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Trusts and Estates Law Section Newsletter

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A Message from the Section Chair

Gary B. Freidman

Greetings. I look forward to a challenging and productive year as the Chair of our Section. Please join me in thanking and congratulating our outgoing Chair, Ira M. Bloom, for his outstanding stewardship during this past year.

A new decade begins with 2010 and it should prove to be an interesting year for our Section. Our Section and the "Big Bar" are working to remedy the issues that have arisen from the sweeping overhaul of the power of attorney provisions of the General Obligations Law, and we must confront counseling estate planning clients in a year without a federal estate tax and the prospect of a return to pre-EGTRRA levels in 2011. Although our clients cannot be unhappy with the absence of a federal estate tax, the absence of a federal "unified credit" may wreak havoc on some estate plans depending on how various formula clauses in the will were drafted. In addition, because of the economic downturn, there is a bill pending in the New York State Legislature to cause a trust created by a New York grantor to be taxable in New York even if there is no New York trustee.

To meet these challenges our Section members will continue to contribute their time and intellect to work with the Law Revision Commission and the Legislature to remedy the numerous problems with the power of attorney legislation. Last year, in conjunction with the Law Revision Commission, our Section prepared technical correction legislation that unani-

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mously passed the Assembly in June. However, due to the impasse in the Senate, the Senate companion bill was not acted upon before the Senate adjourned. More work is needed before the statute meets the needs of our clients.

Concerning estate taxes, the Section has created an "ad-hoc" committee, chaired by Laurence Keiser, to work with the New York City Bar's Estate & Gift Taxation and Trusts, Estates & Surrogate's Courts Committees to study (a) whether legislation is needed to amend the EPTL so that language in documents would be construed with reference to the pre-January 1, 2010 Internal Revenue Code, or to allow for fiduciaries or affected beneficiaries to bring construction proceedings to determine the decedent's intent, and (b) New York State tax issues arising out of the federal morass, including but not limited to the availability of a New York QTIP election, the 2010 New York State estate tax exemption ($100,000 or $1,000,000) and the availability of a step-up in basis. Our Tax Committee will also be drafting a report on the proposed New York State Income Tax legislation to tax trusts created by New York grantors where there is no New York trustee. And as I write this message, January is not even over yet!

In a few weeks, members of our Legislation Committee and others will be traveling to Albany to meet with representatives of the State Department of Taxation and Finance to discuss some of these estate and income tax issues and to meet with the chairs of the Senate and Assembly Judiciary Committees to discuss our Affirmative Legislative Proposals. Among the proposals we are considering advocating this year relate to: codifying the rule of *Riggs v. Palmer* prohibiting a slayer from profiting from the crime; modernizing the law relating to commissions for charitable trusts; expanding the kinds of property that are subject to the family exemption under EPTL § 5-3.1; authorizing directed trusteeships; mandating payment of interest on legacies; and limiting the time in which to file a Notice of Right of Election. We will keep you posted as to the results of our efforts.

I would like to take this opportunity to thank everyone involved in making this year's Annual Meeting such a success—Kathy Heider and Lisa Bataille from the NYSBA, Jennifer N. Weidner, our program chair, Linda B. Hirschson, Professor Gerry W. Beyer, Robert M. Freedman, Kathryn Grant Madigan and Ronald J. Weiss, our speakers, and John Eligon, our luncheon speaker. For those of you who were unable to attend, you missed a timely presentation of the problems we are facing in an attempt to advise our estate planning clients in this year of uncertainty, a panel discussion concerning the problems with (and proposed solutions to) the recent power of attorney legislation, a talk on how we can best provide for our four-legged and other friends (*i.e.*, pets) after we are gone, and an insider's view of the goings on at the Astor trial by a reporter from *The New York Times*.

If you are interested in exactly what it is that the Executive Committee does aside from planning programs, the State Bar web-site contains links to recent meeting minutes and agendas at: http://www.nysba.org/AM/Template.cfm?Section=-Executive_Committee_Information. Our committees do interesting and important work, and for those of you who have not yet had the opportunity to participate, you are indeed missing out. If you are interested in joining a committee, please e-mail me at gfreidman@gss-law.com. We have created two new committees: New Members and Diversity. Both are charged with the task of broadening our membership among new attorneys (whether they are new to the field or newly admitted) and minority practitioners. If you look at the membership of our Section, it is, to say the least, older and rather non-diverse. The creation of these two new committees, ably co-chaired by Michelle Schwartz and Lauren Goodman (New Lawyers) and Anne Bederka and Lori Anne Douglass (Diversity), will allow our Membership Committee, co-chaired by Tom Collura and Stephen Hand, to focus on "enhancing the membership experience." Among the projects they are pursuing are the creation of an on-line jobs bank; the hosting of regional networking receptions, promoting Section activities and promoting the benefits available to Section and NYSBA members.

Last, but certainly not least—SAVE THE DATE for our Trusts and Estates Law Section Spring Meeting in Chicago—May 13 to 16, 2010. The program, entitled "Maintaining Rational Relations: Advising the Family, the Fiduciary and the Drafter," is being skillfully co-chaired by our former Chair, Colleen Carew and Anne Bederka. They have lined up many interesting speakers for the program and several Surrogates to participate in two breakfast panel discussions. Please peruse the brochure which appears elsewhere in this *Newsletter*. I look forward to seeing all (well, at least many) of you in Chicago.

Gary B. Freidman

Editor's Message

The editorial board and the Section leadership has expanded the scope of the *Trusts and Estates Law Section Newsletter*. In this issue and in future issues, in addition to the excellent articles and columns, we are publishing alerts on pending legislation, outlines and transcripts from continuing legal education or other presentations, letters to the editor and opinion pieces, agenda and submissions from the various committees of the Section, CLE program updates and excerpts from articles related to trusts and estates issues in other publications.

As in the past, I encourage you to submit an article discussing a case, matter or issue in which you are or have been recently involved. And now, the editorial board invites you to voice your opinion on pending legislation or existing laws, regulations and practices, and to otherwise get involved in the Section. Perhaps your ideas will be the springboard for an improvement in the way we practice, the laws of the state and the lives of the people in our community.

See you in Chicago!

Ian W. MacLean, Editor in Chief

The Astor Trial Revisited

Editor's Note: The following is the speech John Eligon, a reporter with The New York Times, *delivered at the TELS Luncheon at the Annual Meeting of the New York State Bar Association in New York City in January.*

When Ira [Bloom] asked me to speak about the Astor trial I was actually a bit daunted. It's difficult to know where to start—the legal issues; the interesting aristocratic tales; the colorful personalities; the lawyerly drama. They all made for an interesting experience.

Now I know that this convention really tackles legal issues in a technical head-on way. So I will try to avoid talking to you like some law student trying to impress his professors. Instead, I hope to just share some of the journalistic observations I made over the 20-plus weeks that I sat on a hard courtroom bench hearing the testimony unfold.

First, a brief overview of the case is in order.

When Vincent Astor died in 1969, his widow Brooke Russell Astor took over the famous family fortune, worth tens of millions of dollars. Mrs. Astor used that wealth to rule over New York society and philanthropy with a white-gloved aplomb. She donated to the New York charities and institutions she loved with a personality like no other—an eclectic mix of irreverent humor, charm, flirtatiousness, benevolence and candor. She lived a remarkably long life, dying in 2007 at the age of 105.

In the 1990s Mrs. Astor began showing symptoms of Alzheimer's disease. As the disease worsened, her son, Anthony Marshall, took more and more control of her financial affairs. Mr. Marshall had already served as her financial manager for years. But prosecutors said that Mr. Marshall took advantage of his role.

One of the major issues was a codicil that Mrs. Astor executed to her will on Jan. 12, 2004. It gave Mr. Marshall outright control of Mrs. Astor's residuary estate, worth roughly $60 million. Prosecutors said that Mr. Marshall, along with his friend, Francis Morrissey, who is a lawyer, took advantage of a demented Mrs. Astor to trick her into signing the codicil.

Another major issue was how Mr. Marshall used the powers of attorney his mother gave him. The first was signed in 2000, the second in 2004. Prosecutors alleged that Mr. Marshall improperly spent his mother's money to pay his own expenses. The most serious charge was that Mr. Marshall gave himself a retroactive pay raise of about $1 million in 2005. That, prosecutors said, was first-degree grand larceny—an offense with a minimum 1-year prison sentence. The defense contended that he was acting within his rights as Mrs. Astor's agent. The power of attorney would end up being the match that burned Mr. Marshall. But I'll get to that later.

In the end Mr. Marshall and Mr. Morrissey were convicted of scheming to defraud Mrs. Astor. Mr. Marshall was also convicted of grand larceny, while the jury also found Mr. Morrissey guilty of forging Mrs. Astor's signature on a third codicil to her will. Both men were sentenced to 1 to 3 years in prison, but they remain free pending appeal.

Now, truth be told, when I first got the assignment, I was not exactly jumping out of my socks. This wasn't exactly my kind of world. I'm the kind of guy who prefers covering gritty street crimes over the lifestyles of the rich and famous. And trusts and estates…eeeh? I mean, the language in your field was completely foreign to me.

A codicil? Sounded like some sort of cough medicine. Estate planning? Don't think I'm QUITE there in life yet.

But after reading up on the case, I quickly realized this was more than an obscure trusts and estates scuffle. And as I got more and more acquainted with the players over the weeks, I saw all sorts of compelling storylines unfolding.

When you peel back all the legalese and high society of the Astor trial, what do you get?

The answer: Human beings in all their human fallibility.

This, my friends, was nothing more than a story of family dysfunction. Something you hear from the Upper East Side to Harlem to Albany. Something you find in battles over estates worth $80 million or $8,000. There were tensions between mother and son; between mother and daughter-in-law. There was a father feeling betrayed by his only sons.

I found myself not only covering the drama, but somehow being stuck uncomfortably in the middle of it. I quickly realized that, writing for *The New York Times*, everyone wanted to be my friend, everyone felt it important that I understand their side in depth. This made for some interesting conversations in the hallway and in the courtroom during breaks.

As some of you may have read in an essay I wrote following the trial, my first conversation with Mr. Marshall was something of indoctrination into the world of high society. The entire time we spoke, all I could think was, "What's up with the British accent?" I didn't think that New Yorkers talked like that. Come to find out, his accent was typical of old-world New York aristocrats.

Mr. Marshall remained fairly quiet and earnest throughout the trial—even as some witnesses testified how much his mother was disappointed in him or during testimony that he was greedy.

Perhaps the only vivid emotion Mr. Marshall showed was when his twin sons—his only children—testified against him. One of those sons, Philip, practically started this drama when he filed a guardianship petition in 2006 accusing his father of mistreating Mrs. Astor. In the courtroom, Mr. Marshall clearly avoided eye contact with his sons. During a break that day, Mr. Marshall quickly hobbled out of the courtroom, sat on a bench in the hallway and wept.

Mr. Morrissey was soft-spoken and ueber-charming. He loved talking about European literature or any of a number of obscure scholars. He often brought up his father, seemingly oblivious to the highly publicized controversy surrounding his father's attempt to become a federal judge. He dabbled every now and then in self-deprecating humor. One day, several reporters surrounded him for an explanation on something that had just happened in court. He referred us to his lawyer. One of the reporters told him, "but you can tell us, you're a good lawyer." Mr. Morrissey responded, "If I was, I wouldn't be here." He chuckled and walked off.

I truly enjoyed my chats with Mr. Morrissey. Still, being the cynical journalist that I am, I knew to keep him at an arm's distance. He did, after all, have the reputation of charming his way to the hearts of elderly clients. His law license was even suspended once for improperly taking money from a client.

But in this drama there was hardly a more interesting character than Mr. Marshall's wife, Charlene Marshall.

In court, she was portrayed as the classic Lady Macbeth. Although she was not charged with a crime, prosecutors dubbed her the driving force behind her husband's alleged theft. Many of the changes that Mr. Marshall had his mother make to her estate benefited Mrs. Marshall. By all accounts, it seemed as though Mrs. Marshall was driving the ship. Mrs. Marshall's emotions alternated between crying, laughing and scowling as witnesses offered unflattering testimony about her. Many witnesses spoke about Mrs. Astor's disdain for her. Mrs. Astor was said to have talked about Mrs. Marshall's weight and to have called her a bitch.

Now, the first time I met Mrs. Marshall, she looked at me, smiled and whispered, "Nice hair." She never failed to express her pleasure when I wrote something favorable toward her husband. But she was also quick to pout when my stories were less flattering. In some ways, she came off as her husband's spokeswoman. "I love my husband," she boldly declared after he was convicted. She always seemed to act buddy-buddy with everyone she met. She once unexpectedly ran her fingers through my hair. YES, IT WAS AWKWARD. But I guess that's the price I pay to get the story. I always wondered what fueled Mrs. Marshall's attitude toward me. Did she truly believe that my coverage was fair and that she could trust in me? Or was she simply attempting to curry good PR?

As many of you know, there has been hot debate over whether this case even belonged in criminal court. It's not my place to say. But one interesting thing that I noticed was that throughout much of the trial, during these hallway chats, the defendants and Mr. Marshall seemed extremely loose. It was as if they did not grasp what was on the line. But one day when Mrs. Marshall was crying for an unspecified reason, one person leaned over to me and said, "Maybe she's finally realizing that this is a criminal trial."

These were hardly the only intriguing characters in this drama. The lawyers trying the case provided their own interesting subplots. Even in our adversarial justice system, I am used to seeing the lawyers on both sides be cordial with one another. Not so in this case.

The lawyers spoke over each other, threw personal jabs and exchanged sharp glares. After one pretrial hearing, a prosecutor and a defense lawyer almost got into a physical altercation over accusations that the prosecutor was pandering to the press. And one of my stories caused a bit of a tiff outside the courtroom. A prosecutor was complaining about what I wrote. One of the defense lawyers overheard us. He came over and chimed in his two cents. Next thing I knew, they were barking at each other.

Now the one battle of lawyers that was especially important to the case was between Henry Christensen III and G. Warren Whitaker. Both men are prominent lawyers in your field. They were not charged with crimes, but prosecutors accused both of failing in their professional responsibilities to Mrs. Astor.

By the early 2000s, Mr. Christensen had been Mrs. Astor's lawyer for more than a decade. But prosecutors said that as Mrs. Astor became more dependent on Mr. Marshall, Mr. Christensen grew ambivalent. He was sometimes looking after Mr. Marshall's best

interests rather than Mrs. Astor's, prosecutors said. On the witness stand, Mr. Christensen plainly denied the accusations.

According to the prosecution's theory, Mr. Marshall and Mr. Morrissey eventually fired Mr. Christensen after he would not concede to certain changes to Mrs. Astor's estate plan. They replaced Mr. Christensen with Mr. Whitaker, who drafted and oversaw the execution of the Jan. 2004 codicil. Mr. Whitaker said that Mrs. Astor was competent when she signed the document. But prosecutors said that Mr. Whitaker acted improperly because the first time he ever met or spoke to Mrs. Astor was when he brought the codicil for her to sign. But Whitaker's testimony fit the defense contention that even though Mrs. Astor suffered from Alzheimer's disease, she executed the codicil during a moment of lucidity.

As an aside, I must say that one of the most shocking revelations to me at this trial was how out of it someone could be and still legally execute a will. It surprises me that a person could not know who he is or where he lives on Monday morning, execute a will at lunchtime, and then go back to not recognizing his own reflection Monday night—and yet, under our laws, that will could still stand up in court.

But…Anyway…The roles that Mr. Whitaker and Mr. Christensen played in Mrs. Astor's estate planning offer interesting and serious questions for T&E lawyers to consider. Where do you draw the line in terms of representing different generations of the same family? What are you doing to make sure that you truly know your client's wishes?

But for me as a journalist, there was a more compelling angle to the Whitaker-Christensen story: That being, their scholarly war of words. This was the subject of my favorite blog item during the trial. Both men used their time on the witness stand to take shots at each other. The bad blood began boiling back in 2004 after Mr. Christensen called Mr. Whitaker a—if there are any kids in here, cover your ears—"second-rate lawyer."

This, apparently, is a no-no in the legal profession.

But Mr. Whitaker seemed to get some revenge on the witness stand. He criticized several things that Mr. Christensen did as Mrs. Astor's lawyer. They included using the term "First and Final Codicil," and leaving himself artwork in a will he drafted for Mrs. Astor.

But in the end, the jury would have the final say on these two men, even if they weren't convicted of any crimes. One of the jurors, Lawrence Kaagan, told me: "Do I think that all the lawyers in this case acted honorably and strictly in the unvarnished interest of the client they should have been serving? No, I think a lot of people were distracted by a lot of money and conflicting loyalties."

Mr. Kaagan's statement was more indicative of a larger impression that I got from jurors—that they evaluated the case not only with a thicket of legal instructions, but with their own common sense.

This really was the only way to reconcile the powers of attorney issues in the case. One was executed in 2000, the other in 2004. In these documents, we saw a Rorschach test. The defense said that the powers of attorney gave Mr. Marshall the right to spend his mother's money the way he did. Notably, it allowed him to give himself the retroactive raise of about $1 million. Prosecutors, however, pointed to the same document and said it was proof that Mr. Marshall was acting improperly.

At issue was an explanation of Mr. Marshall's gift-giving authority in the 2004 power of attorney. It read:

> *"In deciding about gifts, my attorney shall take into account my past practices and the situation at the time, including, without limitation, tax considerations, the size of my estate, my health, and any wishes I may have expressed from time to time."*

Here it was in plain language, the defense argued. In the past, Mrs. Astor had paid for various expenses for Mr. Marshall. That included giving him $4 million in 1999 to purchase an apartment, defense lawyers said. The defense also argued that increasing Mr. Marshall's salary provided Mrs. Astor with a tax deduction and decreased her estate taxes.

The prosecutors had a different take on this sentence in the power of attorney. For one, they said that the most Mrs. Astor had spent on gifts in a single year between 1977 and 1997 was just over half a million dollars. But her gift total for 2003, when Mr. Marshall held her power of attorney, was nearly $9 million. How is that consistent with past practices, prosecutors asked. In addition, the prosecution noted that some of the gifts benefited Charlene. Mrs. Astor despised Charlene and would not have wanted to shower her with money, prosecutors said.

The powers of attorney played a central role in the jury's deliberations. On October 6, the 10th day of deliberations, jurors asked the judge for further clarification on the obligations of the agent beyond acting honestly and in good faith. Up to that point, the only instruction the judge had given them regarding the power of attorney was that "the Attorney-in-Fact or Agent has a duty to act honestly and in good faith within the boundaries of authority set out by the Principal in her Durable General Power of Attorney." In the judge's further explanation, one word stuck out, a juror told me.

The agent had the "duty to act with the utmost good faith toward the principal, using MORALITY, fidelity and fair dealing."

MORALITY…MORALITY.

That was the word, according to one juror, that turned the tide against Mr. Marshall. For all the talk about this section and that subsection of the power of attorney, for all the examination of the tax implications of this transaction or that transaction, for all the questions about what Brooke Astor had done in the past… what more human a principle for the case to come down to than morality?

The Irish author Oscar Wilde said, "Morality, like art, means drawing a line someplace."

The Merriam-Webster dictionary defines morality as "conformity to ideals of RIGHT human conduct."

By that definition it would seem that the jurors asked themselves a simple question: Did Anthony Marshall do the RIGHT thing?

Whether the jury reached the correct verdict is not for me to decide.

But what is important is to examine how they reached their decision: In convicting Mr. Marshall of the most devastating charge he faced, they threw jargon to the curb and embraced their own sense of right and wrong. Yes, it is important to play by the rules, to follow the extensive statutes in our legal system, to decide cases on merits and the law, rather than feelings or inklings. Societal norms should not trump the letter of the law. But the Astor jury is a reminder that many cases—be they criminal or civil—are decided by ordinary human beings who defer to their own life experiences. This, I believe, is especially poignant in the field of trusts and estates law because so many of the issues have no bright lines.

Was Mrs. Astor competent when she signed her wills, her codicils or her powers of attorney? Did Anthony Marshall truly believe that he was doing the right thing when he gave himself a raise or tapped her fortune to pay other expenses?

No legal definition can answer these questions.

One juror's column that appeared in The Daily Beast explained the jury's approach. This juror, Philip Bump, wrote that he initially voted for an acquittal on the pay increase.

"But then another juror spoke his mind," Mr. Bump wrote. The yacht that Mr. Marshall bought with the money he took from the raise was just another example "of Tony going to the Brooke Astor ATM, and it stunk," Mr. Bump wrote. "Right about then," Mr. Bump continued, "something in my brain snapped."

"You know what?" he thought to himself, "an employee who steals is not entitled to a raise. Is not entitled to a job. Should Tony Marshall never again get a raise? Not one that, after an average salary hike of about 15% a year, suddenly leaps to 300%. Not in 2005, when his mother, once the doyenne of Park Avenue, could by nearly all accounts no longer even remember his name."

After the verdict, I called many experts in the field—some of you are in this room—to find out what the takeaway from this trial was. The answers varied.

Some suggested that trying estate matters in criminal court would serve as a warning to unscrupulous attorneys or family members. Others said it would simply serve as a reminder to T&E lawyers to take extra precautions to ensure that their clients are competent. And one person said that the trial showed that the best safeguard for the elderly was an honest lawyer. Interestingly enough, the last juror to vote guilty on the pay raise count was a lawyer.

Some might wonder whether the additional safeguards implemented by New York's new power of attorney statute could have prevented what happened in the Astor case. I will leave that debate for sophisticated trusts and estates lawyers like yourselves.

But it seems that for the 12 ordinary people who resolved the Astor case, the answer was not in riders, signatures or legal wording. So often in our society, we blindly accept that a signature beneath a bunch of legal text is infallible. But the jury in this case would not settle for that. They explored the deeper narrative and deferred to something we're all born with, something that law schools don't hand out: common sense.

The Transfer-on-Death Account Registration: There's More to It Than You Think

By Jennifer N. Weidner

Beneficiary designations can be the bane of estate planners, as the designations can unwittingly dismantle an otherwise well-crafted estate plan. While the estate planning attorney drafts a client's Will and is likely to supervise its proper execution, lapses by the client in following through on recommended beneficiary designations are fairly common. Estate planning attorneys, therefore, routinely work with clients to ensure that the beneficiary designations on the clients' retirement accounts and insurance policies are correctly articulated to ensure that the clients' overall dispositive wishes are accomplished considering both probate and non-probate assets.

Increasingly, clients are naming specific beneficiaries on their bank and brokerage accounts holding non-qualified assets, which can have a dramatic effect on a client's comprehensive estate plan. These beneficiary designations, called "Transfer-On-Death Security Registrations," are governed by Article 13, Part 4 of the Estates, Powers and Trusts Law ("EPTL") with respect to decedents dying on or after January 1, 2006.

Transfer-On-Death accounts, referred to hereinafter as "TOD accounts," are merely bank or investment accounts which name a beneficiary to receive the account assets upon the account owner's death. By virtue of the beneficiary designation, the assets are non-probate and pass directly to the named beneficiary upon the account owner's death, rather than passing through the deceased account owner's estate.

The owner of an account with a TOD designation remains the sole owner of the assets during his or her lifetime. EPTL § 13-4.6 provides that the transfer on death designation is fully revocable by the account owner, and does not create any rights in the named beneficiary prior to the account owner's death. The control and ownership of the account is, therefore, unaffected by the TOD designation during the account owner's lifetime. The TOD designation may be amended or revoked by methods prescribed in the TOD account agreement.

The TOD designation is an evolution from earlier forms of creating non-probate assets, such as joint bank accounts or Totten Trusts. The former created an interest in the donee upon creation, and the latter required that revocation had to be made by Will or by acknowledged written instrument. Essentially, prior methods of establishing non-probate assets involved some degree of hampering of the owner's control.

The registration format is simple: EPTL § 13-4.5 provides that the registration "may be shown by the words 'transfer on death' or the abbreviation 'TOD,' or by the words 'pay on death' or the abbreviation 'POD,' after the name of the registered owner and before the name of the beneficiary." EPTL § 13-4.10 provides for methods of naming substituted or successor beneficiaries, and for determining succession of the interest of a deceased beneficiary. By way of example, an account owner can add "LDPS" after a beneficiary's name to indicate that if the beneficiary predeceases the account owner, the beneficiary's interest passes to his or her lineal descendants per stirpes.

Named beneficiaries of TOD accounts may disclaim or renounce their interest in the account. TOD accounts are considered testamentary substitutes which are factored into the calculation of the spousal statutory right of election against a decedent's estate under EPTL § 5-1.1-A.

With such a simple method of converting property which would otherwise flow through an estate into non-probate property, what's not to like about the Transfer-On-Death registration? For estate planning attorneys, there are several concerns to consider.

While a client may be attracted to the simplicity of the designation to convert a probate asset to a non-probate asset, there are several pitfalls which should discussed with the client. The discussion should be incorporated into the client's estate planning consultation as a routine matter, to educate the client about how TOD account registration can affect his or her estate plan.

TOD accounts are governed by the terms of the bank or advisory firm's TOD account agreement. The terms of the TOD account agreement can and often do vary from provisions of the EPTL, which operates as a default statute in the absence of an agreement to the contrary. Consider the following: EPTL § 5-1.4 provides that TOD beneficiary designations are nullified if the account owner and his named beneficiary divorce. However, several financial advisory firms' TOD account agreements provide that divorce does not automatically revoke the TOD designation. Since the EPTL is only a default statute, the terms of the TOD account

agreement prevail, and the account owners under that particular TOD account agreement must understand that if he or she divorces the named beneficiary, he or she must take action to revoke the designation. Without revocation, the ex-spouse will receive the funds at the account owner's death.

TOD accounts can unintentionally alter estate plans. A client's Will may provide for the funding of a trust, such as a marital trust or a supplemental needs trust, and the client may not have added up the numbers to ensure that, in light of the TOD designation, ample probate assets remain to pass through the estate to adequately fund the trust.

Another pitfall results if the TOD account agreement terms provide for a different result with respect to a deceased beneficiary's share. Many estate plans provide that if a named beneficiary predeceases the testator or grantor, the share of the deceased beneficiary passes to the deceased beneficiary's descendants. Several TOD account agreements provide that if any named beneficiary predeceases the account owner, the account assets are divided *among the surviving beneficiaries*. This can produce the (perhaps unintended) result of disinheriting a deceased child's children.

There are other important matters to discuss beyond the potential alteration of the account owner's estate plan. As TOD accounts are non-probate assets, they are not subject to the statutory creditor rights period of the account owner's estate. Therefore, if the TOD account assets are paid out to the named beneficiary and the account owner's estate has insufficient assets to meet the claims of creditors, the creditors may have an action against the assets received (and possibly already dissipated) by the named beneficiary.

Similarly, if there are insufficient probate assets to meet estate tax obligations, or if the tax apportionment clause in the account owner's Will apportions the tax, estate tax will be apportioned against assets such as the TOD accounts. Prior to distributing TOD account assets to the named beneficiary, the prudent TOD account agent (the financial advisor on the TOD account, for example) should obtain assurance from the account owner's Executor that no estate tax or creditors' claims will be required to be paid from the TOD account.

Lastly, since EPTL § 13-4.6(b) provides that a TOD registration "can be revoked or amended by an express direction in the owner's Will which specifically refers to such registration," the TOD account agent may be well advised to contact the fiduciary of the estate of a deceased account owner to ensure that the deceased account owner did not amend or revoke the designation by the terms of his or her Will. One can easily foresee problems created by an agent's distribution of TOD account assets to the beneficiary named on the account without realizing that the account owner had subsequently designated a different beneficiary of the TOD account in his Will.

Financial advisors of TOD accounts should advise their clients to review the TOD designations and account agreements with their estate planning attorneys. If a client indicates to his or her advisor that a divorce is recent or imminent, the advisor should review TOD account designations with the client. And, upon the death of a TOD account owner and prior to distributing the assets to the designated beneficiary, advisors should consult with the deceased client's Executor to ensure that no taxes or creditors' claims will need to be paid from the TOD account assets and that the client did not change the beneficiary by his or her Will.

Estate planning attorneys should keep these matters in mind and include them in estate planning consultations with clients. TOD accounts should be added to an attorney's estate planning asset questionnaire, if one is used. Attorneys should advise clients to read a TOD account agreement carefully, and perhaps review such agreements with the attorney to ensure that the terms won't result in an unintended disposition of assets at the client's death. Estate attorneys should ascertain as soon as possible whether any TOD accounts were owned by the decedent, and, if so, they may wish to advise the institutions holding the TOD account assets not to distribute the assets without consulting with the attorney or Executor.

Jennifer N. Weidner is an estates and trusts attorney with Harter Secrest and Emery, LLP in Rochester, New York. Ms. Weidner specializes in transfer tax planning and estate and trust administration and litigation. Her practice ranges from basic estate and health care directive planning to sophisticated planning techniques for high net worth clients. She is also the Chair of the Committee on Continuing Legal Education for the Trusts and Estates Law Section.

IRS Attacks FLP and FLLC Creation As Indirect Gifts

By Laurence Keiser, J.D., LL.M. (TAX), CPA

The Internal Revenue Service has been attacking the availability of discounts on gift tax valuation on the formation of family limited partnerships and family limited liability companies. Its primary issue has been whether the transfer is a gift of the entity or an indirect gift of property. A gift of an interest in an entity might attract a discount for lack of control and lack of marketability. An indirect gift will not.[1]

Recently, a Tax Court majority (with 5 dissents) rejected an IRS attack on the transfer of an interest in a previously single member LLC. The Court held that a transfer of a membership interest in a single member LLC is a transfer of an interest in the entity, and not a transfer of an interest in its underlying assets. Therefore, a discount was allowed for purposes of the gift tax.[2]

Let us first explore some background.

Gift of an Interest or Indirect Gift

In *Shepherd v. Commissioner*,[3] a father created a partnership in which he owned 50% and his two sons owned 25% each. He then signed a deed to transfer to the partnership some real estate, but the deed wasn't recorded for almost a month. Ten days after recording the land deed, father transferred to the partnership some stock in 3 bank corporations. IRS contended (and the Tax Court agreed) that these were not the transfer of partnership interests but rather indirect gifts of the property to the 2 sons. The sons were partners in the partnership before the property went in.

Might not the Court have followed the doctrine of substance over form? The substance of the described transactions is that after the dust settled, the donor-sons owned interests in partnerships which interests were restricted by state partnership law and the partnership agreement itself. That is the substance of the transaction. Is the order of the steps really relevant or has the IRS and the Court exalted the form of the transaction over its substance?

Unfortunately for taxpayers, *Shepherd* was affirmed by the Eleventh Circuit.[4] Strong dissents in *Shepherd* (Tax Court and 11th Circuit) would have allowed the discounts under the doctrine of substance over form.

Shepherd was followed in *Senda v. Commissioner*.[5] The facts in *Senda* were even worse than the facts in *Shepherd*. Mr. Senda formed the partnership on April 1, 1998 with a trust for his children (created the same day) owning 90% of the partnership and several months later transferred property (28,500 shares of Worldcom stock which ultimately became worthless). The Tax Court had no trouble at all calling this an indirect gift. *Senda* was affirmed by the Ninth Circuit.[6]

More recently in *Heckerman v. U.S.*[7], the theory of *Shepherd* and *Senda* was followed in a case where it seemed everything happened the same day and the donor could not actually prove the order of the steps. The taxpayer could not prove that he didn't both transfer the property and give the interests in the entity simultaneously. The Court called this an indirect gift, but also applied the step transaction doctrine. The Court held all the steps could be collapsed into an indirect gift.

Is application of the step transaction doctrine fair? Historically applied only in a corporate transaction context, the courts use several tests to determine whether the step-transaction doctrine should be applied. (1) Are the transactions pre-arranged parts of a single transaction intended to reach an ultimate result? (2) Are the steps so interdependent that it would not make sense to do one, if you didn't do the others? (3) At the time the first step is entered into, is there a binding legal commitment to undertake the other steps?[8]

The step transaction doctrine was developed in a series of well known cases. For example, the U.S. Supreme Court, in *Gregory v. Helvering*[9] and in *Court Holding Co.*[10] held that the form of the transaction would only be respected if, in substance, that is what occurred. Said another way, the doctrine holds that where a specific result is to be achieved, the tax law can disregard separated, independent steps taken to achieve that result. It has more often been applied when the taxpayer seeks to avoid a taxable result by breaking the transaction into 2 or more steps, each of which might otherwise be non-taxable.

Where the funding of the partnership or LLC and the transfer of interests to donees are close in time, the IRS has argued that the step-transaction doctrine should be applied. Its position is that taxpayer only created the entity in order to make gifts.

In the case of *Holman v. Commissioner*,[11] IRS again argued that the step transaction doctrine should be applied. But the Court rejected its application because the steps took place 6 days apart, the formation of the LLC could have stood on its own as an independent transaction, and there was a real economic risk of a change in value of the property (Dell Corporation stock) between the dates of the two transfers. The Court distinguished

Shepherd and *Senda* because of the passage of the six days.

LLC Legislation and Tax Regulations.

LLC legislation developed in the U.S. slowly, state by state. (Indeed, New York was the 47th State to adopt LLC legislation). New York, like other states before it, allowed the creation of sole member LLCs. IRS reviewed the income tax consequences of LLCs in different states, and issued several revenue rulings, all concluding that LLCs with two or more members would be treated as partnerships for income tax purposes. It did not rule at all as to single member entities.

At the same time, IRS was looking to revise its so-called *Kintner* regulations. These regulations offered guidance on how an entity should be treated for income tax purposes. The regulations listed common characteristics of a corporation and stated that if an entity had more corporate than non-corporate characteristics, it would be treated as a corporation. (IRS used these regulations to attack pass-through of losses from limited partnerships back in the late 1970s during "tax-shelter mania." It argued that limited partnerships were really associations, taxable as corporations.)

Courts noted that the many cases and revenue rulings and revenue procedures made the *Kintner* regulations "unnecessarily cumbersome to administer."[12]

The new regs on this issue, adopted in 1996, effective January 1, 1997, sought to eliminate the confusion by creating an election. When an entity was created, the owner could elect how it would be taxed. These are referred to as the "check the box" regulations. Characterization of the entity now is by an election.

So you can create a sole member LLC and you can elect to have it treated as a corporation (by filing IRS Form 8632). If no election is made, the LLC is treated as a "disregarded entity" because the regs say a sole member LLC is treated as a disregarded entity for Federal tax purposes.

Consistent with the regulations, IRS ruled in Rev. Rul. 99-5 that when the one owner of a single member LLC sold 50% of the interest to an unrelated purchaser, the sale would be treated as the sale of a 50% interest in each underlying asset of the LLC. Thereafter, the 2 owners would be deemed to have contributed their 50% interests in the assets to a new partnership. (This is largely a distinction without a substantial difference.)

The regulation says this characterization is for Federal *tax* purposes, not Federal *income tax* purposes (although it is difficult to contemplate that IRS had any other purpose in mind at the time of promulgation). Nevertheless, the IRS has jumped on this language to argue that a transfer of interests in a sole member LLC by gift is a transfer of interests in the underlying assets.

The *Pierre* Decision[13]

The taxpayer-donor was given a $10 million gift by a friend. She wanted to share the benefit with her son and granddaughter. In July 2000, she created a New York LLC and did not elect to treat it as a corporation (under the check-the-box regulations). She contributed to the LLC cash and publicly traded securities in exchange for 100% of the interest in the LLC.

On September 27, 2000, she gave a 9.5% membership interest to 2 trusts, one for her son and one for her granddaughter and then sold the rest of her interests to the trusts for secured installment notes. The gifts were discounted by 30%. (The purchase price for the sale also reflected a 30% discount.)

NY law recognizes an LLC (however owned) as an entity separate from its owner.[14] Its members have no interest in the specific property of the LLC. This is in conflict with the IRS regulation which treats a one owner LLC as an disregarded entity "for Federal tax purposes." But it is well settled in tax law that gift taxation is based on the state property laws.[15]

IRS argued that because the single member LLC is a disregarded entity, Mrs. Pierre gave away proportionate interests in the underlying property and was not entitled to the 30% discount. It argued that the check-the-box regulations were promulgated to give the choice of tax entity to the owner and override years of litigation over how an entity is to be treated; once elected, the taxpayer was stuck with all the consequences of that status.

The Tax Court, however, opined that how a single-member LLC in treated for tax purposes does not control how a gift is characterized under the Federal gift tax provisions. The IRS regulation cannot override Federal gift tax treatment. For Federal gift tax purposes, you must look to what was given away. New York State law says the gift was a gift of an entity and that is what controls. "A fundamental premise of transfer taxation is that State law creates property rights and interests, and Federal tax law then defines the tax treatment of those property rights," said the Tax Court, citing *Morgan v. Commissioner*.[16] Thus, Mrs. Pierre gave away LLC membership interests and not the underlying assets.

There were 5 dissents, essentially arguing that the IRS regulation should be upheld and given deference. They cited other areas of the tax law (e.g., payroll taxes and like-kind exchange principles) where the sole member LLC is disregarded. According to the dissent, the IRS regulation is not expressly limited to income taxes and should be applied in a transfer tax consequence.

Avoiding *Pierre*

The *Pierre* case is likely to be appealed to the Second Circuit Court of Appeals. It should be noted

that the Second Circuit has previously held that a sole owner of an LLC is directly liable for the unpaid payroll taxes of the LLC.[17] Even if reversed, if the IRS wishes to ignore the substance of the transaction and just focus on the form, it should be easy for a donor to avoid the *Pierre* result (just as it should be easy to avoid *Shepherd* and *Senda*). Just be sure that there are at least 2 members in the LLC *prior* to any major gift transfers.

For example, create the LLC by having someone other than the primary owner contribute 1% of the total consideration in exchange for a 1% interest. It is then not a one owner LLC at the time of a major gift. If the LLC has already been formed as a single member LLC, the owner can first make a transfer of 1% taking into consideration that this transfer might not be subject to discounts. It would then be best to let significant time pass between creation of the LLC and the transfers of the interests. The *Holman* case held that 6 days was enough, but obviously the longer the period, the stronger the case.

Conclusion

Unless limited by legislation, creation of a family partnership or LLC continues to be a legitimate estate planning tool and will continue to be the subject of IRS scrutiny. Precision and respect for the rules will be rewarded. Sloppiness in creation will be punished.

Endnotes

1. See IRC Treas. Reg. § 25.2511-1(h)(1) (holding that a transfer of property to a corporation generally represents an indirect gift to the other shareholders).
2. *Pierre v. Commissioner*, 133 T.C. __ No. 2.
3. 115 T.C 376 (2001).
4. 283 F. 3d 1258 (2002).
5. T.C. Memo 2004-160.
6. 433 F 3d 1044 (2006).
7. W.D. Wash. # July 27, 2009.
8. *Security Industrial Insurance Company v. U.S.*, 702 F.2d 1234 (5th Cir. 1983) (*e.g.*, corporate acquisition context).
9. 293 U.S. 465 (1935).
10. 324 U.S. 331 (1945).
11. 130 T.C. __ No. 12 (2008).
12. *Dover Corp. & Subs. v. Commissioner*, 122 T.C. 324 (2004).
13. *Pierre v. Commissioner*, 133 T.C. __ No. 2.
14. N.Y. Limited Liability Company Law § 203(d).
15. *Aquilino v. U.S.*, 363 U.S. 509 (1960).
16. 309 U.S. 78 (1940).
17. *McNamee v. Dep't of Treasury*, 488 F 3d 100 (2nd Cir. 2007).

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Mom, Dad, Grandma, Can You Please Lend Me Some Money?: The Unintended Consequences

By Anthony J. Enea

Since the Fall of 2008 I am confident that the above titled question has been posed to many parents and grandparents. The severe economic recession and its staggering unemployment have placed many on the precipice of financial disaster. Parents and grandparents who had already seen their investment portfolios decimated have in many cases been asked by their families to help support them until they can get back on their feet. Recently, a longtime client advised me that it was necessary that her estate plan be modified as a result of the hundreds of thousands of dollars she had lent to her son to help keep his business afloat. Sadly, his business did not survive, and he had recently informed her that he would not be able to repay her. Thus, she determined it was neither appropriate nor fair to include him as part of her estate plan.

The most important questions that need to be posed are:

(1) whether the client who has transferred money to his or her family member(s) or friends has done so in the form of a loan or a gift; and (2) whether or not said loan or gift has been adequately and appropriately documented. I suspect that in many cases parents and grandparents have been giving to their families without properly documenting the form of the transaction and its terms, especially in the case of loans. Unfortunately, it is the unintended consequences of these intra-family transactions that has prompted me to write this article.

If the parent or grandparent is making a gift of monies or assets to his or her family members, he or she needs to remember that, if the amount of said gift is in excess of the personal exclusion amount of Thirteen Thousand ($13,000) Dollars per person for the year 2009 ($26,000 if the gift is being made by a couple), a gift tax return(s) must be filed by April 15th of the year following the year the gift was made.[1] If a taxable gift is made in 2009, the gift tax return is due by April 15, 2010. Additionally, they should be made aware that gifts in excess of the personal exclusion amount will reduce their individual One Million ($1,000,000) Dollar lifetime gift tax credit and their individual federal estate tax credit ($3.5 million dollars for the year 2009).

For many parents and grandparents the reduction of their federal gift and estate tax credits is of little or no consequence; for some, depending on the amount gifted and the size of their taxable estates, gifting beyond the exclusion amount could have a significant impact. This impact could be greater due to the present uncertainty of the amount of the federal estate tax credit in 2010 and beyond. Additionally, the New York Estate Tax Credit of One Million ($1,000,000) Dollars per person has remained unchanged, placing an additional tax wrinkle on estates greater than One Million ($1,000,000) Dollars.

Another unintended consequence resulting from the parent(s) and / or grandparent(s) gifting of assets is that for purposes of Medicaid Nursing Home eligibility the transfer would be considered an "uncompensated transfer" of assets, which if made within the applicable five (5) year look back period may result in a period of ineligibility for nursing home Medicaid.[2] (Even when only one spouse makes the gift the transfer of asset rules would apply to both and may create a period of ineligibility for the non-donor spouse). Unless a promissory note or some other document evidencing that the transfer was a loan was contemporaneously executed, Medicaid will take the position that the transfer was an "uncompensated transfer" creating a period of ineligibility for nursing home Medicaid. Thus, the onus would then fall upon the parent and / or grandparent to establish to Medicaid that the transfer (gift) was not made for Medicaid planning purposes. Assuming the "transfer" results in a denial, the donor would have to show at a fair hearing that the transfer was made exclusively for a purpose other than to qualify for Medicaid.[3] This would be a complexity arising from the gift that the parent and / or grandparent would not be aware of until he or she needed nursing home Medicaid within five years from the date of the gift.

The gifting of assets also creates complexities for those parents and grandparents who have more than one child or grandchild. If one child or grandchild has been the beneficiary of a large gift, the question often becomes what can be done to equalize the amount gifted to or for the benefit of other children and grandchildren. Obviously, the gifting of an equivalent amount is the first option but is not necessarily the best option, depending on the finances and lifestyle of the parent or grandparent. The next alternative would be for the parent or grandparent to modify his or her estate plan (wills / trusts) to give to his or her other children or grandchildren an amount equal to that received by the recipient of the gift. Again, this is often not something usually addressed at the time of the gift, and, if addressed at all, it often occurs years after the gift was made.

If the amount transferred by the parent or grandparent is truly a loan and not a gift, it is most important that a promissory note, mortgage, or some other writing evidencing the loan and its terms be executed. The promissory note and mortgage (if the debt is to be secured against real property) or equivalent loan document needs to carefully address repayment terms and interest rate being applied. If there is a security interest such as a UCC-1 or a mortgage, the instrument should be properly recorded to provide further indicia of legitimacy. An additional consequence of a loan made by a parent or grandparent that is often not properly addressed at the time the loan is made are the rules regarding imputed interest on Intra Family Loans and Notes delineated in § 7872 of the IRC.[4]

From an estate tax perspective, it is important to remember that, upon the death of the person making the loan, the principal balance due and accrued interest on the promissory note or loan will be an asset includible in his or her estate for estate tax purposes.[5] Additionally, the balance due to the estate on the loaned amount may be a probate asset against which Medicaid may have a lien or claim.

It is perhaps the Medicaid eligibility consequences of the making of a promissory note, loan or mortgage that are most often overlooked. As a result of the enactment of the DRA which became effective on February 8, 2006, any promissory note, loan or mortgage will be treated as an "uncompensated transfer" (gift) of assets which creates the five year look back period and period of ineligibility for the Medicaid nursing home program unless:[6]

(a) the repayment term is actuarially sound;

(b) payments are made in equal amounts during the term of the loan, with no deferral of payments and no balloon payments being permitted;

(c) prohibits cancellation of the balance upon the death of the applicant / recipient; and

(d) must be non-assignable.

As can be seen from the above, the promissory note that would need to be prepared to avoid the unintended consequence of the loan being considered a gift for Medicaid nursing home eligibility purposes is not your standard promissory note form.

To paraphrase what a wise person once stated, "no good deed goes unpunished." That may very well be the case if parents and grandparents don't fully review and understand the consequences of their decisions to make gifts or loans to their loved ones and friends.

Endnotes

1. Internal Revenue Code ("IRC") Title 26, Subtitle B, Chapter 12, Subchapter A § 26 (B)(12)(A)(2503).
2. Deficit Reduction Act of 2005 (DRA), Public Law 109-17 (2006), Section 6011(A).
3. 96 ADM-11.
4. IRC § 7872.
5. IRC §§ 2031 and 2033 generally.
6. DRA § 6016(c); 42 U.S.C. 1396p (c)(1)(I).

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Florida Homestead: The Submerged Alligator Lying in Wait

By Amy B. Beller and Yoshimi O. Smith

Amy B. Beller

New York trust and estate practitioners who draft documents for Florida domiciliary clients must beware of the potential traps in drafting for disposition of Florida homestead property and administering Florida estates. Florida homestead law has created a wealth of confusion, litigation and, to be frank, major heartburn for Florida lawyers who deal with homestead issues on a regular basis. Trying to properly draft provisions for devise of homestead, and administration of Florida estates with homestead issues, without the requisite expertise, is kind of like wading in alligator-infested waters: some people do it, but why would you want to?

This article provides an overview of the basic principles concerning Florida homestead property that are most relevant to a trusts and estates practitioner. Be cautioned: an entire treatise could be devoted to these issues, which in some respects are completely counter-intuitive and extremely complex. In addition, Florida law regarding homestead is a moving target and continues to evolve—without a conscious effort to keep up to date, it is easy for one's knowledge of homestead law to become stale.

Introduction

The concept of "homestead" under Florida law is established in the Florida Constitution and Florida statutes. It encompasses three distinct principles. First, Florida homestead law restricts the permissible devise and descent of homestead property when the decedent is survived by a spouse or minor child. Second, Florida law provides broad protection of homestead property from creditors' claims. Last, there are property tax benefits which apply to homestead property. All three principles must be considered in connection with a Florida estate plan.

1. What is—and is not—Homestead

Article X, § 4(a), of the Florida Constitution establishes homestead as (i) 160 acres of contiguous land and improvements if located outside a municipality, or one-half an acre of contiguous land if located within a municipality, limited to the residence of the owner and his or her family, and (ii) personal property of up to $1,000. Section 4(b) provides: "These exemptions shall inure to the surviving spouse or heirs of the owner."

Yoshimi O. Smith

In order to qualify for homestead protections, the homestead owner must be a Florida domiciliary and, to obtain the property tax cap, a homestead exemption application must be filed. Non-domiciliaries, including snowbirds and other part-timers, are not entitled to Florida homestead protections.

Property owned as tenants by the entirety by a married couple can be the homestead of both spouses for the purposes of lifetime creditor protections and property tax benefits, but not for purposes of restrictions on devise and other purposes under the Florida Probate Code including for elective share purposes. (This is a huge exclusion, as is discussed below.) In addition, while a condominium may be homestead property, a cooperative apartment is not, at least for purposes of the restrictions on devise.[1]

Finally, although the question was unsettled for some time, it is now reasonably clear that homestead may be owned by a revocable trust without waiving the creditor protections for homestead.[2]

2. Restrictions on Devise of Homestead

Article X, § 4(c), of the Florida Constitution provides: "The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except that homestead may be devised to the owner's spouse if there be no minor child."

Florida Statutes § 732.4015 provides:

> (1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.
>
> (2) For the purposes of subsection (1), the term:

> (a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the grantor's death as if the interest held in trust was owned by the grantor.
>
> (b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor trust, would be the grantor's homestead.

Florida Statutes § 732.401 provides:

> (1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendents, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendents in being at the time of the decedent's death per stirpes.

In the simplest terms, if a decedent is survived by a spouse and no minor children, the decedent's homestead property may not be devised to anyone other than the spouse. If there is an attempted devise of anything other than a fee simple interest to the surviving spouse—including a devise in trust, a devise which contains restrictions, conditions or limitations, or a devise of a life estate to the spouse—then the devise is invalid under Florida law, and the homestead property passes to the spouse outright if the decedent has no issue, or if there are issue, then passes in a life estate to spouse, remainder to issue.[3]

If the decedent is survived by one or more minor children, the decedent's homestead is not subject to devise at all. If there is a surviving spouse and a minor child, the spouse gets a life estate, remainder to child. If there is no spouse, the minor child inherits the homestead property outright. An attempted devise of the property to the trustee of a trust for the benefit of the minor child, even if for that child's exclusive benefit, is invalid.[4]

However, as mentioned above, for purposes of restrictions on devise at death and other after-death issues, "protected homestead" as defined in the Florida Probate Code (Florida Statute § 731.201(32)) specifically excludes real property held as tenants by the entirety. Therefore, if the decedent is married and owns real property as tenants by the entirety with his spouse, the property is *not* homestead for purposes of devise and passes to the spouse by operation of law, irrespective of the existence of minor children.

Consider this example: John is married to Jane. John has three adult children by a prior marriage. Their marital residence is titled in John's name alone and meets the definition of "homestead" property. John dies, devising the residence to his three children. Unless Jane has waived her homestead rights pursuant to a valid prenuptial or postnuptial agreement, the devise fails—Jane has a life estate in the homestead property, vested remainder in the adult children.

What if John devised the property to a credit shelter trust, with Jane as the life beneficiary, remainder to John's children? That attempted devise also fails, because it is less than a fee simple interest to Jane. The only way that John can validly devise his homestead in this example is outright to Jane—any other devise is invalid.

And what if John's children are minors? Then no matter how John attempts to devise the homestead property, it will pass by operation of law, with a life estate to Jane, remainder to his minor children as tenants in common. When minors are involved, a guardian of the property will be necessary to protect their interests in the property.

However, if John and Jane own the residence as tenants by the entirety, then even if John has minor children, the residence passes to Jane by operation of law. It is ironic that the only way to completely disinherit minor children in Florida is to remarry.

Also ironic is the perhaps unintended result under Florida's elective share statute. For elective share purposes, the decedent's fractional share of property owned as tenants by the entirety is included in determining the elective share (30%), even though such property will obviously pass to the surviving spouse, with the offsetting fractional interest received by the surviving spouse reducing the elective share. Thus, the elective estate will include 15% (30% of a 50% interest) of the value of the residence, offset by 50% of the value of the residence which is deducted as property passing to the spouse. However, property owned by the decedent alone is "homestead" property, exempt from calculating the elective share and the spouse's rights in such property are in addition to homestead. Florida Statutes §§ 732.2045(1)(i); 732.2105. Thus, the spouse's life estate in such homestead property (or her fee simple interest if the decedent has no issue) is above and beyond that spouse's elective share.

Take this example: A marital residence worth $600,000 is owned by John and Jane as tenants by the entirety. John has an additional $400,000 in assets which would be includible in determining the elective share. Jane's elective share amount would be 30% of $300,000 (John's 50% interest in the residence) plus 30% of $400,000 (additional assets), totaling $210,000. However, Jane is receiving John's 50% interest in the residence valued at $300,000 which passes to her by operation of law. Therefore, Jane's elective share amount of $210,000 is fully satisfied by receipt of the 50% interest in the residence. If the residence were owned by John alone, Jane would receive $120,000 (30% of $400,000) plus either a life estate in the $600,000 home or, if John had no issue, the entire $600,000 home outright. Thus, if the intent is to minimize a surviving spouse's interests at death, it may be better for the estate planning client to own a marital residence as tenants by the entirety with the spouse than in his name alone.

It is worth noting, however, that the homestead provisions, which were apparently designed to protect spouses, often place the surviving spouse in a difficult if not impossible situation. The spouse, as a life tenant, is responsible for payment of property taxes, mortgage interest and costs of maintaining the property. Under present Florida law, life estate and remainder interests in real property are not subject to partition. As a result, spouses are often saddled with life tenancies in property they cannot afford to maintain, and if the remainder beneficiaries are not cooperative in buying the spouse's interest or agreeing to sell to a third party, the spouse's only option is to walk away.[5]

Two additional points:

(1) Homestead protections may indeed be waived by a spouse during his or her lifetime, for example in a valid prenuptial or postnuptial agreement.[6]

(2) If the owner of homestead property is married and wants to sell or transfer homestead property during the owner's lifetime, the spouse must also sign the deed even though that spouse has no ownership interest.[7]

3. Protection from Creditors

Article 10, § 4, of the Florida Constitution provides that homestead property "shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty…." Homestead property, and the proceeds of sale thereof, cannot be used to pay for estate administration expenses including expenses of the decedent's last illness, funeral expenses, and, importantly, fiduciary and attorneys' fees.

For creditor protection purposes, where the decedent is not survived by a spouse or minor child but is survived by lineal descendants, homestead protections will inure to those heirs.[8] Moreover, homestead not specifically devised will pass to the residuary devisees who were the decedent's heirs and not the general devisees, unless there is a specific direction in the Will that the homestead be sold.[9]

If the decedent's Will directs that the homestead property be sold and the proceeds distributed to any devisees, even to a spouse or minor child, the homestead will not be protected from creditors' claims.[10] Thus, in *Cutler v. Cutler*,[11] the appellate court, en banc, held that the decedent waived the creditor protections afforded homestead where the decedent's Will directed that payment of all expenses should reduce the gifts equally under an article pursuant to which her homestead was devised. However, if the Will does not direct the sale of homestead, the proceeds of sale of homestead property sold after the decedent's death may remain exempt from creditors' claims.[12]

The Florida procedure for dealing with homestead property during estate administration is as follows: the personal representative (executor) will file a petition for determination of homestead, which will include allegations establishing that the residence was in fact the decedent's homestead property. This petition must be served on all interested parties, including creditors of the estate.[13] Some judges will not grant the petition until the creditors' period has expired—in other words, the Florida statutory period during which creditors may file claims against an estate. In the absence of a challenge, the personal representative will obtain an order determining homestead, which will then establish that the homestead property (or proceeds of sale after the decedent's death) is immune from creditors' claims and expenses of administration.

Notwithstanding that the personal representative will seek to have the property determined to be protected homestead, the personal representative generally has no right to take possession of homestead property, and it is not subject to the estate administration process.[14] Pursuant to a statutory change in 2002, the personal representative is authorized, but not required, to take possession of homestead property only if necessary to protect or preserve the homestead property.[15]

The takeaway lesson here is this: unless there is a specific reason for waiving homestead protections, the estate planner must be careful that the devise of homestead is to a spouse or lineal descendant of the testator, and that the instrument does not direct sale of the homestead or provide that the proceeds of sale of

homestead may be used to pay debts, taxes, or expenses of administration. Once at the estate administration phase, the personal representative's counsel must take the necessary steps to determine homestead and must avoid any actions that could subject the proceeds of sale of homestead to creditors' claims.

4. Property Tax Exemption and Cap on Increase

Effective in 1995, the Florida "Save Our Homes" legislation (also called Amendment 10) created a $25,000 homestead exemption from property taxes and imposed a 3% cap on annual property tax increases. Amendment One, effective January 1, 2008, increased the homestead exemption for most properties to $50,000, and now allows for "portability" or transfer of up to $500,000 of the actual assessment cap to a new property.[16] There are additional property tax benefits for homestead for veterans and people over age 65.

In addition to the loss of creditor protection, the property tax benefits of homestead can be lost if title to the property is changed to an irrevocable trust or to the owner's adult children. The loss of such property tax benefits can be significant, particularly if the property is valuable.

The website for the Florida county's property appraiser can be a helpful tool in determining whether property has homestead status for purposes of property taxes, as well as how such property is titled. For example, the property appraiser's website for Palm Beach County is: www.pbcgov.com/papa/index.htm. Using that website, one can search for a property using either the owner's name or the property address.

Conclusion

Without comment on the repercussions of unauthorized practice of law, a New York trusts and estates attorney should proceed carefully in handling estate planning and administration for Florida domiciliaries because of the many issues that can surface from below the visible waterline like an alligator lying in wait for its prey. If after reading this article, you are still inclined to tackle Florida homestead issues as a non-Florida practitioner, then you may want to consider a consultation with Florida counsel. It may be that we're no more qualified to fight off the gator, but as a result of our many lakeside walks we may be able to spot him before he strikes.

Endnotes

1. *Estate of Wartels*, 357 So. 2d 708 (Fla. 1978); *but see Southern Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566 (Fla. 5th DCA 2002) (co-op constitutes homestead property for purposes of exemption from forced sale by creditors).
2. *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006).
3. *Estate of Finch*, 401 So. 2d 13081309 (Fla. 1981) (attempted devise of life estate to spouse was invalid because it was less than a devise of a fee simple interest); *Cleeves v. Cleeves*, 509 So. 2d 1256, 1258 (Fla. 2d DCA 1987) (decedent's attempt to devise one-half interest in homestead to surviving spouse was invalid); 12 Fla. Practice, Estate Planning § 19:28 (2009-2010 ed.) ("The devise to a surviving spouse, if no minor child exists, must be in fee simple….").
4. *But see HCA Gulf Coast Hosp. v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992) (decedent's homestead property was not subject to creditors' claims where devised to a spendthrift trust for the sole benefit of her daughter). Moreover, there may be some methods for avoiding these results using sophisticated techniques as has been suggested by renowned Florida attorney Bruce Stone, but Mr. Stone has observed that these strategies remain untested.
5. *See* Baskies, Jeffrey A., *The New Homestead Trap: Surviving Spouses are Trapped by Life Estates They No Longer Want or Can Afford*, 81 Fla. Bar J. 69 (June 2007). The Real Property, Probate and Trust Law Committee of the Florida Bar is working on a legislative solution to this problem.
6. Florida Statutes § 732.702(1); *City Nat'l Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991); *Wadsworth v. First Union Nat'l Bank*, 564 So. 2d 634 (Fla. 5th DCA 1990); *but see Jacobs v. Jacobs*, 633 So. 2d 30 (Fla. 5th DCA 1994) (holding attempted waiver by spouse after death of homestead owner is not effective).
7. *Nordman v. McCormick*, 715 So. 2d 310 (Fla. 5th DCA 1998) (attempted conveyance by deed of homestead to spouse without spouse's joinder in deed was ineffective); *Clemons v. Thornton*, 993 So. 2d 1054, 1056 (Fla. 1st DCA 2008) (attempt to convey remainder interest in homestead in deed without joinder of spouse was void).
8. *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997) (homestead exemptions inure to any devisee falling within the class of "heirs" as defined by Florida Statutes § 732.103.).
9. *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2006).
10. *Knadle v. Estate of Knadle*, 686 So. 2d 631 (Fla. 1st DCA 1997); *Estate of Price v. West Florida Hosp.*, 513 So. 2d 767 (Fla. 1st DCA 1987).
11. 994 So. 2d 341 (Fla. 3d DCA 2008).
12. *In re Estate of Hamel*, 821 So. 2d 1276 (Fla. 2d DCA 2002).
13. Florida Probate Rule 5.405 (Proceedings to Determine Protected Homestead Real Property).
14. *Spitzer v. Branning*, 184 So. 770 (Fla. 1938).
15. Florida Statute § 733.608(2); Florida Probate Rule 5.404.
16. Florida Statutes §§ 193.155, 193.1554, 193.1555 and 193.1556.

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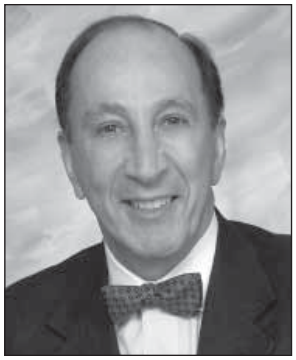
Revoking a Waiver and Consent Is Not As Easy As You Think

By Gary E. Bashian and Michael Candela



Gary E. Bashian

American author Alfred A. Montapert once said that "nobody ever did, or ever will, escape the consequences of his choices."[1] That statement holds true in the field of trusts and estates, in particular when it comes to the execution of a waiver and consent in a probate proceeding. As this article will show, a party to a probate proceeding must exercise care in signing such a document, as it carries with it powerful consequences that cannot be easily undone.

Probate Process: Overview

In its simplest terms, the probate of a will is the process whereby the Surrogate's Court approves the will of a decedent and accepts the document as the decedent's instructions as to how his or her probate estate assets are to be distributed. In order for the court's decision to be binding on all parties, the court must have jurisdiction over all the "necessary parties" to enforce the judgment against each party.[2] The necessary parties to a probate proceeding are described in Surrogate's Court Procedure Act ("SCPA") § 1403. They include those individuals and entities named as beneficiaries in the will and all individuals who would inherent in intestacy if there were no will.[3] Personal jurisdiction over these necessary parties is obtained by their submission to the jurisdiction of the court or by the due issuance and service of process upon them.[4]

By executing a Waiver of Issuance and Service of Process and Consent to Probate, a necessary party submits to the jurisdiction of the court and agrees to the probate of the decedent's will. If a necessary party chooses to sign a waiver and consent, the party must sign the document in the presence of a notary public and return it to the nominated fiduciary for filing with the Surrogate's Court. Execution and filing of the waiver and consent with the Surrogate's Court confirms the jurisdiction of the court over the necessary party.[5]

If a necessary party chooses not to sign the waiver, then the nominated fiduciary's attorney will prepare a Citation and have it signed by the Chief Clerk of the Surrogate's Court.[6] The Citation is then served in accordance with the applicable service rules upon all necessary parties named within it who have not previously submitted to the jurisdiction of the Surrogate's Court.[7] The petitioner will then file proof of service of the Citation with the Surrogate's Court to confirm that the court has obtained jurisdiction over all the necessary parties.[8] Upon receipt of the Citation, the cited parties have the option of either appearing or not appearing in court. By choosing not to appear, they waive their right to challenge the probate of the decedent's will.

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Once all necessary parties have been cited and served with a Citation or signed a waiver and consent that has been filed with the Surrogate's Court, the proofs of jurisdiction over all necessary parties are complete.

Procedure for Revoking a Waiver and Consent

A party seeking to revoke a waiver and consent must make a direct application to the Surrogate by way of an order to show cause[9] or by motion[10] made on notice to all other parties.[11] The burden of proof lies on the party attempting to revoke a waiver.[12] The standard of proof is clear and convincing evidence,[13] which is a difficult standard to meet.

Standards for Withdrawing a Waiver and Consent

Generally, courts do not take lightly to the withdrawal of waivers and consents as "such actions disrupt the orderly process of administration and create a continuous aura of uncertainty."[14] A waiver and consent is binding upon the party who has executed it and can be withdrawn only under certain circumstances.

Courts have established different tests for withdrawal of a waiver and consent before issuance of a probate decree or after issuance of a probate decree, making the latter more difficult to achieve as it requires the vacatur of the probate decree in addition to the withdrawal of the waiver.[15] In both situations, the party seeking to set aside a waiver must show that the waiver was obtained by *fraud* or *overreaching*, was the

product of *misrepresentation* or *misconduct*, or that *newly discovered evidence*, *clerical error* or *other sufficient cause* justifies revocation.[16] If a probate decree has not yet been entered in the proceeding, then such a showing may be sufficient as long as there is no prejudice to the opposing party.[17] In contrast, where a party seeks to set aside a waiver after the entry of a probate decree, the party must also demonstrate a substantial basis for contesting the will and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original probate proceeding.[18]

Grounds for Revocation Denied

When reviewing the facts of a case to see if a party has provided clear and convincing evidence of fraud or other sufficient causes as set forth in the case law, the courts will not only look at the evidence regarding the underlying case but will also scrutinize the educational level and general experience of the individual seeking to revoke a waiver, particularly in cases where the petitioner claims not to have understood the significance of a waiver and consent. In *In re Estate of Titus*,[19] the petitioner sought to revoke a waiver and consent that she had submitted on the grounds that she signed the document without understanding its significance. The court denied her petition, noting that she was a certified public accountant with a master's degree in business administration. Similarly, in the case of *In re Martin's Estate*,[20] the court denied the petitioner's application to revoke a waiver, stating that "[t]he petitioner was a woman of mature years, education and culture."[21] This was also the result in *In re Coccia*,[22] where a court denied a party's attempt to withdraw his previously submitted waiver and consent by finding his "allegations that he did not appreciate or understand the significance of a waiver and consent" to be "unsubstantiated and conclusory."[23]

Courts have also denied applications to vacate waivers based on the issue of notice. In the *Titus*[24] case, the court pointed out that the petitioner was provided a copy of the decedent's will and therefore was deemed to have understood what she was signing.[25] Similarly, in *In re Helmers' Estate*,[26] the court denied the petitioner's application to revoke a waiver and consent, stating that the petitioner possessed a copy of the decedent's will and was "fully aware of the effect of such waiver."[27] Also, in the case *In the In re Durchin*,[28] the petitioner's application was denied since she received "both actual and statutory notice" of objections filed and did not take any formal action until after a decree admitting the will to probate was entered.

As *Durchin* demonstrates, if a necessary party executes and files a waiver and consent with the Surrogate's Court and then seeks to have it revoked, it is best if they attempt to revoke the waiver sooner rather than later, preferably before entry of a probate decree. In *In re Miller*,[29] the petitioner waited nine (9) months before filing an application to revoke his waiver and consent, and the application was denied. This can be contrasted with the holding in *Estate of Bochicchio*,[30] where the court allowed the withdrawal of a waiver when it was requested a few days after the waiver and consent was filed with the court.[31]

Even though neither the nominated fiduciary nor his or her attorney is under an obligation to advise the necessary party of the nature and effect of the waiver and consent,[32] necessary parties are deemed to have read and understood the contents and consequences of signing a waiver and consent. This can best be illustrated in *In re Anderson's Will*,[33] where the court deemed a necessary party "chargeable with knowledge of the contents and the legal effect of such waiver [and consent] whether or not he availed himself of the advice of counsel at the time of the execution thereof."[34]

Therefore, to ensure that an individual makes the correct choice in choosing whether or not to sign a waiver and consent, an individual should consult with an attorney upon receipt of such a document. Of course, consultation with an attorney can itself be grounds for a court to deny an application to withdraw a waiver and consent, as the court will most likely find that the individual understood the consequences of his or her actions.[35]

Circumstances Where Withdrawal is Allowed

There are situations where the courts will allow a necessary party to withdraw a waiver and consent.

Courts will sometimes allow the withdrawal of a waiver and consent where evidence is brought to the court's attention that may alter the outcome of the probate proceeding.[36] In *Estate of Culley*,[37] for example, the decedent's distributees raised factual issues surrounding the decedent's testamentary capacity when he executed the codicil submitted for probate. They alleged, among other things, that at the time they signed their waivers and consents, they were unaware the decedent had been residing in a nursing home operated by a religious group that was named as a substantial legatee in the codicil. The court also noted that the distributees had no attorney when they executed the waivers and that the nominated fiduciary incorrectly advised one of them that her waiver could be withdrawn at any time. Similarly, in the *Estate of Galas*,[38] the Court allowed the petitioners to withdraw waivers and consents upon a showing that the proponent of the will, also the drafting attorney, misled them into signing the waivers. Also, in the *Estate of Carini*,[39] evidence that came to light after the necessary party signed the waiver and consent was grounds for withdrawal of the waiver and consent.

Courts have also permitted the withdrawal of a waiver and consent in the interest of justice and in situations where a withdrawal would not prejudice any of the parties or where a will contest was inevitable because other objections to probate had already been filed. In these circumstances, the court will grant the withdrawal of a previously submitted and fully executed waiver and consent.[40]

The courts have also shown that in addition to allowing withdrawal based on the merits of the underlying case, they will honor an agreement made between the nominated executor and the party seeking to withdraw the waiver and consent, as was done in both the *Estate of Scienze*[41] and *Estate of John Sanchez*.[42] Similarly, if the parties enter into a stipulation of settlement, courts will honor the settlement as well.[43]

Conclusion

As the foregoing illustrates, the execution of a waiver and consent is extremely important and should not be taken lightly, as it may not be able to be withdrawn once submitted. Necessary parties asked to sign such a document should consult with independent counsel.

Endnotes

1. Alfred A. Montapert, Inspirational Quotes on Success, Aug. 2009.
2. *See In re Putignano*, 82 Misc. 2d 389 (Sur. Kings Co. 1975).
3. *See* N.Y. Surrogate's Court Procedure Act § 1403 (SPCA). Other persons who are necessary parties under § 1403 include the nominated executor; any person designated in the will as beneficiary, executor, trustee or guardian, whose rights or interests are adversely affected by a codicil or other subsequent instrument offered for probate; any person designated as beneficiary, executor, trustee or guardian in any other will of the decedent filed in the surrogate's court of the county in which the propounded will is filed whose rights or interests are adversely affected by the propounded will; any person whose rights or interests are adversely affected by the exercise of a power of appointment if the propounded will expressly refers to an instrument which created the power of appointment and purports to exercise the power of appointment; the testator in any case where the petition alleges that the testator is believed to be dead; the state tax commission in the case of a non-domiciliary testator; the fiduciary of a necessary party who has died or, if none has been appointed, his distributees, nominated fiduciaries or named legatees or devisees under any will filed in the court.
4. *See* SCPA § 203.
5. SCPA §§ 203, 401.
6. *See* SCPA §§ 203, 306(1)(b).
7. *See* SCPA §§ 212, 307.
8. *See* SCPA § 203.
9. *See In re Miller's Will*, 162 Misc. 563 (Sur. Ct. New York Co. 1937); *In re Sturges' Will*, 24 Misc.2d 14 (Sur. Ct. New York Co. 1960); *Estate of Thomas A. Knutson, Jr.*, 7/7/95 N.Y.L.J. 36 (col. 1); *Estate of Elizabeth V. Clare*, 4/1/99 N.Y.L.J. 35 (col. 2); *Estate of Robert Frankel*, 12/27/2000 N.Y.L.J. 28 (col. 5).
10. *See In re Bursch's Will*, 285 A.D. 1072 (2d Dep't 1955), *In re Orlowski*, 281 A.D.2d 422 (2d Dept., 2001).
11. *See In re Martin's Estate*, 14 Misc.2d 266 (Sur. Ct. New York Co. 1944).
12. *See In re Anderson's Will*, 22 Misc.2d 662, 663 (Sur. Ct. Suffolk Co. 1960).
13. *See id.*
14. *See Estate of Stern*, 7/20/94 N.Y.L.J. 26 (col. 3).
15. *See In re Frutiger*, 29 N.Y.2d 143 (1971).
16. *See id.*; *In re Estate of Titus*, 39 A.D.3d 1203 (4th Dep't 2007); *In re Hinderson*, 4 Misc.2d 559 (Sur. Ct. New York Co. 1956); *In re Westberg*, 254 A.D. 320 (1st Dep't 1938).
17. *See Estate of Culley*, 2/14/96 N.Y.L.J. 37 (col. 3).
18. *See In re American Comm. For Weizmann Inst. Of Science v. Dunn*, 10 N.Y.3d 82 (2008), *Estate of Elson*, 94 Misc.2d 983 (Sur. Ct. New York Co. 1978).
19. 39 A.D.3d 1203 (4th Dep't 2007).
20. In re *Martin's Estate*, 14 Misc.2d 266.
21. *Id.* at 267.
22. 59 A.D.3d 716 (2d Dep't 2009).
23. *Id.*
24. 39 A.D.3d 1203 (4th Dep't 2007).
25. *See id.*
26. 64 N.Y.S.2d 724 (Sur. Ct. Westchester Co. 1946).
27. *Id.* at 725.
28. 217 A.D.2d 582 (2d Dep't 1995).
29. *In re Miller*, 220 A.D.2d 591 (2d Dep't 1995).
30. 6/26/2003 N.Y.L.J. 24 (col. 2).
31. *See id.*
32. *See Anderson's Will*, 22 Misc. 2d 662, 663; *see also In re Bissell*, 58 Misc.2d 246 (Sur. Ct. Erie Co. 1968).
33. 22 Misc. 2d 662, 663 (Sur. Ct. Suffolk Co. 1960).
34. *See Anderson's Will*, 22 Misc. 2d at 663 *citing In re Stone's Estate*, 272 N.Y. 121 (1936); *In re Habermehl's Will*, 19 Misc.2d 1087 (Sur. Ct. Erie Co. 1959); *In re White's Will*, 16 Misc.2d 22 (Sur. Ct. Cattaraugus Co. 1959); *In re Pearson's Will*, 19 Misc. 2d 833 (Sur. Ct. Westchester Co. 1959); *In re Freundlich's Estate*, 58 N.Y.S.2d 679 (Sur. Ct. New York Co. 1946).
35. *See Bissell*, 58 Misc.2d 246.
36. *See In re American Comm. For Weizmann Inst. Of Science v. Dunn*, 10 N.Y.3d 82 (2008); *Estate of Elson*, 94 Misc.2d 983 (Sur. Ct. New York Co. 1978).
37. 2/14/96 N.Y.L.J. 31 (col. 3).
38. 2/4/2000 N.Y.L.J. 37 (col. 4).
39. 7/23/96 N.Y.L.J. 23 (col. 6).
40. *See In re Carrion*, 1/25/89 N.Y.L.J., 26 (col. 3); *Estate of Hertz*, 12/4/92 N.Y.L.J. 25, (col.2); *Estate of Engelberg*, 10/1/91 N.Y.L.J. 25, (col. 6); *Matters of Stupel*, 1/3/96 N.Y.L.J. 28, (col. 6).
41. 12/6/2006 N.Y.L.J. 30 (col. 2).
42. 7/16/2001 N.Y.L.J. 24 (col. 3).
43. *See Estate of Salvesen*, 11/27/2002 N.Y.L.J. 21 (col. 3).

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Scenes from the Trusts and Estates Law Section

ANNUAL MEETING

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Top Ten Things to Consider Regarding the Estate, Gift and GST Taxes (an Outline on Estate Tax Legislative Developments or Lack Thereof)[1]

By Linda B. Hirschson

10. The state of the current estate tax is in quite a state.

A. By operation of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA, referred to herein as the "2001 Act"), the federal estate tax (the "FET") and the generation-skipping transfer tax (the "GST Tax") were repealed but just for 2010. Accordingly, barring legislation by Congress that is made retroactive to January 1, 2010 (and such retroactivity is upheld by the courts):

1) No FET will be levied on the estates of decedents dying in 2010;

2) No generation-skipping transfer tax (the "GST Tax") will be levied on direct skips, taxable distributions or taxable terminations occurring in 2010;

3) Any completed gift (or a deemed completed gift pursuant to IRC § 2511(c)) is taxable, subject to a $1 million exemption and a maximum rate of 35%.

4) Assets inherited from a 2010 decedent will have a modified carryover basis IRC § 1022.

B. For 2011 and thereafter, barring legislation that changes the applicable exclusion amount and the rate schedule:

1) The maximum estate tax rate will be 55% (with a 5% surtax for estates between $10 million and $17,184,000 million) and there will be a $1 million exemption.

2) For generation-skipping transfers, the exemption will be $1 million, indexed for inflation (in 2011, as indexed the exemption should be $1,340,000) and the tax rate will be 55%.

3) The maximum rate on taxable gifts will be 55% (with the 5% surtax) but the exemption will remain at $1 million.

C. The basis of assets inherited from a decedent dying in 2011 or thereafter will be stepped up (or stepped down) to equal the FET value.

D. The credit for state death taxes under IRC § 2011 will be available in full.

9. If Congress passes estate tax legislation in 2010, it may or may not make such legislation retroactive to January 1, 2010 and such retroactivity may or may not be upheld by the courts (up to and including the Supreme Court).

A. Based on past history, it is not at all clear that the House of Representatives and the Senate will pass legislation this year and if so, what form such legislation will take.

1) For example, Congress could provide for a permanent reinstatement of the 2009 law or instead just a 2 year temporary reinstatement.

2) In the alternative, Congress could provide for a permanent reinstatement of the FET and the GST tax but with a higher exemption ($5 million? Indexed for inflation?). It could include portability of the unified credit and / or it could effect the reunification of the FET and the federal gift tax (the "FGT").

3) Congress could make the legislation retroactive or not.

B. If legislation is passed retroactive to 1 / 1 / 2010, will such legislation be upheld? (See ALI-ABA-Outline, pp. 11-13.)

1) This raises the question of whether retroactivity violates the Due Process Clause of the Constitution or if instead reinstatement of the FET and the GST tax is a "rational means of furthering a legitimate legislative purpose."

2) *Cf. United States v. Carlton*, 572 U.S. 26 (1994) with *Bodgett v. Holden*, 275 U.S. 142 (1927) *et al*, which evidence a partial reliance on the distinction between modifications to an existing regime and the imposition of a wholly new tax.

3) Query how long Congress can take to enact legislation and still make it retroactive. In *Carlton*, the retroactive legislation was enacted 14 months after the legislation it affected.

4) In all likelihood, the estates of some decedent's dying in 2010 will challenge retroactivity, thus prolonging the current uncertainty until, presumably, the Supreme Court rules on the matter.

8. A formula marital clause may no longer accomplish what the married couple contemplated.

A. The use of formula language has the benefit of allowing the estate plans of married clients

automatically to adjust the share of the estate payable to family members other than the spouse, without incurring estate tax. It accomplishes this by expressing the amount, for example, in terms of (1) "the maximum amount that can pass without estate tax" or (2) "the amount equal to the estate tax exemption in effect at my death."

1) A formula based on the maximum amount that can pass free of estate tax generally is meant to define the amount that passes to the credit shelter trust. In a year without a FET that amount can be the entire estate. That being the case, the credit shelter trust will receive everything and, assuming the balance was to go to the surviving spouse, the surviving spouse will receive nothing. The same result would occur with respect to a formula funding the marital share with the minimum amount necessary to reduce the decedent's estate to zero.

2) A formula based on an amount equal to the estate tax exemption available at the decedent's death also is meant to define the amount that passes to the credit shelter trust, with the balance going to the marital share. If there is no exemption available in 2010, under this formula the amount passing to the credit shelter trust will be zero and the entire estate will pass to the surviving spouse. That being the case, the decedent's descendants, perhaps from a prior marriage, or other objects of her bounty, will be disinherited.

B. Depending on how a particular will (or testamentary substitute)[2] is drafted, this undesirable situation perhaps can be rectified by way of disclaimers or QTIP elections but it is necessary to review all documents to determine if in fact that is doable. Query whether a surviving spouse will be willing to disclaim, especially in favor of beneficiaries who are not the surviving spouse's descendants, for example.

C. Note that similar issues arise with respect to property passing to charitable trusts pursuant to formula clauses.

7. A qualified terminal interest property ("QTIP") type trust is probably the best form of bequest to a surviving spouse for 2010.

A. Assuming the current suspension of the FET remains the law for 2010, a decedent's entire estate will pass tax free, no matter who receives it and what form the bequest takes.

1) If a surviving spouse receives the bequest outright and dies in 2011 or thereafter, the value of such bequest remaining at his death will be taxable in his estate.

2) Even if the surviving spouse's interest is in a QTIP type trust, no QTIP election need be made in 2010. On the surviving spouse's subsequent death in 2011 or thereafter, the then value of the trust should not be includible in his estate under IRC § 2044, since no QTIP election will have been made.

3) The estate has up to 15 months to determine if a QTIP election is necessary. Unlike a disclaimer, the executor, be it the surviving spouse or another person, should not have a conflict of interest in making that decision unless perhaps a "Clayton" provision accompanies the will provision creating the QTIP trust.

4) Based on *Clayton v. Comm'r*, 976 F2d 1486 (5th Cir. 1992), a will clause that provides for the non-elected portion of a QTIP trust to pass to the credit shelter trust will not disqualify the QTIP. Therefore, such a provision may make sense in documents drafted this year.

B. See below regarding carryover basis and the ability to allocate an additional $3 million in basis to qualified spousal property, which includes a QTIP type trust.

6. It may or may not be worthwhile for donors (or decedents) to make generation-skipping transfers in 2010.

A. Assuming no reinstatement of the GST tax for 2010, it may be the best of years or the worst of years in which to make gifts to grandchildren or more remote issue.

1) Such a transfer will be subject to gift tax and if the GST tax is effectively reinstated for 2010, the combined gift tax and GST tax is likely to be overly burdensome.

2) Section 901(b) of the 2001 Act provides that after 2010, the "Internal Revenue Code [which of course includes the GST Tax]…shall be applied and administered to…transfers…as if the provisions and amendments [made by the 2001 Act] had never been enacted." ALI-ABA Outline, p. 20.

3) It is not clear how the foregoing will impact on GST transfers made in 2010.

4) An outright direct skip to a grandchild may make the most sense although eventually it is likely to be subject to transfer tax upon the disposition by the grandchild by gift or at death.

5) Transfers to direct skip trusts also should be free of the GST tax in 2010. In addition, subsequent distributions from the trust to grandchildren may be GST tax free but distributions to more remote descendants are likely to be deemed taxable distributions or taxable terminations. See the "drop down" rule under IRC § 2653(a). Query whether it apples if there is no GST tax in 2010. Query whether there can be a

"direct skip" in a year in which there in no GST tax.

B. Given the "as if" language in Section 901(b) of the 2001 Act, query whether:

1) the GST exemption can be allocated in 2011 to a trust created in 2010. Note that the automatic allocation rules for transfers to trusts came in with the 2001 Act and therefore will disappear in 2011.

2) an exemption allocation of $2,000,000 in 2008 or $3,500,000 in 2009, for example, will continue to apply. If not, a trust that was thought to have a zero inclusion ratio, in 2011 may be deemed to have an inclusion ratio somewhere between zero and one. In addition, a qualified severance may not be available, since the provision authorizing it also was part of the 2001 Act.

5. An estate still may be liable for the New York (or another decoupled state) estate tax.

A. Section 951(a) of the New York Tax Law provides that "any reference to the internal revenue code means the United States Internal Revenue Code of 1986, with all amendments enacted on or before July twenty-second, nineteen hundred ninety-eight." The section further provides: "Notwithstanding the foregoing, the unified credit against the estate tax provided in section two thousand ten of the internal revenue code shall, for purposes of this article, be the amount allowed by such section under the applicable federal law in effect on the decedent's date of death. Provided, however, the amount of such credit allowable for purposes of this article shall not exceed the amount allowable as if the federal unified credit did not exceed the tax due under section two thousand one of the internal revenue code on a federal taxable estate of one million dollars" (emphasis supplied).

1) Since the federal unified credit in effect with respect to a New York decedent dying in 2010 is zero, one interpretation of the foregoing provision is that the available credit against the New York estate tax in 2010 also is zero. That being the case, the entire taxable estate would be subject to tax.

2) An alternative explanation is that section 951(a) should be read as referencing the FET in effect in 1998, in which case the available unified credit would be deemed to exist but would be capped at $1 million.

B. The New York tax law does not provide for a state only QTIP election. Therefore, if no QTIP election can be made for FET purposes in 2010, the question arises as to whether a QTIP election can be made for New York estate tax purposes. Here, too, if you assume that it is the 1998 version of the FET that applies, under that version the estate would have made a federal QTIP election and therefore should be able make a New York election.

C. The laws of any other applicable decoupled state also need to be considered.

4. In light of the 35% maximum gift tax rate, now may be a good time to make taxable gifts.

A. These gifts can be combined with generation-skipping transfers.

B. If the law is changed retroactively, the donor may be subjected to a 45% rate instead of a 35% rate.

C. IRC section 2511(c) provides:

> "Treatment of Certain Transfers in Trust.—Notwithstanding any other provisions of this section and except as provided in regulations, a transfer in trust shall be treated as a transfer of property by gift, unless the trust is treated as wholly owned by the donor or the donor's spouse under subpart E of part I of subchapter J of chapter 1."

1) Query whether transfers to wholly grantor trusts are not currently subject to the FGT, whether or not otherwise complete, or if instead, the pre-existing rules for determining whether a completed taxable transfer has occurred, continues to apply to such grantor trusts.

2) If such transfers are deemed incomplete, when would they be considered completed transfers and subject to tax?

3. An asset includible in an estate of a decedent dying in 2010 will have a modified carryover basis but not in excess of the fair market value of such asset. IRC § 1022.

A. This rule puts a premium on maintaining, reviewing and collecting basis information, which can be quite difficult for long held and difficult to value property, e.g. closely held business interests, tangibles, real estate.

B. The modifications to the carryover basis consist of an allocation of up to $1,300,000 to appreciated property acquired from the decedent by any beneficiary and of up to an additional $3,000,000 of appreciated property passing to or for the benefit of a surviving spouse, that is, "qualified spousal property." Qualified spousal property is property passing outright to the surviving spouse or in a QTIP type trust, i.e. the spouse must have the right to all of the net income payable annually. It does not include property passing to a trust with respect to which anyone, including the spouse, has a lifetime power of appointment.

C. The allocation is to be made by the executor.

Depending upon who the executor is, this power can result in conflicts of interest.

D. Query whether special provisions should be included in the will to insure that property of sufficient value passes to the surviving spouse to take advantage of the available $3,000,000 adjustment.

2. The 2010 suspension of the FET and the GST tax gives rise to interest planning opportunities, none of which, however, are free from risk.

A. As discussed above, donors can attempt to make GST tax-free gifts.

B. Wills can be revised to effect generation-skipping transfers in contemplation of a testator dying in 2010.

C. In order to minimize the risk associated with transfers in 2010, consider defined value type provisions.

D. Incorporate alternative formula provisions which take into account the possibility that an estate either will or will not be subject to the FET at the time of the decedent's death.

1. Estate Planners should discuss with their clients the impact of this unprecedented state of the estate tax law on their estate plans.

Endnotes

1. Appended to the outline presented at the Annual Meeting of the Section (and referred to herein as the ALI-ABA Outline) was a detailed outline prepared by Ronald D. Aucult, Milford B. Hatcher, Jr., Charles D. Fox IV and Diana S.C. Zeydel entitled "The Impact of Estate Tax Repeal—Going Blindly Where No One Else Has Gone Before," January 13, 2010. © 2010 by McGuire Woods LLP.
2. Hereafter, wills and testamentary substitutes are referred to cumulatively as "wills."

Linda B. Hirschson is a shareholder of Greenberg Traurig, where she focuses her practice on all aspects of estate planning and administration. She is a member of the Board of Regents of the American College of Trusts and Estates Counsel. Linda develops estate plans for high net worth individuals to enable them to dispose of their assets during life and at death in a manner that meets their personal goals as tax efficiently as possible.

Editor's Note: This outline is adapted from the one presented by Linda B. Hirschson at the 2010 Annual Meeting of the New York State Bar Association, Trusts and Estates Law Section on January 27, 2010.

ALERT BY: TRUSTS AND ESTATES LAW SECTION

Trusts and Estates Law Section Forms Ad Hoc Committee on New York State Estate Taxes to Examine Pressing New York Estate and Trust Taxation Issues

As a result of the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), the federal estate and generation-skipping transfer taxes have been repealed for one year and a modified carryover basis regime has been implemented to deny an automatic step-up in the basis of appreciated assets at death. The gift tax remains in place with a $1 million exemption and a 35% maximum rate. Unless Congress acts, the estate, gift and GST tax will be reinstated in 2011 with a 55% rate, a $1 million unified exemption amount for gift and estate tax purposes and a $1 million exemption from GST tax. These changes have significant planning implications for New York residents given that New York has decoupled from the federal estate tax and has a stand-alone Estate Tax which continues to apply. To address EGTRRA's impact on New York residents, the Trusts and Estates Law Section has created an Ad Hoc Committee on NYS Estate Taxes (the Committee), chaired by Laurence Keiser, Chair of the Section's Taxation Committee.

The Committee has identified three main issues relating to the New York estate tax that require immediate attention. These include (1) the Federal estate tax legislation (or rather, the lack thereof) including prospects for retroactive legislation and how to handle carryover basis; (2) New York State issues relating to construction of formula language in existing documents, at least for the year 2010 and (3) the New York State estate tax exemption amount and the availability of a New York State only QTIP election. (As to item 2, it should be noted that a provision of the Governor's Budget Bill, not yet enacted, would confirm that the exclusion remains at $1 million.) The Committee will collaborate with members of the NYSBA Trusts and Estates Law Section and the New York City Bar's Estate and Gift Taxation Committee and Trusts, Estates and Surrogates Court Committee.

In addition, the Committee will also work to address legislation recently introduced in the New York State Assembly that would amend Tax Law Section 605(b)(3)(D) to cause a trust created by a New York grantor to be taxable in New York even if there is no New York trustee (overturning the *Mercantile Safe Deposit & Trust Company v. Murphy* case which held the prior statute to be unconstitutional). The Committee will work in conjunction with members of State and Local Taxation Committee and the Personal Income Taxation Committee of the New York State and City Bars.

Inquiries on this Update may be directed to Larry Keiser at lkeiser@skpllp.com or Debbie Kearns at dkear@albanylaw.edu.

Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

NO CONTEST CLAUSES

Safe Harbor of EPTL 3-3.5 is Not Exclusive

Decedent's will and revocable trust contained two no contest clauses, one general, the other addressed expressly to decedent's son. All the clauses conditioned forfeiture on challenging the will or trust in court. In addition to the persons enumerated in EPTL 3-3.5 whose examination under SCPA 1404 will not trigger a no contest clause, son's attorneys examined the drafter of decedent's prior wills. The executor, decedent's daughter, then began a construction proceeding seeking a declaration that her brother had indeed violated the no contest clause in the will.

The Surrogate held and the Appellate Division agreed that the examination of a person not included in the safe harbor of EPTL 3-3.5(b)(3)(D) violated the no contest clause. The son therefore forfeited his bequest under the will.

The Court of Appeals reversed. The Court held that the statutory safe harbor is not exclusive, basing its conclusion on the "trend" noted in the Practice Commentaries to EPTL 3-3.5 allowing "broad latitude" in discovery undertaken to determine the existence of a basis for challenging a will and the observation in the same source that the Legislature intended to balance the testator's right to prevent a contest against a beneficiary's right to investigate in order to evaluate whether or not to take a risk and challenge the will despite the no contest clause. The Court also noted that when the statutes were last amended in 1992 to allow examination of the preparer of the will the Legislature indicated that the amendments were intended to ratify public policy as stated in the case law interpreting the statute to allow the production of prior wills.

Having determined that the son did not automatically violate the no contest clause by examining the drafter of decedent's prior wills, the Court went on to determine that the examination did not violate either the general no contest clause, which referred only to a beneficiary contesting or challenging the will "in court," or the clause expressly directed at the son which prohibited him from taking the executor "to court."

A concurring opinion by Judge Graffeo observes that it should be quite easy to draft a no contest clause that makes any actions beyond the statutory safe harbor result in forfeiture.

In re Singer, 13 N.Y.3d 447, 2009 Slip Op. 09265 (2009).

William P. LaPiana

EXECUTORS

Non-domiciliary must Post Bond

SCPA 710(2) provides that an executor who is not required by the will to give bond is entitled to letters by giving a bond "as prescribed by law" even though "an objection has been established to the satisfaction of the court that the person is a non-domiciliary." In applying the section to a request by a beneficiary of decedent's purported will that the nominated executor be required to post bond, Surrogate Holzman held that 710(2) allows a bond to be dispensed with only when the non-domiciliary presents "the most compelling reasons" for that result. That conclusion is supported by a comparison of the present statute with predecessor versions which show a trend to diminish the Surrogate's discretion in connection with the bonding requirement for non-domiciliaries. The conclusion is also supported by the provisions of SCPA 710(3), which clearly give the Surrogate discretion in requiring a bond when a domiciliary fiduciary becomes a non-domiciliary but only when an objection is filed and proof taken. When 710(3) is applicable the fiduciary will have been in office and the Surrogate will be able to make a decision based on how the fiduciary has performed in office. Under 710(2) there is no such record to consider which supports the conclusion that the Surrogate has only very limited discretion under the provision. *In re Nussbaum*, 26 Misc.3d 223, 887 N.Y.S.2d 529 (Sur. Ct., Bronx Co. 2009).

Failure to Liquidate Portfolio Does Not Violate Prudent Investor Standard

Sole beneficiary of decedent's estate objected to the executor's accounting on the grounds that the executor violated the prudent investor standard by not liquidating the estate's stock investments "immediately" after the decedent's death. In a extensive opinion discussing the requirements of the prudent investor standard at length, Surrogate Calvaruso dismissed all objections. The court held that the Prudent Investor Act cannot be read to require all executors to make investment decisions based on the likely duration of the administration of the estate. Here the executor made a prima facie showing of compliance with the prudent investor

standard by showing that he had continued the decedent's investments which she had chosen to provide for her much younger spouse after her death and that holding them for distribution in kind comported with decedent's intent. In addition, taking all of the estate assets into account shows that the estate was diversified although aggressively invested (with 75% of the stock portfolio represented by investments in six securities), and that losses were characteristic of a general market decline caused in part by the events of September 11, 2001. *In re Duffy*, 25 Misc.3d 901, 885 N.Y.S.2d 401 (Sur. Ct., Monroe Co. 2009).

LIFE INSURANCE

Court of Appeals Holds That Life Settlement Brokers Have Fiduciary Duties to Their Clients

In affirming an Appellate Division decision allowing the Attorney General's law suit against a prominent life settlement provider to go forward, the Court of Appeals has held that life settlement brokers are in a fiduciary relationship with their clients. The AG's allegations that the brokers hold themselves out as working to obtain the best deal for their clients in contrast to a life insurance agent who only offers to try to obtain coverage for a client suggest the existence of a fiduciary duty. The same is true of the allegations about the newness of the life settlement market and its unregulated nature which also indicate that clients are in search of expert advice when they retain a broker. *Cuomo v. Coventry First, LLC*, 13 N.Y.3d 108, 915 N.E.2d 616, 886 N.Y.S.2d 671 (2009).

WILLS

Will Revoked by Subsequent Wills May Not be Probated through Application of the Doctrine of Dependent Relative Revocation

Testator wrote five wills during her lifetime; the last was denied probate because it was not properly executed, and the two wills preceeding it were denied probate because the originals which were last in the possession of the testator could not be found and were therefore presumed to have been destroyed with the intent to revoke. The originals of the first two wills (dated 1972 and 1974) survived. Both had been properly executed. All five instruments exercised a general power of appointment over a lifetime trust created by the testator's husband by appointing the trust property to her residuary estate, the primary beneficiary of which under all the instruments was her adopted son.

The two lost wills could not be probated because of the deemed revocation by physical act. The Surrogate determined that revocation of the 1974 will, however, was conditioned on the effectiveness of the final, improperly executed instrument. Since the disposition of the testator's estate in the 1974 will (three-fourths of the residue to her adopted son) was much closer to the disposition in the final instrument (all of the residue to her adopted son) than intestacy would be (one-half of the probate estate to each of her children but all of the appointive property to her birth daughter as taker in default) Surrogate Peckham admitted the 1974 will to probate, applying the doctrine of dependent relative revocation. (19 Misc.3d 471, 852 N.Y.S.2d 713 (Sur. Ct. Broome Co. 2008)) On appeal the Appellate Division reversed and remanded, holding that the 1974 will was revoked by the 1979 will and that admitting the 1974 will to probate would "eviscerate" the rule that revoking a later will does not automatically revive a prior will (EPTL 3-4.6). In addition, the Surrogate's conclusion that the decedent would have preferred the 1974 will to intestacy is "purely speculative." *In re Sharp*, 68 A.D.3d 1182, 889 N.Y.S.2d 323 (3d Dep't 2009).

Ambiguity Cannot be Resolved on Summary Judgment

Decedent's will created a credit shelter trust for the benefit of the surviving spouse and his three children by a prior marriage and funded the trust with two houses he owned. The trustee was given authority to manage the trust and to make purely discretionary distributions of principal and income. The trust also provides that the trust terminates when all of the children have reached 25 years of age at which time the two houses are to be distributed to the widow and children as tenants in common and any remaining principal distributed on to the children. The trustee subsequently sold one of the houses and the widow began a construction proceeding to decide whether or not the trustee was authorized to sell the houses. The widow, the trustee, and the guardian ad litem for the one child who is a minor all moved for summary judgment, which the Surrogate denied. The trustee appealed and the Appellate Division affirmed.

The court held that the trust provisions are ambiguous; the trustee is given full discretion but there is no indication that the bequest of the remainder is contingent on the houses not being sold. The court also found that the deposition testimony of the lawyer who drafted the will did not resolve the ambiguity, and the notes of his meeting with the decedent support the wife's position. In light of the factual issues the matter was remanded for trial. *In re White*, 65 A.D.3d 1255, 885 N.Y.S.2d 535 (2d Dep't 2009).

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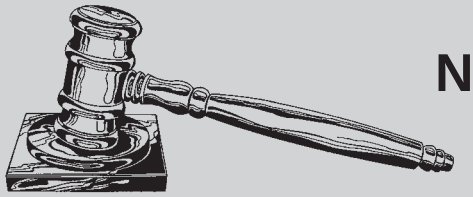
Professors Bloom and LaPiana are the current authors of Bloom and Klipstein, DRAFTING NEW YORK WILLS (Matthew Bender) (Bloom as principal author; LaPiana as contributing author).



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

By Ilene Sherwyn Cooper

Attesting Witness-Beneficiary

In *In re Maset*, the propounded will in an uncontested probate proceeding was witnessed by three witnesses: the nominated executrix, a friend of the decedent who received a small monetary bequest, and the decedent's daughter, who received a bequest of personalty and the residue of the estate.

The court noted that pursuant to the provisions of EPTL 3-3.2 a disposition to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition under the instrument. Although the court recognized that the effect of the statute would cause both the decedent's friend and daughter to lose their bequests, it held, in the interests of fairness, that the decedent's friend would not be required to forfeit his legacy. To this extent, the court dispensed with the testimony of this witness, finding that although the decedent's daughter would lose her testamentary inheritance, as a result of her having to testify in support of the will, she would, pursuant to the statute, nevertheless, be entitled to receive the lesser of her intestate distribution or the disposition given to her by the instrument.

In re Maset, N.Y.L.J., Dec. 1, 2009, p. 29 (Sur. Ct., Dutchess Co.).

Attorney-Client Privilege

During the pendency of an action for enforcement of loan guarantees, the plaintiff bank inadvertently produced nine documents, which it subsequently claimed were protected by the attorney-client privilege.

The record revealed that in response to various discovery demands, the bank reviewed more than two million pages of material and produced approximately 250,000 pages. It subsequently learned that nine of these documents, produced to non-party lenders, were privileged. Once it became aware of its error in producing the documents, the bank sought to have them returned, asserting that under the common interest doctrine they were privileged. The defendants opposed, claiming that the documents were not protected by the common interest doctrine, constituted communications in furtherance of a fraud and therefore could not be protected by a claim of privilege, were impermissibly being utilized by the bank as a shield and a sword, and could not be recalled due to the bank's carelessness in production.

With regard to the bank's reliance on the common interest doctrine, the court opined that while generally disclosure of protected communications in the presence of a third party vitiates the confidentiality of the communications, the common interest doctrine precludes a waiver of the privilege concerning confidential communications, when the disclosure is made between parties in the course of an ongoing common enterprise, and intended to further that enterprise. The doctrine, however, will only be applicable when the underlying communications are protected either by the attorney-client privilege or the attorney work product doctrine.

The court held that in order for a party to demonstrate the applicability of the common interest doctrine, it must be shown that (1) the information was shared with a party with whom the disclosing party had a common legal interest, and (2) the statements for which protection is sought were designed to further that interest. Within this context, the bank claimed that the doctrine was applicable to the subject disclosure due to the joint legal strategy it and the non-party lenders were pursuing in the action. The defendants opposed, arguing that the doctrine did not extend to communications between a party or its attorneys and third parties directly, rather than their counsel.

The court found the defendants argument to be without merit, concluding that it was immaterial that the confidential communications passed from the bank's counsel directly to the non-party lenders, rather than passing to counsel for the lenders. Moreover, the court found that the bank and the non-party lenders were co-lenders of the loan, and shared a common interest in enforcing the defendants' obligations. Additionally, the court found that the communications involved development of legal strategy for obtaining relief against the defendants, and the parties to the communications understood them to be confidential. Accordingly, the court held that the communications fell within the common interest doctrine, and that ab-

sent a waiver of the privilege, they could be recalled by the bank.

The defendants next argued that the bank had waived the privilege inasmuch as the communications were in furtherance of a fraud. The court opined that in order for communications to fall within the crime/fraud exception to the attorney-client privilege, it must be shown that there is probable cause to believe that a fraud or crime has been committed and that the communications in issue were in furtherance of the crime or fraud. Based upon this standard, the court held that the defendants had failed to demonstrate that the crime/fraud exception should be applied as a basis for denying the bank's claim of privilege.

The court also found without merit defendants' contention that the bank was attempting to use the attorney-client privilege as a shield and a sword, by seeking to withhold harmful documents on the grounds of privilege, yet producing related documents that were favorable to its position. The court held that defendants failed to demonstrate that any of the favorable documents that were being produced by the bank were privileged, and thus, there was no basis for reaching the conclusion asserted.

Finally, the court held that the inadvertent production of the documents by the bank did not constitute a waiver of the privilege. In reaching this result, the court emphasized the fact that upon learning of the disclosure, the bank promptly attempted to recall the documents. In addition, the court noted that the number of documents in issue was miniscule compared to the number of documents produced and reviewed by the bank. Further, the court relied upon the fact that the parties had executed a protective order in which they expressly agreed that the inadvertent production of a document subject to the attorney-client privilege would be without prejudice to any claim that such material was protected by the attorney-client privilege.

Accordingly, with the exception of two e-mails between the bank and the non-party lender, the bank's motion was granted, the defendants were ordered to return the balance of the disputed documents, and were prohibited from using them in discovery or at trial.

HSH Nordbank AG New York Branch v. Swerdlow, N.Y.L.J., July 31, 2009, p. 33 (S.D.N.Y.).

Lost Will

Before the court was a motion to withdraw a petition for probate of a lost will, and for letters of administration.

The record revealed that the propounded instrument, which was executed in March 1995, left the decedent's entire estate to her two sisters, or the survivor of them. One of the decedent's sisters predeceased her without issue, thus causing her estate to pass in its entirety to her sole surviving sister. Thereafter, the surviving sister petitioned and was granted the appointment of the guardian of her property. Subsequent to this appointment, the guardians were authorized to petition for probate of the decedent's will, the original of which could not be located. In support of the application, the guardians alleged that a copy of the will was found among the papers of the decedent's predeceased sister, who must have had the original thereof prior to her death. However, after her demise, her home was sold, and all of her papers were discarded.

The instrument was prepared by an attorney, who supervised its execution, and served as a subscribing witness. The second witness to the will execution could not be located. The petitioners thus moved to withdraw the probate petition, and seek letters of administration, based upon waivers by the intestate distributees of the decedent of their interest in the decedent's estate.

The court denied the application, concluding that it was its duty, when a testamentary instrument was on file, to fulfill the testamentary wishes of the testator to the extent those wishes could be fulfilled. The court opined that public policy required the Surrogate to insure the validity of instruments offered for probate. The court noted that while it is normally the duty of a nominated executor to insure the probate of a will and to protect it from attack, exceptions to this rule exist when, for example, it would be futile or otherwise unwarranted to probate the instrument.

The court found that none of the exceptions to the general rule existed. The beneficiary of the instrument was alive, and the petitioners were authorized by the guardianship court to proceed with its probate. The court held that the presumption of revocation was sufficiently rebutted by the explanation given for the disappearance of the original instrument, and the inability to locate the second subscribing witness did not preclude probate of the copy. Finally, the court noted that all of the decedent's distributees agree that the decedent's testamentary wishes be adhered to.

Accordingly, the court directed the petitioners to complete the probate proceeding, or, in the event they failed to do so, the Public Administrator in their place and stead.

In re Brucato, N.Y.L.J., July 17, 2009, p. 28 (Sur. Ct., Kings Co.).

Privity

In *Estate of Schneider v. Finmann et al.*, the Appellate Division, Second Department affirmed an Order of the Supreme Court (Woodard, J.), which dismissed a complaint by the estate of the decedent against the decedent's attorneys for legal malpractice.

The complaint alleged that the decedent, on the advice of counsel, transferred ownership of a life insurance policy on his life from a limited liability partnership that he controlled to himself. This transfer of ownership allegedly resulted in an increased estate tax liability for the decedent's estate, causing the estate to sue for legal malpractice subsequent to the decedent's death in October, 2006.

In defense to the complaint, the defendants alleged that the plaintiff had failed to state a cause of action for malpractice inasmuch as the alleged harm, i.e. increased estate tax liability, did not occur until the decedent's death. While the defendants recognized that, pursuant to the provisions of EPTL Sections 11-3.1 and 11-3.2, certain causes of action will survive a decedent's death, they argued that the section was only applicable to claims that arose during a decedent's lifetime. Inasmuch as the cause of action for malpractice did not accrue until death, the defendants maintained that the claim could not be brought by his estate. In addition, the defendants argued that neither the estate of the decedent, nor his intended beneficiaries, had a relationship of privity with them.

In opposition to the defendants' contentions, the plaintiff argued that the cause of action for malpractice survived the decedent's death, because had the decedent discovered that he had received incorrect advice during his lifetime, he would have had a cause of action for malpractice based on damages incurred to seek new counsel and correct the mistake that had been made. Additionally, plaintiff maintained that privity was not an issue, inasmuch as the complaint had been brought by the decedent's estate and not his beneficiaries.

The Supreme Court disagreed, reasoning that while a cause of action for legal malpractice can survive a decedent's death and can be pursued by his estate, pursuant to the provisions of EPTL 11-3.2, this is not the case when the damages do not occur until after the decedent's death. Under such circumstances, the court opined that the decedent has no claim for damages while alive, and as such, no such claim can survive his death. Further, the court concluded that even if the estate of the decedent had a claim pursuant to EPTL 11-3.2, the cause of action could not be pursued after the decedent's death due to the absence of privity between the estate and the defendants, and the absence of any allegations of fraud, collusion or malice.

The Appellate Division affirmed, holding that inasmuch as the estate was not in privity with the defendants, and none of the exceptions to the privity requirement were alleged, a cause of action by the estate for legal malpractice could not be pursued. Furthermore, the court found that since the decedent did not have a cause of action for legal malpractice against the defendants during his lifetime, the provisions of EPTL 11-3.2 were inapplicable.

Estate of Schneider v. Finmann, et al., Index No. 07-010847, Entered May 14, 2008 (Sup. Ct., Nassau Co.), *affd*, 60 A.D.3d 892, 876 N.Y.S.2d 121 (2d Dep't 2009), *leave to appeal granted*, 12 N.Y.3d 715, 912 N.E.2d 1072, 884 N.Y.S.2d 691 (2009).

Probate Denied

In a contested probate proceeding, the objectants moved for summary judgment denying probate of the propounded will on the grounds of lack of testamentary capacity and due execution. The record revealed that the decedent was within a few days of death at the time he signed the instrument, which he executed at the behest of his ex-wife, who was its sole beneficiary, and in the presence of her lawyer. On the date in question, he was noted as being lethargic, confused, disoriented, and evidencing poor judgment and insight.

Significantly, the supervising attorney testified that during the 1½ hours he was with the decedent at the time of execution, he did not say a single word. Moreover, he stated that after he read the will to the decedent and asked him if it was his will, he simply nodded. He further acknowledged that he did not ask the decedent and the decedent did not state that he was aware of what property was being disposed of by his will, nor did he ask the decedent who the natural objects of his bounty were, or that he understood that he was leaving all of his property to his former wife.

Nevertheless, in an affirmation submitted to the court, the attorney stated that the three witnesses to the will were present when the decedent acknowledged the document and signed it. Further, he stated that during the execution ceremony, the decedent indicated that the instrument was his will, and that he wanted to sign it and have his signature witnessed by the witnesses. The decedent's ex-wife testified that she contacted the supervising attorney at her former husband's request. She further stated that she was at the hospital when the decedent signed his will, and that while he did not verbally discuss the instrument that day, she did see him sign the document.

On the other hand, one of the witnesses to the will testified that he signed his name below a mark on the instrument, purporting to be the decedent's signature,

but stated that he did not see the decedent make it. The second witness, a social worker at the hospital, testified that the decedent was quite lethargic and obviously dying on the date of the will execution, and that in her opinion he was unable to process complex information such as the content of a will. The witness did not recall the decedent asking her to serve as a witness to his will, nor the attorney asking the decedent if he wanted her or the other witnesses to witness its execution. The proponent was unable to offer any information with respect to the third witness, or an explanation as to why he did not testify in support of the will.

Based on the foregoing, the court held that the objectants had submitted sufficient evidence to overcome the presumption of due execution that arises from an attorney-supervised execution, and concluded that the propounded instrument had not been duly executed. In pertinent part, the court found the record devoid of any evidence that the decedent published his will, or that he signed the instrument in the presence of the witnesses, or acknowledged his signature to them. Further, the court noted that the attorney's affirmation lacked credibility, was replete with conclusory assertions, and appeared tailored to meet the statutory requirements rather than a true recitation of the circumstances underlying the execution of the document. The court found that, in fact, the execution ceremony was not as depicted by counsel, but instead was a rushed process that gave no consideration to the decedent's medical condition, or the strictures of the statute. Accordingly, summary judgment on the issue of due execution was granted in the objectants' favor.

In re Stachiw, N.Y.L.J., Dec. 9, 2009, p.25 (Sur. Ct., Dutchess Co.).

Small Estates

Before the court was an application by the decedent's niece to serve as voluntary administrator of her late aunt's estate. The decedent died intestate in 1998 with an estate valued at approximately $22,000. The issue before the court was whether the estate was subject to the new value limit for a small estate administration, i.e. $30,000, or whether it was subject to the $20,000 limit in effect at the time the decedent died.

In concluding that the estate was subject to the $30,000 limitation, the court noted that the legislation amending the statute in order to increase the value of an estate subject to small estate administration contained no explicit language regarding the date of its application. Hence, the court referred to the general rules applicable to statutory construction, and found that with the exception of remedial statutes, which are presumed to apply retroactively, statutes are generally deemed to apply prospectively, unless the statute provides otherwise. The court concluded that amendments increasing the limit on small estates are remedial in nature, intended to adjust for inflation or to extend the benefits of the statute further. Moreover, the court found that the legislature's failure to include any direction for its applicable date indicated that the statute was not intended to only apply prospectively.

Accordingly, the court held that the application for voluntary administration would be subject to the provisions of the statute as amended, and accepted the petition for filing.

In re Garrick, N.Y.L.J., Dec. 15, 2009, p. 26 (Sur. Ct., N.Y. Co.).

Status

In *In re Kaminester*, the executrix of the decedent's estate requested that the right of election filed by the decedent's purported spouse be declared null and void on the grounds that she was disqualified as a surviving spouse pursuant to the provisions of EPTL 5-1.2.

The record revealed that the respondent married the decedent at a time when he was physically and mentally ailing, two and a half months after a Texas court had appointed a guardian for him, during the pendency of a New York Article 81 guardianship in which a temporary guardian of his person and property had been appointed, and two and a half months before he died.

In addition to seeking relief on the grounds of constructive fraud and equitable estoppel, the petitioner relied upon a decision rendered posthumously in which the Article 81 court declared, *inter alia*, the decedent's marriage to the respondent void due to the decedent's incapacity to marry. Notably, the determination by the Article 81 court was affirmed by the Appellate Division, First Department.

The respondent opposed the application alleging, in pertinent part, that her right to elect against the decedent's estate became fixed as of the date of his death, and therefore the posthumous order declaring the marriage a nullity was meaningless. On the return date of citation, the parties stipulated to treat the respondent's answer as a motion to dismiss for failure to state a cause of action.

After analyzing and reconciling the provisions of the Mental Hygiene Law Section 81.29(d) and the Domestic Relations Law Section 7(2), the court rejected the arguments of the respondent, and held that it was bound by the opinion of the Appellate Division, First Department, which declared the decedent's marriage to the decedent void *ab initio*.

Additionally, separate and apart from its reliance on the opinion of the First Department, the court determined that respondent's spousal election was invalid based upon principles of estoppel. Elements of estoppel involve a duty to speak, a failure to speak, and damage to the other party directly due to the silence. Within this context, the court found that the respondent had a duty to speak at the conclusion of the Article 81 hearing, in which the court referred to her as the decedent's girlfriend and had indicated its intention to issue an order declaring the decedent incapable of marrying, when, in fact, she had been married to him for a month. The court opined that respondent's silence, knowing of the existence of her marriage, deprived the petitioner and the decedent, through his court appointed counsel, of the opportunity to obtain a revocation or annulment of the marriage during the decedent's lifetime, and thus precluded her from utilizing that to her advantage in the proceeding, *sub judice,* for enforcement of her elective share.

Accordingly, the court denied the respondent's motion to dismiss, and declared the respondent's right of election invalid.

In re Kaminester, N.Y.L.J., Oct. 23, 2009, p. 36 (Sur. Ct., N.Y. Co.).

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

Section Committees and Chairs

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

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The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed (ianwmaclean@maclean-law.com) or mailed on a 3½" floppy disk or CD (Ian W. MacLean, The MacLean Law Firm, P.C., 100 Park Avenue, 20th Floor, New York, NY 10017) in Microsoft Word or WordPerfect. Please include biographical information. Mr. MacLean may be contacted regarding further requirements for the submission of articles.

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