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# Trusts and Estates Law Section Newsletter

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## A Message from the Section Chair



Granted, I am biased, but I thought the Fall Meeting of our Section at the Westin Hotel in Savannah was a great success. We held two receptions on the lawn in front of the hotel, on the banks of the Savannah River with the cotton warehouses of the city as a backdrop. Many of us played golf or tennis on the hotel's course and courts. We visited nearby Fort Jackson to enjoy a Civil War reenactment, Southern food and period music, followed by a cruise up the river. We went on tours and walks in the beautiful antebellum city of Savannah and dined in its plethora of fine restaurants. We mingled with our colleagues from the Torts, Insurance and Compensation Law (TICL) Section who were also congregating in Savannah. The weather cooperated, by and large. And we also managed to squeeze in two days of rewarding legal presentations.

The topic of our Fall Program was "The Future of Estate Planning." Day One focused on pending changes in the estate tax laws and how estate planners can best address them. John O'Neil of the Senate Finance Committee spoke about the sense of the Congress regarding changes in the tax law. Barbara Sloan then outlined some estate planning strategies to provide for scheduled and potential changes in the estate tax law. Jon Schumacher spoke on the new Treasury Regulations regarding the definition of income and its relation to the unitrust concept. And Ron Finkelstein described current planning opportunities with regard to retirement benefits.

On Day Two we turned to non-tax issues that will remain with us whether or not we continue to have an estate tax. In a first for our Section, a joint presentation was made with the Torts Section on "Wrongful Death Actions: The Intersection of Torts and Estates Laws." Mae D'Agostino of TICL gave the torts lawyer's viewpoint, while New York County Surrogate Renee Roth delivered the estates lawyer's

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perspective. Gideon Rothschild then followed with a thoughtful discussion of asset protection and the non-tax advantages of trusts for the preservation of property. Finally, Joshua Rubenstein gave an entertaining and thought-provoking discussion of how changes in biotechnology are affecting the estates practice, entitled "Is There Sex After Death?"

Next year's Fall Meeting will be hosted by Michael O'Connor in New Orleans. We all look forward to another enjoyable and informative time.

The Winter Meeting will be held on Wednesday, January 26, 2005 at the New York Marriott Marquis. Chair Ron Weiss promises an interesting program focusing on the statutory power of attorney and the power of trustee-beneficiaries to make discretionary distributions to themselves. There will be a cocktail party on Wednesday evening hosted by U.S. Trust Company at their office. Rich Miller and Win Rutherfurd, who organized and performed in such a memorable Gilbert and Sullivan presentation last year, promise us another entertaining evening. On Thursday morning, January 27, the Section's Committees will hold their breakfasts. Those of you who are interested in becoming involved in a committee should take this opportunity to meet the chair and other members and talk about possible projects.

The Spring Meeting will be held in Rochester on Monday and Tuesday, May 9 and 10, 2005.

Finally, an old Chinese proverb says, "Be careful what new laws you write about in the *Newsletter*; they may not be enacted." Apparently my eagerness in the last *Newsletter* to alert Section members to two new laws passed by the New York legislature proved to be the kiss of death for both of them. The privilege bill was vetoed by Governor Pataki, and the bill regarding the affidavit for commissions of an attorney-executor has not been sent to the Governor's desk as of this writing.

**G. Warren Whitaker**


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# Editor's Message



In June of this year, *New York Times* reporter Jeffrey Selingo noted the practical difficulties of gaining access to a decedent's password-protected computer after the decedent's death.[1] But once the computer is unlocked, who owns the data?

In many households, the home computer has now all but replaced the file cabinet as the repository of personal records and information. Increasingly our computers may contain not only our address books, appointment calendars, photo albums, e-mail correspondence logs and the like, but also provide access to our bank and securities account statements, miscellaneous records of payments and personal expenditures, past income tax returns—in short, many of the sources of information a fiduciary typically relies on in order to ascertain and identify estate assets and liabilities.

So it may come as a surprise to learn that a New York decedent's computer is not always an asset of the estate. Under current New York law, the ownership of a New York decedent's computer automatically vests in the decedent's surviving spouse[2] by operation of law, outside of probate and regardless of any contrary provision contained in the decedent's will (N.Y. Estates, Powers and Trusts Law 5-3.1).

EPTL 5-3.1 derives from a 19th century provision enacted to ensure that basic family necessities were insulated from seizure by decedent's creditors and set aside for the benefit of decedent's surviving spouse and minor children. In 1829 these necessities included certain household furniture, one cow, two swine, all spinning wheels and weaving looms, ten sheep and their fleeces, and all yarn and cloth manufactured from the same. As our notions of what constitutes a family necessity have evolved, the statute has been periodically amended. The cows and sheep are gone, of course, and decedent's exempt property now includes decedent's automobile, sewing machine and lawn tractor.

Most recently, in 1992 the statute was amended to include ". . . all household furniture and appliances, including but not limited to computers and electronic devices . . ." The extent to which we rely on home computers has changed dramatically since 1992. Does the scope of EPTL 5-3.1 encompass all information and data stored on a computer's hard drive? In *In re Queen*,[3] for instance, involving the estate of a Pulitzer Prize winning author/reporter, the surviving spouse claimed ownership under EPTL 5-3.1 of decedent's personal computer and all data stored there, including decedent's valuable unpublished manuscripts and screenplays.

This Section's Committee on Estate and Trust Administration is in the process of formulating a proposal to again amend and update various aspects of EPTL 5-3.1. Presumably the long-standing policy considerations underlying the statute can be properly reconciled with the property law enigmas posed by our modern computer age.

## E-Filing Update

Earlier this year this column discussed what is rapidly becoming a nationwide trend—the ability in many states to file court documents in probate court electronically via the Internet—and wondered whether New York Surrogate's Courts would be far behind. Then in August, Governor Pataki signed into law a measure which significantly expands the pilot program for Filing By Electronic Means in New York State courts. Most significantly for this Section, readers should be aware that e-filing is now authorized in Erie County Surrogate's Court.

Does this mean that Buffalo practitioners need never visit the Surrogate's Court again to file papers? Not yet. But according to Peter Fiorella, Deputy Chief Clerk of the Erie County Surrogate's Court, the first step of implementing scanning and intake procedures at the Court, which are designed to digitize the case files, is now well underway and likely to be completed by mid-2005. Thereafter e-filing should become an alternative in most Erie County Surrogate's Court proceedings, provided all parties to the proceeding consent. "We're doing our best to set the stage for the rest of the state," notes Fiorella.

The Editors will periodically report back to readers as this program progresses. It is hoped that the success of e-filing in Erie County will indeed provide the blueprint for the statewide expansion of e-filing in New York Surrogate's Courts.

## Remember

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

## Endnotes

1. Selingo, *Whose Data Is It, Anyway?*, N.Y. Times, June 4, 2004.
2. Or if none, decedent's children under the age of 21.
3. *Estate of Joseph W. Queen*, N.Y.L.J., February 27, 1998, p. 33 (Sur. Ct., Queens Co.).

**Austin Wilkie**

# Decanting Trusts Under EPTL 10-6.6(b)

By Alan Halperin and Michelle W. Albrecht

New York was the first state to enact a statute authorizing trustees to appoint trust property in favor of another trust. Twelve years ago—with generation-skipping transfer, or GST, tax planning in its sight—New York enacted EPTL 10-6.6(b).[1] The statute has become increasingly popular as a result of legislative change in 2001. In response to GST regulations, the New York legislature amended EPTL 10-6.6(b) by removing certain procedural prerequisites (described below), thereby making the statute more accessible. While it is unclear whether the coveted GST tax results may be attained, New York practitioners have been relying on this powerful statute to achieve other important objectives.

This article explores the framework of EPTL 10-6.6(b), while highlighting some unsettled issues. It further analyzes the GST, gift, estate and income tax consequences of employing the statute. The article then describes the potential applications of the statute. And finally, it examines possible alternative ways to decant trust assets in favor of another trust.

## I. Statutory Framework

### A. Statutory Prerequisites

New York Estates, Powers and Trusts Law (EPTL) Section 10-6.6(b) has four statutory prerequisites: the trustee must have absolute discretion to invade the principal of the trust; the exercise of the power cannot reduce the fixed income right of any beneficiary; the exercise of the power must be in favor of one or more of the proper objects of the exercise of the power; and the new trust cannot contain certain provisions (described below) deemed to violate public policy.[2]

### 1. Unfettered Discretion to Invade Principal

The first test—the trustee's unfettered power to invade the principal of the existing trust—requires that there be no constraint on the trustee's power to invade principal. The requirement is not met if there is any limitation on the trustee's discretionary power (other than normal fiduciary duties concerning abuse of discretion). Accordingly, if the trustee may invade principal, but only in accordance with an ascertainable standard (such as for the beneficiary's health, education, maintenance and support), EPTL 10-6.6(b) is not available.[3] Similarly, the trustee's power to distribute for the beneficiary's comfort, in the absolute discretion of the trustee, would seem to fall outside the requisite authority. "'Absolute' discretion, for purposes of EPTL 10-6.6(b), connotes a standard that is unconstrained except by the implicit requirements of reasonableness and good faith."[4]

### 2. Fixed Income Interest

The second requirement—the exercise cannot reduce the fixed income interest of any income beneficiary—does not limit the statute's application if the beneficiaries are discretionary. Rather, the limitation applies only to a beneficiary who is identified specifically in the trust agreement, either by name or other label, as the sole person or persons who will receive the income interest for a fixed period of time.[5] This requirement generally ensures that the marital deduction for estate and gift tax purposes is available where a spouse is to receive all of the income from a trust.[6]

The statute does not deal specifically with a beneficiary's future fixed right to income (as opposed to a current fixed income right). Consider a trust with income payable to A for life (with complete discretion to invade principal for A), then income to B for life, and remainder to C. May the trustee appoint the trust asset in favor of a new trust for A for life, remainder to C, thereby eliminating B's future fixed right to income? It would appear that, since the trustee could eliminate B's future income right via an outright distribution to A, the trustee should be able to divest B of his or her interest by way of a decanting distribution under EPTL 10-6.6(b).

Interestingly, the statute also does not prohibit the elimination of other rights, such as a general power of appointment. Arguably, the potential elimination of such a power could jeopardize the zero inclusion ratio, for GST tax purposes, of transfers to certain trusts.[7] Similarly, the same concern could apply to annual exclusion transfers to trusts for minors.[8]

### 3. In Favor of the Proper Objects

Who are the "proper objects" of the exercise of the power? Are they the current income beneficiaries? Or must the remaindermen of the existing trust also be the same as those under the new trust?

One of the underlying rationales supporting EPTL 10-6.6(b), as described below, is that a trustee's power to invade is akin to a power of appointment. Therefore, the power of appointment rules should shed light on the meaning of this statutory requirement.

Absent a contrary provision in the governing instrument, a donee of a power of appointment may appoint property in further trust.[9] A donee of a power of appointment may not exercise the power in

favor of someone who is not within the class of permissible appointees. For example, the power to appoint among the testator's descendants does not authorize an appointment in trust for the life of a child, with remainder to charity because charity was not included in the permissible class of appointees.[10]

A donee of a power of appointment may grant a permissible appointee yet another power to appoint in favor of persons to whom the donee could not directly appoint. For example, if the power is limited in favor of the testator's descendants, the donee may appoint in further trust for the life of a child, with the child having his or her own power of appointment in favor of descendants and charity.[11] The rationale is that, if the donee could have appointed the property outright in favor of the child, the child could be given a power to expand the class of permissible appointees under his or her own power of appointment.

With this background, let's return to the statutory rule requiring that the exercise of the EPTL 10-6.6(b) power be in favor of the "proper objects of the exercise of the power." Consider a trust for child for life (with full discretion to invade principal), with remainder (if any) to grandchildren. The trust receiving property under EPTL 10-6.6(b) may have the child, and no one else, as a current beneficiary. The remaindermen of the new trust similarly should be limited to one or more grandchildren, the remaindermen of the original trust. However, in exercising the EPTL power, the trustee may grant the child a testamentary power of appointment. That power of appointment may include persons beyond the class of the remaindermen of the original trust.

#### 4. Public Policy Limitations

EPTL 10-6.6(b) requires that the appointed trust not violate EPTL 11-1.7. That statute, in turn, prohibits the grant of certain powers or immunities to testamentary trustees on the grounds that such powers or immunities are contrary to public policy. The proscribed actions are (1) the exoneration of such trustee from liability for failure to exercise reasonable care, diligence and prudence and (2) the power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.[12] Because EPTL 11-1.7 applies only to testamentary trustees, it seemingly has no application where the decanting trust is an *inter vivos* trust.

### B. Utilizing the Statute

Assuming the statutory prerequisites of EPTL 10-6.6(b) are satisfied, a trustee may exercise the power to appoint to a different trust in two ways: either without or with prior court approval.

#### 1. Without Court Approval

#### a. Writing

If a trustee chooses to act without prior court approval, the power must be exercised in a written document that is signed and acknowledged by the trustee, and then filed in the office of the clerk of the Surrogate's Court that has jurisdiction over the trust.[13] Our general (but not universal) experience has been that the court clerk will not require copies of the decanting or new trust to be included with the filing. Some intake clerks, however, have requested that a copy of the decanting trust be filed.

#### b. Service

A copy of the written document must be served on "all persons interested in the trust." Such persons are those individuals who would need to be served in a judicial settlement of a trustee's account. Service on a minor with an interest in the trust may be made on the guardian of the property of the minor or on the parent or parents with whom the minor resides.[14]

The virtual representation rules under Surrogate's Court Procedure Act (SCPA) section 315 apply to EPTL 10-6.6(b). Specifically, under certain circumstances, SCPA 315 permits an individual to represent either a class of individuals with similar interests or another individual with a more contingent interest.[15]

#### 2. With Court Approval

The statute also permits a trustee to seek court approval.[16] A court proceeding may be an attractive option to a trustee who is concerned about its ability to meet the statutory prerequisites[17] or potential personal liability relating to the transfer of assets. The same writing, filing and service requirements apply.

## II. GST Tax Implications

The GST tax was a significant driving force leading to the enactment of EPTL 10-6.6(b), and its subsequent amendment.[18] The critical question is whether the EPTL provision and similar statutes in other states serve the GST tax purpose.

### A. GST Exempt Trusts

Congress enacted the current GST regime, consisting of chapter 13 of the Internal Revenue Code, as part of the Tax Reform Act of 1986 (TRA). Under Section 1433(b)(2)(A) of the TRA, transfers from a trust that was irrevocable on September 25, 1985 generally are not subject to the GST tax.[19] Chapter 13 also does not apply to any GST under a Will or revocable trust executed before October 22, 1986 (the date Congress enacted the TRA), if the decedent died before January 1, 1987.[20] The GST regulations refer to these trusts as "exempt trusts."[21]

Post-effective date additions cause an exempt trust to lose GST grandfather protection.[22] Such tainting additions may come in various forms, including actual transfers and constructive (or deemed) additions.[23]

### B. Extending Exempt Trusts

Careful tax planning often calls for extending GST exempt trusts as long as the law permits (and avoiding actual and constructive additions). Significantly, the GST regulations confirm that a beneficiary's extension of an exempt trust by exercise of a non-general power of appointment in favor of another trust does not expose the trust to chapter 13.[24]

Suppose the beneficiary does not have a power of appointment over an exempt trust, and (by the terms of the governing document) the trust property will pass outright to the remaindermen at the death of the current beneficiary. Alternatively, consider a situation in which an exempt trust is about to expire by its terms (say, when a child or grandchild attains a specified age). In these cases, trust property will pass outright to beneficiaries, thereby potentially exposing GST-exempt assets to transfer taxes. Is it possible to extend such exempt trusts via EPTL 10-6.6(b) without losing grandfather protection? The answer turns on the GST regulations and applicable state law.

### C. GST Regulations

In December 2000, the Treasury issued final regulations providing that an extension of a trust will not taint GST exempt status if both of the following conditions are satisfied: authority under applicable state law permitting a trustee to appoint in further trust existed at the time the exempt trust became irrevocable; and the trustee must be able to exercise such authority without the consent or approval of any beneficiary or court.[25]

At the time the Treasury promulgated this rule, EPTL 10-6.6(b) permitted a trustee to appoint in further trust only with the beneficiaries' consent or court approval. In response to the GST regulations, the New York legislature amended the EPTL provision by excising the beneficiary or court approval requirement. However, exempt trusts generally are those trusts that (among other things) were irrevocable on or prior to September 25, 1985. New York did not enact EPTL 10-6.6(b) until 1992, seven years *after* the cut-off date; and, at least as a procedural matter, the New York statute required consent or approval of the beneficiaries or court for nearly a decade until 2001. Query whether state law therefore could have permitted appointment in further trust at a time when an exempt trust became irrevocable. The answer turns on the common law prior to the enactment of the statute. Before examining this issue, let's explore other GST regulations that could affect the exempt status of a trust altered in accordance with EPTL 10-6.6(b).

Regulation 26.2601-1(b)(4)(i)(D)(1) provides that, even if the applicable state law did not empower the trustee to appoint in further trust when the exempt trust became irrevocable, the distribution to a new trust (if authorized by current law) will not cause the loss of GST grandfather protection if the following conditions are met: the exercise of such power does not cause a beneficial interest in the trust property to be shifted to a beneficiary in a lower generational slot for GST purposes; and such distribution to a new trust does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.[26]

Extending an exempt trust prior to its termination plainly extends the time for the vesting of a beneficial interest and likely shifts a beneficial interest to a lower generation. This regulation, therefore, does not provide GST protection when a trustee extends an exempt trust under EPTL 10-6.6(b). However, it confirms that a new trust will not be subject to chapter 13 if the only change is administrative in nature. It further extends exempt status to a new trust even if the changes are substantive, provided that there is no shift of beneficial interest to a lower generation[27] and the time for vesting of any beneficial interest is not extended.[28]

### D. Common Law

Recall that the GST regulations require an examination of applicable state law to determine whether an appointment in further trust taints exempt status. If there is a shift in a beneficial interest to a lower generation beneficiary or a delay in the vesting of any beneficial interest, the reference point dates back nearly two decades (and perhaps more), prior to the enactment of EPTL 10-6.6(b).

There is some support for the position that EPTL 10-6.6(b) merely codifies the common law. The argument is based on two principles. First, a trustee with absolute power to invade principal, as a matter of property law, is the equivalent of a donee of a special power of appointment.[29] Second, absent a contrary provision in the governing document, a donee of a power of appointment may exercise such power in a manner which is less extensive than authorized by the instrument creating the power. Under this latter principle, if there is authority to distribute outright, there is authority to distribute in further trust.[30]

The 1992 memorandum in support of legislation, included in the legislative history leading to the enactment of EPTL 10-6.6(b), suggests that the provi-

sion merely clarifies then existing state law. The memorandum states:

> Although . . . a trustee's power of invasion seems to fall completely under the EPTL definition of a special power of appointment, New York courts appear to have never addressed the issue of a trustee's ability to invade principal in order to appoint in further trust. There is no authority in New York that would prevent such action, and case law from other states as well as general principles of New York law would appear to permit such an exercise; it, therefore, follows that a trustee could do so under New York law. The proposal is intended to codify this probable result.[31]

The IRS and the federal courts, of course, might have a different view. While applicable state law undoubtedly is a key element under the GST regulations, in a controversy involving federal taxes, a federal court may make its own determination of the underlying state law issue unless there is precedent from the state's highest court.[32] In the absence of any such precedent, a federal court is to give "proper regard" to lower court cases in arriving at applicable state law.

In short, there is support for the position that, under New York common law, a trustee who has complete discretion to distribute trust property may do so in further trust. If that power existed under applicable law as of the time an exempt trust became irrevocable (prior to 1986), a distribution to a new trust will not taint exempt status. This is so even if beneficial interests are shifted to a lower generation. However, the state law prerequisite is not entirely free from doubt.[33]

### E. Loss of Exempt Status

What are the resulting GST tax consequences if the IRS or a court concludes that the distribution to a new trust or an extension of an existing trust, via an exercise of the power under EPTL 10-6.6(b), taints GST exempt status? In considering this question, recall that, as a general rule, all GST events occurring after the effective date of the GST tax are subject to chapter 13. While there is an exception for exempt trusts, a tainting modification, distribution or extension will cause the trust to abandon its label as an exempt trust.

By way of example, suppose an exempt trust is about to expire, by its terms, when a grandchild attains a specified age, say 35 years. Prior to that date, the trustee extends the trust by exercising the 10-6.6(b) power. If the IRS successfully argues that such extension taints GST exempt status, does it follow that all subsequent distributions to the grandchild are GST events? That result would seem draconian: the extension, *if* violative of the GST regulations, admittedly should not allow the trust assets to escape a transfer tax when the beneficial interest devolves to the generation below the current beneficiary. However, even without such trust extension, the current beneficiary (here, the grandchild) would have received the property free of transfer tax.

In the foregoing example, distributions from the new (or extended) trust to the grandchild should not trigger a GST tax. It is reasonable to conclude that the generational step-down rule under section 2653(a) would cause the transferor's generational slot to shift to that of the original transferor's child.[34] Even though the creation and funding of the trust may have been exempt from chapter 13, once the tainting event has occurred, in arriving at the generational assignment of the transferor and beneficiaries, arguably all of the operative provisions of chapter 13 should apply. Those rules in many cases will narrow the range of generations between the transferor and the beneficiaries if a GST event has occurred and property remains in trust. While the foregoing analysis would shield distributions to the current beneficiary from GST tax, it would lead to a GST event upon the termination of the current beneficiary's interest, when lower generational beneficiaries will have interests in the trust property (or when there otherwise will be distributions to beneficiaries occupying a lower generation during the grandchild's lifetime).

If, in the prior example, the trust beneficiary is the transferor's child (rather than grandchild), and the trust is extended beyond the protective cover of the GST regulations, that taint will not trigger an immediate GST tax. The transferor would continue to be the grantor.[35] However, when trust property eventually passes to someone two or more generations below that of the original transferor, say at the child's death, presumably the IRS will seek to impose a GST tax at that time.

## III. Gift and Estate Tax Implications

Under EPTL 10-6.6(b), the trustee—and not the beneficiaries—has the power to appoint in further trust. Furthermore, the statute no longer calls for beneficiary consent or court approval. Assuming the beneficiary is not a trustee (and therefore is not exercising the power), the trustee's exercise of the power should not be a taxable gift.

It is conceivable that the IRS might argue that, unless the beneficiary objects to the modification, dis-

tribution or extension, the beneficiary has made a gift. (Presumably the IRS would advance this argument, if at all, only in cases where there is the potential for the shifting of beneficial interests or a delay in vesting.) Under this possible theory, the beneficiary's acquiescence would be the equivalent of a gratuitous transfer. This argument, if advanced, should not prevail. For a taxable gift to occur, the donor must make a voluntary transfer, and no such transfer occurs when the trustee initiates the act (and the consent of the beneficiary is not required).[36]

The IRS further may argue that the expectation to receive the trust principal at the stated age is the equivalent of a general power of appointment (if the beneficiary lives to that age)[37] and the failure to object to a trust extension under EPTL 10.6.6(b) is a lapse or release of that general power of appointment.[38] However, this argument again is based on the assumption that the beneficiary has the legal right to prevent the trustee's action. If a court could approve a trust extension over the beneficiary's objection, the beneficiary likely will not be deemed to have a general power of appointment. If, on the other hand, it is determined that a court could not sanction an extension in a disputed matter, the gift argument is strengthened.

To minimize the risk that the IRS might assert that a gift has occurred, the beneficiary should be given a limited testamentary power of appointment over the modified, new or extended trust. A power of appointment would render the purported gift incomplete for transfer tax purposes.[39] If the beneficiary's acquiescence is deemed to be tantamount to a gift, and if the gift is incomplete due to the beneficiary's power of appointment in the new or extended trust, the trust property will be included in the beneficiary's gross estate.[40]

## IV. Income Tax Consequences

### A. General Situations Involving Non-Recognition Events

In the often-cited *Cottage Savings*[41] case, a financial institution (Cottage Savings) exchanged its participation interests in one group of mortgages for another institution's participation interests in a different group of mortgages. The Supreme Court held that the exchanged interests embodied legally distinct entitlements because the mortgages were made to different obligors and secured by different homes. The exchange therefore was a recognition event for income tax purposes.

In early rulings following *Cottage Savings*, the IRS suggested that a distribution in further trust might constitute a taxable exchange by those beneficiaries whose interests were materially changed.[42] However, in recent years, the IRS appears to have recognized that a distribution in further trust does not constitute a recognition event for a beneficiary if the distribution is authorized either by the trust document[43] or by local law.[44] This new approach makes sense. In the context of a trust decanting (at the sole discretion of the trustee), the beneficiaries are not exchanging any interests. Therefore, the exercise of the EPTL power to appoint in further trust generally should not trigger a recognition event.

### B. Special Situations That May Lead to Income Recognition

In *Crane v. Commissioner*,[45] the U.S. Supreme Court held that when property subject to a nonrecourse liability is sold, the amount realized includes not only the cash or other property received in exchange for the encumbered property, but also the full amount of the liability. Similarly, if there is a part-sale, part-gift, where the only consideration to the transferor is the transferee's assumption of the liability, there is a deemed sale to the extent of the liability (and a gift of the fair market value of the property which exceeds the liability). In that case, the transferor's amount realized is equal to the transferee's assumed liability.[46]

The regulations confirm the *Crane* holding: "The amount realized from a sale or other disposition of property includes the amount of liabilities from which the transferor is discharged as a result of the sale or disposition."[47] Regulation 1.1001-2(a)(4)(v) further provides that liabilities from which a transferor is discharged as a result of the sale or disposition of a partnership interest include the transferor's share of the partnership liabilities.[48]

Example 5 of Regulation 1.1001-2(c) deals with the income tax consequences arising when a grantor trust holding a partnership interest with a negative capital account ceases to be a grantor trust. Upon cessation of grantor trust status, the grantor is treated as having transferred the partnership interest to the trust. The grantor is deemed to realize an amount equal to the partnership liabilities allocable to the trust's interest. To the extent that amount exceeds the basis of the partnership interest, there is taxable gain.[49]

Under these principles, if the decanting trust ceases to be subject to liabilities as a result of a distribution—whether because the property is encumbered or because an interest has a negative capital account—the trust realizes an amount equal to the encumbrance or negative capital account, potentially leading to a gain. If the transferring trust and the receiving trust are both grantor trusts for income tax purposes, these special rules should have no impact.

This is so because transactions between two grantor trusts (with the same taxpayer as the grantor) generally are ignored for income tax purposes.[50] However, if one or both trusts are simple or complex trusts, the tax advisor must examine whether the liability encumbering any transferred property exceeds basis.

Another situation may give rise to income recognition. If the decanting trustee transfers property to a foreign trust, there may be a recognition event. Under Section 684, the transfer to a foreign trust of an appreciated asset is treated as a sale or exchange. If the transfer involves all of the decanting trust's assets, however, recognition likely will not be a problem. In the last year of its existence, the decanting trust will receive a distribution deduction for the income generated by the transfer to the foreign trust. Moreover, if the transfer is to a grantor trust (with respect to the transferor), there is no deemed sale or exchange at that time.[51] Rather, the deemed sale or exchange occurs once grantor trust status terminates.[52]

### C. Other Income Tax Considerations

Assuming the distribution under EPTL 10-6.6(b) does not give rise to a recognition event, it likely will carry out a proportionate share of the trust's distributable net income, or DNI. Consequently, the distribution will give rise to a deduction for the decanting trust[53] and income inclusion for the receiving trust.[54] The character of the income for the receptacle trust will remain the same as that for the decanting trust.[55]

## V. Potential Uses

EPTL 10-6.6(b) may be useful well beyond the intended GST purposes. For example, it can be used to facilitate state income tax planning. By way of background, complex trusts created by New York settlors or under Wills of New York decedents, referred to as New York resident trusts, generally are subject to New York State income tax.[56] However, such trusts are not subject to New York State income tax if the following three conditions are met: (1) all the trustees are domiciled outside New York State; (2) the entire corpus of the trust, including real and tangible property, is located outside of New York State; and (3) all income and gains of the trust are derived from sources outside of New York State.[57] Intangible personal property held by a trust with no New York trustees generally will not generate New York source income and will not be considered New York property.[58] Assuming the statutory prerequisites are satisfied, a trustee may employ EPTL 10-6.6(b) to create separate trusts to isolate financial assets from assets that generate New York source income. So long as the trustee of the trust holding the financial assets is not a New York domiciliary, that trust generally will escape New York State tax on accumulated income and capital gains.[59]

EPTL 10-6.6(b) also could be used to facilitate the funding of life insurance trusts or to meet other trust obligations. Over time, an individual may have created multiple trusts. It is possible that one such trust has ongoing obligations (say, to pay life insurance premiums or interest and principal payments on a loan), while another trust has available liquidity. Depending on the particular terms of the trusts, it may be possible to combine the available liquidity and the asset giving rise to the obligation.

Trustees further may use EPTL 10-6.6(b) to achieve other goals, such as: dealing with changed circumstances; modifying administrative provisions, including trusteeship provisions; extending the termination date of trusts (for non-tax reasons); correcting drafting errors; converting a complex trust (for fiduciary income tax purposes) to a grantor trust (or vice versa); changing the governing law; and dividing trust property to create separate trusts (to facilitate varying investment strategies for different beneficiaries).

## VI. Alternatives to Statutes

There are, of course, alternatives to EPTL 10-6.6(b).

### A. Provisions in Governing Instrument

The original trust instrument might contain express authority allowing the trustee to pour over the assets to another trust. Indeed, many attorneys are increasingly including an explicit pour-over provision to facilitate the transfer of trust assets, without needing to rely on a state statute.

The original trust agreement further might grant the trustees the power to amend the terms of the trust. Some practitioners include provisions bestowing upon trustees the power to change the trust's administrative provisions. It is more rare, however, for trustees to be given the power to amend dispositive provisions.

Trust documents also might provide for a lifetime power of appointment granted to a beneficiary, thereby allowing the beneficiary to appoint the trust property to another trust with different terms. A beneficiary who exercises a lifetime power of appointment should not be deemed to have made a gift unless the beneficiary relinquishes a vested right to the trust property.

### B. Amendment by Grantor in Accordance with Statute

EPTL 7-1.9(a) allows the grantor of an irrevocable trust to revoke or amend the trust in whole or in part, as long as the grantor obtains the written, acknowl-

edged consents of all persons with an interest in the trust. Although the grantor need not obtain the consent of unborn beneficiaries,[60] the grantor does need to secure the consent of all living beneficiaries, including minors. This requirement is often problematic, because New York case law generally holds that a minor cannot consent.[61] New York courts, however, have relaxed this rigid rule somewhat by holding that the consent of a minor beneficiary is unnecessary if the proposed amendment to the trust is favorable to the minor.[62] In any event, EPTL 7-1.9 is not available if the grantor is not living.

### C. Division and Establishment of Separate Trusts

EPTL 7-1.13(a)(1) permits a trustee to divide a trust and establish separate trusts, without the consent of the beneficiaries and without prior court approval, in order to achieve one of several specified purposes. Trust divisions (absent court direction or beneficiary consent) are permitted primarily in connection with tax planning, such as to isolate marital and non-marital assets, GST exempt and non-exempt assets or subchapter S stock from other trust assets.[63]

Significantly, this EPTL provision does not require that the trustee have unfettered discretion to invade the principal of the trust. However, it is limited because the trustee may use it only to accomplish fairly specific purposes. Paragraphs (2) and (3) of EPTL 7-1.13(a) expand the potential use of the statute. These provisions, respectively, allow a trustee to divide a trust "for any reason which is not directly contrary to the primary purpose of the trust," provided that the trustee obtain either the consent of all the trust beneficiaries or court approval.[64] However, the division must still be consistent with the purpose of the trust (and court or beneficiary approval is required). In addition, each divided trust established under EPTL 7-1.13(a), with limited exception, must be identical to the original trust.[65]

## VII. Conclusion

While EPTL 10-6.6(b) was initially enacted with GST tax planning in mind, the statute has been used in countless other circumstances. The exercise of the power to decant, however, has tax consequences that must be considered.

## Endnotes

1. Alaska, Delaware and Tennessee recently enacted similar statutes.
2. EPTL 10-6.6(b), L. 1992, Ch. 591, effective July 24, 1991 and applicable to all trusts whenever created.
3. *In re Estate of Gerald Mayer,* 176 Misc. 3d 562 (Sur. Ct., New York Co. 1998).
4. *Id*. at 565.
5. Supp. Memo. in Support of Legis., Governor's Bill Jacket, 1992 Chapter 591, at 1-2.
6. I.R.C. §§ 2056(b)(5), (7); 2523(e), (f).
7. *See* I.R.C. § 2642(c).
8. *See* I.R.C. § 2503(c).
9. *See generally* Restatement (Second) of Prop.: Donative Transfers § 19.3 (2003); *see also In re Kennedy's Will*, 18 N.E.2d 146 (N.Y. 1938); EPTL 10-6.6(a).
10. *See In re Fiske's Estate*, 195 Misc. 1017 (Sur. Ct., New York Co. 1949); *see also* Memo. in Support of Legis., Governor's Bill Jacket, 1992 Chapter 591, at 2-3.
11. *See In re Moore*, 129 Misc. 2d 639 (Sup. Ct., New York Co. 1985); Memo. in Support of Legis., Governor's Bill Jacket, 1992 Chapter 591, at 3.
12. EPTL 11-1.7(a).
13. EPTL 10-6.6(d).
14. EPTL 10-6.6(d), (e).
15. For example, suppose a trust exists for A for life, remainder to A's descendants, or if none, to B, or if B is not living, to C. If the trustee wishes to exercise the power to invade, service must be made on A and B (assuming A has no descendants); it is not necessary to serve C because C's interests are adequately represented by B.
16. EPTL 10-6.6(c).
17. Because trustees are not required to seek court approval, it is unlikely that we will see many court decisions addressing the open issues noted earlier.
18. *See* Memo. in Support of Legis., Governor's Bill Jacket, 1992 Chapter 591, at 2; Memo. in Support of Legis., Governor's Bill Jacket, 2001 Chapter 204, at 1.
19. *See also* Treas. Reg. § 26.2601-1(b)(1)(i).
20. TRA § 1433(b)(2)(B), as amended by Technical and Miscellaneous Revenue Act of 1988. *See also* Treas. Reg. § 26.2601-2(b)(2)(i). The GST tax also does not apply to any generation-skipping transfer under a trust to the extent such trust consists of property included in the gross estate of a decedent, but only if the decedent was under a mental disability as of October 22, 1986 which prevented him or her from changing the testamentary plan (and such decedent did not regain competence before death). TRA § 1433(b)(2)(C); Treas. Reg. § 26.2601-1(b)(4).
21. Treas. Reg. § 26.2601-1(b)(4).
22. Treas. Reg. § 26.2601-1(b)(1)(i).
23. *See* Treas. Reg. § 26.2601-1(b)(1)(v).
24. Treas. Reg. § 26.2601-1(b)(1)(v)(B); *see also* Treas. Reg. § 26.2601-1(b)(1)(v)(D) (ex. 4). To come within this rule, the power of appointment must not be exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation in property for a period extending beyond the rule against perpetuities period (measured from the creation of the exempt trust).
25. Treas. Reg. § 26.2601-1(b)(4)(A)(i)(1)(ii). The final regulations also require that the new (or continuing) trust cannot extend beyond the rule against perpetuities period, measured from the date the original trust became irrevocable.
26. Treas. Reg. § 26.2601-1(b)(4)(i)(D)(1).
27. *See* Treas. Reg. § 26.2601-1(b)(4)(i)(D)(2) for rules concerning when modifications will cause a shift in a beneficial interest to a lower generation beneficiary.
28. *See*, *e.g.*, Treas. Reg. § 26.2601-1(b)(4)(i)(E) (ex. 2).

29. In fact, in 1995, New York added EPTL 10-6.6(f), which confirms that the exercise of the power granted to a trustee under EPTL 10-6.6(b) "shall be considered the exercise of a special power of appointment."

30. *See*, *e.g.*, Restatement (Second) of Prop.: Donative Transfers § 19.3 (2003); *In re Hart's Will*, 262 A.D. 190 (N.Y. Sup. Ct. 1941).

31. Memo. in Support of Legis., Governor's Bill Jacket, 1992 Chapter 591, at 4.

32. *Comm'r v. Estate of Bosch*, 387 U.S. 456 (1967).

33. New York trusts have an additional complication: for nearly a decade, from 1992 to 2001, the statute required either beneficiary consent or court approval. Under the GST regulations, either condition would cause the authority under state law to fall outside the safe harbor rule. However, the alternative conditions (which have been removed from the EPTL) could be viewed merely as a procedural requirement that did not exist under state law (prior to 1987).

34. Section 2653 provides that, if there is a GST event and thereafter property is held in trust, for purposes of applying chapter 13 to subsequent transfers from the trust, the transferor shall be assigned to the first generation above the highest generation of the person who has an interest in such trust immediately after the transfer.

35. For GST tax purposes, the transferor generally is the person who transferred property for estate and gift tax purposes. I.R.C. § 2652(a)(1).

36. *See DiMarco Est. v. Comm'r*, 87 T.C. (1986), *acq.* 1990-2 C.B. 1. *See also Harris v. United States*, 71 S. Ct. 181 (1950).

37. I.R.C. § 2514(c).

38. I.R.C. § 2514(b).

39. Treas. Reg. § 25.2511-2(b).

40. I.R.C. §§ 2036(a), 2038.

41. *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554 (1991).

42. *See*, *e.g.*, Priv. Ltr. Rul. 199951028 (Sept. 28, 1999); Priv. Ltr. Rul. 199951009 (Sept. 14, 1999); Priv. Ltr. Rul. 199933027 (May 24, 1999).

43. *See*, *e.g.*, Priv. Ltr. Rul. 200207018 (Nov. 16, 2001); Priv. Ltr. Rul. 200010037 (Dec. 13, 1999).

44. *See*, *e.g.*, Priv. Ltr. Rul. 200135007 (May 29, 2001).

45. *Crane v. Comm'r*, 331 U.S. 1 (1947).

46. *Estate of Levine v. Comm'r*, 634 F.2d 12 (2d Cir. 1980).

47. Treas. Reg. § 1.1001-2(a).

48. For example, suppose a taxpayer's basis in a limited partnership interest is $20,000 and his or her proportionate share of partnership liabilities is $15,000. If the taxpayer sells the interest for $10,000 in cash, the amount realized is $25,000 ($10,000 of cash plus $15,000 of liability discharge). Because the cost basis is $20,000, there is a $5,000 gain ($25,000 less $20,000). Treas. Reg. § 1.1001-2(c) (ex. 3).

49. *See also Madorin v. Comm'r*, 84 T.C. 667 (1985).

50. *See generally* Rev. Rul. 85-13, 1985-1 C.B. 184; *but see Rothstein v. U.S.*, 735 F.2d 704 (2d Cir. 1984). Note that Treas. Reg. § 1.671-2(e)(4) provides that if a trust makes a gratuitous transfer of property to another trust, the grantor of the transferor trust usually is considered the grantor of the transferee trust.

51. I.R.C. § 684(b); *see also* I.R.C. § 679 to determine if receptacle trust is a grantor trust for income tax purposes.

52. Treas. Reg. § 1.684-2(e)(1).

53. I.R.C. § 661(a)(2).

54. I.R.C. § 662(a)(2).

55. I.R.C. §§ 661(b), 662(b).

56. N.Y. Tax Law § 605(b)(3) (2003).

57. N.Y. Tax Law § 605(b)(3)(D) (2003). *See also* TSB-A-94(7)I (New York resident meeting three requirements was not subject to New York State tax); TSB-A-96(A)I (same); TSB-A-00(2)I (same).

58. However, if the intangible personal property itself is used in a trade or business in New York, the intangible personal property will be deemed to generate New York source income. N.Y. Tax Law § 631 (2003).

59. As noted earlier, a distribution under EPTL 10-6.6(b) likely carries out a proportionate share of the trust's DNI. I.R.C. §§ 661(a)(2), 662(a)(2). The character of the income received by the new trust generally will be the same as the character generated by the distributing trust. Accordingly, if the distributing trust has any New York source income in the year of distribution, the receiving trust likely will have New York source income in the year of distribution. In that case, the receiving trust will be exposed to New York State income tax in the year of receipt, but not necessarily in subsequent years.

60. *See In re Peabody*, 158 N.E.2d 841 (N.Y. 1959); *In re Roth*, 73 A.D.2d 560 (N.Y. Sup. Ct. 1979).

61. *See Whittemore v. Equitable Trust Co.*, 165 N.E. 454 (N.Y. 1929); *In re Fletcher*, 57 Misc. 2d 554 (Sup. Ct. N.Y. County 1968).

62. *See In re Cord*, 449 N.E.2d 402 (N.Y. 1983); *In re Wynn Breen*, N.Y.L.J., June 28, 2000, at 27, col. 5 (Sur. Ct., New York Co., June 28, 2000).

63. EPTL 7-1.13(a)(1)(A)-(G).

64. EPTL§ 7-1.13(a)(2), (3).

65. The terms of the disposing instrument generally must govern the new trust. In the case of separate trusts for one or more members of a class of beneficiaries, a trustee acting pursuant to EPTL 7-1.13(a)(2) may distribute the original trust assets to separate trusts for one or more members of the class on a per stirpal or per capita basis, "whichever is consistent with the terms of the disposing instrument." EPTL 7-1.13(c).

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# Mind the Gap: Assisting Clients with Their Charitable Giving

By Patricia Angus

The London Underground has signs posted declaring "Mind the Gap" to alert passengers to the gap between the subway car and platform. There should be a similar sign for lawyers who work with clients to establish charitable vehicles. While lawyers are well prepared to focus on tax and technical aspects of estate and financial plans, many find that the world of organized philanthropy and the substantive aspects of charitable giving lie across a wide gap. Studies have shown that clients are seeking advice on how to get to the other side—and what to do once they get there—from their lawyers and other advisors. They seek guidance on how to make their charitable giving more strategic and effective, but advisors have traditionally been limited in their ability to respond to these needs because the necessary resources lay outside of advisors' usual professional training and expertise. Fortunately, the gap is narrowing, and helpful resources tailored to the needs of lawyers and their clients are becoming increasingly available. This article highlights some of the current resources that help lawyers to better anticipate their clients' needs and to help them cross the gap.

## I. Recent Findings

Over the past decade, several studies have focused on the needs of individuals engaged in charitable giving and the services provided to them by lawyers and other advisors.[1] Studies show that advisors who assist clients with charitable vehicles after the vehicles have been established will attract more clients, increase retention and build their practices through deeper client relationships.[2] The demand for such advice will only continue to grow, especially since estimates of the $41 trillion intergenerational transfer of wealth (including $6 trillion to charity) have been confirmed despite the economic downturn.[3] The National Center for Family Philanthropy estimates that there are now over 40,000 family foundations in existence, of which more than half were created in the past decade.[4]

### Clients Seek Advice on Philanthropy

Several recent studies provide insight into client needs, resources available to donors and giving patterns of diverse communities.[5] The National Center for Family Philanthropy (NCFP) surveyed donors in California to learn more about their motivations, challenges and rewards in developing giving or grantmaking programs. The results are useful for lawyers in New York because California led the growth of family philanthropy in the 1990s and its charities were the first to be hit with the economic downturn and that state's fiscal crisis. New York is in a similar position.

The findings show that, while clients are comfortable with the level of tax and technical advice they receive, they feel lost after charitable structures are put in place. The study makes clear that donors are interested in resources that help them understand best practices in philanthropy and provide connections to others in the field. Similarly, donors desire continuing education to give effectively. A national study conducted by New Visions Philanthropic Research and Development, a non-profit research and consulting organization, shows that there is a need for more effective, comprehensive education programs that are more easily accessible and adaptable to donors' time constraints.[6] These programs must help donors from the very beginning, because, as actor Alan Alda puts it: "It's only after you embark on this voyage of philanthropy that you realize how far there is to go."[7]

Useful information and resources are indeed available for advisors to anticipate and understand their clients' needs. The Philanthropic Initiative (TPI), a Boston-based non-profit consulting firm, reports in "Doing Well By Doing Good—Improving Client Service, Increasing Philanthropic Capital: The Legal and Financial Advisor's Role,"[8] that clients look to their advisors to initiate discussions of charitable giving and to guide them through the process. Further, lawyers tend to overestimate the weight placed by donors on tax consequences of their giving when, in fact, donors place tax benefits toward the bottom of their priorities. According to *Giving USA 2001*, a publication of the AAFRC Trust for Philanthropy, researched and written by the Center on Philanthropy at Indiana University, donors cited the following reasons for charitable giving:

- Feel strongly about the cause (54%)
- Moral imperative or right thing to do (47%)
- Personal experience with the organization (40%)
- Religion or spirituality (36%)

- Health issues (personal or family illness) (30%)
- Tax benefit (28%)[9]

### Giving Practices Differ Across Ethnic Groups

Advisors need to be aware of how ethnicity can affect donors' interests and approaches to giving. In "Cultures of Caring," the Council on Foundations reviewed giving practices among the African-American, Latino, Asian-American and Native American communities, all of which are growing sources of charitable donations.[10] The report warns against using generalizations and stereotypes, but points out similarities across and within these ethnic groups, which comprise a growing percentage of the U.S. population. For example, a deeper sense of reciprocity leads to charity that is focused on mutual assistance within these groups rather than charity for unknown recipients. According to the survey, civil rights are a higher priority among African-Americans, while cultural heritage or preservation is more important to Asian-Americans, Latinos and Native Americans. Much of the giving in these groups is not structured formally. Often, first-generation immigrants make it a practice to "remit" some of their earnings or assets to help support communities in their countries of origin. Lawyers need to be aware of this tendency and help clients become more tax-efficient and strategic in their giving.

### What's on the Other Side

The other side of the gap has many names—the independent sector, the charitable giving community and the voluntary or non-profit sector, to name a few—and includes more than 1.5 million organizations with combined revenues of over $670 billion.[11] It consists of all the organizations that contribute to society's well-being but function outside of business and government—including well-known charitable institutions, community-based organizations, and private foundations—and received a total of $241 billion in funding in 2002, equivalent to 2.3% of U.S. GDP.[12] Individual giving made up 83.8% of this total figure, with $183.73 billion in direct gifts and $18.1 billion in bequests.[13]

## II. How to Get There and Guide Clients

Lawyers must become more familiar with the people, institutions and resources in organized philanthropy, and, in turn, serve as guides to clients who wish to make their giving more effective. Each client in the process of establishing a formal structure such as a private foundation should be alerted to the need to develop a mission for the new entity and educated on how to manage its day-to-day operations.

The first step in helping to guide a client is to find out about the nature of the client's interest in giving to charity. Rather than asking solely about financial assets, a lawyer must learn about the client's motivations, values and interests. Ideally, this should become a part of the standard intake process, using some of the following kinds of questions:

- Does your estate plan reflect your values?
- Where do you currently make charitable contributions—and/or volunteer? Do you wish to include them in your estate/financial plans?
- Do you wish to leave anything to charity? If so, how?

Even if these questions are not asked up front, clients may later provide clues that should trigger discussion of charitable giving interests. If a client mentions any of the key motivating factors (e.g., involvement with an organization, personal/family health issues, passion for a cause), the lawyer should ask whether this interest should be included in the plan.

Second, the lawyer must discuss the nature and depth of the interest. Does the client want to give passively (e.g., a bequest) or actively (e.g., by creating a family foundation)? What are the client's personal values and motivations for giving? How much does the client know about needs and opportunities in the clients' chosen areas of interest?

Lawyers should take advantage of the organizations offering tools and resources that are specifically tailored to assist lawyers in engaging in these discussions and to broaden their knowledge of philanthropy, including the National Center on Planned Giving (and its Planned Giving Design Centers), the Council on Foundations, the Forum of Regional Associations of Grantmakers, local non-profit organizations and philanthropic advisors. Resources and support geared to specific communities are available through regional associations of grantmakers,[14] such as the New York Regional Association of Grantmakers (NYRAG). NYRAG serves the metropolitan New York area and promotes and supports the practice of organized philanthropy for the public good. NYRAG offers workshops and other resources to help lawyers and other professional advisors become more familiar with the field of philanthropy. These groups are leading professional resources for both emerging and existing corporate, independent, public and family foundations on all aspects of grantmaking and management. Their collective members include some of the largest and most well-established grantmakers in the country as well as newer, small family foundations.[15] By becoming a part of this network, new donors can stay at the cutting edge of developments in philanthropy.

Lawyers must adapt also to the ways in which needs vary across ethnic groups. For example, lawyers can help facilitate giving by clients who wish to make gifts to their home countries by alerting them to organizations that assist in the process, including federated funds, community foundations and "friends of" charitable organizations.[16] Advisors should make it a practice to ask whether clients are already giving informally, whether they are affiliated with one or more of these organizations, and if they wish to be connected to them.

Lawyers should encourage their clients to approach their giving with the same attention that they apply to the rest of their affairs. Some helpful resources to guide individuals and families through the process of thinking more strategically about their giving include the books *Smart and Caring*, *Inspired Philanthropy: Creating a Giving Plan*, and *Wealth in Families*.[17] There are other useful new resources on a more technical level as well, allowing an advisor who creates a formal structure to prepare the client for the administrative and governance issues that the client will face in managing the entity's operations.[18]

Lawyers who lead clients to the right organizations, affinity groups and philanthropic advisors help ensure that their clients will have a rewarding experience with their charitable giving. Philanthropy that is guided by clear objectives and informed by experienced grantmakers is more likely to be operated efficiently from a governance standpoint, reducing liability and increasing enjoyment. The National Center for Family Philanthropy[19] offers individual donors research, support and knowledge on issues ranging from family dynamics to proper decision-making to principles of proper grantmaking. By connecting with organizations, local regional association of grantmakers (e.g., NYRAG), community foundations or federated funds clients can choose among offerings that will enhance their knowledge These organizations offer considerable experience in the community, access to helpful information and support for charitable giving vehicles.

There are also associations and affinity groups that can help the client become connected with effective charities in their ethnic community. The Coalition for New Philanthropy and its member organizations (the Asian-American Federation of New York, the Center on Philanthropy and Civil Society at The Graduate Center of the City University of New York, the Hispanic Federation, NYRAG, and The Twenty-First Century Foundation) assist African-American, Asian-American and Latino donors with individual and collective philanthropy and can connect them with information about how to effectively meet the needs of the disadvantaged in those communities.

For lawyers and other advisors, the Coalition has recently developed an information kit entitled *Building Client Relationships Through Philanthropy* that provides information on cultural giving patterns, techniques for identifying clients likely to be interested in philanthropy and strategies for broaching the topic with clients.[20] The Coalition, as well as many associations and groups noted above, now offer a variety of workshops for professional advisors.

Donors who seek confirmation that their gifts are being put to good use by the organizations receiving them can turn to the organizations and associations mentioned in this article for assistance in learning useful evaluation methods that have been tested by the philanthropic community.[21]

In the long run, by learning about client motivations, values and philanthropic goals, it is likely that lawyers and other advisors will develop better relationships with their clients and provide the kinds of services that clients have indicated that they are seeking. In addition, by crossing the gap into the philanthropic sector both with and for clients, advisors will enhance their knowledge and gain useful experience to ensure thoughtful, effective charitable giving. And, who knows, maybe some day there won't be a gap to mind.

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14. *See* www.givingforum.org.
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# Objections to Probate—A Proponent's View

By Lainie R. Fastman

The notion of personal freedom is deeply ingrained in American values. We permit, albeit with a jaundiced eye, the eccentric to make his abode in the park, carry his belongings in a shopping cart and travel the subways for a living.

Consistent with this principle, we do not question, and indeed heartily endorse, the idea that at death, one may dispose of one's property as one desires.[1] If the frail and elderly aunt, while fond of her nephews and nieces, excludes them in her will and elects to benefit her devoted home-health aide, will she succeed?

A will proponent's counsel must take advantage of every opportunity afforded to assist his client's efforts to allow the propounded will to be admitted to probate in order to effectuate the decedent's wishes. A brief exploration of these opportunities should aid him in facing the opposition in the ritualized warfare that constitutes a contested probate case.

## Formalities of Execution

By imposing adherence to certain formalities surrounding execution, we have, at the outset, determined that the testator should not enter lightly into a dispositive scheme. Estates, Powers and Trusts Law ("EPTL") section 3-2.1 sets forth the requirements of creating a valid will.

As experienced estates practitioners know, the testator, or someone on his behalf, must sign at the end, in the presence of at least two (2) attesting witnesses. At some time during the ceremony of execution and attestation, the testator should declare to each of the attesting witnesses that the instrument to which his signature is affixed is his will. The witnesses must, within one 30-day period, attest the testator's signature, as affixed or acknowledged in their presence, and, at the request of the testator, sign their names and affix their addresses. The necessary ingredients are specific, but the procedure for the execution and attestation of wills "need not be followed in the precise order" enumerated in the statute. The statute was designed to prevent fraud in the execution of wills.[2] Surrogate's Court Procedure Act ("SCPA") section 1408(1) provides that the court, before admitting a will to probate, "must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution."[3]

Although the objectant to probate will routinely recite a failure of due execution, in most instances, the proponent will prevail, as the statute's "beneficial purpose should not be thwarted by an unduly strict interpretation of its provisions."[4] All that is required is "substantial and acceptable compliance."[5]

Indeed, a reading of the cases cited under the statute reveals its benign application. Thus, we see a will or codicil admitted to probate with a missing page;[6] written in the form of a letter in decedent's own handwriting, stating it was a codicil to her will and closing with the words "Love, Mother";[7] where the will consisted of a carbon copy;[8] where spouses mistakenly signed each other's identical wills;[9] where decedent, who could not write, affixed her "mark" rather than her name;[10] where the will was signed by testatrix's agent because she was physically incapacitated;[11] where decedent had folded two sheets of paper into four sections and the writing started on page one, continued on page four and concluded on page two.[12]

EPTL 3-2.1 is aided by a presumption of due execution where the will was executed under the supervision of an attorney.[13] Furthermore, due execution is inferred by the presence of an attestation clause.[14] The uncontroverted testimony of the attesting witnesses will be dispositive.[15] In short, while the burden is on the proponent to prove by a fair preponderance of the evidence that the will was executed in compliance with the statute, it is not a heavy burden to carry and the testator who exercised a modicum of judgment and sought the help of counsel of even modest competence should have his wishes carried out. Clearly, the proponent, discouraged under the weight of one or more of the above enumerated infirmities, should see his spirits lifted by a thorough review of these cases.

The real challenge for the testator and, later, the proponent of his will, lies in the examination of the testator's testamentary capacity and the manner in which the exercise of the testator's freedom of choice may, according to objectant, have been subverted by undue influence.

## Who May Object to Probate

Had she died intestate, decedent's property would have passed to those in the nearest degree of heirship, the distributees enumerated in EPTL 4-1.1. The assumption is made, although it is not always justified, that testatrix, survived by her children, would wish to benefit them to the exclusion of her dearest friend, or her nephew. The class of persons to whom process must issue when the will is offered for probate, as provided by SCPA 1403, includes dece-

dent's distributees, the executor, if another person is propounding the will, and a beneficiary or fiduciary whose rights are adversely affected by any other, later dated instrument, offered for probate. The court, in the exercise of its equitable powers, may require that others be served with process as well. SCPA 1410 provides that "any person whose interest in property or in the estate of the testator" would be adversely affected by the admission of the will to probate may file objections to all or part of a will.[16]

The distributee who is excluded in the will, or whose intestate share would have exceeded that which is given to him in the will, is the objectant whose emergence may be anticipated, unless the testator, in advance, secured the distributee's surrender of his right to object.[17]

## The Role of the Public Administrator

The objectant may not come alone, but may bring a retinue. Whenever there are unknown distributees or where the distributees named in the probate petition are related to decedent in the fourth degree of consanguinity,[18] or more remotely, the public administrator must be served with process as required by SCPA 1123(2)(i)(2).

The public administrator "in his discretion," may "take any action in behalf of such person or persons as a person interested might" take.[19]

Such action may include the filing of objections.[20] In addition, the court may, in its discretion, direct the public administrator to appear in a proceeding as provided by SCPA 1123(2)(i)(1). Where no distributee would be eligible to receive letters were the will denied probate, the public administrator is a person "otherwise interested in the will" entitling him to examine the subscribing witnesses.[21] The public administrator may assert this right even where the distributees at issue have consented to probate, as it is the duty of the Surrogate's Court before admitting the instrument to probate to satisfy itself with the genuineness of the will and the validity of its execution.

The proponent of decedent's last will and testament now not only must contend with unhappy distributees, but with the possible opposition of the public administrator.[22] A quasi-public officer, he is, nevertheless, an advocate. SCPA 1124(I)(5) provides that his counsel "shall be allowed his reasonable fee. Such expenses and fees shall be payable either from the estate generally or from the shares or interests of the respective persons represented by the Public Administrator, as may be directed by the Court."[23]

This provision may provide some motivation on both sides. In *In re Schindhelm's Will*, the appellate division held that the Surrogate's Court should have granted proponent's motion to strike the appearance, authorization and objection to probate filed by respondent, the public administrator, as his participation was a "burdensome or unnecessary duplication of the function" of a special guardian appointed by the court to safeguard the interests of unknowns.[24]

Furthermore, it would seem, that, under appropriate circumstances, the passionate proponent might enlist the aide of the public administrator if it appears that there is no factual basis for objectant's persistence, or for his angling for a settlement offer. The public administrator may be honor-bound on behalf of the very unknowns he represents not to diminish the estate by his unnecessary fees and, instead, to provide an affidavit in support of proponent's position.

Where the public administrator's participation is not grounded upon his representation of unknown distributees and where there is vigorous opposition to probate by objectants, a motion made sometime during the discovery process by proponent to dispense with the public administrator's continued representation may be appropriate, unless the latter joins in the objections.

## Testamentary Capacity

Turning to the issue of testamentary capacity, as stated by the New York Court of Appeals,

> . . . [T]he proponent has the burden of proving that the testator possessed testamentary capacity and the Court must look to the following factors: 1) whether she understood the nature and consequences of executing a will; 2) whether she knew the nature and extent of the property she was disposing of; and 3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.[25]

The appropriate inquiry is whether the decedent was lucid and rational at the time the will was executed.[26] While the decedent may have suffered from senile dementia and was physically frail, such evidence is not necessarily in conflict with testamentary capacity.[27] Although the decedent was in a semi-conscious condition and unable to talk, when roused, he nodded his head to questions asked up to a time after the will was executed and the testimony of the witnesses, who were present at the time the will was executed, to that effect was persuasive.[28]

These cases illustrate that the kind of capacity required to execute a valid will differs from that

required to contract in general. Furthermore, the testator is presumed to have testamentary capacity.[29]

The court will not allow probate, even without objections, unless it is satisfied that the decedent "was in all respects competent to make a will and not under restraint."[30] This language may lend some credence to the notion that the burden of proving absence of restraint is on the proponent as well. Although, as we shall see, the burden of proof of undue influence falls to the objectant, counsel for the proponent may feel forced into producing one giant stew of proof and shouldering the burden of freedom from undue influence. Proof of capacity should be limited to its components as elucidated in *Kumstar*, and nothing more.[31] The court, in *In re Schillinger's Will*, addresses the issue fully:

> There can be no doubt that the meaning of the word "restraint" includes and covers the term "undue influence," or that the requirement that it must appear to the surrogate that the testator was not under restraint at the time he made his will before the will can be admitted to probate affords some basis to the theory that there is a burden resting upon the proponent of a will to prove absence of restraint, which, as we have seen, embraces undue influence. But the courts have not taken this view . . . [o]n the contrary, we find that upon the question of "restraint," the burden is upon the contestants.[32]

To the proponent who must try his case, this analysis will compel him to proceed properly and not do more than is necessary. He will begin the production of testimony by proving due execution and competency "at any length he may choose". . . "either by offering the deposition of the attesting witnesses that is commonly used in a non-contested probate, or by offering the record of an examination [before trial] . . . Proponent may, at least, rest on such *prima facie* proof as raises the presumption of sanity."[33] Thereupon, objectant who claims that testator labored under restraint will address this as a "distinct matter of defense."[34] Even in framing her motion for summary judgment, proponent should be mindful of who must prove what.

## The Objects of One's Bounty

As we have seen, in *Kumstar*, one of the ingredients of testamentary capacity is the knowledge of the "natural objects" of one's bounty.[35] Who are these lucky persons? An EPTL 4-1.1 distributee might smugly assume that his kinship to the decedent entitles him to this appellation. He may be mistaken. The cases do not always make clear exactly what is meant by the term. In *In re Stephani's Will*, the court reflected upon the testimony related to the testamentary capacity of a decedent who was an inmate of Dannemora State Hospital for the criminally insane.[36] The psychiatrist testified that decedent knew "who his relatives were and who were the natural objects of his bounty."[37] Dr. Bailey, who helped out at the hospital for a short time, testified that decedent "knew the object of his bounty, and that he knew his relatives"[38] *[suggesting that these were not necessarily the same].* The court opined, however, that testamentary capacity requires that testator "must know his relatives, sometimes called the object of his bounty"[39] *[suggesting they are one and the same].*

The issue was before the court in *In re McCarty's Will*.[40] "It sounds well to declaim about the exclusion of those who are the natural objects of one's bounty, but before we assume fraud as against reputable citizens (*where fraud and undue influence were claimed*), we should inquire who these 'natural objects' are, and what claims they had upon testatrix's bounty."[41] Decedent's numerous cousins who resided all over the globe were not included in the class of natural objects of her bounty. The court commented about the degrees of kinship as set forth in the intestacy statutes and concluded that the interests of cousins are removed. "We are of the opinion that a person of sound and disposing mind might absolutely close his eyes and his mind to the existence of his cousins, and grant his entire estate to intimate business and social associates, without giving rise to the presumption of having been defrauded by undue influence."[42]

In fact, decedent, in *McCarty,* who provided for her brother's widow who had made a home with her, was looking after "the natural object of her bounty."[43] Similarly, where the evidence established that decedent's friend was "like a daughter," the friend was a "natural object" of decedent's bounty, in contrast to her niece and nephew with whom decedent did not have a relationship.[44]

Even if one's distributees are the natural objects of one's bounty, one must know one's "relations with them."[45] Thus, where a testator substantially reduced the gift to his children and grandchildren because, as he complained to the drafter of the will, they did not love him and no longer visited him on special occasions like his birthday, objectants did not prevail because testator knew his relations with the objects of his bounty.[46] Similarly, in *Bush*, decedent failed to remember his two sisters and instead benefited his friends.[47] As there is "nothing in the record to indicate a close relationship which would lead to the conclusion that he should have remembered them in his will," decedent carried the burden of proving

capacity.[48] Similarly, in *In re Steinman*, decedent's cousins had not presented any proof that they had a meaningful relationship with decedent.[49]

In short, the embattled proponent faced with the natural opposition of excluded distributees, may be heartened to know that they are not necessarily the natural objects of decedent's bounty. This principle may be contrary to commonly held convictions, but the fact finders should not be permitted to "mistake their functions as those of an ultimate testator . . . in order to make a will just in their opinion."[50]

Where counsel is the attorney draftsman and thus can take some precautions if distributees are excluded, it may be useful to make reference in the will to decedent's lack of a relationship to distributees, or, if this is undesirable for reasons of sensibility, to ask decedent to write a letter, in her handwriting, setting forth the reasons for excluding her nephews and favoring her dear friend.

## Undue Influence

As we have seen, the concepts of capacity and freedom from restraint, or undue influence, are closely interlaced but distinctly different. Counsel should be mindful of objectant's burden to prove undue influence which has been defined as "an affirmative assault on the validity of a will."[51]

The law can be briefly stated. Objectant must provide evidence of all three elements of undue influence: motive, opportunity and the actual exercise of undue influence. Such influence must amount to a moral coercion which restrained independent action and destroyed free agency, which "constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist."[52] The court may not submit the issue of undue influence to the jury where evidence that influence was actually utilized is insufficient.[53] To raise an issue of fact as to undue influence, more proof is required than mere conclusory allegations and speculation.[54] Since undue influence is not often the subject of direct proof, it can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the conditions of his health and mind, his dependence upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of that person to wield it, and the acts and declarations of such person.[55]

Where there is substantial disparity in power between the decedent and the person purportedly having exercised the undue influence, the law imparts a "confidential relationship," as held in *Ten Eyck v. Whitbeck*,[56] which, in turn gives rise to an inference of undue influence.[57] This inference may not automatically be drawn, where the donee has a close family relationship with decedent.[58] If the inference may be drawn, the burden of proof shifts from the objectants to proponent to "show the integrity of the bequest" made in the propounded instrument.[59]

## The Motion for Summary Judgment

It should be readily apparent that an allegation of undue influence constitutes fertile ground for objections. It has long been settled that the remedy of summary judgment in contested probate proceedings is available where objectants have failed to raise a genuine and material issue of fact.[60] The regnant theory for years was that such relief could not lie where the objection was based on undue influence. Increasingly, however, a motion for summary judgment in favor of proponent may succeed even where the will is challenged on that ground.

In *In re Proceeding of Camac*, decedent began living with one of her two daughters shortly after the death of her husband.[61] Decedent left the bulk of her estate to her two daughters, leading to her son's objections on the grounds of undue influence. The court's denial of proponent's motion for summary judgment was reversed and the objection on the ground of undue influence dismissed. The court held that objectant had failed to raise a triable issue of fact. Appellant did not participate in the drafting or execution of the will. Until five weeks before her death, decedent was able to take care of herself and went to her office twice a week. The surrogate improperly relied on an inference of undue influence based upon a presumed confidential relationship between decedent and her physician daughter, as there was no evidence that the daughter had any direct involvement in the preparation or execution of the will.

In the last couple of years numerous successful summary judgment motions dismissing objections based on undue influence have been reported in the *New York Law Journal*.[62] In conclusion, the proponent no longer needs to feel restrained from moving for summary judgment on the issue of undue influence.

## The Timing of the Motion

Once issue is joined, a motion for summary judgment is available. However, the court will be more inclined to grant the motion where discovery has been completed.[63] Clearly, this is not to say that it may not be useful to wear the opponent down with a number of summary judgment motions, forcing him, in the process, to lay bare his proof. This decision is partly driven by economics. Unfortunately, the wealthy estate is in a better position to mount a

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vigorous defense of the will than the modest one. Seward Johnson, of the multi-national health care manufacturer Johnson & Johnson, "left a massive portion of his estate to a woman more than half his age who had captured his heart and possibly his mind."[64] A full-time lawyer was employed whose only duty consisted of protecting the estate from excluded family members. In the usual case, counsel will be restricted by the financial resources of the estate and will wait until discovery is complete before filing the motion for summary judgment.

## Conclusion

Although the receipt of objections is a distressing event for the proponent, at the very least alerting him to the commencement of what may become a long and painful process, the proponent should be encouraged by all that works in his favor. A careful, orderly, parsing of the components of the proponent's burden, together with a properly timed, well-crafted summary judgment motion will often lead to probate.

## Endnotes

1. *But see* EPTL 5-1.1-A (Consol. 2003) (dealing with the right of election by the surviving spouse).
2. *See In re Will of Kobrinsky*, 51 Misc. 2d 222, 273 N.Y.S.2d 156 (Sur. Ct., Kings Co. 1966).
3. SCPA 1408(1) (Consol. 2003).
4. *See In re Will of Dupin*, 36 Misc. 2d 309, 310, 232 N.Y.S.2d 381, 383 (Sur. Ct., Nassau Co. 1962).
5. *See In re Andrews' Will*, 195 Misc. 421, 88 N.Y.S.2d 32 (Sur. Ct., Broome Co. 1949).
6. *See Estate of Zina Chugin*, N.Y.L.J., June 9, 2003, p. 35, col. 1 (Sur. Ct., Suffolk Co.); *In re Estate of Hall*, 118 Misc. 2d 1052, 462 N.Y.S.2d 154 (Sur. Ct., Bronx Co. 1983).
7. *In re Estate of Kenneally*, 139 Misc. 2d 198, 528 N.Y.S.2d 314 (Sur. Ct., Nassau Co. 1988).
8. *Estate of Saxl*, 32 Misc. 2d 481, 222 N.Y.S.2d 765 (Sur. Ct., New York Co. 1961).
9. *In re Estate of Snide*, 80 A.D.2d 276, 439 N.Y.S.2d 690 (3d Dep't 1981).
10. *In re Irving's Will*, 153 A.D. 728, 138 N.Y.S. 784, *aff'd*, 207 N.Y. 765, 101 N.E. 1106 (1913); *In re Romaniw's Will*, 163 Misc. 481, 296 N.Y.S. 925 (Sur. Ct., Westchester Co. 1937).
11. *In re Gallagher's Will*, 123 N.Y.S.2d 912 (Sur. Ct., Queens Co. 1953).
12. *In re Peiser's Will*, 79 Misc. 668, 140 N.Y.S. 844 (Sur. Ct., New York Co. 1913). *See also In re Reid's Will*, 47 N.Y.S.2d 426 (Sur. Ct., Queens Co. 1944); *In re Hildreth's Will*, 36 N.Y.S.2d 938 (Sur. Ct., Westchester Co. 1942); *Will of Santo Sapienza*, N.Y.L.J., June 27, 2003, p. 33, col. 2 (Sur. Ct., Rockland Co.).
13. *See In re Estate of Philbrook*, 185 A.D.2d 550, 586 N.Y.S.2d 394 (3d Dep't 1992).
14. *See In re Will of Alden*, 52 A.D.2d 1051, 384 N.Y.S.2d 287 (4th Dep't 1976).
15. *See In re Estate of Matteo*, 134 A.D.2d 261, 520 N.Y.S.2d 594 (2d Dep't 1987).
16. For the interplay of the statutes heretofore referenced, see Peter C. Valenti and Joann T. Palumbo, *Interplay of SCPA 1403; 1410 and 709*, N.Y.L.J., Jan. 31, 1996, p. 3, col. 1.
17. *See* SCPA 1403(1)(a); SCPA 1001(1)(b); *In re Cook's Will*, 244 N.Y. 63, 154 N.E. 823 (1926). *Cf. In re Estate of Cagney*, 186 Misc. 2d 760, 720 N.Y.S.2d 759 (Sur. Ct., Dutchess Co. 2001), *aff'd*, *In re Cagney*, 293 A.D.2d 675, 740 N.Y.S.2d 448 (2d Dep't 2002). *See also* John C. Welsh, *2000-2001 Survey of New York Law: Estates and Trusts*, 52 Syracuse L. Rev. 375 (2002) (discussing the issue more fully).
18. The "fourth degree of consanguinity" may sound far away, but first cousins will so qualify.
19. SCPA 1123 (4).
20. *See In re Estate of von Knapitsch*, 296 A.D.2d 144, 746 N.Y.S.2d 694 (1st Dep't 2002).
21. *See In re Wiberg's Will*, 197 Misc. 511, 98 N.Y.S.2d 930 (Sur. Ct., Queens Co. 1950).
22. The public administrator is not an arm of the court. SCPA 1128 provides that the operation of the offices of the public administrator is subject to guidelines established by an administrative board, consisting of thirteen members, five of whom shall be Surrogate's Court judges.
23. SCPA 1124(I)(5).
24. 11 A.D.2d 777, 778, 205 N.Y.S.2d 81, 83 (2d Dep't 1960).
25. *In re Estate of Kumstar*, 66 N.Y.2d 691, 692, 487 N.E.2d 271, 272 (2d Dep't 1985); *In re Estate of Bush*, 85 A.D.2d 887, 446 N.Y.S.2d 759 (4th Dep't 1981).
26. *In re Estate of Long*, 176 A.D.2d 1059, 575 N.Y.S.2d 205 (3d Dep't 1991); *Hedges*, 100 A.D.2d 586, 473 N.Y.S.2d 529.
27. *In re Estate of Ruso*, 212 A.D.2d 846, 622 N.Y.S.2d 137 (3d Dep't 1995); *In re Hedges*, 100 A.D.2d 586, 473 N.Y.S.2d 529 (2d Dep't 1984).
28. *In re Holcomb's Estate*, 150 Misc. 684, 271 N.Y.S. 225, *aff'd*, 242 A.D. 889, 275 N.Y.S. 481 (3d Dep't 1934).
29. *In re Beneway's Will*, 272 A.D. 463, 71 N.Y.S.2d 361 (3d Dep't 1947).
30. SCPA 1408(2).
31. 66 N.Y.2d 691.
32. 231 A.D. 679, 680, 248 N.Y.S. 610, 612, *aff'd*, 258 N.Y. 186, 179 N.E. 380 (1932) (citations omitted).
33. *See In re Brown's Estate*, 144 Misc. 440, 442, 259 N.Y.S. 275, 277 (Sur. Ct., Monroe Co. 1932) (for an elegant exposition of proponent's burden at trial).
34. *See id.*
35. 66 N.Y.2d 691.
36. 250 A.D. 253, 294 N.Y.S. 624 (3d Dep't 1937).
37. *Id.* at 256.
38. *See id.*
39. *See id.*
40. 141 A.D. 816, 126 N.Y.S 699 (2d Dep't 1910).
41. *Id.* at 819.
42. *Id.* at 820.
43. *Id.* at 821.
44. *Estate of Eleanore E. Tobin*, N.Y.L.J., Oct. 2, 2000, p. 26, col. 3 (Sur. Ct., N.Y. Co.).
45. *Kumstar*, 66 N.Y.2d at 692.
46. *In re Elco*, 153 A.D. 2d 860, 545 N.Y.S.2d 377 (2d Dep't 1989).

47. *Bush*, 85 A.D.2d 887.

48. *Id.* at 888.

49. N.Y.L.J., Aug. 31, 1998, p. 28, col. 1, (Sur. Ct., Bronx Co.); *cf. Estate of William Dolinsky,* N.Y.L.J., Feb. 29, 2003, p. 21, col 6. (Sur. Ct., Westchester Co.).

50. *In re Woods*, 189 A.D. 324, 325, 178 N.Y.S. 573 (2d Dep't 1919).

51. *See Schillinger*, 231 A.D. 679 at 680.

52. *In re Will of Walther*, 6 N.Y.2d 49, 53,159 N.E.2d 665, 668 (1959) (quoting *Children's Aid Soc. v. Loveridge*, 70 N.Y. 387 (1877)).

53. *In re Will of Vukich*, 53 A.D.2d 1029, 385 N.Y.S.2d 905 (4th Dep't 1976), *aff'd*, *In re Estate of Vukich* , 43 N.Y.2d 263, 401 N.Y.S.2d 176, 372 N.E.2d 12 (1977).

54. *In re Estate of Young*, 289 A.D.2d 725, 738 N.Y.S.2d 100 (3d Dep't 2001); *In re Estate of Dietrich,* 271 A.D.2d 894, 706 N.Y.S.2d 763 (3d Dep't 2000); *In re Posner*, 160 A.D.2d 943, 554 N.Y.S.2d 666 (2d Dep't 1990).

55. *Rollwagen v. Rollwagen*, 63 N.Y. 504 (1876).

56. 156 N.Y. 341, 50 N.E. 963 (1898).

57. *Hazel v. Sacco*, 52 A.D.2d 1042, 384 N.Y.S.2d 572 (4th Dep't 1976).

58. *See Estate of Raymond Revit*, N.Y.L.J., May 10, 1999, p. 31, col. 2 (Sur. Ct., Westchester Co.).

59. *Estate of Eleanore E. Tobin*, N.Y.L.J., Oct. 2, 2000, p. 26, col 3.

60. *In re Estate of Bartel*, 214 A.D.2d 476, 625 N.Y.S.2d 519 (1st Dep't 1995).

61. 300 A.D.2d 11, 751 N.Y.S.2d 435 (1st Dep't 2002).

62. *Estate of Fay Libby Weinberg,* 1 A.D.3d 523, 767 N.Y.S.2d 234 (2d Dep't 2003); *See In re Estate of Sweetland*, 273 A.D.2d 739, 710 N.Y.S.2d 668 (3d Dep't 2000); *In re Esberg*, 215 A.D.2d 655, 627 N.Y.S.2d 716 (2d Dep't 1995); *Matter of Helen Godulias,* N.Y.L.J., September 29, 2004, p. 29, col. 4 (Sur. Ct., Queens Co.); *Estate of Barbara J. Noseworthy,* N.Y.L.J., June 27, 2003, p.31 col. 6 (Sur. Ct., Kings Co.); *Estate of Arthur Raeder*, N.Y.L.J., May 21, 2003, p. 20, col. 2 (Sur. Ct., Kings Co.); *Matter of Ilona Weltz*, N.Y.L.J., Mar. 27, 2003, p. 22, col. 4 (Sur. Ct., Queens Co.); *Estate of Andree Banner*, N.Y.L.J., Feb. 26, 2003, p. 23, col. 6 (Sur. Ct., Bronx Co.); *Estate of William Dolinsky*, N.Y.L.J., Jan. 29, 2003, p. 21, col. 6 (Sur. Ct., Westchester Co.); *Estate of George A. Scarpa*, N.Y.L.J., Oct. 29, 2002 p. 22, col. 6 (Sur. Ct., Kings Co.); *Estate of Michael Meth*, N.Y.L.J., Sept. 13, 2002, p. 23, col. 1 (Sur. Ct., Queens Co.).

63. *See Estate of Umberto Dominione*, N.Y.L.J., June 18, 2003, p. 25, col. 1 (Sur. Ct., Nassau Co.); *Estate of George Scarpa*, N.Y.L.J., Oct. 29, 2002 p. 22, col. 6. (Sur. Ct., Kings Co.).

64. Heather Ellis, *Dealing with Mental Disability in Trust & Estate Law Practice: The Sanist Will*, N.Y. L. Sch. J. Int'l & Comp. L., 2003.

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# New Tax Act Introduces Substantial Changes to the U.S. Tax Rules for Expatriating Individuals

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

Section 804 of the American Jobs Creation Act of 2004 substantially alters the expatriation tax rules applicable to individuals who lose their status as U.S. citizens or long-term residents. The old subjective "tax avoidance" test is dropped entirely—individuals renouncing their citizenship or losing their long-term residence status will now be subject automatically to taxation under the special alternative tax regime for expatriates contained in section 877(b) ("alternative tax regime") if they satisfy one of three objective tests. Moreover, the exceptions to the application of the alternative tax regime are extremely narrow and will seldom apply. The income, estate, and gift tax consequences of the alternative tax regime itself, however, are modified only by a minor addition to the types of gifts covered.

In a radical departure from former law, individuals subject to the alternative tax regime are treated as fully tax resident in the United States during any year in the ten-year period following expatriation in which they are physically present in the United States for more than 30 days. Thus, an individual would be subject to worldwide income, estate, and gift taxation in any such year. The normal exceptions under section 7701(b) for days of physical presence (the "substantial presence" test) do not apply for this purpose, although up to 30 days of physical presence may be excluded if the individual is working in the United States on those days, and a number of other qualifications are satisfied. Thus individuals subject to the alternative tax regime cannot avail themselves of the exceptions in the "substantial presence" test rules for students, teachers, professional athletes or foreign government-related individuals.

Other changes require annual information reporting for each of the ten years after expatriation for individuals subject to the alternative tax regime and add a special rule for determining when an individual expatriates for U.S. tax purposes.

The new expatriation tax rules are applicable to expatriations occurring after June 3, 2004. Thus, the new rules have retroactive effect.

## Background

The United States has for some time imposed a special alternative tax regime on U.S. citizens and long-term residents[1] who have expatriated if they were found to have a "tax avoidance" motive for expatriating. This alternative tax regime subjects certain gains received by expatriates during the 10 years after they expatriate to U.S. income tax, even though non-resident aliens would normally not be taxed on such gain.[2] Moreover, the alternative tax regime imposes gift and estate taxes on transfers of assets that normally would not be subject to those taxes when transferred by a non-domiciliary.[3] Furthermore, under the so-called "Reed Amendment," U.S. citizens who renounce their U.S. citizenship (but not long-term residents who renounce their residency) may be barred from re-entering the United States.

## Subjective Tax Avoidance Test Dropped

The new legislation replaces the "tax avoidance" motive test with an objective test.[4] The alternative tax regime for expatriates applies to any expatriate who (1) had an average tax liability for the prior five years of $124,000 (this is the same as the current trigger under existing law, and, like the current trigger, is indexed for inflation), (2) has a net worth of $2 million or more (not indexed for inflation, but up from $622,000 (indexed for inflation) under current law), or (3) does not certify under penalty of perjury that he or she had properly complied with U.S. tax law for the prior five years. Expatriates who meet any one of these tests will be subject to the alternative tax regime laid out in section 877 and its companion gift and estate tax provisions for a period of 10 years.

> Example. Mr. S, a Swiss and U.S. national, decides to expatriate. His only assets are shares in U.S. companies and his home in Switzerland. He is worth US$10,000,000. Under the old rules, if Mr. S. gave up his U.S. citizenship, he could seek a ruling from the Internal Revenue Service that his expatriation did not have a tax avoidance motive. *Under the new rules, the alternative tax regime automatically applies to him, unless he can satisfy one of the very narrow exceptions described below.*

## Narrowly Drawn Exceptions

If the individual triggers either the average tax liability or net worth test, the alternative tax regime

will not apply if the individual satisfies either of two rather narrowly drawn exceptions. These exceptions do not apply to an expatriate who meets the third test set forth above, i.e., the exceptions are not available to expatriates who fail to certify under penalty of perjury that they have properly complied with U.S. tax law for the past five years. The first exception applies to an individual who became a citizen of both the United States and another country at birth, who continues to be a citizen of that other country after expatriation, and who has had no "substantial contacts" with the United States. However, in order to have "no substantial contacts" with the United States, the expatriate must (1) have never been a U.S. resident, (2) have never held a U.S. passport, and (3) have not been present in the United States for more than 30 days in any calendar year during the 10 calendar years preceding expatriation. Because most U.S. citizens who are dual nationals have obtained a U.S. passport at one time or another, very few individuals will qualify for this exception.

The second exception requires that the expatriate (1) be less than 18-1/2 years old at the time of expatriation, (2) have been a citizen of the United States from birth, (3) have parents neither of whom was a U.S. citizen at the time of the expatriate's birth, and (4) have not been present in the United States for more than 30 days during any of the 10 calendar years prior to the year of expatriation. Again, this is not a very useful exception because very few people will satisfy all of its requirements.

Notably, both of the foregoing exceptions apply only to former U.S. citizens. Neither exception applies to long-term residents who give up their U.S. residence. Accordingly, the only hope an expatriating long-term resident has of avoiding the alternative tax regime is to fall below both the average-tax-liability and net-worth thresholds and to certify under penalty of perjury that he or she has properly complied with U.S. tax law for the prior five years.

## Worldwide Income, Gift, and Estate Taxation for Expatriates Physically Present More than 30 Days in Year

Perhaps the most radical change in the expatriation tax rules is the treatment of an individual otherwise subject to the alternative tax regime as if he or she were a U.S. citizen or tax resident in any year (of the 10 calendar years after expatriation) in which he or she is physically present in the United States on more than 30 days under new section 877(g). This results in the individual's being exposed not only to income tax on his or her worldwide income for the entire year (regardless of when earned/received), but also to estate tax on his or her entire estate, and to gift tax on all gifts during that year.

None of the exceptions for days of physical presence in the United States under section 7701(b) apply for purposes of this rule. Thus, the fact that the individual is present in the United States as a teacher, student, professional athlete or foreign government-related individual is generally irrelevant.

> Example. Professor A, a national and resident of Argentina, is subject to the alternative tax regime because he was a long-term U.S. resident who gave up his green card in November 2004 and was worth more than $2 million at the time. In 2007, Professor A receives a temporary appointment as a visiting professor at a U.S. university, and arrives in the United States on August 15, 2007, to begin his duties as a professor. His appointment concludes on June 15, 2008, and he takes a short vacation in the United States and returns to Argentina on July 15, 2008. He did not travel to the United States in 2005 or 2006, and did not visit the U.S. in 2007 before he began teaching. *Under normal U.S. tax residence rules, he would not be a U.S. tax resident for either 2007 or 2008, because he would not satisfy the 183-day physical presence requirement to be considered a U.S. tax resident in either year. This is because all of his days of presence in 2007 would be disregarded since he was working as a professor, as would all but 30 days in 2008. However, because Professor A is subject to the alternative tax regime, he is treated as being physically present in the United States for purposes of the 30-day rule for virtually all days he was in the United States in 2007 and 2008. Thus Professor A is taxed as a U.S. tax resident for both 2007 and 2008 on his entire worldwide income for each year (regardless of when in the year it was earned/received).*

Up to 30 days of physical presence may be disregarded, however, under a very narrowly drawn exception. This exception applies to days an individual is present in the United States while working for his or her employer. This exception is subject to several qualifications. First, the employee and the employer must not be related. Second, only days on which the worker is actually performing services for

his employer are excluded. Thus days when the employee is not working (e.g., weekends and holidays) count as days of physical presence in the United States. Finally, this exception applies only to an individual who has either certain "ties to another country" or has "minimal prior physical presence in the United States." An individual is considered to have the requisite "ties to another country" if, within a reasonable time after expatriation, the individual (i) becomes a citizen or resident of the country in which such individual, his or her spouse, or either of his or her parents was born, and (ii) becomes fully liable for income tax in such country. An individual has "minimal prior physical presence in the United States" if for each year of the prior ten-year period ending on the date of expatriation the individual was present for 30 days or less (not counting days when the individual couldn't leave because of a medical condition that arose while the individual was in the United States).[5]

This exception would not help Professor A in the previous example, because he could only disregard 30 days of physical presence in the United States for each of 2007 and 2008. Even disregarding 30 days in each year, he was still present for more than the required 30 days in each year.

Thus, expatriates subject to the alternative tax regime must count, very carefully, their days of physical presence in the United States each year for ten years after expatriation. Failure to do so could expose them to U.S. income taxation on their worldwide income, U.S. gift taxation on all their gifts, and U.S. estate taxation of their worldwide estate for a taxable year when they are present for more than 30 days in the United States.

While this provision is harsh, the new legislation, unlike the Reed Amendment, does not provide that individuals who expatriate may be barred from reentering the United States.[6] As a practical matter, however, the new rules may have much the same effect; even an individual who satisfies the 30-day-employment exception would have only a maximum of 60 days in the United States before he would be subject to tax as if he were a citizen or resident.

> Example. Mr. S, a Swiss and U.S. national, decides to expatriate. His only assets are shares in Swiss companies and his home in Switzerland. He is worth US$10,000,000. Under the old rules, if Mr. S. gave up his U.S. citizenship, he would no longer have any U.S. estate tax exposure given his non-U.S. situs assets. *Under the new rules, should Mr. S give up his citizenship in 2005 and spend 31 or more days in the U.S. in 2007, and then die in 2007, he would have a U.S. estate tax exposure on the entire US$10,000,000.*

## Special Rule for Determining When Expatriation Occurs for U.S. Tax Purposes

The statute also codifies in new section 7701(n) a special tax rule for determining when an individual has expatriated for tax purposes. This provision requires the individual to notify either the Secretary of State or the Secretary of Homeland Security and to submit an information statement pursuant to section 6039G.

New section 7701(n) applies to all individuals who expatriate, not just those who fall above the thresholds for application of the special tax rules of section 877(b). Failure to give the requisite notice or to file the requisite information statement invalidates the expatriation for U.S. tax purposes and subjects the would-be expatriate to continued taxation as a U.S. citizen or resident until the non-compliance is rectified.

Notably, under new section 6039G, all expatriating individuals, not just those subject to the alternative tax regime, are required to provide full information concerning their assets, liabilities, and income.

## Annual Information Reporting Requirements

In addition to the information statement under section 6039G that must be filed to have a valid expatriation for tax purposes, expatriates who are subject to the alternative tax regime must file a section 6039G information statement (i.e., Form 8854) every year during the 10 years following expatriation. Additional information that must be reported under amended section 6039G includes annual (apparently worldwide) income of the expatriate, as well as number of days in the United States.

The IRS will need to make revisions to current Form 8854 to provide for the additional and different information that will now be required annually.

Failure to file the annual statement subjects the expatriate to a penalty of $10,000 unless the failure was due to reasonable cause and not to willful neglect.

## Extension of Alternative Tax Regime to Certain Gifts of Foreign Corporate Stock

With one exception noted below, the new expatriation rules do not alter the income, estate, or gift tax consequences of being subject to the alternative tax regime.

However, the gift tax rules applicable to expatriates subject to the alternative tax regime were expanded to include gift taxation of gifts of certain foreign corporate stock. Section 2501(a)(5) was added to provide that where the expatriate donor owns, directly or indirectly, 10 percent or more of the voting stock of a foreign corporation, and also owns, directly, indirectly or by attribution, more than 50 percent (by vote or value) of a foreign corporation, gifts of such stock will be subject to gift taxation to the extent of the proportion of U.S.-situs assets owned by the foreign corporation. This amendment in effect parallels current estate tax rules for expatriates, which, in section 2107(b), extend the expatriate's gross estate to include foreign corporate stock under the same conditions and in the same proportion.

## Endnotes

1. A long-term resident is an individual who has had the status of a lawful permanent resident of the United States (a non-U.S. citizen who holds a "green card") during eight of the 15 years ending with the year he ceases to be a lawful permanent residence or commences to be treated as a non-U.S. tax resident under a tax treaty. IRC § 877(e)(2).
2. IRC § 877(b).
3. IRC §§ 2107 & 2501(a)(3).
4. Although the "tax avoidance" motive test of prior law was subjective, an expatriate was presumed to have such a motive if he satisfied either a net worth or an average income tax liability test set forth in the statute. Certain individuals were not presumed to have a tax motivation for expatriation despite satisfying these tests, however, if within one year after expatriation they submitted a ruling request to the IRS for a determination that the expatriation was not tax motivated.
5. There appears to be a technical flaw in the statute (§ 877(g)(2)(C) as amended by the Act), which merely refers to "the rule of section 7701(b)(3)(D)(ii)." The cited provision refers only to excluding days on the basis of a medical condition. The Conference Report (H.R. Rep. No. 108-755) states, in footnote 448:

   > However, [for purposes of determining minimal prior physical presence] an individual is not treated as being present in the United States on a day if **(1) the individual is a teacher or trainee, a student, a professional athlete in certain circumstances, or a foreign government-related individual or** (2) the individual remained in the United States because of a medical condition that arose while the individual was in the United States. Sec. 7701(b)(3)(D)(ii). (emphasis supplied).

   The highlighted exclusion is in section 7701(b)(3)(D)(i), so the reference in both the statute and the Conference Report are erroneous if this is what was intended. A technical amendment will be required.
6. However, the Reed Amendment was not repealed, and so, in principle, could still be applied.

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# NEW IRS PROJECT

## FORGIVENESS OF INDEBTEDNESS

Section 61(a)(12) of the Internal Revenue Code provides that "gross income means all income from whatever source derived, including (but not limited to) the following items: . . . income from the discharge of indebtedness." See also section 108 (income from discharge of indebtedness). The Internal Revenue Service has initiated a project to ensure that taxpayers (generally a parent) who forgive the indebtedness of another (such as a child) report the forgiveness on their income tax returns in the year the indebtedness is forgiven.

During the October 2004 Gift Tax classification for 2003 Gift Tax returns, returns showing discharge of indebtedness gifts (of either principal or income) were pulled from the files. The Service intends to match each return with the respective donor's income tax return for 2003 to ensure that the income from the discharge of indebtedness was reported. If it was not reported, the Service will contact the taxpayer to explain the discrepancy.

In advance of being contacted by the Internal Revenue Service, practitioners may wish to review client Gift Tax returns filed for 2003 to see if any returns report forgiveness of indebtedness, and where appropriate advise clients to amend their income tax returns to report the income from the discharge of indebtedness if not previously reported.

*Provided to the* Newsletter *courtesy of John F. Rausch, Esq., IRS Estate Group Manager, Albany.*

# Medicaid Recoveries from Estates

By Philip A. Di Giorgio

Since the adoption of OBRA '93, the federal government has required all states to implement estate recovery actions against the estates of individuals who were 55 years of age or older when Medicaid assistance was received.[1] Thus where the estate planner's client is a Medicaid recipient, one of the primary goals is to minimize the extent of reimbursement of Medicaid benefits which may eventually be recoverable from the client's estate or the estate of a legally responsible relative of such a recipient.[2]

In general, Medicaid benefits paid out before a recipient turns 55 cannot be recovered,[3] and the law only permits recovery of benefits paid within ten years of the individual's death.[4] Thus, if a person begins receiving Medicaid at age 55 and continues to receive benefits until death at age 80, then the Department of Social Services would be limited to recovering the benefits paid during the recipient's last ten years of life—in this case from the time the recipient attained age 70, which is exactly ten years prior to the recipient's death at age 80.

Medicaid benefits which were *correctly paid* cannot be recovered during the life of the Medicaid recipient; rather, they may only be recovered from the recipient's estate after death.[5] Further, correctly paid Medicaid benefits may not be recovered from the estate of the recipient until after the death of the surviving spouse, if any, and only when there is no surviving child who is under 21, blind or totally disabled.[6] In contrast, the Department of Social Services is entitled to recover *all incorrectly paid* benefits and may do so during the life of the recipient, upon proper notice to the recipient, regardless of whether the recipient was over 55 years of age at the time benefits were received or the status of other family members.[7]

## I. Recoveries from the Estate of the Medicaid Recipient

Only the probate estate of the Medicaid recipient is subject to a Department of Social Services Medicaid lien in the state of New York.[8] (Note that under federal law states may now elect to expand the definition of "estate" for recovery purposes.)

However, federal law mandates the waiver of recovery where recovery would result in undue hardship.[9] This exception is applied in the following circumstances:

- Sole income producing asset
- Homestead of modest value
- Other compelling circumstances.

Under § 1802 of NY Surrogate's Court Procedure Act, an executor or administrator will be relieved of personal liability on a claim which is not filed within seven months of appointment, if the fiduciary acts in good faith when distributing estate assets. The expiration of the seven-month creditor's period does not, however, invalidate a claim by the Department of Social Services for recovery of Medicaid benefits paid; it merely releases the fiduciary from personal liability if acting in good faith.

### Medicaid Liens

As noted above, Medicaid liens are unenforceable against the following classes of individuals:

- Surviving spouse
- Blind child
- Minor child
- Disabled child.[10]

The disabled child exception is applicable even where the child is not financially dependent. Liens on real property are also unenforceable against a child who lived in the home of a recipient and served as the Medicaid recipient's caregiver for at least two years prior to institutionalization.[11]

In general the home is considered an exempt asset. However, the home may become an available asset where the Medicaid recipient becomes institutionalized.[12] A Medicaid lien may not attach to real property if any of the following classes of people reside in the home:

- Spouse
- Minor child
- Disabled or blind child
- Sibling with equity interest who has resided there at least one year.[13]

As long as a home maintains its exempt status, the Department of Social Services will not be able to recover anything from the proceeds of its sale during the recipient's lifetime. Only benefits paid after the home loses its exempt status can be recovered upon sale. However, once the home is sold the proceeds will be treated as an available resource, and the recipient will become ineligible for benefits until the proceeds are spent down and or transferred and the appropriate penalty period has expired. Of course, the down side to holding onto the residence in the sole name of the recipient until death is that upon death the house would become a probate asset subject to Medicaid lien.

**Irrevocable Trusts**: Should the Department of Social Services be permitted to recover from assets transferred to an irrevocable trust by a Medicaid recipient? No. In the absence of a showing of fraud or collusion, the Department of Social Services should not be able to recover from the assets of an irrevocable trust established by the medicaid recipient, provided that the appropriate penalty period had expired prior to application for benefits and provided that the trustee had no power to make distributions of trust principal to the grantor/Medicaid recipient. Further, the fact that the grantor retained a limited or special power to appoint the trust principal to a certain class of persons, other than the grantor, the grantor's estate or the creditors of the grantor's estate, should not result in a different outcome. Nor should the fact that even an irrevocable trust can be revoked upon consent of all of the beneficiaries under NY EPTL § 7-1.9.[14]

## II. Recoveries from the Estate of the Community Spouse[15]

**Disclaimer:** Under New York law any person may disclaim or renounce an inheritance within nine months of a decedent's death.[16] The disclaimed property will be deemed to pass as if the disclaiming party had predeceased the decedent. For this reason, disclaimers are sometimes used in connection with Medicaid planning. However, the use of a disclaimer is considered a transfer for Medicaid eligibility purposes.[17] The disclaiming party creates a penalty period the duration of which is dependent upon the value of the disclaimed property. The Department of Social Services has argued that the penalty period created as a result of a disclaimer begins to run when the disclaimer is made, rather than from the date of death.

**The Elective Share**: Under New York law a spouse cannot be disinherited involuntarily. If a spouse is disinherited, the spouse may claim a right of election against the estate, which would entitle the claimant to approximately one-third of the net estate (after certain adjustments).[18] The failure to claim the elective share may create a period of ineligibility for the surviving spouse who fails to make the election. In fact, in New York State the Department of Social Services has successfully argued that the guardian of an incapacitated Medicaid recipient is deemed to make a right of election claim on behalf of the ward.[19] The result might be even worse, though, if the recipient does not make a timely election, and the recipient is deemed to make a transfer as a result of the forfeited election. At least if the right of election is exercised voluntarily, the recipient can in turn transfer out a portion of the elective share property, perhaps as much as one-half, while using the balance of the elective share funds to private pay during the resulting period of Medicaid ineligibility.

As is the case with many other statutory rights, the potential beneficiary of the elective share may enter into an agreement to waive his or her statutory right of election. However, a waiver of the elective share by a prenuptial or postnuptial agreement is not always effective for Medicaid eligibility purposes.[20] The waivers that are most likely to succeed are waivers that were not executed to obtain Medicaid eligibility and for which consideration was received by the waiving party. Even a failed waiver may be preferable to a disclaimer, since the penalty period for a waiver of elective share rights which is found to be a deemed transfer by the Department of Social Services is measured from the date of death of the community spouse, as opposed to the period for a disclaimer which will not run until the disclaimer is made, which can be up to nine months after the date of death.

When are assets of a deceased community spouse considered available to an institutionalized spouse who exercises or is compelled to exercise the elective share right? It has been held that the Department of Social Services should only consider "available" income and resources when determining eligibility for Medicaid benefits[21], and that the date the election is made should be the date the resources are considered available. "Available resources" are defined as all resources in control of the applicant.[22] Assets in control of an executor or administrator should not be considered available until the estate assets are marshaled, evaluated and administered.

### The Community Spouse's Implied Contract

Recovery from the estate of a community spouse who elected to refuse to provide financial support to a Medicaid recipient may be available during the lifetime of the recipient spouse, but only if the community spouse had sufficient means to pay at the time the services were provided.[23] The burden of proving that the community spouse had sufficient means to pay at the time benefits were paid is on the Department of Social Services.[24]

If a community spouse is found to have excess resources, and if the community spouse refuses to contribute to the support of the institutionalized spouse, then the DSS may successfully argue that an implied contract exists between the county and the refusing community spouse.[25] Excess resources are defined as non-exempt assets in excess of the community spouse resource allowance (CSRA), which is currently $74,820. However, it is important to note that the CSRA is not fixed in stone. A community spouse whose income is below the minimum monthly maintenance needs allowance may request a fair hearing for the purpose of obtaining an increased CSRA.[26] If an implied contract is found to exist and the community spouse dies with excess resources, then the court

may hold that Medicaid benefits paid out on behalf of the institutionalized spouse may be recovered from the estate of the community spouse.

As previously noted, recovery is available against the estate of the Medicaid recipient only to the extent of probate assets. It is unclear whether or not the same rule would apply to the estate of the community spouse. However, past experience indicates that the Department of Social Services is likely to take the position that it may recover against both the probate and non-probate assets of a community spouse against whom it has an implied contract.

In order to recover against non-probate assets, the Department of Social Services would have to find some legal ground to support its position, most likely that the community spouse made a fraudulent conveyance to the detriment of Department of Social Services as a known creditor. This argument has been successfully used by the Department of Social Services against the estate of the Medicaid recipient.[27] It is not, however, clear whether or not this theory could be successfully applied against the estate of the community spouse. Such an application would appear to run contrary to the Social Services Law, which indicates that transfers by the applicant spouse after Medicaid eligibility has been determined will have no impact on the Medicaid eligibility of the beneficiary spouse.[28] If the Department of Social Services is successful in connection with the claim for implied contract against the community spouse, pre-decision interest may be allowed.[29]

In summary, if equipped with a proper estate plan and a clear understanding of certain postmortem planning techniques, such as disclaimers and the right of election, the impact of the federally mandated recovery from the estates of Medicaid recipients and their spouses can be minimized.

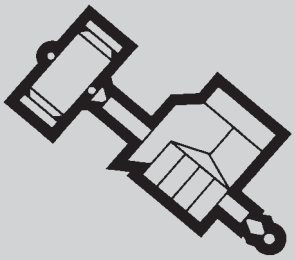
## Endnotes

1. 42 U.S.C. § 1396 P(b)(1).
2. A statement of New York State policy relating to Medicaid liens and recoveries is set forth at Administrative Directive 02 OMM/ADM-3, Medicaid Liens and Recoveries, New York State Department of Health (April 17, 2002).
3. N.Y. Social Services Law § 369(2)(b)(i)B (hereinafter "SSL").
4. SSL § 104.
5. 18 N.Y.C.R.R. § 360-7.11(a).
6. SSL § 369(2)(b)(ii).
7. 18 N.Y.C.R.R. § 348.4, 352.31(d)(5).
8. 42 U.S.C.A. § 1396 P(b)(4)(B) and SSL § 369(b).
9. 42 U.S.C. § 1396p(b)(3).
10. SSL § 369(2)(b)(ii).
11. SSL § 369(2)(a)(ii). *See also In Re Estate of Samuelson*, 110 A.D.2d 187 and *Estate of Burstein*, 611 N.Y.S.2d 739 (disabled child exception applicable even where there is no financial dependence).
12. SSL § 369(2)(a)(ii).
13. *Id.*
14. *Spetz v. New York State Dep't of Health*, 190 Misc. 2d 297 (Sup. Ct., Chautauqua Co. 2002); Versow v. Sutkowy, 209 F.R.S. 309 (N.D.N.Y. 2002).
15. The "community spouse" is defined as the spouse of the Medicaid recipient. SSL § 366-c.
16. EPTL 2-1.11.
17. *Molloy v. Bane*, 214 A.D.2d 171 (2d Dep't 1995).
18. EPTL 5-1.1A.
19. *In re Mattei*, 169 Misc. 2d 989 (1996).
20. *Dionisio v. Westchester County DSS*, 665 N.Y.S.2d 904 (A.D., 2d Dep't 1997).
21. *In Re Estate of Little*, 256 A.D.2d 1152 (1998).
22. 18 N.Y.C.R.R. § 360-2.3(c)(1).
23. *In re Estate of Craig*, 82 N.Y.2d 388 (1993).
24. *In re Dabney*, 104 A.D.2d 678 (3d Dep't 1984); *In re Craig*, 82 N.Y.2d 388 (1993).
25. See *Commissioners of the Department of Social Services City of NY v. Fishman*, 280 A.D.2d 296, 2001; *Commissioner of the Department of Social Services v. Spellman*, 243 A.D.2d 45, 1998, and SSL § 366(3)(a).
26. SSL § 366-C(8)(c) and 18 N.Y.C.R.R. § 360-4.10(c)(7).
27. *Bandas v. Emperior*, 122 Misc. 2d 192 (Sup. Ct., Cayuga Co. 1983).
28. SSL § 366-C(5)(c).
29. *In re Klink*, CA 00-02504.

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**At Right:**
**Conference Chair Joshua S. Rubenstein speaks at the Second Annual Sophisticated Trusts and Estates Law Institute held on Thursday, November 4 and Friday, November 5 at the Grand Hyatt New York.**



# RECENT NEW YORK STATE DECISIONS

Ira Mark Bloom and William P. LaPiana

## JOINT ACCOUNTS

### Post-death Deposits of Earning Are Not Gifts

Decedent died intestate in the attack on the World Trade Center on September 11, 2001. At the time of his death he maintained three joint bank accounts at a branch bank in the World Trade Center complex in the names of himself and his fiancee. Three days after decedent's death his employer made deposits to two of the accounts. In an action by the personal representative to recover the accounts for the estate, the Surrogate held, first, that the accounts were true joint accounts. Although the original signature cards were destroyed on September 11, 2001, testimony by bank employees that all joint accounts opened at the time the subject accounts were opened contained language of survivorship was sufficient to establish the right of survivorship, citing *In re Butta*, 3 A.D.3d 347, 770 N.Y.S.2d 343 (1st Dept. 2004). Second, the post-death deposits did not belong to the surviving depositor because decedent retained the right to alter the direct deposit arrangement during his life and thus he did not make an irrevocable gift of his future earnings. *In re Jelnek*, 3 Misc. 3d 725, 777 N.Y.S.2d 871 (Sur. Ct., Queens Co. 2004).

## SLAYERS

### Wrongdoer Has Life Estate in Tenancy by the Entirety

Husband killed his wife. Among their assets was the marital home held in tenancy by the entirety. Husband conveyed a mortgage on the property to his defense counsel, in payment for their legal services. In an action by the administrator of wife's estate to invalidate the mortgage the Supreme Court, Chenango County, denied the estate's motion for summary judgment. Because the parties to a tenancy by the entirety have life estates subject to the right of survivorship, husband has a vested property interest. Civil Rights Law § 79-b prohibits forfeiture of this vested interest (citing *In re Covert*, 97 N.Y.2d 68, 735 N.Y.S.2d 879, 761 N.E.2d 571 (2001)). Therefore, at the time of the conveyance of the mortgage, husband possessed the commuted value of a life estate in one-half the property. *Cardozo v. Wlaksiuk*, 3 Misc. 3d 1060, 777 N.Y.S.2d 615 (Sup. Ct., Chenango Co. 2004).

## TRUSTS

### Court Approval Not Required for Taking Commissions

Infant's mother and a bank were appointed co-trustees of a supplemental needs trust created for infant from the proceeds of the settlement of a medical malpractice action. The trust provided that the bank was to receive commissions in accord with its compensation schedule in effect at the time compensation is paid, that the mother and any successor individual trustee was not to receive compensation, and granted the trustees powers that could be exercised without court approval pursuant to EPTL 11-1.1. The trustees submitted their first required annual accounting, and the Supreme Court disallowed more than 90% of the commissions that had been paid, required that no future commissions be paid without prior court approval, and ordered that all legal fees paid to the trustees' counsel be returned to the trust and that no future fees be paid without prior approval.

On appeal, the Appellate Division reversed the Supreme Court. The trust provisions are consistent with SCPA 2312, which validates payment of commissions in specified rates or amounts and has no provision for prior court approval. The corporate trustee is entitled to pay itself its commissions, subject to review by the court, and prior approval cannot be required. Similarly, EPTL 11-1.11 sanctions payment of reasonable legal fees without court approval. Because the legal fees were at least in part related to the bank's efforts to resign, a hearing is necessary to determine whether the bank is free of negligence, overreaching or any other impropriety and therefore entitled to be reimbursed for fees attributable to the attempt to resign. *In re Hawwa A.*, 9 A.D.3d 362, 779 N.Y.S.2d 578 (2d Dep't 2004).

### Supplemental Needs Trust May Be Funded with Social Security Disability Payments

New York law limits the amount of income a recipient of Medicaid can retain, with the excess being used to pay for services (Social Services Law §

366(2)(a)(7)). New York law also allows the establishment of a supplemental needs trust for a person under the age of 65 with that person's own assets so long as the trust provides for reimbursement to the state from trust assets remaining at the beneficiary's death (Social Services Law § 366(2)(b)(2)(iii)). These provisions conform to federal law (42 USC 1396p(d)(4)(A)). The guardian of a mentally retarded person under age 65 commenced a proceeding to establish a supplemental needs trust for her ward to be funded with his Social Security disability payments. The Surrogate found that the establishment of a supplemental needs trust with SSD payments conforms with the law. The court granted the application, subject to minor revisions of the trust, including a provision that the state of New York be the first payee of any remaining trust funds on the death of the beneficiary. *In re Kennedy*, 3 Misc. 3d 907, 779 N.Y.S.2d 346 (Sur. Ct., Nassau Co. 2004).

## WILLS

### Disposition of More than Elective Share Does Not Indicate Undue Influence

Decedent and his second spouse entered into a prenuptial agreement in which they renounced their elective shares and agreed to accept whatever disposition was made in the parties' wills. Decedent's son by his first marriage objected to admission of decedent's will. The Appellate Division upheld dismissal of the objections, noting, among other reasons, that the fact that decedent's will gave the surviving spouse more than the elective share did not, without more, raise an implication of undue influence. *In re Fairbairn*, 9 A.D.3d 579, 780 N.Y.S.2d 40 (3d Dep't 2004).

### Substantial Compliance Is Sufficient for Publication Requirement; No Evidence of Insane Delusion

Like previous wills, decedent's last will made no provision for his only child and for certain grandchildren, but unlike those wills also disinherited all his other grandchildren save one to whom he gave his entire estate. One of the disinherited grandchildren raised objections, asserting that the will was improperly executed and that decedent suffered from an insane delusion. The Appellate Division upheld admission of the will to probate, relying on the presumption of due execution based on attorney supervision and a self-proving affidavit. The court rejected the argument that the execution ceremony failed to comply with the publication requirement, finding that the testimony of the witnesses and the supervising attorney indicated substantial compliance. In addition, evidence that the relationship between decedent and the disinherited grandchildren had changed before the will was executed was sufficient to sustain the decedent's belief that his grandchildren did not care about him, and thus objectant failed to meet the burden of proving decedent suffered from an insane delusion. *In re Pilon*, 9 A.D.3d 771, 780 N.Y.S.2d 810 (3d Dep't 2004).

### Limited letters Will Not Issue Where Probate Proceeding Is Pending

Decedent's will contained an *in terrorem* clause, the violation of which would result in forfeiture of a beneficiary's interest and any interests of his issue. Decedent was survived by his widow and two sons by a previous marriage. One son filed objections to probate and also applied for limited letters under SCPA 702, to allow him to begin discovery proceedings against widow who had offered the will for probate. The court discussed the history of SCPA 702 and noted that cases applying the section involve some "impending harm threatened by the action or inaction of a fiduciary." In this case there is no showing of any harm that would result from delaying discovery until the probate is complete and disposition of the decedent's estate established. In addition, to grant limited letters in this instance would allow the petitioner to collect ammunition with which to challenge the will or to bring pressure for a settlement while avoiding the *in terrorem* clause. SCPA 702 was not intended to be used in such circumstances and the application was denied without prejudice to renewal on completion of the probate proceeding. *In re Stoller*, 4 Misc. 3d 538, 780 N.Y.S.2d 861 (Sur Ct., New York Co. 2004).

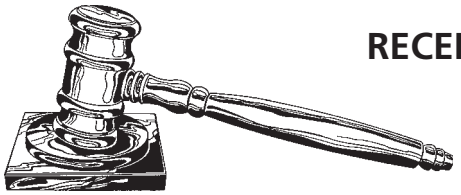
## WRONGFUL DEATH

### Damages May Be Had for Lost Tax Benefits

In a wrongful death action, the executor sought damages for the loss of tax benefits. New York case law holds that a plaintiff in a wrongful death action cannot recover for loss of a future tax advantage, the existence of such advantages being too speculative. (*Farrar v. Brooklyn Union Gas*, 73 N.Y.2d 802, 537 N.Y.S.2d 26, 533 N.E.2d 1055 (1988)); *Johnson v. Manhattan & Bronx Surface Transit Operating Auth.*, 71 N.Y.2d 198, 524 N.Y.S.2d 415, 519 N.E.2d 326 (1988)). The court held that such a recovery was possible where decedent died eight months before the termination of her QPRT because the tax advantage is not speculative or subject to change. Recovery is measured by the increase in estate taxes due to the inclusion of the personal residence in the gross estate. The court dismissed, however, claims based on the premature end of decedent's lifetime giving program and the existence of IRD, the tax effects being too speculative. *Del Broccolo v. Torres*, 4 Misc. 3d 510, 780 N.Y.S.2d 857 (Sup. Ct., Nassau Co. 2004).

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

**Ilene Sherwyn Cooper**

## Attorney's Fees

In a contested accounting proceeding, the parties settled their differences pursuant to a stipulation which provided, *inter alia*, that the objectant would make application to the court requesting that his legal fees be paid by the trustee of the subject trust.

Thereafter, the objectant made application for payment of his fees, which application was opposed by the trustee.

In denying the application, the court opined that generally a party is not entitled to recover attorney's fees from an opposing party, as the same are considered incidents of litigation. In cases where a contestant's legal fees are chargeable against an estate, the court has determined that the services rendered benefitted the estate as a whole, not merely the contestant. To prevail, the contestant must establish by clear and convincing evidence that the estate was benefited, and that an estate fund exists from which the court may direct payment.

Based upon the foregoing, the court found that only the objectant benefitted from the litigation and that the estate had not been enlarged in any way as a result.

*In re Olson Revocable Trust*, N.Y.L.J., August 3, 2004, p. 24 (Sur. Ct., Suffolk Co.).

## Compulsory Accounting

In *In re Estate of Bassen*, the court was confronted with a motion to dismiss a compulsory accounting proceeding instituted by the decedent's grandson.

The decedent died, testate, survived by two daughters. Pursuant to the pertinent provisions of her Will, she provided for a number of legacies to named individuals, and devised and bequeathed the residue of her estate in equal shares to her surviving children. In addition, the decedent's will exercised a power of appointment granted to her under the Will of her predeceased husband. Specifically, pursuant to the terms of her husband's Will, the decedent received an income interest in trust, with a power to appoint the remainder upon her death. The decedent did so by appointing 1/7 of the trust remainder to the petitioner, and the remaining shares to other persons.

The petitioner sought a compulsory accounting of the decedent's estate based upon this interest as an appointee of the trust remainder under the Will of the decedent's husband.

The estate fiduciary moved to dismiss the petition, claiming that the petitioner lacked standing to institute the proceeding. In support of his position, the executor maintained that the petitioner was not a current or contingent beneficiary of the decedent's estate as he was neither a distributee nor a legatee or devisee under her Will. The petitioner responded by claiming that he was a person named in the Will of the decedent and was the decedent's grandson, and thus, a "person interested" as defined by the provisions of SCPA sections 103(39) and 2205.

The court disagreed with the petitioner, holding that he was neither a distributee of the decedent nor a beneficiary of the decedent's estate. Specifically, in this latter regard, the court stated that the petitioner's interest as an appointee of the power of appointment granted to the decedent by the Will of her late husband did not make him a beneficiary of the decedent's estate but rather the estate of her predeceased spouse. Accordingly, inasmuch as the petitioner did not have the requisite interest in the estate of the deceased as defined by the provisions of SCPA 2205, the court held that he lacked standing to compel the fiduciary to account.

Furthermore, citing the decision by the Appellate Division, Second Department in *In re Lupoli*, 275 A.D.2d 780, the court held that the petitioner lacked standing on the grounds that he did not fall within the category of persons entitled to citation pursuant to SCPA 2210.

Finally, the court rejected the petitioner's request to compel an accounting on its own motion, finding that the record failed to demonstrate any basis for such relief.

*In re Estate of Bassen,* File No. 3179/2002, May 28, 2004 (Sur. Ct., Westchester Co., Surr. Anthony A. Scarpino, Jr.).

## Construction Proceeding

In *In re Estate of Harris*, the court was confronted with the question as to the proper disposition of the residue of the decedent's estate.

The record reflected that the decedent's estate was entitled to funds derived from the principal of a trust created under the Will of a predeceased decedent. These funds did not become a part of the decedent's estate, and thus, subject to the provisions of her Will, until approximately ten years after the decedent's death in 1991, i.e., the year 2001.

The decedent's Will directed that the residue of her estate be paid to a specified not-for-profit corporation that her executor was to establish. Although the said corporation was initially established, it was dissolved four years later, in or about 1995. Upon its dissolution, its assets passed to another corporation, a Catholic Diocese.

The distributees of the decedent argued that the residuary disposition of her estate failed because the specified not-for-profit corporation was dissolved prior to the vesting of the funds from the subject trust. They thus maintained that the funds passed to them as a lapsed legacy. The Diocese argued that as a successor to the since-dissolved corporation, it was entitled to the funds. In support of its position, the Diocese referred to the Not-for-Profit Corporation Law § 1005(a)(3)(A).

Based upon the provisions of the statute, the court held in favor of the Diocese, and directed that the funds of the subject trust pass to that corporation. In reaching such result, the court noted the general validity of the anti-lapse statutes, and the absence of any circumstances which would overcome the strong constructional preference to avoid intestacy.

*In re Estate of Harris,* N.Y.L.J., August 17, 2004, p. 26 (Sur. Ct., N.Y. Co.).

## Constructive Trust

Plaintiff commenced suit against the defendant, with whom he had had a romantic relationship, to impose a constructive trust on property which he had transferred to defendant, and to restrain the defendant from transferring, encumbering or otherwise disposing of the property. Plaintiff had transferred title to the property to the defendant approximately one year after beginning his relationship with her. Shortly thereafter, the relationship terminated.

In support of his cause of action, plaintiff asserted that he had transferred the property to the defendant with the understanding that because they were romantically involved and committed to each other, and because he was clinically depressed at the time, he could trust her to manage his finances and business dealings. Specifically, as to the subject property, defendant claimed that it was expressly understood, at the time of the transfer, that he would continue to hold nominal title to the property in constructive trust and that the defendant would convey her interest in the property to him upon his request. Plaintiff alleged that when the defendant refused to comply with his request for reconveyance of the property, or to turn over to him the rent being derived from the property, he commenced suit.

In support of her motion to dismiss the complaint, defendant maintained, in pertinent part, that she had sold the property to a good-faith buyer, and, as such, she no longer held title to the property upon which a constructive trust was sought. Therefore, according to the defendant, the court was without power to impose a constructive trust.

The court found the defendant's argument to be without merit. The court opined that a trust will follow property through all changes in its shape and form so long as the property or its proceeds are capable of identification. "Where a trustee in breach of trust disposes of trust property and receives other property in exchange, the beneficiaries can charge him as a constructive trustee of this property or at their option can enforce an equitable lien upon it to secure their claim against the trustee for damage for breach of trust." 5 *Scott on Trusts* § 508, at 555. Moreover, the court held that even where the specific proceeds cannot be traced, the plaintiff was not without a remedy, inasmuch as a personal judgment could be enforced against the wrongdoer.

Accordingly, the court denied the defendant's motion to dismiss the complaint for constructive trust.

Additionally, the court denied the plaintiff's motion to amend his complaint to allege fraud and conversion, finding that the cause of action for fraud was time-barred, and that a cause of action for conversion will not lie where the subject matter is real property.

*Kupferman v. Scott*, N.Y.L.J., July 28, 2004, p. 23 (Sup. Ct., Suffolk Co., Justice Arthur Pitts).

## Letters of Administration

In a proceeding for letters of administration, a petition and cross-petition were filed by the dece-

dent's two daughters, each of whom claimed that they were the person most eligible to serve. The record revealed that the decedent died survived by five children, three of whom renounced their appointment and supported the application of the cross-petitioner to be appointed administrator, or in lieu thereof, the Public Administrator. The sole asset of the decedent in the United States was a home in Scarsdale, New York.

The court denied the request for the appointment of the Public Administrator, finding that the petitioner and cross-petitioner had statutory priority, and that the appointment of the Public Administrator would constitute an unnecessary expense to the estate.

Further, the court held that when hostility makes two petitioners in the same class of priority unable to agree as to the estate's administration, the Surrogate may choose one of them, with preference being given to the person with the largest share in the estate, or if the shares are equal, to the one preferred by the majority of the distributees.

Accordingly, on the basis of the foregoing, the court appointed the cross-petitioner on the grounds that her appointment was supported by her three brothers, she was a New York resident, and she had assisted in the settlement of the decedent's foreign estate assets.

*In re Estate of Pi-Eng Liu Wu*, N.Y.L.J., p. 31 (Sur. Ct., Westchester Co.).

## Preliminary Letters Testamentary

In a contested probate proceeding, the objectants opposed the issuance of preliminary letters testamentary to the petitioner, the named executor in the instrument. The objections to the issuance of preliminary letters was based upon claims that the propounded will was the product of undue influence, that there was long-standing friction between the objectants and the petitioner, and on allegations that the petitioner was dishonest in money matters. Additionally, one of the objectants, who resided in the decedent's home and continued to do so after her death, expressed concern that the petitioner, who was the specific devisee of the property under the Will, would seek to evict her from the premises.

In addressing the issues raised by the application, the court opined that the removal and/or nullification of a testator's selection of a named fiduciary should be exercised sparingly, and only upon a clear showing of serious misconduct. Hence, in the absence of a strong showing that the assets of the estate will be endangered by the appointment of the named fiduciary as preliminary executor, courts are reluctant to allow opposition to such appointment. "Only where fraud or undue influence rise to the level of dishonesty which constitutes a grounds for disqualification under SCPA 707 will the court deny preliminary letters to the executor selected by the decedent [citation omitted]."

Based upon the foregoing, the court held that the opposing papers failed to provide the requisite basis for denying the petitioner's application. Nevertheless, in order to protect the interests of the decedent's children who were residing in the decedent's realty, the court restricted the preliminary letters to be issued in order to prohibit the fiduciary from transferring, encumbering or commencing an eviction proceeding against any one of the decedent's children without application.

*In re Estate of Williams*, N.Y.L.J., August 17, 2004, p. 26 (Sur. Ct., Bronx Co.).

## Vacate Default

The former trustee of an inter vivos trust established by the decedent moved to vacate a default judgment which directed that he and his former attorney jointly and severally refund excessive attorneys fees. The fiduciary had previously been removed by Order of the court based upon his improvident management of the trust in his care, including the payment of large fees to his former counsel. The court noted that the fiduciary had arbitrarily capped fees at $300,000, and that, in fact, the fees paid to former counsel exceeded $448,000. The size of the trust in issue was approximately $3.5 million.

The record reflected that a proceeding in relation to the fees charged to the estate had been instituted by the fiduciary's sister, who was an estate beneficiary, and that the fiduciary had received notice from the court of its decision directing his former counsel to attend a hearing or file an affidavit of legal services in support of the sums paid. Thereafter, former counsel filed an affidavit of legal services with the court, in lieu of a hearing, and the court rendered a decision, based thereon, fixing counsel fees in the sum of $20,000, and directing that counsel and the fiduciary jointly and severally be responsible for refunding the sum of $428,475.63 to the estate. In the interim, the fiduciary was removed as trustee, and a proceeding was instituted for the appointment of a successor.

In his motion to be relieved of his default in connection with the proceeding to fix fees, the court opined that the burden is upon the moving party to show reasonable cause for the default but also to demonstrate that he has a meritorious defense by submitting an affidavit of merit by someone with

personal knowledge of the facts. To this extent, the court found it significant that the former fiduciary failed to submit his own affidavit in support of the motion, but instead relied on an affidavit by his new counsel. Moreover, although counsel indicated that the former fiduciary had never received notice from his prior counsel as to the status of the fee application, he failed to refute the claims by opposing counsel that counsel had provided such notice to him.

Further, the court noted that the former fiduciary had retained counsel to represent him in proceedings before the court long before the actual decision of the court fixing fees, and yet, at no time did the former fiduciary through his new counsel seek to participate in the fee proceedings. Indeed, the former fiduciary did not seek to vacate his default until proceedings had been instituted in the Supreme Court, approximately one year after the order and judgment reducing fees had been entered, to enforce the judgment against funds that had been restrained. The court held that the fiduciary's delay in acting until such time could not be considered an excusable default.

Moreover, the court rejected the fiduciary's claims that he had relied upon the advice of counsel respecting the propriety of the legal fees charged to the estate. A fiduciary may not escape liability on the grounds that he was guided by the advice of an attorney. In the administration of an estate, a fiduciary is required to employ diligence and prudence, and cannot be excused in the discharge of these duties based upon the fiduciary's reliance upon counsel.

Accordingly, having been removed for his failure to properly manage the estate, most particularly insofar as the payment of legal fees was concerned, the court concluded that the former fiduciary could not be excused from liability for the loss suffered by the trust estate.

*In re Estate of Shapiro*, N.Y.L.J., August 4, 2004, p. 27 (Sur. Ct., Nassau Co., Surr. John Riordan).

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Mike Feigenbaum
Ron Finkelstein
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Second Place Foursome:

Tim Thornton
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Rich Miller
Murray Stolz

### Tennis

Doubles Winners:

Lawrence P. Murphy
Joyce A. Heilbronner

Doubles Runners-Up:

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**Trusts and Estates Law Section**

## Upcoming Meetings of Interest

| | |
|---|---|
| **January 26, 2005** | Annual Meeting, New York, NY |
| **May 9-10, 2005** | Spring Meeting, Rochester, NY |
| **September 29–October 2, 2005** | Fall Meeting, New Orleans, LA |
| **September 13–17, 2006** | Fall Meeting, Philadelphia, PA |

## Publication of Articles

The *Newsletter* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted to Austin Wilkie, Holland & Knight LLP, 195 Broadway, New York, NY 10007. Authors should submit a 3½" floppy disk (in Microsoft Word or WordPerfect) along with a printed original and biographical information. Please contact Mr. Wilkie regarding further requirements for the submission of articles.

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