmation setting forth the due diligence performed to locate the original testamentary instrument, the chain of custody and the circumstances surrounding its misplacement or destruction. For practicality, the attorney-drafter of the will should be contacted before initiating the proceeding to confirm whether the drafter or testator retained the original will. The court records should also be checked to determine whether the original will was filed with the court for safekeeping and all of this information should be included in the aforementioned affidavit and/or affirmation. The proponent may also consider filing a proceeding to compel the production of the will pursuant to SCPA 1401 if there is any reason to believe someone is withholding or has destroyed the original will.

Jurisdiction is also obtained in the same manner as an ordinary probate proceeding, but all waivers and consents, citations and notices of probate must recite the same relief in the wherefore clause of the petition regarding probating a copy of the lost or destroyed will. If the court grants the petition admitting the copy to probate, the decree must recite all of the terms of the will, so that a certified copy of the decree may be used as a conformed copy of the will.

Revocation

Of the three elements required to probate a lost or destroyed will, revocation is by far the most challenging to prove. The controlling statute is N.Y. Estates, Powers & Trusts Law (EPTL) 3-4.1, which provides that a will may be revoked by either executing a new will or by its destruction with revocatory intent.

Thus, if the testator retained the original will and it cannot be found posthumously, a presumption arises that the testator destroyed the will during his or her lifetime *with the intent* to revoke it.[2] Alternatively, if the testator did not retain the original testamentary instrument the presumption of revocation does not arise. Hence, an inquiry to the attorney-drafter regarding who retained the original instrument is important. In instances where the attorney-drafter did retain the testator's original will and inadvertently lost or destroyed it, the drafter should submit a detailed affirmation outlining the circumstances, as courts have held that the presumption of revocation does not arise where the original will was destroyed in a fire at the attorney's law office[3] or where the attorney-drafter lost the testator's will in the process of moving office locations.[4]

The presumption of revocation also did not arise in *In re Cafferky,*[5] wherein the proponent offered a photocopy of a will which contained the stamped word "copy" and included a notation that the original was held at the office of the attorney-drafter. The witnesses to the will, along with the attorney-drafter who served as the third witness, had all died. The proponent submitted handwriting affidavits for the decedent and attorney-drafter, along with an affidavit from the decedent's niece who stated that the decedent had shown her the copy of the will and advised her that the attorney retained the original.

In matters where it is known that the testator retained the original will, the presumption of revocation may be overcome by a showing of facts and circumstances that the original testamentary instrument was lost or destroyed.[6] Such as in disasters like Hurricane Sandy[7] and 9/11,[8] or where the circumstances demonstrate the decedent executed and retained the original instrument two days prior to her hospitalization where she remained until her death.[9]

Speculation or suspicion, however, is insufficient to overcome the strong presumption of revocation,[10] like a mere showing of motive and opportunity by an adversely affected party,[11] or claims that the testator suffered from severe visual disability.[12] Nor was the proponent in *In re Robinson-Murphy*,[13] able to overcome the presumption that the decedent revoked her will, which was created prior to her being married, where the testimony adduced at a hearing demonstrated that the decedent had made several changes to her non-probate assets after she married and shortly before her death.

Note that some courts may dispense with a lost will hearing if the presumption of revocation does not arise, and therefore, the proponent should also seek such relief under those circumstances.

Due Execution

As in a typical probate proceeding, due execution under EPTL 3-2.1 must be established. Specifically, the testator must sign at the end of the instrument, in the presence of two witnesses (or acknowledge his or her signature to them), who also sign the instrument at the testator's request and are aware that the testator is executing a will. Further, there is a presumption of due execution when the instrument's execution was attorney supervised,[14] and a presumption of statutory compliance where the will contains an attestation clause and accompanying affidavit of attesting witnesses.[15]

Typically, proof of due execution can be elicited from the testimony of the attorney-drafter and/or attesting witnesses to the will. The surrogate, of course, must be satisfied from the totality of the evidence that the will was properly executed, that the testator had the requisite capacity and was not under any restraint.[16] In *In re Philbrook*,[17] the Appellate Division, Third Department affirmed the surrogate's court ruling, which held that the proponent of an unsigned purported copy of the decedent's will failed to establish due execution where the attorney-drafter and his secretary could not recall the instruments' execution.

Terms

Most often a photo or conformed copy of the original testamentary instrument is used to prove its terms. Where a copy of the original will is produced, the statute does not also require two witnesses to prove the terms of the will. However, proof is required that the copy is a true and accurate copy of the original will. Therefore, someone is required to testify or affirm to the substance of the dispositive provision of the testamentary instrument but not the instrument's exact language.[18] This proof is normally provided by the attorney-drafter, legal staff who typed or otherwise assisted with the instrument's preparation, or one of the attesting witnesses.

Conclusion

While the loss or destruction of an original will presents challenges to the administration of an estate, legal professionals can easily navigate these types of proceedings using the guidance outlined in this article to ensure the decedent's testamentary wishes are fulfilled.

Diane Matero is a court attorney-referee in Kings County Surrogate's Court where she also serves as the court's internship program coordinator. Prior to her current role, she served as principal law clerk to Surrogate Montalbano, counsel to the Queens County Clerk and was a practitioner concentrating in trusts and estates law.

Endnotes

1. N.Y. Surrogate's Court Procedure Act 1407 (SCPA).
2. *In re Fox,* 9 N.Y.2d 400 (1961); *In re Lewis,* 25 N.Y.3d 456 (2015).
3. *In re Morel*, 2015 WL 5248607 (Sur. Ct., N.Y. Co. 2015).
4. *In re Gorba*, 63 Misc. 3d 1219(A), 114 N.Y.S.3d 819 (Sur. Ct., Dutchess Co. 2019).
5. 38 Misc. 3d 1219(A), 967 N.Y.S.2d 865 (Sur. Ct., Bronx Co. 2013).
6. *Fox,* 9 N.Y.2d at 407-408; *In re Philbrook,* 185 A.D.2d 550, 552, 586 N.Y.S.2d 394, 396 (3d Dep't 1992).
7. *In re Certoma,* 55 Misc. 3d 908, 51 N.Y.S.3d 385 (Sur. Ct., Queens Co. 2017).
8. *In re Fondal,* N.Y.L.J., Jan. 22, 2003 at 17, col. 1 (Sur. Ct., N.Y. Co. 2003).
9. *In re Gillen,* 19 Misc. 3d 1129(A), 866 N.Y.S.2d 92 (Sur. Ct., Nassau Co. 2008).
10. *Fox,* 9 N.Y.2d at 407-408; Philbrook, 185 A.D.2d at 552, 586 N.Y.S 2d at 396.
11. *In re Massimo,* 50 Misc. 3d 1206(A), 29 N.Y.S.3d 847 (Sur. Ct., Queens Co. 2015), *aff'd* 177 A.D.3d 640, 109 N.Y.S. 3d 885 (2d Dep't 2019).
12. *In re Evans,* 264 A.D.2d 482, 694 N.Y.S. 2d 453 (2d Dep't 1999).
13. 52 Misc. 3d 1211(A), 41 N.Y.S.3d 721 (Sur. Ct., Erie Co. 2015).
14. *In re Templeton*, 116 A.D.3d 781, 781, 983 N.Y.S.2d 610, 611 (2d Dep't 2014).
15. *Id.*
16. *See In re Collins,* 60 N.Y.2d 466, 470 N.Y.S.2d 338 (N.Y. 1983).
17. 185 A.D. 2d 550, 586 N.Y.S.2d 394 (3d Dep't 1992).
18. *In re Kleefeld,* 55 N.Y.2d 253, 448 N.Y.S.2d 456 (N.Y. 1982); *In re Smith*, 114 Misc. 2d 769, 452 N.Y.S.2d 783 (Sur. Ct., Ulster Co. 1982); *In re Gorba,* 63 Misc. 3d 1219(A), 114 N.Y.S.3d 819 (Sur. Ct., Dutchess Co. 2019).

Should New York Consider the California Licensure Model for Non-Corporate Professional Fiduciaries?

By Francine Lee

Only a few states require licensure of non-corporate professional fiduciaries. California, which is one of those states, strictly regulates professional fiduciaries in order to help protect against potential neglect or the physical, emotional or financial abuse of vulnerable clients. This article will focus on the regulatory and licensing requirements for professional fiduciaries in California in an effort to raise awareness and stir discussions as to whether the California model should be considered by New York.

Cautionary Tale

In the 2020 movie "I Care a Lot," a con artist makes a living by convincing the justice system to grant her guardianship over elders whom she pretends cannot take care of themselves. She places them in assisted living facilities where they are sedated and separates them from the outside world by preventing their family members from being able to contact them. She then sells off their homes and assets, pocketing the proceeds. Some inspiration for the movie came from an article written in The New Yorker called "How the Elderly Lose Their Rights," by Rachael Aviv, published October 2, 2017.[1] The article tells the true story about the owner of the company Private Professional Guardian, who abused Nevada's guardianship system by draining her elderly and disabled clients' bank accounts, taking their assets and isolating them from their families. The owner was sentenced to 16 to 40 years after pleading guilty to two counts of elder exploitation, two counts of theft and one count of perjury.[2]

There are many questions people may have when deciding whether to hire a fiduciary and how to choose one: What if a corporate trustee does not offer the personal relationship the individual is seeking? What if the individual has too little assets for a corporate trustee to take on as a client? What if there are no trustworthy family members or friends who are qualified to act as trustee? What if there is no one in the family who has the skill or time to act as the trustee for their family member's special needs trust or guardianship? What about the parents of a special needs child who worry about who will take care of the child when they pass away? How does one find a qualified non-corporate fiduciary? California is one of the few states that has developed a possible solution to this dilemma – licensed professional fiduciaries.

California Professional Fiduciary Requirements

A professional fiduciary in California is:[3]

- A person who acts as a guardian or conservator of the person, the estate, or the person and estate, for two or more individuals at the same time who are not related to the professional fiduciary or to each other.
- A personal representative of a decedent's estate for two or more individuals at the same time who are not related to the professional fiduciary or to each other.
- A person who acts as a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three individuals, at the same time.

Professional fiduciaries come from many different backgrounds, such as current and former attorneys, health care professionals, business professionals, people who cared for ill family members or who developed a passion for helping others – sometimes as a second or third career. They serve seniors, people with mental and physical disabilities and children who do not have the ability to manage their own affairs and do not have a family member with the skills or proximity to manage and protect their money or health care needs. Professional fiduciaries also manage special needs trusts for developmentally and mentally disabled individuals and serve as guardians of children. For people with complex family dynamics (i.e., blended families, children with addiction issues, etc.), a professional fiduciary can serve as an independent third party to help the settlor ensure his or her wishes are complied with.[4] Professional fiduciaries are typically named in a trust or will or are appointed by the court in situations such as undue influence, fraud, disputes between co-trustees and in contested conservatorship matters. Generally, many California Probate Court judges appreciate the value professional fiduciaries bring to the matters that come before them.

Professional fiduciaries may:[5]

- Serve as trustees for large and small trusts, including trusts with complex assets such as active businesses or commercial real estate holdings.
- Be appointed as conservator to manage the conservatee's estate and/or person.

- Serve as an executor if named in the will, or as an administrator if not named in the will, or if there is no will.
- Be designated by the Social Security Administration as representative payees to receive income and pay the expenses of an incapacitated individual.
- Act as agent under Power of Attorney for financial matters and health-care decisions, including placement, medical treatment and final burial arrangements.
- Become the quarterback of the team that can include attorneys, financial advisors, accountants and case managers.
- Pay bills, manage assets, oversee tax and accounting preparation, and general management including housing and daily care, medical needs, transportation and shopping.

Professional fiduciaries in California are strictly regulated. In 2006, California passed the Professional Fiduciaries Act (the "act") and created the Professional Fiduciaries Bureau (the "bureau") to regulate non-family member professional fiduciaries, including conservators, guardians, trustees, personal representatives of a decedent's estate and agents under durable power of attorney.[6] In enacting the Act, the California Legislature acknowledged:[7]

- The growth of the number of people aged 65 and over.
- This population's expectation that they and their property will be protected by a fair system with a high standard of care.
- A trend of people acting as professional fiduciaries.
- Inadequate regulation of professional fiduciaries that can result in the neglect or the physical, emotional or financial abuse of the vulnerable clients that professional fiduciaries are supposed to serve.
- The necessity of a program to license and regulate professional fiduciaries to protect public health and welfare.

The Bureau is a regulatory agency within the California Department of Consumer Affairs. Its mission is: "To protect consumers through licensing, consumer education, and enforcement of the Professional Fiduciaries Act and promote and uphold competency and ethical standards across the profession."[8] As of January 2023, approximately 836 professional fiduciaries had active licenses.[9]

Professional fiduciaries must be licensed[10] and follow a strict code of ethics that sets standards for decision making, conflict of interest, confidentiality, residence placement and care treatment.[11] They are bound by the California Probate Code and the Uniform Prudent Investors Act. Professional fiduciaries must be 21 years of age, take courses required and approved by the Bureau, pass a lengthy exam, attend continuing education classes, have a clean criminal background and credit history check and be bondable.[12] Requirements for licensing include passing an examination and completing 30 hours of approved education courses.[13] Once licensed, professional fiduciaries must complete 15 hours of continuing education credit every year for renewal.[14] Applicants must also have a four-year degree from an accredited college or an equivalent of related work experience.[15] Professional fiduciaries are required to file an annual statement with the Bureau reporting any changes to the license, new cases, closed cases, bankruptcy and breaches of fiduciary duty.[16]

Professional fiduciaries must "ultimately answer to the court even if the matter is not court supervised. Professional Fiduciaries are ultimately responsible for the actions of anyone they hire to assist with managing a client's needs such as investment companies or realtors. The Professional Fiduciary may be surcharged by the court for client losses resulting from improper management."[17] The Bureau investigates complaints, and can impose fines, sanctions, removal and suspension or termination of a professional fiduciary's license as well as referrals to the district attorney if criminal action is identified. The Bureau posts on its website information regarding citations, fines, suspensions, and revocations of licenses or other related enforcement action taken by the Bureau relative to the licensee. Certain professionals can act as professional fiduciaries without being licensed:[18]

- Attorneys licensed by the state bar association.
- Certified public accountants and enrolled agents when working within the scope of their professions.
- Employees and agents of trust companies, FDIC-insured institutions, public agencies, certain nonprofits and specified broker-dealers and investment advisers.
- Guardians, conservators or personal representatives of a decedent's estate serving on behalf of fewer than two individuals at the same time.
- Trustees and agents under a durable power of attorney if serving on behalf of three individuals or fewer at the same time.

Only 14 states regulate professional fiduciaries or guardians/conservators today: Alaska, Arizona, California, Florida, Illinois, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, Texas, Utah and Washington.[19] California is only one of three states that require actual licensure, as opposed to registration or certification by the Center for Guardianship Certification.

The Professional Fiduciary Association of California (PFAC) is a non-profit organization that provides ongoing professional education to licensed fiduciaries and individuals seeking to get their license as well as opportunities for collaboration between its members. It has numerous chapters throughout California and over 1,200 members. People interested in finding a professional fiduciary can use the PFAC website (www.pfac-pro.org) or the Bureau's website (www.fiduciary.ca.gov/licensees/index.shtml).

Conclusion

Professional fiduciaries play an important role and are a valuable alternative to corporate trustees. California's system of regulating and requiring licensure for professional fiduciaries helps safeguard the public by: (1) ensuring professional fiduciaries have the education and skill they need; (2) requiring professional fiduciaries to comply with a strict code of ethics and the California Probate Code; and (3) maintaining oversight to ensure compliance with continuing education requirements, investigating and resolving potential violations, and posting relevant information about licensed professional fiduciaries on its website for the public to see. New York might consider exploring the California model to fill in the gaps in the New York system and hold fiduciaries to a standard of care.

Francine Lee is a managing director and the business leader for the Ernst & Young LLP's Fiduciary/Trust & Estate Accounting Services (FTEAS) practice. Francine is a frequent speaker at industry conferences and a published author on topics impacting fiduciaries, including fiduciary leading practices, fiduciary accountings, the role of fiduciary accountings in litigation and the calculation of fiduciary accounting income.

The author wishes to thank **Robert Earnest**, professional fiduciary and founder of Earnest Fiduciary, Lauriann Wright, partner at Wright Kim Douglas, and Amy Olson, executive director, Professional Fiduciary Association of California, for his contributions to this article. The views reflected in this article are those of the author and do not necessarily reflect those of Ernst & Young LLP or other members of the EY organization.

Endnotes

1. See Samuel Spencer, *"I Care a Lot: The Shocking True Stories Behind the Netflix Movie,"* Newsweek (Feb. 24, 2021).
2. *Id.*
3. Cal. Bus. & Prof. Code § 6501.
4. See generally, Professional Fiduciary Association of California, Frequently Asked Questions: Who Do Professional Fiduciaries Serve (https://www.pfac-pro.org).
5. *Id.*
6. See *Background Paper for The Professional Fiduciaries Bureau*, Joint Sunset Review Oversight Hearing, March 16, 2023, Assembly Committee on Business and Professions and the Senate Committee on Business, Professions, and Economic Development.
7. Professional Fiduciary Act, 2006 Cal. ALS 491; 2006 Cal. SB 1550; 2006 Cal. Stat. ch. 491.
8. *Background Paper for The Professional Fiduciaries Bureau.*
9. *Id.*
10. Cal. Bus. & Prof. Code § 6502 (licensure) and § 6533 (licensing requirements).
11. See California Professional Fiduciaries Bureau, Professional Fiduciaries Code of Ethics, Title 16, Division 41, Article 4, California Code of Regulations (https://coastfiduciary.com/wp-content/uploads/2015/09/CA_Professional_Fiduciaries_Code_of_Conduct.pdf).
12. See generally, *Background Paper for The Professional Fiduciaries Bureau*; Professional Fiduciary Association of California Frequently Asked Questions: What is a Professional Fiduciary (https://www.pfac-pro.org).
13. *Background Paper for The Professional Fiduciaries Bureau.*
14. *Id.*
15. *Id.*
16. See California Professional Fiduciaries Bureau, Licensees (https://www.fiduciary.ca.gov).
17. Professional Fiduciary Association of California, Frequently Asked Questions: What Is a Professional Fiduciary (https://www.pfac-pro.org).
18. See Cal. Bus. & Prof. Code § 6501 and *Background Paper for The Professional Fiduciaries Bureau*.
19. American Bar Association Guardianship and Conservatorship, Legal Charts, State Guardian Certification Chart (August 2024) (https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-chrt-st-guard-cert.pdf).

New York Supreme and Surrogate's Court Decisions

By Ilene Cooper

Examination of Fiduciary

In *In re Nicholson,* the court was confronted with a motion to compel the co-executor of the estate to respond to four categories of questions that he had been directed not to answer during the course of his examination pursuant to SCPA 2211. The decedent died with a will survived by his wife and three children. His two sons, James and Justin, were appointed co-executors of his estate, and co-trustees of the marital trust created under his will for the benefit of his surviving spouse, with remainder to his children. Three years after the decedent's death, the executors accounted, and objections were filed by the decedent's spouse, who thereafter engaged in SCPA 2211 examinations of the fiduciaries. During the course of these examinations, counsel for the decedent's son, James, directed him not to answer four categories of questions pertaining to the decedent's real estate holdings, and James' personal business affairs. As a result, the objectant moved to compel his testimony.

In addressing the issue, the court observed that the decedent had significant real estate holdings at the time of his death, and that one of his sons, James, assisted him during his lifetime in the management of these assets. In addition, it appeared that James had real estate assets of his own.

The court found that the objectant had failed to satisfy her burden that the subject matter of the questions at issue was material and necessary to the issues raised in the pending accounting. Specifically, the court determined that she had failed to demonstrate that discovery concerning matters outside the accounting period would be relevant to the administration of the estate during the accounting period, or that there was any basis for questioning James about his personal finances and business matters. Further, to the extent that questions were posed regarding the financial interests of third parties and entities that neither James nor the estate managed or controlled, or had an ownership interest, the court concluded that the objectant had failed to establish that such inquiries were pertinent to James' stewardship as co-executor during the accounting period.

Accordingly, the objectant's motion was denied.

***In re Nicholson*, N.Y.L.J., May 23, 2024, p. 8. col. (Sur. Ct., N.Y. Co.)**

Fiduciary Duty

Before the Surrogate's Court, Saratoga County, in *In re Weber,* was a contested interim accounting in which objections were filed by the decedent's son and petitioner's nephew. The court scheduled a hearing at which the following issues were tried: (1) whether petitioner breached her fiduciary duty by retaining the decedent's real property in the Bahamas; (2) whether petitioner breached her duty by traveling to the Bahamas and whether such travel amounted to a conflict of interest and self-dealing, and (3) whether the objectant suffered damages from petitioner's alleged breaches.

Initially, the court addressed the question of whether the petitioner was a trustee with special investment skills subjecting her to a heightened standard of care. The testimony adduced, *inter alia,* indicated that the petitioner was never a trust attorney or worked in the investment services field, or held herself out to possess such specialized skills. In view thereof, and the uncontradicted opinion of the objectant's expert that petitioner was a "lay trustee," the court found that the petitioner was a lay trustee and was to be judged as such.

The court next addressed the issue of whether the petitioner's retention and use of the Bahamas property constituted misconduct and if so, whether it resulted in damages. Based on the evidence at the hearing, the court found that the petitioner's conduct in this regard was not imprudent on its face, as objectant failed to demonstrate that some other investment standard or product would have been more reasonable.

As to petitioner's travel to the property, the court noted that while petitioner admittedly used her travel to the Bahamas as a vacation, it determined that the evidence failed to establish that such travel plans improperly influenced her retention of the property. Indeed, the petitioner testified that the primary purpose of her trips was for trust purposes, including meeting with property managers, and overseeing repairs of the premises. In view of this testimony, the uncontroverted testimony of objectant's witness that the de minimis use of vacation property, i.e., up to 50% of the time, for personal use was appropriate, and the lack of documentary evidence disclosing the petitioner's length of stay or the work she performed while there, the court denied objectant's allegations that petitioner breached her fiduciary duty during her trips to the Bahamas.

Finally, the court held that inasmuch as objectant had failed to prove that petitioner had breached her fiduciary duty, damage calculations were unnecessary. Nevertheless, the court, in pertinent part, opined that had a breach of fiduciary duty been found, and damages calculated, the reliance by objectant's expert on artificial intelligence in cross-checking his calculations placed an affirmative duty on objectant's counsel to disclose the use of artificial intelligence and required that the evidence sought to be admitted be subject to a hearing regarding, *inter alia,* the reliability of the AI program, prior to its admission.

Accordingly, the petitioner's interim account as trustee was settled as filed.

***In re Accounting of Susan F. Weber as the Trustee of the Michael S. Weber Trust*, 220 N.Y.S.3d 620 (Sur. Ct., Saratoga Co. 2024)**

In Terrorem Clause

Before the court in *In re Brown* was a motion to dismiss a proceeding by the trustee of the Hinman Brown Revocable Trust for a determination that the respondents violated the *in terrorem* clause contained in the instrument. The subject trust named the decedent as trustee during his lifetime, and his long-time lawyer as one of two successor co-trustees on his death. At its inception, Radio Drama Network, a charitable foundation (RDN), was the remainder beneficiary of most of the Trust assets. However, the Trust went through multiple amendments prior to the decedent's death, one of which established the Hinman Brown Charitable Trust, RDN as remainder beneficiary, and instead gave the petitioner the power to allocate trust assets to charities of the petitioner's choice. The Trust and each of its amendments included an *in terrorem* clause.

Following the decedent's death, his will, dated October 20, 2004, was admitted to probate, and letters testamentary were issued to the petitioner. RDN was the sole beneficiary under the will.

Respondents were the decedent's granddaughters, the directors of RDN, and also RDN's president and vice-president respectively. Petitioner was also an RDN board member. In 2015, RDN, through its president and director, instituted a proceeding which sought, *inter alia,* invalidation of the revocable trust to the extent it established the charitable trust, and provided increased commissions to the petitioner, and reinstatement of RDN as remainder beneficiary of the trust.

By decision in July 2019, the court found that the 2015 petition stated timely, valid claims against the petitioner sounding in fraud and undue influence in connection with the revocable trust, and the Appellate Division affirmed, but dismissed so much of the claims as sought compensatory and punitive damages. Thereafter, the petitioner instituted the subject proceeding seeking forfeiture as a result of respondents' actions in authorizing, filing, and prosecuting the 2015 petition. The motion to dismiss pursuant to CPLR 3211 (a)(7) followed.

In support of the motion, the respondents argued that nothing in the *in terrorem* clause expressly prohibited them from asserting claims on behalf of RDN, that at all relevant times, respondents were acting on behalf of RDN, that the decedent never intended the *in terrorem* clause to be triggered under the circumstances, and that a contrary ruling would be violative of public policy.

In opposition to the motion, petitioner asserted that the *in terrorem* clause applied to any legal proceeding by the respondents through whatever entity or vehicle, and that as such, by filing and prosecuting the 2015 petition, the respondents used RDN as a vehicle to indirectly challenge the Trust.

The court framed the issue as requiring it to consider whether the allegation that respondents indirectly contested the revocable trust while acting in their capacities as officers and directors of RDN was a legal basis for finding that they triggered the *in terrorem* clause. Within this context, the court concluded that under no reasonable reading of the *in terrorem* clause would respondents' actions as officers and directors of RDN trigger its provisions.

Specifically, the court determined that the respondents were not acting as individuals when they instituted the 2015 proceeding, but for legal purposes they were acting on the corporation's behalf. Moreover, the court found that by asserting positions on behalf of RDN the respondents did not stand to benefit individually. To this extent, the court observed that there were no New York cases that have expressly held that will or trust contests by representatives acting in their fiduciary capacities, but who are also beneficiaries, could constitute an indirect attack on an instrument resulting in a forfeiture of their own gifts under the challenged instrument. Nevertheless, the court noted that other jurisdictions, as well as the Restatement (Third) of Property, had considered the issue and found otherwise.[1] Finally, the court held that a finding that respondents had not triggered the *in terrorem* clause was in keeping with the decedent's intent, which was to ensure that his son, the respondents' father, did not receive the bulk of his estate. In any event, the court opined that if it had been the decedent's intent to penalize the respondents for acting on RDN's behalf, there would be considerable question as to whether a court of equity would enforce the forfeiture.

As such, the respondents' motion to dismiss the 2019 petition was granted.

***In re Brown*, N.Y.L.J., Oct. 7, 2024, p. 30, col. (Sur. Ct., N.Y. Co.)**

Limited Letters

Before the Surrogate's Court, New York County, in *In re Mayer,* was an application by the decedent's daughter for limited letters of administration in order to commence a discovery proceeding to recover three properties for the estate that she claimed were sold using invalid powers of attorney. The decedent died survived by two daughters. Her will divided her estate into two shares, with petitioner's share being reduced by a $1 million bequest to her daughter. Letters testamentary issued to the decedent's attorney and friend.

The record reflected that prior to her death, the decedent commenced a lawsuit against the petitioner in the Supreme Court, Suffolk County, alleging trespass to real property and tortious interference with decedent's efforts to sell her property in Westhampton Beach. Shortly thereafter, the decedent executed a power of attorney designating her real estate agent to sell the Westhampton Beach property and an adjacent property. The properties were ultimately sold, and the Supreme Court action was discontinued. A second power of attorney was then executed appointing an attorney to sell a third property located in Westhampton Beach. This third parcel was sold the next day. Notably, the attorney/agent and the executor of the estate were affiliated with the same law firm.

Approximately six years after the decedent's will was admitted to probate, the petitioner commenced the proceeding *sub judice* for the purpose of challenging the three real estate sales on the ground that the powers of attorney used to effectuate the sales were forged, and the decedent lacked testamentary capacity to execute the forms. The executor allegedly had failed or refused to commence a discovery proceeding to recover the properties because of a conflict of interest arising from the executor's and/or his law firm's involvement in the sales. Notably, petitioner did not contend that the purchasers did not act in good faith or that the property sales were for less than fair market value.

Upon review of the papers submitted, the court held that the petitioner had failed to establish that the prosecution of a turnover proceeding with respect to the three properties would be a reasonable use of estate assets, particularly since the petitioner did not contend that the sales were unfavorable to the estate. Additionally, the court observed that petitioner's submissions failed to demonstrate that the properties were sold against the decedent's wishes.

Further as to the issue of the decedent's capacity, the court noted that although the decedent executed her will three weeks prior to executing the first power of attorney and seven weeks before executing the second, the petitioner did not object to probate. Finally, under the circumstances, the court found no basis for concluding that the executor acted unreasonably in refusing to pursue the turnover proceeding.

***In re Mayer*, N.Y.L.J., Oct. 9, 2024, p. 8. col. (Sur. Ct., N.Y. Co.)**

Preliminary Letters

In *In re Gordon,* the Surrogate's Court, New York County, was confronted with competing applications for preliminary letters testamentary. The decedent died, testate, survived by his nephew, as well as one great nephew, and two great nieces as his distributees. In his will, decedent left a part of his estate outright to his long-time partner and the residuary estate in trust for her benefit. The will nominates the partner as primary executor and trustee, and the nephew as her successor. Additionally, the instrument authorized the partner, who was 94 years old, to designate a co-trustee to act with her, which she expressed her intention of doing.

The decedent's nephew filed a petition for probate of his will, and requested the issuance to him of preliminary letters, claiming that the decedent's partner was unfit to serve due to her advanced age and infirm condition. The decedent's partner filed a cross-petition for probate and application for preliminary letters, together with a memo from a social worker who indicated that upon a recent visit with her she found no evidence of cognitive deficits.

The court noted that it will ordinarily issue preliminary letters testamentary to the executor named in the propounded instrument in order to honor the testator's presumptive wishes regarding the appointment of a fiduciary and reduce the possibility of frivolous contests. Indeed, the court will generally respond to serious, but disputed, allegations concerning the designated executor by providing that the named fiduciary post a bond or a limitation of authority as a prerequisite to an appointment.

Based on the foregoing, and following a conference of the matter, the court held that it was satisfied that the allegations of unfitness did not support a conclusion that the estate would be at risk if the decedent's partner was appointed, and therefore did not require a hearing on the issue. Nevertheless, the court addressed the concerns of the decedent's nephew regarding the protection of estate assets by requiring that the decedent's partner post a bond as a condition to her appointment as preliminary executor.

***In re Gordon*, N.Y.L.J., Aug. 20, 2024, p. 17, col. (Sur. Ct., N.Y. Co.)**

Redaction of Court Records

Before the Surrogate's Court, Queens County, in *In re Lucano,* was an unopposed proceeding for the compromise and settlement of a wrongful death action in which the petitioner moved for an order authorizing the redaction of alleged confidential information from the pleadings. Specifically, petitioner sought to redact, *inter alia,* the names and addresses of all interested parties, the decedent's residence and employer, decedent's date of birth, diagnosis and death, and the gross settlement amount. The underlying cause of action arose out of the decedent's occupational exposure to asbestos which caused him to contract mesothelioma and ultimately die.

The court observed that all court records and judicial proceedings, with certain exceptions, are considered open to public scrutiny so as to foster the efficiency and integrity of the judicial process. In particular, pursuant to SCPA 2501 (8), all books and records in the Surrogate's Court are open to inspection by any person at reasonable times except those that are sealed.

Further, under the Uniform Rules for the Surrogate's Court, whether or not a sealing order is issued, the parties are obligated to redact confidential personal information (CPI) in papers submitted to the court for filing. Such information includes a taxpayer identification number, except the last four digits thereof. The court, *sua sponte,* or on motion by any person, may remove CPI from papers, or direct papers to be resubmitted with such information redacted. Additionally, the Uniform Rules limit disclosure of (1) pleadings under SCPA Article 17 and 17-A; (2) death certificates; (3) tax returns; (4) firearms inventory; and (5) documents protected under Federal or State law.

Within the foregoing context, the court held that it was not authorized to permit the filing of redacted pleadings in the manner requested by the motion, especially since none of the information constituted CPI. As such, the court converted petitioner's motion as a request for a sealing of the court record. To that extent, the court observed that pursuant to 22 N.Y.C.R.R. § 216.1, it could seal a court record upon a written finding of good cause. While good cause is not defined, the rule directs that the court consider the right of the public to have access to court proceedings and records, as well as the interests of the parties, since the law in New York favors public disclosure of court records. Thus, good cause requires that compelling circumstances exist that justify the restriction of public access to the records. The court is not constrained to seal the record merely because the parties consented or because documents are marked "confidential."

In support of the application, petitioner argued that redacting the settlement terms as referenced in the pleadings was necessary because the agreement in the underlying action contained a confidentiality clause to insure the privacy of each individual settlement. Further, petitioner alleged that the confidentiality provisions were designed to uphold the integrity of the claims against other remaining defendants. Yet, the court noted that while Supreme Court pleadings were filed as exhibits with the compromise petition, there was no proof submitted that the Supreme Court approved the settlement agreement, or that the agreement was directed to be deemed confidential. Moreover, it observed that petitioner's motion failed to present affidavits or other competent evidence in support of its factual assertions.

Without any alleged facts to support a finding that sealing the record would limit any "significant and concrete harm" to the parties, or that the wrongful death proceeding involved a unique incident, the court held that petitioner failed to satisfy his burden of establishing good cause to permit a sealing of the record as requested. Accordingly, petitioner's motion was denied.

***In re Lucano*, N.Y.L.J., August 2, 2024, p. 17, col. (Sur. Ct., Queens Co.)**

Termination of Trust

Before the Surrogate's Court, New York County, in *Matter of the Termination of the Ira Yohalem Irrevocable Trust*, was an uncontested proceeding in which the petitioner, co-trustee of the Ira Yohalem Irrevocable Trust, requested, *inter alia,* approval to terminate the trust as uneconomical pursuant to EPTL 7-1.19, and to distribute a portion of the principal thereof to one of two presumptive remainder beneficiaries and the remaining trust assets to the income beneficiary.

The record revealed that the settlor of the trust was deceased, and that he was survived by his wife, who was the other co-trustee of the trust, two adult children, and two grandchildren, one of whom was a minor. The value of the trust was $930,000. Pursuant to the terms of the trust, upon the settlor's death the trust estate was to pass to a marital trust as well as a residuary trust, each of which provided for the settlor's spouse to receive the net income thereof for life, granted her a 5 and 5 power[2] with respect to the principal of the trusts, and authorized the trustees to invade principal for the spouse's maintenance, support, and health. Upon the death of the settlor's spouse, the trustees were directed to pay the remaining principal of the trusts in equal shares to the settlor's two children, per stirpes.

The court opined that early termination of a trust on the grounds of economic unfeasibility is permitted pursuant to EPTL 7-1.19 if the court finds that (1) continuation of the trust is economically impracticable; (2) the express terms of the trust do not prohibit its early termination; (3) early termination would not defeat the specified purpose of the trust; and (4) such termination serves the best interests of the beneficiaries. Failure by the petitioner to satisfy each of these four factors will result in a denial of the request to terminate even if all beneficiaries consent to the application.

Within this context, the court noted that continued administration of a trust has been found to be economically impracticable when its annual administration expenses either approach or exceed the trust's annual income or when the trust funds are insufficient to generate meaningful income for an income beneficiary. Early termination has therefore been permitted for modest-sized trusts valued, by way of example, at $24,000 or $71,000. On the other hand, a trust of more than a minimal value, such as the subject trust amounting to $930,000, was not so small as would warrant its early termination. Indeed, the court observed that the petitioner had failed to demonstrate that continued administration of the trust would be uneconomical. No calculations were offered to show the trust's annual income or the expenses of its administration, nor had it been established that the expenses of administering the trust were so great as to render insufficient the income payments therefrom for the benefit of the settlor's spouse.

Moreover, the court found that although early termination was not expressly prohibited by the terms of the trust, it appeared that early termination would contravene its specified purpose of providing for the settlor's spouse for life. To this extent, the court opined that the proposed redistribution of the trust upon its early termination, providing the settlor's spouse and one of his two children with an outright distribution of principal, was a significant departure from the trust's purpose of maintaining available funds for the spouse's lifetime, and withholding principal distributions, if any, to the settlor's two children until the spouse's death.

Accordingly, the petition was denied.

***Matter of the Termination of the Ira Yohalem Irrevocable Trust*, N.Y.L.J., July 17, 2024, p. 17, col. (Sur. Ct., N.Y. Co.)**

Endnotes

1. Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.5 cmt. f (Am. L. Inst. 2003).
2. This power allows the spouse to receive up to 5% of the trust principal each year upon request.

Eric W. Penzer Esq., Judge Stephen W. Cass, Judge Peter J. Kelly, Judge Rita M. Mella, Judge Acea M. Mosey

Trusts & Estates Law Section Luncheon Presentation Panel Title: Mastering Stress and Workload Management in the Information Age. Paul J. Unger Affinity Consulting Group

Trusts & Estates Law Section Annual Meeting Program Panel Title: Malpractice in Estate Planning. Speaking: Laurie S. Keniry, Esq., Cioffi Slezak Wildgrube P.C. Sitting: Co-panelist Irma K. Nimetz, Esq., McCarthy Fingar LLP, White Plains, NY

Trusts & Estates Law Section Annual Meeting Program – Panel Title: DNA, Surrogacy, Frozen Gametes – Planning & Litigating Heirship. Panelists – Kathleen ("Casey") Copps DiPaola, Esq. / Copps DiPaola Silverman, PLLC / Albany, NY and Co-Founder of the New York Surrogacy Center: Robert M. Harper, Esq; Farrell Fritz, P.C., Uniondale, NY.

U.S. Federal Tax Aspects of Cross-Border Estate Planning

By K. Eli Akhavan

Globalization continues to reshape the legal and financial landscape. Tax and estate planning practitioners face a growing demand for attorneys with more than a passing familiarity with cross-border tax planning. Families are no longer confined by national borders, with many individuals holding dual citizenship, owning property abroad, or maintaining multinational family ties. These global connections have introduced significant complexity to estate planning, particularly in the realm of tax planning.

This article discusses the U.S. federal tax rules that are implicated in the sphere of cross-border estate planning. Additionally, the article discusses certain traps for the unwary as well as potential planning opportunities.

1. Fundamental U.S. Income Tax and Transfer Tax Rules

A. Residency and Domicile

The threshold issue in cross-border tax and estate planning is classification as U.S or non-U.S. for both individuals and entities. For example, a U.S. citizen or U.S. "resident" is subject to U.S. taxation on worldwide income while a non-citizen non-resident is only subject to U.S. taxation on "U.S. source" income. Alternatively, an individual is subject to U.S. worldwide estate and gift taxation if the individual is a U.S. citizen or is "domiciled" in the U.S. An individual who is not a U.S. citizen and is not domiciled in the U.S. is subject to estate and gift taxation only on bequests and gifts of "U.S. situs" assets.

Income Taxation

An individual is a resident for federal income tax purposes and subject to U.S. taxation on worldwide income if such individual is:

1. a citizen;
2. a green card holder;[1] or
3. a resident who meets the "substantial presence test."[2]

An individual meets the substantial presence test for a calendar year if such individual is present in the U.S. more than 183 days, measured as follows:

1. present in the given year for 183 days or more;
2. present in the U.S. for at least 31 days in the calendar year, plus one-third of the days present in the prior year, plus one-sixth of the days present in the second prior year, equals to 183 days.[3]

Practitioners should be aware that there are certain category exceptions under the Internal Revenue Code for the day count including, but not limited to, students, teachers, and those holding diplomatic visas.[4]

Additionally, the United States has tax treaties with a number of countries that provide "tie-breaker" rules. The tie-breaker rules provide resolution mechanisms to determine a single tax residence of an individual who may potentially be classified as tax resident of two different countries. The United States would allow an individual who would nevertheless meet the substantial presence test to claim tax residency in a different country by filing IRS Form 1040NR U.S. Nonresident Alien Income Tax Return and IRS Form 8833, Treaty-Based Return Position Disclosure.

Finally, if there is a situation in which an individual who would meet the three-year average substantial presence test and is not present in the United States for 183 days or more in the current calendar year, the individual can avoid U.S. tax resident status by demonstrating that the individual has a tax home and closer connection to a foreign country.[5]

Transfer Tax

For purposes of transfer taxation, a U.S. resident is subject to U.S. estate, gift and generation-skipping transfer taxation on bequests and gifts of his or her worldwide assets. A U.S. resident for purposes of estate and gift taxation is an individual who is "domiciled" in the U.S.[6] A U.S. resident for purposes of the estate and gift tax is an individual whose domicile is in the U.S.[7] The Treasury regulations define that as a person who is present in the U.S. and has no definite present intention to leave.[8] Intent is determined based on facts and circumstances. It follows that a green card holder is not automatically a domiciliary[9] and someone present on a non-immigrant visa may be considered domiciled in the U.S.[10]

B. U.S. Federal Taxation of U.S. and Non- U.S. Persons

1. Income Taxation

An individual who is considered a U.S. person for federal income tax purposes is taxed at the top marginal rate of 37% on his or her worldwide income. A U.S. person may be able to take advantage of foreign tax credits and tax treaties in order to avoid double taxation of income. A non-U.S. person (NRA) is subject to U.S. income tax on U.S. source income. With respect to an NRA, there are two different categories of taxation depending on the type of income. Fixed, determinable, annual or periodical (FDAP) income is taxed at a flat 30% rate without the benefit of deductions (e.g., dividends from a U.S. incorporated entity).[11] Income effectively connected with the conduct of a U.S. trade or business ("ECI income") is taxed at graduated rates and may benefit from deductions and expenses allocated to such income.[12] As a general rule, an NRA is not subject to capital gains tax in the U.S. unless such income is derived from certain dispositions of U.S. real property interests. Dispositions of U.S. real property interests are subject to FIRPTA,[13] an important topic for NRAs, but outside the scope of this article.

2. Transfer Taxation

Gift, estate, and generation-skipping transfer (GST) taxes may apply to transfers during life, transfers at death, or transfers that "skip" a generation, respectively, made by a U.S. domiciliary.[14] A U.S. domiciliary is a decedent or donor who is a U.S. citizen or has his or her domicile in the U.S. on the date of death or at the time that a gift or transfer is made.[15] Domicile determines which assets are includible in an individual's estate, and thus his or her U.S. federal estate tax liability.[16] Someone who is neither a U.S. citizen nor a resident alien domiciliary is not a U.S. domiciliary for U.S. federal wealth transfer tax purposes, or a non-resident alien domiciliary (NRD).[17] Someone who intends to remain in and is also present in the U.S. would be a resident alien domiciliary.[18]

A U.S. domiciliary is taxed on the net value of all his or her worldwide assets, wherever situated. An NRD is generally only taxed on his or her U.S. situs assets.[19]

A U.S. domiciliary can transfer, either at death or during life, his or her lifetime exemption amount, which is $13.99 million in 2025.[20] Generally, gifts made by a U.S. domiciliary reduce the lifetime exemption amount. But a U.S. domiciliary may annually gift the annual gift tax exclusion amount, which the IRS set to $19,000 in 2025, to any person, without reducing his or her lifetime exemption amount or without gift tax if the lifetime exemption amount has already been used. Any remaining unused portion of the lifetime exemption amount of a deceased U.S. domiciliary will offset the taxable estate of the decedent. A U.S. domiciliary may also make gifts to his or her U.S. domiciliary spouse without gift or estate tax, in any amount, without transfer taxes.

On the other hand, an NRD may only offset $60,000 against U.S. situs property, defined below, included in his or her estate, but this exclusion cannot offset gifts of U.S. situs property made during life, unlike a U.S. domiciliary.[21] But an NRD may make annual gifts of the annual gift tax exclusion amount, of $19,000 in 2025. An NRD may also transfer any amount of U.S. situs property to a U.S. citizen spouse, but may not transfer more than $190,000 in 2025 of U.S. situs property gifts to a non-U.S. citizen spouse without such gift being included in the transferor's taxable gifts on which a 40% gift tax is imposed. However, a qualified domestic trust (QDOT) may sometimes allow for an unlimited marital deduction for testamentary U.S. situs bequests to a non-U.S. citizen spouse. A QDOT would allow the surviving spouse to qualify for the unlimited marital deduction on estate taxes.[22] However, a QDOT would not be effective for lifetime gifts. In order for the testamentary QDOT to be effective, it must meet the following requirements:[23]

1. Trust must pay all income to the surviving spouse during his or her lifetime.

2. The spouse must be the only beneficiary of distributions of principal. Each distribution of principal is subject to the estate tax at the time of the distribution at the highest rate.

3. The QDOT must have at least one U.S. trustee who must be given the power to withhold estate tax on each principal distribution.

4. If the trust's assets are more than $2 million, there must be a U.S. bank or U.S. branch of a foreign bank as trustee. If not, there must be a posting of a bond or letter of credit must be posted equal to 65% of the initial value of the trust's assets.

5. If the trust's assets are valued at $2 million or less, if more than 65% of the trust's assets are offshore real property, there must be either a U.S. institutional trustee, or if not, there must be a posting of a bond or letter of credit in an amount equal to 65 % of the initial fair market value of the trust's assets.

3. Internal Revenue Code

As mentioned above, an NRD is generally subject to U.S. federal wealth transfer tax only on transfers of U.S. situs property. The definition of U.S. situs property differs in some respects for estate and gift tax purposes.

U.S. situs property for federal estate tax purposes includes tangible and intangible property situated, meaning physically located, within the U.S.[24] This definition would generally include real and personal property located in the U.S., stock in a domestic corporation,[25] debt obligations of a U.S. person or governmental entity,[26] contract rights enforceable against U.S. persons, or cash located within the U.S.[27] Cash located in U.S. safe deposit boxes and deposited with U.S. brokerage houses are also U.S. situs assets.[28] The Code and Treasury Regulations do not provide specific rules for the situs of partnership assets. The general practical approach has been that partnerships formed under U.S. law are U.S. situs assets and the same approach should apply for foreign partnerships that own U.S. situs assets or that carry on a trade or business in the United States.

U.S. situs property for federal gift tax purposes includes real property or tangible personal property situated within the U.S. at the time of the transfer.[29] Notably, if an NRD gifts "intangible property," the transfer should not be subject to U.S. federal gift tax, unlike the definition for U.S. federal estate tax purposes, regardless of 'physical' location (e.g., location of stock certificates).[30] For this purpose, intangible property would include stock in a domestic corporation,[31] but also bonds, notes, bank deposits, patents, partnership interests, and goodwill.[32] Instead, such property generally takes a situs of its owner's domicile for U.S. federal gift tax purposes.[33] When it comes to cash gifts that are transferred in the United States, the rules are less clear. For example, a wire that is sent from a foreign bank account to a U.S. bank account may be a gift of a U.S. situs asset. The general recommendation is to either convert the cash to a non-U.S. situs asset (e.g., U.S. securities) or to have the funds wired to the U.S. person's foreign bank account.

Planning opportunities are created because an NRD can gift stock in a U.S. corporation, or other intangible assets, without incurring any U.S. federal gift tax, whereas if the same NRD held such assets in his or her own name until death, such assets would be included in his or her gross estate and may be subject to a 40% estate tax.

Additionally, if the NRA is domiciled in a country that has an estate tax treaty with the U.S., they may be entitled to use a pro-rated exemption amount of the U.S. lifetime exemption in effect at the time of the decedent's death.

4. Estate and Gift Tax Treaties

Estate and gift tax treaties between the United States and individual countries may modify residency determination and asset situs classification. Certain treaties provide foreign residents with an estate tax credit exceeding the default $60,000 exemption by granting a proportional share of the full U.S. unified credit based on the percentage of U.S. situs assets.[34] Additionally, some treaties allow for a marital deduction for transfers to a noncitizen spouse, subject to specific limitations.

Several treaties also exempt U.S. corporate shares owned by foreign residents from U.S. estate tax, thereby reducing potential tax liabilities. However, there may be a corresponding obligation on the foreign side.

2. Planning for U.S. Situs Assets

An NRA with U.S. situs property has a few options to mitigate U.S. estate taxation, including purchasing life insurance, borrowing funds on a non-recourse basis, transferring assets to an irrevocable trust, and owning assets through an entity that is deemed to a foreign corporation for U.S. federal income tax purposes.

Life Insurance

An insurance policy that pays out death benefits on the life of an NRA are not included in the NRA's gross estate even if the issuer is a U.S. insurance carrier, proceeds are payable to the NRA's estate, and the NRA dies owning the policy. As such, an NRA can purchase U.S. life insurance to cover potential estate taxes.[35]

The limitations of this strategy include whether the NRA is eligible for such insurance as well as the cost of the insurance.

Non-Recourse Debt

If an NRA owns an asset such as real estate located in the U.S., they can reduce the value of the U.S. situs asset by obtaining a nonrecourse loan that is collateralized by the U.S. real property. Non-recourse financing may not be easy to find, and the loan must be property structured to U.S. income tax issues.

Irrevocable Dynasty Trust

1. Planning With an Irrevocable Dynasty Trust

If an NRA has U.S. situs property, the NRA can structure the ownership as trust ownership. The NRA has to avoid retained interests in the assets of the trust and cannot control the beneficial enjoyment of the trust (under Sections 2036 and 2038 of the Internal Revenue Code). If the NRA decided to use a U.S. situs structure, the trust should be established in a self-settled trust jurisdiction such as Delaware, Nevada, South Dakota or Wyoming to obtains benefits such as perpetuities periods that are longer or non-existent, as well as the option for the grantor to be a discretionary beneficiary of trust principal while having the assets shielded from creditors and the estate tax. A perpetual dynasty trust is one that may, but need not, last forever.[36] These trusts preserve wealth for future generations, but may also be drafted with flexibility to allow the trustee to distribute the assets outright to the beneficiaries at a later point in time, depending on future circumstances. Moreover, in some states like Delaware, the grantor may retain a discretionary interest in the trust while shielding the assets from the reach of the grantor's future creditors.[37]

Upon a showing that no U.S. federal estate or gift tax would be imposed upon the death of an NRD, no GST tax is imposed.[38] To avoid U.S. transfer taxes during the life of the foreign trust, the trust should be drafted to ensure that any U.S. beneficiaries do not have a general power of appointment over the trust.[39] A carefully drafted limited power of appointment may be used to appoint property to the heirs in each generation (but not to the power holders themselves), or otherwise a power subject to an "ascertainable standard."[40] An NRD grantor may also create a fully discretionary trust and guide the trustee using a "letter of wishes," but such a letter should contain similar limited power of appointment provisions.[41]

If a trust is an irrevocable non-grantor trust, then the trust is not disregarded from its owner or transparent, and the trust is responsible for filing its own tax return. A domestic irrevocable trust must generally report its worldwide income, whereas a foreign non-grantor trust (FNGT) must generally report its U.S. source income. The trustee should provide a Foreign Non-Grantor Trust Beneficiary Statement to report any distribution to a U.S. beneficiary. As mentioned above, a U.S. beneficiary who receives a distribution from the trust must also file Form 3520.[42] A U.S. beneficiary must also file Form 8938 to report certain specified foreign financial assets.[43] Other filing obligations may exist, depending on the circumstances.[44]

2. Foreign Trust or Domestic Trust

From a U.S. income tax perspective, the NRA has two options in creating the self-settled trust. It can either be a foreign trust or a domestic trust for U.S. federal income tax purposes. A U.S. trust would have to pay taxes on its worldwide income while a foreign trust pays taxes only on its U.S. source income. As a general rule, if there are not going to be any U.S. beneficiaries and the trust will not own U.S. real property interests, a foreign trust is preferred. If the trust will have U.S. beneficiaries or will own U.S. real property interests, then a U.S. trust may be the better option. The reason why a U.S. trust is preferred in the case of a U.S. beneficiary is because the U.S. penalizes a U.S. beneficiary if the beneficiary receives accumulated income from a foreign trust due to onerous anti-deferral throwback rules. With respect to ownership in U.S. real property interests, ownership by a foreign trust would subject dispositions and income to FIRPTA withholding.

3. Classification as a Foreign Trust or Domestic Trust

All trusts are considered foreign trusts by default, unless two tests are met – (1) the "court test" and (2) the "substantial decisions test."[45] The court test requires that the trust be under the primary supervision of U.S. courts and the substantial decisions test requires that one or more U.S. persons control all substantial decisions of the trust. Substantial decisions include, but are not limited to, the power to distribute income or principal, beneficiary selection, power to terminate the trust, and the power to remove, add or name a successor trustee.[46]

In other words, even if a trust is settled under U.S. law in a trust jurisdiction such as Nevada or Wyoming, the trust can still be classified as a foreign trust for U.S. federal income tax purposes. Almost without any exception, any trust that is settled under foreign laws, such as the Cook Islands or Nevis, will be classified as a foreign trust due to failing the court test.

4. Classification as Foreign Grantor Trust or Foreign Non-Grantor Trust

Generally, for a U.S. person who creates a trust, the trust will be treated as a "grantor trust" if the conditions under Internal Revenue Code Sections 671-677 are met. A grantor trust means that the person who made a gratuitous transfer to the trust will be treated as the income tax owner of all items of income and deductions generated by the trust. The rules for a foreign grantor as somewhat different. For trusts created after September 19, 1995, a foreign grantor will be treated as the owner of the trust only if one of the two following conditions are met:

1. The grantor can revoke the trust and revest title in himself without the consent of any person, or with the consent of a related or subordinate person who is subservient to the grantor.

2. The grantor and/or the grantor's spouse are the sole beneficiaries of trust income or principal during the grantor's lifetime.[47]

A foreign grantor trust's assets are all includible in the foreign grantor's estate unless the assets are not U.S. situs assets. For example, if the assets owned by the foreign grantor trust are shares in a foreign corporation, they would not be includible in the foreign grantor's estate. Practitioners should take heed of Internal Revenue Code Section 2104(b) in making a transfers of a U.S. situs asset to a foreign grantor trust and then later converting it into a non-U.S. situs asset as there may be estate tax implications even if the asset is a non-U.S. situs asset. For example, if stock of a U.S. corporation is transferred to a revocable trust and then sold and the proceeds reinvested in a foreign corporation, there may be estate tax inclusion.

A foreign grantor trust becomes a foreign non-grantor trust (FNGT) upon the grantor's death. A FNGT has potential adverse tax consequences for U.S. beneficiaries.

5. Foreign Non-Grantor Trusts

Generally, any income earned by the FNGT that is not distributed to its U.S. beneficiaries in the year incurred becomes undistributed net income (UNI); U.S. beneficiaries would be subject to the throwback tax and a deferred interest charge once the FNGT actually makes a distribution of such UNI.[48] The IRS also penalizes U.S. beneficiaries of FNGTs because capital gains included in UNI are recast as ordinary income as UNI generally does not retain its character and would therefore be taxed at a rate of 40.8% as opposed to 23.8%.[49] This regime seeks to prevent the accumulation of wealth and tax U.S. beneficiaries in a manner that approximates the income tax that would have been owed had the income been distributed in the year earned.[50] If a trust has U.S. beneficiaries, then those U.S. beneficiaries and the trust are better off if that trust is domestic. Note that restructuring may also be necessary once the trust becomes irrevocable to avoid potential Controlled Foreign Corporation and Passive Foreign Investment Company issues.

A FNGT would determine its taxable income in the same way as an NRA,[51] as described above, with certain modifications.[52] The U.S. generally only taxes a foreign beneficiary of a FNGT on his or her proportionate share of the trust's U.S. source income. Thus, the character of the U.S. income of a FNGT generally establishes the foreign beneficiary's U.S. tax liability.[53] In other words, the U.S. generally does not tax a foreign beneficiary on distributions from a FNGT if such distributions are foreign-source income. The throwback tax also may not apply. A foreign trust is generally more advantageous in situations where all the beneficiaries are non-U.S. persons.

Foreign Corporation Ownership

As already noted above, only U.S. situs assets are subject to the estate tax. Shares in a U.S. corporation are considered U.S. situs assets, while shares in an entity that is a foreign corporation are not deemed to be a U.S. situs asset. In other words, a foreign corporation set up in a tax-optimal jurisdiction such as the Cayman Islands can serve as an effective estate tax blocker. If there are U.S. beneficiaries of the NRA, consideration must be given to the controlled foreign corporation and passive foreign investment company anti-deferral regimes for ownership in foreign corporations.

Additionally, even if there are no U.S. beneficiaries, a foreign corporation structure may not be optimal. For example, if the foreign corporation owns real property through a subsidiary and there is net positive rental income, distributions from a U.S. subsidiary up the chain may be subject to double taxation. Moreover, consideration must be given to the branch profits tax and any potential treaty relief.

Finally, the NRA's home jurisdiction tax laws must be considered in terms of receiving dividends from the foreign corporation.

Conclusion

International estate planning presents both opportunities and challenges for individuals with cross-border assets, multinational families, or tax residency complexities. Failing to properly structure an estate plan can lead to unexpected tax liabilities, double taxation, and legal complications for an individual's heirs and beneficiaries.

Estate planning professionals must be familiar with fundamental income and estate tax laws and utilize the appropriate proper legal structures to ensure wealth is preserved and transferred in a compliant and tax-optimal manner. Tax and legal advisors in both the U.S. as well as the applicable foreign jurisdiction must be consulted in order to achieve maximum tax efficiency.

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Endnotes

1. I.R.C. § 7701(b)(1)(A).
2. I.R.C. § 7701(b)(3)(A).
3. *Id.*
4. *See,* I.R.C. § 7701(b)(5).
5. I.R.C. § 7701(b)(3)(B).
6. Treas. Reg. § 20.0-1(b)(1); Treas. Reg. § 25.2501-(1)(b).
7. *Id.*
8. *Id.*
9. *See, e.g., Estate of Jack,* 54 Fed. Cl. 590 (2002).
10. *See, e.g.,* Rev. Rul. 80-363; 1980-2 C.B. 249. *See also* Rev. Rul. 80-209, 1980-2 C.B. 248 (1980) (illegal alien domiciled in the U.S.).
11. *See* I.R.C. §§ 871(a) (for nonresident aliens), 881(a) (for foreign corporations).
12. I.R.C. §§ 871(b)(1), 882(a)(1). Whether or not a foreign taxpayer "is engaged in trade or business within the United States shall be determined on the basis of the facts and circumstances in each case." Treas. Reg. § 1.864-2(e). *See e.g., Comm'r v. Groetzinger,* 480 U.S. 23 (1987); c.f. *Higgins v. Comm'r*, 312 U.S. 212 (1941).
13. FIRPTA stands for Foreign Investment in Real Property Tax Act, which governs the taxation of foreign individuals and entities that sell U.S. real property interests.
14. I.R.C. §§ 2501(a), 2511(a), 2031(a), 2033.
15. Treas. Reg. § 20.0-1(b)(1).
16. I.R.C. §§ 2103, 2101.
17. I.R.C. § 2101.
18. Treas. Reg. §§ 20.01-1(b)(1), 25.2501-1(b).
19. I.R.C. § 2101(a).
20. The lifetime exemption amount for a U.S. domiciliary is inflation adjusted and is set to decline to the 2017 exemption levels, $5,000,000 at the end of 2025, but will be adjusted for inflation.
21. Property situated outside the U.S. generally need not be included on a decedent's estate tax return. Treas. Reg. § 20.2103-1.
22. *See* I.R.C. § 2056(d)(2)(A).
23. *See* I.R.C. § 2056A and regulations under Treas. Reg. § 20.2056A.
24. I.R.C. § 2103; Treas. Reg. § 20.2104-1(a).
25. I.R.C. § 2104(a).
26. I.R.C. § 2104(c). But see I.R.C. § 2105(b) (covering exceptions to general rules of I.R.C. § 2104(c), such as debt obligations where the interest in the hands of the NRD qualifies as "portfolio interest").
27. Rev. Rul. 55-143, 1955-1 C.B. 465 (1955) ("funds in the safe-deposit box on the date of decedent's death . . . are includible . . . in the decedent's gross estate situated in the United States.").
28. I.R.C. § 2104(c).
29. Treas. Reg. §§ 25.2511-1(c), -3(a), (b)(1).
30. I.R.C. § 2501(a)(2); Treas. Reg. § 20.2105-1(f).
31. *See, e.g.*, PLR 8342106 (no Federal gift tax imposed on gift of stock in domestic corporation by NRD).
32. PLR 7737063. See also PLR 8210055 (gift by NRD of a check drawn on a foreign bank but payable by a U.S. bank, was not subject to U.S. gift tax because "such property is situated outside the United States.").
33. *Blodgett v. Silberman*, 277 U.S. 1 (1928); *Thomas v. Virginia*, 364 U.S. 443 (1960); Rev. Rul. 55-143, 1955-1 C.B. 465.
34. *See, e.g.*, U.S.-Switzerland and U.S.-Australia treaties.
35. I.R.C. § 2105; Treas. Reg. § 20.2105-1(g).
36. Some states, such as Delaware and South Dakota, have eliminated the Rule Against Perpetuities, which generally allows certain trusts to last for an unlimited duration.
37. *See* Mark W. Smith, *Careful Pre-Immigration Planning Can Save Significant Taxes,* 34 Est. Plan. 30, 33 (Feb. 2007).
38. I.R.C. § 2663(2); Reg. § 26.2663-2.
39. I.R.C. §§ 2041, 2514, 2652(a)(1). *See also,* Portfolio 6420-1st: Tax Planning for Portfolio Investment into the United States by Foreign Individuals, VII. Use of "Dynasty Trusts" for U.S. Transfer Tax Planning Purposes, Bloomberg Tax (2024) (hereinafter, "Portfolio 6420-1st").
40. I.R.C. §§ 2514(c)(1) ("power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard . . . shall not be deemed a general power of appointment" for gift tax purposes), 2041(b)(1)(A) (providing same for estate tax purposes). *See* Portfolio 6420-1st.
41. *See* Portfolio 6420-1st.
42. I.R.C. § 6048(a).
43. I.R.C. § 6038D; Treas. Reg. §§ 1.6038D-1(a)(1)-(5), -2(a). See also, I.R.C. §§ 6013(g), 6013(h).
44. For example, Form 56 (report fiduciary relationships), Form 4970 (report accumulated distributions should there be any UNI distributed), Form 1042-S (withholding for U.S. source income for foreign persons), among others.
45. I.R.C. §§ 7701(a)(30)(E), (31)(B).
46. *See* Treas. Reg. § 301.7701-7(d).
47. I.R.C. § 672(f).
48. I.R.C. §§ 665(a)-(b), 666, 667.
49. I.R.C. §§ 667(a), 1411, 1(h)(11)(A). This assumes the U.S. beneficiary would be in the highest marginal bracket.
50. *See* Mark W. Smith, *Careful Pre-Immigration Planning Can Save Significant Taxes*, 34 Est. Plan. 30, 43 n. 47 (Feb. 2007).
51. I.R.C. § 641(b).
52. *See generally,* I.R.C. §§ 642, 643, 651, 661.
53. *See, e.g.*, Rev. Rul. 81-244, amplified by Rev. Rul. 86-76 (income "retain[s] its character . . . in the hands of the beneficiaries").

Why U.S. Persons Owning Foreign Homes Need a U.S. and a Foreign Will

By Diane K. Roskies

In today's highly mobile world, it is increasingly common for U.S. citizens and permanent residents to own homes abroad. These properties may have been acquired as vacation homes, inherited from parents who remained in their home countries, or maintained as dual residences for work, particularly by executives of international corporations. Even after retirement, many individuals choose to retain their non-U.S. homes. In my practice, I have encountered all these scenarios involving U.S. persons who own second homes outside the U.S., including Canada, Mexico, France, Italy, Korea, Israel, Ireland, Germany, England, and the Virgin Islands.

For clients and their spouses who are U.S. citizens or green card holders, non-U.S. homes often do not require intricate estate tax planning. New York estate tax does not apply to real property located outside the state and U.S. persons benefit from the full federal estate tax applicable exclusion amount, commonly referred to as the "unified credit." Unless Congress enacts changes, the federal exclusion amount for 2025 is nearly $14 million per person.

Challenges of Using a Single Will

For U.S. persons who currently benefit from the large U.S. estate tax exclusion, a tax-free bequest of a non-U.S. home is still difficult. If only one will is used, several complications may arise:

- **Translation Issues**: The original will must be translated, and some legal terms may not translate precisely.
- **Execution Requirements**: Will execution standards often vary between countries, potentially leading to a claim of undue execution in one of the relevant countries.
- **Filing Requirements**: The original will may need to be filed in both jurisdictions. Some foreign courts accept exemplified, authenticated, or court-certified copies of the will with an apostille, while others may not. Certain courts may even require a bonded attorney from the first country to personally hand deliver the original will to the second country for inspection and copying.

A notable example of these difficulties occurred in 2013 when a New York Surrogate's Court admitted to probate the will of a U.S. decedent who owned property in Israel. The New York executor petitioned for ancillary probate in Israel, submitting an exemplified copy of the U.S. will to the Israeli court. However, the Israeli court required an affidavit from a New York attorney confirming that, under a New York statute, the inheritance rules governing the property outside the U.S. were subject to local Israeli laws. No such New York statute existed, complicating the process.

Risks of Local Intestacy

If there is only a U.S. will, and it fails to effectively dispose of a non-U.S. residence, the property may default to the intestacy rules of the foreign country. If these rules align with the client's wishes, a non-U.S. will may not be necessary. However, if the foreign intestacy rules conflict with the client's intentions, a non-U.S. will is essential to ensure the property is distributed as the client desires.

Two Wills for U.S. Persons

One practical solution for bequeathing a non-U.S. home is to have two wills, one for the United States and another for the country where the non-U.S. property is located. While this approach requires two probate (or similar) proceedings – one in each jurisdiction – it is often easier than original probate in the U.S. followed by ancillary probate in the other country.

Although it is often said that an individual should have only one will at a time, multi-jurisdictional wills are common in international estate planning. U.S. estate tax may not be a factor for U.S. persons because of their large exclusion from U.S. estate tax. However, other issues must be addressed when a U.S. person considers two wills.

1. If the clients are U.S. persons, their U.S. will should state that their U.S. will governs their worldwide property in every country, other than the country where they maintain their non-U.S. residence.
2. The non-U.S. will should state that the non-U.S. will governs only property in that country.
3. In general terms, the U.S. will should enumerate worldwide property that the U.S. will covers, i.e., real property, banks, and brokerage accounts, but not property in the non-U.S. country where the U.S. person owns a non-U.S. residence.
4. In general terms, the non-U.S. will should enumerate the property that the non-U.S. will covers, including the location of a residence in the non-U.S. country, but not property located outside of that non-U.S. country.

5. The U.S. will should designate the law of which State of the United States governs the U.S. will.

6. The "elective share" or "forced share" of the surviving spouse in both the U.S. and the non-U.S. country must be considered. Is it necessary to ask the client's spouse to sign a waiver of the right of election or forced share for one or both countries?

7. The "forced heirship" or mandatory inheritance of the client's children in a non-U.S. country must be considered. Is it possible for adult children to sign waivers of their forced share?

8. If the U.S. client agrees, the U.S. will may give the U.S. executor the power to pay estate administration expenses and taxes in the non-U.S. country out of U.S. funds. The U.S. executor may not have the power to use the U.S. funds if that is not stated in the U.S. will.

9. The inheritance tax of non-U.S. countries is often collected from the beneficiaries, not the estate. The U.S. will may allow the U.S. executor to reimburse the beneficiaries for the non-U.S. inheritance tax.

Residuary Clause

Using a standard residuary clause that bequeaths "all the rest, residue, and remainder of my estate wherever situated" should be avoided, as it defeats the purpose of distinguishing between the disposition of U.S. and non-U.S. property. Instead, the residuary clauses in both the U.S. will and the non-U.S. will must be meticulously edited to apply solely to the property governed by each respective will.

Wills Must Not Revoke Each Other

Most important, the two wills must not revoke one another. A clause that clearly safeguards against unintended revocation is essential. The following is a clause that might appear in a U.S. will of a U.S. person:

Proposed Revocation Clause in a United States Will of a U.S. Person

> "1. JOHN DOE, publish and declare this to be my United States Last Will and Testament, to control the disposition of the property hereinafter described and defined as my Estate, and I hereby revoke all Wills and codicils at any time heretofore made by me with respect to such Estate. This United States Will shall not revoke or otherwise interfere with the disposition of any property which is situated in the Republic of ABCXYZ. This United States Will can only be revoked by another Will which is later in date than this United States Will. This United States Will may not be revoked unless the revocation clause of another Will specifically refers to this United States Will by date of execution and explicitly revokes it."

The U.S. will continues with a clause that defines the "estate" which is bequeathed under such U.S. will. Usually, the "estate" in a U.S. will of a U.S. person would be the individual's worldwide assets, other than property that is in the non-U.S. country, here the Republic of ABCXYZ. In the non-U.S. will, there should be a complementary revocation clause. The "estate" should be defined as including only property located in the Republic of ABCXYZ, such as the non-U.S. residence.

Note that if the non-U.S. residence is in a country that is a member of the European Union, it is necessary to research whether an EU regulation on inheritance is relevant. In every case, it will be essential for attorneys in each country to communicate in advance and draft the two wills as a coordinated service for the client.

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Protecting a Trust in the Event of a Beneficiary Divorce: Colorado's Recent *Smith* Case

By the Multi-State Committee

Case Overview

In a 2024 decision, the Colorado Court of Appeals reinforced the protection of a beneficiary's interest in a third-party trust during divorce proceedings. The case, *In re Marriage of Smith*,[1] provides significant insights into how discretionary trusts are treated in marital dissolutions under Colorado law, and teaches important lessons relevant for estate planners across the country. The trust in question was created for the benefit of Jane Smith, her siblings, and her father, with trustees granted the discretion to distribute income or principal for health, education, maintenance, and support (HEMS). In their divorce proceedings, John Smith asked the court to take into account Jane's interest in the trust, and the Colorado Court of Appeals declined to do so.

Court's Decision

On August 22, 2024, the Colorado Court of Appeals ruled in favor of Jane Smith, making two key determinations:

1. Non-Allocable Property Interest: The court held that Jane's potential right to receive discretionary principal or income distributions from the trust, which benefits multiple beneficiaries, did not constitute a property interest that could be allocated in the divorce settlement.

2. Exclusion from Consideration as an Economic Circumstance: The court further determined that Jane's interest in the trust was not an "economic circumstance" that could be taken into account when determining support awards or settlement terms. The court viewed Jane's father's testamentary power of appointment as a factor that makes the trust essentially revocable or amendable for purposes of the economic circumstance statute. Under Colorado law, a divorcing individual's property right is not considered an economic circumstance if it is revocable or amendable. This is analogous to a situation in which an individual is named as a beneficiary of a life insurance policy or a retirement account, both of which are types of designations that can be revised.

Implications and Impact for Planning in Other States

The *Marriage of Smith* decision highlights the features of a trust that can strengthen creditor protection in the event of a beneficiary's divorce – specifically, this trust was a "sprinkle" trust with multiple beneficiaries, and one beneficiary had a power of appointment that could affect the divorcing beneficiary's future interest in the trust. It is notable that, along with Massachusetts, Colorado is one of the states that is most liberal in finding that a beneficiary's interest in a third-party trust can be taken into account in a divorce. Colorado sets a high bar for trust terms that avoid claims from a divorcing beneficiary's ex-spouse, so it is helpful to estate planning attorneys nationwide to have this case as a benchmark. Importantly, keep in mind that the state law that applies to the divorce proceedings is determinative for this particular question of creditor protection. Since beneficiaries can and do move between states, and state laws can and do change, it is helpful to draft trust instruments with other states' laws (and their interpretation, as illustrated in the *Smith* case) in mind. A further protective measure that is not present in the trust referenced in the *Smith* case, but that would have bolstered the creditor protection offered by the trust, is to use a distribution standard that gives complete discretion to a third-party trustee, eschewing an ascertainable standard such as HEMS.[2]

Endnotes

1. *In re Marriage of Smith*, 2024 COA 95 (Colo. App., August 22, 2024).
2. For a full discussion of creditor protection and income tax considerations concerning trusts with a HEMS standard, *see* Steve Oshins, *It's Time to Stop Using Health, Education, Maintenance and Support Trusts!*, LISI Estate Planning Newsletter 3116 (May 1, 2024).

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Florida Update

By David Pratt, Farhaan Anjum and Alex Picard

Decisions of Interest, Recent Updates in Florida Law and Practice Tip for Non-Florida Lawyers

An estate may be re-opened to rescind a wrongful death settlement to a decedent's trust upon claims of fraud, despite a waiver of further distributions from the decedent's trust.

The Fourth District Court of Appeal reversed a trial court order denying the reopening of an estate for fraud based on a waiver signed by the surviving spouse.

The decedent's estate pursued a wrongful death action after the decedent was tragically murdered by a deliveryman. Under Florida Statutes § 768.20, claims of wrongful death must be brought by the personal representative of an estate on behalf of the survivors. Accordingly, one of the decedent's two sons, as personal representative, pursued claims of loss of consortium on behalf of the decedent's spouse (appellant), among other damages. The personal representative settled the action completely on the loss of consortium claim and distributed the proceeds according to the decedent's estate plan.

The decedent's will divided her estate into a marital and non-marital portion. The marital portion was required to be distributed outright to the appellant, and the non-marital portion was required to be held in trust for the Appellant's benefit; upon his death, the remainder was required to be distributed to the two sons and their children. Under the trust, income and principal could be paid to the Appellant at the discretion of the trustees, who were the two sons. The personal representative distributed the settlement proceeds to the trust, and the estate was closed.

Thereafter, the Appellant and the two sons had a disagreement over the disposition of the settlement proceeds due to the Appellant's desire to donate the proceeds to a library in the name of the decedent. After retaining counsel, the Appellant and the sons agreed to increase the Appellant's monthly distributions in exchange for the Appellant waiving his rights to any other distributions from the trust (the agreement).

Several months later, the Appellant petitioned to reopen the estate, claiming that the personal representative committed fraud or acted in bad faith in connection with the settlement by withholding material information about the Appellant's rights as the surviving spouse in violation of the personal representative's duties. Specifically, the Appellant argued that the personal representative had a duty to disclose that the Appellant, as the surviving spouse, was entitled to receive 100% of the settlement proceeds, and that the personal representative acquired an advantage by transferring the proceeds to the trust instead. The Appellant moved to rescind the transfer of the settlement to the trust and pursue recovery of his claims as surviving spouse.

The personal representative responded with the affirmative defense that the Appellant waived his rights to reopen the estate through waivers signed during the probate administration and through the Agreement, which he argued "waived any right to any further distribution under the trust by plain and unambiguous language."[1] The Appellant contended he had no actual or constructive knowledge of his 100% entitlement to the settlement and the Agreement contained no waiver of fraud.

The trial court granted the personal representative's motion for summary judgment, finding the Appellant waived any right to further distribution from the trust due to the Agreement and that the estate could thus not be reopened for fraud.

On appeal, the court recognized that Florida law allows for an estate to be re-opened in instances of fraud or bad faith, which extends to situations where a fiduciary violates an obligation to make a full disclosure to a beneficiary of all material facts. The court found that, although the loss of consortium claim was pursued by the estate as required by Florida law, it was not a claim of the estate, but rather a claim of the Appellant's as surviving spouse. Thus, any recovery based on the claim was not truly an estate asset that could be distributed to the trust, but rather the Appellant's asset that he allowed the personal representatives to distribute to the trust.

Under this rationale, the court reasoned that the Agreement did not control the claim and bar re-opening because the Agreement only waived the Appellant's right to recover further distributions *from the trust*, and the Appellant instead sought to rescind the original distribution *to the trust*. Further, the court noted that, even if the Agreement was relevant, it did not expressly or impliedly waive any claims to fraud. The court reversed the trial court's grant of summary judgment.

Udell v. Udell, No. 4D2023-1662 (Fla. 4th DCA 2024)

Florida Voters Ratify Amendment 5, Modifying the Homestead Tax Provisions Found in § 6 of Article VII and Creating a New Section of Article XII of the Florida Constitution

On November 5, 2024, voters approved Amendment 5, providing updates to the state's homestead laws by requiring the value of a property's additional homestead exemption be adjusted annually for inflation, based on the Consumer Price Index (CPI). The amendment to the Florida Constitution updated § 6 of Article VII and created a new §42 of Article XII, as well as amending Fla. Stat. § 196.031(1)(b).

Florida's homestead exemption, originally passed in 1992 and placed into effect in 1995 as part of the "Save Our Homes" Amendment, provides up to a $50,000 reduction in the assessed value of a homestead property for property tax purposes. The first $25,000 of exemption applies to all taxes, including school district levies. The next $25,000, or the "additional exemption," applies to the assessed value of a property between $50,000 and $75,000, and only applies to non-school district levies. Additionally, the assessed value of a homestead property cannot increase beyond three percent or the CPI, whichever is lower.

Under the new regime, if the CPI inflation adjustment is positive, the additional exemption will be increased beyond the $25,000 benchmark. The changes do not provide any increase for the first $25,000 in exemption that benefits school district levies.

The law took effect on January 1, 2025, and applies starting with 2025 property tax assessments.

FL. Const. art. VII, § 6.

FL. Const. art. XII, § 42.

Fla. Stat. § 196.031(1)(b).

Florida Practice Tip

Non-Florida lawyers need to be cognizant of the "traps for the unwary" under Florida law. With each Florida update article, we provide a "Florida Practice Tip" that illustrates a trap that should be avoided. In this article, we discuss who may serve as a personal representative in Florida.

The probate process can be complex, especially when navigating large and complicated estates, statutory deadlines and numerous rules set forth in the Florida Probate Code and related rules. One simpler and often overlooked aspect of the probate process is the personal representative, who plays arguably the largest role in administering an estate. It is important to fully understand the rules for selecting a personal representative, the ramifications for violating these rules and the importance of including such selection in an estate plan.

Florida Statutes §§ 733.302-305 outline the qualifications for a personal representative. Under Florida law, to act as a personal representative, an individual must be at least 18 years old and either a Florida resident or closely related to the decedent (i.e., a blood-related or adoptive lineal parent or descendant, spouse, sibling, aunt/uncle, niece/nephew, a lineal blood-relative to one of the foregoing, or the spouse of one of the foregoing). An individual is not qualified to act as a personal representative if he or she has been convicted of a felony, abuse of an elderly or disabled adult, or is mentally or physically unable to perform the necessary duties.

Additionally, a bank or a trust company may act as a personal representative; a trust company must be incorporated under the laws of Florida, and a bank must be authorized and qualified to exercise fiduciary powers in Florida.

If a personal representative does not resign immediately after knowing that he or she was unqualified to act at the time of appointment, such personal representative will be personally liable for costs and attorney's fees incurred in the removal process. This liability applies even if the personal representative did not know, but should have known, that he or she was unqualified.

Fl. Stat. § 733.301 outlines the preference of appointment of a personal representative. In a testate estate, the personal representative nominated in a will has priority, followed by a person selected by a majority in interest of the persons entitled to the estate and then a devisee under the will. If multiple devisees apply to act as personal representative, the court may select the best qualified to act. In intestate estates, the surviving spouse has priority, followed by a person selected by a majority in interest of the heirs and then the heir nearest in degree. If multiple heirs apply to act as personal representative, the court may similarly select the best qualified to act. In both instances, if no parties apply to act as personal representative, the court shall appoint a capable person to act.

In summary, estate planning attorneys must be careful in drafting clients' wills to ensure that parties named to act as personal representative are qualified. Disputes over the role of personal representative can be costly, time consuming and burdensome for the grieving family of the decedent. Proper lifetime planning after consideration of Florida's statutory requirements can provide clarity in navigating the probate process.

Endnote

1. *Udell v. Udell*, No. 4D2023-1662 (Fla. 4th DCA 2024) at 2.

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