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Trusts and Estates Law Section Newsletter

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

A Message from the Section Chair

The Trusts and Estates Law Section has a great deal to be proud of. We are one of the two largest sections of the New York State Bar Association. We offer a wide array of high-caliber Continuing Legal Education programs aimed at all levels of experience. We produce an excellent newsletter filled with articles and features that are of great value to practitioners. Our committees give helpful comments and reports on proposed legislation, and also generate our own proposals for improving New York laws.

The people responsible for all these achievements are you, the members of our Section, who volunteer your time to act as committee members, chairs and vice-chairs, delegates and officers. You should all be proud that your efforts have combined to make this such a highly regarded Section. And I am proud to be selected as the Chair of the Section for the coming year.

I would first like to congratulate my predecessor, Timothy Thornton, for the fine job he has done over the past year. His leadership, energy and diligence have benefited the Section enormously. And the Fall Meeting in Victoria last year under Tim's aegis will long be remembered as one of our best. How he persuaded Queen Elizabeth II to attend the meeting and bestow knighthood upon Surrogate Czygier and me will always amaze me.

I would also like to thank Magdalen Gaynor, whose term as editor of this newsletter ended with the last issue. If Meg's tenure did not begin with the invention of movable type by Johannes Gutenberg, it certainly feels that way. We are all grateful for her many years of hard work and her gentle reminders that she needed more articles for the next issue. We also welcome Austin Wilkie as the new editor beginning with this issue.

Inside

The Annual Meeting in New York City was a great success despite the efforts by Mother Nature to snow on our parade. Phil Burke, the Program Chair and also our incoming Treasurer, put together a fine program entitled "We All Love New York: Taxes, Domicile, Venue, Jurisdiction, Sales, Use and Doing Business in the Empire State." The program featured excellent presentations on New York tax traps and issues by speakers Dan Hastings, Paul Comeau, Gerald Stack and Wayne Berkowitz. We are grateful to Christie's and Mellon Bank for hosting a fine evening reception, and to Section members Richard Miller and Winthrop Rutherfurd and the Blue Hill Troupe for putting on a performance of "Trial by Jury" that will long be remembered by all of us who attended it.

The Section's Spring Meeting should be taking place in Syracuse about the time you receive this newsletter (April 22 and 23). Chair-Elect Michael O'Connor, as Program Chair, has put together an interesting and useful program on "Estate Planning for Families with Problems," which will explore how to plan taking into account troubled marriages, children by prior marriages, disabled and spendthrift beneficiaries, and similar personal challenges. There will also be a roundtable on Thursday with a number of Section members at different tables discussing various estate planning techniques. We are all looking forward to a good and informative time. Social Chair Marion Fish is arranging a dinner at the Everson Museum in downtown Syracuse.

Mark your calendar (or create an appointment in Outlook) for the Fall 2004 meeting, which will be in Savannah, Georgia from October 14-17. We will stay in the Westin Savannah Harbor Resort and Spa, situated on an island across the river from downtown Savannah. As the name implies, the hotel boasts a beautiful spa and golf course on the premises, together with tennis and a pool. We are looking forward to some fine dining and tours of the beautiful and historic city of Savannah. Some people will want to combine the trip with a stay at nearby Hilton Head, Kiawah or Amelia Island.

Chair Linda Wank is putting together the program for Savannah on "The Future of Estate Planning." The first day will focus on how estate planners can deal with upcoming tax issues, such as future scheduled fluctuations in the unified credit and the state death tax credit and the possibility of carryover basis. Day Two will examine non-tax issues that are growing in importance, such as asset protection trusts and biotechnology issues. We are also hoping to have a joint presentation with the Torts, Insurance and Compensation Law Section, which will be holding its Fall Meeting in Savannah at the same time, possibly on the topic of wrongful death claims.

Finally, if any of you are interested in watching a good movie one evening after you have finished your entries, you might consider renting *Changing Lanes*. This 2002 thriller starring Ben Affleck and Samuel L. Jackson revolves around missing legal documents, exercise of a power of appointment, a codicil, incapacity, undue influence and control of a major foundation. If the handling of estate issues in the movie has an uncanny verisimilitude, kudos goes to our Section's own Ronald Weiss, who was legal consultant for the film.

G. Warren Whitaker

Upcoming Meetings of Interest

Spring 2004	"Discount Gifting Techniques" Presented in four locations
May/June 2004	"Settling an Estate" Half-day program Presented in eight locations throughout the state
October 14-17, 2004	Fall Meeting, Savannah, GA
September 29-October 2, 2005	Fall Meeting, Royal Sonesta Bourbon Street New Orleans, LA
September 13-17, 2006	Fall Meeting, Philadelphia, PA

Editor's Message

At this writing in February 2004, the *New York Times* reports in depth on the "longevity boom," the growing number of elderly Americans who outlive their actuarial life expectancies.[1] As journalist Susan Dominus notes, according to population projections "close to 1 in 20 American boomers are expected to live to 100, thanks to breakthroughs in treatments for heart disease and cancer, lives relatively free of hard labor, and long-standing memberships at the gym."

Does an extra 15, 20 or 30 years of life begin to reshape the society we know? Planning for retirement and old age, as well as the inheritance expectations of the next generation, may be due for re-evaluation. After all, how does one plan appropriately, at age 65, for a surviving spouse who may well live to age 100? Is a child's inheritance to be entirely deferred until age 70?

Trusts and estates lawyers will play an important role in this subtly shifting landscape, and several articles in the current *Newsletter* touch on these areas. As the country ages, powers of attorney will continue to be essential in managing the affairs of elderly Americans. Philip A. DiGiorgio's article explores the changes proposed by the New York Law Revision Commission to New York's General Obligations Law governing powers of attorney. The increasing scrutiny given to ethical issues when representing clients with various degrees of diminished capacity is considered in Amy B. Beller's article. And in the wake of the Enron debacle, Amy J. Maggs re-examines fiduciary obligations in the administration of this country's pension and employee benefits system.

Other articles include Joseph M. Accetta's concise analysis of the substantive burdens of proof in contested accounting proceedings, Christopher M. Houlihan's excellent guide to SCPA 1404 examinations, and Carl T. Baker's trenchant observations on attorney engagement letters, including his helpful model. Do you customarily bill your clients by the hour or on a fixed-fee basis? There are passionate advocates for each approach, and Carl bravely throws down the gauntlet. Perhaps a courageous member of the Section will respond.

This issue of the *Newsletter* marks my first as editor. I know I speak for all members of the Section in thanking my predecessor, Magdalen Gaynor, for her work over the last three years. Meg's editorial wizardry is surely a hard act to follow, and no one could have set a better example.

Remember that the *Newsletter* relies on you, 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.

Austin Wilkie

Endnotes

1. Dominus, *Life in the Age of Old, Old Age*, N.Y. Times, Feb. 22, 2004 (Magazine).

A Summary of the New York State Law Revision Commission's Proposed Changes to the General Obligations Law in Relation to Powers of Attorney

By Philip A. DiGiorgio

A Power of Attorney is a legal instrument whereby a person known as the principal grants the authority to act on his behalf to an agent known as the attorney-in-fact. The Power of Attorney, in particular the Durable Power of Attorney, is a powerful estate planning tool, the potential use and misuse of which cannot be overstated. It was for this reason and in order to provide guidance to users of powers of attorney that the legislature initially created the New York statutory short form Powers of Attorney, which offer model forms that can be relied upon under New York law for the purpose of drafting and executing valid powers of attorney. The three model forms available under New York law include the following:

1. The Non-Durable Power of Attorney which lapses upon the incapacity of the principal;
2. The Durable Power of Attorney which does not lapse upon the principal's incapacity; and
3. The Springing Power of Attorney which takes effect at a future time, usually upon the principal becoming incapacitated.

The New York statutory short form Powers of Attorney and the rules governing them are set forth under New York General Obligations Law, § 5-1501 through § 5-1506. In recent years, criticism of the current statutory forms and the law governing them has included the following:

- The model statutory short forms are confusing to the layperson;
- The forms, as they currently read, do not offer enough guidance and explanation to the principal;
- There is no clear guidance regarding the steps the principal must follow to revoke a power of attorney;
- The forms, as they currently read, do not offer enough guidance and explanation to the attorney-in-fact; and
- The rules governing the model statutory short forms should be universal in their application and applied to all valid powers of attorney under New York law.[1]

With these and other criticisms in mind, the New York State Law Revision Commission (the Commission) has proposed legislation to revise the New York General Obligations Law in regard to powers of attorney. In the words of the Commission,

> The purpose of the proposed legislation is to codify the common law with respect to powers of attorney, and provide instruction and clarification on how to execute, use and revoke both short form and custom powers of attorney. The proposed provisions also instruct the attorney-in-fact on the fiduciary obligations associated with acting pursuant to the power of attorney, how to sign when acting on behalf of the principal, and the significance of the signature. While not unduly burdening the use of powers of attorney, these provisions are intended to make it more difficult to use powers of attorney for the financial exploitation of elderly and vulnerable principals.[2]

The following paragraphs are intended to serve as a summary of the most significant changes to the law governing powers of attorney as proposed in the New York State Law Revision Commission's Report of November 2003.

Cautionary Statement to the Principal

The language used in the cautionary statement to the principal, which is contained in the current New York short form Powers of Attorney, would be revised to make the statement more comprehensible to the lay person. The modified statement would explain in laypersons' terms the legal effect of the Power of Attorney, the obligations of the attorney-in-fact, and how the principal may revoke the Power of Attorney. It is hoped that the proposed revisions, if adopted, would increase the likelihood that the principal will understand the risks and obligations created in the Power of Attorney he or she is about to execute.

In order to be valid under New York law, every Power of Attorney, including those not based on the statutory short forms, would have to include verbatim the language of the cautionary statement from the appropriate statutory short form.[3]

Revocation

The current statute provides no guidance on how to revoke a Power of Attorney.

The Law Revision Commission has recommended providing specific direction in regard to the revocation of Powers of Attorney by the principal, and by operation of law. The statutory short form Powers of Attorney would themselves include language within the cautionary statement which indicates that the principal has the right to revoke or terminate the Power of Attorney at any time as long as he or she is of sound mind. The principal would then be directed to the appropriate statute which would set forth the proper alternatives which may be used to revoke the Power of Attorney. Those alternatives would include:

1. Expressly providing for the method of revocation in the document;
2. Physically destroying all executed originals of the Power of Attorney, and any copy of the Power of Attorney that has been honored and retained by a third party; and
3. Delivering a signed and dated Revocation of Power of Attorney to the attorney-in-fact. However, third parties who have not received written notification of the revocation of the Power of Attorney would not be held liable for acting in good faith upon the Power of Attorney.[4]

Notice to the Attorney-in-Fact

As enunciated by the New York Appellate Division in *Semmler v. Naples*,[5] the relationship between an attorney-in-fact and the principal has been characterized as agent and principal with the attorney-in-fact under a duty to act with the utmost good faith toward the principal in accordance with the principles of morality, fidelity, loyalty, and fair dealing.

The revised statute would codify the common law duties of an attorney-in-fact. Those duties would include:

1. The duty to act solely in the best interest of the principal, and avoid conflicts of interest between the principal and the attorney-in-fact, or any other person;
2. The duty to keep the principal's property separate and distinct from any property owned or otherwise controlled by the attorney-in-fact;
3. The duty to keep a complete record of all receipts, disbursements and transactions entered into by the attorney-in-fact; and
4. The duty to provide written notice to the principal and to the successor attorneys-in-fact in order of their appointment if the attorney-in-fact is unwilling or unable to act.[6]

In order to be valid, all powers of attorney, including those not based on the statutory short forms, would have to include verbatim a notice to the attorney-in-fact which would be contained in the newly revised statutory short forms, and which would include a listing of the aforementioned fiduciary duties.

Acknowledgment of Power of Attorney by Attorney-in-Fact

Before being authorized to act under a power of attorney, the attorney-in-fact would be required to sign the power of attorney whereby he or she would be acknowledging and accepting his or her fiduciary duties under the instrument.[7]

Prudent Person—Standard of Care to Be Imposed

The Law Revision Commission has recommended that the General Obligations Law in regard to powers of attorney be revised to impose upon attorneys-in-fact the standard of care imposed on other fiduciaries, i.e., the standard that would be observed by a prudent person dealing with the property of another.[8]

The Attorney-in-Fact's Duty to Act

The Law Revision Commission has proposed a revision to the General Obligations Law which would enable a principal to require his attorney-in-fact to act and exercise certain powers granted to him or her under the instrument. The attorney-in-fact would not have an affirmative duty to act unless the principal set forth specific instructions in the power of attorney instrument which would require his or her attorney-in-fact to act. Further, this obligatory duty to act would not be binding on the attorney-in-fact unless and until the attorney-in-fact signed the Power of Attorney instrument and acknowledged his or her duty to exercise the specified powers.[9]

Resignation of the Attorney-in-Fact

The Law Revision Commission has recommended a procedure by which an attorney-in-fact who is unwilling to act or continue to act may resign after the principal has become incapacitated and is unable to appoint a successor attorney-in-fact. If, however, the terms of the power of the attorney require the attorney-in-fact to act, the attorney-in-fact must seek court approval of his or her resignation to terminate liability as attorney-in-fact. The proposal further provides that if the attorney-in-fact is not under a duty to act, the attorney-in-fact may seek court approval of his or her resignation, the purpose being to put the court on notice that an incapacitated party no longer has anyone who is authorized to act on his or her behalf.[10]

Compensation of the Attorney-in-Fact

The Law Revision Commission has proposed that an attorney-in-fact not be entitled to compensation unless the principal has specifically authorized it. The Commission proposes revising the statutory forms to allow the principal to list the name of each attorney-in-fact who will be entitled to seek reasonable compensation.[11]

Refusal by Third Parties to Honor a Power of Attorney

The Commission has recommended amendments to the General Obligations Law to encourage routine acceptance of statutory powers of attorney. Third parties, including financial institutions, would be permitted to reject the power of attorney for reasonable cause. Reasonable cause would be defined to include specific circumstances where the power of attorney is invalid, or where the attorney-in-fact's motives or exercise of authority are suspect.[12] The circumstances which a party may use to argue in support of a claim for reasonable cause are not limited to those listed in the proposed statute. However, it shall be deemed unreasonable for a third party to refuse to honor a power of attorney if the only reason for the refusal is any of the following:

1. The power of attorney is not on a form prescribed by the third party to whom the power of attorney is presented;

2. There has been a lapse of time since the execution of the power of attorney; or

3. On the face of the power of attorney there is lapse of time between the date of acknowledgment of the signature of the principal and the date of acknowledgment of the signature of the attorney-in-fact, or attorneys-in-fact, or there is a lapse of time between the dates of acknowledgment of the signatures of the attorneys-in-fact designated to act separately.[13]

The revised statute would protect third parties from liability for unknowingly acting upon a power of attorney that has been revoked either by the principal or by operation of law. Specifically, the Commission proposes that a third party will not be liable for honoring a power of attorney if it has not received actual notice of revocation by the principal or by operation of law.

If a third party refuses to honor a power of attorney without reasonable cause, that party can be compelled to honor a power of attorney via a special proceeding described in proposed Section 5-1508. The petitioner in such a proceeding may be entitled to attorneys' fees upon a court's determination that the refusal to honor was made without reasonable cause.

Authority to Access Health Care Billing Records

The Commission has proposed that an attorney-in-fact's authority with respect to records, reports and statements as set forth on the statutory short form powers of attorney be revised to include health care billing and payment matters. The revision is needed because the absence of such specific authority in the instrument under current law has led some health care providers to deny billing records to attorneys-in-fact. These specific authorizations in regard to an attorney-in-fact's authorization to access health care billing records would be added to the statute, as well as to the model forms, to eliminate the need to add express permission in the power of attorney when the model forms are not being utilized.[14]

As under current law, the revised provision would limit the authority of the attorney-in-fact to financial matters, and expressly prohibit the attorney-in-fact from making health care decisions for the principal. Under current law a principal may grant health care decision-making authority to a third party only by executing a Health Care Proxy pursuant to Section 2981 of the Public Health Law.

Gifting Authority

If it is the principal's intention to grant to the attorney-in-fact the authority to make gifts, especially gifts to the attorney-in-fact himself or herself, then it is critical such authority be expressly spelled out in the instrument.

> It is for the common security of mankind . . . that gifts procured by agents from their principals, should be scrutinized with a close and vigilant suspicion. Therefore, in order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney-in-fact to himself or a third party absent clear intent to the contrary evidenced in writing.[15]

The Commission has recommended the following changes to the attorney-in-fact's authority to make gifts under the statutory forms:

1. The attorney-in-fact would be authorized to make full annual exclusion gifts as defined under Internal Revenue Code § 2503. Currently, gifts under the statutory short forms are limited to $10,000 per donee;

2. The principal would be able to grant to the attorney-in-fact the authority to establish Internal Revenue Code § 529 education accounts; and

3. The provision would also permit the attorney-in-fact to take advantage of the gift splitting provisions under Internal Revenue Code § 2513 so that the attorney-in-fact would be authorized to split gifts with the principal's spouse for annual exclusion purposes.[16]

Principal's Designee Authorized to Demand Record of Attorney-in-Fact's Transactions

The revised statute would permit the principal to designate a person or persons who have the authority to request and receive a complete record of all receipts, disbursements and transactions entered into by the attorney-in-fact on behalf of the principal. The attorney-in-fact would be required to provide a copy of the record upon request to the person designated by the principal. The attorney-in-fact would be entitled to compensation for reasonable expenses incurred in making the records available.[17] The attorney-in-fact has the obligation to maintain such records under current law. This provision would enable the principal to grant a specified party the power to review the attorney-in-fact's acts without incurring the effort and expense of a court proceeding.

Signature of an Attorney-in-Fact Required When Acting on Behalf of Principal

"Lack of statutory guidance as to how the attorney-in-fact must sign documents when acting on behalf of the principal gave rise to problems in determining which transactions were the attorney-in-fact's, and which were the principal's."[18] The revisions recommended by the Commission would prescribe the manner in which the attorney-in-fact must sign whenever he or she is acting on behalf of the principal under the authority of the power of attorney. The attorney-in-fact would be required to write the principal's name and sign his or her own name as attorney-in-fact for the principal. In addition, the revised statute would provide that such a signature would constitute an attestation by the attorney-in-fact that he or she is acting under the authority and within the scope of a valid power of attorney.[19] Consequently, even where an attorney-in-fact falsely attests to the validity of a power of attorney, a third party who relies on the signature of the attorney-in-fact will escape liability unless the third party had actual notice that the power of attorney was no longer valid.

Estate Matters

The revised statute would clarify that if an attorney-in-fact was authorized to engage in estate transactions, then the attorney-in-fact would have the authority to act with respect to any estate, trust or other funds, regardless of whether the estate, trust or other source of funds was specifically identified or in existence at the time the principal executed the power of attorney. The principal, of course, could still place limits on the attorney-in-fact's authority in this regard.[20]

Halting Abuses of Powers of Attorney

According to Article V, Paragraph C of the Law Revision Commission's Report of November, 2003, its proposal would assist in halting abuse by permitting third parties to challenge a power of attorney and to seek removal of the attorney-in-fact. Under the proposal, a civil proceeding could be commenced to remove the attorney-in-fact on the grounds that the attorney-in-fact had violated or is unfit, unable or unwilling to perform the fiduciary duties, and the principal lacks capacity to give or revoke the power of attorney, or is a "vulnerable adult." A civil proceeding may also be commenced to determine:

1. If the principal had the capacity to execute the power of attorney;

2. The validity of the power of attorney; or

3. If the power of attorney was wrongfully procured.

The attorney-in-fact may be subject to civil and criminal liability if he or she:

1. Transfers property to himself or herself without specific authorization in the power of attorney;

2. Acts wrongfully in procuring any power of attorney or any authority provided in the power of attorney, and takes control of the principal's assets or property;

3. Acts in an unauthorized manner or violates the standard of care or fiduciary duty; or

4. Acts under power of attorney with actual knowledge that it has been revoked.

Powers of Attorney Executed in Other Jurisdictions

The Commission has proposed that the General Obligations Law be revised to make it clear that powers of attorney validly executed in other jurisdictions must be accepted as valid for use in New York.[21]

Conclusion

The points summarized above are not intended to provide an exhaustive review of the changes proposed by the Law Revision Commission. However, the complete report of the Law Revision Commission is available at the New York State Law Revision Commission Web site, www.lawrevision.state.ny.us. Also available at the Web site are copies of the proposed legislation and a section-by-section commentary regarding proposed revisions.

Endnotes

1. Law Revision Commission Commentary, Section II, page 2.
2. Memo submitted in support of proposed legislation of the New York State Law Revision Commission.
3. Proposed General Obligations Law §§ 5-1501A(1)d, 5-1501B(3), and 5-1501C(4).
4. Proposed General Obligations Law § 5-1509.
5. 166 A.D.2d 751.
6. Proposed General Obligations Law § 5-1505.
7. Proposed General Obligations Law §§ 5-1501A(1)(c), 5-1501B(1)(d), and 5-1501C 4(d).
8. Proposed General Obligations Law § 5-1505(2).
9. Proposed General Obligations Law § 5-1505(1).
10. Proposed General Obligations Law §§ 5-1505(1)(6) and 5-1508(4).
11. Proposed General Obligations Law § 5-1506.
12. Law Revision Commission Commentary, Section X, page 10.
13. Proposed General Obligations Law § 5-1504.
14. Proposed General Obligations Law § 5-1502K.
15. *Fender v. Fender*, 329 S.E. 2d 430 at 431.
16. Proposed General Obligations Law § 5-1502M.
17. Proposed General Obligations Law § 5-1503(5).
18. Law Revision Commission Commentary, Section XIII, pages 14-15.
19. *Id.*
20. Proposed General Obligations Law § 5-1502G.
21. Proposed General Obligations Law § 5-1510.

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(paid advertisement)

Ethical Issues in Representing Clients with Diminished Capacity

By Amy B. Beller

The representation of clients with diminished capacity in trusts and estates matters is an occupational hazard, and presents a myriad of ethical dilemmas for practitioners. Such ethical issues are perhaps more frequently raised as aspersions cast on the lawyer in will contests, contested gift cases, and proceedings for turnover of estate assets, than in the context of straightforward claims in disciplinary proceedings or malpractice cases. However, the ethical practitioner must be mindful of these issues to avoid the pitfalls, both direct and indirect, of missteps with the diminished-capacity client.

This article provides an overview of the ethical issues implicated in representing a client with diminished capacity under New York law as well as in multi-state practice.

The Governing Ethical Rules

New York's Code of Professional Responsibility, Ethical Consideration ("EC") 7-12, provides:

> Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

29 McKinney's Consol. Laws of N.Y. Ann. (West 2003).

Similarly, the Model Rules of Professional Conduct ("MRPC"), Rule 1.14, provides:

> Client under a Disability.
>
> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The 1999 Third Edition of the Commentaries of the American College of Trust and Estate Counsel ("ACTEC") to MRPC 1.14 discusses the permissive conduct, affirmative duties, and prohibited conduct of an attorney representing a client with diminished capacity, as well as the implications of the client's impairment on general legal principles such as attorney-client privilege.[1] However, significant proposed changes for the Fourth Edition of ACTEC's Commentaries are expected to provide much more guidance to trusts and estates practitioners in their representation of clients with diminished capacity.

Determination of Diminished Capacity

The lawyer's first determination must be the extent of the client's impairment so that the lawyer may decide whether the client has any capacity to make informed decisions as to the matters affecting his interests. Although the Third Edition of the ACTEC Commentaries is silent on this issue, the Fourth Edition is expected to provide that in determining the extent of a client's diminished capacity, the lawyer should consider the facts and circumstances of the individual case, based on interaction with the client.

As a practical matter, the lawyer for a client believed to have diminished capacity must remember that litigation, such as a will contest, may be on the horizon. The lawyer should consider whether the client is seeking to make substantial changes to his or her estate plan, whether the proposed changes are natural or rational (such as those to remove a recently pre-deceased beneficiary), whether the client can articulate logical reasons for the desired changes, and the extent of the involvement of those benefiting from proposed changes. The lawyer should also be mindful of the standard of capacity for the transaction at issue, and make sure that she is familiar with the legal test for such standard in undertaking a determination of the client's competence. Finally, the lawyer should be aware that the decision to obtain a physician's opinion of competence may have dire consequences in a subsequent effort to uphold the client's transaction, not only if the medical opinion is negative or equivocal: Unless it is a routine practice of the drafting attorney, the mere fact that a physician's opinion on capacity was obtained may provide fodder for a contestant's argument that the client's impairment was evident.

Diminished Capacity and Will Executions

The considerations relative to a client's impairment are particularly important in connection with will executions because of the public policy to allow a testator to dispose of his or her assets even when infirm. There is a wealth of cases in New York and elsewhere holding that the law looks with tender eyes upon the acts of the aged.

Consider *Vignes v. Weiskopf*, 42 So. 2d 84 (Fla. 1949), in which the Supreme Court of Florida held that it was proper for a lawyer to prepare and supervise execution of a codicil for a client with questionable capacity. The court observed:

> We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.
>
> Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted.

To that end, the ACTEC Commentary to MRPC 1.14(b) provides:

> Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, will substitute, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

Such evidence might include detailed notes of meetings with the client during which the client expressed his or her intent; a specific and detailed execution memorandum; and perhaps medical records supporting a finding of capacity.

However, some jurisdictions' ethics committees have reached an opposite result, finding that the lawyer has an affirmative duty to satisfy herself that the client has capacity*. See, e.g.*, San Diego Op. 1990-3 (1990). Since these conflicting decisions seem irreconcilable, a lawyer having doubts as to a client's capacity should review the most recent decisions on this issue emanating from courts and committees in her own jurisdiction.

So then, what is the estate planning lawyer to do when she is asked by a client with diminished capacity to prepare and supervise execution of a will? If the lawyer is satisfied that the client has testamentary capacity as defined in the relevant jurisdiction, the lawyer may proceed in preparing the client's will. But this answer may be of little comfort to the litigation-adverse estate planner, who would prefer not to be subject to deposition or trial, and who may be the target of cutthroat litigation tactics in an attempt to embarrass the lawyer or impeach her credibility. In that case, as a general matter, the lawyer may decline the representation:

> A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of a fair share of tendered employment which may be unattractive both to the lawyer and the bar generally.

New York Code of Professional Responsibility, EC 2-26.

Diminished Capacity in Other Matters

The capacity issue is not be limited to testamentary capacity. In New York City Op. 82-41 (1982), the Association of the Bar of the City of New York held that where a law firm had concerns about the capacity of a client who was seeking appointment as administratrix of two estates, the firm had an obligation to ascertain whether the client had the capacity to undertake the decisions and responsibilities that would be incumbent upon her. The Association held that, at minimum, the firm must meet with the client outside of the presence of her nearly constant companion to ascertain whether she understood the relevant events and the decisions purportedly made by her. The Association observed that it may be advisable for the firm to seek guidance from a diagnostician.

Acting in the Diminished Client's Interests

A lawyer is permitted to act on behalf of a client with diminished capacity to effect the client's intent. The ACTEC Commentaries provide:

> Implied Authority to Act in the Best Interests of Disabled Client. The lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client.

The ACTEC Commentaries state that a lawyer may—but is normally not required to—take action to protect a client with diminished capacity who is at risk of financial or other harm:

> Discretion to Seek Appointment of Guardian for Disabled or Apparently Disabled Clients. A lawyer who reasonably believes that a client is unable to act on his or her own behalf may, but is ordinarily not required, to seek the appointment of a guardian or take other protective action with respect to the client's person and property. See MRPC 1.14(b). In such a case, for example, the lawyer may "seek guidance from an appropriate diagnostician." Comment, MRPC 1.14.

The ACTEC Commentaries to MRPC 1.7 are in accord:

> Disabled Client. A lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be disabled, including the initiation of protective proceedings. Doing so does not constitute an impermissible conflict of interest between the lawyer and the client. . . .[2]

Importantly, the Fourth Edition of the ACTEC Commentaries is expected to provide that a lawyer may take reasonable protective action where the lawyer reasonably believes the client (1) has diminished capacity; (2) is at risk of substantial physical, financial, or other harm; and (3) cannot adequately act in his own interest. The proposed requirement that the lawyer reasonably believe the client is at risk of substantial physical, financial, or other harm is apparently intended to curtail the improvident reliance on MRPC 1.14(b) by overzealous counsel.

Where the lawyer represented the client before the client's capacity was impaired and prior to the appointment of a fiduciary for the client, the lawyer may be considered to continue to represent the incapacitated client. The ACTEC Commentaries provide:

> A lawyer who represented a now disabled person as a client prior to the appointment of a fiduciary may be considered to continue to represent the disabled person. Although incapacity may prevent a disabled person from entering into a contract or other relationship, the lawyer who represented the disabled person prior to incapacity may appropriately continue to meet with and counsel him or her. Whether the disabled person is characterized as a client or a former client, the lawyer for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991).

In Illinois Advisory Opinion 91-24 (1991), the Illinois ethics committee held that a lawyer representing a guardian for an incapacitated person represents the guardian in his representative, not individual, capacity, and thus has a duty to the ward, including a duty to take steps necessary to protect the ward's estate from the possibly fraudulent acts of the guardian.

The Fourth Edition of the ACTEC Commentaries is expected to provide that a lawyer has an affirmative duty to a client with diminished capacity to act if the lawyer is aware that the fiduciary appointed to act for the client is acting adversely to the client's interest. MRPC 1.3 ("Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.").

Even where the lawyer represents the fiduciary for the person with diminished capacity, the lawyer may have an obligation to prevent or rectify the fiduciary's misconduct. MRPC 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . . ."); Comment, MRPC 1.14 ("lawyer may have an obligation to prevent or rectify the guardian's misconduct"). However, if MRPC 1.2(d) is the standard, the fiduciary's conduct must rise above mere negligence or inaction, which will not give rise to any duty on the lawyer to act.

In *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. App. 1976), a malpractice action, the court held that the lawyer for a guardian owed a fiduciary duty to the guardian's ward, and that privity of contract was not required for the ward to maintain his claim. *See also In re Fraser*, 523 P.2d 921 (Wash. 1974) (attorney owes duty to ward as well as guardian).

Ethics and Guardianship Proceedings

How is a lawyer to proceed if she has determined that her client cannot act on his own behalf? If there is no one with authority to act for the client, such as an attorney-in-fact pursuant to a durable power of appointment, common sense would dictate that the lawyer should initiate (or have someone initiate) a proceeding for appointment of a guardian. However, the commencement of a guardianship proceeding raises additional ethical issues for the lawyer: Can the lawyer reveal attorney-client communications in support of the application for appointment of a guardian? Does the lawyer's involvement in, or support of, the guardianship application create an impermissible conflict of interest?

Although some ethics committee decisions have held that a lawyer is prohibited from seeking appointment of a guardian or conservator for a diminished client, or from consulting a physician regarding the client's condition, e.g., Cal. Formal Op. 1989-112 (1989) (lawyer may not initiate conservatorship proceedings on client's behalf without client's consent), the ACTEC Commentaries extol as the preferable view the decision of the ABA in Informal Opinion 89-1530 (1989):

> [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is *impliedly authorized* within the meaning of Model Rule 1.6. Thus, the inquirer may consult a physician concerning the suspected disability. [Emphasis added.]

Accord New York City Op. 1987-7 (1987) (a lawyer may disclose confidential information in seeking the appointment of a guardian if necessary to protect the client's interests but the request should be made *in camera* and should be filed under seal); *but see* Nassau County Bar Ass'n Op. 90-17 (it is improper for a lawyer to suggest to a client's family that the client is in need of psychiatric care based on observations during a consultation).

MRPC 1.7, discussed *supra*, governs conflicts of interest. The ACTEC Commentaries to MRPC 1.7 provide:

> Disabled Client. A lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be disabled, including the

initiation of protective proceedings. Doing so does not constitute an impermissible conflict between the lawyer and the client. See ACTEC Commentary on RPC 1.14 (Client under a Disability). However, a lawyer who is retained on behalf of the client to resist the institution of a guardianship or conservatorship may not take positions that are contrary to the client's position or make disclosures contrary to the provisions of MRPC 1.6 (Confidentiality of Information).

In other words, the lawyer seeking appointment of a guardian or conservator for an incapacitated client may reveal such information necessary to protect the client's interests, but a lawyer hired by a client with diminished capacity to defend against a finding of incapacity may not reveal any information or take any position contrary to the client's position.

Conclusion

Representation of a client with diminished capacity raises issues and challenges for all lawyers, the trusts and estates attorney among them. As medical science becomes increasingly agile at forestalling death and total mental incompetence, the Bar is likely to encounter these situations more frequently. Our ethical rules must be flexible and responsive to the dilemmas we will face, and must, above all, affirm the dignity of the client with diminished capacity and the sanctity of attorney-client relationships.

Endnotes

1. The ACTEC Commentaries are available on the organization's Web site at www.actec.org.
2. As originally proposed, MRPC 1.14(b) imposed upon the lawyer an affirmative duty to act to "protect the diminished client when doing so was in the client's own interest." *See* ABA, Probate and Trust Subcouncil responds to Kutak Commission, 9 Prob. & Prop. 6, 9 (1981).

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Enron, ESOPs, and Fiduciary Duty

By Amy J. Maggs

Enron's impact on retirement plans remains difficult to estimate. It is hard to separate issues that are unique to Enron's specific facts from those endemic to the pension system as a whole. This article concentrates on fiduciaries in employee stock ownership plans. By reviewing fiduciary protections assigned to ESOPs, we can then evaluate the efficacy of current law in light of recent events.

Enron is one mess that just won't go away. Along with the soap opera of shredded documents, opaque off-balance-sheet transactions, and corporate greed, significant questions remain about the rights and responsibilities of both fiduciaries and employees. These questions involve fundamental public policy issues that are best examined in the context of both ERISA's origins and evolving case-law.

It is not surprising that Enron has been compared to Studebaker, the car manufacturer that went out of business, terminating a pension plan that covered approximately 11,000 employees.[1] It is widely accepted that the failed promises of Studebaker triggered the enactment of the Employee Retirement Income Security Act of 1974. As John H. Langbein and Bruce A. Wolk wrote, in their textbook *Pension and Employee Benefit Law*, "The funding and vesting rules that constitute the centerpiece of Title I of ERISA, and the pension insurance program created under Title IV, can be traced to the Studebaker incident."

Like Studebaker, the problems broached by the Enron fiasco are complex and far reaching. The role of accounting firms, the use of off-balance-sheet transactions and special purpose entities, the treatment of stock options, and the most effective way to protect employees from risk are just a few of the issues being debated.[2] Is it sufficient to educate employees about the need for diversification in investments, or should there be mandatory limits in defined contribution plans similar to those in defined benefit plans? Hope has been expressed that the country will ultimately benefit from the problems brought to light through the Enron debacle, leading to a stronger pension and employee benefit system. Concern has also been expressed about the best way to address the problems within the complex structure of ERISA, which must inevitably interact with the economy as a whole.[3]

"I've watched this go from a backwater technical issue no one paid attention to, to now being one of the core issues people think of," said Rep. Earl Pomeroy (D-N.D.), a leading pension authority in Congress. "As a result, the politics behind it have grown hotly charged as well. This is a mixed blessing. The good news is Congress is now interested," Pomeroy said. "The bad news is Congress is now interested. This is an area where ill-advised, well-intentioned legislation can do some serious damage."

It is also important to consider the changing landscape of employment benefits along with the Enron bankruptcy. When ERISA was first enacted on Labor Day of 1974, the vast majority of retirement plans provided by employers were defined benefit plans. The Pension Benefit Guaranty Corporation was created to protect employees enrolled in defined benefit plans.

The trend in retirement benefits has been away from the defined benefit plans that proliferated at the time of ERISA's legislation, and toward defined contribution plans. Lower administrative costs and regulatory oversight, shifting of risk to the plan participants, and lower funding requirements make defined contribution plans very attractive to employers. With the market experiencing unprecedented growth, the value of the defined contribution plans grew at phenomenal rates. The attitude of the American public was, "If it's not broken, don't fix it!" With the subsequent cooling of the economy, and the resulting worthless stock of several major employers, there has been a hue and cry to reform ERISA to protect vulnerable employees. In a speech presented at the 2002 National Summit on Retirement Savings, Senator Edward M. Kennedy (D-Mass.) declared that:

> Our challenge today is to learn lessons from the Enron scandal so we can strengthen America's pension system and protect the retirement security of America's workers. Enron executives cashed out more than a billion dollars of stock while Enron workers' retirement disappeared. Corporate executives get golden parachutes when they lose their jobs, but workers get only a tin cup when they lose their retirement savings. As we have seen with Enron, all too often the top brass is set for life, while the average worker pays the price. The emerging details of the Enron scandal reveal a shocking abuse of corporate power that left

> workers powerless to protect themselves. Enron workers lost more than $1 billion of their retirement savings because they were pressured to invest 401(k) savings in company stock. This is a widespread problem at many major companies, where workers have as much as 90 percent of their 401(k) assets in company stock. The real test of pension reform is whether it will prevent future Enrons.

Everyone agrees that they don't want to have a repeat of the Enron scandal. However, that is where the consensus ends. In a written statement on behalf of the ERISA Industry Committee, John M. Vine emphasized the need for employees to have the autonomy to make their own investment decisions and encouraged the alignment of both employer and employee interests created through stock based plans.[4]

> If Congress responds excessively to the risks associated with stock-based plans by imposing restrictions that prevent these plans from meeting employers' business needs, Congress will have addressed one risk by creating other, more dangerous risks: that millions of employees will be unable to share in their employers' success and that employers will curtail their commitments to their plans and reduce employees' retirement savings.

Because the problems that have emerged as a result of Enron's bankruptcy are so complex and inexorably linked to their unique business of providing for communication and energy needs, including complex off-balance-sheet derivative transactions, it is easy to wish for simple solutions and handy scapegoats.[5] It is very difficult to separate out the problems that are unique to Enron's specific facts from the problems that are endemic to the pension system as a whole and, therefore, need to be resolved. If Enron is an outlier, an anomaly, it would be difficult to gain any useful lessons from their mistakes. On the other hand, it would be wrong to apply all of the problems experienced by Enron to current pension and employee benefit law. To avoid the temptation of either over- or under-generalizing, the balance of this article will be more narrow in focus and will concentrate on only one form of employee benefit, the employee stock ownership plan, or ESOP. By obtaining an objective understanding of the fiduciary protections assigned to ESOPs, we will be better prepared to evaluate the efficacy of current law in the light of recent events.

Fiduciaries in ESOPS

As ERISA is an adaptation of the basic law of trusts to meet the special considerations present in employee benefits, the role of the fiduciary in an ESOP is a further adaptation of previously modified rules to meet the specific exigencies of this type of employee benefit. As discussed in the *Columbia University Business Law Review* article, "ESOP's Failures: Fiduciary Duties When Managers of Employee-Owned Companies Vote to Entrench Themselves" by Brett McDonnell, an ESOP fiduciary is subject to ERISA's "prudent investor rules," must act "solely in the interest of the participants and beneficiaries" and "may not deal with the assets of the plan in his own interests."

Along with those basic similarities, ESOPs, by their structure, are by necessity exempt from many of the restrictions found in other types of employee benefit plans. ESOPs, as previously mentioned, are exempt from the diversification requirement, like most other defined contribution plans. ESOPs are also not subject to prohibitions against lending money or an extension of credit between a plan and a party-in-interest. Fundamental to the structure of an ESOP is the accrual of stock and concurrent voting rights in the benefit plans of both employees and owners. This fundamental difference sets the stage for the majority of conflicts between fiduciaries and plan members, which turn on issues related to qualified stock. The best way to understand how these issues present themselves is to look at case law relating to ESOPs and see how the role of the fiduciary has changed, or not, over time.

Important Cases

In *Firestone* (*Firestone Tire and Rubber C. v. Bruch*, 489 U.S. 101 (1989)), the Supreme Court considered the standard of judicial review in the interpretation of plan documents and denial of benefits by fiduciaries, determining that:

> . . . the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits under Section 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligi-

> bility for benefits or to construe the terms of the plan.

Before this decision, courts applied the arbitrary and capricious standard of review adopted by the Labor Management Relation Act. The Supreme Court established a new standard of review that would be based upon concerns unique to ERISA. "Accordingly, the Court applied trust law principles to establish a standard of review applicable to Section 1132(a)(1)(B) actions" as was explained in a 1999 *Rutgers Law Review* article by Kenneth Hayes.

Donovan (*Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982)) determined if fiduciary duties were breached when trustees, in response to a tender offer, used pension funds to defend against a hostile takeover. This case turned on the exclusive benefit rule found in ERISA Section 404(a), and concluded that trustees with mixed loyalties should not place themselves in situations when they are not able to make decisions with a "single eye." Because the fiduciaries failed to either resign or engage independent legal counsel and thoroughly examine all alternatives, they were found to have breached their fiduciary duties.

Similarly, in *Danaher* (*Danaher Corp. v. Chicago Pneumatic Tool Co.*, 636 F. Supp. 246, 7 EBC 1616 (S.D.N.Y. 1986)), the trustee was deemed to have breached his fiduciary duty by not evaluating the best interests of plan participants and their beneficiaries in a tender offer while in the dual role of both trustee and corporate president. The court suggested the placement of a neutral trustee in the president's position would be a possible solution, as long as the best interests of participants is considered in the abstract and not decided to best suit certain factions or in fear of repercussions from future management.

In contrast, *Fairchild* (*In Re: Fairchild Industries, Inc.*, 835 F. Supp. 603 (N.D. Fla. 1993)) found that the board and fiduciaries of a corporation were not held liable for a breach of their fiduciary duty. Subsequent to the sale of a subsidiary, the corporation went into bankruptcy and the assets of the ESOP became worthless. Because the corporation was able to recognize that they were in a position where their loyalties would be conflicted, the board and fiduciaries engaged an independent fiduciary to evaluate the transaction. Citing *Donovan*, the court concluded that the trustees and board had correctly discharged their fiduciary duty by appointing an independent trustee to manage the assets of the new ESOP created after the sale of the subsidiary.

The plan sponsor, retirement committee and corporate board members in *Andrade* (*Andrade v. The Parsons Corp.*, 12 EBC 1954 (C.D. Cal. 1990)) were held to have appropriately discharged their fiduciary duties. Significantly, neither the board nor senior executives were found to owe a fiduciary duty to the ESOP participants because: "The Senior Executives had no authority under the plan document to dispose of the plan assets. The ESOP vested exclusive authority over the disposition of plan assets in the named fiduciary, that is, the Retirement Committee."

In addition, the members of the retirement committee demonstrated a procedural prudence in their actions, and were found to have appropriately discharged their fiduciary duties for the exclusive purpose of:

> . . . providing benefits to participants and their beneficiaries . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

In *Martin* (*Martin v. Feilen*, 965 F.2d 660 (8th Cir. 1992)), it was concluded that ERISA's fiduciary duties were only applicable to transactions relating to investing in the ESOP's assets or plan administration, and business judgments would not incur a breach of fiduciary duties. Kenneth Hayes explains the decision in *Martin* saying: "The court in developing its standard was motivated, in part, by a concern that a corporate officer who also serves as an ESOP trustee should not be subject to breach of fiduciary duty claims for decisions made in the course of day-to-day duties as a corporate officer."

In *Fink (Fink v. National Savings and Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985)), the plan participants challenged and overturned the previous court decision that was in favor of the fiduciaries. Plan beneficiaries claimed that the failure to diversify stock holdings by fiduciaries, despite the knowledge that the company was experiencing financial difficulties after losing their largest customer, was a breach of fiduciary duties. The court overturned the previous decision, stating:

> . . . the basic ERISA limitation period of six years runs from the date of the breach or violation, except in case of fraud or concealment, when it runs from the date of discovery of the breach or violation. If there is no fraud or concealment, the six year period can be reduced to three years if the defendant can show that the plaintiff had either actual or con-

> structive knowledge of the breach or violation; the three year period runs from the time the plaintiff gained such knowledge.

The court reviewed the previous decision *de novo* and determined that there were genuine issues of material fact. ERISA required the trustee to act solely in the interest of the retired employees with care, skill, prudence, and diligence, pursuant to 29 U.S.C. Section 1104(a)(1)(B). The court determined that the retired employees could pursue the claims against the trustee and its co-fiduciaries in which they lacked actual or constructive knowledge. The three-year limitation period did not apply because the retired employees could not discern from fully completed forms that the trustee failed to perform fiduciary duties. Further, the court by vacating the earlier decision, allowed the plaintiffs to introduce allegations of fraud against the fiduciaries under the Federal Rules of Civil Procedure.

Significantly, the court ruled that even though an EIAP (eligible individual account plan, defined in ERISA at Section 404(a)(3)(A), 29 U.S.C. 1107 (a)(3)(A)), like an ESOP, is exempt from the 10 percent diversification requirement, there is still a fiduciary duty to act in the "sole interest" and with "prudence." *Fink* is an important decision because it articulates that all ERISA trustees are subject to the same rigorous fiduciary standards. Also, the court determined that policy considerations favoring EIAP investments in employer stock do not trigger a broad reading of ERISA's exemptions. *Fink* emphasized the need for a fiduciary to proactively investigate the types of investments retirement funds are placed in, even when there is not a duty to diversify and the funds are primarily invested in employer securities.

In a decision similar to *Fink*, *Moench* (*Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1955)) overturned a previous decision that was in favor of the plan fiduciaries. In 1986, Statewide Bancorp, a bank holding company, established an ESOP. In 1989, Statewide was in a state of extreme financial distress and its stock plummeted from about $18 a share in 1989 to under 25 cents a share in May of 1991. On May 22, 1991, the FDIC took control of the bank, and Statewide filed for bankruptcy. While the stock decreased in value, the ESOP committee continued to invest in Statewide Bancorp stock, despite their knowledge that the company was in a distressed financial condition.

The court determined, in deciding the appropriate level of review, that because plan documents gave the Committee broad discretion to interpret the terms of the plan, the appropriate level of review was not the strict prudent person standard, but the more deferential arbitrary and capricious standard used in *Firestone*. To determine if the fiduciaries violated the law, the following test was applied:

1. Whether the interpretation is consistent with the goals of the Plan;
2. Whether it renders any language in the Plan meaningless;
3. Whether the relevant entities have requirements of the ERISA statute;
4. Whether the relevant entities have interpreted the provision at issue consistently; and
5. Whether the interpretation is contrary to the clear language of the plan.

The court determined that even if the documents state that the assets are to be invested primarily in employer stock, it doesn't mean that they must be invested exclusively that way. The Committee also failed to document that they actually deliberated, discussed, or interpreted the plan provisions, and failed to show that they investigated alternatives or relied on neutral outside advice. The court ruled in favor of defendant fiduciaries and remanded the case. In addition, the court determined that, in limited circumstances, defendants could be liable for a breach of fiduciary duty under ERISA by continuing to invest in employer stock according to the ESOP's direction.

Most ESOP litigation concerns valuation of stock in closely held companies. *Chao* (*Chao v. Hall Holding Co.*, 2002 U.S. App. LEXIS 5929 (N.D. Ohio, 2002)) was decided on April 3, 2002. *Chao* concerns the breach of fiduciary duty that occurred in the valuation and purchase of stock from a closely held company. Earlier in 2003, the Supreme Court refused to review the Court's determination that the fiduciaries of the ESOP breached their duties by purchasing stock without sufficient investigation and subsequently overpaid for the stock. Before discussing the case, it is important to realize that the correct appraisal of the value of an employer's stock being sold to an ESOP is at the same time both essential and extremely complex. If the fiduciary allows the plan to purchase shares of stock for a price in excess of their value, it is a violation of fiduciary duty under ERISA Section 404. The fiduciary would be personally liable to the plan participants for the excess amount paid. In addition, as *Tax Management Portfolios, ESOPs* explains:

> [If an] . . . employer contributes stock to an ESOP and claims a deduction based on the inflated price, then the deduction will be disallowed to the extent of the overvaluation and

> could constitute a prohibited transaction (if the plan is a combination stock bonus and money purchase pension plan, a minimum funding deficiency would arise under § 412).

If pursuant to a put option stock is sold back to the employer for less than fair market value, the participant might have a cause of action against the employer. In addition to the difference in the price paid from fair market value, an excise tax may also be imposed under IRC Sections 4975(a), 4975(f)(2) and 4975(b).

Even though IRC Section 401(a)(28)(C) provides that an ESOP will not be qualified unless all securities that are not regularly traded on an exchange are valued by an independent appraiser, there is not much official direction available to determine how these appraisals are to be done.[6]

In *Chao,* defendant fiduciaries appealed a decision in favor of the Secretary of Labor. The decision overturned a previous decision in favor of the fiduciaries in *Reich v. Hall Holding Company*. The Court found that the fiduciaries had failed to conduct a prudent and independent investigation to determine the fair market value of the stock, since they had instructed the appraiser to value the wrong entity and the date of the appraisal was not current. Additionally, the court clarified that ". . . requiring a causal link between the failure to investigate and the resultant harm in order to prove a violation under Section 406 would be contrary to Congress's intent to enact Section 406. Basically, in creating § 406(a), Congress intended to create a category of per se violation." Because the fiduciaries did not engage in a good faith determination of the value of the stock, they violated the requirements of "adequate consideration" under ERISA Section 3(18)(b) and 29 U.S.C. Section 1002(18)(B). Finally, the court determined that the award of money damages of $1,049,549 plus interest, by the previous court to compensate the beneficiaries of the ESOP for the difference between the amount originally paid for the stock and the determined fair market value was appropriate. The court did go as far as to point out that all three elements of fiduciary duty, including loyalty, the prudent man standard and exclusive benefit, were violated by at least one fiduciary.

Conclusion

ESOPs are, to a great degree, a tool of corporate finance and also a vehicle for employee benefits. At first blush, this seems like the perfect marriage; the corporation is happy and the employee is happy. So where is the problem? The problem is that there are many risks present in this form of benefit, and most of them fall on the employee. ESOPs increase employer risk by allowing companies to raise money through leverage, subsequently diluting the value of shares. The hope is that with greater risk will come a similar reward, such as greater assets in the ESOP along with expanded employment opportunities. Unfortunately, this is not always the situation, as demonstrated in many of the previous cases.

With so much of their future tied to their place of employment, to also have an employee's "happy ever after" retirement income tied to the success of their employer compounds the risk and loss faced if the company were to fail. Employees participating in ESOPs are granted very limited disclosure of pertinent financial information, and the resulting asymmetrical information increases the likelihood of moral hazard issues, as Enron has well demonstrated. Restrictions on diversification and transferability further compound the risk to plan participants and their beneficiaries.[7] In the end, plan participants at Enron were completely unaware of the off-balance-sheet partnerships and the true level of the debt the company was carrying. One might argue that the employees did not lose that much because the stock wasn't ever worth its inflated value during Enron's full bloom glory days. If employees were able to obtain a fair valuation of their stock, they might have made different choices in how to invest the discretionary amounts in their pension funds.

By assuming that there were appropriate regulations to forestall this kind of event, no one thought to question the "too good to be true" news of Enron stock. In August of 2000, Enron stock was sold for a record $90.75. Only one Wall Street analyst changed the status of the stock to "sell" before it hit $10. In the article, "How to Stuff a Wild Enron" by P.J. O'Rourke, published in the April 2002 *Atlantic Monthly*, the author quips: "I've got to hurry and hire Arthur Andersen before everyone in the company gets sent to Club Fed. I'm going to tell my new accountants: I had this expensive divorce. But I figure that you can list it as an asset. Because, believe me it was *worth* it." On a more serious note, the author also writes:

> Regulation creates a moral hazard. We don't understand finance, but it's *regulated*, so we are safe. . . . Regulation of the marketplace isn't bad. The problem is, rather that regulation that we have now is too good—at least in its intent. Our regulatory bodies strive to create honest dealings, fair trades, and a situation in which no one has an advantage over anyone else. But human beings are not honest.

At the Enron Hearings, during January of 2002, Professor John H. Langbein of Yale Law School made the following statement: "ERISA invited this mess, and unless you change ERISA, I can predict to you with utter certainty that such cases will happen again, as they have repeatedly in the past. What's new about the Enron calamity is simply the enormity of the loss." According to Professor Langbein, Enron is not an outlier, despite all of their tricky off-balance-sheet gymnastics. Enron is just the predictable result of the change in distribution and concentration of pension assets in pension plans from defined benefit, where the risk is on the employer, to defined contribution, where the participant holds the risk. By applying standard diversification practices to all types of employment plans, it would be possible to eliminate about 70 percent of all investment risk. Absent the legislation to implement similar diversification requirements of all defined contribution plans, Professor Langbein proposes the following warning be a mandatory addition to any Summary Plan Description:

> WARNING: Under commonly accepted principles of good investment practice, a retirement account should be invested in a broadly diversified portfolio of stocks and bonds. It is particularly unwise for employees, who are already subject to the risks incident to employment, to hold significant concentrations of employer stock in an account that is meant for retirement saving.

Endnotes

1. *See* "Besieged Employers Warn of Cuts to Workers' Retirement Account," by Ellen E. Schultz and Theo Francis, *The Wall Street Journal*, March 5, 2002. http://online.wsj.com/article/0,,SB1015279409326210640,00.html. See, also, "Enron's Fall Piques Congress' Interest in 401(k) Rules," by Michael Tackett, *The Chicago Tribune*, January 25, 2002, *available at* www.chicagotribune.com/news/chi-0201250358jan25.story. *See also* "Experts Wonder Whether Enron's Collapse Will Result in 401(k) Reforms the Way Studebaker's Demise Improved Pension Plans," by Kathleen Pender, *San Francisco Chronicle*, February 14, 2002, *available at* www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/02/14/BU176564.DTL.
2. Monthly Income Preferred Shares, or MIPS, were created in 1993 by Goldman Sachs & Co. These talented securities are able to transform themselves into debt or equity as needed. "For the tax man, it resembled a loan so that interest payments could be deducted from taxable income. For shareholders and rating agencies, who looked askance at overleveraged companies, it resembled equity." *See* "How the Treasury Department Lost A Battle Against A Dubious Security," by John D. McKinnon and Greg Hitt, *The Wall Street Journal*, February 4, 2002.
3. The regulations governing ERISA are universally acknowledged to be overly complex, variable and inconsistent. *See* "ERISA at 50: A New Model for the Private Pension System," by Pamela C. Perun and C. Eugene Steurele, February 2000, found at Urban Institute: www.urban.org/retirement/reports/4/retire_4.html#abou. *See also* "Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans," by David A. Pratt, *Buffalo Law Review*, Volume 49, No. 2, Spring/Summer 2001.
4. An Employee Stock Ownership Plan, or ESOP, is a type of defined contribution plan designed to invest primarily in qualifying employer securities, and which meets such other requirements as the Secretary of the Treasury may prescribe by regulation. ERISA § 407(d)(6) and 29 USC § 1107 (d)(3)(A)(1994). This section also defines the term "eligible individual account plan." An individual account plan includes profit-sharing, stock bonus thrift savings, employee stock ownership plans, and money purchase plans. Because an ESOP is designed to invest primarily in employer securities, they are exempt from many of the prohibited transactions provided under sections 406 and 407 of ERISA. There are two definitions of "ESOP," one in ERISA and one in the Code. In the Code section 4975(e)(7) an ESOP is defined as a stock bonus plan "designed to invest primarily in qualifying employer securities," which are defined in IRC § 4975(l).
5. A Derivative is a contract whose value is based upon the performance of an underlying financial asset, index, or other investment. For example, an ordinary stock option is a derivative because its value changes in relation to the performance of the underlying stock. Different derivative instruments such as swaps, forwards, futures and options can be combined in a hedging strategy to reduce financial risks. Enron was extensively involved in hedging and derivative transactions.
6. Under proposed DOL regulations § 2510.3-18 (b)(3) there are eight factors that are required in valuation of an ESOP:
    1. A summary of the qualifications of the person preparing the valuation
    2. A statement of the asset's value and the method used to reach the value
    3. A full description of the asset being valued
    4. Different factors that should be taken into account
    5. The purpose of the valuation
    6. The relevance or significance of the valuation methods
    7. The effective date of the valuation
    8. The signature of the person preparing the report and date of the report
7. *See* "ESOP's Fables: Leveraged ESOPs and Their Effect on Managerial Slack, Employee Risk and Motivation in the Public Corporation" by Hunter C. Blum, 31 U. Rich L. Rev. 1539, December 1997. ESOPs have no registration requirements under the Securities Act of 1933, unlike a public offering which has intense documentation requirements.

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The Contested Accounting Proceeding: Substantive Burdens of Proof

By Joseph M. Accetta

This article will serve as a primer for the novice Surrogate's Court practitioner in understanding and applying some of the more common evidentiary burdens attendant to a contested fiduciary's accounting proceeding commenced under Surrogate's Court Procedure Act ("SCPA") Article 22.

General Burdens

In a proceeding to settle a fiduciary's account, the Surrogate has broad discretion to "make such order or decree as justice shall require."[1] With respect to the evidentiary burdens at the outset of a contested accounting proceeding, initially, the *Fiduciary* must make a *prima facie* showing that: (i) he/she has fully accounted for all of the assets under his/her charge; and (ii) the account is accurate and complete.[2] As a practical matter, this is done by filing the accounting and the accompanying affidavit the accounting party must execute pursuant to SCPA 2209.[3]

Thereupon, the *Objectant* has the burden of going forward to establish, with some credible evidence, that the accounting is incomplete and/or inaccurate. In this respect, the Objectant's burden is to affirmatively demonstrate the exclusion and/or omission of assets *with a reasonable degree of certainty (i.e., fair preponderance of evidence)*.[4] As one would anticipate, *conjecture* and/or *mere suspicion* are insufficient to satisfy the Objectant's burden.[5]

However, when the Objectant bears this, or any other, affirmative burden of proof or of going forward, any doubts that exist regarding the sufficiency of the proof offered are to be resolved *against* the Fiduciary.[6] Finally, if an Objectant satisfies the foregoing burden, the burden of going forward "shifts" back to the Fiduciary, to show, by a *fair preponderance of evidence*, that the account is, in fact, accurate and complete.[7]

Specific Burdens

I. Estate Assets

1. Objectant Shows Receipt of Asset by Fiduciary: When attempting to show that assets have been omitted from the account, if an Objectant successfully shows the receipt of an asset by the Fiduciary, the burden shifts back to the Fiduciary to explain its omission from the account. (i.e., the Fiduciary must show that the asset was properly expended and/or distributed).[8]

2. Fiduciary Claims Possession of Asset in His/Her Personal Capacity: Similarly, when the Objectant is attempting to show that assets have been omitted from the account, if the Fiduciary, *in his/her individual capacity*, *personally* claims ownership of an asset formerly belonging to the decedent, the Fiduciary has the burden of showing that the asset was properly omitted from the account because it belongs to him/her.[9]

Ordinarily, the quantum of proof in the foregoing instance is by *fair preponderance of evidence*. However, in appropriate circumstances, the Fiduciary must demonstrate a higher quantum of proof. For example, if a *gift* is claimed—the standard is *clear and convincing* evidence with respect to all three elements of the gift (i.e., intent, delivery and acceptance).[10] Also, if the *inter vivos* relationship between the decedent, as donor, and fiduciary, as donee, was a fiduciary relationship, either *de jure* (i.e., power of attorney, attorney/client, doctor/patient) or *de facto*,[11] the Fiduciary (donee) must corroborate the gift in all respects by testimony and evidence elicited from disinterested witnesses.[12] Additionally, if no fraud or undue influence is asserted, the Fiduciary (donee) bears the burden of proof, by *fair preponderance of evidence*, that the decedent had the requisite mental capacity to make the gift.[13] However, if the Objectant asserts *fraud or undue influence* in the making of the gift, the Objectant bears the burden of proof on those issues, *by fair preponderance of evidence.*[14] Finally, if the Objectant successfully establishes that a "*confidential relationship*" existed between the decedent and the fiduciary (*as donor and donee*, respectively), the Fiduciary must establish, by *clear and convincing* evidence, not only all three elements of the gift, but also that the transfer in question was voluntary and free from undue influence or restraint.[15]

3. Joint Bank Accounts: Pursuant to Banking Law § 675(b), it is *presumed* that a deposit in the names of two people to be paid to the survivor of them, *in the absence of fraud or undue influence*, is *prima facie* evidence of the intention of the depositor to create a *joint tenancy* and to vest title to the account in the survivor. The party—usually the Objectant—who seeks to challenge the joint tenancy and, therefore, assert that the asset is an estate asset, must establish, by *clear and convincing* evidence that the account was either (i) opened as a matter of convenience; or (ii) created jointly due to undue influence, fraud or lack of decedent's capacity.[16] However, where there existed a "*confidential relationship*" between the decedent, as depositor, and fiduciary (i.e., depositor/co-tenant), the burden of going forward shifts to the party claiming the existence of a "right of survivorship."[17]

4. Lost Assets and Assets Without Value: If an asset and/or property is alleged to have been "lost" the Fiduciary has the burden of showing that the property was later stolen or lost through no fault (i.e., negligence) of his/her own.[18] Additionally, the Fiduciary has the burden to show that an asset has no value.[19]

5. Valuation—Sale for Less Than "Fair Market Value": As to the valuation of assets for accounting purposes, the general practice is for the Fiduciary to recite the appraised "date of death" value of the asset used for estate tax purposes. This value is deemed to be the "fair market value" of the asset in question. However, if there is an allegation that an asset was sold or otherwise disposed of for less than "fair market value," the Objectant has the burden of proving that the understated value was the result of the Fiduciary's negligence or failure to exercise his/her duty to preserve the asset in question by the exercise of prudence.[20]

6. Investment of Assets—Loss of Value: Upon examination of the account, the Fiduciary's investments are scrutinized. If the account reflects losses, the Fiduciary should present sufficient evidence (in his direct case) to explain the circumstances surrounding the investment in question. However, the burden of proof is on the Objectant to affirmatively demonstrate that the Fiduciary invested assets *imprudently* [21] and that the loss in value reflects *negligence* on the part of the Fiduciary.[22]

7. Delay in Distribution of Assets: Ordinarily, pursuant to EPTL 11-1.5, the Fiduciary has seven months from the date of appointment to distribute the estate's assets. Upon any "delay" in distributing the estate, the Fiduciary has the burden of explaining the propriety of the reasons for any such delay.[23]

8. Self-Dealing: In the event a Fiduciary is alleged to have engaged in "self-dealing" with the estate's assets, the Fiduciary bears the burden of proving that his/her conduct was free from any such "self-dealing."[24]

9. Apportionment of Principal and Income: Upon examination of the account, if an objection is raised that the Fiduciary breached a duty in apportioning expenses against one interest to the detriment of another interest, the Objectant bears the burden of establishing that breach of duty.[25]

10. Abuse of Discretion: In the event there is an allegation that a Fiduciary—particularly a trustee—has "abused his/her discretion" during his/her tenure, the Objectant has the burden of proving such an abuse occurred. In this respect, the proof must demonstrate that the Fiduciary, in exercising or failing to exercise the stated power: (i) acted dishonestly or with an improper, even though not dishonest, motive; or (ii) acted beyond the bounds of reasonable judgment; or (iii) has failed to use his/her judgment.[26]

II. Status

When an issue is raised in an accounting proceeding regarding one's "status" in that proceeding (e.g., status as a party, or status as a distributee): (i) the person seeking to establish one's status bears the burden of doing so; and (ii) the Fiduciary bears the burden of seeking disqualification of one who purportedly has established his/her status.[27]

III. Claims

1. General Burdens: In general, the Fiduciary is charged with reviewing all claims presented, and either paying legitimate claims or rejecting suspect or unsubstantiated claims.

In doing so, the Fiduciary has the burden of raising all appropriate defenses to claims which exist in the estate's favor (i.e., the running of the applicable *statute of limitations* underlying the claim).[28] Also, the Fiduciary has the burden of proving the validity of his/her own *personal* claims against the estate, and must seek approval of the Court before any satisfaction of personal claims.[29]

2. Third-Party Claims: When a disputed claim has been allowed, the Fiduciary has the burden of proving that the claim was properly allowed and paid. This is done by establishing his/her compliance with SCPA Article 18, especially the provisions pertaining to filing claims with an estate fiduciary and establishing the parties' rights upon the fiduciary's allowance or rejection of claims.[30] The Fiduciary also has the burden to show that a delay in the payment of a valid claim was justified.[31] The Objectant will bear the burden of coming forward with evidence to establish that an allowed claim was invalid, and that the Fiduciary acted improperly by allowing said claim. Also, when a disputed claim has been disallowed, the *Claimant* bears the burden of proving the validity of said claim.

3. Claims Emanating from "Personal Services" Performed: When a *family member* of the decedent asserts a claim emanating from "personal services" performed during the decedent's lifetime, there is a *presumption* that the services were rendered out of affection, and *no monetary compensation was expected*. The Claimant, of course, may present competent evidence to rebut the foregoing presumption.[32] Otherwise, any non-family member with a claim emanating from "personal services" performed bears the burden of proof as to that particular claim.

IV. Expenses of Administration

1. Estate Taxes: A Fiduciary has the duty to make timely payments of estate taxes.[33] If the Objectant makes an objection to any interest and/or penalties accrued due to the untimely payment of such taxes, the Fiduciary has the burden of demonstrating that the imposition of the interest and/or penalties was not improper.[34]

2. Funeral Expenses: These must be *reasonable*. Upon objection to the *reasonableness* of the funeral expenses paid: (i) if the Fiduciary seeks reimbursement for monies he/she advanced, the Fiduciary has the burden of showing that the amount paid was *reasonable* and the expense was *proper* (*includes* charges for burial, cost of cemetery plot, erection of stone/monument, post-burial meal, etc.); and (ii) if a Claimant seeks reimbursement for unpaid funeral expenses, the burden is on the Claimant to establish the validity and reasonableness of the amount claimed.[35]

3. Typical "Expenses" Incurred: In general, the burden is on the Fiduciary to prove the propriety of all expenses of administration he/she has incurred.[36] A *prima facie* showing consists of the presentation of a written memorandum (i.e., voucher, receipt) which contains a sufficient statement of the nature and character of an expense in question to show that the expense was "fair and reasonable."[37] Once the Fiduciary meets this initial burden, the burden of going forward shifts to the Objectant to show that the claimed expense was *unreasonable.*

Typically, expenses for *long distance travel and/or lodging* are allowed, provided the need for such expenses were anticipated by the decedent when he/she nominated the fiduciary. Conversely, routine or incidental expenses, including *meals, stationery, postage, telephone and local travel* charges are ordinarily charged against a Fiduciary's statutory commissions.[38]

4. Delegation of Duties: In the event the Fiduciary employs agents to perform services he/she is not capable of performing (i.e., accountants, real estate brokers, financial consultants), the *Fiduciary* has the burden of justifying the need for the employment of such agents (i.e., that the services performed by the agents did not fall into the ordinary duties of the Fiduciary), in order to permit the Court to allow the cost of employing the agent as an independent expense of administration. Otherwise, that cost is charged against the Fiduciary's statutory commissions.[39]

5. Statutory Commissions: SCPA 2307(1) mandates the payment of statutory commissions to a Fiduciary *absent* a showing of misconduct or mismanagement of the estate during the Fiduciary's tenure.[40] However, a Fiduciary who takes commissions without first obtaining Court approval risks penalties, including a surcharge for interest calculated from the date the unauthorized commissions were paid.[41]

6. Counsel and Professional Fees: In general, when the accounting Fiduciary seeks to have counsel and/or professional fees, whether previously paid or outstanding, fixed and allowed, the Fiduciary has the burden of establishing the reasonableness of the amount of the fees for which approval is sought.[42] However, if the amount of fees sought is disputed by the fiduciary, then *Counsel* bears the burden of establishing the reasonableness of the fees sought.[43]

With respect to the Court's approval of counsel and/or professional fees, the practitioner should be aware of some additional general rules emanating from the case law, including:

(i) When multiple attorneys/professionals have performed services, reasonable aggregate fees should *not* exceed the fee ordinarily deemed reasonable for one attorney/professional;[44]

(ii) absent a showing of necessity for the use of an accountant, any accountant's fees incurred will be absorbed by counsel and/or the fiduciary;[45] and

(iii) if an attorney/fiduciary is seeking both counsel fees and a full fiduciary commission, the latter will be considered when fixing the reasonable amount of the former.[46]

V. Waiver and Consent—Setting Aside:

Finally, in determining all relevant burdens, when a prospective Objectant to a Fiduciary's account wishes to vacate a "waiver and consent" he/she has previously executed, the practitioner should be guided by the following principals of law, set forth in February 2002 by Surrogate Anthony A. Scarpino, Jr. of Westchester County, in *In re Blanche Hunter*:[47]

> A party may seek to vacate an accounting decree on the ground

that a waiver and consent he or she executed was obtained through "fraud, misrepresentation, or other misconduct" (CPLR 5015(a)(3); *Matter of Paul*, 105 A.D.2d 928, 930), or "any other ground tending to destroy the validity of the waiver" (*Matter of Celantano's Will*, 31 Misc. 2d 727; *Matter of Sturges' Will*, 24 Misc. 2d 14).

Where the application to withdraw a waiver and consent follows the execution of a decree, the party must show that: (i) the waiver itself was obtained through fraud, misrepresentation, misunderstanding, undue influence, collusion, accident or some other similar ground; (ii) the parties can be placed in a position of *status quo ante*; and (iii) the proposed objections raised are meritorious (*see*, *Matter of Frutiger*, 29 N.Y.2d 143; *see generally*, 1 Harris, New York Estates: Probate, Administration and Litigation, § 3:92, at 3-25 (5th ed)).

However, where fraud is alleged in the context of a fiduciary relationship, fraud is presumed, and the burden shifts to the fiduciary to demonstrate, by clear and convincing evidence, the absence of fraud or other misconduct (*see*, *Matter of Greiff*, 92 N.Y.2d 341; *Matter of Paul*, *supra*, at 929 (*and authorities cited*)).

This shifting of the burden is consistent with the long-standing tenets of law in this State pertaining to the nature of certain duties a fiduciary owes to a beneficiary. Among these duties are the duty of utmost loyalty in all instances (*see*, *Meinhard v. Salmon*, 249 N.Y. 458). Also, where, as here, the fiduciary clearly possesses superior knowledge and has benefitted from the beneficiary's execution of a release or waiver, the transaction will not be sustained "unless the beneficiary has been given full knowledge of his (or her) rights and of all material facts and circumstances" (*Matter of James' Estate*, 86 N.Y.S.2d 78, 87–89; *see*, *Adair v. Brimmer*, 74 N.Y. 539, 554; *Matter of Ryan's Will*, 291 N.Y. 376, 417).

Endnotes

1 See SCPA 2211(1).

2 See *In re Schnare*, 191 A.D.2d 859.

3 Note that the doctrine of laches will *not* excuse the fiduciary's initial burden in the foregoing respect. *See In re Acker*, 128 A.D.2d 867.

4 *See In re Watson*, 215 NY 209; *In re Swiller*, 205 App. Div. 302. Unless otherwise noted, the reader shall assume that an applicable quantum of proof is by "fair preponderance of the evidence."

5. Be aware of this concept within the context of a motion for summary judgment by the Fiduciary. *See, e.g., In re Magnor*, N.Y.L.J., March 29, 2000, at 32, col. 5; *In re Ditraglia*, N.Y.L.J. Nov. 19, 1999, at 34, col. 1.

6. *See In re Shulsky*, 34 A.D.2d 545; *In re Miller*, N.Y.L.J., Aug. 30, 1995, at 26, col. 1.

7 *See In re Schnare*, *supra* note 2; *In re Shulsky*, *supra* note 6.

8. *See In re Valverde*, 148 Misc. 49, *aff'd*, 242 App. Div. 653, *aff'd*, 266 N.Y. 620.

9. *See In re Greenberg*, 158 Misc. 446.

10. *See Gruen v. Gruen*, 68 N.Y.2d 48; *In re Kelly*, 285 N.Y. 139.

11. *See, e.g., In re Buxton*, N.Y.L.J., Oct. 30, 2003, at 31, col. 3.

12. *See In re Corse's Estate*, 182 N.Y.S.2d 514, *aff'd*, 13 A.D.2d 651.

13. *See In re VanAlstyne*, 207 N.Y. 298.

14. *See In re Connelly*, 193 A.D.2d 602.

15. *See In re Gordon v. Bialystoker Center & Bikur Cholim*, 45 N.Y.2d 692.

16. *See Pinacso v. Del Pilar Ara*, 219 A.D.2d 540; *In re Boyd*, 186 A.D.2d 394.

17. *See In re Camard*a, 63 A.D.2d 837.

18. *See In re Kircher*, 123 Misc. 2d 397.

19. *See In re Joost*, 50 Misc. 78, *aff'd sub nom*, *In re Voelbel*, 126 App. Div. 932.

20. *See In re Barnett*, 84 N.Y.S.2d 105; *In re Hoyt*, N.Y.L.J., July 9, 1998, at 31, col. 6.

21. *See In re Schnare*, *supra* note 2; *In re Newhoff*, 107 Misc. 2d 589, *aff'd*, 107 A.D.2d 417.

22. *See In re Iversen*, N.Y.L.J., Aug. 5, 1996, at 34, col. 2.

23. *See In re Haigh*, 133 Misc. 240.

24. *See In re Greiff*, 92 N.Y.2d 341; *In re Jakobson*, 293 A.D.2d 541.

25. *See In re Davies' Estate*, 54 Misc. 2d 1065.

26. *See In re Manny*, N.Y.L.J., June 10, 2002, at 37, col. 1.

27. See, e.g., for disqualification of distributees, EPTL 4-1.4 and EPTL 5-1.2.

28. *See, e.g., In re Phelps*, 55 Misc. 2d 290, *aff'd*, 28 A.D.2d 1206.

29. *See* SCPA 1805; *In re Shulsky*, *supra* note 6.

30. *See generally* SCPA 1803, 1806 and 1807.

31. *See In re Ducas*, 109 N.Y.S.2d 17, *aff'd*, 279 App. Div. 730.

32. *See In re Margraf*, N.Y.L.J., Dec. 18, 2000, at 35, col. 3.

33. *See In re Steinhardt*, 91 Misc. 2d 1034.

34. *See In re Iversen*, *supra* note 22.

35. *See In re Kircher*, 123 Misc. 2d 397.

36. *See In re Taylor*, 251 N.Y. 257.

37. *See In re Seabury*, N.Y.L.J., May 1, 1995, at 28, col. 3.

38. *See In re Erlich*, N.Y.L.J., July 6, 2001, at 23, col. 3.

39. *See In re Grace*, 62 Misc. 2d 51, *aff'd*, 315 N.Y.S.2d 816; *In re Acker,* 128 A.D.2d 867.
40. *See In re Klenk*, 151 Misc. 2d 863, *aff'd*, 204 A.D.2d 640; *In re Thron*, 139 Misc. 2d 1045.
41. *See In re Crippen*, 32 Misc. 2d 1019.
42. *See In re Potts*, 213 App. Div. 59, *aff'd*, 241 N.Y. 593. For a listing of the general factors a Court considers upon its fixation and allowance of reasonable compensation for counsel and other professionals, see *In re Freeman*, 34 N.Y.2d 1.
43. *See Sand v. Lammers*, 150 A.D.2d 355.
44. *See In re Mattis*, 55 Misc. 2d 511.
45. *See In re Musil*, 254 App. Div. 765.
46. *See In re Moore*, 139 Misc. 2d 26.
47. 190 Misc. 2d 593, 599.

The author has been a Principal Court Attorney and/or Court Attorney/Referee at the Surrogate's Court, Westchester County, since February 1995, and is a frequent lecturer and author on matters pertaining to Surrogate's Court practice.

In Memoriam

Donald S. Klein

(1947-2003)

Arlene Harris, a former Chair of our Section, expressed her thoughts on the passing of Donald S. Klein, who was an active member of this Section's Expanded Executive Committee, at the Committee's December 5, 2003 meeting.

On November 15, 2003 we lost a dear friend and colleague, Donald S. Klein, who died after a hard-fought battle with brain cancer at the much too young age of 56. Don was my best friend and closest colleague, and I feel honored and enriched to have had the pleasure of working with him as a team for over 12 years at the law department of the New York County Surrogate's Court. Don came to the Court from the law departments of the Supreme Court of New York County and the Appellate Division, First Department. He was a great source of procedural, practical and substantive knowledge and one of the most diligent, hard-working and caring lawyers. Don was an active longtime member of this Executive Committee and he rarely missed a meeting or social event—his research for the Newsletter Case Notes became legendary. Don was also one of the most outgoing, friendly and sociable members of any group—always ready for any party or reception—and his athletic abilities and joy of competition both on the tennis court and golf course were admired by all who knew him, even those he beat. Don was a devoted family man and was so proud of his two children, Jason and Zoe, and all their accomplishments, even though Jason was a better golfer and skier than was Don. We send out deepest sympathies to Don's wife, Barbara, and to his children. We will all miss Don and now let us share a moment of silence in his memory.

1404 Examinations: A Practitioner's Guide

By Christopher M. Houlihan

Estate proceedings can be among the most personal and emotional events of a person's life. They rank in order of magnitude with divorce and child custody. Clients often personalize every bequest or lack of bequest and often see it as a validation or a censure by a family member or close friend.

Section 1404 of the Surrogate's Court Procedure Act provides the practitioner with a unique opportunity to test the water and explore the terrain prior to engaging in a will contest. Cleverly named "1404 Examinations," they allow a potential contestant in a probate proceeding to depose witnesses and request documents prior to making any objection or filing papers and at least part of the expense is paid by the estate.

It provides a great opportunity for dispute resolution. Many cases are settled after 1404 Examinations are completed and, in some instances, the case can be over, one way or the other, after their conclusion. It provides a great learning experience and invaluable intelligence for analyzing a potential will contest and for advising clients.

1404 Examinations are among the most useful and powerful tools available to litigators both in preparing for litigation and in assisting in the decision process with clients. For these reasons, it is important for the attorney to begin the investigation and analysis immediately upon being contacted by a client.

Civil litigators are familiar with the provisions of the Federal Rules of Civil Procedure and the Civil Practice Law and Rules, which permit some pre-action discovery to frame issues. However, these procedures are limited and they often require prior court approval which is given sparingly, if at all. In Surrogate's Court practice such discovery is common. In fact, it is expected when a will contest is being considered and may even be considered part of an attorney's obligation to exercise prudence and good faith prior to commencing a will contest.

In familiarizing yourself with Surrogate's Court practice there are at least four primary sources with which you should become acquainted:

1. The Surrogate's Court Procedure Act (SCPA)
2. The Estates, Powers and Trusts Law (EPTL)
3. The Civil Practice Law and Rules (CPLR)[1] and
4. The Uniform Rules for the New York State Trial Courts—Surrogate's Court (Uniform Rules).

These statutes draw a road map for the practitioner and should be reviewed on a regular basis.

SCPA 1404(4) provides, in part:

> . . . Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents.

It should be remembered that if a 1404 examination is requested by a party, the proponent of the instrument should use the opportunity to ask the attesting witnesses the questionS necessary to establish a prima facie case at trial. Not only will it memorialize the testimony in the form most favorable to proponent's case, but it will set the stage for the whole examination.

How do you request a 1404 Examination? There is no statutorily mandated method of request. Most often an oral request is made on the return date of the citation before the surrogate. A better method might be to telephone the attorney for the proponent of the propounded instrument to select a date, time and place of examination. In addition, a written notice demanding 1404 Examinations is often served on or prior to the citation return date.

All document discovery should be in writing and should follow the requirements of Article 31 of the CPLR.[2] Counsel should request and/or subpoena medical records, the attorney draftperson's file, including notes, correspondence, phone messages, faxes, electronic transmittals, all drafts of all prior wills, codicils and/or trusts, all executed prior wills, codicils and/or or trusts, photographs, videos, greeting cards, journals, diaries, nurses' notes, the visitor records of nursing homes, hospital records, autopsy reports, CT scans, MRI films, financial records, checking accounts, cancelled checks, pharmacy records and all matter material and necessary in the prosecution or defense of the proceeding, regardless of the burden of proof.

Who should be deposed? As a general rule all of the attesting witnesses and the person who prepared the will should be examined. If there is an *in terrorem* clause, the nominated executors in the propounded instrument and the proponents should be examined.

Where should the 1404 Examination be conducted? Section 207.28(a) of the Uniform Rules provides that, unless the court otherwise directs, all examinations pursuant to SPCA 1404 (and other enumerated sections) shall be held at the courthouse. Nevertheless, examinations are sometimes held at an attorney's office unless someone asks that the matter be heard at the courthouse. There are several counties which require that all 1404 Examinations be held at the courthouse. If there is a dispute over the location of the examination, it should take place at the courthouse. The lawyer should contact the clerk of the court to determine the requirements of each surrogate.

There are at least two strong reasons for conducting examinations at the courthouse: First, unless there is a court order to the contrary, the court will not permit the original propounded instrument to be removed from the courthouse. A careful examination of the instrument is essential and it may uncover facts crucial to proving or disproving a case. The attorney should carefully examine the original instrument. He or she should look for apparent alterations which may not appear on photocopies; the watermarks of each page should be examined to determine if they are all the same; evidence of alteration or forgery should be pursued; the staples should be examined; rust marks from paper clips should be noted; impressions upon the paper should be pursued; handwritten notations on the fronts and backs of pages should be the subject of questioning. Secondly, if there are problems with the deposition—such as directions to a witness to not answer a question or contentious behavior on the part of any of the participants or if there are questions of law or procedure—in most instances an immediate ruling can be obtained from the court or a law assistant/referee/court attorney.

It is important to remember that the party conducting the 1404 Examination should make arrangements to have a court reporter at the site of the examination. Again, the clerk of the court should be consulted concerning local custom and usage. In some jurisdictions, the use of a particular reporter may be mandated.

What are the dangers inherent in a 1404 Examination? In the first instance, the examination must be thorough and complete. This examination may very well be the only chance a party has to depose a particular witness. Section 1404(4) provides: ". . . No person who has been examined as a witness under this section shall be examined in the same proceeding under any other provision of law *except by direction of the court*" (emphasis added). While a particular procedure is not spelled out in the statute, this requires an application to the court and an explanation of why the information could not have been gathered at the original examination. Secondly, the attorney conducting the examination should be familiar with the perils surrounding *in terrorem* clauses. EPTL 3-3.5(b)(3) provides:

> The following conduct, singly or in the aggregate, shall *not* result in the forfeiture of any benefit under the will: . . . (D) The preliminary examination, under SPCA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding (emphasis added).

The expanded disclosure of section 1404 is not limited to the beneficiary affected by the *in terrorem* clause.[3] However, plenary discovery proceedings under CPLR Article 31 in a will contest will trigger an *in terrorem* clause.[4] The limited protection of EPTL 3-3.5(b)(3)(D) is for "limited pre-objection discovery intended to avoid meritless, destructive litigation."[5] Thirdly, the practitioner must be mindful of the time limitations for filing objections to the probate of the propounded instrument. SPCA 1410 provides:

> . . . The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination is requested pursuant to 1404, objections must be filed within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court.

Some counties require that objections be filed within ten days after filing the transcripts of the 1404 Examinations. Other courts will permit the attorneys to stipulate as to a particular day for filing objections. The safest course is to stipulate on the record as to a particular day and have the court approve the stipulation and agreement. This will avoid embarrassing situations later on in the case.

Special Aspects of 1404 Examinations

1. The Attorney-Client Privilege. The attorney-client privilege does not apply in a proceeding involving the probate, validity or construction of a will. An attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under CPLR 4503(a) which would tend to disgrace the memory of the decedent.[6] It should be noted that CPLR 4503(a) was amended in 2002 to extend the attorney-client privilege to protect confidential communications made by a fiduciary to his or her attorney even if made before litigation was contemplated. Under prior case law beneficiaries had been deemed entitled to disclosure of these confidential communications.

2. The Three-Year/Two-Year Rule. Section 207.27 of the Uniform Rules provides that in any contested probate proceeding in which objections to probate are made and the proponent or the objectant seeks an examination before trial, the items upon which the examination will be held shall be determined by the application of Article 31 of the CPLR. The rule provides that "[e]xcept upon the showing of special circumstances, the examination will be confined to a three-year period prior to the date of the propounded instrument and two years thereafter, or to the date of decedent's death, whichever is the shorter period." As a general rule, this limitation will be enforced. Among the "special circumstances" exceptions are allegations of a scheme of fraud or allegations of a continuing course of conduct of undue influence.[7]

3. The Deadman's Statute. CPLR 4519 is perhaps the most written about and misunderstood evidentiary rule in New York practice. We all think we know what it says and what it means and what its applications are. It is one of those rules which must be carefully read and reread each time its application may appear warranted. It is seen more often in Surrogate's Court than any other court in the state. In almost every instance, the deadman's statute and its applicability should be briefed and strong consideration should be given to making a motion *in limine* prior to a hearing or trial. The issue may determine whether or not the lawyer will become involved in the case at the outset.

It should be remembered that CPLR 4519 is invoked as an objection to the competence of a witness. Its use is intended to disqualify a witness. This statute is applicable not just to all statements but also to "transactions" (e.g., "I saw the decedent give my brother the watch.").

The deadman's statute does not apply to pre-trial discovery, and an examination concerning any personal communication or transaction between a respondent and a decedent shall not be deemed to be a waiver of the provisions of CPLR 4519.[8]

In its simplest terms, there are three basic elements to the deadman's statute:

A. The communication or personal transaction must be between the witness and the decedent;

B. The witness must have a pecuniary gain; and

C. The objecting party must be the executor, administrator or someone who derives his or her title or interest from the decedent.

4. The Examination of the Draftsperson. Before a will or codicil is executed, the draftsperson should carefully read the attestation clause and the attesting witnesses' self-proving affidavit. 1404 Examinations can often be embarrassing to a draftsperson. For example, if the testator was known to be blind, why did the witnesses (including the draftsperson) sign an affidavit stating that the testator could "read" and "was not suffering from any impairment of sight?" Similarly, if the testator has hearing or other impairments or is unable to read, write or converse in the English language, the attestation clause and the witness affidavit should accurately reflect how the disability was overcome and the precise methods used in communicating with the testator. These are fertile grounds for 1404 Examination and can result in unnecessary embarrassment when tailored documents are not used.

5. Payment of Expenses. One of the more interesting aspects of 1404 Examinations is the fact that SCPA 1404(5) provides that, if the examinations are conducted before objections are filed, the testator's estate shall pay the cost of the first two attesting witnesses within the state and some of the court reporter and transcript charges. The costs of all other examinations including subsequent examinations are governed by CPLR Article 31.

6. Opinion Testimony by Lay Witnesses. An attesting witness may give opinion testimony concerning the soundness of the testator's mind and that testimony is entitled to great weight. Similarly, a lay witness may testify to another's handwriting in order to prove the genuineness of a document.[9]

7. 1404 Examination Preparation

A. Learn as much as possible about the testator's personality traits—his or her physical and mental condition;

B. Learn about the testator's relationships with the various parties; and

C. Learn the identity of other friends or family members who may have proof to offer at trial. This may assist in avoiding testimony precluded by the deadman's statue.

8. Objections to Probate. The most common objections to an instrument offered for probate are:

A. Lack of proper execution;

B. Lack of testamentary capacity (did the testator understand (a) the nature of the act; (b) the nature and extent of his or her assets and (c) the names and identities of persons who are "the natural objects of one's bounty?"); and

C. The execution of the propounded instrument was the result of undue influence and/or fraud.

The object of 1404 Examinations is to prove or refute these objections. Each side has its own objective and will try to elicit favorable information.

9. Witnesses Should Be Sequestered. Attesting witnesses are often colleagues or employees of the attorney draftsperson. Unless the decedent was a long term or unusual client, recollections of the execution of the document may be vague. If witnesses are sequestered, it is often surprising how differently each witness's testimony evolves. For instance, on the question of whether the propounded instrument was stapled when it was executed, one witness may give an emphatic "yes," while another may give an emphatic "no" and the third will not remember whether or not it was stapled.

This highlights the importance of witness preparation. It is essential that all witnesses be properly and ethically prepared to honestly respond to valid inquiries.

Areas to Be Covered in a 1404 Examination

The burden of proof on the issues of due execution and testamentary capacity is upon the proponent; the burden of proof on the issues of undue influence, revocation and fraud is on the contestant; and the questions must be established by a fair preponderance of the credible evidence.[10]

The proponent has the burden of proving that the testator possessed testamentary capacity and the court must examine the three standard factors.[11]

Due Execution

The examining attorney should make every effort to learn everything about the circumstances surrounding the execution of the propounded instrument. Among the areas which should be covered are: where was the document executed; at what time did the testator arrive; how did the testator arrive; was the testator alone or with others; who was present; did the testator walk steadily, use a wheelchair, cane, walker, crutches, lean on someone; how was the testator dressed; was the testator clean shaven, rumpled, shoes shined, neat and clean; did the testator wear eyeglasses or a hearing aid; what kind of shoes was the testator wearing; when was the propounded document prepared; how many drafts were made; were drafts mailed to the testator; what was the physical layout of the room; who sat where; was the door open or closed; did someone stand beside or over the testator; who was in the waiting room or in an adjoining room; was the instrument read; was the whole instrument read or only parts; if only parts were read, which parts were read; who said what to whom and when; did the testator page through the instrument; was the instrument read aloud; were questions asked; was there any apparent difficulty in reading, signing, speaking; whose pen was used; was anything said or done which struck the witness as unusual, odd, or peculiar; was the propounded instrument stapled and, if so, when and how and by whom; were all the witnesses present at the same time; did the testator declare the propounded instrument to be as purported; if so, how and when; did the testator seem alert, awake, sober; was the testator taking any medications; did the testator ask questions, exhibit confusion, concern, anger, surprise; were any changes in the documents requested by the testator or anyone else; examine the original instrument; examine the watermarks; examine the staples to see if they have been removed or replaced; are there rust marks showing the use of paper clips holding other documents to the instrument; do the documents bear the same type face; are there any interlineations; any initials; any cross-outs or "white outs"; did the testator fill in the date; did the testator know the date and year; did the testator speak English; if not, were the documents translated and, if so, by whom and what were the translator's qualifications; was the testator able to hear; was more than one copy executed; what was the total elapsed time from the beginning of the execution to the end; how much time elapsed from the time the testator arrived on the premises until he or she left; if the testator left the location of the signing how did he or she leave; and did the testator make or receive phone calls or leave the room to talk to someone?

The Lack of Testamentary Capacity

Inquiry should be made as to the apparent physical and mental health of the decedent, including hospitalizations, infirmities, medications, diagnoses, the results of MRI examinations and CT scans. The aim is to see if the testator understood the nature of his or her act in signing the propounded instrument, if the decedent knew the nature and extent of his or her assets and if the testator knew the names and identities of the persons who were the natural objects of his or her bounty. In this regard, ask who prepared the inventory of assets; examine all tax returns and net worth statements; determine what was the relationship between the testator and the various beneficiaries; ask why did the testator select various charities and what was his or her relationship to the individual, the charity or the institution named in the document.

Undue Influence

The draftsperson should be closely examined as to how the testator came to him or her. Was this a long-term client or was it a recent referral; how long had the draftsperson known the testator; did the draftsperson and testator meet alone or was someone else present; had there been prior draftspersons and, if so, why were the former relationships terminated; was the procedure in preparing and executing the instrument hurried or rushed and, if so, why; where did the draftsperson meet with the testator—office, home, restaurant, car, hospital, nursing home; how many times did the draftsperson meet with the testator; what was discussed at each meeting; what was the physical appearance of the testator at each meeting; were there any ailments or infirmities observed; was the draftsperson aware of any medications or surgery involving the testator; copies of all drafts, previous instruments, wills, trusts and correspondence should be carefully examined and questions should be asked if deemed advisable; if changes have been made to drafts, why were they made; did he or she give a reason for a change; how many drafts were made; what was the time lapse between drafts; did the decedent make written comments on the drafts? Most importantly, from whom did the draftsperson take instructions and to whom were the drafts sent and who was billed for and/or paid for the services rendered?

Look at the nurses' notes and the hospital records; look for signs of confusion, dementia or abuse; what were the testator's living arrangements; was there a confidential relationship between the testator and a beneficiary which would change the burden of proof;[12] who fed the testator; who cleaned for him or her; who shopped; who paid the bills; who wrote the checks; and exactly what was the testator's reliance on others?

1404 Examinations are a unique tool which can help the practitioner in advising a client as to whether or not to file objections to a propounded instrument. If a decision is made to proceed with objections, valuable information can be obtained through these examinations.

Endnotes

1. SCPA 102 provides "The CPLR and other laws applicable to practice and procedure apply in the surrogate's court except where other procedure is provided by this act."
2. SCPA 1404(4) provides, in part ". . . There shall be made available to the party conducting such examination, all rights granted under article 31 of the civil practice law and rules with respect to document discovery."
3. Groppe, et al., Harris 5th Edition New York Estates: Probate, Administration and Litigation § 20:69 [2003].
4. *See* Groppe et al., *supra* note 3 at § 20:69.7, citing *In re Ellis*, 252 A.D.2d 118, 683 N.Y.S.2d 113 (2d Dept. 1998) *leave to appeal denied*, 93 N.Y.2d 805, 689 N.Y.S.2d 429, 711 N.E.2d 643 (1999).
5. *Id.*
6. CPLR 4503(b).
7. "Allegations of a scheme of fraud or a continuing course of conduct of undue influence may be sufficient special circumstances to extend the period. [*Matter of Brady*, 273 App. Div. 968, 77 N.Y.S.2d 916 (4th Dept. 1948); *Matter of Carpenter*, 252 App. Div. 885, 300 N.Y. Supp. 375 (2d Dept. 1937)]" Groppe, et al., *supra* note 3 at § 20:128. *See also* § 20:128 citing *In re Chambers*, N.Y.L.J. Nov. 2, 2001, at p. 21, col. 5 (Sur. Ct., Suffolk Co.) wherein the court ruled that the objectant must set forth the facts that support such allegations.
8. CPLR 2104(6).
9. *See* Groppe, et al., *supra* note 3 at §§ 19:166 and 19:167.
10. Pattern Jury Instructions § 7:28.
11. *In re Kumstar*, 66 N.Y.2d 691, 469 N.Y.S.2d 414, 487 N.E.2d 271 (1985), *reargument denied*, 67 N.Y.2d 647, 490 N.E.2d 558, 499 N.Y.S.2d 1031.
12. Pattern Jury Instructions § 7:56, *et seq.*

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The Estate Settlement Representation Letter and "Selling" Your Services

By Carl T. Baker

Why an Engagement Letter?

The simple answer is: because it is the law. By rule, all New York attorneys must provide their clients with "a written letter of engagement" if the fee will exceed $3,000. This is a codification of what should be a standard practice. While the purpose of the rule is to avoid fee disputes, the basis for making it a standard practice is the ultimate ease of billing your client. When the fee is agreed to beforehand, the billing process is perfunctory, not purgatorial. Consider: You have agreed with the client that the fee for the matter will be $20,000, to be billed quarterly, over a one year period. What do you do at the end of the first quarter? Send out a $5,000 bill for services.

In contrast, revisit a place most of us have been: A client comes in with a problem requiring immediate attention. You tear into it and suddenly realize that you have done a substantial amount of work and never clearly talked fees to the client. You obtain your time records for the matter and begin reviewing them. In the back of your mind you are asking yourself "I wonder what the client expects to pay?" You review your time records, what work you have accomplished and your hourly billing rate. You edit the work descriptions to make them sound appropriately complex and time-consuming, you "tailor" the time to make sure it is reasonable, you agonize over the ultimate fee to be billed. Finally you send a statement, and immediately begin wondering if the client will smile and say "is that all?" (a bad thing), or will frown and consider you a relative of the leech family (a worse thing). You do not know when, or if, you will be paid and more importantly, you do not know the status of your client relationship—you are in billing purgatory.

Given that an "engagement letter" can create the more "heavenly" situation, the question is not whether to do one, but what form the letter should take and what fee you will be quoting.

Preparing the Letter and Setting the Fee

A "Sample Letter of Engagement" has been prepared by the New York State Bar Association and can be found at www.nysba.org (click on "Attorney Resources" and then scroll down the left hand side to "Letter of Engagement"). While this sample letter is meant to act as a basic form for all legal matters, it reads and feels as though it were drafted by an attorney (actually, and what is perhaps worse, it reads as though it were prepared by a litigation attorney).

The better practice is to develop standard form letters for the most common types of Trusts and Estates work that your office performs. When the next matter comes in, select the appropriate form and then take the time to tailor it to that matter. It is respectfully submitted (to use a legal-sounding phrase) that taking the time to (1) carefully consider the services that you are about to deliver; (2) set a reasonable fee; and (3) appropriately describe (sell?) the services to the client will make your practice more profitable and enjoyable.

In developing a form letter for estate settlement work, a critical question will be the basis for determining your fees. How much and when will you be billing the client? There are two choices: (1) hourly at set rates, or (2) on a fixed-fee basis for described services to be performed. If you choose the former, you may find yourself right back in billing purgatory. There is only one choice. (At least that is the author's strongly held opinion. At a recent discussion of the Practice and Ethics Committee of the Trusts and Estates Law Section, it was clear that some may prefer hourly billing arrangements. It is human nature to see the same thing differently. However, those who prefer hourly billing arrangements in this area of the law are simply wrong and will have to write their own article, something the editors of this *Newsletter* would presumably appreciate.)

Years ago a friend and colleague, Michael R. Supronowicz, of Schenectady, New York, explained that he will not accept an estate settlement file on an hourly basis. His practice is to always quote a fee to the prospective client. Michael's reasoning is simple and persuasive: He does not want to ever end up in a debate with a client over the necessity for, or length of, a particular telephone conversation, or any other effort put into the file.

From time to time, clients will insist on hourly billing, believing it will be less expensive than a "percentage." They are wrong. Properly presented, the client can be shown that reaching an agreement on a fixed fee is a freeing experience and converts the relationship from one of potential conflict, to one of cooperation. The client is freed from the concerns of "how much will this question cost me, or should I call with this information, or I wonder what the status is?"

Rather, once the fee is set and agreed to, the client can be encouraged to call with questions and to contribute information, and the conversations can be warm and patient, not clock-managed and stilted.

The agreement is also freeing for the attorney. Instead of being a slave to time and time management, the attorney and attorney's staff can more easily handle and control all of those matters that ultimately will make the settlement process proceed most smoothly (for example, controlling the checkbook, one of the matters that clients "on the clock" might insist on handling themselves and which somehow always make the process more difficult and expensive). Further, the attorney can take charge and plan the process, appropriately leveraging staff, software and systems to efficiently complete the settlement.

In short, a fixed and agreed-to fee can be heavenly for all concerned if—and this is actually a VERY BIG IF—"IF" the fee is appropriately set and presented. The fee must be sufficient for you to enthusiastically undertake the work, and it must be presented to the client such that the client perceives the value that is to be provided.

If you are promising to perform prompt, professional services, you deserve to be paid appropriately. In addition to the actual time involved, you are going to bring your expertise to bear on a complex matter, incur substantial responsibility, and control a process that will, in most instances, involve multiple parties over a significant period of time (at least a year—or to put it in terms of life expectancy, about 1/80th of your life, and if the process goes two or three years, this one matter will span 2 to 4 percent of your time on this planet).

Your prior experiences in settlement work; your investment in continuing education; your forms and office procedures; your automation and software support; your staff and their training all allow you to handle the process in substantially less time than anyone starting fresh, without background or experience. All add value to your services and all deserve to be appropriately compensated. Moreover, in many cases, your expert advice and guidance can save the clients many times the cost of your services, and in all cases, your services are tax deductible, if not for estate tax purposes then for income tax purposes. You deserve to be well-paid.

Easy enough to sell you, another attorney, on that concept. The tricky part is selling the client. And this is an aspect of the legal practice that is not taught in law school and for which there is little or no continuing education—the "selling" of legal services. There is plenty of information regarding "marketing," in the sense of getting your name out and developing a following or at least potential client interest in your services, but there is precious little about closing the deal—about presenting the actual work to be performed and fees to be charged and having the client accept the proposal. This is where the rubber meets the road (to use a phrase that is apparently important to the successful design of tires). This is where marketing meets remuneration, where you will succeed and enjoy your practice and where you will harmonize your client relationship. On the other hand, fail at this and you will trap yourself in an uncomfortable, uneconomic and unrewarding purgatory.

Presenting a legal fee of thousands of dollars, or approaching 3 to 4 percent of an estate's value, deserves, and generally requires, some explanation. While the required retainer letter will help avoid fee disputes, that is really a minimalist's goal. What you want to create is a positive, profitable relationship. You want to sell yourself and your services to the client. A properly thought out and structured Settlement Representation Letter can do the latter. It deserves your thoughtful time and attention to prepare and present.

An Estate Settlement Representation Letter

What follows, with some additional commentary, is an engagement letter our office has created over time. It is, as it should be, a work in progress (any and all suggestions, comments, additions, etc., that this article may generate will be thoughtfully considered and the good ones freely stolen). It is offered because it has worked well for our firm. Clearly it is designed to be tailored to the particular settlement at hand. While its general outline and provisions provide a basic framework for the "common" work to be done, it still requires time and effort to complete for each and every new settlement file. Its existence, and the variety of provisions that have been grafted into it, simply make the task of creating the new letter a little less onerous. It provides the presentation of the legal fee that you are proposing to charge in an appropriate context. Its purpose is to close the deal and deliver us from the evil that hourly time charges may lead to.

Re: Estate of

Dear :

In our initial meeting with everyone, I mentioned that we would review the work to be done and set a fee for our services in settling ______'s Estate. The purposes in setting a fee are three-fold: (1) it gives us a fixed number to use for estate or income tax deduction purposes; (2) it lets you know what we will charge so that once agreed to you do not have to worry about how much time we spend together or how much you call on us (in fact, we encourage you and the family to call often with any concerns, questions, or information); and (3) it defines the work that will be required and that we will be responsible for.

I am sending a copy of this letter to your children as well, so that they will also be aware of our responsibilities as attorneys and your duties as Executor.

CUSTOMARY SETTLEMENT PROCESS

In general, the estate settlement process is composed of three steps: collection and management of assets; payment of debts and taxes; and distribution of the assets. To reach the final step—distribution, the process involves, among other matters:

- court proceedings (the "probate" of the will has already been accomplished, additional court involvement will relate to the filing of the required Inventory of Assets Report and the final settlement of the probate estate)
- asset collection, protection, management, valuation, liquidation and transfer (this is in the works and will continue to be a major concern and effort)

(**Comment**: We do not immediately set and quote a fee to a client. We do not do it for several reasons, so long as the client is comfortable with our promise to provide the fee quote. First, we do not do it immediately because we need information to determine what work is going to be required and then time to consider what our fee will be. Secondly, by starting the work, we are consciously creating our client relationship. At the point the letter is sent, hopefully the client has already developed an appreciation for our advice and level of service and is already inclined to continue with us.)

- record keeping and accounting (necessary for appropriate tax decisions and filings, and ultimately for accounting to the beneficiaries)
- federal and state transfer taxation (timely estate tax determinations, filings and, if necessary, payments)
- federal and state income taxation of the decedent, estate, any trusts and the beneficiaries (in this area we will be working closely with your accountant, ______________, CPA, to determine tax years, tax elections and tax entities that will provide the best income tax results for you)

(**Comment**: While many firms, especially the larger practices, may handle income taxation in house, we prefer to refer this work out. If the client does not have an established accounting relationship, we will arrange for the assistance of a qualified local CPA. This works well for our practice on many levels. We do not have to maintain staff expertise in this area, and working closely with the local accounting firms maintains relationships and referral sources.)

- estate tax planning for your family (many of the decisions made in the course of the administration of this estate will have significant future transfer tax consequences to your children)

COLLECTION OF ASSETS

We now have information regarding the assets held in ________'s name alone (approximately $____,000.00) and held jointly with or payable to _____ (approximately $____,000.00). We will be obtaining and confirming the date of death value of all assets. These values will be used for estate tax filing purposes and to establish a new basis for income tax purposes.

In addition to the information that you have provided regarding the cash and investment accounts, the home and all real estate needs to be appraised and we will need to obtain values for all of the personal property (home furnishings, vehicles, etc.) to include in the estate tax returns. The house appraisal will establish a value for estate tax purposes, and set a new cost basis for the one-half value that will be included in the estate and pass to you. We have spoken with ________ and the appraiser should be calling you soon to set a convenient time to do the home appraisal.

ESTATE TAX AND INCOME TAXES

Because _______'s gross estate (the individual assets and all jointly owned property) will exceed $1,500,000 in value (actually will be almost $_._ million), Federal and New York State estate tax returns are required to be filed. However, due to available credits and deductions there will be no estate taxes to be paid. We will prepare and file the estate tax returns which are due ____________, nine (9) months from the date of death.

All of the income earned on ________'s assets through his date of death will be reportable on your joint personal returns for 200_. Upon ________'s death his Estate became an independent taxpayer for income tax purposes. This is in part why we applied for a tax identification number. The income on his assets subsequent to his death is reportable by his estate, or the beneficiaries receiving the income, depending upon how the estate is administered and distributed. Further, certain estate expenses (for example attorneys' fees, accountant's fees, court costs and Executor's commissions, if taken) are deductible for either estate or income tax purposes. Since there will be no estate taxes to be paid, the strategic use of these expenses as income tax deductions will reduce and shelter substantial income from taxation.

DISTRIBUTION OF ESTATE

The minimum time frame for the distribution of an estate in probate is seven (7) months from the date of appointment of the Executor, which was _________, 200_. We are in the process of paying all the cash gifts and bequests in the Will. As you are the sole residuary beneficiary, the balance of the net estate will go to you.

The biggest decision you will need to be making is a "disclaimer" decision. You have the right to simply take the entire estate, or to disclaim all or any portion of the estate, including __________'s one-half interest in the jointly owned assets. The reason to disclaim would be to avoid eventual estate taxation in your estate. Under current federal law, assets with a value up to $1,500,000 can be disclaimed without generating any estate tax in ___________'s estate. This would mean that these assets will continue to be controlled by his Will and consequently held in the trust under Article ______ for your benefit. The tax advantage to disclaiming up to the $1,500,000 threshold is that the disclaimed assets *will never be exposed to any federal estate taxation in his or your estate* (there will be some current New York estate tax to pay if you disclaim more than $1,000,000, but once this tax is paid the assets will also be sheltered from any further New York estate taxation upon your death).

Any assets taken into your name *may* be exposed to estate taxes depending upon the year of your death, the rules in place, and the value of your estate at that time. For example, if you were to simply take all of _____________'s assets, your total estate would then be worth $_____,000,000. If you were to die this year or next, your estate would owe approximately $_________ in estate taxes. On the other hand, if you disclaim $__,000,000, then your estate will only be $________ and would only owe $ ___________ in estate taxes.

Clearly, the disclaimer decision is significant and critically important. This decision must also be made within nine (9) months of ____________'s death (the time frame for filing the estate tax returns).

If you do disclaim, then the Article _______ Trust under ___________'s Will will be created and funded with the disclaimed assets. In that event, it will have its own tax identity and we will advise the Trustees, ______________ and _______________, regarding the appropriate administration of the Trust. While you will not have direct control over the Trust, certainly you can be involved and assert indirect control through your relationship with _____________. We will be working closely with you and counseling you as to the various options and results of your disclaimer decision, during the administration of the estate.

Finally, and in any event, we will be working with you to transfer the assets from ______________'s name to the estate and then to either the disclaimer trust or directly to you.

MISCELLANEOUS MATTERS

As part of the comprehensive settlement of _____________'s estate, and the personal planning decisions that you will be making, we will also address and be updating all of your personal estate planning documents, and advising you as to the protection and distribution of your assets, so that the settlement of ___________'s estate and your personal estate planning work together to protect your combined estates from any significant estate taxation.

(**Comment**: The settlement process is an opportunity to either cement current client relationships or develop new ones. We generally include in our services some level of estate planning for the Executor and the decedent's family.)

COMMISSIONS AND ATTORNEYS' FEES

Executor's commissions are statutorily provided payments for the work and responsibility you incur as Executor. The payment schedule is five percent (5%) of the first $100,000 of *administered* estate assets (this does not include the jointly owned property or assets with named beneficiaries); four percent (4%) of the next $200,000, three percent (3%) of the next $700,000; and two and one-half percent (2.5%) of the next $4,000,000. In this Estate the commissions would amount to approximately $__,000. The commissions are earned income in your hands, reportable as such on your personal income tax returns, and a deductible expense to the Estate. Because the Estate will not owe any Estate taxes, and you are the sole income and residuary beneficiary, and consequently will be receiving the entire estate either directly or as the beneficiary of the disclaimer trust, we recommend that you waive the payment of commissions.

As to our attorneys' fees, there is no statutory provision in New York regarding the legal fees for the administration and settlement of an estate. Legal fees are ultimately subject to control and review by the Surrogate's Court, and initially set and agreed to by the Executor and the attorneys. The Executor's commissions are most often the starting point for determining the reasonableness of legal fees. In our experience, the Surrogate's Court, when it is required to set or review attorney's fees, uses the commission schedule as an initial yardstick in determining the reasonableness of the fees. Similarly, the Internal Revenue Service often uses the Executor's commission schedule to decide if the deduction for attorneys' fees claimed on an estate tax return is reasonable and appropriate.

It is not possible to determine with any near certainty the actual amount of our time that will be required to properly settle this estate. Even if it were, I would not propose to handle this matter on an hourly basis. We prefer that our relationship to you and your family be one of the highest level of professionalism and comfort. In order to provide you with the required quality of service, it is critical that neither you nor we be "clock-watchers." From our perspective, we have to feel comfortable in supplying all the necessary manpower and resources of this firm over the next _____ months to assist you in making the best possible decisions and to position the estate, and the potential trust, for the appropriate filings and payments. From your perspective, you, and potentially _______________ and _____________________ as co-trustees of the disclaimer trust, need to be comfortable in calling on us, meeting with us, and working with us as necessary to make the various critical decisions that will be required.

On our part, we promise our diligent efforts to promptly complete the settlement of _____________'s estate and to provide you with the best possible advice. We are available to you and your family at any time to answer your questions and address any problems. At all times, at least _______ people in our firm will be familiar with this matter and available to you and your family to answer questions and keep the administration moving forward on a timely basis. Those persons are myself, my assistant, ______________, whom you have been working with, and my _________, ____________. At times, other staff or attorneys may also be involved with aspects of the settlement process.

Having now reviewed this matter in some detail and considered the various items that will need to be addressed, to provide all of the services that we currently anticipate, our minimum fee will be $__,000.00. While the breadth and depth of our services will be substantial, there is an economy of dealing with a small, closely knit family. This fee will fairly compensate our time, efforts, experience, systems and capabilities, and covers all of the above-described services and recommendations. While I cannot envision any reason for our fees to exceed this figure, it is possible that some unanticipated work may require additional efforts (for example, a tax dispute or some form of litigation, both of which are extremely unlikely). Logically, if that happens, you will be aware of any particular difficulties that we encounter and which will require additional work on our part, not described in this letter. If that occurs, we will discuss any increased fees before you would become responsible for them.

We are required to advise you that should a dispute arise between us regarding our legal fees, you have the right to have the dispute resolved by binding arbitration. In such an event, we will provide you with information and forms for addressing the matter under the New York Fee Dispute Resolutions Program.

In addition to our fees, we will bill for our disbursements, including significant postage expenses, substantial photocopying, court filing fees, and other miscellaneous out-of-pocket disbursements. As you will see, some of these items (for example, court fees) represent out-of-pocket expenditures we make on behalf of the Estate. Others represent services we provide (for example, photocopying) that are integral to our ability to do our work and for which we keep records of usage and charge clients based on the volume of the service.

You will also be incurring other fees for the services of other professionals. As you know, we currently intend to rely upon your accountant, ______________, for assistance with income tax planning and return issues. Appraisers and other professionals will be called upon judiciously.

We anticipate billing our fees periodically as we complete portions of the settlement process. Having obtained the probate of the Will and your appointment as Executor, as well as the initial analysis and administration of the Estate, we are submitting our first partial fee and cost billing. The timing of our further billings will follow the major settlement events. We anticipate another partial billing in about two months as the administration progresses, and then one upon the filing of the estate tax returns, and a final statement upon completion of the settlement process.

We look forward to working closely with you over the next several months. Certainly, if you have any immediate questions regarding this letter, our services to be performed or any aspect of the settlement process, please contact me.

Very truly yours,

Carl T. Baker is a partner in the Glens Falls, NY law firm of Fitzgerald Morris and is Vice Chair of the Practice and Ethics Committee of this Section.

RECENT NEW YORK STATE DECISIONS

Ira Mark Bloom and William P. LaPiana

ADMINISTRATION OF ESTATES

Creditors' Claims—Payment of Exempt Assets to Irrevocable Lifetime Trust Does Not End Exemption

Decedent created an irrevocable lifetime trust which gave the trustees power to pay the debts and expenses of the decedent's estate should the assets of the estate be insufficient. The trustees could exercise the power in their "sole and absolute discretion," but "in no event" were they obligated to make such a payment. The decedent's estate was indeed insolvent. The trust had been funded with life insurance and the death benefit from a state employees' retirement plan and was also the beneficiary of the decedent's federal Thrift Savings Plan death benefit and of an IRA.

The Surrogate held that the authority given the trustees to pay debts and expenses of the estate cannot be exercised when the trust assets themselves are exempt from creditors' claims. If payment were made from such assets, the creditors would be beneficiaries of the trust and there was no evidence that the decedent intended the payment of debts to be preferred over the rights of the beneficiary. The life insurance proceeds were clearly beyond the reach of creditors under Insurance Law § 3212(b). The status of the other non-probate assets was not as clear-cut. The general rule is that non-probate assets over which the decedent maintained a power of disposition during life are available to creditors. The state employees' retirement plan death benefit had been assigned to the irrevocable trust and therefore the decedent had no power to withdraw it or change the beneficiary. The decedent could have changed the beneficiaries of the IRA and the Thrift Savings Plan, but these assets are immune from creditors' claims during the decedent's lifetime by statute and it is implicit in the statutory scheme (EPTL 13-3.2(a)) and case law authority that this exemption continues after death. The power to change beneficiaries is not enough to overcome the exemption and give creditors access to the assets. In addition, the decedent's right to withdraw assets from the Thrift Savings Plan was limited to certain situations of hardship and the right to withdraw assets from the IRA was limited by tax penalties. Therefore none of the assets of the trust were available to pay creditors. *In re Gallet*, 196 Misc. 2d 303, 765 N.Y.S.2d 157 (Sur. Ct., N.Y. Co. 2003).

Creditors' Claims—Pension Benefits, Insurance Proceeds and Annuities Exempt from Creditors

In another case involving non-probate assets and creditors, the creditor attempted to reach insurance proceeds, a Teacher's Retirement System death benefit and an annuity created under IRC § 403(b) through a salary reduction agreement, all of which were payable to a named beneficiary. The Surrogate held that the insurance proceeds were exempt by statute from claims by the decedent's creditors. (Insurance Law § 3213(b)(1)). The Teacher's Retirement System death benefit was also exempt from creditors (Education Law § 524), based on court holdings (including *Gallet*) that the exemption applies after the employee's death. Although the 403(b) plan is not protected by a statutory anti-alienation provision, the plan is an "annuity." Accordingly, the court held that EPTL 13-3.2(a) applied to the plan to exempt it from the claims of commercial creditors. The court supports this conclusion with a lengthy quotation from *Gallet*.

The court goes on to observe that EPTL 13-3.2(a) is subject to Debtor and Creditor Law § 273, the fraudulent conveyance provision, but the decedent was not made insolvent by designating a beneficiary, nor was the estate rendered insolvent by payment to the beneficiary because the assets were never part of the probate estate. *In re King*, 196 Misc. 2d 250, 764 N.Y.S.2d 519 (Sur. Ct., Broome Co. 2003).

Creditors' Claims—Property Subject to General Power Created by Decedent Is Part of Estate for Purposes of DSS Reimbursement

Social Services Law § 369 obliges the Department of Social Services to seek reimbursement for medical assistance correctly paid from the "estate" of the recipient which is defined by the same section as all property passing under a will or by intestacy. Decedent created an irrevocable trust over which he retained a testamentary general power of appointment. The executor of the estate resisted DSS's request for reimbursement, asserting that the appointive property did not pass under the will and was not part of the probate estate. The Surrogate held, however, that under the law applicable to powers (EPTL 10-7.2 and 10-7.4), the property subject to the power was available to the decedent's creditors. Because DSS was a preferred creditor (Social Services Law § 104(1)), the Surrogate, in a case of first impression, held that the appointive property was subject to the Department's claim even though not part of the probate estate. *In re Albasi*, 196 Misc. 2d 314, 765 N.Y.S.2d 213 (Sur. Ct., Bronx Co. 2003).

Elective Share—Spouse Entitled to Statutory Interest on Elective Share

Decedent's spouse elected to take her statutory share. Guardians *ad litem* for the infant contingent remainder beneficiaries of decedent's testamentary trust objected to executors' accounting showing payment of 6 percent interest on the elective share amount, the rate paid under EPTL 11-1.5 on outright pecuniary bequests. The Surrogate held that to deny interest to the spouse would unjustly enrich the estate and reduce the value of the elective share. Accordingly, the pecuniary amount of the elective share was entitled to interest under EPTL 11-1.5. In addition, the Surrogate reaffirmed prior rulings of the Court that a proceeding to compel payment of a legacy need not be brought in order obtain statutory interest. *In re Kasenetz*, 196 Misc. 2d 318, 765 N.Y.S.2d 216 (Sur. Ct., Nassau Co. 2003).

Elective Share—Right of Election Dies with Surviving Spouse but Estate May Pursue Action Against Executor of Will of First Spouse to Die

Decedent's will left half his estate in trust for his surviving spouse. At the time of decedent's death his wife was incompetent and living in a nursing home; her expenses were being paid by Medicaid. The widow died one year after her husband and the Department of Social Services asserted a claim for reimbursement against her estate. Decedent appointed a relative who was also a beneficiary as executor of the will and trustee of his wife's trust. The executor did not offer decedent's will for probate until one year after the widow's death. The widow's administrator sought to assert the widow's right of election, alleging that the executor delayed offering the decedent's will for probate in order to frustrate the widow's right of election.

The court first held that the widow's administrator could not assert the right of election. EPTL 5-1.1-A specifically addresses incompetent spouses, allowing the right of election to be filed by a guardian (EPTL 5-1.1-A(c)(3)) and giving the Surrogate discretion to extend the time for filing the election for an incompetent surviving spouse beyond that allowed competent spouses (EPTL 5-1.1-A(d)(3)). The statutory scheme prevents the court from disregarding the "traditional view" that the surviving spouse's death ends the right of election. However, the widow's administrator does have the opportunity to prove that the executor's delay in offering the decedent's will for probate was motivated by the desire to frustrate the right of election, which would amount to fraud in its equitable (rather than its legal) meaning—actions inconsistent with fair dealing and good conscience. Were fraud proven, the widow's estate would be entitled to have a constructive trust imposed. *In re Application of Possick (Estate of Wurcel)*, 196 Misc. 2d 796, 763 N.Y.S.2d 902 (Sur. Ct., N.Y. Co. 2003).

Executor's Duties—Co-executor Cannot Appoint Another Co-executor Attorney-in-Fact

One co-executor of decedent's will executed a New York statutory short form power of attorney, naming her co-executor as attorney-in-fact to carry out "estate transactions," and submitted the form for filing in the Surrogate's Court pursuant to EPTL 13-2.3, 22 N.Y.C.R.R. 207.48 and General Obligations Law § 5-1502G. The Surrogate refused to accept the instrument because the filing provisions apply only to powers of attorney executed by an estate beneficiary concerning an interest in a decedent's estate. The Surrogate further observed that an executor is not empowered to exercise a general power of attorney because that would amount to an impermissible delegation of fiduciary responsibilities. The co-executor's only option if she wishes not to participate in the administration of the trust is to resign. *In re Jones*, 765 N.Y.S.2d 756 (Sur. Ct., Broome Co. 2003).

GUARDIANS

Health Care Proxy—Appointment of Guardian Can Include Removal of Health Care Proxy

An incapacitated person had given her power of attorney to her niece. The attorney-in-fact was found to have violated her fiduciary duty to the principal by transferring to herself the principal's property. The Supreme Court appointed an independent guardian and also removed the attorney-in-fact as the health car proxy for the incapacitated person. The Appellate Division upheld the lower court's action, noting that under the statutes (Public Health Law § 2981 and Mental Hygiene Law § 81.19(d)(1)), the court must consider any appointment of a health care proxy in appointing a guardian. *In re Nora McL. C.*, 308 A.D.2d 445, 764 N.Y.S.2d 128 (App. Div. 2nd Dept. 2003).

TRUSTS

Successor Trustee—Court Will Not Advise on Seeking Accounting from Predecessor

A successor trustee brought a two-pronged petition to Surrogate's Court for advice and direction under SCPA 2107(2). The first request involved the construction of two trust instruments which the Court first read together to create a valid trust. Finding that one of the instruments was ambiguous, while the other was much more clearly written, the Court held that the terms of the second instrument would govern the trust's terms, even though the original of that instrument could not be found. Because the absence of the original was adequately accounted for, the photocopy of the trust was accepted based on an exception to the best-evidence rule.

The successor trustee also asked the Court to decide that he was not required to seek an accounting from his predecessor. The Court refused the request, holding that the decision whether or not to seek an accounting from a predecessor trustee must be made by the trustee. Were the Court to make that decision it would be substituting its judgment for that of the fiduciary, exactly the circumstance referred to in SCPA 2107(2) which allows the Court to exercise its discretion to decline to entertain a petition for direction and advice absent "extraordinary circumstances." *In re Kline*, 196 Misc. 2d 66, 763 N.Y.S.2d 721 (Sur. Ct., Fulton Co. 2003).

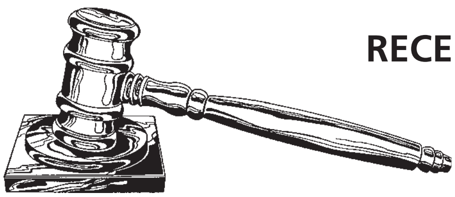
Special Purpose Trustee—Appointment Appropriate to Avoid Conflict of Interest

Testamentary trust gave the trustees power to confer a general power of appointment on any trust beneficiary. Conferral of a general power on the income beneficiary would tax the trust as part of the income beneficiary's estate and avoid the generation skipping transfer tax that otherwise would be due. Because the trustees all had contingent remainder interests in the trust, they feared that an exercise of their discretion to confer the general power would result in their making a taxable gift to the income beneficiary. The trustees therefor sought the appointment of a "special-purpose" trustee to decide on whether or not to confer the general power of appointment on the income beneficiary.

The Court granted "limited and restricted" letters under SCPA 702(8) and (9) to the proposed special-purpose trustee. The Court noted that while the cited provisions had been used to displace trustees unwilling to act, the requested action was clearly within the ambit of the statute which encompasses furthering the best interests of the trust in situations where fiduciaries are reluctant to act. *In re Goldman*, 764 N.Y.S.2d 175 (Sur. Ct., N.Y Co.).

Ira Mark Bloom is Justice David Josiah Brewer Distinguished Professor of Law, Albany Law School. William P. LaPiana is Rita and Joseph Solomon Professor of Wills, Trusts and Estates, New York Law School.

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

Bill of Particulars

In a contested accounting proceeding, motion was made, *inter alia*, for an order of preclusion based upon the objectants' failure to provide an adequate bill of particulars.

The Court opined that an order of preclusion should only be granted under circumstances which demonstrated that a party's failure to comply with a disclosure order was willful and deliberate. Upon consideration of the bill of particulars supplied by the objectants, the Court found that while it failed to respond to several of the petitioner's demands, it was not so defective as to warrant preclusion. Specifically, the Court noted that one question of the demand was evidentiary in nature and beyond the scope of a bill, while the responses to other demands were so vague and general as to be virtually useless to the petitioner. While these responses might only be adequately provided after examination of the fiduciary, the Court determined that objectants had the obligation of stating that to be the case if true. Further, the Court held that objectants had to supply a list of personalty they claimed was part of the estate. Although the fiduciary had the burden of proof on this issue, once this burden was satisfied, the objectants had the burden of coming forward with evidence to establish that the account was inaccurate.

Accordingly, the objectants were directed to supply a supplemental bill of particulars with greater specificity, or risk being precluded from providing any evidence concerning the issues at trial.

In re Estate of Joseph DiMattina, N.Y.L.J., December 10, 2003, p. 26 (Sur. Ct., Suffolk Co., Surr. Czygier).

Contested Probate

In a contested probate proceeding, the petitioner moved for an order dismissing the objections and admitting the will to probate, and the objectant moved for partial summary judgment invalidating the devise of the decedent's realty to the attorney-draftsman and named executor under the will.

The only discovery which had taken place in advance of the motion were examinations pursuant to SCPA 1404. Neither the petitioner nor the objectant were deposed.

In support of her motion for partial summary judgment, the objectant maintained that the petitioner could not meet his burden pursuant to *In re Putnam*, due to the lack of any indication that the decedent was advised to seek independent counsel before making a testamentary provision for her attorney. Indeed, since the only evidence in support of petitioner's bequest would be his own testimony, testimony which would be inadmissible at trial, objectant claimed the petitioner could not defeat the inference of undue influence.

In his cross-motion, petitioner stated that he first met the decedent in 1989, and that they developed a social as well as professional relationship with each other. Petitioner further indicated that the decedent's relationship with her daughter was strained at best. Given the fact that the burden of undue influence remained with the objectant, despite the inference of *Putnam*, and that the execution of the will was attorney supervised, it was accorded a presumption of regularity, which according to petitioner, had not been rebutted.

The Court denied both motions, however, granted objectant leave to renew her motion after the completion of discovery given the allegations regarding the attorney's conduct. Petitioner was advised that the Court would strictly scrutinize his conduct at the appropriate time.

In re Estate of Frances S. Crissy, N.Y.L.J., December 2, 2003, p. 26 (Sur. Ct., Suffolk Co., Surr. Czygier).

Discovery of Assets

In an action commenced by the distributees of the decedent for fraud and the recovery of assets, the Court determined that plaintiffs had not established their claims of fraud and conversion of assets, but that defendant had not proven that certain transfers to him were gifts. In reaching this result, the Court noted that the testimony in support of the alleged gift was by interested witnesses, and that although the decedent routinely conducted his business affairs with the assistance of counsel, the decedent's lawyers were never informed of the transactions in issue.

Estate of F. Adele Wooters v. Gouijane, N.Y.L.J., October 14, 2003, p. 24 (U.S. Dist. Ct., S.D.N.Y., Scheindlin, J.)

Due Execution

In an uncontested probate proceeding, the two attesting witnesses printed their names at the end of the attestation clause of the instrument. They also signed the affidavit of the attesting witnesses which was attached to the instrument.

The issue before the Court was whether the printing of the witnesses' names at the end of the instrument constituted their signatures in compliance with the requirements of EPTL 3-2.1(a)(4).

In determining that the printed names were the signatures of the witnesses, the Court referred to General Construction Law § 46, which defined a signature as including any memorandum, mark or sign, placed upon any instrument with intent to authenticate or execute such instrument or writing. Based upon the evidence and a review of the document offered for probate, the Court concluded that the attesting witnesses printed their names with the intent to execute or authenticate the attestation clause of the will. Probate of the instrument was, therefore, granted.

In re Estate of Anna Green, N.Y.L.J., November 17, 2003, p. 34 (Sur. Ct., Queens Co., Surr. Nahman).

Fiduciary Duties

The decedent's will named two persons as co-executors, one of whom was the decedent's daughter. The decedent's daughter sought to file a durable power of attorney by which she named her co-executor as her attorney-in-fact to carry out "estate transactions." According to an affidavit filed with the Court, the decedent's daughter was frequently traveling and thus unavailable to execute estate-related transactions.

The filing of the power of attorney was requested pursuant to EPTL 13-2.3, 22 N.Y.C.R.R. 207.48 and the General Obligations Law 5-1502G, which establish the rules for recording powers of attorney relating to or affecting an interest in a decedent's estate. The Court held that these provisions were intended to apply to a beneficiary, and not an executor or a fiduciary, and therefore they were inapplicable under the circumstances.

Further, the Court held that the fiduciary could not delegate the responsibility for the entire administration of the estate to another, even to a co-fiduciary. The Court cautioned that the fiduciary who engages in such a delegation of authority is liable for a breach of trust and potentially subject to surcharge.

In re Estate of Cecile S. Jones, N.Y.L.J., October 31, 2003, p. 22 (Sur. Ct., Broome Co., Surr. Peckham).

Gift

Before the Court was a contested discovery proceeding and a contested compulsory accounting proceeding, both involving the activities of the respondent vis-a-vis the decedent's assets prior to death.

A trial was held, at the conclusion of which the Court directed the respondent to account and to turn over to the petitioner all of the decedent's books and records requested in the petition. In rendering this determination, the Court found that the respondent was the decedent's de facto fiduciary with respect to his personal and financial affairs; i.e., a person who, based upon a relationship of trust and confidence, undertakes the duties and responsibilities of a fiduciary. Moreover, with respect to certain accounts that were in issue, the Court found that the respondent had failed to present proof of her entitlement to the proceeds in these accounts either as a joint tenant or as a tenant in common. As to the respondent's claims that a portion of her funds were commingled in the accounts, the Court held that the issue of respondent's contribution to the funds would be left for determination in the accounting proceeding.

In re Estate of Arthur Buxton, N.Y.L.J., November 14, 2003, p. 29 (Sur. Ct., Westchester Co., Surr. Scarpino).

In Terrorem Clause

In a contested probate proceeding, the cross-petitioner sought an order granting summary judgment with respect to her petition requesting probate of the decedent's will prior to a determination as the validity of the codicil thereto, and a construction, *inter alia,* of the *in terrorem* clause in the will. The *in terrorem* clause in issue read, in pertinent part, as follows:

> If any person or persons named as beneficiaries herein . . . shall file or cause to be filed objections to, or in any manner contest, this Will or any Codicil thereto, in part or in whole, or attempt to prevent the probate thereof . . . then I direct that such person or persons shall receive nothing under this Will and all provisions for or in favor of such person or persons . . . shall be revoked . . .

The cross-petitioner was a beneficiary under the will. The codicil modified the will by naming a new executor, and revoking two bequests, exceeding $10 million dollars, to the cross-petitioner. In her motion, the cross-petitioner argued that the *in terrorem* clause would only be triggered to the extent that she objected to the codicil, and the codicil was admitted to probate. In opposition, the respondents maintained that whether the cross-petitioner was successful or unsuccessful in her challenge to the codicil, the *in terrorem* clause would cause a complete forfeiture of her bequests. Further, the respondents opposed construction of the Will prior to probate.

The Court held that although the general rule is to await a construction of the will until its probate, in instances involving a no-contest clause, the beneficiary was entitled to know whether a contest would result in a forfeiture, and to have the will construed for that purpose.

The specific issue framed by the Court was whether the *in terrorem* clause in the will caused a forfeiture of the cross-petitioner's bequests under the will if she was successful in objecting to the probate of the codicil. Respondents argued that the will and codicil were inseparable and thus an objection to the codicil caused a forfeiture of the bequests under the will regardless of the outcome of the challenge to the codicil. The Court disagreed.

The Court held that the *in terrorem* clause in the will could only reasonably be construed to apply to a contest of "any valid Codicils"; that is, only to a codicil admitted to probate. This being the case, the Court concluded that if the cross-petitioner was successful in contesting the codicil, the *in terrorem* clause did not affect her bequests under the will.

In re Estate of Martin, File No. 323871, October 17, 2003 (Sur. Ct., Nassau Co., Surr. Riordan).

Powers of Guardian

In a pending guardianship proceeding, the issue before the Court was whether the provisions of SCPA 1750 and 1750-b could be applied retroactively so as to allow the brother and guardian of the person of the respondent to direct the withdrawal of life-sustaining treatment. The respondent was presently hospitalized with pneumonia, hypoxia and hypertension. He was on a respirator and received nutrition and hydration through a nasogastric tube. The respondent's physicians opined that his condition was irreversible and terminal.

The guardian's authority was conferred prior to the effective date of the Health Care Decisions Act. As such, Mental Hygiene Legal Services ("MHLS"), on behalf of respondent, maintained that the guardian was not authorized to direct the removal of the respondent's life support. MHLS further maintained that since the respondent could not express his wishes as to the continuation of life-sustaining treatment, the guardian standing in his shoes could not do so. *See In re Storar*, 52 N.Y.2d 363.

The Court disagreed. Referring to the provisions of SCPA 1750 and 1750-b, the Court noted that neither section precluded the guardian from making health care decisions. Indeed, the provisions of SCPA 1750-b unequivocally state that guardians shall have authority to make "health care decisions," unless specifically prohibited by the Court. The provisions of the statute further state that such health care decisions "may include decisions to hold or withdraw life-sustaining treatment."

Additionally, the Court concluded that the reliance by MHLS on *In re Storar* was misguided, and that the case before it was distinctly different from the factual circumstances underlying that decision.

Accordingly, the Court held that the Health Care Decisions Act applied to all guardians, whether appointed before or after the effective date of the Act, and that the guardian was conferred with all the powers granted by that statute.

In re MB, N.Y.L.J., November 5, 2003, p. 26 (Sur. Ct., Richmond Co., Surr. Fusco).

Reformation of Wills

In an uncontested accounting proceeding, the petitioner, JP Morgan Chase, requested that the Court reform the provisions of the decedent's will in regard to certain restrictions which required that it invest any cash held in the trust in an account paying interest at the prevailing rate "until such time as bonds become available . . . at interest not less than 8 percent."

The trustee maintained that bonds paying a return of 8 percent were unavailable, and thus, the restriction upon investments contained in the trust should be removed. The Court noted that at the time the trust was created, interest rates were unusually high. The Court further noted from the terms of the instrument that the Grantor believed government bonds would provide safety and a reasonable income stream to the beneficiaries. Given the prevailing circumstances in the market, i.e., the drop in interest rates, and the resulting lack of high-yielding bonds for a protracted period of time, the Court granted the relief sought, invoking the doctrine of equitable deviation.

In re Estate of Morgenstern, N.Y.L.J., September 17, 2003, p. 19 (Sur. Ct., New York Co., Surr. Preminger).

Renunciation

The decedent died, survived by his sister who was the administrator of his estate, and a half-brother. A wrongful death action was commenced by the administrator which sought damages for pain and suffering, as well as pecuniary losses and loss of inheritance. After discovery, the defendants moved for partial summary judgment dismissing the claims for pecuniary loss and loss of inheritance. In opposing the motion, the administrator sought to file a late renunciation of her interest in the estate in favor of her daughter, who she claimed was more likely to receive support and an inheritance from the decedent. The defendants opposed.

A late renunciation can be filed if the court finds "reasonable cause" for doing so. Petitioner based her claim of reasonable cause on the decision in *DeLuca v. Gallo*, 287 A.D.2d 222 (2001). The decision in *DeLuca* recognized that although wrongful death damages are usually determined as of the decedent's demise, the filing of a renunciation of an interest as a distributee in a wrongful death action alters who is to be a distributee and thus a claimant in a wrongful death action.

The Court opined that the determination of "reasonable cause" for filing a late renunciation is a flexible analysis dependent on the facts of each case. In assessing the issue in the case before it, the Court noted that although petitioner sought to file her renunciation two years and nine months after the decedent's death, her application was only nine months after the decision in *DeLuca* was rendered, and thus, from this perspective was not unreasonably late. This result, held the Court, was further supported by considerations of justice and fairness in requiring a tortfeasor to be responsible for damages to a person who actually suffered pecuniary loss as a result of the decedent's death, though not a statutory distributee.

Accordingly, petitioner's request to file a late renunciation was granted.

In re Estate of Bruce Howard Bowyer, N.Y.L.J., December 3, 2003, p. 27 (Sur. Ct., New York Co., Surr. Preminger).

Right of Election

In an uncontested proceeding, the Court relieved the surviving spouse of the decedent of her default, and authorized her to file a notice of election against his estate, despite the fact that more than two years had elapsed since the decedent's date of death.

In reaching this result, the Court noted that only one case, *In re Rosenkranz*, N.Y.L.J., November 20, 2000, dealt directly with the issue of whether the two year period set forth in EPTL 5-1.1-A(d)(1) was a limitations period barring any relief thereafter. While the Court opined that the relief granted in *Rosenkranz* was equitable given the circumstances presented, it concluded that the argument could equally be made that the provisions of EPTL 5-1.1-A(d)(2) were to be circumscribed by the time frame for filing an elective share established by the provisions of EPTL 5-1.1-A(d)(1).

Nevertheless, in the case before it, the Court granted the relief requested on the grounds that it was unopposed, that if the two-year period was deemed a statute of limitations it would have to be affirmatively pled, and that reasonable cause had been demonstrated.

In re Estate of Carlos Fernandez, N.Y.L.J., December 9, 2003, p. 26 (Sur. Ct., Bronx Co., Surr. Holzman).

SCPA 2211 Examinations

Prior to filing objections, the respondents examined an officer of the corporate fiduciary pursuant to the provisions of SCPA 2211. The principal issue raised was the fiduciary's management of the estate realty. The officer examined testified that he had no knowledge regarding the fiduciary's policies and procedures respecting the asset. As such, the respondents moved to examine four other employees of the corporation, and to restrain the corporate fiduciary from paying any further legal fees to its counsel. The motion was opposed by the fiduciary who maintained that respondents had sufficient information, without the additional examinations, to frame objections, and that no basis existed for denying the fiduciary fees.

The Court denied the respondents' request to examine four additional corporate witnesses, but allowed the examination of one additional corporate employee, without prejudice to further discovery being conducted pursuant to CPLR Article 31.

Further, the Court denied the respondents' application concerning legal fees, holding that its practice was generally to address the propriety of payment at the conclusion of a particular proceeding, and not prior to a finding of wrongdoing on the fiduciary's part.

In re Estate of Edward G. Acker, File No. 1347 P 1972, December 16, 2003 (Sur. Ct., Suffolk Co., Acting Surr. Braslow).

Separation Agreements—Construction

In an Article 78 proceeding brought against the New York City Police Pension Fund, the Court reversed the Fund's decision to pay death benefits to a police officer's estranged wife, finding that the separation agreement between the parties wherein they each waived their respective rights in each other's pension and retirement benefits represented the clear intention of the parties to relinquish all benefits whether acquired during life or as a result of a party's death.

Valentin v. New York City Police Pension Fund, N.Y.L.J., November 21, 2003, p. 21 (Sup. Ct., New York Co., Stone, J.).

Standing

In a probate proceeding, the petitioner moved to preclude the decedent's daughter from proceeding to take SCPA 1404 examinations on the grounds of her lack of standing to object to probate. The respondent was one of four children of the decedent from a prior marriage. The record reflected that in addition to the propounded instrument, the decedent had a prior will which provided for the respondent. Petitioner argued that the respondent would not be adversely affected by probate of the propounded instrument inasmuch as she received a more beneficial interest in the estate under that will as compared to the prior will.

In rejecting the petitioner's arguments, the Court noted that the respondent was a distributee of the decedent and entitled to receive an outright interest of 1/8 of the estate, rather than an interest as a trust beneficiary, as provided in the propounded will and prior will. Moreover, the Court determined that in assessing the issue of a distributee's standing to object to probate, the relevant comparison to be made is the interest of the distributee under the propounded will as compared to distributee's interest in intestacy, without regard to the number of intervening prior wills. In making this comparison on the facts before it, the Court concluded that the respondent would be adversely affected by admission of the propounded will to probate, despite the fact that her intestate share was less than her ultimate interest as a trust remainderman under the propounded will inasmuch as there was no guarantee that the trust assets would grow and provide a larger sum to her upon the termination of the trust.

In re Estate of Antonio Nigro, N.Y.L.J., October 1, 2003, p. 29 (Sur. Ct., Nassau Co., Surr. Riordan).

Status

In a contested administration proceeding, the issue before the Court was whether the judgment of divorce between the decedent and respondent, signed three weeks after the decedent's death, disqualified the respondent as the decedent's surviving spouse.

Prior to her death, the decedent commenced an action for divorce against the respondent. The action was not contested by the respondent, who waived the service of all further papers in the action but for the judgment of divorce. The Findings of Fact and Conclusions of Law and the Judgment of Divorce were not signed by a Special Referee until after the decedent's death.

In concluding that the respondent was the decedent's surviving spouse, the Court referred to the prevailing law which holds that when a party dies during the pendency of a divorce action, the action abates. However, when the court in the divorce action has rendered a final judgment of divorce but has not performed the ministerial act of entering that judgment prior to the death of one of the parties, the marital relationship will be deemed severed, and the survivor will not be considered a spouse for purposes of inheritance. This exception, stated the Court, does not apply when all issues, including collateral issues, have not been finally determined during the lifetime of the parties. Under such circumstances, the entry of the final judgment of divorce is not a ministerial act.

Based upon the foregoing, the Court concluded that although the action of divorce was uncontested, the record revealed that the matter was not submitted to the Special Referee for determination until after the decedent's death. Accordingly, the post-death judgment of divorce did not disqualify the respondent as the decedent's surviving spouse.

In re Estate of Carol Rabalais, N.Y.L.J., November 19, 2003, p. 29 (Sur. Ct., Kings Co., Surr. Feinberg).

Statute of Limitations

In a contested accounting proceeding, the Court addressed the applicable statute of limitations as to claims based upon fraud and breach of fiduciary duty by the decedent's attorney-in-fact. The objectants alleged, *inter alia*, that the petitioner exercised undue influence upon the decedent in persuading her to convey to him a parcel of real property. Objectants further alleged that the petitioner breached his fiduciary duty to the decedent as her attorney-in-fact by making gifts and transfers of funds to himself, members of his family and a personal friend.

The petitioner moved to dismiss certain of the objectants' claims on the basis of the statute of limitations. The objectants cross-moved for partial summary judgment as to their claims based upon petitioner's breach of fiduciary duty.

With regard to petitioner's motion to dismiss, the Court held that the statute of limitations was a bar to objectants' claims pertaining to the transfer of the decedent's real property, but that it was not a bar to objectants' claims based upon petitioner's conduct as the decedent's attorney-in-fact.

Specifically, the Court determined that objectants' cause of action with respect to the realty accrued on the date of the conveyance thereof in June, 1989, and that, as such, the applicable six-year statutory period within which to sue had expired. The Court further determined that petitioner's status as the decedent's attorney-in-fact did not toll the running of the statute of limitations inasmuch as the power of attorney was not employed in the challenged transaction and bore no relation to it.

On the other hand, the Court found that the tolling provisions applied as to the balance of the objectants' claims against petitioner as the decedent's attorney-in-fact on the grounds that the transfers in issue were made by him in his fiduciary capacity.

Regarding objectants' cross-motion with respect to these claims, the Court concluded that questions of fact existed as to the validity of the purported gifts and transfers of the decedent's funds made by the petitioner to himself and family members, as well as to a personal friend in the form of a "loan." Notably, the petitioner was unable to collect full repayment of this loan on behalf of the decedent, but did reimburse himself from the decedent's funds for losses which he personally incurred in connection with the loan transaction. The Court found that by reimbursing himself in advance of the decedent, the petitioner placed his own interests ahead of his principal in clear breach of his fiduciary duties, and thus granted partial summary judgment in objectants' favor on this issue.

In re Estate of Frances McNamara, N.Y.L.J., October 7, 2003, p.29 (Sur. Ct., Westchester Co., Surr. Scarpino, Jr.).

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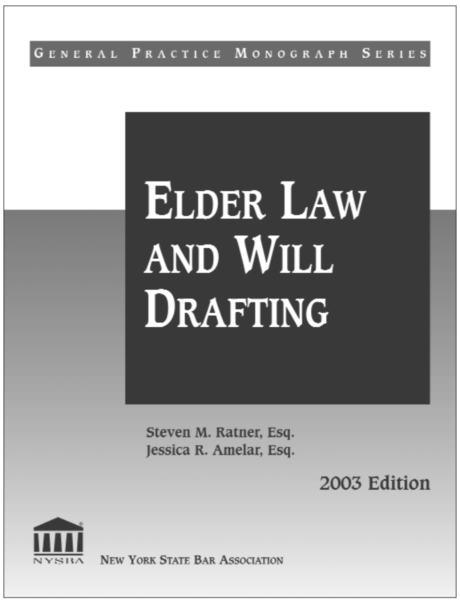

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