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of the New York State Bar Association

A Key Ingredient in Your Estate Plan: Proper Tax Apportionment

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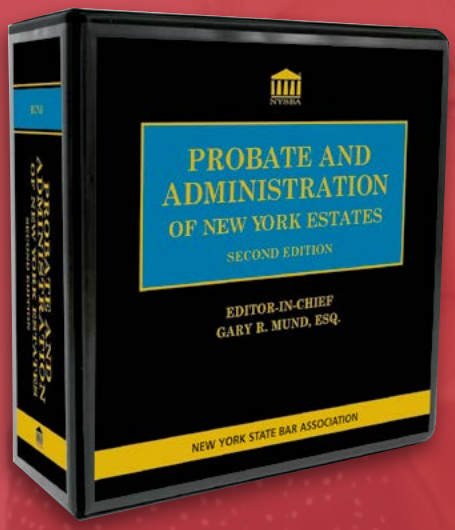

Editor-in-Chief
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Trusts and Estates Law Section Journal

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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.

Authors will be notified only if articles are rejected. Authors will be asked to sign a copyright agreement that can be found here:

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TRUSTS AND ESTATES LAW SECTION JOURNAL

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Final Message From the Section Chair

It is hard for me to believe that my year as section chair is almost over; it seems like it was only last week that I was leading my first Executive Committee meeting. It has been a great year for our section with many positives to report.

One of the year's highlights has been the return of in-person networking and social events. In addition to our Albany and Manhattan happy hours, in October we had a well-attended happy hour at the Buffalo Club, which was our first live event in the Queen City since COVID-19. It was a terrific evening and a wonderful opportunity to meet new people and the Surrogates in a casual setting. Thank you to Surrogate Acea Mosey, District Representatives Andrew Besch and Lisa Powers, and Treasurer Holly Beecher for their tireless work in organizing this event.

In November, St. John's Law School graciously hosted "From St. John's to Surrogate: A Trust & Estates Networking Reception," where downstate surrogates regaled us with tales from the bench and met with section members. It was another memorable evening; thank you to St. John's Law for hosting our section, and to District Representatives Sydney Spinner and Harini Maragh for putting the evening together.

As many of you witnessed first-hand, our fall meeting at the Sagamore was a rousing success. Program Chairs Meaghan Feenan and Brooke Morris led the fantastic program "Family Matters: Litigation and Planning Considerations for the Modern Family" that touched all areas of practice and gave the attendees a lot to think about. One highlight was the surrogate's panel moderated by our rising star, Emma Pletenycky, where we heard insights from Surrogates Timothy McElduff (Orange), Rosemarie Montalbano (Kings), Acea Mosey (Erie), and Mary Keib Smith (Onondaga). Thank you to all of them for participating in the fall meeting; our section is truly lucky that the surrogates are willing to participate in these programs. Thank you as well to our fall meeting lecturers, namely, David Bamdad, David Consigli, Jennifer Boll, Jill Beier, Kevin Cohen, Lisa Fenech, Matt Nolfo, Michael Calcagni, Michael Zahler, Rob Harper, Rochelle Cavanagh, and Ross Katz

I hope you will join us for the section's Annual Meeting at the Hilton Midtown on January 14. We will begin the day bright and early with committee breakfast meetings, which are the perfect opportunity to get involved in the work of our section's many active committees. That will be followed by our CLE program, titled "Keeping in Tune: Trusts & Estates in the Digital Age." Chaired by Lindsay Feuer and Aileen Almonte, the program will focus on some of the modern challenges in trusts and estates practice, including artificial intelligence and electronic discovery, as well as an interactive panel with the surrogates. That will be followed by our section's luncheon and speaker – stay tuned for more details – and a cocktail reception that evening. It is always a memorable day, and I look forward to seeing everyone there.

Angelo M. Grasso

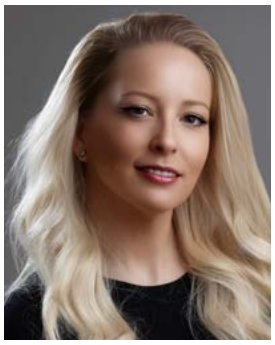
All of these events would not happen without the support of our section's many sponsors, whom I cannot thank enough for their partnerships with the section. And, of course, these events would not work without the tireless work of our committee members. In particular, I thank Lisa Fenech and Mariann Sarraf of the Sponsorship Committee, who have helped us all make connections to our sponsors, and Nicole Clouthier and Meaghan Feenan, co-chairs of our Membership Committee.

A final item I would like to highlight is our section's perpetually robust CLE program that continued in 2025, and this year covered some fresh topics with new speakers. To highlight a few, Diane Matero presented on wrongful death and 9/11 VCF proceedings; Moira Laidlaw spoke on Spousal Lifetime Access Trusts (SLATs); Seth LeMaster, Darcy Katris, and Frank Santoro gave a presentation on the ethical use of AI; Tzipora Zelmanowitz spoke on the probate and administration of estates; and Rob Harper presented on the removal of fiduciaries. The section is always looking for new topics and new presenters for CLEs – do not hesitate to contact us if you have an idea.

In closing, it has been an absolute pleasure and an honor to serve as the section's Chair for the past year, and thank you to everyone for your assistance, support, participation, and hard work. It's been a fantastic 12 months, and I'm excited to see what incoming chair Tara Anne Pleat has in store for us next year.

Message From the Editor-in-Chief

By Avigail Goldglancz



Avigail Goldglancz

I want to wish a warm welcome to Monika Jain of Holland & Knight LLP, who joins our editorial board as an associate editor.

Thank you to all of you who contributed to this volume. I also want to express my sincere gratitude to recurring contributors, Ilene Sherwyn Cooper for her Case Notes column; David Pratt, Farhaan Anjum and Alex Picard for their Florida Updates column; Brad Dillon and Katie Lynagh for their Multistate Updates and a special thank you to the Surrogate's Court Committee for their wonderful series this year on special notices.

Lastly, I want to give a tremendous thank you to the wonderful editors who worked diligently on each volume this year. I am so grateful for all your hard work.

Please consider submitting an article or column for publication in the Journal. Our next deadline for submissions is January 8, 2026 for publication in the spring issue. CLE credits may be obtained.

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The Recent Amendment to NYTL 954(a)(3) Concerning the Addback for Certain Taxable Gifts Made Within Three Years of a Decedent's Death

By Kevin Matz

On May 9, 2025, Governor Kathy Hochul signed into law an amendment to Section 954(a)(3) of the New York Tax Law (NYTL) that is effective for New York residents dying on or after that date (the "2025 amendment"). NYTL 954(a)(3) provides for the inclusion in a decedent's New York gross estate of certain taxable gifts made within three years of the decedent's death that are not part of the federal gross estate for federal estate tax purposes. This statutory provision was scheduled to expire for New York resident decedents dying after December 31, 2025. The 2025 amendment extends this provision so that this addback now applies to New York resident decedents dying prior to January 1, 2032. The 2025 amendment also adds one sentence to this provision that will potentially now allow the amount added back to the New York gross estate under NYTL 954(a)(3) to be deductible for federal estate tax purposes on a going forward basis.

Background

NYTL 954(a)(3) provides for the inclusion in a decedent's New York gross estate of certain taxable gifts made within three years of the decedent's death that are not part of the federal gross estate for federal estate tax purposes. This statutory provision was originally enacted in 2014 and, prior to the 2025 amendment, was scheduled to expire for New York resident decedents dying after December 31, 2025.

Prior to the 2025 amendment, NYTL 954(a)(3) was very problematic from a deductibility standpoint for *federal* estate tax purposes. This was the case because the portion of the New York estate tax that is attributable to amounts added back for inclusion in the New York gross estate does not qualify for the deduction for state death taxes under Section 2058 of the Internal Revenue Code (IRC), which requires that state death taxes pertain to property included in the federal gross estate in order to be deductible under IRC Section 2058.[1]

In contrast to the requisite language for deductibility under IRC Section 2058, NYTL 954(a)(3) only applies to certain taxable gifts that are made within three years of a decedent's death that are "*not otherwise included in the decedent's federal gross estate*." (NYTL 954(a)(3) (emphasis added). The portion of the New York estate tax that is attributable to NYTL 954(a)(3) prior to the 2025 amendment therefore did not come within the scope of what is needed to obtain a federal estate tax deduction under IRC Section 2058. This result can be highly prejudicial to the estates of New York decedents for federal estate tax purposes, which must pay federal estate tax on such amounts without obtaining the benefit of an offsetting deduction on the federal estate tax return that can effectively reduce the 40% federal estate tax by as much as 6.4% on a 16% New York State estate tax (16% x 40% = 6.4%), and by an even greater percentage amount in certain other scenarios.

One potential solution to this problem (which would be entirely revenue neutral for New York estate tax purposes) that the 2025 amendment invoked would be to recharacterize the New York estate tax that is attributable to the application of NYTL 954(a)(3) *as an obligation of the decedent as of the decedent's death*. This would render the increase in New York estate tax that is attributable to NYTL 954(a)(3) eligible for deduction under a *different* Internal Revenue Code section – specifically, *under IRC Section 2053(a)(3) as a claim against the estate*. This characterization as an obligation of the decedent's estate is consistent with the notion that NYTL 954(a)(3) essentially functions as a contingent gift tax obligation that is imposed upon the donor's estate as of the donor's death. Support for this position follows under the United States Supreme Court's decision in *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), which generally requires the courts and the Internal Revenue Service to respect characterizations that are directed pursuant to a state's statute.[2]

By treating the New York estate tax that is attributable to the application of NYTL 954(a)(3) *as an obligation of the decedent as of the decedent's death*, such amount would *not* be subject to estate tax apportionment under EPTL 2-1.8, but would instead be subject to debt obligation treatment under EPTL 13-1.3.

The 2025 Amendment

The 2025 amendment amends NYTL 954(a)(3) in the following manner effective for New York residents dying on or after May 9, 2025:

> (1) by pushing back the December 31, 2025 sunset date for NYTL 954(a)(3) by six years by instead making it inapplicable to the estates of decedents dying on or after January 1, 2032; and

(2) by treating the addition of New York estate tax attributable to the application of NYTL 954(a)(3) "as an obligation of the decedent as of the decedent's death that is subject to the provisions of this article [which is in reference to Article 26 of the NYTL titled "Estate Tax"] (but which shall not be deductible for purposes of this article)" (the "NYTL 954(a)(3) Debt Obligation Treatment").

A redline version that shows the text of this statutory amendment to NYTL 954(a)(3) is set forth below (the stricken text appears in red font, while the newly added statutory text is underlined in black font):

L.2025, c. 59 legislation

NYTL § 954. Resident's New York gross estate

(a) General. – The New York gross estate of a deceased resident means his or her federal gross estate as defined in the internal revenue code (whether or not a federal estate tax return is required to be filed) modified as follows:

*** *** ***

(3) Increased by the amount of any taxable gift under section 2503 of the internal revenue code not otherwise included in the decedent's federal gross estate, made during the three year period ending on the decedent's date of death, but not including any gift made: (A) when the decedent was not a resident of New York state; or (B) before April first, two thousand fourteen; or (C) between January first, two thousand nineteen and January fifteenth, two thousand nineteen; or (D) that is real or tangible personal property having an actual situs outside New York state at the time the gift was made. Provided, however that this paragraph shall not apply to the estate of a decedent dying on or after January first, two thousand ~~twenty-six~~ thirty-two. The amount by which the total tax imposed under this article exceeds the total tax that would have been imposed under this article if this paragraph did not apply shall be treated as an obligation of the decedent as of the decedent's death that is subject to the provisions of this article (but which shall not be deductible for purposes of this article).

Taking a step back to consider the 2025 amendment's legislative history, the New York State Senate's proposal to amend NYTL 954(a)(3) instead would have made this statutory provision permanent, in lieu of opting to sunset it for decedents dying on or after January 1, 2032. The NYSBA Trusts and Estates Law Section submitted the following memorandum in support of the Senate proposal to amend NYTL 954(a)(3): NYSBA TRUSTS AND ESTATES LAW SECTION MEMORANDUM IN SUPPORT OF SENATE'S PROPOSED AMENDMENT TO NYTL 954(a)(3) (the "TELS Memorandum in Support"). The TELS Memorandum in Support did not take any position concerning the making of NYTL 954(a)(3) permanent.

As stated in the TELS Memorandum in Support (page 46), the 2025 amendment's NYTL 954(a)(3) Debt Obligation Treatment is intended to prevent New Yorkers from being prejudiced for federal estate tax deduction purposes due to the unavailability of a federal estate tax deduction under IRC Section 2058 for property that is not included in a decedent's federal gross estate. The 2025 amendment's NYTL 954(a)(3) Debt Obligation Treatment, moreover, would be entirely "revenue neutral" for New York State estate tax purposes due to its ending parenthetical language which specifies that such obligation "shall not be deductible for purposes of this article." For these reasons, the TELS Memorandum in Support urged the 2025 amendment's inclusion in the final budget. This result was indeed achieved.

Kevin Matz is a partner in the New York City office of ArentFox Schiff. Kevin is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and is a certified public accountant. Kevin chairs the New York City Bar Association's Estate and Gift Taxation Committee and the New York State Society of Certified Public Accountants' Trust and Estate Administration Committee. January 2023 was his second three-year term as co-chair of the Taxation Committee of the New York State Bar Association's Trusts and Estates Law Section.

Endnotes

1 IRC Section 2058(a) provides that "[f]or purposes of the tax imposed by [IRC] section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia *in respect of any property included in the gross estate* (not including any such taxes paid with respect to the estate of a person other than the decedent)" (emphasis added).

2 As the Supreme Court explained in *Bosch*, "the State's highest court is the best authority on its own law. If there be no decision by that court *then federal authorities must apply what they find to be the state law* after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." *Bosch*, 387 U.S. at 465 (emphasis added). There can be little doubt that federal authorities, applying this standard, should confer significant weight upon a state statute that speaks directly on the subject matter before it.

A Key Ingredient in Your Estate Plan: Proper Tax Apportionment

By Monika Jain

What Is Tax Apportionment?

Tax apportionment directs the fiduciaries of an estate to pay estate taxes from a certain source. Section 2002 of the Internal Revenue Code of 1986, as amended (the "code"), states that the tax imposed by Chapter 11 (i.e., the federal estate tax) shall be paid by the executor, but it does not state how such tax should be allocated among an estate's beneficiaries. In New York, unless a decedent's will or "non-testamentary instrument," such as a revocable trust, states otherwise, federal, state and other death taxes are to be apportioned in accordance with Section 2-1.8 of the Estates, Powers and Trusts Law (EPTL).[1]

New York's Apportionment Statute

Section 2-1.8(a) of the EPTL states that with respect to any property required to be included in the gross tax estate of a decedent, unless otherwise provided in a will or non-testamentary instrument, all estate and other death taxes (imposed under the law of New York or any other jurisdiction) are to be equitably apportioned among the persons interested in such estate, whether or not they are residents or non-residents of New York.

Section 2-1.8(c) of the EPTL provides more detailed rules regarding such apportionment and sets forth, in pertinent part, (1) the proportion in which the tax shall be apportioned amongst the beneficiaries, (2) how exemptions or deductions shall be allocated, and (3) how interest resulting from the late payment of the tax shall be apportioned. Importantly, EPTL 2-1.8(d) makes clear that any direction as to apportionment or non-apportionment, whether contained in a will or non-testamentary instrument, shall relate only to the property passing thereunder, unless such will or instrument provides otherwise.

Considerations When Drafting Apportionment Language in a Will or Revocable Trust

While New York and other states have well-drafted statutes that very specifically set forth tax apportionment rules, the reality is that most estate plans include language that overrides the "default" state law rules. The intent of this article is to remind practitioners to be clear and specific with their bespoke apportionment language and to be sure to ask clients pointed questions about the make up of their assets, including whether they are probate or non-probate

assets and the beneficiaries thereof. Once the practitioner has a complete picture of the client's assets and information regarding whom the client would like to benefit in his or her estate plan (and how), the practitioner can advise the client how to best direct estate taxes be paid. Some options, by way of example, include:

- directing that all taxes on probate and non-probate assets be paid from the residuary estate;
- directing that taxes on only probate assets be paid from the residuary estate, and that taxes be apportioned on non-probate assets amongst the beneficiaries thereof;
- directing that a larger share of taxes be allocated to certain beneficiaries because such beneficiaries are inheriting a larger portion of the estate; or
- directing that taxes be paid in accordance with state law.

This article will focus on the complications that arise when a will directs estate taxes to be paid from the residuary estate but the will's structure arguably creates more than one residuary estate, leading to confusion regarding which residuary beneficiaries should bear the burden of the tax. This article will then briefly touch upon other factors practitioners should take into account when advising clients how best to allocate estate taxes.[2]

More Than One Residuary Estate

If a will directs that the entire residuary estate be distributed to certain individuals or entities, a direction to pay taxes out of the residuary estate is clear and easy to effectuate: taxes are to be paid first and the balance is to be distributed to or among the various individuals or entities.

If, instead, a will directs that the residuary estate be disposed of in two or more parts, a direction to pay taxes "out of the residuary estate" becomes less clear. When asked to interpret wills in such cases, courts have either (1) apportioned the estate taxes among all the residuary beneficiaries, or (2) if the first part of the residuary article makes cash bequests, typically treated the cash bequests as pre-residuary and allocated taxes to the second part.

In *In re Sued*,[3] the court was asked to interpret a will that directed that estate taxes be paid from the residuary estate, but the will contained two residuary clauses. The preamble of Article FOURTH of the will disposed of "all the rest, residue and remainder of my estate." Article FOURTH was then divided into two parts: FOURTH (A) devised the decedent's house to the decedent's daughter, and FOURTH (B) bequeathed the balance of the estate to the decedent's five children, including the daughter, "equally and *per stirpes*." The executor asked the court to construe Article FOURTH (B) as the "true" residuary estate, meaning that the bequest of the real property to the decedent's daughter should be treated as a pre-residuary bequest and pass to her free of estate tax. The executor initiated the construction proceeding because not all of the residuary beneficiaries agreed with his interpretation of the will. The court determined that "[a]t a minimum, there is an ambiguity as to the testator's intentions, requiring the application of [New York's] tax apportionment statute." The court then held that Article FOURTH, in its entirety, constituted the residuary clause and directed that estate taxes were to be apportioned among all of the residuary beneficiaries, including the devisee of the real property, according to the value of their residuary bequests.

In *In re Kindermann*,[4] the will directed the executor to pay taxes out of the residuary estate, which first set forth nine specific cash dispositions and then directed that the balance be distributed to two charities. The Appellate Division apportioned estate taxes against all dispositions, but the Court of Appeals reversed, and while acknowledging that the will appeared to contain a "residuary within a residuary," held that the testator intended that the nine specific dispositions should not bear any share of tax and that only the "balance" of the residuary should be responsible for the tax.

Similarly, in *In re Boeth*,[5] the will disposed of the residuary estate in two clauses: one clause made bequests to eight beneficiaries and the other left the "rest" of the residuary in different percentages amongst three recipients. The will directed the executor to pay taxes out of the "residuary estate," and the court directed that the taxes be apportioned against only the three recipients, not the beneficiaries under the first clause of the residue.

In *In re Feil*,[6] the court addressed the apportionment of estate taxes following the death of Gertrude Feil, and had to base its decision on the language of the will of Gertrude's predeceased husband, Louis Feil. Louis's will established a marital trust for Gertrude, over which a full qualified terminable interest property (QTIP) election was made. Upon Gertrude's death, the trustees of the marital trust were directed to distribute (1) the sum of $20,000,000 to Louis's issue (subject to continuing trusts), and (2) the balance to the trustees of a charitable lead annuity trust. Siblings Carole and Jeffrey Feil were appointed co-executors and co-trustees under Gertrude's will. Carole believed that the $20,000,000 bequest should not bear any portion of tax, and Jeffrey believed that it should. Louis's will simply stated that all "death taxes" were to be charged, without apportionment, against his residuary estate. Louis's will also provided that if Gertrude did not survive him, the sum of

$20,000,000, as a pre-residuary legacy, should be distributed to his issue (subject to continuing trusts). The court held that Carole's position was the correct one, and that it was clear to the court that Louis intended the $20,000,000 bequest to survive "intact" (i.e., tax-free), whether distributable upon Louis's death or Gertrude's subsequent death. The court explained that Louis's repeated use of such fixed sum both "inside and outside the residuary" as the intended amount to be received by his issue made it clear that his intent was that such sum, regardless of when paid, was to pass tax-free. The court was also persuaded by Carole's reliance on "true residuary" jurisprudence, which provides that when a residuary disposition is divided between specific amounts and a further disposition of the "balance," the "balance" is the "true residuary," and if the will directs that taxes be paid out of the residue, they should be charged only against the "true residuary."

Ultimately, all of these cases illustrate why a clear tax apportionment provision is so important. At the very least, clear language (1) would ensure the decedent's intent is properly effectuated, and (2) would avoid the need for a construction proceeding, particularly when there is no consistent, predictable manner of construction in this context. As demonstrated hereinabove, practitioners should take note that a direction to pay estate taxes "out of the residuary estate" might not be sufficiently clear to effectuate the testator's true intent, particularly in situations where the testator wishes to divide the residuary estate into multiple parts. In such situations, practitioners should discuss with the testator how estate taxes should be allocated among such parts so as to avoid the need for a construction proceeding after the testator's death.

Other Considerations

When considering how best to allocate estate taxes, aside from ensuring that a direction to pay taxes out of the residuary estate is clear, practitioners should take many other factors into account, which will depend upon each client's specific circumstances. For example, practitioners should consider whether married clients share the same children and if they do not, practitioners may need to be thoughtful about the tax consequences resulting upon the surviving spouse's death. Even when a couple shares the same children, upon the death of the surviving spouse, the couple's estate plan may direct that certain assets pass to only some, not all, of their children. For instance, if a couple runs a successful business, has three children and plans to leave the business interests to only two of the three children, should estate taxes be allocated equally among the three children if the third child will receive less

in terms of value? Another scenario to consider is what if clients wish to leave their probate assets equally among all of their children, but divide non-probate assets (such as retirement accounts) among only some of their children? Should the residuary estate pay all estate taxes (even on non-probate assets), when the children will each be receiving different amounts after aggregating their probate and non-probate inheritances?

Lastly, when considering a client's retirement accounts – particularly if they are of significant value – practitioners may want to provide the executor with the discretion to pay estate taxes due on such accounts out of the decedent's residuary estate to minimize negative income tax consequences resulting from the tax being apportioned directly against the beneficiaries of such accounts. As noted above, whether to include such discretion would, of course, depend upon who the beneficiaries of the decedent's assets are (whether they are all part of the same nuclear family, for example).

Conclusion

Proper tax apportionment is indeed a key ingredient in any estate plan and, as illustrated above, should not be viewed as simple "boilerplate" language, but should be given serious thought and consideration.

Monika Jain is a partner at Holland & Knight LLP, focused on estate and tax planning, wealth transfer and asset protection, business succession planning, estate and trust administration, contested probate matters, matrimonial agreements and charitable giving for high net-worth U.S. clients. Ms. Jain earned a B.A. from Colgate University (cum laude with Honors in English), a J.D. from Northwestern University School of Law, and an LL.M. (Master of Laws) in taxation from NYU School of Law. The author wishes to thank Chazz Freeman for his contributions to this article. Mr. Freeman is an associate at Holland & Knight LLP, focusing on complex commercial litigation, appeals, and white collar criminal defense.

Endnotes

1. The New York Court of Appeals, in 1941 in *In re del Drago*, 287 N.Y. 61, 38 N.E. 2d 131 (1941), upheld the constitutionality of New York's tax apportionment statute, and held that the federal estate tax statute does not dictate who ultimately bears the burden of the tax; rather, state law governs the ultimate impact of the tax among beneficiaries. The court noted that while the executor is responsible for paying the tax, the state may determine how the tax burden should be allocated among those interested in the estate, subject to any direction provided by the decedent in his or her will.
2. For ease of illustration, this article will describe different tax scenarios in a will (as opposed to a pour-over will and accompanying revocable trust).
3. 33 Misc.3d 1206(A), 941 N.Y.S.2d 537 (Sur. Ct., Kings Co. 2011); *see also In re Shubert*, 10 N.Y.2d 461, 225 N.Y.S.2d 13 (1962).
4. 21 N.Y.2d 790, 288 N.Y.S.2d 480 (1968).
5. N.Y.L.J., December 7, 2009, p. 28, col.3 (Sur. Ct., N.Y. Co.).
6. 27 Misc.3d 274, 2009 N.Y. Slip Op. 29541 (Sur. Ct., Nassau Co. 2009).

Estate Planning in a Technologically Advanced World: The Case for Digitally Preserving Paper Wills

By Ellen G. Makofsky and Morgan A. Clarke

Surely many readers of this article are scratching their heads worrying about what to do with the large cache of aging wills stored in their offices or placed in designated safe deposit boxes. Will storage is an ongoing issue for attorneys for two basic reasons. First, attorneys who regularly retain clients' original wills are easily overwhelmed by the sheer number of wills entrusted to them. With a large cache of wills comes concern about a lawyer's responsibility to preserve and protect these documents, particularly as the practitioner contemplates leaving the practice and/or their own death. Second, attorneys hired by families of deceased persons to probate a will often cannot easily move forward because the deceased testator's will can no longer be located. A solution to both these problems may be found in new legislation allowing attorneys to shred and dispose of original wills, provided the attorney first scans the will and then certifies that the scanned copy is as good as the original. The law would further require attorneys to maintain a backup system for the electronically stored documents. With the above considered, the Practice and Ethics Committee of the Trusts and Estates Law Section of the New York State Bar Association would like to promulgate legislation that would accommodate the electronic storage of wills.

The Electronic Wills Act won the approval of the New York State Legislature in its most recent session and as of this writing, is awaiting signature by Governor Hochul. This legislation, if approved by the governor, would provide for the execution of electronic wills, representing a sig-

nificant step toward modernizing estate planning in New York. Unfortunately, the legislation still fails to address the substantial and ongoing burden of attorneys who retain hundreds and sometimes thousands of original paper wills executed prior to the coming new era of electronic wills.

Numerous cases in New York underscore the importance of securely preserving original wills. There are typically three basic options for safekeeping a will. First, the original will can be held by the attorney; second, the will can be held by the client/testator for safekeeping, or third, the will can be deposited with the surrogate's court for a fee of $45.[1] Despite these choices, most often attorneys maintain their clients' original wills. Once an attorney takes on the responsibility of storing an original will, the attorney has an ethical duty to safeguard the stored will. Pursuant to Rule 1.15 of the New York Lawyer's Code of Professional Responsibility, a lawyer must place an original will in "a safe deposit box or other place of safekeeping as soon as practicable," "maintain complete records" of that property, and return the original will promptly if the client requests.[2]

Despite an attorney's ethical responsibilities, lost or missing wills remain a pervasive problem. Anyone following the New York State Bar Association's (NYSBA) listserv is familiar with repeated requests regarding the location of missing wills or searches for attorneys who created wills for deceased testators whose original wills have gone missing. These repeated requests illustrate the need for statutory reform in New York to help safeguard original wills and resolve the ongoing cycle of lost wills.

There are many cases involving an original will initially stored with the drafting attorney and later lost after the attorney's death or retirement. New York courts have addressed the issue of lost wills under the framework of Surrogate's Court Procedure Act (SCPA) 1407. This statute allows a lost or destroyed will to be admitted to probate if three conditions are met:

(1) it is established that the will has not been revoked,

(2) the will's execution is proved in the manner required for the probate of an existing will, and

(3) all provisions of the will are clearly and distinctly proved by at least two credible witnesses or by one witness and a copy or draft of the will proved to be true and complete.[3]

Despite SCPA's "safety net," when a family member dies and a will is misplaced, locating the Will can be difficult for the decedent's family. Further, as case law clearly illustrates, there are inconsistent outcomes when addressing whether to admit a lost Will for probate.

In *In re Estate of Kleefeld,*[4] an original will was retained by an attorney who predeceased the will's testator.[5] When the testator died, the will could not be located, prompting the proponent to commence a proceeding to admit the testator's copy of the lost will to probate under SCPA 1407.[6] Because the will was lost while in the attorney's possession, the proponent was able to show the testator's lack of intent to revoke the will.[7] The proponent was also able to establish due execution through the testimony of the two witnesses who attested to the original will; however, the witnesses were unable to testify to the will's contents.[8] In an effort to prove the contents of the will, the secretary who typed the original will delivered testimony, but even then, the secretary was unable to testify to the substance of the will.[9] While the Surrogate's Court and appellate court held that the requirements of SCPA 1407 had been established, admitting the lost will to probate, the Court of Appeals disagreed, reversing the prior courts' admission of the copy for probate.[10] The Court of Appeals held that SCPA 1407 was clear on its face when stating that:

> a lost will may not be admitted to probate upon the submission of a conformed copy of the original will and the testimony of one witness which does not establish the actual substantive provisions of the will independently of the copy since pursuant to SCPA 1407 the witness must testify as to the substantive provisions of the original will and not merely to the effect that the submitted copy is believed to be authentic.[11]

By contrast, in *Matter of Castiglione,*[12] an original will went missing during an attorney's office relocation.[13] The court admitted the lost will to probate because the proponent provided a signed photocopy of the will along with a sworn statement from the drafting attorney confirming that the copy was an exact replica of the original will, the attorney retained the original will for safekeeping, and the attorney lost the original will when he moved his office.[14] The court found that the statutory requirements of SCPA 1407 were satisfied and rebut the presumption of revocation through evidence that the testator believed the original will was still in existence at the time of a subsequent codicil's preparation.[15] These cases, with vastly different outcomes, illustrate the uncertainty and risks inherent in losing an original will. In both matters, litigation would have been unnecessary if there were a way for attorneys to digitally preserve and file executed wills electronically.

As previously alluded to, the proposed Electronic Wills Act, awaiting the signature of Governor Hochul, only addresses newly electronically executed wills. It does not

include provisions for the digital storage of previously executed wills through traditional methods. Still, we hope the governor will timely sign the bill and that once law, the Legislature might consider opportunities for the electronic storage of executed paper wills. Helpfully, the Electronic Wills Act already contemplates certain required electronic procedures for the formatting of a will as well as removal and revocation procedures, all of which may be readily expanded to include digitizing executed paper wills.[16] Further, many of the formalities for executing an electronic will under the Electronic Wills Act mirror the requirements for executing a traditional paper will. Section 3-6.6 of the Electronic Wills Act notes that an electronic will must be a record that is readable as text at the time of signing, signed at the end by testator or another in the testator's name in the testator's physical presence and by the testator's direction, and must be signed in the physical or electronic presence of the testator by at least two witnesses who must sign within 30 days.[17] The major difference with electronic wills is that the testator may sign in the physical or electronic presence of witnesses and once signed, the will must be electronically filed within 30 days of its execution.[18] If New York is to adopt electronic wills, it is reasonable to apply similar procedures to allow attorneys to digitize previously executed paper wills, provided they meet the same execution standards.

Attorneys who have remained in contact with a testator should be allowed, with the testator's consent, to digitize the testator's previously executed will and file the will under the same procedures proposed under the Electronic Wills Act and dispose of the original. If a testator wishes to revoke an electronically filed will, then the same provisions as those in the Electronic Wills Act would apply.[19]

Furthermore, where a testator cannot be located to return an original will, attorneys should also be permitted to digitally store wills following a reasonable period of years following its execution. Other jurisdictions have already implemented policies to address the challenge of storing old wills. In Maryland, attorneys may file original wills with the register of wills if at least 25 years have passed since execution, the testator's address cannot be found, and the will is not subject to a binding contract.[20] Once filed, the register may destroy the will after retaining a digital copy.[21] In Colorado, the Electronic Preservation of Abandoned Estate Planning Documents Act provides a procedure for determining whether an original will was abandoned as well as a process for creating an electronic estate planning document for an abandoned original document, namely, filing the electronic document with the state court administrator and then allowing for the destruction of the original document.[22] The Electronic Preservation of Abandoned Estate Planning Documents Act states that a custodian (e.g., an attorney) must first try to return the original document to its creator through a diligent search including sending a notice to the creator's last known address.[23] If the creator does not retrieve the original within 90 days, the custodian may file an electronic copy and destroy the original.[24] The custodian must scan the original document in color, verify that it is a true and complete copy, and file it with the Colorado State Court Administrator.[25] A formal filing statement must also be submitted including the creator's name, aliases, birth date, last known addresses, along with details of the document declaring the electronic copy is true and accurate.[26] Once the electronic estate plan is filed, the court administrator securely stores each electronic document and creates a searchable index of creators' names and addresses.[27] Once the document has been filed electronically and the date-stamped receipt is issued, the custodian is authorized to destroy the original paper document.[28] These laws recognize the practical burden attorneys face with storing original documents and provide for a secure way to transition from paper storage to digital archives. New York should adopt a similar framework.

To alleviate the issue of lost wills and the storage burden many practicing attorneys bear with regard to older wills, the Practice and Ethics Committee of the Trusts and Estates Law Section of the NYSBA would like to propose legislation permitting an attorney in possession of an original will for a period of 25 years from the date of execution, or an original will that a testator requests be digitized, to initiate a process to preserve the will in certified electronic form and later dispose of the original paper will. Prior to digital conversion and disposal of the original document, the attorney would need to make a diligent effort to contact the testator to return the original. If the testator cannot be located or fails to take possession of the original will, the attorney/custodian may send written notice to the testator's last known address stating that a certified electronic copy of the will will be filed with the New York State Unified Court System, and the original will will be destroyed if the testator does not chose to obtain possession of the original document within 90 days of being notified. After the expiration of 90 days, the attorney can scan the will in color and submit an affidavit under penalty of perjury stating that the scanned document is a true and complete copy of the original, that a diligent search was performed and that notice was given to the testator's last known address and/or the custodian received permission from the testator to dispose of the original and maintain a digital copy. At that point, the certified electronic copy is then electronically filed with the New York State Unified Court System. Upon successful filing and confirmation of receipt, the attorney/custodian is authorized to destroy the original

paper will. Once a certified electronic copy is filed, it holds the same legal effect as the original and may be submitted for probate. Additionally, a certified digital copy may be revoked following the same procedures as outlined in Section 3-6.7 of the proposed bill and removed from the system as outlined in the proposed bill.

The time is ripe for New York to allow for the complete digitalization of wills. Such legislation should not only permit electronic wills but also authorize the digital preservation of previously executed wills.

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Endnotes

1. SCPA 2507(1); *see also* SCPA 2402(9)(v).
2. *The Lawyer's Code of Professional Responsibility*, R 1.15.
3. SCPA 1407.
4. 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (l982)
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. 40 A.D.3d 1227, 837 N.Y.S.2d 360 (3d Dep't 2007).
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* New York State Assembly Bill A7856 (2025-2026).
17. *See* New York State Assembly Bill A7856 (2025-2026).
18. *See* New York State Assembly Bill A7856 (2025-2026).
19. *See* New York State Assembly Bill A7856 (2025-2026) (Section 3-6.7 states "(a) [a]n electronic Will may revoke all or part of a previous Will. (b) An electronic Will is revoked by (1) a subsequent Will that revokes all or part of the electronic Will; (2) removal of the electronic Will from the custody of the New York state unified court system by: (i) the testator; (ii) another person duly authorized by the testator as proved by at least two witnesses, neither of whom shall be the person removing the electronic Will; or (iii) as otherwise authorized by the uniform rules of the surrogate's court; or a writing of the testator clearly indicating an intention to effect such a revocation or alteration, executed with the formalities prescribed by this article for the execution and attestation of a Will.").
20. MD. Estates and Trusts Code § 4-204 (2024).
21. *Id.*
22. Colo. Rev. Stat.§§ 15-23-101-122 (2024).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

Special Notices to the Attorney General and the Public Administrator's Office

By Brette A. Haefeli, Brooke S. Morris, Justin M. Piccione and The Surrogate's Court Committee

Surrogate's Court proceedings often involve parties who are not immediately apparent: unknown heirs, distant relatives, or charitable beneficiaries whose interests must be protected. Two institutional actors play a vital role in safeguarding those interests – the attorney general and the public administrator. While their functions differ, both offices are frequently necessary parties in probate, accounting, and administration proceedings, and practitioners must be attuned to the circumstances in which notice to these offices is required.

Notice to the Attorney General

The attorney general is not merely a passive recipient of notices in Surrogate's Court practice but an active participant charged with protecting the public interest. In particular, the attorney general safeguards the rights of unknown distributees and charitable beneficiaries, ensuring that estate assets are not improperly distributed or escheated to the state without due process. The requirement of notice is firmly grounded in both statute and case law.

New York's Surrogate's Court Procedure Act (SCPA) provides that whenever it appears there are no known distributees or beneficiaries – or when it is uncertain whether such persons exist – process must issue to the attorney general.[1] Likewise, the Estates, Powers, and Trusts Law (EPTL) requires that the attorney general be cited whenever an estate involves charitable dispositions, whether religious, educational, or benevolent in character.[2]

The scope of this statutory oversight is broad. In accounting proceedings, where a legacy or distributive share is payable to an unknown person, the decree must direct the fiduciary to pay the sum to the state comptroller for the benefit of the person later determined to be entitled, and a copy of that decree must be served on the attorney general.[3] In guardianship matters, both the Civil Practice Law and Rules and the Executive Law mandate that notice of certain termination petitions be provided to the attorney general.[4] The EPTL further requires service upon the attorney general when a trustee or executor petitions for instructions regarding charitable property, when charitable real estate is to be sold or mortgaged, or when a will containing charitable bequests is the subject of probate litigation or compromise.[5]

Although the attorney general's statutory authority is broad, the courts have clarified its limits. In *Matter of Gregory*, the Surrogate's Court held that the attorney general was not a necessary party to a proceeding under SCPA 1809 where there was no evidence that the fiduciary's interests conflicted with those of the attorney general, and intervention would have delayed the matter without any tangible benefit to the estate.[6] The court emphasized that the attorney general's presence becomes essential only when the actual distribution of estate assets is at issue, as in an accounting, where the attorney general has the opportunity to review the acts of the fiduciary.[7]

By contrast, other decisions highlight the attorney general's indispensable role when unknown heirs or charitable dispositions are at stake. In *Matter of Tumpeer* and *Matter of Aaltonen*, the courts required citation to the attorney general in proceedings involving unknown distributees, recognizing the office's responsibility to safeguard the interests of potential heirs whose identities or whereabouts could not be established.[8] And in *Matter of Lachat*, the Surrogate's Court stressed that the attorney general's duty to enforce charitable gifts is unaffected by the form of the proceeding: whether in probate contests, administration proceedings, construction actions, or accountings, the attorney general must be given the opportunity to discharge its supervisory function.[9]

Taken together, these authorities highlight that the attorney general's role is not limited to safeguarding unknown heirs but extends broadly to the supervision of charitable dispositions. Practitioners should therefore anticipate the need for notice whenever charitable bequests or uncertain heirship is present in a proceeding.

Notice to the Public Administrator

The public administrator (PA) serves as the fiduciary of last resort in New York estate practice. By statute, the PA administers estates where a decedent dies intestate without heirs, where heirs are unwilling or unqualified to serve, or where no nominated executor is available.[10] In such cases, the PA assumes full fiduciary duties: protecting and marshaling assets, arranging for burial, paying debts and taxes, and locating and distributing property to lawful heirs.[11]

Because the PA's mandate is to protect estates in which there may be unknown or distant distributees, the SCPA provides numerous situations where the PA must be cited.[12] For example, when a petition for probate or administration does not appear to name all distributees, or when the closest distributees are first cousins or more remote relatives, the court directs that citation issue to the PA.[13] Similarly, the PA must be cited in proceedings involving property or funds deposited for unknown persons, minors, incompetents, or beneficiaries residing in countries where transfer of assets is restricted.[14]

Courts have affirmed the PA's broad standing to protect estate interests. In *Matter of von Knapitsch*, the Appellate Division, First Department, held that the PA had standing to file objections to probate even where several distributees had been identified and either waived or defaulted.[15] The court rejected the petitioner's argument that the absence of "unknown distributees" defeated the PA's standing. Instead, the court emphasized that under SCPA 1123(2)(i)(2), the PA is a necessary party "in every probate proceeding" where distributees are unknown *or* are first cousins or more remote.[16] Because the distributees in *von Knapitsch* were either unknown or first cousins, the PA was properly authorized to intervene.[17]

Thus, the PA serves as a statutory safeguard to ensure estates are properly administered where heirship is uncertain or too remote for private parties to adequately protect their interests.

Conclusion

The attorney general and the public administrator serve complementary but distinct functions in Surrogate's Court practice. The attorney general protects charitable interests and unknown heirs, while the public administrator ensures estates are not left without fiduciary oversight where heirs are distant, unknown, or unwilling to serve. Both offices must be cited in a range of proceedings under the SCPA and EPTL, and both have been recognized by the courts as essential to preserving the integrity of estate administration. Practitioners must therefore remain vigilant in identifying the circumstances that trigger these special notice requirements, lest their proceedings be delayed or jurisdictionally defective.

Endnotes

1. N.Y. Surr. Ct. Proc. Act Law (SCPA) 316.
2. N.Y. Est. Powers & Trusts Law (EPTL) 8-1.1(f).
3. SCPA 2222.
4. CPLR 1012(b)(1); N.Y. Exec. Law § 71.
5. EPTL 8-1.4(e)(1), 8-1.4(e)(2), 8-1.1(g)–(h).
6. *Matter of Gregory*, 102 Misc. 2d 735, 736–37 (Sur. Ct. Westchester Co. 1980).
7. *Id.*
8. *Matter of Tumpeer*, 2008 N.Y. Misc. LEXIS 3401, fns. 3 and 5 (Sur. Ct. New York Co. 2008); *Matter of Aaltonen*, N.Y.L.J., Nov. 12, 1997, at 31 (Sur. Ct. Westchester County).
9. *Matter of Lachat*, 184 Misc. 486 (Sur. Ct. New York Co. 1944).
10. SCPA 1123, 1213, 1215.
11. *Id.*
12. *Id.*
13. SCPA 1123(2)(i)(2).
14. SCPA 2218.
15. *Matter of von Knapitsch*, 296 A.D.2d 144 (1st Dep't 2002).
16. *Id.* at 147-48.
17. *Id.*

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Why Mediate in Surrogate's Court? Practical Benefits and Real Examples

By Emma Pletenycky and Madison Pracht

Surrogate's Court controversies create the perfect environment for grieving family members – whether bloodline, marital or chosen – to escalate any existing conflict and emotional strain between them. Surrogate's Court proceedings routinely concern the probate of wills, administration of estates and complex trust proceedings. Given the inherent familial nature of the parties to these types of matters, legal positions are often driven by long-standing dysfunction, resentment and splintered relationships rather than legitimate rule of law. The high costs and lengthy process often associated with Surrogate's Court practice can further the probability of deepening conflict among estate litigants.

In New York, all parties to Surrogate's Court proceedings are encouraged to participate in an alternative means of dispute resolution (ADR) – including mediation, arbitration, neutral evaluation, in-court settlement practices, and summary jury trials – at the earliest opportunity available. These alternative options are becoming a more popular means to resolve trusts and estates disputes and are generally the most efficient and affordable. All proceedings heard in Surrogate's Court are presumptively eligible for early referral to an ADR process (unless otherwise excluded). In most instances, mediation must start with the voluntary participation of all parties. Voluntary participation supports the integrity of the process by ensuring cooperation and strengthening the potential for a mutually agreeable resolution. However, with emotions and passions running high in Surrogate's Court, it can be difficult to get the distributees and beneficiaries to agree to give it a chance.

Surrogate's Court practitioners should advise their clients of all litigation options, including participating in mediation or another appropriate ADR process at the onset of representation. Here's why mediation can be the best option.

Preserve Relationships

- ADR provides an environment that fosters rational dialogue and compromise, ultimately aiming to build understanding among participants.

- Neutrals can balance collaboration and the flow of communication to prevent one party from dominating or intimidating the other.
- ADR provides an opportunity for parties to air their grievances without judgment (or a court transcript memorializing it!).

Save Time and Money

- Disputes could be resolved in weeks or months instead of years (or decades!).
- ADR generally results in faster resolution than litigation because parties can move at their own pace and utilize additional resources beyond what may be available in Surrogate's Court.
- ADR tends to reduce or eliminate the likelihood of multiple court appearances and continued motion practice.

Protect Your Client's Dignity and Values

- Sensitive and uncomfortable family matters, including personal conflicts, remain behind closed doors.
- Surrogate's Court proceedings can be emotionally complex and financially impact multiple generations.
- Collaborate instead of litigate! It is not about who is right or wrong.

Flexibility

- Create personalized solutions that can address the client's emotional needs and be more meaningful and enduring.
- Neutrals can help to set boundaries and navigate family dynamics like grief and distrust.
- Even if mediation does not solve the whole dispute, the parties might settle most of the issues.

The first step in the ADR process is for providers to undergo ADR training. This preparation ensures neutrals have the necessary skills to manage conflict impartially, facilitate productive communication and guide parties toward mutually agreeable resolution. Proper training ensures neutrals are not only familiar with the principles and ethics of mediation but are also capable of applying them in a wide range of complex and sensitive situations.

In Surrogate's Court, ADR processes are typically provided by any one or more of the surrogates, law clerks, court attorney-referees, court attorneys, court appointed mediators or other ADR staff. In Hon. Hilary Gingold, Surrogate of New York County chambers, court attorneys and court attorney-referees are required to obtain commercial mediation training in accordance with Part 146 of the Rules of the Chief Administrative Judge.[1]

Part 146 requires a total of 40 training hours, including 24 hours of basic training and 16 additional hours of advanced training.[2] Training includes: defining and discussing ADR processes; defining and discussing the nature of conflict; discussing the values and purposes underlying mediation; defining and discussing the mediation process; teaching mediation skills; the role of the mediator and other participants; identifying and responding to power imbalances; identifying and responding to different values and biases; highlighting ethical issues and codes of conduct; preparing trainees for online mediation; court procedures and applicable laws; the impact of the case type and status of the parties; ethical standards; and special considerations for specific case types. In addition, six hours of continuing education training, including two hours of anti-bias training, are required every two years.[3]

Surrogate Gingold views Part 146 commercial mediation training as the most suitable for mediating Surrogate's Court disputes. In addition to the emotional complexities associated with inheritance disputes and trust proceedings, oftentimes litigants are actively working in their family-owned businesses, meaning more than just inheritance is at stake. As such, Surrogate's Court cannot ignore the complex commercial aspects of litigation and mediators must be able to navigate these nuanced situations, ensuring that both familial and business interests are properly addressed.

To understand how mediation works in practice, we are happy to share some illustrations of recent matters utilizing an ADR process from the chambers of Surrogate Gingold. These illustrations are meant to provide valuable insight to Surrogate's Court practitioners on how disputes might be mediated in the surrogate's courts – from identifying the key issues to facilitating constructive dialogue and ultimately reaching a resolution. These illustrations aim to demonstrate the practical application of mediation principles and their effectiveness in achieving equitable and constructive resolutions.

Illustration 1

A petitioner for Limited Letters of Administration to pursue a cause of action in her mother's estate was met with opposition when her brother – decedent's only other distributee – filed an affidavit in opposition alleging petitioner was untrustworthy with money. Respondent's affidavit alleged that petitioner had not kept family members aware of their late father's health condition prior to his death and alluded to misfeasance in his estate without any proof.

At the call of the calendar, the surrogate reminded the parties that statute of limitations issues could impact pursuing a cause of action in the decedent's estate. Absent the appointment of an administrator, a lawsuit on behalf of the estate could not be commenced.

Respondent complained about petitioner's lack of communication, and his concerns with her appointment as administrator when he felt she did not communicate with family members adequately. When the parties began discussing decedent's assets, respondent mentioned that their predeceased father's power tools were missing and that he wanted something from his parents and had nothing because petitioner took everything. The surrogate referred the parties to mediation with one of the court attorneys on staff to help the siblings come to a resolution over the distribution of the decedent's personal property. The parties agreed, and the brother consented to his sister's petition for Limited Letters of Administration. The judge reminded

the parties, "You can fight about this nonsense, or you can work it out, and have a relationship."

During the court's informal mediation, the parties agreed petitioner would send her brother a rosary and clothing from his parents, and the personal items their parents had kept of his throughout the years, including his birth certificate, confirmation and communion records, and sports medals. The surrogate issued an order directing the sister to send the items to her brother, and Limited Letters of Administration issued to her.

Here, the resolution reached by the parties was not one that could be solved through the filing of papers. Of course, the parties could have continued to litigate the appointment of an administrator, but the basis for objections was rooted in respondent's frustration and confusion from the loss of his parents. Mediation allowed a remedy that focused on what the parties ultimately wanted – the specific tangible items that were important to the parties in honoring the memory of their parents and even more importantly, the preservation of family ties.

Illustration 2

On competing petitions for Letters of Administration, petitioner alleged to be the decedent's sole daughter and distributee while cross-petitioner alleged to also be decedent's daughter and a distributee. Cross-petitioner was decedent's biological daughter, adopted by a different family at birth, who reconnected with decedent and had a relationship with him later in life. She was present with him at his death.

At the call of the calendar, both parties appeared pro se. This was the first time the two of them had met. They stated they had tried to settle this dispute "in the beginning," but it did not work out.

The law in this matter was very clear – the cross-petitioner was not a distributee, as she had been adopted out of the family – and therefore, she had no standing to be granted Letters of Administration or receive a share of decedent's estate. Despite this obvious legal result, the surrogate directed the parties to mediation with a court attorney-referee. Ultimately, the parties agreed to a financial settlement and the cross-petitioner withdrew her petition. What was gratifying to see was that not only did the sisters resolve their issues, but they also exchanged contact information, and the cross-petitioner introduced her husband to the petitioner.

While cross-petitioner had no standing to be granted Letters of Administration or to inherit from decedent's estate, mediation allowed the parties to come to a resolution that honored their respective history with their father, ended any potential litigation while respecting both parties and allowed the sisters to foster a new family relationship. The parties were dealing with the grief of losing a parent, coupled with the stress of long-standing familial issues coming to a head.

Mediating Surrogate's Court disputes is an appropriate means to create resolutions in the interests of justice that resolve legal issues and address emotional concerns. Even cases that may seem simple by the letter of the law can often reflect deep emotional issues that cannot be resolved without further probing. The success of mediation is evidenced through these case illustrations, where mediation led to a productive and somewhat happy resolution. Mediation allowed the parties to move past their grief to seek solutions that might not be afforded through traditional litigation. Moreover, the parties were able to preserve their familial relationships and move forward amicably.

The Mediation Committee would like to extend special thanks to Surrogate Gingold for generously providing these case illustrations which serve as a valuable learning tool for understanding mediation in the Surrogate's Court context. The Mediation Committee would also like to acknowledge and commend Surrogate Gingold's commitment and dedication to utilizing and promoting ADR in matters before her.

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Endnotes

1. 22 N.Y.C.R.R. 146.
2. 22 N.Y.C.R.R. 146.4(b).
3. 22 N.Y.C.R.R. 146.5.

What if John Hancock Used 'Times New Roman' in 1776? ESRA and the Use of Electronic Signatures

By Eva-Marie Cusack, Kerri L. Bringslid and Nicholas Sheherlis

"John Hancock." The name is less synonymous with the person than it is his signature. As the president of the Second Continental Congress, he was the first person to affix his "John Hancock" to the Declaration of Independence.[1] His elegant signature reflected his education and status in colonial society and became the hallmark of personalized marks. What if he used the "Times New Roman" font instead of affixing his signature by hand? Would his signature be as iconic? With the ever-increasing use of electronic signatures, there may never be such a recognizable signature again.

What Is ESRA?

Since 2000, electronic signatures statutorily have the same legally binding effect as handwritten signatures under the Electronic Signature and Records Act (ESRA), codified in the New York State Technology Law Article 3. Under ESRA, "an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[2] Electronic signatures include "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with intent to sign the record."[3] Electronic signatures are now admissible in legal proceedings.[4] In an age where technology is prevalent, laymen and legal professionals alike are increasingly utilizing digital signatures and the provisions of ESRA serve to recognize and facilitate the use of technology in signing documents submitted to the courts.

Adoption of ESRA in New York

ESRA's recognition of the legal validity of electronic signatures has been incorporated by several rulemaking and regulatory bodies in New York. The Official Compilation of Codes, Rules and Regulations of the State of New York, for instance, adopts ESRA's approval of electronic signatures.[5] The Uniform Rules for New York State Trial Courts have also adopted ESRA, recognizing that a document electronically filed with the courts shall be considered signed and binding on a person identified as the signatory if "the signatory has electronically affixed the digital image of his or her signature to the document."[6]

Several decisions at the trial and appellate level also demonstrate recognition of ESRA. At the appellate level, electronic signatures on supporting depositions have been held to be valid signatures.[7] Trial courts have relied on decisions like *People v. Johnson* to uphold electronic signatures affixed to supporting depositions by replying to an email request for signature with an email confirmation.[8] Electronic signatures on contracts containing arbitration clauses have also been held to be valid at the appellate level.[9] In addition, recognition of electronic signatures has been implemented into some New York State Unified Court System mediator manuals.[10]

Limitations to the Application of ESRA

ESRA has exceptions. For instance, ESRA does not apply to "any document providing for the disposition of an individual's person or property upon death or incompe-

tence, or appointing a fiduciary of an individual's person or property, including, without limitation, wills, trusts, decisions consenting to orders not to resuscitate, and powers of attorney" with certain exceptions.[11]

Moreover, not all courts will accept electronic signatures. For instance, some court rules do not recognize electronic signatures on submissions such as stipulations. Justice Leslie A. Stroth's Civil Term rules, updated as of May 8, 2025, state that "the Court will not so-order any stipulations without the signatures of all counsel. Typed signatures are not accepted."

There is also precedent at the appellate level for rejecting electronic signatures due to lack of intent of the sender to affix a legally binding electronic signature. In these cases, while electronic signatures could be accepted on the documents in different circumstances, the purported signatures were rejected due to evidence being presented that the alleged signatory did not intend for the electronic signature to act as a signature on the documents at issue. For example, in *Solartech Renewables, LLC v. Vitti*, the plaintiff sought to have a proposed side letter that the defendant sent by email, which included defendant's typed name (but not signature), serve as an "electronic record" with an electronic signature proving the formation of a contract between the parties.[12] However, the facts show that the typed name was affixed not to the side letter itself, but to the email attaching the side letter.[13] The court held that "although emails are electronic records, not every attachment to an email qualifies as an electronic record under ESRA."[14] Further, the court reasoned that one of the purposes of ESRA was to promote the use of such technology and to "fulfill this purpose, it was necessary for the Legislature to permit emails to be considered equivalent to signed writings when that was the sender's intent, because it was not possible to place a handwritten signature on an email or similar electronic record that was being transmitted electronically."[15] The court held that since the defendant did not intend for the typed name at the bottom of the email to serve as an electronic signature to the attached side letter, the typed name did not serve as a valid electronic signature to the side letter under ESRA.

Similarly, in *Adler v. 20/20 Companies*, the appellate court found a genuine issue of fact as to whether plaintiffs affixed electronically signatures to the subject employment agreements, or whether the agreements were electronically signed on their behalf by a representative of 20/20 without giving plaintiff an opportunity to review the agreements and assent to their terms.[16] As in *Solartech Renewables, LLC*, evidence of a lack of intent to electronically sign the proffered documents could defeat the validity of a purported electronic signature. These cases contrast with previously discussed precedents such as *People v. Almodovar* where the court found that the email communications indicated intent to have an electronic signature with the same valid effect as a handwritten signature affixed to the purported document through an email reply.[17]

Accordingly, practitioners must be aware of the limitations in applying ERSA to ensure that the court accepts the electronically signed documents sought to be filed. As an evidentiary consideration, practitioners must consider if the electronic signatures are supported by evidence of intent of the signatory for the alleged signature to act as a valid electronic signature.

Bottom Line

Although electronic signatures can make practice more efficient by forgoing an inked signature from a client, ESRA is not universally accepted in every jurisdiction nor is it permitted for every document. Therefore, practitioners must be sure to do their due diligence first by reviewing precedent and local rules in the jurisdiction in which they seek to file and ensuring that there is evidence to support an intent by the purported signatory that the alleged electronic signature on the proffered document be deemed a valid electronic signature.

Alternatively, one could always affix their "John Hancock" in hopes of achieving the same notoriety. It appears that those days, as is so often said, are gone.

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Endnotes

1. *Signed by John Hancock*, The American Enlightenment: Treasures from the Stanford University Libraries, https://exhibits.stanford.edu/american-enlightenment/feature/signed-by-john-hancock.
2. N.Y. State Technology Law § 304. In L.2002, 3.314, the legislative intent of the section was to

   > support and encourage electronic commerce and electronic government by allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents. Subsequent to the adoption of ESRA, the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001-7006), known as the ESign Law, was adopted to permit and encourage the expansion of electronic commerce in interstate and foreign commercial transactions. Like ESRA, this federal law authorizes the use and acceptance of electronic signatures and electronic records in the context of these commercial transactions. It is the intent of this bill to ensure that these laws continue to complement each other in achieving their stated purposes. Rather than seeking to modify, limit or supersede federal law, the legislature finds that it is in the best interest of the state of New York, its citizens, businesses and government entities for State and federal law to work in tandem to promote the use of electronic technology in the everyday lives and transactions of such individuals and entities. It is with this finding in mind that the following amendments are made to the state technology law.

3. N.Y. State Tech. Law § 302(3).
4. *See* N.Y. State Tech. Law § 306.
5. *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 540.4(a)-(b).
6. Uniform Rules for Trial Cts, 22 N.Y.C.R.R. § 202.5-b(e)(1)(ii).
7. *See People v. Johnson*, 31 Misc. 3d 145(A) (2d Dep't 2011) (where the officer's electronic signature on a deposition in support of the electronic ticket was deemed adopted by the officer, with the same validity as a "signature affixed by hand" *citing* N.Y. State Tech. Law § 304[2]).
8. *See People v. Almodovar*, 63 Misc. 3d 997, 1000 (Crim. Ct., Richmond Co. 2019) (holding that an email is response to an electronically transmitted supporting deposition was a valid verification pursuant to N.Y. Criminal Procedure Law § 100.30[1][d]).
9. *See Dewald v. Massachusetts*, 237 A.D.3d 562 (1st Dep't 2025) (execution of an agreement to arbitrate by electronic signature valid); *Wen Zong Yu v. Charles Schwab & Co., Inc.*, 34 Misc.3d 32 (2d Dep't 2011).
10. *See* 2025 NYS UCS/9th Judicial District Small Claims Court Mediation Program Mediator Manual at pg. 4.
11. N.Y. State Tech. Law § 307(1).
12. *See Solartech Renewables, LLC v. Vitti*, 156 A.D.3d 995, 995-97 (3d Dep't 2017).
13. *See id.* at 999-1000.
14. *See id.*
15. *See id.* at 1000.
16. *See Adler v. 20/20 Companies*, 82 A.D.3d 918, 920 (2d Dep't 2011).
17. *See Almodovar*, 63 Misc. 3d at 997-1000.

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Administering the Modern Estate: A Guide for Obtaining the Decedent's Digital Assets

By Diane Matero

As we move further and further into the digital age, gone are the days when a fiduciary could merely collect the decedent's mail to discover assets and claims, review the decedent's address book to find potential heirs, and collect photographs to distribute to family members. Increasingly we as a society are relying on our often password protected smartphones to engage apps for banking and bill paying, to check emails for paperless e-statements, to maintain our contact list, and to take photos of life's precious moments. So how does a fiduciary[1] access these digital assets to properly administer the decedent's estate? The answer is found in Article 13-A of the Estates, Powers and Trusts Law (EPTL).

Digital Assets

Article 13-A creates mechanisms for both individuals to control access to their digital assets posthumously and for fiduciaries to obtain such access. Digital assets are defined as "electronic record[s] in which an individual has a right or interest"[2] and can be divided into two categories, (1) electronic communications, such as emails, text messages or other communications between private parties;[3] or (2) other assets that are not communications, such as photographs,[4] contact lists[5] and calendars.[6] A fiduciary is charged with the same duty of care, loyalty and confidentiality in managing the decedent's digital assets as they are with managing the decedent's tangible personal property.[7] Thus, the fiduciary must first determine whether the decedent, also known as the user,[8] provided for post-death disclosure of his or her digital assets, and, second, whether the digital asset is an electronic communication or not.

Decedent's Directive

A user may create a post-death disclosure directive under a service agreement for the digital account, called an online tool.[9] The online tool is a separate and distinct agreement from the traditional terms-of-service agreement. Apple and some social media sites provide for a "legacy contact" or as Google calls it, an "inactive account manager," which is a person or persons that the decedent designates to access the digital account post-death. The online tool may also allow a user to require deletion of the account after their death.

A user may also grant, by will, trust, power of attorney or other instrument, an individual with authority to access the user's digital account.[10] The online tool directive is controlling, however, if contrary to a directive in the user's will, trust, power of attorney or other instrument.[11] Thus, it is becoming imperative in the estate planning stage to counsel clients regarding digitally stored assets and information.

If the decedent neither designated a so-called legacy contact in an online tool directive nor provided for such a successor under an estate planning instrument, the directive in the traditional terms-of-service agreement between the user and the service provider, also called the custodian,[12] will control.[13] These agreements tend to be restrictive, and are designed to protect the custodian from liability under various federal and state privacy laws. Many of us are guilty of clicking "I agree" to these agreements without thoroughly reading them. In this circumstance, the custodian will require a court order before making disclosure for fear of violating federal or state law.

Disclosure of Electronic Communication vs. Other Digital Assets

After determining whether the decedent made a post-death disclosure directive or not, the fiduciary must next determine whether the digital asset sought for disclosure consists of electronic communications or some other type of digital asset. The extent of disclosure of electronic communications is dependent on several factors. In the absence of the decedent's directive granting disclosure in either an online tool, will or similar instrument, disclosure of electronic communications to the decedent's fiduciary may only be made by court order.[14] Further, absent the decedent's directive, disclosure of electronic communications to the decedent's fiduciary is limited to only a catalogue of the communications[15] unless the fiduciary can make a showing to the court that disclosure of the communications is reasonably necessary to administer the decedent's estate.[16]

A catalogue of the electronic communications consists of the "to and from" line, the sender or recipient's email address and the time and date of the communication, whereas the content of the communication refers to the subject line and actual text of the communication. Contact lists are also treated as catalogue information.[17] Other digital assets that are not communications, like photographs and calendar information, are required to be disclosed to the fiduciary by the custodian unless the decedent or court directs otherwise.[18]

Procedure for Obtaining Disclosure of Digital Assets

The procedure for obtaining disclosure of electronic communication, where the decedent granted post-death access in either an online tool, will, trust or other instrument and for obtaining catalogue information or other digital assets is very similar. The fiduciary, as either an executor, administrator or voluntary administrator under Article 13 of the Surrogate's Court Procedure Act (SCPA), must provide to the custodian: (1) a written request for disclosure; (2) a copy of the decedent's death certificate; (3) a certified copy of the letters appointing the fiduciary; and if requested by the custodian, (4) information to identify the digital account; and (5) evidence linking the account to the decedent.[19] Additionally, if the decedent provided a post-death disclosure directive in a will, trust or other instrument and electronic communications are sought, the fiduciary must also provide the custodian with a copy of the such instrument.[20] Whereas, if only catalogue information or another digital asset not consisting of communications is sought, the fiduciary must provide the custodian with an affidavit stating that disclosure of the digital asset is reasonably necessary for the administration of the decedent's estate.[21]

The custodian has discretion in the amount of disclosure, if any, it provides in response to a request by a fiduciary[22] and may charge a reasonable administrative fee for the cost of disclosure.[23] Where the decedent failed to give an affirmative directive allowing disclosure of his or her digital assets or where the custodian requires it, the decedent's fiduciary must seek a court order for disclosure.

To obtain a court order, the fiduciary should commence a discovery proceeding pursuant to SCPA 2103. The petition should: (1) identify the specific digital asset sought for disclosure and the custodian who holds the account; (2) state the basis for the petitioner's knowledge that the specific account is associated with the decedent; (3) state whether the decedent provided an affirmative directive granting disclosure in an online tool or by will, trust or other instrument; and (4) explain why the asset is reasonably necessary

for administration of the decedent's estate.[24] It may also be prudent to provide any proposed order or language provided by the custodian. Citation must issue and be served on the custodian.

Although the custodian usually does not interpose objections or even respond to the citation, the court nevertheless must balance the need for disclosure of the asset to administer the decedent's estate and the decedent's privacy.[25] These proceedings are entertained on a case-by-case basis. If the court denies disclosure, it is typically done without prejudice to allow the fiduciary to commence a new proceeding demonstrating the need for disclosure to properly administer the decedent's estate based on additional evidence.[26]

Disclosure of digital assets may also be sought as part of a small estate proceeding pursuant to Article 13 of the SCPA. The court may provide a voluntary administrator with authority to access the decedent's digital assets in the certificate issued under SCPA 1304(5), so long as the asset does not exceed $50,000.00.[27] The small estate affidavit should provide the same information regarding the digital asset as provided in a petition for discovery under SCPA 2103 as outlined above. Jurisdiction, however, is not required over the custodian in small estate proceedings.

Conclusion

As our reliance on technology becomes ever more prevalent, the practitioner's role in counseling clients on digital assets is more important than ever. Standard practice should now include creating an inventory of all of the client's digital assets and crafting a plan for access posthumously. Failure to do so may cause a delay, or even complete loss, of monetary and sentimental digital assets.

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Endnotes

1. EPTL 13-A-2.1 also applies to guardians, trustees and agents under a power of attorney but for purposes of this article, the focus will be on fiduciaries administering estates. For guardians, *see* EPTL 13-A-3.8; for trustees, *see* EPTL 13-A-3.5 through 3.7; for agents under a power of attorney, *see* EPTL 13-A-3.3 and 13-A-3.4.
2. EPTL 13-A-1(i).
3. *In re Molloy*, N.Y.L.J., Jul. 7, 2023, p. 7, col. 2 (Sur. Ct., N.Y. Co.).
4. *In re Swezey*, N.Y.L.J., Jan. 17, 2019, p. 23, col. 3 (Sur. Ct., N.Y. Co.).
5. *In re Serrano*, 56 Misc. 3d 497, 54 N.Y.S. 3d 564 (Sur. Ct., N.Y. Co. 2017).
6. *Id.*
7. EPTL 13-A-4.1(a).
8. EPTL 13-A-1(y).
9. EPTL 13-A-1(p); EPTL 13-A-2.2(a).
10. EPTL 13-A-2.2(b).
11. EPTL 13-A-2.2(a).
12. EPTL 13-A-1(g).
13. EPTL 13-A-2.2(c).
14. EPTL 13-A-3.1(e)(3).
15. EPTL 13-A-3.2.
16. EPTL 13-A-3.1(e)(3)(D).
17. *Serrano*, 56 Misc. 3d 497, 498; *see also Molloy*, N.Y.L.J., Jul. 7, 2023, p. 7, col. 2.
18. *Swezey*, N.Y.L.J., Jan. 17, 2019, p. 23, col. 3.
19. EPTL 13-A-3.1; EPTL 13-A-3.2.
20. EPTL 13-A-3.1(d).
21. EPTL 13-A-3.2(d)(3).
22. EPTL 13-A-2.4(a).
23. EPTL 13-A-2.4(b).
24. *In re Gager*, N.Y.L.J., June 28, 2019, p. 27, col. 1 (Sur. Ct., N.Y. Co.).
25. *In re White*, N.Y.L.J., Oct. 3, 2017, p. 25, col. 1 (Sur. Ct., Suffolk Co.).
26. *In re Coleman*, 63 Misc. 3d 609, 615, 96 N.Y.S. 3d 515 (Sur. Ct., Westchester Co. 2019); *Molloy*, N.Y.L.J., Jul. 7, 2023, p. 7, col. 2.
27. SCPA 1301(1).

Terminating a Trust? Don't Forget To Consider This Tax Issue

By Louis Vlahos

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Remember Taxes

Every conveyance of property or of an interest in property from one person to another is prompted, or at least influenced, by economic considerations. The parties to the transaction may swap properties, or one party may transfer a property to another in exchange for money[1] or for the services of the other party. In these instances, there has been a conscious or deliberate exchange of value between the parties – each party has determined that the exchange will improve their own position.[2]

Even where a party transfers property – something of actual or potential value, including an interest in a closely held business – to another party without the expectation of receiving any consideration in exchange, the transferor has decided that the transferee would realize a greater economic benefit from the property than would the transferor,[3] or the transferor has concluded that the disposition of the property today would result in substantial cost savings for the transferor in the future.[4]

Immediate Tax Cost – Economics of a Transfer

Speaking of costs, another factor that must be considered by the owner of property in determining whether a transaction makes economic sense is the cost of consummating the transaction.

Among the most immediate and certain of the costs to be incurred, and perhaps the most significant, is taxes.

Given the considerable economic burden that taxes may represent,[5] it will behoove the parties to any transaction, including one that is ostensibly structured as a gift, to understand the tax treatment of the property interests that may be transferred, as well as the tax treatment of the vehicle through which the transfer is effectuated.

While most business owners and many of their beneficiaries are familiar with the income taxation of an equity interest in a business, which is the form of property interest commonly conveyed by a business owner to such beneficiaries, very few are versed in the income tax treatment of what is probably the vehicle most commonly used by a transferor for conveying an economic interest in such property to the transferor's beneficiaries – the trust.[6]

It Takes All Kinds

The tax laws recognize several categories of "taxpayer," some of which are subject to income tax, others which are not, still others that may be taxed in one taxable year but not another, and a few that are disregarded for purposes of the tax.[7]

In general, the first category, of taxable persons, includes individuals and "C" corporations;[8] the second category, of non-taxable persons, includes partnerships[9] and "S" corporations[10]; the third category, of persons the tax status of which may vary year-to-year, includes non-grantor trusts;[11]

the last category, of disregarded persons, includes grantor trusts,[12] qualified subchapter S subsidiaries,[13] and single member LLCs.[14]

Passthroughs

A taxpayer included in either the second or fourth categories is often referred to as a "passthrough" entity.

The income and gain realized by a passthrough entity is reported on the income tax returns of its owners, or deemed owners,[15] whether or not distributed to them,[16] and takes the same character in their hands as in the hands of the entity.

Entity Distributions – Taxpayer Beware

Understandably, many taxpayers may conclude, because of a particular entity's passthrough nature, that a distribution of money or other property from the entity to its owners would not be taxable, either to the entity or its owners; unfortunately for these taxpayers, they'd be only partially correct.

Partnership

In the case of a partnership, for example, a distribution of money by a partnership to a partner is generally not taxable to the partner except to the extent the amount of money distributed exceeds the adjusted basis of such partner's interest in the partnership immediately before the distribution.[17] Because a partner's basis for their partnership interest is increased by the amount of such partner's distributive share of the partnership's taxable income for the taxable year and prior years, the distribution of cash reflecting the amount of such previously included income is "absorbed" by the partner's adjusted basis.[18]

A distribution of property in-kind to a partner is generally not a taxable event.[19] There are exceptions, however; for example, if a partnership distributes to one of its partners (A) a property that was contributed to the partnership by another partner (B), the contributing partner (B) may be surprised to learn that they must recognize the gain that was inherent in the distributed property as of the time of its contribution, if such distribution occurs within seven years of such contribution.[20]

A distributee-partner and their fellow partners may also be surprised to learn that a distribution may result in a taxable event for all of them. Assume the partnership holds money and assets the sale or exchange of which would generate capital gain. Assume the partnership also owns assets, the sale or exchange of which would generate ordinary income.[21] Say the partnership distributes money or capital gain property to the distributee-partner in liquidation of such partner's equity interest. In effect, the former partner will have received an amount of money or capital gain property that exceeds their share of such property immediately before the liquidation of their interest in the partnership. Conversely, the remaining partners will end up with a greater share of ordinary income property than they had before the distribution. The Code[22] treats the former partner as having exchanged their share of ordinary income property in exchange for a greater share of the partnership's pre-distribution money and capital gain property. This deemed exchange causes the former partner to recognize some ordinary income and the partnership (i.e., the remaining partners) to recognize some capital gain.[23]

S Corporation

A distribution of money by an S corporation to its shareholders is not taxable to the shareholders to the extent of their adjusted basis for their stock.[24] As in the case of a partnership, such basis is adjusted upward to account for the shareholders' inclusion in their income of their pro rata share of the S corporation income and gain.[25]

If an S corporation distributes to its shareholders property with a fair market value in excess of the corporation's basis for such property, the corporation will be treated as having sold such property to the shareholders.[26] The gain realized by the corporation from the deemed sale is reported by the shareholders on their own tax returns.[27]

Although a corporation is not treated as having more than one class of stock[28] if its governing provisions[29] provide for identical distribution and liquidation rights, any distributions – including actual, constructive, or deemed distributions – that differ in timing or amount are to be given appropriate tax effect in accordance with the facts and circumstances.[30] For example, a disproportionate distribution may be treated as one that was made on a pro rata basis among the shareholders, then followed by a transfer of value between those shareholders who, respectively, received more or less than their pro rata share; depending upon the facts and circumstances, the shareholder who received less than their share may, for example, be treated as having made a gift or having paid compensation or other consideration to the other shareholder.[31]

Grantor Trust

Assuming the grantor's purpose in creating and transferring property to a trust was to remove such property from their gross estate and provide for their beneficiaries, the grantor will not have retained any rights with respect to the trust or its property that would defeat this purpose. For example, the grantor would not be expecting to receive a distribution from the trust.[32]

However, if the trust's original governing instrument or applicable law gives the trustee the discretion to reimburse

the grantor for that portion of the grantor's income tax liability attributable to the trust, the existence of that discretion, by itself (whether or not exercised) will not cause the value of the trust's assets to be includible in the grantor's gross estate.[33] In the event the trustee decides to reimburse the grantor, the transfer of money from the trust to the grantor will be disregarded for purposes of the income tax because the trust is a disregarded entity as to the grantor.

Where the grantor of the trust is required to include all the income and gain of the trust on the grantor's own tax return, any distribution by the trust to its beneficiaries will not be subject to income tax in the hands of such beneficiaries. Indeed, for purposes of the income tax, the transfer – i.e., the trust distribution – is treated as having been made by the grantor. In the absence of any consideration paid by the recipient beneficiary, the deemed transfer from the grantor – by which the grantor's ownership, for income tax purposes, of the property distributed from the trust is terminated – should be treated as a gift for purposes of the income tax.[34]

What if the distribution from the grantor trust to the beneficiary consists of property in-kind that is encumbered by a liability subject to which the beneficiary takes the property? In that case, the grantor will be treated as having sold the property for an amount of consideration equal to the amount of the liability,[35] and will be required to report on their tax return the gain from such sale.

Non-Grantor Trust

Which brings us to the subject of today's post – a distribution resulting in the early termination of a non-grantor trust.

In general, a non-grantor trust is an irrevocable trust that is created by a grantor, either during their lifetime or following their death. The trustees of such a trust – acting as fiduciaries under applicable state law – take title to the property that was conveyed to them by the grantor as a lifetime gift to the beneficiaries of the trust, or by the grantor's estate as a testamentary transfer to such beneficiaries.

The trustees will hold the property conveyed to them for the benefit of the beneficiaries[36] designated by the grantor.[37] The discretion allowed the trustees by the grantor with respect to the management, investment, disposition, and distribution of the trust property and the income arising therefrom may range from very broad to strictly limited.[38]

Trust Taxation

The Code[39] imposes the federal income tax upon the taxable income of a non-grantor trust. The trustee of the trust is required to make and file the trust's annual income tax return[40] and to pay the tax imposed on the taxable income of the trust.

Of course, the gross income of the trust and of its beneficiaries does not include the value of any property conveyed to the trust by gift or bequest.[41]

Query whether the distribution of such gifted or bequeathed property by the trust to its beneficiaries should, likewise, not be included in their income – after all, if they had received it directly from the grantor or the grantor's estate such receipt would not have been taxable to the beneficiaries.

In fact, any amount which, under the terms of the trust, is properly paid or credited as a gift or bequest of a specific sum of money or of specific property, and which is paid or credited all at once, or in not more than three installments, is neither included in the income of the recipient-beneficiary – the distribution does not carry out taxable income[42] of the trust – nor deducted by the trust for purposes of determining taxable income.[43]

That said, the income realized by the trust that arises from any such gifted or bequeathed[44] property is not excluded from the gross income of the trust. Likewise, where the interest conveyed to the trust by gift or bequest is the income from a property (as distinguished from the property itself), the amount of such income is also not excluded.[45]

In general, the taxable income of a trust is computed in the same manner as in the case of an individual.[46] There are exceptions, however; for example, the Code provides a special deduction for trusts.

The Distribution Deduction

Specifically, in computing its taxable income for a particular year,[47] a non-grantor trust is allowed to claim a deduction for certain distributions made[48] by the trust to its beneficiaries during such year.[49] These rules bring us back to the third category of taxpayer mentioned earlier – the taxpayer that may or may not be subject to the income tax for a particular taxable year.

Stated simply,[50] the purpose of this distribution deduction is to ensure that the taxable income of a trust is taxed only once – either to the trust or to its beneficiaries.[51] This outcome is best illustrated with the so-called "simple trust."

Simple Trust

A simple trust is required to distribute all of its income currently. The income beneficiaries of the trust are required to include in their gross income the income that the trust is required to distribute, whether or not the trust actually makes such distribution.[52] In turn, the trust is allowed a deduction for the amount of the required income distribution in computing its own taxable income for the taxable year in which the income is required to be distributed currently, but not in excess of the trust's "distributable net income" for the year.[53]

Thus, the simple trust is, in some ways, similar to a passthrough – its income is taxed to its beneficiaries whether or not distributed to them. However, the trust is still taxable on its capital gains. If the trust distributes such gains for a taxable year, it will not be treated as a simple trust for such year but, rather, as a complex trust.[54]

Complex Trust

A trust will also be treated as a complex trust if it is not required to distribute all of its income currently. If such a trust makes no distributions to its beneficiaries for a taxable year,[55] the trust – not its beneficiaries – will be liable for income tax with respect to its taxable income for that year.

If the trust is required to make current distributions of income for a taxable year,[56] or if other amounts are properly distributed or required to be distributed from the trust for such year, the trust will be allowed a deduction in computing its taxable income of an amount equal to the sum of the income required to be distributed currently and any other amounts properly paid or required to be distributed for such year.[57] However, the deduction cannot exceed the trust's distributable net income for the taxable year.

The trust will have taxable income for a taxable year if its distribution deduction for such year does not equal or exceed the trust's distributable net income.

At the same time, the beneficiaries of the trust will include in their gross income the amount of income required to be currently distributed to them (whether or not distributed), plus all other amounts properly paid or required to be distributed to the beneficiaries for the year.[58]

However, the amount included in the gross income of the beneficiaries cannot exceed the trust's distributable net income. In other words, the amount distributed to the beneficiaries for a taxable year will generally not be taxable to them to the extent it exceeds the trust's distributable net income for the year.[59]

If a trust was allowed to deduct with respect to a taxable year the amount of trust income for such year that was required to be distributed by the trust currently, plus any other amount that was required to be distributed for such year, the trust will not be allowed to claim a distribution deduction with respect to the subsequent distribution of such amount in a later taxable year, and the beneficiary-recipients will not be required to include the amount of such distribution in income.[60]

If a trust reported and paid tax on its taxable income for a taxable year when the trust was not required to, and in fact did not, make any distributions for such year, the subsequent distribution of such income to the beneficiaries of the trust in a later year will not be included in the taxable income of such beneficiaries – having already been taxed to the trust.

Trust Termination

It is likely that, at some point, whether by its own terms or by agreement of the interested parties, a trust will terminate by distributing its property (including any current and accumulated income) to those beneficiaries of the trust that are entitled to succeed to such property upon termination of the trust.[61]

This final distribution to the beneficiaries will carry out the trust's distributable net income for the final year of the trust. But should the distribution otherwise be taxable notwithstanding the amount distributed exceeds the trust's distributable net income? Should it be taxable where the property that the grantor or the grantor's estate originally gifted or bequeathed to the trust was not taxable at the time of such gift or bequest?

In general, a trust distribution of property in-kind should not generate taxable gain for the trust or its beneficiaries unless the trust elects to recognize gain – as if the property had been sold to the distributee-beneficiaries at its fair market value[62] – or unless the distribution is made in satisfaction of a pecuniary amount owed to the distributee-beneficiary or in place of another specific property that was supposed to have been distributed to such beneficiary.

Gain may also be recognized where (i) the trust instrument provides for pro rata distribution of the properties comprising its corpus on termination of the trust in accordance with its terms (not a commutation), (ii) the trust and local law are silent as to the trustee's authority to make a non-pro rata distribution of such properties in kind, and (iii) the trustee (at the request of the beneficiaries) makes a non-pro rata distribution such that each beneficiary ends

up with 100 percent ownership of the property distributed to such beneficiary.[63] Specifically, the non-pro rata distribution by the trustee is treated as the equivalent of a pro rata distribution by the trustee, followed by an exchange among the beneficiary-distributees of their respective pro rata shares of the trust corpus.

The IRS had also previously ruled[64] that the amount received by the life tenant of a trust in consideration for the transfer of the life tenant's entire interest in the trust (a term interest) to the holder of the remainder interest was to be treated as an amount realized from the sale or exchange of a capital asset. According to the agency, the right to income for life from a trust estate was a right in the estate itself.

Are there other income tax consequences that may occur as a result of the liquidating distribution? Is there another scenario in which gain may be realized by the trust or by its beneficiaries by reason of a distribution of property in kind?[65]

A recent IRS letter ruling[66] illustrated one such scenario. The IRS's holding (described below) should alert taxpayers and their advisors that there may be other tax risks lurking within a transaction that may otherwise be viewed as fairly innocuous to someone who is unfamiliar with them.

Agreement to Terminate

Settlor created and contributed property to an irrevocable trust, Trust, for the benefit of Grandchild. No other additions were made to the trust.

Under the terms of Trust, the trustees were required to pay an annual annuity to Grandchild. No other distributions were permitted during Grandchild's lifetime. Upon Grandchild's death, the annuity was to be paid per stirpes to Grandchild's lineal issue. At all times relevant to the IRS's ruling, Grandchild had two living adult children (the Current Remaindermen) and four living grandchildren (the Successor Remaindermen). None of Grandchild's lineal issue had a predeceased child with living issue.[67]

By its terms, Trust was to terminate upon the last to die of ten individuals, including Grandchild. Upon termination of Trust, all the trust property was required to be distributed per stirpes to the issue of Grandchild, outright and free of trust. The Current Remaindermen and a Corporate Trustee were serving as co-trustees of Trust.

On Date, Grandchild, the Current Remaindermen, and the Corporate Trustee[68] entered into Agreement, which provided for the early termination of Trust.[69] Upon such termination, Trust property would be distributed to the beneficiaries in accordance with the actuarial value of each beneficiary's interest in Trust at that time (the Proposed Distribution), which was to be determined by a qualified appraiser.[70]

Agreement further provided that the co-trustees could make non-pro rata distributions of Trust property to satisfy the Proposed Distribution.[71]

Rulings Requested

In connection with implementing Agreement, the co-trustees asked the IRS to consider several issues, including whether: (i) the Proposed Distribution in termination of Trust would be treated as a taxable sale or exchange of Grandchild's and Successor Remaindermen's interests in Trust to the Current Remaindermen; and (ii) to the extent the Current Remaindermen exchanged property, including property deemed received from Trust, for Grandchild's and the Successor Remaindermen's interests in Trust, such exchange would be taxable to the Current Remaindermen.

IRS's Analysis

According to the Code, a taxpayer's gross income includes the gains derived by such taxpayer from dealings in property;[72] it also includes income from the taxpayer's interest in a trust.[73]

The gain realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income sustained by the exchanging taxpayer.[74]

The gain from the sale or other disposition of property is equal to the excess of the amount realized therefrom by the taxpayer over the taxpayer's adjusted basis[75] for the property.[76]

The amount realized by a taxpayer from the sale or other disposition of a property is equal to the sum of any money received plus the fair market value of other property received.[77]

In determining gain from the sale or disposition of a "term interest in property"[78] – which does not include a remainder interest – that portion of the adjusted basis of the interest which is determined by reference to the settlor's basis in the property at the time the property was gifted to the trust is disregarded.[79]

Proposed Distribution – Really a Sale

Although the transaction in question took the form of a distribution of Trust's property in accordance with the actuarial values of the respective interests of Grandchild, the Current Remaindermen, and the Successor Remaindermen, the IRS determined that, in substance, it was a sale of Grandchild's and the Successor Remaindermen's interests to the Current Remaindermen, and an exchange by the Current Remaindermen of their interests with the other beneficiaries.

Accordingly, the amounts received by Grandchild as a result of the termination of Trust were amounts received from the sale or exchange of a capital asset to the Current Remaindermen.[80]

Similarly, the amounts received as the Proposed Distribution by the Successor Remaindermen were amounts received from the sale or exchange of a capital asset to the Current Remaindermen. The amount realized would be the fair market value of the Proposed Distribution received by the Successor Remaindermen.

In addition, to the extent that the Current Remaindermen exchanged property, including property deemed received from Trust, for the interests of Grandchild and the Successor Remaindermen, the Current Remaindermen would recognize gain on the property exchanged, based on the fair market value of the property transferred to Grandchild and the Successor Remaindermen as the Proposed Distribution.

Observations

The IRS's private letter ruling described above should put trustees, trust beneficiaries, and their respective advisers on alert for potentially adverse income tax consequences that may result from the early termination of a trust.

Unfortunately, the ruling is mostly conclusory and short on analysis – in other words, it does not offer much guidance. In fact, it relies on an earlier published ruling[81] that is factually distinct from the scenario in the letter ruling, but for the fact that it involved an early termination of the trust.

It appears likely that the IRS was also basing its conclusion upon another published ruling[82] – not cited – in which the non-pro rata nature of the trust-terminating distribution requested by the beneficiaries, but not authorized under the trust agreement or local law, provided the foundation for concluding that the trust initially made a pro rata distribution among the beneficiaries, following which the beneficiaries rearranged the ownership of the properties as they had agreed among themselves.

In the commutation of a trust, the trustee makes terminating distributions to the holders of the beneficial interests in the trust equal to the actuarial value of their interests. Each beneficiary gives up their respective beneficial interest in the trust in exchange for a lump sum payment in money or in-kind. The commutation terminates any relationship between the beneficiaries and the trust, and the trust terminates.

Because the trust terminates, there cannot have been a sale between the trust and the beneficiaries. Does that necessarily mean there must have been a sale among the beneficiaries, at least in the case where neither the trust agreement nor local law authorize non-pro rata distributions?[83]

But what if such distributions are authorized, as was the case in the letter ruling?

Endnotes

1. This will not necessarily involve a change in ownership – allowing another the temporary use of one's property in exchange for consideration is as much an economic decision as the sale or exchange of such property.
2. No, this is not going to be a discussion of rational choice theory.
3. This is why we talk about disposable wealth when we advise clients who are contemplating gifts to others.
4. Think along the lines of removing an appreciating asset from one's estate by gifting it to a family member. The estate tax savings to the grantor's estate and beneficiaries may far outweigh the loss of a basis step-up that would otherwise have been realized by the same persons upon the grantor's demise.
5. For example, the prospect of a 40 percent federal gift tax on the transfer of property to the trust, or the imposition of a 37 percent federal income tax on the income generated by such gifted property in the hands of the trust, will greatly impact the economic costs and therefore, the economic benefits of the transfer.
6. We won't be covering the creditor protection that a properly drafted trust may afford its beneficiaries, but this benefit – one driven by economics – should not be underestimated.
7. Though not disregarded for other taxes; for example, employment taxes.
8. Electing small business trusts (ESBTs) may also be included here. IRC 641(c); Sec. 1361(e); Reg. Sec. 1.1361-1(m). An ESBT is eligible to own shares of stock in an S corporation. In exchange form this privilege, the ESBT is taxed on its pro rata share of S corporation income and gain at highest applicable tax rate, and it is not permitted to claim a deduction against such income for distributions made to its beneficiaries. More on this shortly.

   Assume the corporations in question are not exempt from federal income tax; for example, corporations described in IRC Sec. 501(c).
9. For our purposes, please ignore the imputed underpayment rules of the centralized partnership audit regime under the Bipartisan Budget Act of 2015. Of course, a partnership includes an LLC that (i) has not elected to be treated as an association for tax purposes (Reg. Sec. 301.7701-3) and (ii) has at least two members.
10. Please also ignore the excess net passive income rule of IRC Sec. 1375 and the built-in gain rule of IRC 1374.
11. Basically, Subchapter J of Chapter 1 of the Code. These may be "simple" or "complex" trusts.
12. IRC Sec. 671 et seq. We assume here that the entire trust is treated as a grantor trust, and that the grantor owns both the trust's income and corpus. We also assume an "intentionally defective" grantor trust – one that is irrevocable. See IRC Sec. 673, 674, 675, and 677. In the context of estate planning, IRC Sec. 674 and Sec. 675 are likely the most commonly encountered grantor trust the provisions, though IRC 677 may be the only operative provision in the case of a SLAT (where one spouse creates a trust for the benefit of the other spouse and their issue). Where the subject of the gift is shares of S corporation stock, a qualified subchapter S trust, or QSST, the sole beneficiary of the trust is treated as the owner of the stock under the grantor trust rules,

with one exception: any gain from the sale of the stock is taxed to the trust, not the beneficiary. IRC Sec. 1361(d); Reg. 1.1361-1(j).

13. IRC Sec. 1361(b)(3).
14. Yet another deliberate simplification – the LLC has not elected to be treated as an "association" for tax purposes. Reg. Sec. 301.7701-3.
15. The "grantor" of a grantor trust is generally treated as the "owner" of the trust's assets and income. IRC Sec. 671; Reg. Sec. 1.671-2.
16. See, for example, Reg. Sec. 1.702-1(a) and Reg. Sec. 1.1366-1(a)(1). The grantor trust to which we refer is an irrevocable trust the assets of which that are intended to be excluded from the grantor's gross estate. For that reason, the grantor will typically not have retained any right to distributions in respect of such property. IRC Sec. 2036. There are exceptions, however; GRATs, for example, provided the grantor survives the term of their retained interest.
17. IRC Sec. 731(a)(1).
18. IRC Sec. 705(a).
19. IRC Sec. 731(a).
20. IRC Sec. 704(c)(1)(B). Similarly, if the partnership distributes property (X) in-kind to a partner (A) who, within the preceding seven-year period, had contributed a different property (Y) to the partnership, such contributing partner (A) will recognize gain up to the built-in gain of the contributed property (Y), at the time of its contribution. IRC Sec. 737. See also the disguised rules under IRC Sec. 707, especially IRC Sec. 1.707-3, which may, for example, treat the contribution of a property by a partner (A) to a partnership as a sale of such property by A if the partnership distributes money to the contributing partner (A) within two years of such contribution.
21. This includes "substantially appreciated inventory and "unrealized receivables" – the latter encompasses a range of assets; for example, unrealized receivables and depreciation recapture. IRC Sec. 751(c).
22. Obviously, the "Code" refers to the Internal Revenue Code. There are other, albeit lesser (lower case "c") codes; bankruptcy, for example. (Sorry, Kris.)
23. IRC Sec. 751(b).
24. IRC Sec. 1368(b). We assume the S corporation does not have C corporation earnings and profits. IRC Sec. 1368(c).
25. IRC Sec. 1367 and Sec. 1366.
26. IRC Sec. 311(b).
27. IRC Sec. 1366. Depending upon the property and other circumstances, all or some of this gain may be treated as ordinary income. IRC Sec. 1239, Sec. 1245.
28. In order to qualify as a small business corporation which may elect to be treated as an 'S' corporation, a corporation cannot have more than one class of stock. IRC Sec. 1361(b)(1)(D).
29. The articles of incorporation, bylaws, applicable state law, and binding agreements relating to distribution and liquidation proceeds. Reg. Sec. 1.1361-1(l)(2).
30. Reg. Sec. 1.1361-1(l)(2).
31. Alternatively, if one shareholder receives their pro rata distribution much later than another shareholder, the former may be treated as having made a loan to the distributing corporation. Reg. Sec. 1.1361-1(l)(2)(vi), Example 2.
32. Of course, in the case of a trust that is a SLAT, distributions may be made to the grantor's spouse without causing inclusion of the trust in the grantor's estate.

    Note: when the grantor of a trust, who is treated as the owner of the trust, pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, the grantor is not treated as making a gift of the amount of the tax to the trust beneficiaries. Rev. Rul. 2004-64.

33. However, if, pursuant to the trust's governing instrument, the grantor must be reimbursed by the trust for the income tax payable by the grantor that is attributable to the trust's income, the full value of the trust's assets will be includible in the grantor's gross estate under IRC Sec. 2036.

    Note there are PLRs according to which the modification of a trust agreement to add a tax reimbursement clause will constitute a taxable gift by the trust beneficiaries because the addition of a discretionary power to distribute income and principal to the grantor is a relinquishment of a portion of the beneficiaries' interest in the trust. The valuation of such a gift is another story.

34. IRC Sec. 102. We're assuming the gift was already completed for purposes of the gift tax. Reg. Sec. 25.2511-2.
35. Reg. Sec. 1001-2(a)(4).
36. Or class of beneficiaries.
37. Reg. Sec. 301.7701-4(a) provides that:

    the term 'trust' as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.

38. In any case, the grantor will not have retained any rights with respect to the trust property or its income that would cause the grantor to be treated as the owner thereof for purposes of the income tax.

    Significantly, the grantor will also have been careful to avoid the retention of any interest in the trust that would cause the trust's property to be included in the grantor's gross estate under their death. See IRC Sec. 2035 to 2038, and Sec. 2042.

39. IRC Sec. 1(e)(2); Sec. 641(a).
40. On IRS Form 1041, U.S. Income Tax Return for Estates and Trusts. IRC Sec. 6012(a), Sec. 6072(a).
41. IRC Sec. 102(a).
42. Actually, distributable net income.
43. IRC Sec. 663(a); Reg. Sec. 1.663(a)-1(a).
44. Used broadly to include not only a testamentary transfer of personal property but also a devise of real property.
45. IRC Sec. 102(b).
46. IRC Sec. 641(b).
47. Trusts are required to use the calendar year as their taxable year. IRC Sec. 644.
48. Or deemed to have been made. See the 65-day rule under IRC Sec. 663(b).
49. IRC Sec. 662.

    It should be noted that complex trusts are not the only entity that is allowed a distribution deduction under the Code. For example, RICs and REITs are allowed to reduce their taxable income by the so-called dividends-paid deduction, which refers to

certain dividend distributions made by such entities to their shareholders. As in the case of the trust, this distribution deduction allows these other entities to be treated as passthroughs, in some respects, for income tax purposes.

50. Actually, oversimplified, but probably sufficient for our purposes.
51. Compare this to partnerships and S corporations – their owners (not the entities) are taxed on the entity's taxable income regardless of whether any distributions are made to the owners.
52. IRC Sec. 652.
53. IRC Sec. 651. Basically, the taxable income of the trust with respect to a taxable year, with certain modifications. IRC Sec. 641(b); IRC Sec. 643(a); Reg. Sec. 1.643(a)-0. Among the modifications: there is no deduction for distributions; capital gains are excluded to the extent they are allocated to corpus and are not paid, credited, or required to be distributed to any beneficiary during the taxable year. IRC Sec. 643(a)(3). Reg. Sec. 1.643(a)-3.
54. In its final taxable year, when it distributes all its assets, a simple trust will be treated as a complex trust.
55. As where income, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated. IRC Sec. 641(a).
56. The so-called simple trust is required to distribute all of its income currently. The income beneficiaries of the trust are required to include in their gross income the income that the trust is required to distribute, whether or not the trust actually makes such distribution. IRC Sec. 652. In turn, the trust is allowed a deduction for the amount of the required income distribution in computing its own taxable income for the taxable year in which the income is required to be distributed currently (but not in excess of the trust's distributable net income for the year). IRC Sec. 651.

    Thus, the simple trust is, in some ways, similar to a passthrough. However, the trust is still taxable on its capital gains. Moreover, if the trust distributes such gains, it will not be treated as a simple trust but, rather, as a complex trust. A trust will also be treated as a complex trust if it is not required to distribute all of its income currently.

57. IRC Sec. 661.
58. IRC Sec. 662.
59. IRC 662(a)(2).
60. IRC Sec. 663(a)(3); Reg. Sec. 1.663(a)-3.
61. Reg. Sec. 1.641(b)-3(b).

    At some point, Congress will get its act together and eliminate the federal transfer tax benefits currently associated with the use of dynasty trusts.

62. IRC Sec. 643(e)(3). Indeed, the basis of any property received by a beneficiary in a distribution from a trust will be the adjusted basis of such property in the hands of the trust immediately before the distribution. IRC Sec. 643(e)(1).
63. Rev. Rul. 69-486.
64. Rev. Rul. 72-243.
65. We are assuming the trustee will not elect to recognize gain under IRC Sec. 643(e)(3). Reg. Sec. 1.661(a)-2(f).
66. Private Letter Ruling 202509010, 03/03/2025.
67. In other words, the per stirpes designation of beneficiaries was of no import.

    A "per stirpes" designation directs property that would otherwise have passed to a predeceasing beneficiary to such beneficiary's issue. For example, if one of the Current Remaindermen in the ruling had predeceased Grandchild, that deceased Current Remainderman's share would have passed to their issue (a member of the Successor Remaindermen).

68. There was also a special representative appointed by the Court to represent the minor and unborn Trust beneficiaries.
69. Not all trusts may be terminated early; for example, GRATs and QPRTs. Reg. Sec. 25.2702-3(d)(5); Reg. Sec. 25.2702-5(c)(6).
70. Thus, it is unlikely that gifts were made among the various holders of interests in the trust. To the contrary, see IRC Sec. 2519 which addresses IRC Sec. 2056(b)(7) QTIP marital trusts.
71. Court approved Agreement.
72. IRC Sec. 61(a)(3).
73. IRC Sec. 61(a)(14).
74. Section 1.1001-1(a).
75. Provided in IRC Sec. 1011.
76. IRC Sec. 1001(a).
77. IRC Sec. 1001(b).
78. A "term interest" in property defined as (a) a life interest in property, (b) an interest in property for a term of years, or (c) an income interest in a trust. IRC Sec. 1001(e)(2).
79. Pursuant to IRC Sec. 1015, to the extent that the adjusted basis for the interest is a portion of the entire adjusted basis of the property. IRC Sec. 1001(e)(1). However, this rule does not apply to a sale or other disposition which is a part of a transaction in which the entire interest in property is transferred. IRC Sec. 1001(e)(3); Reg. Sec. 1.1001-1(f).
80. The IRS cited Rev. Rul. 72-243 in support of this conclusion.
81. Rev. Rul. 72-243.
82. Rev. Rul. 69-486.

    A revenue ruling is an official interpretation by the IRS of the Code and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts. Revenue rulings are published for the information of and as guidance to taxpayers, IRS personnel and tax professionals.

    A private letter ruling (PLR) is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel.

83. Query whether this is a realistic scenario.

Recent Legislative Changes in Florida and South Dakota Trust Law

By Katie Lynagh and Brad Dillon

Florida (CS/CS/SB 262; Ch. 2025-159, eff. June 20, 2025)

In June 2025, Florida enacted Chapter 2025-159, introducing notable revisions to its Trust Code. Two provisions merit special attention: limitations on actions by successor trustees and clarification of homestead treatment in community property trusts (CPTs).

Successor Trustee Actions

New § 736.10085 bars a successor trustee from suing a predecessor for acts or omissions to any greater extent than a beneficiary could. Section 736.08125 was amended accordingly. The effect is to align successor rights with beneficiary rights, preventing end-runs around limitations or defenses that would bar beneficiary claims. This provides greater certainty for departing trustees while reinforcing the need for incoming fiduciaries to promptly review prior administration.

Community Property Trusts and Homestead

The act also addresses CPTs, expressly providing that transferring homestead property into a CPT does not constitute a change of ownership for ad valorem tax reassessment, but is treated as an inter-spousal transfer. Definitions of "community property" and "community property trust" were updated, and the amendment applies retroactively to trusts created before, on, or after the effective date. The clarification makes CPTs more attractive for married couples seeking basis adjustment strategies while preserving property tax protection.

South Dakota (SB 69; signed Mar. 31, 2025; eff. July 1, 2025)

South Dakota has enacted § 55-1B-13 (SL 2025, ch. 196, § 5), a new statute clarifying and expanding the powers of a tax trust advisor. This change underscores the state's ongoing commitment to a directed trust framework, where specialized fiduciaries can guide key aspects of trust administration.

Under the new provision, a tax trust advisor:

- Acts in sole and absolute discretion on matters within their scope, and their decisions are binding on trustees, fiduciaries, and beneficiaries.
- May exercise powers outlined in the governing instrument, plus certain statutory powers unless expressly prohibited.

In addition to those conferred by the trust instrument, a tax trust advisor may now:

- Direct trustees on tax matters, including elections, return preparation and filing, payment of taxes, and positions to be taken on returns.
- Shape the tax impact of trust transactions, such as the purchase, sale, or exchange of assets, or contributions and distributions at both the trust and entity level.
- Require trustees to rely on tax information provided pursuant to other statutory provisions.
- Select and oversee tax advisors to prepare returns or filings.
- Instruct trustees to sign and file returns as directed.
- Exercise any other tax-related powers provided in the governing instrument or referenced in chapter 55-1A.

This statute provides welcome clarity and protection for trustees and fiduciaries by allowing trustees to confidently follow a tax trust advisor's direction without fear of liability for those decisions.

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New York Supreme and Surrogate's Court Decisions

By Ilene S. Cooper

Accounting

Before the Appellate Division, Fourth Department, in *In re Metz,* was an appeal from order of the Surrogate's Court, Erie County, which, in part, dismissed the objections to the petitioner's accounting. Petitioner commenced the underlying proceeding for the judicial settlement of his account as the decedent's attorney-in-fact. Objections were filed to the account, and the Surrogate's Court dismissed the objections, in part. The Appellate Division modified the surrogate's order.

Objectants first claimed that the petitioner's account, which commenced in 2010, was incomplete because it did not cover the full period of petitioner's stewardship. The court agreed. The petitioner testified that in 2008 he transferred and then liquidated one of decedent's investment accounts in his role as decedent's attorney-in-fact, and documentary evidence established that petitioner was also acting as decedent's attorney-in-fact when he liquidated one of decedent's annuities in 2009. Although the Court noted that the scope of an accounting lies in the discretion of the Surrogate's Court, it concluded that petitioner's account should be amended in order to cover the years 2008 and 2009, and modified the Surrogate's order accordingly.

Objectants next argued that the Surrogate erred in failing to surcharge petitioner for 12 cashier's checks totaling $58,000 that were withdrawn from decedent's savings account and deposited into petitioner's account. The Court found that petitioner failed to satisfy his burden of proof with respect to the cashier's checks inasmuch as the account and his testimony failed to substantiate any expense of decedent relating to the checks. Thus, the Court further modified the order by directing an additional surcharge of petitioner in the amount of $58,000.

Objectants further claimed that petitioner, in breach of his fiduciary duty to decedent, engaged in self-dealing when acting as decedent's attorney-in-fact by managing her assets in a way that frustrated her estate plan to his benefit. The Court agreed noting, in particular, that in determining which of the decedent's assets to liquidate, petitioner looked first to those assets in which he had a lesser interest as beneficiary and then transferred portions of those liquidated assets into accounts that he held jointly with decedent. The Court therefore modified the Surrogate's order by sustaining the subject objection, and remitting the matter to the Surrogate's Court to determine an appropriate surcharge.

Finally, contrary to objectants' contentions, the Court concluded that the Surrogate did not abuse her discretion in declining to award either attorney's fees or pre-judgment

interest on the surcharge, although it did not preclude such an award on remittal. Further, the Court concluded that the Surrogate did not abuse her discretion in denying objectants' post-hearing motion to reopen the record.

***In re Metz*, 238 A.D.3d 1477, 234 N.Y.S.3d 719 (4th Dep't 2025)**

Accounting

Before the Surrogate's Court, Ulster County, in *In re McAnaney*, was a contested administrator's accounting proceeding compelled by the fiduciary's sister. The record revealed that the petitioner, one of the decedent's three children, was appointed administrator of his estate in 1999. During the early years of her stewardship, she had liquidated essentially all of decedent's assets, netted approximately $517,800 for the estate, and distributed to each of the distributees an aggregate amount of $218,422 in 1999 and 2000.

The only estate asset retained by the petitioner was a five-unit dwelling, which the estate continued to own and maintain so that the decedent's son, petitioner's brother, could have a place to live rent-free, in accordance with the decedent's purported wishes. While initially there were estate funds available to pay the operating costs of the premises, the carrying charges consumed nearly all of the $316,946 in reported expenses of estate administration. Additionally, petitioner paid her brother over $68,000 in unidentified cash distributions not made to her sister, for his alleged role as caretaker of the property. Following the distributions of estate funds made in 2000, the cash in the estate was depleted, and unbeknownst to the petitioner's siblings, petitioner absorbed the cost of maintaining the property from her personal assets. Ultimately, the property was sold in 2022, netting the estate $512,000, of which petitioner claimed $250,800 in "management fees," and reported only $60,050 available for distribution to her sister.

Thereafter, in response to her sister's compulsory accounting proceeding, the petitioner filed an account of her stewardship covering the period July 10, 1999, through November 25, 2024. Objections were filed by the petitioner's sister, who alleged, *inter alia*, that the petitioner had failed to timely administer the estate as a result of her retaining the housing unit, and mismanaged estate funds by incurring over 20 years of operating expenses that could otherwise have been distributed to the distributees had the property been sold sooner.

Based on the record and its review of the accounting, the court found that the petitioner breached her fiduciary duties throughout her tenure as evidenced, most particularly, by her failure to maintain clear and accurate books and records of her stewardship. To this extent, the court pointed to various discrepancies and missing information in the schedules of petitioner's accounting, including substantiation of the expenditures that she repaid to herself without prior court approval. As a consequence, the court found that petitioner's reimbursement to herself was improper and directed that the funds be restored to the estate.

Further, the court found that petitioner's advance payment of commissions to herself was improper, and that her multifaceted misconduct provided ample grounds for denying her commissions entirely. Petitioner was therefore directed to restore the advance payment to the estate.

Additionally, the court observed that the fiduciary invested estate funds in an ordinary or low-interest checking account for the initial period of her stewardship, and thereafter, failed to earn any interest on estate funds in violation of the Prudent Investor Act. While the court noted that petitioner's conduct in delaying the sale of the estate property was also imprudent, it denied the objectant's request for damages on this issue due to her failure to provide the date by which the petitioner could reasonably have been expected to sell the premises. On the other hand, the court found that the dissipation of estate funds to address the housing needs of the decedent's son was prejudicial to the objectant, who would have otherwise had use of the funds had the property been timely sold. The court held that the remedy for the impartiality exhibited by the petitioner would be a reallocation of estate distributions to equalize the benefits between the decedent's son and the objectant.

Finally, the court found that the petitioner had engaged in self-dealing by procuring an SBA loan for her personal benefit and then repaying the loan using estate funds. Applying the "no further inquiry" rule, the court set aside the payment of the loan by the estate, and surcharged the petitioner accordingly.

***In re Militello/In re McAnaney*, N.Y.L.J., Apr. 4, 2025, p. 91, col. 4 (Sur. Ct., Ulster Co.; File No. 99341)**

Construction Proceeding

In *Jean Kennedy Smith 1998 Residence Trust*, the Surrogate's Court, New York County, was confronted with a proceeding to declare invalid the exercise of a power of appointment over the corpus of a qualified personal residence trust, as well as other related relief.

The decedent, the grantor of the subject trust, died on June 17, 2020. Pursuant to the pertinent provisions of the subject trust, the co-trustee of the trust was given a special and exclusive power of appointment exercisable within two years of the grantor's death. In default of the exercise of the power, the petitioner, one of the grantor's surviving sons, was an equal remainder beneficiary with his brother and two sisters of the trust estate.

Two years before expiration of the deadline, the co-trustee exercised the power by forgiving certain indebtedness owed to the trust by the grantor's two daughters, appointing outright distributions from the trust to each daughter, and appointing the balance of the trust to a new trust of which he was a trustee. The new trust gives the co-trustee discretion to pay income or principal to any of grantor's issue and continues to grant him (or any successor trustee) a special, exclusive power to appoint the trust assets among grantor's issue, or in default of the exercise of that power, to the grantor's two daughters, or if they were deceased, to their issue, per stirpes, outright.

Following the commencement of the proceeding, a pre-answer motion to dismiss was filed by the co-trustee, as well as the grantor's two daughters, alleging that the petition failed to state a cause of action, with the daughters also alleging that the documentary evidence refuted the petitioner's claims.

Affording the petition a liberal construction and accepting as true the factual allegations that are not refuted by the trust instrument itself, the court dismissed the petition based on documentary evidence and for failure to state a cause of action. Specifically, the court concluded that there was no ambiguity in the instrument, which unequivocally provided the co-trustee with a power of appointment, and authorized him to exercise it in the manner he did.

***In re Jean Kennedy Smith 1998 Residence Trust*, N.Y.L.J., Jun. 9, 2025, p. 17, col. 2 (Sur. Ct. N.Y. Co.; File No.: 2020-3036).**

Gift

In *In re Ingberman*, the Surrogate's Court, New York County, determined that the decedent's post-deceased daughter had not made a gift of her entire interest in four LLC's, or had transferred her income interest in two LLC's to her brother. The decedent died survived by her daughter, Jeanette, and her son, Israel, both of whom were appointed the executors of her estate. Thereafter, the decedent's daughter died, and Israel, as the surviving executor, accounted, indicating therein that in 2008 and 2009 Jeanette had made the subject gifts. Jeanette's husband, as administrator of her estate, objected.

At the trial of the matter, Israel testified that he had a very close relationship with his sister, and visited her daily while she was hospitalized. However, he admittedly did not know she was married until she was in hospice, and stated that he was not aware of her financial circumstances in 2009, and that he did not ask her about them. While serving as co-executor with his sister, Israel took the lead in administering the estate, and had the primary contact with the estate attorney. Further, despite the provisions of the decedent's will, which divided the subject LLC interests equally between Jeanette and Israel, Jeanette executed an assignment of those interests to him in 2009 purportedly based on the family's understanding that these assets would remain in the family and be given to him as of the date of the decedent's death. The assignment was executed near the hospital where Jeanette was receiving outpatient treatment, with only Israel and Jeanette present, and thereafter, was sent to estate counsel. The assignment was not sent to the entities, and on the date of Jeanette's death, title in the LLCs remained in the name of the estate.

In addition to the assignment, in 2008, the executors signed letters addressed to two of the LLCs directing that the income therefrom be distributed to an account belonging to Israel. He testified that he required this income in order to obtain a personal bank loan.

Despite the foregoing, Israel testified that following the date of the letters and the assignment of the LLC interests,

income from the entities continued to be paid to the estate, and he continued to make equal distributions thereof to himself and his sister. Yet, Jeanette wrote checks to Israel in the amounts distributed to her, retaining only a portion to pay her taxes. Further, counsel for the estate testified that Jeanette stopped receiving K-1s from the estate following the date of the assignment, and Jeanette's accountant testified that she never expressed any position with respect to the ownership of the LLC interests.

Witnesses for the objectant testified, *inter alia*, that income deposited into the estate account following the date of the assignment was treated as belonging to Israel based on conversations had with either Israel or estate counsel, that Jeanette was anxious and frustrated about her assets, and was looking forward to receiving her inheritance, and that it was anticipated that Jeanette's husband would inherit everything she received from the decedent's estate.

The court held that the proof adduced at trial failed to establish by clear and convincing evidence that a valid inter vivos gift had been made of the subject LLC interests. To a large extent, the court found that Israel's testimony was not credible, and contradicted by the testimony of disinterested witnesses and uncontroverted documentary evidence. Further, the court found that neither Israel's conduct nor Jeanette's conduct after the execution of the assignment established that Jeanette relinquished dominion and control over her interest in the entities, or that Israel accepted same, notwithstanding the presumption that a gift of value to a donee is accepted.

As to the purported gift of Jeanette's income interest in two LLCs, the court found that the letters relied upon to establish same were executed by Israel and Jeanette in their fiduciary capacities, without Jeanette's input, for the purpose of improving Israel's loan prospects, and only directed the deposit or payment of income to Israel's bank account. In view thereof, the court held that Israel had failed to establish that a gift had been made of the funds.

***In re Ingberman,* N.Y.L.J., Apr. 16, p. 18, col. 4 (Sur. Ct., N.Y. Co.; File No: 2007-0879)**

Revocation of Letters

In *In re Cohn*, the petitioners commenced a proceeding for a compulsory accounting, the posting of a bond, or in the alternative, to revoke the preliminary letters testamentary of the respondent, and issue letters of administration c.t.a. to one of the petitioners.

The court issued an order directing respondent to account by a date certain, and by separate decision and order, directed respondent to post a bond and revoked his preliminary letters pending the filing of his account. An

evidentiary hearing was scheduled on the application for revocation of letters.

In support of their application for removal, petitioners alleged that respondent utilized estate funds for his own purposes, failed to prosecute the proceeding for probate of the decedent's will, and failed to file an inventory with the court. Additionally, the court noted that respondent had failed to account or post a bond in compliance with the court's orders, and failed to refute any of the allegations against him. Accordingly, in accordance with the provisions of SCPA 509, the court deemed the allegations in the petition to be due proof of the facts stated.

Although recognizing that nullifying a testator's choice of fiduciary should be exercised sparingly, the court held that removal was warranted on the grounds that respondent had exceeded the scope of his duties as preliminary executor, and jeopardized the estate by failing to abide by court orders. Moreover, the court noted that inasmuch as estate property was outside the court's jurisdiction as a result of respondent's breach of duty, and respondent failed to communicate with petitioner's counsel, it was in the best interests of the estate and its beneficiaries, that letters of administration be issued to the public administrator.

***In re Cohn*, N.Y.L.J., Jun. 3, 2025, p. 6, col. 4 (Sur. Ct., N.Y. Co.; File No. 2023-838).**

Summary Judgment

Before the court in *In re Welter* was a motion for summary judgment by the petitioner and residuary beneficiary admitting the propounded will to probate as a lost will pursuant to SCPA 1407. The motion was opposed by the decedent's son, who was the sole distributee of her estate.

Searches of the decedent's apartment for a will following her death revealed a conformed copy of the instrument, and a letter from the attorney-draftsperson enclosing the copy, and indicating that the original had been retained by his office. The drafting attorney was unable to provide information regarding the whereabouts of the instrument due to a diagnosis of Alzheimer's disease that prevented him from communicating. A colleague from his office located the same copy of the will on his computer, together with a self-proving affidavit.

The court found that through the affidavit of the attesting witnesses, which they signed two months after the propounded instrument was executed, and through the sworn deposition testimony of two of those witnesses, proponent has established *prima facie* the requirement that the instrument was executed in accordance with the requirements of EPTL 3-2.1. Further, the court found that petitioner established the provisions of the will through the copy of the instrument found on the computer files of a colleague, the text of which was identical to the conformed copy of the will found in the decedent's apartment, an original letter of the attorney-draftsperson enclosing a conformed copy of the will, the testimony of the two of the three attesting witnesses, who identified their signatures on the instrument, and the affidavit of one of those witnesses stating that she typed the original will, and confirming that the propounded will represented the instrument signed by the decedent.

However, the court held that a question of fact existed requiring a hearing as to whether the instrument was revoked by the decedent. Specifically, the court noted the objectant's allegations that during the 15- year period between the execution date of the will and the decedent's date of death, she could have requested that the original be sent to her from the attorney-draftsperson and revoked it.

***In re Welter*, N.Y.L.J., May 19, 2025, p. 28, col. 4 (Sur. Ct., N.Y. Co.; File No: 2023-186)**

Three Year/Two Year Rule (3-2 Rule Period)

In a contested probate proceeding, respondent moved to (1) expand the safe harbor provisions of SCPA 1404(4) and EPTL 3-3.5; (2) expand the discovery period of Uniform Rules for the Surrogate's Court § 207.27 (N.Y. Comp. Codes R. & Regs. tit. 22, § 207.27); and (3) compel the production of certain documents. Specifically, respondent sought permission to examine "the circumstances surrounding the administration" of the estate of respondent's father, Richard Fisher, who died in 2006, and "the execution of a 2008 version of Decedent's will" and to depose five additional individuals who are not among those who fall within the safe harbor provisions of SCPA 1404[4] and EPTL 3-3.5[b][3][D]. In addition, respondent asked the court to compel the production of documents related to "Decedent's assets and gift giving."

Upon consideration of the record, the court granted the respondent's application to expand the statutory discovery period, three years prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is shorter (3-2 Rule Period) in order to allow respondent to engage in discovery from the date of death of respondent's father to December 18, 2009. However, the court denied the respondent's request to inquire into the administration of his father's estate finding that special circumstances had not been presented for that purpose.

Further, the court denied the respondent's request to conduct additional examinations prior to the filing of objections, concluding that respondent had failed to demonstrate that the requested depositions would provide infor-

mation of substantial importance or relevance to a decision to file objections to probate.

Finally, the court granted respondent's request for discovery of gift tax returns and documents related to the decedent's charitable giving within the 3-2 Rule Period. Additionally, on consent of the preliminary executors, the court directed the fiduciaries to provide respondent with the net value of the estate's distributable assets based on the disclosures made in the decedent's estate tax return.

***In re Landau*, 2025 N.Y. Misc. LEXIS 2246, 2025 N.Y. Slip Op. 31244 (U) (Sur. Ct., N.Y. Co.; File No: 2023-2246)**

Turnover

Before the Appellate Division, Third Department, in *In re Telian*, was an appeal from an order of the Surrogate's Court, Delaware County, which, in a proceeding pursuant to SCPA 2103, *inter alia*, granted petitioners' motion for summary judgment, and directed respondent to turn over certain real property to the decedent's estate.

The record revealed that pursuant to a judgment of divorce between the decedent and respondent, which incorporated the terms of a stipulation of settlement between the parties, the respondent agreed to convey the subject real property to the decedent and forgo any interest therein, in return for the decedent paying respondent a specified sum of money. Despite decedent taking possession of the property, he failed to remit full payment to the respondent, who refused to execute a deed to the premises. Litigation ensued resulting in an order of the Supreme Court directing respondent to execute a deed and the decedent to execute a mortgage over the subject property in respondent's favor for the unpaid balance of the monies owed. Nevertheless, both parties failed to comply.

The decedent subsequently passed away, and respondent took possession of the property. As a result, petitioners, as administrators of the decedent's estate, instituted a proceeding pursuant to SCPA 2103, seeking to determine the assets of the decedent's estate, and ultimately moved for summary judgment arguing that despite the subject property being titled in the respondent's name, it was an asset of the decedent's estate. The respondent cross-moved for summary judgment arguing that since the decedent had failed to satisfy the requirements of the stipulation and court order that she remained the titled owner of the property. The Surrogate's Court granted the petitioners' motion, and respondent appealed.

The Appellate Division affirmed. The court concluded that by providing the stipulation and court order, the petitioners had satisfied their burden of demonstrating that the decedent had an interest in the subject property at the time of his death, and that it was therefore an asset of his estate. The court found that the respondent's failure to execute a deed transferring the property to the decedent did not negate the decedent's interest, but instead demonstrated the persistent noncompliance by the decedent and the respondent with the stipulation and order.

Despite granting petitioners' motion, the court found that respondent was not without a remedy. The Surrogate's Court directed the estate to satisfy respondent's debt, and the appellate court concurred, noting that compliance with the prioritization set forth in SCPA 1811(2) was required, together with the payment of statutory interest from the date of entry of the Supreme Court order.

***In re Telian*, 239 A.D.3d 1107, 237 N.Y.S.3d 298 (3rd Dep't 2025)**

Ilene S. Cooper
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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

A Beneficiary's Sole Occupancy of a Residence Held in Trust Alone Is Not a Sufficient Basis for an Award of Rent to Another Beneficiary of Such Trust

A residence was owned by a revocable trust (the "Trust") that became irrevocable upon the death of the trust's settlor in 2014. Following the settlor's death, her son and daughter were both co-trustees and beneficiaries of the Trust. In 2021, the son told his sister that he wanted her to purchase his one-half interest in the residence or put it up for sale. By 2022, the brother grew dissatisfied with his sister's response and requested the trial court remove her as a co-trustee. In an order dated February 6, 2023, the trial court removed the sister as a co-trustee and ordered the equal distribution of the trust residue, making the siblings tenants in common, with each owning a one-half interest in the residence.

Shortly thereafter, the brother filed an action for the sale and partition of the residence alleging he was also entitled to an adjustment to the proceeds from the sale of the residence equal to one-half the reasonable rental value of the property beginning in 2014. The sole basis of his request was that the sister had been the sole occupant of the residence during that time.

The trial court awarded the brother 117 months of rent dating back to May 2014 despite neither the brother's complaint, the evidence offered in support of his claim, nor the trial court's order citing any legal basis for awarding rent other than the sister's exclusive possession of the residence since 2014.

On appeal, the Second District Court of Appeal noted that before 2023, the residence was held in the Trust. As a result, any rent obligation that may have been owed by the sister should have been owed to the Trust, not to the brother. Further, to the extent his claim was predicated on the two of them being cotenants, the tenancy was created by the order dated February 6, 2023, and, therefore, the earliest that the brother could have been entitled to an award for rent would be that date. Moreover, the brother neither alleged nor proved that his sister's actions amounted to ousting the brother from accessing the residence, and the trial court made no such findings that the sister claimed exclusive ownership of the residence. Given the award of rent to the brother was solely because the sister was the sole occupant of the residence at that time, the Second District Court of Appeal held that this reasoning was not a sufficient basis upon which the brother could have been entitled to rent. Therefore, the Second District Court of Appeal reversed the award of rent to the brother.

Seaborn v. Seaborn, 413 So. 3d 989, 50 Fla. L. Weekly D 1314 (Fla. Dist. Ct. App., 2025)

Reformation of Deeds Available Where a Trustee Mistakenly Transfers Property in Individual Capacity

In 2006, husband and wife created a joint revocable living trust agreement. The two parcels of real property at issue in the instant case were deeded to the living trust.

According to an affidavit in support of summary judgment filed by the grandson at the trial court level, in 2016 the grandson moved in with his grandparents at their request to assist with day-to-day activities. In return, his grandparents left the grandson and granddaughter the two properties. Eventually, in 2018, the wife passed away leaving her husband as the sole trustee of the living trust. At the husband's request, the grandson contacted an attorney to effect the agreement to transfer the two properties. The attorney failed to discover that the properties were held by the living trust and, rather, prepared "Lady Bird" deeds for each property. In these deeds, the husband left both properties to the grandson and granddaughter, while reserving a life estate in exchange for "ten dollars and other good and valuable considerations." However, the husband signed the deeds individually, without reference to the trust or his position as trustee. The two deeds were recorded two weeks after execution.

In 2020 the husband died, and his daughter, as successor trustee of the living trust, sued to eject the two grandchildren from both properties. The grandchildren counterclaimed seeking reformation of the deeds based on mutual mistake by the parties. The trial court held for the grandchildren and reformed the deeds from the husband, individually, to the husband, as trustee of the living trust.

Under Florida law, courts have the power to reform a written instrument where a mutual mistake has been made and the instrument does not accurately express the true intention or agreement of the parties. On appeal, the First District Court of Appeal noted that the trial court appropriately considered parol evidence to effect the parties' intent. Such parol evidence showed that the husband, grandson and granddaughter all believed that the husband could transfer the properties as an individual and, due to the mistaken advice by the attorney, the transfer was incorrectly effectuated by the deeds. In addition, the District Court

of Appeal noted that the husband retained the ability to transfer the two properties as the trustee of the living trust.

The daughter relied on case law to argue that a trustee cannot convey property held in trust as an individual. In addition, she noted that not only was the attorney negligent in preparing the deed, but that the husband and grandson were negligent in not remembering the two properties were held in the living trust. Lastly, the daughter argued there could be no reformation based on mutual mistake because there was not adequate consideration for the deeds.

The District Court of Appeal did not find the daughter's arguments compelling and responded that while a trustee cannot convey trust property in the trustee's individual capacity, the instant case concerned reformation of two deeds in accordance with the parties' intent. In addition, while the husband and the grandson were arguably negligent, simple negligence is not sufficient to preclude reformation. Lastly, the District Court of Appeal noted the rule that any consideration that will support a deed is sufficient for the purpose of reformation, so the recitation of $10 payment and the grandson's promise to provide household assistance to the husband and wife provided consideration for the deeds.

As a result, the First District Court of Appeal held that summary judgment was properly granted against the daughter.

Johnson v. Johnson, 413 So. 3d 872, 50 Fla L. Weekly D 1021 (Fla. Dist. Ct. App., 2025)

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 durable powers of attorney in Florida and the validity of springing durable powers of attorney.

A standard durable power of attorney generally authorizes an agent to exercise most financial duties on behalf of the principal, including collecting sums on behalf of the principal, settling accounts, borrowing and conducting other banking and investment transactions. In Florida, it is possible to include optional "superpowers" to allow an agent to create an inter vivos trust on behalf of the principal, gift on behalf of the principal, complete beneficiary designations and disclaim property. In addition, an agent can be given the power to amend or revoke a trust on behalf of the principal, provided such trust includes language that explicitly provides for the amendment or revocation by an agent of the principal. For these "superpowers" to be validly given to an agent, they must be specifically enumerated and acknowledged by the principal within the durable power of attorney.

It is not uncommon to draft a single durable power of attorney in favor of multiple agents to serve jointly or severally, or in succession. Despite this prevalence, practitioners may not draft a springing power of attorney in Florida. A springing power of attorney is a specific type designed to become effective only upon the occurrence of a predetermined event or condition, such as the principal's incapacity.

In 2011, the Florida Power of Attorney Act was enacted, and the law was changed to prohibit the creation of new springing powers of attorney. This change did not invalidate all springing powers of attorney, as an exception exists for documents validly created and signed before October 1, 2011.

While a principal cannot execute a springing power of attorney in Florida, if he or she wants to avoid its immediate applicability, one option is for the principal to identify an agent to hold the power of attorney in escrow and direct him or her to release it to the named agent(s) only upon the showing of the principal's incapacity. Such incapacity can be shown by a legal finding or a mechanism prescribed by the principal. For example, it could require two independent doctors to state, in writing, that the principal cannot handle his or her financial affairs.

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Memorandum in Support

TRUSTS AND ESTATES SECTION

T&E #2 March 29, 2025

S.3009-B Senate Committee: Finance
Assembly Committee: Ways and Means
Effective Date: Immediately

AN ACT to amend the tax law, in relation to making the estate tax three-year gift addback rule permanent (Part T)

LAW AND SECTIONS REFERRED TO: Section 1. Paragraph 3 of subsection (a) of section 954 of the tax law, as amended by section 1 of part F of chapter 59 of the laws of 2019

TRUSTS AND ESTATES LAW SECTION TAXATION COMMITTEE SUPPORTS THIS LEGISLATION

SUMMARY

The Trusts and Estates Law Section of the New York State Bar Association (the "Trusts and Estates Law Section" or the "Section") supports the proposed amendment to Section 954(a)(3) of the New York State Tax Law ("NYTL 954(a)(3)") that is contained in Part T of S.3009-B (the Senate "One-House Budget Bill" dated as of January 22, 2025), a copy of which is set forth in the exhibit to this memorandum (the "Senate Proposal").[1]

ANALYSIS

Background

NYTL 954(a)(3) provides for the inclusion in a decedent's New York gross estate of certain taxable gifts made within three years of the decedent's death that are not part of the federal gross estate for federal estate tax purposes. This statutory provision was originally enacted in 2014 and is currently set to expire for decedents dying after December 31, 2025.

NYTL 954(a)(3) is very problematic from a deductibility standpoint for federal estate tax purposes. This is the case because the portion of the New York estate tax that is attributable to amounts added back for inclusion in the New York gross estate does not qualify for the deduction for state death taxes under Section 2058 of the Internal Revenue Code (IRC) -- which requires

[1] S.3009-B is set forth at the following link, with Part T appearing on pages 78-79: https://legislation.nysenate.gov/pdf/bills/2025/S3009B.

that state death taxes pertain to property included in the federal gross estate in order to be deductible under IRC Section 2058.[2]

In contrast to the requisite language for deductibility under IRC Section 2058, NYTL 954(a)(3) only applies to certain taxable gifts that are made within three years of a decedent's death that are "***not otherwise included in the decedent's federal gross estate."*** (NYTL 954(a)(3) (emphasis added) The portion of the New York estate tax that is attributable to NYTL 954(a)(3) therefore does not come within the scope of what is needed to obtain a federal estate tax deduction under IRC Section 2058. This result can be highly prejudicial to the estates of New York decedents for federal estate tax purposes, which must pay federal estate tax on such amounts without obtaining the benefit of an offsetting deduction on the federal estate tax return which can effectively reduce the 40% federal estate tax by as much as 6.4% on a 16% New York State estate tax (16% x 40% = 6.4%), and by an even greater percentage amount in certain other scenarios.

One solution to this problem (that would be entirely revenue neutral for New York estate tax purposes) would be to recharacterize the New York estate tax that is attributable to the application of NYTL 954(a)(3) ***as an obligation of the decedent as of the decedent's death.*** This would render the increase in New York estate tax that is attributable to NYTL 954(a)(3) eligible for deduction under a different Internal Revenue Code section – specifically, ***under IRC Section 2053(a)(3) as a claim against the estate.*** This characterization as an obligation of the decedent's estate is consistent with the notion that NYTL 954(a)(3) essentially functions as a contingent gift tax obligation that is imposed upon the donor's estate as of the donor's death. Support for this position follows under the United States Supreme Court's decision in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), which generally requires the courts and the Internal Revenue Service to respect characterizations that are directed pursuant to a state's statute.[3]

By treating the New York estate tax that is attributable to the application of NYTL 954(a)(3) ***as an obligation of the decedent as of the decedent's death***, such amount would ***not*** be subject to estate tax apportionment under EPTL 2-1.8, but would instead be subject to debt obligation treatment under EPTL 13-1.3.

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[2] IRC Section 2058(a) provides that "[f]or purposes of the tax imposed by [IRC] section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia ***in respect of any property included in the gross estate*** (not including any such taxes paid with respect to the estate of a person other than the decedent)." (emphasis added)

[3] As the Supreme Court explained in Bosch, "the State's highest court is the best authority on its own law. If there be no decision by that court ***then federal authorities must apply what they find to be the state law*** after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court." Bosch, 387 U.S. at 465 (emphasis added). There can be little doubt that federal authorities, applying this standard, should confer significant weight upon a state statute that speaks directly on the subject matter before it.

The Senate Proposal

The Senate Proposal would amend Section 954(a)(3) of the New York Tax Law (NYTL) in the following manner:

> **(1)** by making NYTL 954(a)(3) permanent by deleting the language that renders it inapplicable to the estates of decedents dying on or after January 1, 2026; and
>
> **(2)** by treating the addition of New York estate tax attributable to the application of NYTL 954(a)(3) "as an obligation of the decedent as of the decedent's death that is subject to the provisions of this article [which is in reference to Article 26 of the NYTL titled "Estate Tax"] (but which shall not be deductible for purposes of this article)" (the "NYTL 954(a)(3) Debt Obligation Treatment").

While the Trusts and Estates Law Section does not take a position concerning the making of NYTL 954(a)(3) permanent, the Section strongly supports the Senate Proposal's NYTL 954(a)(3) Debt Obligation Treatment to prevent New Yorkers from being prejudiced for federal estate tax deduction purposes due to the unavailability of a federal estate tax deduction under IRC Section 2058 for property that is not included in a decedent's federal gross estate. The NYTL 954(a)(3) Debt Obligation Treatment moreover would be entirely "revenue neutral" for New York State estate tax purposes due to its ending parenthetical language which specifies that such obligation "shall not be deductible for purposes of this article."

For these reasons, the Trusts and Estates Law Section **SUPPORTS** the Senate Proposal and urges its inclusion in the final budget.

Exhibit: Proposed Amendment to NYTL 954(a)(3) as set forth in S.3009-B

PART T

(as reflected in S.3009-B)

Section 1. Paragraph 3 of subsection (a) of section 954 of the tax law, as amended by section 1 of part F of chapter 59 of the laws of 2019, is amended to read as follows:

(3) Increased by the amount of any taxable gift under section 2503 of the internal revenue code not otherwise included in the decedent's federal gross estate, made during the three year period ending on the decedent's date of death, but not including any gift made: (A) when the decedent was not a resident of New York state; or (B) before April first, two thousand fourteen; or (C) between January first, two thousand nineteen and January fifteenth, two thousand nineteen; or (D) that is real or tangible personal property having an actual situs outside New York state at the time the gift was made. ~~[Provided, however that this paragraph shall not apply to the estate of a decedent dying on or after January first, two thousand twenty-six.]~~ The amount by which the total tax imposed under this article exceeds the total tax that would have been imposed under this article if this paragraph did not apply shall be treated as an obligation of the decedent as of the decedent's death that is subject to the provisions of this article (but which shall not be deductible for purposes of this article).

§ 2. This act shall take effect immediately.

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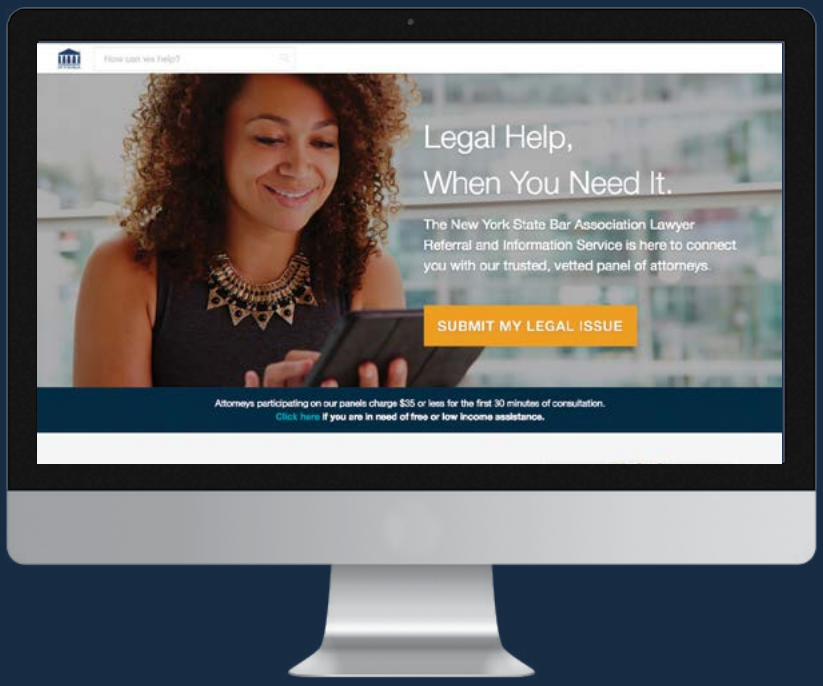

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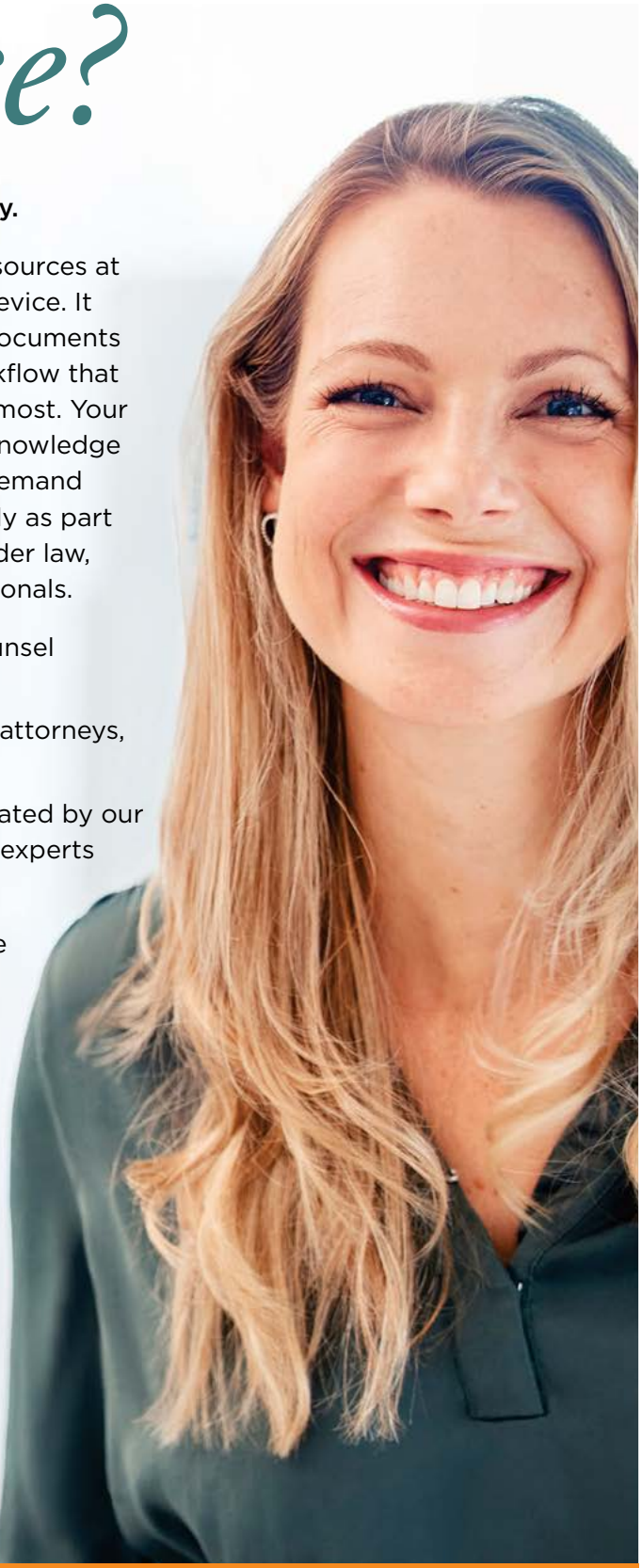

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