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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

The year is racing along, as they tend to. Our recently completed Spring Meeting in Rochester was a resounding success. More than 130 lawyers attended, which is a record, at least in recent years.

The roundtable program held on the first day of the Meeting continued to generate considerable interest. Lou Pierro did a stellar job in recruiting table moderators. Each of the three one-hour sessions was animated and educational. Jonathan Blattmachr's table might even be described as "dramatic." Over 100 participated in the roundtable program.

On Monday evening, cocktails and dinner were held at the George Eastman House and included an opportunity to wander through the residence and garden.

Tuesday's program led us through the basics of handling taxable estate planning in the new tax environment. We learned about planning strategies with retirement accounts, college savings through 529 Plans, issues affecting middle class clients and the challenges of the legislative process in New York State.

Monroe County Surrogate, Honorable Edmund A. Calvaruso, offered remarks at lunch, and Jennifer Leonard, President of the Rochester Area Community Foundation, shared her observations with us on the current state of charities in light of changing tax structures and the advent of donor advised funds offered through commercial mutual fund companies.

Nicole Marra and Cressida Dixon were co-Chairs of Tuesday's program. They did an excellent job in

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selecting outstanding speakers from the area and keeping the program organized.

We were honored to have both New York State Bar Association President Ken Standard and President-Elect Vince Buzard in attendance.

Our next Section Meeting will be held on September 29th through October 2nd at the Royal Sonesta Hotel in New Orleans. Jack Barnosky is assembling an outstanding panel of speakers, with a focus on the question of competence and undue influence in the execution of Wills and other documents. Plenty of time will be available to enjoy the jazz and legendary restaurants of this charming southern city. Now is the best time to make reservations.

Another goal of the Section in the coming few months will be the compilation and distribution of a new Membership Directory. Many of us have kept the previous version of the Directory close to our desks to allow us to look up the names and contact information of attorneys we need to reach, or to find an attorney in a specific geographic area. To be included in the Directory, be sure to return the consent form promptly so that the Directory can be finalized.

Michael E. O'Connor

Editor's Message

"I reckon I'll be at the beck and call of folks with money all my life, but thank God I won't ever again have to be at the beck and call of every son of a bitch who's got two cents to buy a stamp."

William Faulkner,
upon being dismissed from the U.S. Post Office
for playing cards out back while customers were waiting up front.[1]

A recent Pennsylvania decision in the ongoing saga of the Milton Hershey School[2] once again highlights our evolving understanding of the rights of private parties to sue to enforce the provisions of restricted gifts to charity.

Where a donor specifically restricts a gift to charity by imposing conditions on the charity's use of the gift, courts generally agree that the charity is legally bound by the specific terms of the gift and must honor the restrictions. But who has the right to complain if the restrictions are not honored?

Traditionally, neither the donor, nor the ostensible beneficiaries of the gift (the broad class whom the gift is intended to benefit), enjoyed legal standing to sue to enforce these charitable duties. Instead, only the state Attorney General had standing to enforce the restrictions imposed by the donor on the charity's use of the gift. Limiting standing to the Attorney General to enforce society's interest in the proper operation of charities promotes the salutory goal of minimizing the risk of vexatious and multiple lawsuits from members of the public at large who may not have a sufficiently tangible stake in the matter.

In *Hershey*, however, the Alumni Association of the Milton Hershey School for orphan children was granted standing to challenge certain agreements made between the charitable trust which operated the school and the Pennsylvania Attorney General concerning reforms in the administration of the trust and the school. The court noted that the factors which influence a court's willingness to allow a private party to sue for the enforcement of charitable obligations should include a careful evaluation of: (1) the extraordinary nature of the acts complained of and the remedy sought, (2) the presence of fraud or misconduct on the part of the charity or its directors, (3) the attorney general's availability or effectiveness, and (4) the identity of the benefited class and its relationship to the charity.

The *Hershey* decision follows at the heels of a number of recent, well-noted cases which also extend standing to private parties to enforce charitable obligations, including *Robertson v. Princeton University*,[3] where the court granted standing to individual descendents of the donors to enforce the intent of the donors' charitable foundation created to benefit Princeton University, and *Smithers v. St. Luke's-Roosevelt Hospital Center*,[4] where the court granted standing to the donor's widow, as court-appointed representative of her husband's estate, to challenge the use of his restricted gift, despite an alternative arrangement approved by the New York Attorney General. In the words of the three-judge majority opinion in *Smithers*:

> The Attorney General's interest in enforcing gift terms is not necessarily congruent with that of the donor. . . . We conclude that the distinct but related interests of the donor and the Attorney General are best served by [according] standing to donors to enforce the terms of their own gifts concurrent with the Attorney General's standing to enforce such gifts on behalf of the beneficiaries thereof.

Are these decisions allowing concurrent standing to private parties long overdue? Commentators typically report that in states in which the Attorney General's office maintains an active charities bureau, chronic under-funding and under-staffing are not unusual.[5] By way of illustration, a performance audit of the Charitable Trust Section of the Michigan Attorney General's Office[6] provided the following 2002 data comparing Michigan with six other states having similar charitable oversight operations:

State	Attorneys Responsible for Charitable Oversight	Registered Charities	Registered Charities per Attorney
Michigan	1	4,125	4,125
New Hampshire	1	6,000	6,000
Minnesota	3	5,501	1,834
Massachusetts	7	41,000	5,857
Ohio	8	3,000	375
California	10	82,000	8,200
New York	18	40,000	2,222

Based on the figures compiled in the Michigan Audit, it is not surprising that monitoring the charitable sector's compliance with donor-imposed use conditions may not rank as a top priority among state Attorneys General charities bureaus. Given prevailing state budgetary constraints, first priority is surely owed to prosecuting arguably more egregious instances of the misuse of charitable funds. But this is precisely why affording private parties concurrent standing to enforce charitable restrictions, to supplement the efforts of the state Attorney General, is so sensible. The only question is in properly determining *which* private parties should enjoy this privilege. Clearly, there must be a balance between the improved enforcement that private party standing encourages, and the need to protect against the risk of vexatious litigation were the floodgates thrown open to every member of the public with "two cents to buy a stamp." Stay tuned.

REMEMBER

The *Newsletter* relies on the members of the Section for the majority of its timely, incisive and informative articles on all areas of our practice. We strongly encourage you to contact us if you have an article, or an idea for one, to be considered for publication.

Endnotes

1. Blotner, *Faulkner: A Biography* (1984), at 118.
2. *In re Milton Hershey School*, 2005 Pa. Commw. LEXIS 38 (Pa. Commw. Ct., Jan. 31, 2005).
3. *Robertson v. Princeton University*, No. C-99-02, slip op. (N.J. Sup. Ct., Mercer Co., June 20, 2003).
4. *Smithers v. St. Luke's-Roosevelt Hospital Center*, 723 N.Y.S.2d 426 (App. Div. 2001).
5. *See, e.g.*, Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 Indiana L.J. 937 (2004).
6. Michigan Department of Attorney General and Department of Consumer and Industry Services, Audit of State Activities Related to Nonprofit Organizations (May 2002).

Austin Wilkie

Proposed Changes to Estate and Gift Taxation: Report of the Staff of the Joint Committee on Taxation

By Deidre G. O'Byrne

In February 2004, Senators Charles Grassley and Max Baucus, the Chairman and Ranking Member, respectively, of the Senate Finance Committee, requested that the staff of the Joint Committee on Taxation (the "Joint Committee Staff") report periodically to Congress with proposals to reduce the size of the "tax gap." Their letter refers to a gap in 2001 of $311 billion between what was owed by taxpayers and the amount paid voluntarily and on a timely basis.[1] More recently, estimates of the tax gap for that year are even larger—between $312 and $353 billion.[2]

The first report of the Joint Committee Staff, dated January 27, 2005 (the "Report"), responded to the Finance Committee's request by detailing "proposals that would reduce the size of the tax gap by curtailing tax shelters, closing unintended loopholes, and addressing other areas of noncompliance in present law" in addition to making proposals that would "reform certain tax expenditures."[3]

As the Report notes, the proposals touch on virtually every aspect of tax law. The proposals to modify provisions of the estate and gift taxation system are far reaching—ranging from limiting taxpayers' ability to allocate generation-skipping transfer ("GST") tax exemption to perpetual dynasty trusts to modifying the special transfer tax rules applicable to Section 529 qualified tuition accounts. The projected revenue benefits from the proposals to reform the estate and gift taxation system, however, are relatively modest. The high estimate by the Joint Committee Staff is approximately $4.75 billion in additional revenue for the budget period from October 1, 2005 to 2014, using the Congressional Budget Office's 2004 baseline.[4]

The proposals modify the existing system of estate and gift taxation, which of course faces what many believe is a strong possibility of permanent repeal in this Congress. Barring absolute repeal, however, lawmakers, faced with skyrocketing deficits, may look to proposals such as these to squeeze out revenue, in particular if rates are lowered and exemption amounts increased. If enacted, the proposals would impact the practice of every estate planning professional.

This article will summarize some of the key changes to current law that would be made by the proposals if enacted.

I. Prohibit the Allocation of GST Tax Exemption to Perpetual Dynasty Trusts

The Report objects to the ability of taxpayers in certain states to allocate GST tax exemption (currently $1,500,000) to a so-called "perpetual dynasty trust."[5] The assets of a trust subject to the governing law of a state that has abolished or modified in certain ways the common law rule against perpetuities, to which GST tax exemption has been allocated, can grow and be distributed to individuals many generations below that of the trust's creator without ever being subject to transfer tax. Such a result, according to the Report, is inconsistent with the structure of the current transfer tax system, which is designed to tax transfers in each generation. In addition, the Report notes that permitting the continued allocation of GST tax exemption to such trusts, which are available under the laws of only certain states, results in the unequal treatment of taxpayers.

The proposal adopts a broad definition of a "perpetual dynasty trust" as a trust created under the governing law of a state that has abolished the rule against perpetuities, or under the governing law of a state that allows a trust creator to elect to not have a rule against perpetuities apply. In addition, a trust created under the laws of a state that has modified the traditional rule against perpetuities to allow the creation of interests for individuals "more than three generations younger than the interest's creator" would also be considered a perpetual dynasty trust for purposes of the proposal. The proposal would prohibit the allocation of GST tax exemption to a perpetual dynasty trust. It makes available a limited exception for such trusts that provide for distributions to individuals in the same generations as the transferor's children and grandchildren. Finally, moving the situs of a trust from a state that has retained the rule against perpetuities to a state that has abolished it would result in the trust becoming fully subject to GST tax.

The Report states that "[u]nder the proposal, the generation-skipping transfer tax exemption effectively is limited to an exemption of a skip of one generation." Currently, the exemption may be allocated to property by the transferor of such property, regardless of the transferee.[6] The only distinction made between an allocation of exemption to property transferred to a trust and to outright transfers is that in the case of a trust the allocation must be made to the trust rather than to specific trust assets.[7] Allocations to different types of trusts or among trusts created under various state laws are not differentiated.

The proposal seems to leave unaffected trusts created under the laws of states such as New York, that have codified a rule against perpetuities that permits creation of a trust for a term of a life in being plus twenty-one years.[8] A trust created in New York today, for example, that terminates at the expiration of the perpetuities period and to which a transferor with a living great-grandchild allocates her GST tax exemption, could result in transfers to even the great-grandchildren of the transferor's great-grandchild, depending upon the lifespan of the beneficiaries, without the imposition of any GST tax. A skip of more than one generation would therefore be achieved with respect to the assets of such a trust. The proposal does not address an allocation to this type of trust, while it would not permit the allocation of exemption to a trust with identical dispositive provisions that was created in Delaware, for example, a state that has abolished the common law rule against perpetuities. While removing certain assets in perpetuity from the transfer tax system by contributing them to perpetual dynasty trusts is arguably an abuse of that system, the proposal does not result in the uniform treatment of transfers in trust.

II. Valuation Discounts

The Report also makes proposals that would limit the availability of minority interest and marketability discounts in determining the fair market value for federal estate, gift and GST tax purposes of certain property such as shares of stock in a corporation, interests in a partnership or limited liability company and other similar interests in a business or investment entity.[9] Two sets of rules, aggregation rules and a look-through rule, are proposed. The Report states that the proposals are specifically intended to address the use of interests in family limited partnerships and limited liability companies to manufacture minority and marketability discounts that do not reflect the actual economics of the transfers.

Aggregation Rules. Two aggregation rules are proposed. Under the basic aggregation rule, the fair market value of the transferor's or the transferor's estate's entire interest in the property prior to the transfer is established. The proposed rule then requires that the value of the transferred property for transfer tax purposes is its pro-rata share of this value of the entire interest held by the transferor. The basic aggregation rule is intended to eliminate the availability of a minority interest discount when the transferor controls the entity immediately prior to the transfer.

If the transferor or his estate did not own a controlling interest in an asset immediately prior to the transfer of an interest in it, but the transferred interest in the hands of the transferee is a part of a controlling interest, a special transferee aggregation rule would apply. Under this rule, the value of the transferred portion of the asset for transfer tax purposes is instead its pro rata share of the value of the entire interest in the asset owned by the transferee after taking into account the transfer in question. The Report considers the transferee aggregation rule necessary to address step transactions in which multiple gifts are made to the same transferee.

The Report notes that each of the aggregation rules proposed would be meant to incorporate spousal, but not broader family, attribution.

Look-through Rule. If a controlling interest is owned in the entity before the transfer by the transferor or after the transfer by the transferee, and at least one-third, by value, of the entity's assets are marketable assets, a look-through rule would also apply. Its application is intended to deny a marketability discount to such a transferred interest to the extent the entity holds marketable assets. The Report takes the position that if the owner of a transferred interest has a controlling interest in the entity and can therefore access the marketable assets it holds, a marketability discount for those assets is inappropriate.

As proposed, the look-through rule would establish the value for transfer tax purposes of such a transferred interest to be the sum of (1) the net value of the entity's marketable assets allocable to that transferred interest, and (2) the value of the interest attributable to nonmarketable assets, after taking into account any appropriate discount for such nonmarketable assets. The Report defines marketable assets to include cash, bank accounts, certificates of deposit, money market accounts, commercial paper, U.S. and foreign treasury obligations and bonds, corporate obligations and bonds, precious metals or commodities and publicly traded instruments.

The aggregation rules and the look-through rule as proposed disregard the existence of a legal entity between the holder of a "controlling" interest in such entity and its underlying assets. The proposals do not define what constitutes "control." The examples given by the Report indicate that control would seem to be determined solely by ownership of percentage interests in the entity, as opposed to determining whether the holder of such interests actually has the authority to make decisions as to distributions and liquidation.

III. Curtail the Use of Crummey Powers

The Report objects to the creation of trusts that grant Crummey powers to persons who are not vested trust beneficiaries.[10] Multiple annual exclusion gifts may then be made, when the trust assets will ultimately pass to only a single beneficiary and not to all the Crummey power holders. The proposal for addressing this perceived abuse of Crummey powers includes three options for Congress to consider in the alternative.

Option 1. Under the first option, a Crummey power holder must be a "direct, noncontingent beneficiary of the trust" to be considered a donee of a gift to such trust that qualifies for the annual exclusion. A small vested interest created for purposes of avoiding this restriction, as determined by the Treasury Secretary, will be disregarded in determining whether a Crummey power exists. It is the Report's view that the enactment of this option should not affect standard life insurance trusts. The Report recommends that if enacted this rule should be effective for transfers to trusts made after the date of enactment.

Option 2. The second option would, in the Report's words, effectively eliminate Crummey powers as a tax-planning tool. This option would acknowledge the existence of such powers for purposes of determining whether a gift qualified for the annual exclusion only if the Crummey power cannot lapse during the holder's lifetime. If enacted, the proposal recommends that it become effective for transfers to trusts created after the date of enactment, as the Report anticipates that it would cause serious complications for families' financial planning by eliminating Crummey powers altogether.

Option 3. The third option would require the IRS to engage in a facts and circumstances test to determine whether there is an arrangement or understanding that the powers will not be exercised and whether there is a meaningful possibility they will be exercised. Only those Crummey powers that meet these tests would be considered valid. The Report acknowledges that this option presents "administrative compliance difficulties." If effectively applied, the Report asserts that this option would eliminate most Crummey arrangements. Again, because of anticipated complications for families' financial planning that would result from the enactment of this option, the Report recommends that if enacted the proposed rule be applied to transfers to trusts created after the date of its enactment.

The Report acknowledges that there are legitimate, non-tax avoidance reasons for allowing gifts to trusts to qualify as annual exclusion gifts. The enactment of Option 1 would seem to be a reasonable solution for the abuse of "minting" annual exclusion gifts that will ultimately benefit only one beneficiary.

IV. Require Consistency Between an Asset's Reported Estate Tax Valuation and Its Basis in the Hands of an Heir

The Report notes that under present law the estate tax value of an asset provides only a rebuttable presumption of its basis in the hands of an heir. The proposal recommends that when an estate has an estate tax liability, the executor would be required to provide the heir and the IRS with a statement of the asset's value as reported for federal estate tax purposes that would be binding on the heir as the heir's basis.[11]

The Report objects to the possibility that under current law, an heir may claim, under certain circumstances, a basis in an asset that is higher than that reported for federal estate tax purposes. In such case, upon subsequent sale of the asset, the difference between the estate tax value and the basis claimed by the heir would not be subject to income tax (assuming the asset was sold for at least the amount of the basis claimed by the heir). Noting that one rationale for the step-up in basis of an asset at a decedent's death is to subject the asset only to estate tax at the decedent's death—and not to both estate and income tax—the Report objects to the possibility that a portion of the asset's value may essentially be exempt from income tax.

The Report also refers with favor to the additional benefits to be derived from a required report that would provide the heir and the IRS with a record of an asset's basis upon which both the Service and the heir would rely at the asset's subsequent sale.

The Report notes that the proposal would create some problems. For example, if after an audit the IRS succeeds in adjusting the estate tax value of an asset upwards, the heir will have been provided with, and be expected to rely upon, a record of that asset's basis that is too low. The heir will be subject to income tax on that difference. The Report rejects the possibility of implementing a relief mechanism for the heir in such case, stating that the existence of such a mechanism would negate an incentive inherent in its proposal for more realistic reporting of estate tax values by fiduciaries, even though both estate tax and income tax would be imposed on the difference between the value of the asset reported for federal estate tax purposes and the adjusted value subsequent to the audit. It does not seem unreasonable to allow for an amended report to be provided to the heir and to the Service subsequent to the audit providing the finally determined value of an asset for federal estate tax purposes. If the asset has already been sold by the heir and an income tax return filed, he or she could use this amended report as the basis for seeking a refund.

V. Modify Transfer Tax Provisions Applicable to Section 529 Qualified Tuition Accounts

The proposals note that the typical qualified tuition account or prepaid tuition contract under Section 529 of the Code involves four persons—a contributor, a designated beneficiary, an account owner (who often is not the contributor or the designated beneficiary) and an administrator. The Report objects to the special transfer tax rules currently applicable to Section 529 accounts that are inconsistent with otherwise applicable transfer tax rules and that are in certain cases unclear.[12] In addition, the Report notes that in many qualified tuition programs neither the designated beneficiary nor the contributor has any right to ensure that the designated beneficiary will receive educational or other benefits from the account.

In essence, the proposals require that a taxpayer relinquish control over the use and enjoyment of the account in order to treat a transfer to it as a completed gift.

The proposals provide that a contribution to a qualified tuition account is not a completed gift by the contributor and is includible in his or her estate unless the program conforms to certain requirements. When the four criteria identified by the proposals are met, as under current law, the contributor may also elect to treat the gift ratably over a five-year period to qualify for up to five years of annual exclusion gifts, beginning with the year of contribution. In general, the criteria result in the treatment of a contribution to a qualified account as a gift to the designated beneficiary, subject to the ordinary rules with respect to relinquishment of control. Certain limited special provisions for transferring the assets in the account without transfer tax consequences are made in the event the designated beneficiary dies before attaining the age of 18 or becomes learning disabled.

Under the proposals, a contribution to a program that does not meet the four criteria will be a completed gift to the designated beneficiary only when an amount is distributed from the qualified account to or for his or her benefit. Until that time, a contribution by an account owner will be includible in the account owner's estate. In addition, if the criteria are not met, contributions to the account by persons other than the account owner may constitute a completed gift to the account owner at the time of contribution. Such contributions would then become includible in the account owner's estate. A subsequent completed gift by the account owner would occur at the time of a distribution of the contributed property to any person other than the account owner. Finally, the proposals would require that when the criteria are not met a change of account owner will be a completed gift to the new account owner. The donor would not be eligible to allocate such gift ratably over a five-year period. A change of designated beneficiary would not be, in such a case, a completed gift.

The proposal recommends that its changes apply to contributions and the earnings thereon subsequent to the date of enactment.

Qualified tuition programs are enormously popular vehicles for college savings. The Report cites estimates which indicate that there may be five million Section 529 accounts currently in existence, with assets approaching $50 billion.[13] The Report acknowledges that the proposals effectively eliminate the transfer tax advantages available under current law for Section 529 accounts, and may therefore make them less attractive savings vehicles.

Endnotes

1. Letter by Charles E. Grassley, Chairman, and Max Baucus, Ranking Member of the United States Senate Committee on Finance to Mr. George K. Yin, Chief of Staff, Joint Committee on Taxation, February 26, 2004.
2. "I.R.S. Estimates '01 Unpaid Tax Could Be as High as $353 Billion," Lynnley Browning, The New York Times, March 30, 2005.
3. Introduction and Summary to "Options to Improve Tax Compliance and Reform Tax Expenditures," Staff of the Joint Committee on Taxation, January 27, 2005 ("Report"), p.1.
4. "Estimated Revenue Effects of Options to Improve Tax Compliance and Reform Tax Expenditures," Report, pp. 425-430.
5. Report, Chapter XI, Estate and Gift Taxation, Section A, Limit Perpetual Dynasty Trusts (secs. 2631 and 2632), pp. 392-395.
6. I.R.C. § 2631(a).
7. Treas. Reg. § 26.2613-1.
8. New York Estates, Powers and Trusts Law, Section 9-1.1(b).
9. Report, Chapter XI, Estate and Gift Taxation, Section B, Determine Certain Valuation Discounts More Accurately for Federal Estate and Gift Tax Purposes (secs. 2031, 2512 and 2624), pp. 396-404.
10. Report, Chapter XI, Estate and Gift Taxation, Section C, Curtail the Use of Lapsing Trust Powers to Inflate the Gift Tax Annual Exclusion Amount (sec. 2503), pp. 405-408.
11. Report, Chapter XI, Estate and Gift Taxation, Section D, Provide Reporting for a Consistent Basis Between the Estate Tax Valuation and the Basis in the Hands of the Heir (sec. 1014), pp. 409-411.
12. Report, Chapter XI, Estate and Gift Taxation, Section E, Modify Transfer Tax Provisions Applicable to Section 529 Qualified Tuition Accounts (sec. 529), pp. 412-424.
13. Report, citing Statement of Charles Toth on Behalf of The College Savings Foundation and Securities Industry Association Before the United States Senate Committee on Finance on the Role of Higher Education Financing in Strengthening U.S. Competitiveness in a Global Economy, July 22, 2004 (citing Financial Research Corporation, Quarterly Update April 2004), and Morningstar Testimony to the House Financial Services Committee, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, June 2, 2004.

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IRS Clarifies Procedure Necessary to Make Expatriation Effective for U.S. Tax Purposes

By Thomas A. O'Donnell and Peter A. Cotorceanu

On April 22, 2005, the United States Internal Revenue Service ("IRS") issued Notice 2005-36, which applies to all U.S. citizens and long-term residents ("LTRs") who have expatriated[1] from the U.S. since June 3, 2004.[2] The Notice clarifies the steps an expatriate must take to make the expatriation effective for U.S. tax purposes. Of particular importance is Notice 2005-36's requirement that, unless and until the expatriate files the IRS's recently revised version of Form 8854, the expatriation is not effective for tax purposes. In other words, any U.S. citizen or LTR who has expatriated since June 3, 2004 must file the latest version of Form 8854 or continue to be taxed as a U.S. citizen or resident, i.e., continue to be taxed on worldwide income and be subject to estate and gift taxation on all transfers of assets regardless of the situs of the asset.

Background

Section 804 of the American Jobs Creation Act of 2004 ("the Jobs Act" or "the Act") substantially altered the expatriation tax rules applicable to individuals who lose their status as U.S. citizens or LTRs. Although the Act was not passed until October 22, 2004, it applies retroactively to expatriations that have occurred since June 3, 2004.

> *"Of particular importance is Notice 2005-36's requirement that, unless and until the expatriate files the IRS's recently revised version of Form 8854, the expatriation is not effective for tax purposes."*

One of the changes the Act made was to add a new rule for determining when an individual's expatriation is effective for tax purposes. Specifically, this provision requires the individual to notify either the Secretary of State or the Secretary of Homeland Security of the expatriation and to submit an information statement detailing, among other things, his or her income, assets, liabilities, and number of days spent in the U.S. Until these requirements are met, the expatriation is not effective for tax purposes (though it may well be effective for immigration purposes).

Moreover, the new notice and information requirements apply to *all* individuals who renounce their citizenship or give up their LTR status, not just to those to whom special tax rules apply because they fall above certain net worth or average income tax liability thresholds or because they fail to certify that they have been U.S. tax compliant for the previous five years.[3]

After the Jobs Act was passed, there was some confusion about just how an expatriate was supposed to comply with the new requirements, especially the information reporting requirements: The IRS did not revise the form that expatriates had traditionally filed as part of the expatriation procedure (Form 8854) to reflect the Jobs Act's new requirements until March 2005. However, even after the IRS published the revised Form 8854 and Instructions, it was still not clear how expatriations that had occurred after June 3, 2004 using the old Form 8854 would be treated. Notice 2005-36 clarifies these uncertainties.

Revised Form 8854 Must be Filed to Make Expatriation Effective for U.S. Tax Purposes

Notice 2005-36 clarifies the following three issues: First, as mentioned earlier, unless and until an expatriating citizen or LTR files the most recent version of Form 8854, his expatriation is not effective for tax purposes, i.e., he will continue to be fully subject to all the tax rules that apply to U.S. citizens and residents. Thus, any such person who expatriated since June 3, 2004 and who used the prior version of Form 8854 must file the new Form 8854 in order to make his expatriation effective for U.S. tax purposes.

Second, if the expatriate files the new Form 8854 on or before June 15, 2005, he will be taxed as a U.S. citizen or resident only until the date that he notified the Department of State or the Department of Homeland Security of the expatriation. (The revised Instructions to Form 8854 make clear that this notification will normally be deemed to have been given as part of a citizen's renunciation of citizenship before a consular officer or, in the case of an LTR, as part of turning in his green card and filing Department of Homeland Security Form I-407, "Abandonment of Lawful Permanent Resident Status.") In other words, filing the new Form 8854 before June 15, 2005 has the advantage of making most expatriations effective for tax purposes retroactive to the date that citizenship or green-card status was relinquished.

"Except in those extremely rare cases where a person is better off being taxed as a U.S. citizen or resident, any U.S. citizen or LTR who expatriated since June 3, 2004 and who has not yet filed the most recent version of Form 8854 should do so as soon as possible."

Third, if the expatriate does not file the IRS's revised Form 8854 until *after* June 15, 2005, the expatriation will not be effective until the *later* of (i) the date that the expatriate provides the requisite notice to the Department of State or the Department of Homeland Security (i.e., normally the date that he expatriated for immigration law purposes), or (ii) the date he filed revised Form 8854.

The bottom-line? Except in those extremely rare cases where a person is better off being taxed as a U.S. citizen or resident, any U.S. citizen or LTR who expatriated since June 3, 2004 and who has not yet filed the most recent version of Form 8854 should do so as soon as possible. Otherwise, he or she may continue to be subject to U.S. taxation as if the expatriation had not occurred.

Endnotes

1. Strictly speaking, "expatriation" refers only to U.S. citizens who renounce their citizenship; LTRs, by contrast, abandon their immigration status as U.S. permanent residents. However, for simplicity's sake, we use the terms "expatriation" and "expatriate" to refer to both.
2. For purposes of these rules, an LTR is an individual who has been a U.S. permanent resident (i.e., green card holder) in eight out of the last fifteen calendar years.
3. That is, they need not be subject to the special taxation rules for expatriates set forth in IRC section 877(b).

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Amendments to Article 81 of the Mental Hygiene Law

By Robert Kruger

Chapter 4318 of the Laws of 2004 was approved on September 14, 2004. The new law, consisting of substantive amendments and many technical changes, became effective on December 13, 2004. Before describing the technical and procedural corrections, many of which require little or no discussion, the substantive changes will be addressed.

Substantive Changes

I. "Life Sustaining Treatment"

This term is defined in MHL 81.07(g)(3) to mean "medical treatment which is sustaining life functions and, without which, according to reasonable medical judgment, the patient will die within a relatively short time."

Article 81 is silent on the authority of a guardian to consent to the administration of life sustaining treatment, or to withhold consent to such treatment. MHL 81.29(e).

The guardian only has the power to "consent or to refuse generally accepted routine or major medical or dental treatment" subject to provisions of MHL 81.29(e) (dealing with life sustaining treatment). MHL 81.22(a)(8). Conversely, the guardian is not obligated to insist that these devices be used. Left to the guardian is the core question of when to insist upon aggressive care, and when to be silent.

II. Appointment of Counsel

There are several situations set forth in MHL 81.10 where the appointment of counsel is required. With one exception, the rules governing when counsel must be appointed have not changed. The exception is that counsel will be required only if a temporary guardian is requested, not when temporary powers are requested.

The most common situation where temporary powers are requested is to prevent a financial abuser from looting the bank accounts of the Alleged Incapacitated Person ("AIP"). Thus, an attempt to secure a restraining order to freeze the AIP's bank accounts no longer triggers the appointment of counsel. The court can, however, appoint counsel if the court believes that the appointment of counsel will be "helpful to the resolution of the matter." MHL 81.10(7).

III. Attachment of Medical Information to Petition

MHL 81.07(b)(3) explicitly states that the attachment of medical information to the papers submitted in support of an application to appoint a guardian (i.e., the petition) is not required.

However, the submission of medical information is not prohibited and, in many counties, the judge hearing the matter will require medical information. Therefore, the change in the law may be cosmetic only, unless one is willing to challenge the judge before whom one (presumably) appears often.

IV. Revocation of Powers of Attorney and Health Care Proxies

Previously MHL 81.29(d) had provided for revocation of powers of attorney and health care proxies on one basis only—incapacity *ab initio*. The amended law expands these grounds to provide for revocation if breach of fiduciary duty is found.

This, no doubt, addresses situations where powers of attorney are the instruments of financial abuse. The change brings the statute into line with current judicial practice and codifies common custom.

V. Surrogate's Court Jurisdiction

MHL 81.04 was amended to provide that the surrogate's court with jurisdiction over an estate also has jurisdiction over, and may entertain a guardianship application for, an incapacitated person who has a property interest in that estate.

Apparently, in the past many surrogate's courts would decline to exercise jurisdiction in these cases, sending the petitioner across the street to Supreme Court for relief. Now, the jurisdiction in the Surrogate's Court is explicitly provided.

Technical Amendments

1) MHL 81.03 is amended to add definitions for "facility" and "mental hygiene facility." This amendment simplifies the statute by defining the terms once, and thereby eliminates repetition.

2) MHL 81.05 is amended to provide that after a guardian has been appointed, any proceeding to modify a prior order be brought to the court issuing that prior order. This requirement had

not been clear in the earlier version of the statute.

3) MHL 81.06 is amended to provide that the chief operating officer ("CEO") of a petitioning institution may designate a person to initiate a guardianship proceeding. Previously, only the CEO was authorized by statute to bring the proceeding.

4) MHL 81.07 was amended in several respects:

   a) the proceeding is now commenced with the filing of the petition. Previously, the statute was silent on this issue. The change is helpful in measuring various time limitations.

   b) MHL 81.07(b)(1) as amended requires that the order to show cause be heard no later than 28 days after the order to show cause is signed, rather than 28 days after filing. This amendment avoids unnecessarily restricting the time within which the Court Evaluator must investigate and report.

   c) MHL 81.07(e) as amended requires that the order to show cause be served on the AIP, the AIP's attorney, if known, and the Court Evaluator. Moreover, the manner of service is simplified. Service on the Court Evaluator and the attorney for the AIP may now be made by facsimile or overnight mail. In addition, the court now has explicit authority to designate other means of service on the AIP if the AIP refuses to accept service, a measure of some importance when the AIP is mentally ill.

   The statute previously required service of the petition on the spouse and adult children of the AIP, the parents of the AIP, if living, the adult siblings of the AIP, and the person(s) with whom the AIP resides.

   Now these individuals are to receive the order to show cause, but not necessarily the petition, at least at the outset. Rather, these individuals are to receive a new form of notice, called a "Notice of Proceeding." MHL 81.07(p) sets forth the contents of this notice.

   It is unclear why presumptive distributees and other close family members[1] are afforded only this bare-bones notice as prescribed in MHL 81.07(f). If an adult child anticipates a custody fight with a sibling over a parent, withholding the petition creates a barrier for the sibling, and allows the petitioner, perhaps unwisely, the advantage of an opening salvo. At the commencement of the proceeding, we often do not know who possesses relevant information concerning the AIP which may be of assistance to the court. In many cases it is close family members who already possess such information of great depth and relevance concerning the AIP, and it is questionable whether they should, in essence, be shut out of the inquiry.

5) MHL 81.08 was amended to require that the petition:

   a) identify all persons who are to be given notice of the proceeding, together with their addresses and telephone numbers.

   b) identify the names, addresses and telephone numbers of all persons to be served with the order to show cause, and their relationship to the AIP (MHL 81.08(a)(2)). This allows the Court Evaluator the opportunity, at the very least, to contact and interview these persons.

   c) recite information required in MHL 81.21, if powers are sought to transfer or gift any portion of the assets of the AIP (MHL 81.08(a)(5)).

6) Court Evaluators are required to be appointed from a list maintained by the Office of Court Administration (OCA). MHL 81.09(b)(i).

7) Under MHL 81.10, the AIP has the right to choose counsel. The right of the AIP to choose counsel does not appear to alter existing law or practice. Often, an interested family member will make the choice for the AIP, and the question of who selected the AIP's counsel has been a constantly recurring issue in the guardianship arena. The statute does not address this issue.

8) The court may appoint Mental Hygiene Legal Service ("MHLS") as the Court Evaluator (MHL 81.09(b)(1)), or as counsel (MHL 81.10(e)) for the AIP.

   This insinuation of MHLS into guardianship proceedings is worth highlighting. MHLS works cheaply; their current rate is $30.00 per hour. In a plain vanilla case, such as a permanently incapacitated child who has a tort claim, the cost savings represent a clear benefit.

   However, in a difficult case, such as family custody fight over a demented parent, MHLS may not bring sufficient real-life experience and insight into human nature to do the job effectively. Family custody battles involve siblings with a lifelong history of resentments, real or imagined or both. The appointment of MHLS may not provide a sufficiently sophisticated Court Evaluator in all cases.

Finally, given today's climate in the world of fiduciary appointments (OCA and Rule 36), there may be a veiled agenda at work behind the increasingly visible role of MHLS in the guardianship arena, as private attorneys are replaced by an agency which, some suspect, is being groomed to become the Public Guardian.

9) MHL 81.09(c)(9) expands the power of the Court Evaluator to request the authority of the court to obtain documentation and records of psychologists and social workers, in addition to the authority previously existing to obtain medical records of a physician.

10) MHL 81.13 now requires a decision by the court within 7 days of the hearing, rather than within 45 days of the signing of the order to show cause, an obviously salutary change.

11) MHL 81.15(b) now requires the court to make a determination of whether the Incapacitated Person ("IP") (no longer an AIP) should receive copies of the initial report and thereafter annual reports. This change obviously implicates the capacity of the IP, balancing the IP's right to know with the IP's ability to know.

12) Under amended MHL 81.11(f), the AIP is the only party able to demand a trial by jury on the question of capacity.

13) More detailed powers of the property management guardian are set forth in amended MHL 81.21. The statute, while not all inclusive, sets forth in detail basic powers that any fiduciary needs to function as property management guardian.

14) MHL 81.25(c) changes the bonding requirements in significant ways. For instance, an infant's compromise order, for a child who is a tort victim, customarily places the infant's funds in a blocked account, available only if and when the parents obtain an order of withdrawal. In this context, no bond is required.

If the child is permanently damaged, and an Article 81 guardianship is commenced, the guardian is customarily bonded to the full extent of the recovery.

If the recovery is substantial, many middle class parents may encounter difficulties in securing bond, as the surety may not be willing to write insurance bonding the entire recovery. MHL 81.25, as amended, now offers the court an option in certain cases. The court may retain a substantial portion of the recovery in a blocked account and release to the guardians the amount for which the guardians qualify.

This solution works well for responsible (i.e., prudent) guardians who are supporting their children, rather than the reverse. It does not work if the child requires a Supplemental Needs Trust, because the blocked account will constitute an "available resource," thereby disqualifying the tort victim from Supplemental Security Income and, particularly, Medicaid.

15) MHL 81.28 has also been amended to eliminate the reference to SCPA 2309 as the sole, or preferred, method of calculating the guardian's commissions.

The Law Revision Commission, in its commentary on this amendment, struggles with the subject and expresses uncertainty regarding the appropriate method of calculating the guardian's commissions. The commentary suggests that this subject remains unsettled and will be revisited at some future time.

16) Finally, under MHL 81.36(c) the court may now dispense with a hearing, for good cause shown, when modification of the powers of a guardian is sought. We suspect that modification occurs primarily, albeit not exclusively, when the power to place the IP in a nursing home is sought. If the application is adequately supported, the court may grant the application *ex parte*.

However, an application to purchase a residence or vehicle, or to grant or enlarge a stipend, are not as likely to be granted *ex parte*, since there is, typically, a benefit to both the guardian and to the IP. Courts will probably require that these kinds of applications be on notice, to give potential objectors the opportunity to be heard.

Endnote

1. In order of priority, those entitled to this notice include the spouse, parents, adult children, adult siblings and the person with whom the AIP resides. In the absence of all of the foregoing, notice is to be given to at least one but no more than three living relatives in the nearest degree of kinship, as well as any attorney-in-fact and health care agent, social welfare agencies connected with the AIP, the local social service agency, if the AIP receives public assistance, and the chief executive officer of a facility in which the AIP resides. MHL 81.07(g).

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What if They Really Repealed the Estate Tax?

By Jonathan J. Rikoon

One result of the most recent federal election is the increased likelihood that the estate tax will be permanently repealed, unlike the partial repeal of 2001. The political maneuvering that may lead to those results is not today's topic. Rather, this article will briefly identify some of the direct and indirect consequences of permanent repeal.

Income Tax Basis. Under the 2001 federal tax legislation, repeal of the estate tax (which is effective only for deaths during 2010) is accompanied by repeal of the current rule that assets included in an estate receive a basis of fair market value on the date of death (usually referred to as a step-up in basis). Instead, under the legislation the basis of inherited assets will be the lower of the decedent's basis or fair market value upon death.

The legislation does retain the ability to step-up basis by up to $1.3 million, plus another $3 million for property passing to a surviving spouse or a QTIP (qualified terminable interest property) trust (Code § 1022). Interestingly, for estates of unmarried decedents with a value of more than $1.3 million but less that $3.5 million, "repeal" of the estate tax actually yields an increase in overall federal taxes, because the current rules include an unlimited step-up plus no estate tax on the first $3.5 million (in 2009), while in 2010 the price for giving up the estate tax generally is that there will be capital gains tax on a $3.5 million estate if the decedent's basis is less than $2.2 million (which, when added to the $1.3 million step-up, would equal the $3.5 million).

Presumably any permanent repeal of the estate tax would likewise include permanent repeal of the step-up in basis. Many practitioners are concerned about the need to prove the decedent's basis, possibly in property that was purchased decades ago and for which no records are extant. In such a case the basis might be deemed to be zero because it cannot be proved.

Coordination with state tax law will be a problem. For example, in a state which does not repeal its estate tax (see below), but which like New York continues to compute taxable income, including capital gains, based upon the federal computation, the estate or beneficiaries will in effect pay both state estate tax and state capital gains tax on the same item—another tax increase generated by estate tax "repeal."

How will any permitted step-up in basis (such as the $1.3 million under section 1022) be allocated? Will the executor be required to allocate that ratably among beneficiaries? What if some beneficiaries receive assets with a basis close to zero (founder's stock, for example) and others receive assets with a basis somewhat, but not too much, below fair market value (e.g., portfolio marketable securities)? Will allocations designed to yield overall tax efficiency generate another set of equitable adjustments among classes of beneficiaries, similar to those spawned by tax elections between deductions on the income and estate tax returns? Should wills (or revocable trusts) specifically direct, or alternatively authorize, the fiduciary to allocate the available step-up in basis in some particular fashion, for example to generate the most tax savings (which may depend on an analysis of the marginal income tax rates of the beneficiaries), possibly with a make-up amount from other assets if necessary?

Some Ripple Effects

Gift Tax. If the 2001 legislation is any guide, permanent repeal of the estate tax may nevertheless leave the gift tax intact and largely unchanged except perhaps by a lower rate. The 35 percent marginal rate reflected in the 2001 legislation (section 2502) was a compromise which reflected income tax rates, because preserving the gift tax was seen as a way to block capital gains and other income tax avoidance. Now that federal capital gains and dividend tax rates are down to 15 percent for many classes of assets, is it possible that the gift tax rate would be reduced to that level as well, after repeal of the estate tax? And will the $1 million lifetime gift tax exemption remain unchanged as well, or will it perhaps be substantially increased along the lines of at least the current exemption level for federal estate taxes? Or, will a radical reform of the income tax lead to the repeal of the gift tax as well?

Income in respect of a decedent. Obviously many of the rules regarding income in respect of a decedent under section 691 will change, because those rules focus on the interplay between the federal estate tax and income tax imposed on the same item; once the estate tax is repealed, both income in respect of a decedent, and the corresponding deductions in respect of a decedent, will no longer be pertinent, just as the section 691(c) deduction against the income tax for estate tax attributable to the same item will no longer be relevant.

Generation-Skipping Transfer Tax. The other federal transfer tax is the generation-skipping transfer tax. If the estate tax is repealed, presumably the GST tax will also be repealed at least to the extent that it deals with transfers at death. Possibly it would be retained as a further backup to the gift tax, at least to the extent of lifetime transfers.

State Death Taxes. The stepped repeal of the federal credit for state death taxes in 2001 (replaced now with a deduction effective this Jan. 1), its varying implications for state estate and inheritance taxes based on the technicalities of state tax law, and the subsequent response (or non-response) of the states, put an end to the former trend of estate tax uniformity among the states even without repeal of the federal estate tax. If the federal tax is indeed repealed the disparate impact of the estate taxes of the different states will be even larger, untempered by the federal deduction. Change of domicile may become a more important tax planning device.

In New York (and other states with a tax based on the old state death tax credit), deathbed gifts will reduce state tax because the base for calculation of the old credit (which in turn sets the amount of state tax) does not include adjusted taxable gifts. Making sure that an attorney-in-fact or trustee has the authority to make such gifts will require forethought as will the creation of arrangements to borrow to make cash gifts, itself a useful technique so long as basis is still stepped-up at death and there is an advantage to deferring sales of assets until after death.

Flexibility

Ever since the 2001 federal tax legislation, practitioners have been trying to prepare documents that are flexible enough to deal with death that may occur prior to, during or after the period of estate tax "repeal." No matter how complicated it may be to try to plan for state estate taxes and all income taxes, if repeal is permanent, drafting will be simpler (because there will be no need to prepare as well for the alternative in which the federal estate tax is imposed). On the other hand, it will no longer be sufficient to prepare a stopgap will in the hope that repeal will be reversed or the client will die before repeal becomes effective.

Effect on Current Formulas. For example, if the estate tax is repealed, what happens to a typical formula that divides an estate between a marital legacy and a bypass or credit shelter legacy? It probably will not matter whether the marital share is pecuniary, residuary or fractional; what will matter is exactly how the formula is worded. If the credit shelter legacy is defined as the maximum amount that can pass free of federal estate tax after taking into account the unified credit, then (in the absence of any changes in the will or state law) one can certainly see an interpretation of that instrument such that the entire estate bypasses the spouse, perhaps in a way that was never intended. A somewhat different construction, depending on the actual language, might yield the opposite result, under which the entire estate passes to or for the spouse.

The one thing that is almost certain not to happen without a new will is for there to be the sort of division of wealth that was originally contemplated by the testator. Perhaps state legislatures will enact measures that would provide clear guidance in application of the marital deduction/bypass formula after repeal, to avoid many rounds of otherwise fruitless litigation.

Relatedly, a formula legacy of the amount of remaining GST exclusion will probably yield the correct result, that is, no legacy at all, but there could be anomalies depending upon the precise language used, for example if the size of the legacy is instead phrased as the largest amount that can pass without creating a GST tax at the date of death or upon any future distribution from or termination of a trust.

Overall Planning Implications. What this suggests is that clients and advisors alike would be driven to try to work out what the client's wishes actually are in the absence of an estate tax. No longer will we be able to start with an assumption that the estate should be divided between a marital legacy and the largest obtainable non-marital legacy. Instead, issues regarding division of control and economic benefit between the surviving spouse on the one hand, and the decedent's descendants, on the other hand, will be more likely to be addressed directly. Similarly, there would be no transfer tax reason to create a dynasty trust or a GST trust, but such a trust still may make sense in certain cases to reduce overall family income taxes or to provide for grandchildren (and their descendants) without permitting the child (and his or her creditors) to access those resources.

Overall, the present uncertainty regarding survival of the estate tax suggests maximum flexibility to be built into wills and trusts, including powers of appointment and trustee discretion. It may be worth considering ways to permit amendment of trusts long after the testator or settlor has died, either directly or through pour-over to a different trust along the lines suggested by EPTL 10-6.6. But there does not seem to be any single magic bullet that will work for everyone.

Existing Structures. Another problem is how to deal with estate planning structures that have been created and funded but no longer serve a useful function after estate tax repeal. In many cases, there are irrevocable trusts together with family partnerships or LLCs. Sometimes the structures can be quite complex and daunting. Sometimes things are much simpler, for example use of an insurance trust to hold life insurance designed to escape the estate tax. There may also be intra-family transactions such as purchase of an interest in a family business enterprise for a combination of cash and an installment note; or perhaps there is a grantor retained annuity trust (GRAT) under way.

To the extent that these transactions are designed for the primary purpose of reducing estate taxes, if the estate tax is repealed one would think the transaction should be unwound. If the transaction documentation does not permit voluntary unwinding, then it may be possible to obtain judicial relief based on changed circumstances. There may also be state legislation which permits unwinding these transactions and structures in the event of estate tax repeal.

Effect on Practice

The final topic to address, but perhaps the one closest to the hearts of some readers, is the effect of these changes on the practice of trusts and estates law. Obviously estate planning and drafting will no longer need to take federal estate taxes into account. State estate and inheritance taxes as well as those imposed by foreign jurisdictions will acquire a relatively more important role. Indeed, the absolute dollar impact of state and foreign death taxes will be increased once the federal estate tax is repealed, due to loss of the credit or deduction now allowed against the federal estate tax for payment of those taxes.

There may be correspondingly greater emphasis on saving capital gains tax, particularly for inherited assets with a basis that is difficult or impossible to establish. Other income tax planning may be paid more attention (unless that tax too is repealed!). Bear in mind, however, that the effective marginal rate of either the state estate tax or the federal and state combined capital gains (or other income) taxes will almost certainly be significantly lower than the old federal estate tax rate itself, which may put some pressure on fees.

Non-tax issues will probably achieve a greater level of importance. Depending upon the particulars of each client's situation and goals, there may be an increased emphasis on choice of law and jurisdiction, perhaps with some jurisdiction shopping (unrelated to the search for domicile in a state with the most favorable state death tax, which may or may not be available in a state with favorable rules on trust longevity and asset protection, for example). Obviously in that context it will be important to create a sufficient nexus to the target jurisdiction so that its law will indeed apply, preferably in a way recognized by the former jurisdiction as well.

Asset protection will likely be a growing portion of the trusts and estates practice following repeal of the estate tax, particularly in view of an increasingly litigious society. This is likely to be true even if tort reform is enacted that reduces the risk of catastrophic tort liability for clients or family members. The types of transfers and assets that are necessary in order to achieve asset protection, whether domestic or overseas, may generate capital gains or gift tax concerns.

Asset protection is not just for the testator or settlor, but protection of the beneficiaries against their creditors may also be reinforced as an important planning goal.

As the amount of wealth that is transferred by death or by reason of trusts increases, particularly as the baby boomer generation matures and begins to prepare to transmit its wealth without a federal estate tax, fiduciary litigation is likely to become an increasing portion of the practice. It will almost certainly continue to be true that a thorough grounding in the tax consequences of proposed settlements of litigation will be a valuable commodity. The precise mix of taxes affected by a given settlement, of course, will be somewhat different after repeal.

Even in the absence of litigation, there is likely to be a need for considerable advice and perhaps explanation, mollification or mediation, relating to application of the Prudent Investor Rule and the revised Principal and Income Act. This may be affected in another way by the estate tax repeal, because the tax consequences of portfolio trading decisions will be different. For example, there is presently a disincentive to liquidate low-basis portfolios, even for the purpose of diversified reinvestment of the proceeds, due to the imposition of capital gains tax; in case of inherited property, this disincentive disappears, making diversification relatively more attractive. If the step-up in basis is repealed as part of the repeal of the estate tax, the standard disincentive will apply even to inherited assets, which of course presents considerable pressure in the opposite direction from the prudent investor rule's directive to diversify. In turn, that may lead to the drafting of wills and trusts with broad exculpation and indemnification language, itself potentially a ripe source of future litigation.

Perhaps the bottom line for trusts and estates practitioners is that even if the estate tax is really repealed, our life will not get simpler and may grow more complicated.

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Section Hosts First International Estate Planning Institute

By G. Warren Whitaker

The Trusts and Estates Law Section was the co-sponsor of an International Estate Planning Institute held in New York City on March 10th and 11th, 2005. The other co-sponsor was the Society of Trusts and Estates Practitioners (STEP), a worldwide organization with over 11,000 attorneys, bankers and accountants as members. As the previous Chair of the Section, as well as the Chair of the STEP New York Branch, it was perhaps not entirely coincidental that I found myself chairing the Institute. We assembled a stellar roster of speakers from around the world to address U.S. tax and estate planning considerations in a multinational context. The conference sold out its capacity of over two hundred attendees a week in advance. The audience was drawn primarily from the New York area, but one-third of the attendees came from other parts of the United States and throughout the world, with Canada, the U.K., the Caribbean and Australia among the places represented.

Arthur Cohen and Warren Whitaker

Andrew Penney

I opened the conference with a general review of U.S. tax laws pertaining to international estate planning. My talk was an elaboration on the following basic rules:

1. U.S. citizens and residents are subject to U.S. income and transfer taxes on their worldwide income and assets.
2. Non-U.S. persons are subject to U.S. income and transfer taxes only on U.S. source income and U.S. situs assets.

I described the sometimes surprising definitions of U.S. situs assets and U.S. source income, the nearly unique U.S. rule taxing all U.S. citizens on their worldwide income and assets regardless of where they reside, and the different residence tests for U.S. income and estate tax purposes.

Marnin Michaels of Baker & McKenzie in Zurich followed with a discussion of the U.S. planning issues that arise in the case of a spouse who is not a U.S. citizen. He reviewed the characteristics and disadvantages of utilizing a qualified domestic trust (QDOT), which is required in order to obtain the U.S. estate tax marital deduction for property passing at death to a non-U.S. citizen spouse.

Gideon Rothschild of the New York law firm of Moses & Singer LLP then discussed offshore trusts created by U.S. persons. He emphasized that there is almost never a tax advantage to the creation of such trusts, since the U.S. grantor trust rules cause the income of foreign trusts to be taxed to the U.S. grantor in nearly every case. Instead, U.S. persons create offshore trusts to protect their assets from future creditors, which (given the litigious nature of U.S. society) has made these trusts very popular.

Karen Troy and others from Royal Bank of Canada

Carlyn McCaffrey of Weil, Gotshal & Manges LLP in New York spoke about the quite different tax situation that exists with regard to foreign trusts created by non-U.S. persons for U.S. beneficiaries. Although these trusts can result in significant income and estate tax advantages, there are also major pitfalls to be dealt with, particularly concerning the issues of grantor trust status, accumulated income and underlying corporations.

Bruce Zagaris of Berliner, Corcoran & Rowe, L.L.P. in Washington, D.C. addressed the shifting status of money laundering regulations, "gatekeeper" initiatives and the U.S. Patriot Act, and the increasing obligations for attorneys in connection with these areas. Bruce also discussed the legal and ethical issues confronting U.S. attorneys who may be deemed to assist clients in foreign tax avoidance.

Michael Cadesky of the Toronto accounting firm of Cadesky & Associates, and also the Chair of STEP Worldwide, gave an incisive and amusing talk about the differences between U.S. and Canadian tax laws and the complexities of planning for individuals who are affected by both sets of laws, particularly U.S. citizens residing in Canada. Since Canada has no inheritance or estate tax, income tax planning is paramount, but for U.S. citizens residing in Canada the U.S. estate tax is also an omnipresent concern.

Joseph Field of the New York office of Withers Bergman LLP wrapped up the first day's session with a lively talk about non-U.S. inheritance rules and concepts such as Sha'aria law, forced heirship, sham trusts, stiftungs and other exotic creatures that the international planner is likely to encounter.

At the end of the first day STEP and GAM co-hosted a well-attended and convivial cocktail party at which participants traded international war stories and made or renewed acquaintances. This was followed by a memorable speakers' dinner at Gramercy Tavern hosted by Royal Bank of Canada.

Day Two opened with a presentation on death tax treaties to which the U.S. is a party and how they can alter the rules for U.S. taxation of non-U.S. persons and assets. The talk was given by Michael Galligan, a partner in the New York firm of Phillips Nizer LLP, who noted that the standard foreign death tax credit allowed by the Internal Revenue Code in the absence of a treaty is often limited in its scope, and that treaties can offer much greater protection.

Andrew Penney of Speechly Bircham in London followed with a comparison of U.S. and U.K. estate planning laws and a discussion of fact situations that can arise involving both sets of laws, particularly the use of trusts by U.S. citizens residing in the U.K., U.K. parents with U.S. children and U.K. domiciliaries temporarily residing in the U.S.

Arthur Cohen, a partner in the New York accounting firm of Cohen & Schaeffer, CPA, PC in New York, then gave a practical talk about advising clients who have failed to properly report offshore income or assets on how to remedy this violation with the IRS on the best terms possible. The importance of coming clean with the IRS on a voluntary basis before the IRS contacts the taxpayer was emphasized. Art also described the complexity of the current U.S. reporting requirements under which transactions that are nontaxable (such as gifts from foreign persons and/or distributions from foreign grantor trusts) can nevertheless result in penalties in the millions of dollars for failure to properly report.

(l to r) Michael Galligan, Warren Whitaker and Arthur Cohen

Steven Cantor

The next speaker was Steven Cantor, of the firm Cantor & Webb P.A. in Miami, Florida. His topic was the special complexities of planning for the common situation of a foreign person who owns real estate in the United States. He discussed the use of foreign corporations to shelter these properties from U.S. estate tax and the resulting income tax complications that can arise upon rental and sale of these properties.

Wrapping up the conference was Michael Pfeifer, of the Washington, D.C. law firm of Caplin & Drysdale, Chartered (and formerly an advisor at the Internal Revenue Service on many of the major international tax laws that were enacted in the 1990s). His timely topic was the U.S. tax consequences of giving up U.S. citizenship or permanent resident ("green card") status. These rules were amended in the fall of 2004 and Michael gave the audience an overview of the changes as well as a history of past legislation and proposals in this area.

Michael Pfeifer

All participants agreed that the Conference was a great success which helped meet a need among U.S. practitioners to become more aware of international principles and issues. Plans for a second Institute to be held next year (in a larger venue) are already under way. We are grateful to the sponsors who helped underwrite the Conference: besides STEP, GAM and Royal Bank of Canada, they included Fiduciary Trust Company International, Commonwealth Trust Company of Delaware, HSBC Private Bank and Trident Trust.

G. Warren Whitaker, a partner in the New York office of Day, Berry & Howard LLP, is the immediate past chair of the Trusts and Estates Law Section and the chair of the New York branch of STEP.

Scenes from the 2005 Spring Meeting

May 9-10, 2005

Hyatt Regency, Buffalo

RECENT NEW YORK STATE DECISIONS

Ira Mark Bloom and William P. LaPiana

ACCOUNTINGS

Beneficiary Bound by Accounting in Trust Distributed to Beneficiary's Trust

As co-executor of decedent's will and co-trustee of two testamentary trusts established by the will, bank judicially settled its accounts as executor and as trustee of one of the trusts when the income beneficiary died. That trust was added to the second trust. The individual co-trustee then died and the bank filed an intermediate account in the remaining trust. The income beneficiary of the remaining trust, who gave her waiver and consent to the account, was allowed to withdraw it. She then brought objections to the account based on the bank's failure as trustee of her trust to object to its failure as executor and then trustee to diversify the investments in the estate and in the other trust (specifically the retention of Eastman Kodak stock while it greatly declined in value). The Surrogate denied the bank's motion to dismiss. A divided Appellate Division modified the decree to dismiss those objections based on the bank's failure to contest its own prior accountings. The Court of Appeals has affirmed the Appellate Division, agreeing that because the objectant had received notice of the prior accountings in accord with SCPA 2210(10), which requires notice to all persons interested in the trust by a fiduciary accounting to itself in a separate capacity as trustee, the prior decrees were *res judicata*. The high court also agreed that objections based on the trustee's failure to object to its own conduct in a different fiduciary capacity are objections to that conduct and could have been fully aired in the prior accountings of which the beneficiary had notice. *In re Hunter*, __ N.Y.3d __, 2005 WL 673650 (Court of Appeals 2005).

ADMINISTRATION OF ESTATES

Legatees of 100% of Stock of Corporation Cannot Seek Liquidation in Surrogate's Court

The dispositive provisions of decedent's will consisted only of a residuary clause equally dividing the residuary estate between two persons who were also co-executors. The estate included 100% of the stock of a corporation. One of the co-executor legatees petitioned for an order directing sale of real property held by the corporation and the liquidation of corporation. The Surrogate denied the petition because the two legatees were now the owners of the corporation and must seek the requested relief under the provisions of the Business Corporation Law. *In re Kagan*, __ Misc. 3d __, 790 N.Y.S.2d 366 (Sur. Ct., Dutchess Co. 2005).

RENUNCIATIONS

Unfiled Renunciation May Be Withdrawn

Shortly after decedent died intestate, his brother, executor of his mother's will, obtained from decedent's widow and sole distributee a renunciation of her interest in decedent's share of his late mother's estate. Under his mother's will, which had not yet been offered for probate, decedent would receive a one-third interest in certain real property. Decedent's brother retained possession of the renunciation but did not file it within nine months of decedent's death as required under EPTL 2-1.11(b)(2). Ten months after decedent's death, his widow opened an intestate administration in order to collect decedent's gift under his mother's will. Decedent's brother then began a proceeding seeking an extension of the time to file the renunciation which the widow then retracted. Because the statute makes a renunciation effective as of the date of filing (EPTL 2-1.11(b)(2)) and makes a renunciation irrevocable once filed (EPTL 2-1.11(g)), the unfiled renunciation may be retracted by the widow. *Estate of Overgard*, 5 Misc. 3d 628, 785 N.Y.S.2d 662 (Sur. Ct., N.Y. Co. 2004).

TRUSTS

Statement of Purpose of Bequest Does Not Create Trust

Decedent's homemade will gave her estate "to my two nephews in trust for their education." The administrator c.t.a. petitioned for a construction seeking a declaration that the will created a valid trust. The petition was opposed by the guardian ad litem for the nephews. Held, the will did not create a trust. The language in the will did not exhibit the "fundamental attributes" of a trust. It named no trustee, did not distinguish income from principal, made no disposition of a remainder, nor did the will in any way limit "qualitatively or quantitatively" the nephews' interest in the property. Even if the court were to appoint a trustee, the trustee would have no active duties and the trust property would vest in the beneficiaries. The language referring to education refers only to the purpose of the gift and the property passes to the two nephews in fee. *Estate of Mannara*, 5 Misc. 3d 556, 785 N.Y.S.2d 274 (Sur. Ct., N.Y. Co. 2004).

Language Creating Trust Prevents Taking of Deductions for Depreciation

Decedent's will created a QTIP trust for the surviving spouse and directed the trustees to pay to the beneficiary the "total income received by them in respect of leases or any other wasting, diminishing or decreasing assets." Based on that language and a reading of the will as a whole in light of all the facts and circumstances, the Appellate Division affirmed the Surrogate's order to the trustees to distribute trust income without any reduction for depreciation deductions allowed to the trusts by virtue of an election under § 754 of the Internal Revenue Code made by the limited partnerships owning the real property held in the trust. *In re Chadrjian*, 15 A.D.3d 579, 790 N.Y.S.2d 213 (2d Dep't 2005).

WILLS

Conflicting Affidavits by Witness Require Additional Facts to Prove Execution

One of the witnesses to decedent's will made an affidavit supporting proper execution of the will but then made a subsequent affidavit denying that key elements of the execution ceremony had taken place. On examination before the court the witness claimed the Fifth Amendment privilege not to testify, but subsequently submitted a third affidavit in which she said that she did not see decedent sign the will and that he did not acknowledge his signature to her. The other witness's testimony supported a finding of due execution. The Appellate Division held that conflicting affidavits and the refusal to testify most closely resemble the situation in which a witness has forgotten the occurrence which under SCPA 1405(3) requires, in addition to the testimony of one witness, "such other facts as would be sufficient to prove the will." *In re Hutchinson*, 13 A.D.3d 704, 785 N.Y.S.2d 590 (3d Dep't 2004).

Proceeding to Enjoin Executor from Taking Certain Actions with Respect to Property Does Not Require Jury Trial

Decedent's widow brought a proceeding pursuant to SCPA 2105 for a decree ordering decedent's executor to amend his application for preliminary letters to omit certain stock and to enjoin the executor from interfering with surviving spouse's alleged interest in the stock. Surrogate's Court denied executor's motion to strike widow's demand for a jury trial. The Appellate Division reversed, holding that while a jury trial may be appropriate in a proceeding under SCPA 2105 where the relief requested could also be obtained at law, for example, where the petitioner seeks the return of property and the proceeding is therefore akin to replevin, the petitioner's request for an injunction sounds in equity and there is not entitlement to a jury trial. *In re Rivara*, 12 A.D.3d 611, 785 N.Y.S.2d 469 (2d Dep't 2004).

Language of Survival Overrides Antilapse Statute

Decedent drew his own will and gave his residuary estate to "my surviving sisters and brother [naming them] share and share alike." Decedent's sisters survived him but his brother predeceased. The Surrogate construed the will to give the residue to the sisters and the Appellate Division affirmed, holding that the survivorship language clearly barred application of the antilapse statute, EPTL 3-3.3. *Estate of Stangle*, 14 A.D.3d 828, 788 N.Y.S.2d 241 (3d Dep't 2005).

Original Probate of Non-Domiciliary's Will Denied

The Surrogate's Court has discretion to admit to original probate the will of a non-domiciliary of New York State (SCPA 206 and 1605). Decedent was a domiciliary of Florida but she died and was buried in New York. Her will was executed in New York, and three quarters of her property is located in New York as are several of the beneficiaries, including two charities. Decedent nominated four executors, two of whom cannot serve under Florida law because they are not Florida residents nor sufficiently closely related to decedent. The eligible nominees offered the will for probate in Florida where the equivalent of preliminary letters were granted and where objections to probate were filed. That litigation is ongoing. The disqualified nominees then filed the will for original probate in New York. Even though the issuance of preliminary letters (as opposed to admission to probate) is not a bar and the law of the domicile does discriminate against New York domiciliaries as fiduciaries, one of the statutory grounds for admission to original probate, the Surrogate declined to entertain the petition for two reasons: First, the two other nominated executors are eligible to serve in Florida and second, it would be unduly prejudicial to require the parties to litigate two proceedings. *Estate of Neval*, 788 N.Y.S.2d 843 (Sur. Ct., Westchester Co. 2005).

Acknowledgment of Disclosure of Consequences of Appointing Attorney as Executor Must Be Separate from Will

SCPA 2307-a requires that a testator who appoints his or her attorney as executor acknowledges that the testator understands that the attorney will be entitled to commissions as well as to a legal fee. If the testator does not make such an acknowledgment, the attorney-executor is limited to one-half the statutory commission. As originally enacted the statute was not completely clear on whether the acknowledgment had to be made in a writing separate from the will. The statute has been amended to expressly require that the acknowledgment be separate from the will (L. 2004 ch. 709). In affirming the Surrogate Court's direction that the attorney's fees shall not exceed half the statutory commissions, the Appellate Division stated that the amendment is a clarification of what the statute "as originally enacted" was intended to require. *Will of Lustig*, 15 A.D.3d 184, 789 N.Y.S.2d 131 (1st Dep't 2005).

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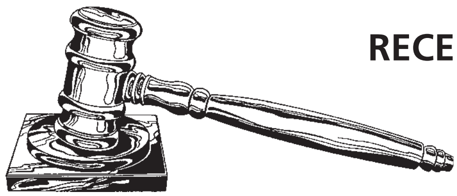

CASE NOTES—
RECENT NEW YORK STATE SURROGATE'S AND SUPREME COURT DECISIONS

Ilene Sherwyn Cooper

Attorneys Fees

In an action for legal fees, the defendant moved for summary judgment dismissing the law firm's complaint on the grounds that no written retainer or letter of engagement had been entered between the parties. The fees at issue were derived from work performed by counsel in connection with an appellate hearing before the September 11 Victim Compensation Fund. As a result thereof, the compensation awarded to the defendant was increased, and plaintiff claimed 25% of the increment.

The court held that the failure of plaintiff to enter a written retainer agreement with the defendant or to provide a letter of engagement was fatal to its request for fees. The court concluded that preclusion from seeking fees was a reasonable penalty for noncompliance with 22 N.Y.C.R.R. 1215.1, when the rule was intended to avoid the type of dispute at issue, and plaintiff's failure to comply was deliberate.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint was granted.

Klein Calderoni & Santucci LLP v. Bazerjian, N.Y.L.J., February 18, 2005, p. 24 (Supreme Ct., Bronx Co., Justice Gonzales).

Attorney-Fiduciary

Before the court was an issue addressed to the disclosure requirements of SCPA 2307-a, and more specifically, whether they applied to a paralegal of the attorney-draftsperson's law firm.

The record revealed that at the time the will was executed, the decedent executed a 2307-a disclosure statement, witnessed by the attorney only. The court expressed concern that the attorney-draftsperson was attempting to circumvent the requirements of SCPA 2307-a by designating his paralegal, rather than himself, as executor of the decedent's estate. In an affidavit submitted to the court, the paralegal indeed stated that she was not a close friend of the decedent and that she became acquainted with him through her employment with the attorney. Although not an attorney herself, the court found that the paralegal's relationship with the attorney combined with her lack of relationship with the decedent was such that an SCPA 2307-a disclosure statement was required. To this extent, the court found that the disclosure statement which had been signed was null and void inasmuch as it had been, in effect, signed by the executor-designee, i.e., the attorney himself. As such, the commissions of the executor were limited to one-half of an executor's commission pursuant to statute.

In re Estate of Wagoner, 2005 N.Y. Slip Op. 25054, January 10, 2005 (Sur. Ct., Albany Co., Surr. Doyle).

Discovery

Before the court was a motion to compel compliance with a Notice for Discovery and Inspection and for sanctions. The respondent opposed the motion and cross-moved for sanctions against the movant. The court denied both motions.

The Notice for Discovery and Inspection was served on June 25. The record reflected that respondent's counsel objected to the Notice by letter, dated July 26, and never moved for a protective order.

The court held that the failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by the provisions of CPLR 3122 forecloses inquiry into the propriety of the information sought except with regard to material which is privileged under CPLR 3101, or disclosure requests that are palpably improper. A disclosure request is palpably improper if it seeks information of a confidential and private nature and does not appear to be relevant to the issues in the case.

Based upon the foregoing, the court held that although the respondent's objections to the notice for discovery were untimely, the document demand was palpably improper in that it sought information which was irrelevant to the proceeding before the court. Accordingly, the motion to compel disclosure was denied. Moreover, the cross-motion for sanctions was also denied on the grounds that the motion to compel disclosure could not be deemed frivolous.

In re Estate of McKeon, N.Y.L.J., February 2, 2005, p. 32 (Sur. Ct., Westchester Co., Surr. Scarpino).

Ejectment

The estate administrator brought an ejectment proceeding against a distributee who was occupying the decedent's home rent free to the exclusion of the other distributees.

The Court held that it had jurisdiction over the matter since it involved the affairs of the decedent and the ejectment was part of the process of administering the estate. Moreover, the Court opined that a fiduciary has the right to possess and manage the decedent's realty so that it may be sold in accordance with the statutory authority provided to the fiduciary, and rent can be collected, and the property otherwise preserved in the interests of the beneficiaries.

Although title to real property vests in the intestate distributees upon the death of the decedent, their rights are subject to the rights granted to the administrator to take immediate possession of the property in order to manage and sell it for purposes of distribution. Where the estate is the owner in common of real property, a fiduciary may request permission of the Surrogate to partition the property. Where, however, the other occupant is a distributee, a fiduciary may seek ejectment pursuant to the provisions of SCPA 1902.

Based upon the foregoing, the Court concluded that the sole occupancy of the subject premises by the distributee, rent free since the decedent's death, prevented the fiduciary from selling the premises, which was the estate's primary asset, to the detriment of the other distributees. Accordingly, the Court held that it was in the best interests of the estate that the property be sold as expeditiously as possible, and ordered that the distributee be ejected, and that possession be restored to the estate administrator.

In re Estate of Taylor, N.Y.L.J., February 2, 2005, p. 22 (Sur. Ct., Kings Co.).

Gift

In a contested discovery proceeding for the recovery of proceeds in a money market account, the respondent, executrix, moved for summary judgment finding that she was the sole owner of the account. The application was opposed by the petitioner.

The record revealed that two years before her death, the decedent received a substantial settlement of a medical malpractice claim and deposited the bulk of the monies into a money market fund held jointly with the respondent. About two weeks thereafter, the decedent executed a will wherein she divided her estate equally among her three children. That will was admitted to probate and letters testamentary issued to the respondent.

Petitioner opposed summary judgment alleging that the decedent intended to treat her children equally and that the presumption afforded by Banking Law section 675 was inapplicable to the account at issue. Petitioner further argued that the respondent had a confidential relationship with the decedent inasmuch as she was the decedent's attorney-in-fact, and that the decedent was in poor health and suffering from dementia and hallucinations at the time the account was created.

In support of the motion, respondent alleged that the record was devoid of any evidence that the account was for convenience only, and argued that the petitioner's claims relative to undue influence were logically inconsistent inasmuch as at or about the time the account was established by the decedent she also executed her will dividing her estate equally among her children.

Based upon the foregoing, the court held that despite the presumption accorded the respondent under the Banking Law, the dearth of admissible evidence surrounding the creation of the account in question precluded an award of summary judgment.

In re Estate of Petersen, N.Y.L.J., December 14, 2004, p. 34 (Sur. Ct., Suffolk Co., Surr. Czygier).

Gift

In a contested probate proceeding, the temporary administrator and 70% beneficiary of the estate moved for summary judgment determining that the bequest to the attorney-draftsman and certain lifetime transfers to him were procured by undue influence.

The record revealed that the decedent had originally retained the respondent in connection with her late sister's estate. Within two years thereafter, he had drafted the propounded will but also had convinced the decedent to put his name on her bank account as a joint tenant. Respondent then began to withdraw funds from the account into his own escrow accounts. He did not demonstrate that these transfers were made with the decedent's knowledge or consent. Once the decedent had died, the respondent claimed that these withdrawals were gifts. The court found that correspondence in the record belied this claim, as did the fact that the transfers were made into respondent's escrow accounts.

Additionally, the record revealed that respondent had effected the sale of the decedent's Paramount stock and placed the sale proceeds, first, in his brokerage account, and thereafter into his escrow account. Although respondent claimed that this was a gift as well, the court held that the transfers themselves evinced no such intention, and that respondent offered no proof to substantiate his claims or rebut the inference of undue influence as a result of his confidential relationship with the decedent.

Accordingly, summary judgment was granted. Respondent was directed to restore all monies and the proceeds of the stock sale to the estate, and the provisions in the decedent's will in respondent's favor were excised.

In re Estate of LeBow, N.Y.L.J., January 21, 2005 (Sur. Ct., New York Co., Surr. Roth).

Life Tenant

In a proceeding pursuant to Article 19 of the SCPA, the petitioner sought an order authorizing the sale of a parcel of realty devised to him under the will, authority to engage a real estate broker for purposes of sale, and a direction that the proceeds be distributed in accordance with the Internal Revenue Service actuarial tables. In addition to being the devisee of a life estate in the real property, the petitioner was a 60% beneficiary of the residuary estate. Respondent was the remainder beneficiary of the realty.

In support of the application, the petitioner argued that as a life tenant he could request a sale of the property, and that a sale in this case was necessary inasmuch as he could no longer reside at the premises. Petitioner further argued that a sale of the property was in the best interests of the estate given the strength of the real estate market.

Respondent opposed the application, arguing that petitioner's life estate was merely a right of occupancy conditioned upon the performance of certain obligations, which petitioner failed to perform. Petitioner claimed that a life estate was more than simply a right to occupy.

The court agreed with the petitioner in holding that a life estate is something more than a right of occupancy. The court opined that a life tenant is tantamount to, although not entirely the equivalent of, a fee owner of the property, with all the rights and benefits and burdens of such ownership, including the right to exclude others from possession, the right to lease and collect rents, and the rights to force a sale of the property and collect the value of his life estate therein over the objections of remaindermen. The court noted that, as compared to a life tenancy, a right of occupancy is merely a personal privilege, and does not carry with it the added rights and responsibilities of a life tenant.

Within the foregoing context, and based upon the express language of the decedent's will, the court concluded that the petitioner had a life estate in the property. With regard to the question of whether petitioner had forfeited his interest as life tenant by virtue of his failure to perform certain obligations attendant to his use of the property, the court concluded that the will did not expressly condition the petitioner's life interest on the performance of these obligations, nor could such condition be inferred from the terms of the instrument. Further, the court held that petitioner's failure to satisfy certain obligations attendant to the property did not constitute a waiver or surrender of his rights to the property.

Finally, with respect to the proposed sale of the property, the court concluded, after examining the provisions and relevant case law under SCPA article 19, and RPAPL section 1602, as well as the provisions of the decedent's will, that a sale would fulfill the intention of the decedent to provide for the petitioner for the duration of his life.

In re Estate of Strobe, N.Y.L.J., December 28, 2004, p. 19 (Sur. Ct., Nassau Co., Surr. Riordan).

Lis Pendens

Before the court was an application to cancel a *lis pendens* that was filed in the context of a contested compulsory accounting proceeding.

The court granted the application, finding that the petitioner did not have an interest in the property but was merely a creditor of the decedent's estate. Specifically, the court noted that the petitioner was not a beneficiary under the decedent's will, nor was she entitled to any specific real property owned by the decedent by reason of her exercise of her right of election. Moreover, although the petitioner requested that the fiduciary be restrained from disposing of any of the proceeds of sale of the subject realty, the court found that the petitioner had not made an application for injunctive relief, and that there was no basis for granting such relief *sua sponte*.

In re Estate of Foy, File No. 1677 P 2002, March 11, 2005 (Sur. Ct., Suffolk Co., Surr. Czygier).

Paternity

In re Estate of Kenneth V., Surrogate Weiner addressed the issue of posthumous DNA testing within the context of an unopposed application by petitioner for an order declaring him to be the son and sole heir of the decedent. The proof at the hearing revealed that the mother of the petitioner and the decedent had a three-year relationship at the conclusion of which she discovered she was pregnant. Thereafter, she gave birth to the petitioner, although she had, by then, married another man. The decedent acknowledged that he was the father of the petitioner to the petitioner's mother, to his mother and to his brother.

After the decedent's death, the funeral home provided a lock of the decedent's hair to a lab for DNA testing. However, the sample did not contain the requisite hair follicles and therefore nuclear DNA testing was unavailable. As a consequence, the petitioner submitted the decedent's toothbrush for DNA nuclear and mitochondrial testing, together with the decedent's cut hair sample. The test results established that the DNA from the toothbrush had a 99.79 percent probability of being from the biological father of the petitioner.

The court opined that a non-marital child will be held to be the child of his father where paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own. Given the fact that the decedent had acknowledged the petitioner to be his son, the question became whether clear and convincing evidence of paternity existed. Based upon the DNA test results, the court concluded that the standard had been met. Significantly, the court recognized that posthumously obtained DNA test results have been accepted as clear and convincing evidence of paternity pursuant to the provisions of EPTL 4-1.2(a)(2)(C). Moreover, the court noted that mitochondrial DNA analysis has been found reliable by the scientific community and has been accepted as evidence.

Accordingly, the court held that the petitioner had established himself to be the son and sole heir of the decedent, and granted the petitioner's application in its entirety.

In re Estate of Kenneth V., N.Y.L.J., January 24, 2005, p. 22 (Sur. Ct., Rockland Co., Surr. Weiner).

Paternity

In a contested compulsory accounting proceeding, the court ordered the Medical Examiner to provide genetic material of the decedent for DNA testing in order for the petitioner to establish he was the son of the decedent. The court held that because petitioner had produced an affidavit of a third party in order to satisfy the "open and notorious" requirement of the paternity statute, it would allow the petitioner to proceed with the DNA testing for the purpose of satisfying the statutory requirement that paternity be established by clear and convincing evidence.

In re Estate of Davis, N.Y.L.J., p. 20 (Sur. Ct., Kings Co., Surr. Feinberg).

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Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed (austin.wilkie@hklaw.com) or mailed on a 3½" floppy disk (Austin Wilkie, Holland & Knight LLP, 195 Broadway, New York, NY 10007) in Microsoft Word or WordPerfect. Please include biographical information. Mr. Wilkie may be contacted regarding further requirements for the submission of articles.

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