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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

In This Issue

- Digital Assets and Accounts
- Estate Taxes and the Santa Clause Revisited
- E-Discovery in Litigation
- Burial & Cemetery Issues

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Message from the Chair

2017 was a successful year for the Trusts and Estates Law Section. Thank you to all members who contributed their time and talents to make those successes possible. With our new chair, Natalia Murphy, at the helm, 2018 is sure to be an even more productive year for us.

In November 2017, Ira Bloom and I appeared before the Executive Committee and House of Delegates of the Association and presented the proposed New York Trust Code. Both the Executive Committee and the HOD voted to support the proposed legislation. As a result, the Executive Committee of the Section is working to have the proposed legislation introduced in the legislature in 2018. In addition, the proposed Uniform Directed Trust Act was approved by the Section's Executive Committee and will be presented to the Executive Committee of the Association in January 2018.

The 2018 Annual Meeting, in New York City, will be co-chaired by Kevin Matz and Jessica Goldsmith. The presentations will focus on family-limited partnerships and LLCs, ethical considerations in estate and gift tax audits, as well as avoiding pitfalls in planning. Our luncheon speaker, Austin Bramwell, Esq., with U.S. Department of the Treasury should be very informative and insightful.

The Spring meeting is scheduled to be held at The Cloisters in Sea Island, Georgia, May 3rd to 6th, 2018. The meeting will be chaired by Michael Schwartz. The topic is "Sophisticated Estate Planning." We hope to see you there.

At the beginning of my tenure, I stated that I wanted to focus on committee participation. The engagement and productivity of our committees is essential to our Section's ability to develop legislative proposals and see to their passage in the legislature, as well as to produce articles and continuing legal education programs for the benefit of our members. While we have dedicated and committed chairs of our various Sections, they need committee members to assist them. Our committees are posted on the website. I encourage every Section member to become actively involved in a committee. They are the backbone of our Section.

Thank you for the opportunity to serve as the Chair of the Section.

Sharon L. Wick

Message from the Editor

This edition of the *Newsletter* addresses a number of especially timely topics. Joseph A. Bollhofer provides a summary of the recent digital assets legislation, Angelo M. Grasso gives us an overview of e-discovery concepts for the Surrogate's Court practitioner, and Paul S. Forster and Laurence Keiser again offer estate tax savings suggestions—this time for decedents dying on or after January 1, 2019—in a follow-up to their well-received spring 2016 article. In addition, Raymond M. Planell and Matthew G. Parisi address frequent issues that arise in connection with burial and cemetery matters.

We continue to urge Section members to participate in our *Newsletter*. CLE credits may be obtained. The deadline for submissions for our next edition is March 9, 2018.

The editorial board of the *Trusts and Estates Law Section Newsletter* is: **Jaclene D'Agostino,** jdagostino@farrellfritz.com, Editor in Chief; **Naftali T. Leshkowitz,** ntl@leshkowitzlaw.com, Associate Editor; **Sean R. Weissbart,** srw@mormc.com, Associate Editor; **Thomas V. Ficchi,** tficchi@cahill.com, Associate Editor; and **Shaina S. Kamen,** skamen@strook.com, Associate Editor.

Jaclene D'Agostino

Digital Assets and Accounts—Can Life Get More Complex?

By Joseph A. Bollhofer

Passwords, passwords, passwords.

How many passwords do you have? It is amazing how quickly they have become a necessity. And don't forget user names.

Keeping track of these passwords and user names and managing digital assets and accounts can be hard enough. But if you become incapacitated or die, do you have any plan for access and management by someone you trust?

"Many of us have agreed to have 'paperless' accounts with our banks, investment companies, creditors and others, often at their urging."

You probably have more digital assets and accounts than you realize. "Assets" can include domain names, licenses, contents of blogs and websites, emails, social media content, photographs, stored credits for airlines, credit card accounts, debit card accounts, PayPal accounts, Amazon accounts and countless other items.

Many of us have agreed to have "paperless" accounts with our banks, investment companies, creditors and others, often at their urging. Having account statements and records saved electronically is a nice, neat way to go through life. However, we are now at the mercy of our computers, third parties' computers and the internet. Additionally, cybersecurity is an increasingly significant concern that we all must deal with as best we can.

However, even if all assets and accounts are secure and accessible to us, if we become incapacitated or die, those who we leave in charge might have problems. For example, a few years ago an owner of a building supply business suffered a stroke, which affected his memory and physical well-being. He kept all his business records in a Yahoo! account—including accounts payable, accounts receivable, and inventory. His family attempted to get access to the account and continue operating the business. Yahoo! denied access. The business continued to receive deliveries and could not identify the customers or the sale prices for those products. The business rapidly declined.

Problems such as this can be avoided or minimized. As with any other delegation of authority to act, access to and control over digital assets and accounts can be authorized in a comprehensive power of attorney. Of course, the agent appointed under a power of attorney should be someone that you trust completely. The specific scope of authority should be spelled out as clearly as possible.

Since the authority under a power of attorney automatically ends when the principal dies, authority to access and control all digital assets and accounts should also be given to an executor under a last will and testament. Last year New York's Estates, Powers & Trusts Law (EPTL) was amended to add a new Article 13-A.[1] This law details the rules regarding the circumstances under which fiduciaries, including agents under powers of attorney and executors under wills, may have access to and control over digital assets[2] and digital communications. The law is complex and, in my opinion, poorly worded in some parts. What is clear is that, first, a "user" (i.e., a person who has an account with a "custodian") may use an online tool to direct the custodian to disclose, or not to disclose, some or all of the user's digital assets, including content of electronic communications.[3] Those directions will override any contrary direction in a will, power of attorney or other document.

This law also states that the custodian may, "at its sole discretion," (1) grant a fiduciary full access or (2) grant access "sufficient to perform the tasks" necessary or (3) provide a "copy in a record of any digital asset that . . . the user could have accessed . . . ."[4] Aside from the rather nebulous language regarding sufficiency, this provision does not make clear what I believe the law's intent to be: that the custodian *must* do one of those things.

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Another section of the law states that "if a deceased user consented" (e.g., presumably in a will or trust), the custodian "*shall*" disclose to the estate's representative the content of the user's "electronic communications."[5] Still another section of the law states that, unless the user directed otherwise before death, the custodian "*shall*" disclose to the estate's representative a "catalogue of electronic communications"[6] sent or received by the user "and digital assets, other than the content of electronic communications" if the custodian is given certain proof of authority and an affidavit ("if requested by the custodian") stating that disclosure of digital assets "is reasonably necessary for administration of the estate."[7] The statute also requires disclosure of the content of electronic communications to an agent, but only if the power of attorney *expressly* grants that authority, and only to the extent granted.[8]

EPTL 13-A-3.4 is where it gets particularly interesting, and confusing, and warrants full quotation:

> Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal *and digital assets*, other than the content of electronic communications, of the principal if the agent gives the custodian: [appropriate proof of authority].[9]

This section requires disclosure of "digital assets" even if the power of attorney does not specifically authorize disclosure. However, the concept of control is not addressed. Therefore, if an agent does not have specific authority, the control of, for example, a domain name or software license (including perhaps authority to renew them) could be lacking, and result in the loss of the name or license. Since the exact results of a "disclosure" are unknown in advance, a power of attorney granting specific authority over digital assets is wise, if that is the intention.

Similar provisions deal with the rights and authority of trustees and guardians. Virtually every one of these provisions permits the custodian to first require "evidence linking the account to the user" or "a number, username, address, or other unique subscriber or account identifier assigned by the custodian." There are also provisions throughout the statute for courts to become involved to direct or prohibit disclosure, which they will do. There is a lot potentially at stake, monetarily and emotionally. This new law, and the concepts of legal rights to digital assets and accounts in general, is sure to be hashed out during the coming years.

This is a complicated and intensely personal subject. Some people might not want anyone to have access to every email account, blog or other type of digital asset. However, careful consideration should be given to how digital assets and accounts are to be handled in the event of incapacity or death. The best we can do is prepare for the inevitable, and give clear, written instructions to custodians, and in powers of attorney and wills.

Endnotes

1. 2016 N.Y. Laws 354, eff. Sept. 29, 2016.
2. N.Y. Estates, Powers & Trusts Law 13-A-1(i) ("'Digital asset' means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.").
3. *See id.* at 13-A-2.2.
4. *Id.* at 13-A-2.4.
5. *Id.* at 13-A-3.1. The EPTL gives "electronic communications" the same meaning as in 18 U.S.C. § 2510(12), which defines "electronic communications" as

   > any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—(A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

6. Catalogue of electronic communications" is defined as "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person." EPTL 13-A-1(d).
7. *Id.* at 13-A-3.2.
8. *Id.* at 13-A-3.3.
9. *Id.* at 13-A-3.4 (emphasis added).

The New York State Estate Tax Regime and the Santa Clause Revisited

It Only Gets Worse On or After January 1, 2019

By Paul S. Forster and Laurence Keiser

In the spring 2016 issue of this publication we wrote an article titled *The New New York State Estate Tax Regime, a Trap for the Unwary: Proposed Will Language to Save Estate Taxes and Obtain Direct Pecuniary Benefit for Beneficiaries (Santa Clause)*. The purpose of this follow-up article is to dispel the widely held notion that for the estates of decedents who die on or after January 1, 2019, the credit against the New York State Estate Tax will be fixed in an amount so as to shelter from New York State Estate Tax a taxable estate equivalent to the federal exempt amount, whatever it may be, on January 1, 2019. Nothing could be further from the truth.

On or after January 1, 2019, just as it has since April 1, 2014, the credit against the New York State Estate Tax will diminish as the taxable estate increases, because of the mathematics of the calculation of the New York State Estate Tax credit.

Based upon the federal exempt amount presently known ($5,490,000), this diminution in the New York State Estate Tax credit under current law will result in beneficiaries of taxable estates between $5,490,001 and $6,000,908, actually getting less than $5,490,000. Put another way, as taxable estates rise within this range, the beneficiaries get less.

The need for the Santa Clause is greater than ever.

Snooze Part, the Workings of the Calculations

Chapter 59 of the Laws of 2014 (Part X) made significant amendments to the New York State estate tax effective for estates of individuals with dates of death on or after April 1, 2014. Prior to these amendments, the New York State estate tax was the maximum amount allowed on the federal estate tax return as a credit for state death taxes.

Among other things, as pertinent to this article, Chapter 59 increased the New York State estate tax return filing thresholds as follows: effective for decedents who died on or after April 1, 2017 ($5,250,000), and effective January 1, 2019 (the federal basic exclusion amount then in effect). The federal basic exclusion amount, insofar as presently is known, is $5,490,000 for decedents who die on or after January 1, 2019 and is subject to increase (indexed) thereafter based on inflation.

Chapter 59 of the Laws of 2014 (Part X) also provides an applicable credit for certain estates.

As "explained" in New York State Department of Taxation and Finance Technical Memorandum TSB-M-14(6)M, which provides a summary of all of the amendments to the New York State estate tax effective April 1, 2014, which can be found at the Department's website (http://www.tax.ny.gov), the applicable credit is allowed against the estate tax when a New York taxable estate (including gifts) is not greater than 105% of the basic exclusion amount. The amount of the credit cannot exceed the tax imposed.

If the New York taxable estate is less than or equal to the basic exclusion amount, the applicable credit amount will be the amount of tax that is computed on the taxable estate. The applicable credit is phased out as the New York taxable estate approaches 105% of the basic exclusion amount.

If the New York taxable estate is greater than the basic exclusion amount but not greater than 105% of the basic exclusion amount, then the applicable credit is equal to the estate tax that would be due on an amount computed by multiplying the basic exclusion amount by one minus a fraction.

The numerator of the fraction equals the New York taxable estate minus the basic exclusion amount, and the denominator equals five percent of the basic exclusion amount. This is very confusing stuff, and requires careful parsing of the language in order to create the correct algebraic equation. Common core it is not. Phew, glad that's over!

Pernicious Effect of New Estate Tax Regime

The purpose of this and our previous article is to explain the pernicious effect of the new New York State estate tax regime as a trap for the unwary, and to suggest some Will (or Trust) language (a Santa Clause) to provide advantages to clients and their beneficiaries.

The following is an example of how the "credit" is applied, and how the Santa Clause language would

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affect favorably the amounts received by the beneficiaries.

Our examples are based upon the estates of decedents who die after January 1, 2019, but the similarly pernicious effect of the tax statute applies as well to the estates of persons dying before that date. The taxable estate in our example is $5,500,000. The applicable credit is available because the taxable estate exceeds the basic exclusion amount ($5,490,000) which applies during that period by an amount ($10,000) that is less than or equal to 5% of the basic exclusion amount ($274,500).

is calculated phases out the credit in such a way, as in our example, that the "marginal" rate is a confiscatory 244%, or greater than 100%.

After January 1, 2019, the credit phases out between a taxable estate of $5,491,000 and $5,764,500 (5,490,000 x 1.05%), as we have seen, a difference of $274,500. However, the New York State Estate Tax at the upper boundary of the phase-out range is $482,540, as against an increase in the taxable estate of only $274,500, still a confiscatory marginal rate of 176%, well above 100%.

"The effect of a Santa Clause is to authorize the executor of an estate within the range to make a charitable gift of so much of the estate as will reduce the taxable estate to the exempt amount."

The credit against the tax is equal to the estate tax that would be due on an amount computed by multiplying the basic exclusion amount ($5,490,000) by one (1) minus a fraction. The numerator of the fraction equals the New York taxable estate ($5,500,000) minus the basic exclusion amount ($5,490,000) which equals $10,000. The denominator of the fraction equals five (5) percent of the basic exclusion amount or $274,500 (5% x $5,490,000).

In our example, the credit would be $425,600, calculated as follows:

(5,490,000 x (1-(10,000/274,500)) = 5,490,000 x (1-.03643) = 5,490,000 x .96357= 5,290,000. The credit would be the tax on $5,290,000, which is $425,600.

Accordingly, the estate tax on $5,500,000, for a decedent dying on or after January 1, 2019, is calculated as follows:

Taxable estate	$5,500,000
Tax computed	450,000
Credit	425,600[1]
Estate tax due	$24,400

But wait a minute, you say. The taxable estate only is $10,000 above the "exempt" amount, but the estate tax on the $10,000 increase in the taxable estate is $24,400—that is a confiscatory marginal rate of 244%. Put another way, if the taxable estate is $5,500,000 and the tax is $24,400, the net estate distributable to the beneficiaries is only $5,475,600. If the taxable estate were only $5,490,000 there would be no tax due and the beneficiaries would get $5,490,000. With an estate that is $10,000 *greater*, they get $14,400 *less*. How can this be? It is because the manner in which the credit

But that is not the end of it. It is not until the taxable estate reaches $6,000,909 that an increase in the taxable estate actually results in the beneficiaries getting more money. Put another way, the beneficiaries of a taxable estate of $6,000,909, on which the estate tax is $510,909, end up getting only $5,490,000, which is the same amount that they would get on a taxable estate of $5,490,000, which would be exempt from tax. That means that the beneficiaries get no benefit of any portion of the additional $510,909.

But that is not the worst part of it. Because of the way the credit phases out, on estates between $5,490,000 and $6,000,909, the beneficiaries get *less* than $5,490,000, the so-called "exempt" amount.

As we have said before, to paraphrase Senator Dirksen, at $510,909, you are talking real money!

For the astute who have wondered why the Federal Estate Tax has not figured in our calculations, this is because, within the New York Estate Tax credit phase-out range, the New York State Estate Tax (which is a deduction against the Federal Estate Tax) is so large that it reduces the taxable estate for Federal Estate Tax purposes below the federal exempt amount ($5,490,000).

Santa Clause

All is not lost, however. As we have proposed before, a "Santa Clause," as described below, should be included in all Wills or Trusts in which the taxable estate may fall within the range effected by the phase-out of the credit against the New York State Estate Tax.

Put simply, the effect of a Santa Clause is to authorize the executor of an estate within the range to make

a charitable gift of so much of the estate as will reduce the taxable estate to the exempt amount.

A proposed Santa Clause would read as follows:

> In the event my estate is taxable for New York State Estate Tax purposes, then, and in that event, I give, devise, and bequeath to: (choose one of following three (3) alternatives)
>
> (1) particular named charity (ies);
>
> (2) my executor hereinafter named to be distributed by him to, between, or among the following named charity (ies);
>
> (3) my executor hereinafter named to be distributed by him to, between, or among such charity (ies) distributions to which are eligible to be deducted for estate tax purposes as may be designated by him;
>
> the maximum portion of my estate as will result in a reduction of my New York State Estate Tax which equals or exceeds the amount so distributed.

Once the taxable estate exceeds the upper bound described above, for example, $6,000,909 for estates of decedents dying on or after January 1, 2019, any such charitable distributions would exceed the tax imposed, and the Santa Clause would not apply, since there would be no New York State Estate Tax credit and the marginal rate is 12%, which would be only a fraction of any amount to be distributed to charity. For those of you who do not have our previous article handy, the phase-out range for decedents who die on or after April 1, 2017 and before January 1, 2019, is $5,250,000 to $5,512,500.

Effect of Use of Santa Clause

Under examples 1, 2 and 3 of the proposed Will (or Trust) clause above (Santa Clause) in an estate of a decedent dying on or after January 1, 2019, in which the taxable estate otherwise would be $5,764,500, a gift to charity of $274,500 would save the estate $482,540 in New York State Estate Tax, and increase the amount payable to the beneficiaries of $208,040.

The benefit to the beneficiaries ($208,040) is calculated as follows:

(A) Will as written:
Taxable estate: $5,764,500
Estate tax: (482,540)
Net distributable: $5,281,960

(B) Will with Santa Clause:
Charitable gift: $274,500
Taxable estate: $5,490,000 ($5,764,500-$274,500)
Estate tax: 0
Net distributable to non-charitable beneficiaries: $5,490,000

It is hoped that this analysis has shed some light on this complicated subject and provides some helpful guidance to avoid the trap this estate tax regime lays for unsuspecting practitioners.

Endnote

1. For the mathematically inclined, this number varies slightly, depending on the number of places the various fractions used in the calculations are carried.

Electronic Discovery in Surrogate's Court Litigation

Part I: An Introduction to Electronic Discovery Concepts

By Angelo M. Grasso

Long the bane of commercial litigators, electronic discovery, or e-discovery, has slowly but surely become a part of Surrogate's Court litigation. With its own language and issues that do not exist in conventional paper discovery, many practitioners have adopted the ostrich approach and tried to ignore the subject, or thrown up their arms in disgust after hearing a jargon-filled speech on technology and cost.

This is a mistake. Failing to understand and address e-discovery can lead to avoidable difficulties and unnecessary discovery disputes that only prolong litigation and add unnecessary cost. A solid command of the concepts behind e-discovery will aid not only the Surrogate's Court litigator, but also the planner and administrator who suspects she might need to produce documents in the future concerning her interactions with a testator or fiduciary.

This article, the first of two parts, is intended for Surrogate's Court practitioners who have had limited exposure to e-discovery, and provides an overview of some of the key terminology and processes that encompass e-discovery. The article will also discuss the preservation, collection and review of e-discovery, litigation holds and predictive coding, and the pitfalls for attorneys and clients who fail to comply with e-discovery rules and conventions.

Electronically Stored Information

The crux of e-discovery is the management of Electronically Stored Information (ESI). Rule 34 of the Federal Rules of Civil Procedure defines ESI as:

> Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.[1]

This definition is both illuminating and vague, as it gives almost no specificity, perhaps in an effort to encompass technology that could not be anticipated, at the expense of precision. The comments to the 2006 Amendments to Rule 34 admit this, stating the rule "is intended to be broad enough to cover all current types of computer-based information and flexible enough to encompass future changes and developments."[2]

Fortunately, the Commercial Division of the Supreme Court of Nassau County has provided practitioners with more guidance. Long viewed as the New York State courts' leader in electronic discovery, the Court's rules[3] contain a list of what constitutes ESI:

- Native files
- Network access information
- Metadata
- Hard drives
- Internet usage files
- Offline storage
- Transaction logs
- Backup materials
- Spreadsheets
- Text files
- Emails
- Graphics
- Attachments
- Audio/visual files
- Voicemails
- Databases
- Instant messages
- Calendars
- Word processing documents
- Telephone logs
- Information stored on laptops, removable media, or "other portable devices"

While most of these terms are familiar, a few are worth exploring in detail. "Native Files" means ESI in the electronic format in which it was created, viewed, and/or modified. For example, an actual word processing file (with a .docx extension) would be a native file, while a printout of the document or a PDF of the document would not be. The same is true for spreadsheets: the .xls file is a native file; the hard copy spreadsheet is not. While those types of files are relatively easy to find and produce, much trickier are files that are not readily readable, such as databases.

"Static images" are representations of ESI made by converting a native file into a standard image format that can be viewed and printed. In other words, it is taking the file or data and putting it in a format that you can see, akin to preparing a trial exhibit. This would usually include PDFs of files, as PDF is not a format in which documents are ordinarily created. Similarly, it includes printouts of e-mails, rather than an entire Outlook data file.

"Metadata" is information embedded in a Native File that is ordinarily neither viewable nor printable, but is generated when a file is created, modified, deleted, sent, received and/or manipulated. For example, a file's name, type, size, and location are all metadata. So

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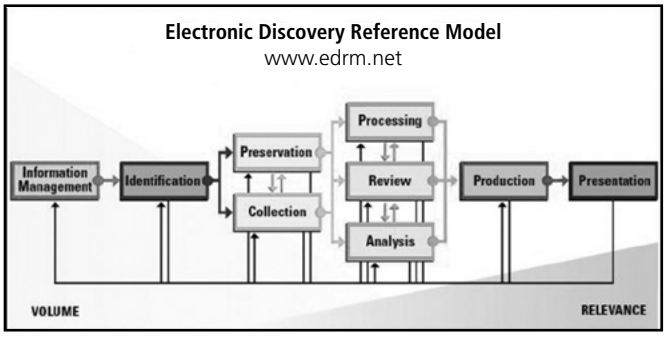
are the dates the file was created and modified, and in each instance, who made the changes. A file's metadata is analogous to an internal diary that tracks and reads all modifications made to a file.

The Electronic Discovery Reference Model

The most common scheme under which e-discovery proceeds is the electronic discovery reference model (EDRM), which is illustrated by the flowchart below. The EDRM is an attempt to break down the e-discovery process from start to finish into nine stages. Much like the "inverted pyramid" used for depositions, the goal is to go from general to specific, starting with the most documents and ending up with the fewest, while relevancy increases.



The EDRM has nine stages:

- **Information management**: The client's internal procedures for maintaining ESI.
- **Identification**: Locating potential sources of ESI.
- **Preservation**: Preserving ESI.
- **Collection**: Gathering ESI for further use.
- **Processing**: Reducing and converting ESI to useable formats.
- **Review**: Evaluating ESI for relevance and privilege.
- **Analysis**: Evaluating ESI for content.
- **Production**: Delivering ESI to other parties in the correct form.
- **Presentation**: Using ESI, such as at depositions, trial, and hearings.

The EDRM is a broad template; frequently, entire stages will be skipped. As the chart indicates, some of these stages will occur concurrently. While all nine stages have their relative importance, the most common subject of discovery disputes concern the preservation, collection, and processing of ESI.

The Litigation Hold: *Zubulake v. UBS Warburg*

The most important e-discovery concept for a practitioner to understand are your and your client's duties and obligations concerning the collection and preservation of ESI. This concept is encompassed in the litigation hold, which was developed in the case *Zubulake v. UBS Warburg, LLC*.[4] *Zubulake* began as a conventional gender discrimination litigation; five decisions[5] and a jury trial later, it stands as the case outlining the contours of electronic discovery; it was the precursor to the sweeping 2006 amendments to the Federal Rules of Civil Procedure that govern e-discovery.

Ms. Zubulake was an equities trader at UBS who was allegedly denied a promotion. She brought an action in the Southern District of New York for gender discrimination, failure to promote, and retaliation.[6] Her case was assigned to Judge Shira Sheindlin, who had long expressed an interest in electronic discovery, and who used the case to write extensively on the subject.

From the beginning, Ms. Zubulake alleged that the evidence to prove her case was in emails on UBS' servers. Accordingly, she demanded production of e-mails sent among her former colleagues and superiors.[7] In response, UBS produced only 100 emails—a rather low number, considering that Ms. Zubulake had printed out and retained over 400 relevant emails before she left UBS.[8]

Judge Sheindlin first considered Ms. Zubulake's motion to compel, where she argued that the relevant e-mails were on UBS' backup media and should be produced.[9] After finding that the e-mails in question were relevant, the court turned to the issue of cost-shifting, as UBS claimed that it would cost over $300,000 to produce the requested e-mails because they were stored on backup tapes, and a timely and costly process was required to convert the data to readable emails.[10] The court determined that UBS was obligated to produce all emails that were readily accessible—*i.e.*, on optical disks or active servers—plus those from any five backup tapes that Ms. Zubulake selected.[11] In addition, UBS was directed to submit an affidavit outlining the results of its search and the time and cost expended so the court could make a proper cost-shifting analysis.[12]

In a subsequent opinion, the court addressed the issue of who would pay the $273,000 cost of restoring, searching and producing the emails from the 77 backup tapes.[13] Ultimately, the court assigned 25% of the cost of restoration to Ms. Zubulake, but held that UBS was to bear entire cost of producing the documents, noting that it was UBS' prerogative to have a senior associate at a large law firm to conduct the e-mail review, which Ms. Zubulake had no obligation to pay.[14]

By *Zubulake IV* it was clear that many e-mails were missing and could not be recovered.[15] Plaintiff moved for various sanctions, including an adverse inference

instruction against UBS with respect to the missing e-mails.[16] Noting that a spoliation sanction can only be levied if UBS destroyed evidence it had a duty to preserve, the court addressed three key questions: (i) When did UBS' duty to preserve arise?; (ii) What is the scope of UBS' duty to preserve?; and (iii) If UBS failed to preserve ESI, what is the appropriate remedy?

As to when the duty to preserve arose, the court held that the duty attached when litigation was reasonably anticipated.[17] UBS argued this occurred when Ms. Zubulake filed her human resources complaint; the court disagreed, holding the duty to preserve attached when the "key players" at UBS believed that litigation was possible.[18] About four months before Ms. Zubulake filed her human resources complaint, several key players began marking their internal e-mails as "privileged and confidential."[19] Additionally, a supervisor testified that the possibility of litigation "was in the back of his mind" as early as four months before she filed the complaint with human resources.[20] The court held UBS' duty to preserve arose at that point in time, as this was clear evidence that UBS knew that litigation was possible.[21]

As to the scope, the court stopped short of saying that once the duty to preserve arose, all ESI had to be preserved, noting this would paralyze a large institution like UBS, which is often involved in litigations.[22] Instead, the court held that it is the party's obligation to set aside the "unique" ESI:

> While a litigant is under no duty to keep or retain every document in its possession, it is under a duty to preserve what it knows, or reasonably should know is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.[23]

To this end, the court created the now-famous "litigation hold":

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.[24]

The court focused on the ESI from the people it dubbed the "key players," and held that the litigation hold must encompass all documents from key players in existence at the time litigation was reasonably anticipated or created thereafter.[25]

After concluding that UBS failed to preserve e-mails, the court turned to ascertaining the appropriate remedy. It began by noting its reluctance to impose an adverse inference sanction, as it is often too difficult to overcome.[26] The court instead employed a three-part test, holding that the party seeking an adverse inference instruction must show that:

1. A duty to preserve existed when the materials were destroyed;
2. The materials were destroyed with a "culpable state of mind"; and
3. The destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find it would support the claim or defense.[27]

The second prong is the fulcrum in determining the severity of the sanction, as the court held that if the destruction of evidence was done in bad faith—*i.e.*, willfully or intentionally—this demonstrates the evidence destroyed was relevant, satisfying the third prong.[28] Hence, the key question becomes whether the destruction of ESI was merely negligent, or whether the offending party engaged in a willful pattern of destruction.[29] Here, the court held that the destruction of the e-mails appeared to have been mere negligence, not willful, and declined to apply an adverse inference instruction, but did order UBS to sit for additional depositions (at its own expense) concerning the missing e-mails.[30]

Sanctions: *Zubulake V* and *Montreal Pension*

The issue of sanctions rose to the forefront in *Zubulake V*. After the *Zubulake IV* depositions were completed, it was clear that many critical e-mails were deleted, never produced, and lost forever. The court held that both UBS and its counsel failed to hold and produce relevant evidence, which prejudiced Ms. Zubulake, noting the interplay between the client and counsel:

> A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.[31]

The court suggested three steps that counsel "should take to ensure compliance with the preservation obligation": issuing a timely litigation hold, communicate directly with the "key players," and instruct all employees to produce electronic copies of the relevant, active files.[32] Practitioners who find themselves in actual or potential litigation where ESI is a factor are

well-advised to take these three steps and "get ahead" of e-discovery before running the risk of sanctions.

The court held that "the duty to preserve and produce documents rests on the party," and since UBS had continued to delete relevant e-mails beyond when the duty to preserve attached, they willfully destroyed potentially relevant information, warranting an adverse inference instruction.[33] Not surprisingly, in large part because of the sanction, Ms. Zubulake prevailed at trial, and UBS was directed to pay her $29.3 million—a hefty price to pay for deleting e-mails.

Sanctions once again became a key issue before the same court when Judge Scheindlin revisited the state of e-discovery in *Univ. of Montreal Pension Plan v. Bank of America Securities, LLC*,[34] which she titled "*Zubulake* Revisited: Six Years Later." *Montreal Pension* was a fairly complicated case with 96 plaintiffs suing concerning the loss of over half a billion dollars from the liquidation of two funds in the British Virgin Islands. During discovery, the defendants claimed they found substantial gaps in some of the plaintiffs' document productions. Depositions were held, after which defendants moved for sanctions, alleging that 13 plaintiffs failed to preserve and produce documents and submitted false declarations concerning their collection and preservation efforts.[35]

In *Montreal Pension*, the court found that plaintiffs "failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after their duty to preserve arose."[36] This led to the court to consider two key issues:

1. **Level of Negligence**. The court noted that ordinary negligence is a "failure to conform" to the standards "set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding."[37] (Artfully, Judge Scheindlin noted that someone is negligent even if the conduct "results from a pure heart and an empty head.")[38] By contrast, gross negligence is failing "to exercise even that care which a careless person would use." Willful negligence goes a step further, and is "an act of unreasonable character in disregard of a known of obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."[39]

Helpfully, the court provided examples of each form of negligence. Actively destroying documents is willful negligence.[40] Failing to issue a written litigation hold is gross negligence, as it is "likely to result in destruction of relevant information."[41] Failing to obtain ESI from all employees, take all measures on ESI, or use proper search terms is ordinary negligence.[42] The tricky line is the destruction of backup tapes or the failure to collect ESI from key players: this could be either willful or gross, depending on the circumstances.[43]

2. **Burden of Proof and Sanctions**. As every litigator knows, a case's success can turn on who bears the burden of proof. Here, the court creates multiple standards for the burden of proof on sanctions motions, holding that it "differs depending on the severity of the sanction."[44] For less severe sanctions (such as money), the court will focus on the conduct of the spoliator and whether there was any relevance to the documents that were destroyed.[45] However, if the party is seeking a severe sanction such as dismissal or striking a pleading, then the innocent party has the burden of showing that the spoliator had control of the evidence, acted with a culpable state of mind, and that the missing evidence was relevant to the claim or defense.[46]

As to the relevance prong, the court looked back to *Zubulake* and noted that relevance *and* prejudice may be presumed if the spoliator acted in bad faith or was grossly negligent.[47] If it was just "regular" negligence, then the innocent party must go the extra mile and show via extrinsic evidence that the destroyed evidence would have been *favorable* (not just relevant) to the claim or defense. Moreover, even if the negligence were gross, the presumption can be rebutted by showing that there was no prejudice.[48] The court's goal is clear:

> The party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a "gotcha" game rather than a full and fair opportunity to air the merits of a dispute.[49]

Ultimately, the court noted its reluctance to hand out sanctions, because it "divert[s] court time from other important duties—namely, deciding cases on the merits."[50] Indeed, the *Montreal Pension* court estimated that it spent 300 hours on this motion alone.[51] Hence, the court noted that the goal is to reach a balance between keeping parties in line but keeping sanctions applications from becoming common, which it concluded, "is not a good thing."[52]

Predictive Coding: *Da Silva Moore* and *Delaney*

Preserving and collecting ESI is only one step in the e-discovery process. Equally critical is reviewing the ESI for responsiveness and producing it. No attorney has ever reveled in document review, but e-discovery adds the complicating factor of volume. Clients will often provide their attorneys with millions of ESI documents, which must then be sifted for responsiveness and privilege. Even putting aside the attendant boredom and indifference to reviewing over a million documents manually, doing so is woefully

ineffective. A 1985 study showed that attorneys wildly overestimate their ability to find responsive documents on manual review.[53] Later studies have shown that the level of agreement for manual review is approximately 70-75%, disproving the notion that human review of documents is the "gold standard."[54]

One of the most innovative developments in e-discovery is predictive coding, the most common method of automating ESI review. To make predictive coding work, the attorneys will review and code an initial group of documents (the "seed set") to "train" the computer by telling the computer which of the documents in the seed set is and is not responsive. The computer "learns" from the seed set, and applies this "knowledge" to the remaining documents to determine what is and is not relevant. Once this has been done, the attorneys will manually review sample responsive and non-responsive results to determine whether the computer review reached a predetermined "confidence level." If it has not, then the seed set and algorithm will be refined to produce a response with an increased confidence level.

Predictive coding sounds a bit like hocus-pocus and a recipe for mistakes. However, it is less foreign than it sounds: anyone who uses e-mail has inadvertently bumped up against predictive coding, which is how your spam filter works. While there will be a larger upfront expense to code and teach the computer, on a large enough set of documents, it is almost certainly more cost-effective than having attorneys and paralegals bill hourly at an inferior success rate.

Predictive coding first gained acceptance in *Da Silva Moore v. Publicis Groupe*,[55] where Magistrate Judge Andrew Peck encouraged the parties to use predictive coding. *Da Silva Moore* contains a fairly extensive review of the process used to try to narrow the universe of responsive documents from three million. Judge Peck noted that predictive coding has two enormous benefits:

1. It greatly reduces the amount of manual review that needs to be done by attorneys, as "technology-assisted review requires, on average, human review of only 1.9% of the documents."[56]

2. Keyword searches, the default for document review, are of limited utility because they are often over-inclusive and yield too many non-responsive documents. Equally problematic, "the way lawyers choose keywords is the equivalent of the child's game Go Fish," as the requesting party selects words "without having much, if any, knowledge of the responding party's 'cards.'"[57]

Ultimately, the court determined that predictive coding was the proper approach for sifting through the vast quantity of documents, holding:

> Computer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases. While this Court recognizes that computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection. Courts and litigants must be cognizant of the aim of Rule 1, to "secure the just, speedy, and inexpensive determination" of lawsuits.[58]

However, a key to predictive coding is transparency and cooperation between the parties. The pitfalls of conducting predictive coding without transparency was made apparent in the Nevada case *Progressive Casualty Ins. Co. v. Delaney*.[59] In a declaratory judgment action concerning failed banks in multiple jurisdictions, the parties submitted a Joint ESI Protocol that the court approved and so-ordered. In the first search, Progressive collected approximately 1.8 million ESI documents. Using search terms set forth in the Joint ESI Protocol reduced it to "merely" 565,000 documents, which, as Thomas Jefferson said, "is too many damn pages for any man to understand."[60] Progressive's attorneys attempted a manual review, but determined after 125,000 documents that it was simply too voluminous.

Progressive then decided to unilaterally ignore the Joint ESI Protocol and turn to predictive coding, which narrowed the field from 565,000 to 90,575 "potentially relevant" documents.[61] Progressive further noted that adding a "privilege" filter identified approximately 27,000 documents as "more likely privileged," and proposed manually reviewing these documents while producing the remaining 63,000 documents without manual review, subject to a clawback agreement.[62]

The issue raised in opposition was the lack of transparency behind Progressive's predictive coding. While the search terms that reduced the universe of documents from 1.8 million to 565,000 was established in the Joint ESI Protocol, the defendants had no way of knowing what method was used to "seed" and "teach" the predictive coding system, nor would plaintiffs give this information, claiming it was discovery about discovery.[63] The court took a dim view of this reluctance, noting that "courts which have allowed predictive coding...have emphasized the need for cooperation and transparency in adopting predictive coding processes and methods."[64] The court explained transparency was necessary because predictive coding was vulnerable to the "garbage in, garbage out" phenomenon:

> Predictive coding, or technology assisted review, uses software that can

> be trained by a human being to distinguish between relevant and non-relevant documents. However, the quality of its product depends on the quality of the information used to "train" the software.[65]

As Progressive's lack of transparency failed to "comply with [its own expert's] recommended best practices," the court determined that allowing secretive predictive coding "will only result in more disputes."[66] Because Progressive ignored the discovery Order, the court directed them to run a filter for privilege, but otherwise, to produce all of the 565,000 emails on the basis that transparency trumps work product.[67] While this appears to have been a victory for the defendants, it is arguable that they were punished, as it now became their burden to review over half a million ESI documents.

Conclusion

E-discovery presents issues that require careful attention by all practitioners to the management, collection and dissemination of their ESI. A future article will discuss how the Surrogate's Courts have treated ESI and e-discovery, and explore the contours of the practitioner's obligations to preserve and produce ESI.

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1. Fed. R. Civ. P. 34(a)(1)(A).
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3. https://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf.
4. 217 F.R.D. 309 (S.D.N.Y. 2003).
5. Specifically: 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*"); 230 F.R.D. 290 (S.D.N.Y. 2003) ("*Zubulake II*"); 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*"); 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*"); 229 F.R.D. 422 (S.D.N.Y. 2004) ("*Zubulake V*").
6. *Zululake I,* 217 F.R.D. at 312.
7. *Id.* at 312-13.
8. *Id.* at 313.
9. *Id.*
10. *Id.*
11. *Zubulake I,* 217 F.R.D. at 324.
12. *Id.*
13. *Zubulake III,* 216 F.R.D. at 283.
14. *Id.* at 290.
15. *Zubulake IV,* 220 F.R.D. at 215.
16. *Id.*
17. *Zubulake IV,* 220 F.R.D. at 217.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Zubulake IV,* 220 F.R.D. at 218.
25. *Id.*
26. *Zubulake IV,* 220 F.R.D. at 219-220.
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28. *Id.* at 221.
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30. *Id.* at 222.
31. *Zubulake V*, 229 F.R.D at 433.
32. *Id.* at 433-34.
33. *Id.* at 436.
34. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
35. *Montreal Pension,* 685 F. Supp. 2d 462-63.
36. *Id.* at 463.
37. *Id.* at 464.
38. *Id.*
39. *Id.*
40. *Montreal Pension,* 685 F. Supp. 2d at 465.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Montreal Pension,* 685 F. Supp. 2d at 467.
45. *Id.*
46. *Id.*
47. *Id.*
48. 685 F. Supp. 2d at 468-69.
49. *Id.* at 468.
50. *Id*. at 471.
51. *Id.*
52. The least interesting part of *Montreal Pension* is how it was resolved, as the court meted out particularized penalties and judgments for each of the thirteen plaintiffs over the course of sixteen pages, which mattered to the litigants, but had little precedential value.
53. David E. Blair & M.E. Maron. *An Evaluation of Retrieval Effectiveness for a Full-Text Document Retrieval System*, Communications of the ACM, Vol. 28, Issue 3 (1985).
54. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. Tech. 11, (2011); Herbert L. Roitblatt, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. Am. Soc'y for Info. Sci. & Tech. 70 (2010).
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56. *Da Silva Moore,* 287 F.R.D. at 190.
57. *Id.* at 191.
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59. 2014 WL 3563467 (D. Nevada 2014).
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61. *Progressive* at *2.
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63. *Id.* at *9.
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First Things First: Addressing Burial and Cemetery Issues

By Raymond M. Planell and Matthew G. Parisi

From time to time trust and estate attorneys find it necessary to delve into the laws, regulations and rulings regarding cemetery matters, particularly if there is a dispute among a decedent's family members regarding the proper disposition of a decedent's remains or a need to determine the unique rights and responsibilities of various parties having an interest in a cemetery lot. The following is an outline of some of the most frequent issues that arise and the principles that apply in resolving these issues.

I. Control of the Disposition of the Decedent's Remains

An initial question in many disputes involves the identification of the person who has the right to control the disposition of the decedent's remains. Section 4201 of the Public Health Law (PHL) provides the list "in descending priority" of those with "the right to control." A person designated in a written instrument executed by the decedent has the highest priority. PHL § 4201(3) provides a form of designation and also recognizes a designation by Will "in the absence of a written instrument made pursuant to subdivision three."[1]

In lieu of a written designation, the priority list grants the right of control first to the surviving spouse, then a surviving domestic partner (as defined by statute), then any child over the age of eighteen years, then either of the decedent's parents and next to any of the decedent's siblings over the age of eighteen years. After close family, the priority list continues with the decedent's guardians (Articles 17 or 17-A of the Surrogate's Court Procedure Act (SCPA) or Article 81 of the Mental Hygiene Law), intestate distributees (after siblings), the fiduciary of the decedent's estate, a "close friend or relative" and finally, a public administrator or others appointed pursuant to Article twelve or thirteen of the SCPA.

Despite this clear statutory priority list, disputes may arise. This is particularly so where several persons with equal priority (several children, for instance) fail to agree, or the validity of a written designation is challenged, or several persons claim to be the surviving spouse or domestic partner. The statute requires all such disputes to be "resolved by a court of competent jurisdiction pursuant to a special proceeding under article four of the civil practice laws and rules."[2] It also contains provisions that allow cemeteries, funeral homes and others to rely upon statements of persons claiming the right to control.[3] Importantly, the statute also authorizes those providing services relating to the disposition of a decedent's remains to refuse to provide services if there is a dispute regarding control:

> No person providing services relating to the disposition of the remains of a decedent shall be held liable for refusal to provide such services, when control of the disposition of such remains is contested, until such person receives a court order or other form of notification signed by all parties or their legal representatives to the dispute establishing such control.[4]

The application of PHL § 4201 was discussed in *Mack v. Brown*.[5] The decedent's body had been cremated pursuant to an authorization signed by a woman (Brown) who identified herself as the decedent's surviving spouse. Another woman (Mack) also claimed to be the decedent's surviving spouse. Mack and the decedent's issue commenced the action to recover damages for emotional distress. One of the defendants, Green-Wood Cemetery, had disposed of the decedent's remains in accordance with the wishes of Brown, before learning that the decedent may have instead been married to Mack at the time of his death. Green-Wood Cemetery appealed the order of the Supreme Court, Kings County, which denied its motion for summary judgment. The Appellate Division reversed, providing, in pertinent part, that:

> We need not determine, however, whether the marriage between the decedent and Brown was void. Green-Wood's liability does not depend upon whether Brown's marriage is void, but instead depends upon whether its own actions were taken 'reasonably and in good faith' (Public Health Law §4201 [7]) under the circumstances.
>
> The clear intent of the statute is, *inter alia*, to shield cemeteries, crematories,

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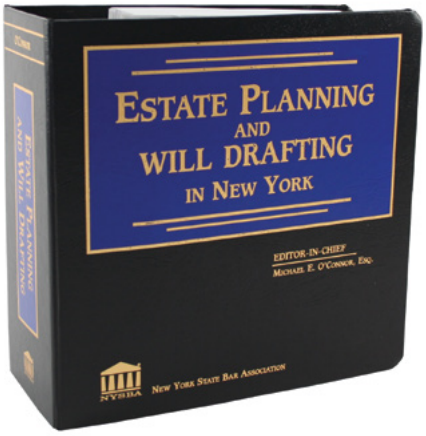

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Addressing Burial and Cemetery Issues

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> and funeral firms from civil liability, so long as they reasonably rely in good faith upon the directions of persons with apparent authority to control the disposition of human remains, and obtain the documentation set forth in the statute. The Legislature, in enacting the 2005 version of Public Health Law §4201, effective August 2, 2006, could not have intended for cemeteries, crematories, and funeral firms possessed of duly-executed authorizations, death certificates, and related documentation, such as Green-Wood was here, to cross-examine grieving widows or widowers, children, parents, siblings, or others to confirm the validity of the familial or personal status claimed under the Public Health Law, or to conduct independent investigations of such persons to protect themselves from potential liability. Naturally, if a cemetery, crematory, or funeral firm receives incomplete or suspicious documents or other information that would cast doubt upon an individual's authority to control a decedent's remains, further inquiry would be indicated. Here, however, the plaintiffs proffered no evidence in admissible form to suggest that Green-Wood had any reason not to rely upon Brown's seemingly valid authorization and marriage certificate naming her as the decedent's surviving spouse. To require Green-Wood to conduct further examination or investigation of Brown's marital status would render meaningless the civil liability protections now afforded to it by Public Health Law §4201. Consequently, the Supreme Court should have granted Green-Wood's cross motion for summary judgment dismissing the complaint insofar as asserted against it.[6]

II. Control of the Memorial

The person with the right to control a decedent's remains also has the right to arrange for memorialization. The Rules of the New York State Cemetery Board provide, in pertinent part, that the "right to memorialize . . . shall belong to the person having the right to possession of the body."[7] Any memorialization must comply with the cemetery's specific rules and regulations. When memorialization cannot be agreed upon by those with equal priority, a Court proceeding would be required to resolve the dispute.

III. Burial Rights and Control of the Place of Burial

Sometimes, the person in charge of the decedent's remains will arrange for a place of burial to be purchased post-mortem. However, in many cases, the decedent may have burial rights that were acquired (1) by pre-death purchase, (2) pursuant to statute or (3) as a result of designation by those controlling the burial rights. The statutory framework for these rights with respect to cemeteries regulated by the State Cemetery Board is found in NPCL Article 15.

NPCL § 1502(e) sets forth the fundamental concept that a person who purchases a cemetery lot acquires the "right of use thereof for burial purposes," not fee simple title. "It is an established principle that the purchaser of a cemetery lot does not acquire a fee title, but a right, in the nature of an easement, to use the lot for purposes of interment . . . ."[8] Consequently, the applicable statute provides that a "deceased person shall have the right of interment in any lot, plot or part thereof of which he or she was the owner or co-owner at the time of his or her death . . . ."[9] Spouses, children and parents of a living owner also have burial rights "without the consent of any person" claiming an interest in the lot. Those rights, however, can be superseded in certain cases if the owner files an objection at least 30 days prior to the death of a spouse, child or parent who would otherwise have burial rights.

A surviving spouse of a deceased owner also has burial rights in the lot and "shall have in common [with the owners of the lot] the possession, care and control of such lot . . . ."[10] A deceased owner's interest will pass to his or her surviving joint tenant(s), or tenant by the entirety, if any, or, if none, will pass to his or her devisees, if "effectually devised" or, if not, to his or her descendants, or if none, to the surviving spouse, or, if none, to his or her intestate distributees.[11] A devise is effectual only "if the lot . . . is specifically referred to [in the deceased lot owner's Will]."[12]

This latter provision gives rise to family disputes when it is assumed by a residuary beneficiary under the lot owner's Will that he or she is entitled to ownership of the cemetery lot. The issue is particularly acute when the surviving spouse is the residuary beneficiary, but learns that the children have become the actual owners of the lot. A surviving spouse may not want to share "possession, care and control" of the lot, particularly if the decedent's children are children of a prior marriage.

For example, in *Hammerstein v. Woodlawn Cemetery*, the plaintiff surviving spouse and sole beneficiary of the deceased purported owner's Will had not "as she claims, succeeded to the rights of her late husband under his Will" because "no interest in the cemetery lot devolved on the plaintiff" under her husband's Will since the Will did not provide a specific reference to the lot.[13] Despite this statutory rule, however, the Court of Appeals in *Saulia v. Saulia*[14] determined that a Will which specifically devised a cemetery lot to a surviving spouse also should be construed to continue burial rights for the decedent's son from a prior marriage. The Court held that "whatever power and rights were conferred by the devise did not include destruction of the statutory right of burial that the son possessed until his father's death. Thus analyzed, while the widow retains the ownership of the plot and the possession, care and control, the son has a right to be buried in the plot."[15]

Cemeteries will often require lot owners to provide an affidavit, commonly referred to as an "Affidavit of Heirship," certifying those "entitled to the possession, care and control" of the lot if more than one person is so entitled.[16] Generally, the affidavit is provided when a lot owner dies and his or her interest passes to devisees, descendants or other distributees. Likewise, if a lot is purchased post mortem, the executor or administrator "shall . . . file with the corporation, an affidavit setting forth the names and places of residence of all of the decedent's distributees . . . ."[17] The cemetery is entitled to rely upon the truth of the statements contained in such an affidavit.

Those with "possession, care and control" of a lot have the right to select monuments, plants, shrubs and flowers for the lot, subject to the cemetery's rules and regulations (and any rights of memorialization of a person having control of the decedent's body). They also have the right to designate those who will have interment rights or restrict those who will have ownership rights. NPCL § 1512(f) allows lot owners and surviving spouses with a right of interment, to:

> (A) designate the person or person or class of persons who may thereafter be interred in said lot or in a tomb in such lot and the places of their interment; (B) direct that upon the interment of certain named persons, the lot or tomb in such lot shall be closed to further interments; (C) direct that the title of the lot shall upon the death of any one or more of the owners, descend in perpetuity to his or her or their distributees, unaffected by any devise.

Designations are frequently used to restrict burial rights to specific persons, to the exclusion of others who may otherwise, by virtue of statutory provisions, acquire burial rights and/or succeed to ownership rights. For example, in *Application of Von Gross*,[18] the Court found that an owner's friend, whose remains were interred at the request of the owner who died subsequently, could not be removed to provide space for the owner's spouse and children to be buried in the lot. The Court held that "if, as provided by statute…, the decedent could in his lifetime have designated in writing the names of those to be buried in his plot, even after his death, then certainly it is in accordance with the statutory scheme that the decedent have the power to accomplish the same objective by his unequivocal act during his lifetime of interring the remains of his friend in his cemetery plot."[19]

IV. Disinterment: Exercising a Benevolent Discretion

The *Von Gross* opinion also reviews precedents regarding disinterment applications and provides the following quotation found in *In re Currier (Woodlawn Cemetery)*:[20]

> The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned… While the disposition of each case is dependent upon its own peculiar facts and circumstances and while no all-inclusive rule is possible, the courts, *exercising a "benevolent discretion,"* will be sensitive "to all those promptings and emotions that men and women hold for sacred in the disposition of their dead." . . . *And looming large among the factors to be weighed are the wishes of the decedent himself*.[21]

NPCL § 1510(e) provides the statutory requirements for disinterment. Removal is permitted with the consent of the cemetery, the lot owners, and the spouse, children (if of full age) and parents of the decedent. "If the consent of any such person or of the corporation cannot be obtained, permission by the county court of the county, or by the supreme court in the district, where the cemetery is situated, shall be sufficient."

At times, the cemetery may oppose a disinterment, thus requiring a Court Order, in an effort to honor the decedent's wishes, despite the contrary wishes of surviving family members. *In re Currier (Woodlawn Cemetery)* held in favor of the family and against Woodlawn Cemetery in such a circumstance, referring to the cemetery as "at best, a formal party."[22] Judge Conway's dissent, however, cited *Smith v. Green-Wood Cemetery*,[23] wherein an application of the grandchildren of the original owners seeking to disinter the remains of the original owners and their son and daughter was

denied. The Supreme Court opinion noted that the cemetery refused to consent to the disinterment (which consent was required by the cemetery's rules) and stated that there "can be no question about the intention of the purchaser of the plot to procure for himself and the members of his family a final resting place, and I can see no substantial reason why his wishes should not be respected."[24] Similarly, in *Brand v. Elmwier Cemetery Assoc.*,[25] the cemetery refused to consent to a surviving spouse's application to remove the remains of her deceased husband's first spouse. The Supreme Court held that the wishes of the deceased husband could not be overridden by the second spouse's desire to be buried side by side with her husband and daughter.

A Court Order will also be required if the person whose remains are sought to be disinterred has no surviving spouse, children or parents. Justice DiBella so held in *In re Stewart Bauman*[26] in which he denied petitioners' application to disinter and transfer the remains of petitioners' great-grand aunt. The Court described petitioners' rationale and the Court Order requirement as follows:

> Petitioners seek to remove the body of their great grand Aunt, Marion Stewart, from its present place of burial in Grave 6 and to transfer and inter her body in the same lot to Grave 4. A court Order is required because there is no surviving spouse, child or parents of the deceased to give consent. See Section 1510(e) of the New York Not-For-Profit Corporation Law. If granted this relief, petitioners would thereafter disinter their father Leslie Stewart Jr. from Grave 4 and re-inter his body in Grave 6. This would leave room for the eventual burial in Grave 6 of Gillian Stewart, the second wife of Leslie Stewart Jr.[27]

V. Transfers of Burial Lots

In addition to being subject to a cemetery's rules and regulations (which must be approved by the New York State Cemetery Board if the cemetery is subject to State regulation) and New York's statutory disinterment requirements, a lot owner's rights are limited with respect to conveyances or resales. The general statutory rules state that: (1) only cemetery corporations may sell or convey cemetery lots;[28] (2) it is unlawful to purchase a cemetery lot for purposes of resale;[29] and (3) after a burial in a lot, the lot is inalienable.[30]

Several exceptions to these general statutory rules are likewise contained in Article 15: (1) a membership or religious corporation or unincorporated association or society which provides burial benefits for its members may purchase cemetery lots in bulk and resell these rights to its members; (2) before a burial in the lot (or after removal of all bodies) and assuming that the original purchase was not made for the purpose of resale, a lot owner may sell or convey the lot, subject to the cemetery's right of first refusal to re-purchase the lot for a price equal to the price paid by the lot owner together with simple interest at the rate of four percent per annum; (3) even after a burial in a lot, a sole owner may "give his entire interest, or, if not prohibited by the rules and regulations of the cemetery corporation, any portion thereof to any person within the third degree of consanguinity to the owner, or, in the event that no such person exists, within the fourth degree of consanguinity to such owner"; and (4) an owner may release his or her interest to other owners.[31]

The provisions of NPCL § 1513(c) regarding a cemetery's right of first refusal have been challenged on the basis that they are "confiscatory because the price of the plot as determined by the statute is far below the market price."[32] Nonetheless, Federal District Judge Weinstein held that NPCL § 1513 (c) "is a valid exercise of the state's police power. The legislature could rationally have believed it necessary to prevent the commercial exploitation of cemetery plots intended to be devoted to eleemosynary purposes."

The inability of a lot owner to exploit ownership of a cemetery lot for commercial purposes is implicitly recognized by the Internal Revenue Service in Treas. Reg. § 20.2033-1(b), which provides in pertinent part that: "A cemetery lot owned by the decedent is part of his gross estate, but its value is limited to the salable value of that part of the lot which is not designed for the interment of the decedent and the members of his family."

Lot owners (or their attorneys) sometimes seek to arrange for lot ownership rights to be transferred to a trust. NPCL Article 15 does not appear to permit trust ownership since, as noted by the Court of Appeals in *Saulia v. Saulia*, "ordinary concepts of title, ownership and devolution of title applicable to real property do not apply to cemetery plots."[33] Simply put, the statutory framework which governs the rights of lot owners only makes sense if lot owners are individuals who obtain burial rights for themselves, and those related to them or designated by them.

VI. Tax Impact of Payments to Cemeteries

Lot owners often ask whether payments to cemeteries are tax deductible. All New York-regulated cemeteries are required to be not-for-profit[34] and, consequently, should be tax exempt under Internal Revenue Code (IRC) § 501(c)(13). IRC § 170 (c)(5) allows for the income tax deduction of contributions to a § 501(c)(13) cemetery if the funds are dedicated to the care of the cemetery as a whole and not for the purchase or care of a specific lot. Conversely, IRC § 2055 (estate tax) and §

2522 (gift tax) do not have provisions similar to § 170(c)(5) so bequests and gifts to non-religious cemeteries are not deductible with respect to those taxes.[35] But, "reasonable expenditure for a tombstone, monument, or mausoleum, or for a burial lot, either for the decedent or his family, including a reasonable expenditure for its future care may be deducted" as a funeral expense for estate tax purposes, if the expenditure is allowable under local law.[36]

VII. Conclusion: Consider Burial Issues as Part of a Client's Estate Planning

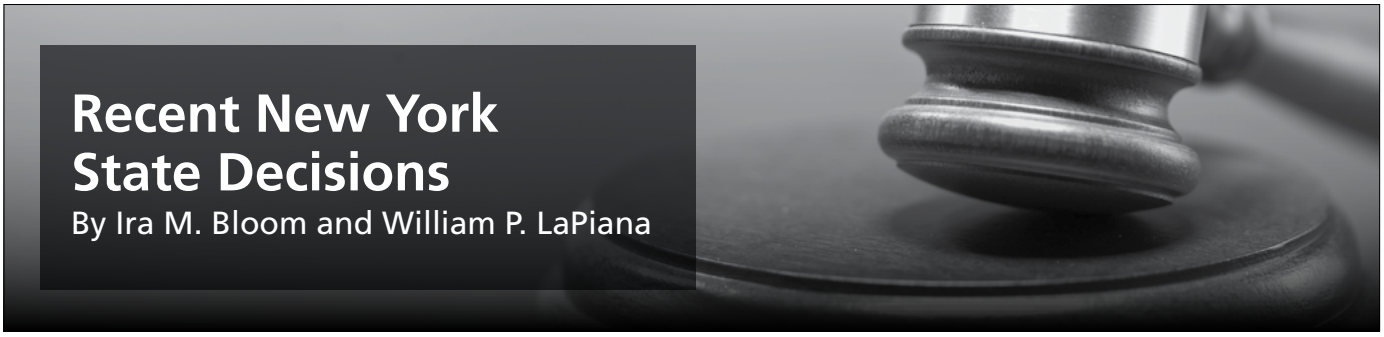
As with other planning issues, consideration of the alternatives and the execution of appropriate documents in advance will generally avoid disputes regarding the rights and responsibilities of lot owners and their family members. A situation that most families will want to avoid is a failure to provide enough space for all those who wish to be interred in the family lot. A March, 2000 Bulletin issued by the New York State Division of Cemeteries provides the following tongue-in-cheek description of the problem:

> If all the grave spaces in a lot are occupied, bodies cannot be removed to "make room." When there is only one vacant grave and several "co-owners," the logical policy is "first-come/first-served." Our division often finds itself embroiled in family disputes where "ownership" of a single (remaining) grave is challenged. The only way these issues can be resolved to the satisfaction of a complainant is for him or her to "pass away" and fill the grave before anyone else in the family. When informed about the laws of ownership and the first-come/first-served nature of lot ownership, these complaints are quickly withdrawn!

Further information regarding many of the cemetery issues described in this article is available on the website of Division of Cemeteries: www.dos.ny.gov/cmty. Attorneys may also contact the New York State Association of Cemeteries (website: www.nysac.com) for guidance and assistance.

Endnotes

1. PHL § 4201(4).
2. PHL § 4201(8).
3. PHL § 4201(7).
4. PHL § 4201(8).
5. 82 A.D. 3d 133, 919 N.Y.S.2d 166 (2d Dep't 2011).
6. *Id*. at 141,142.
7. Cemeteries, except municipal cemeteries, family or private cemeteries and those which are operated, supervised or controlled by religious corporations, are regulated by the New York State Cemetery Board, established by Section 1504 of the Not-For-Profit Corporation Law (NPCL). The State Cemetery Board operates within the Division of Cemeteries of the Department of State. 19 NYCRR § 201.15.
8. *Hammerstein v. Woodlawn Cemetery*, 21 Misc. 2d 42, 45, 194 N.Y.S.2d 385 (Sup. Ct., N.Y. Co. 1960).
9. NPCL § 1512(d).
10. NPCL § 1512(b).
11. *Id.*
12. *Id.*
13. *Hammerstein*, 21 Misc. 2d at 46.
14. 25 N.Y. 2d 80, 302 N.Y.S.2d 775 (1969).
15. *Id.* at 85.
16. NPCL § 1512(e)(1).
17. NPCL § 1512(c).
18. 56 Misc. 2d 275, 288 N.Y.S.2d 308 (County Ct., Orange Co. 1968).
19. *Id.* at 278.
20. 300 N.Y. 162, 90 N.E.2d 18 (1949).
21. *Id*. at 164 (emphasis added) (internal citations omitted).
22. *Id.*
23. 173 Misc. 215, 17 N.Y.S.2d 706 (Sup. Ct., N.Y. Co. 1940).
24. *Id.* at 216.
25. 59 Misc. 2d 408, 299 N.Y.S.2d 573 (Sup. Ct., N.Y. Co. 1968).
26. Sup. Ct., West. Co., Index No. 19442/08.
27. *See also In re Estate of Hyman Elman*, 152 Misc. 2d 656, 578 N.Y.S.2d 95 (Sup. Ct., Queens Co. 1991).
28. NPCL § 1513 (a) (1).
29. NPCL § 1513 (a) (2).
30. NPCL § 1512 (a).
31. NPCL § 1513.
32. *Warschauer Sick Support Society v. New York*, 754 F. Supp. 305, 307 (E.D.N.Y. 1991).
33. 25 N.Y. 2d 80, 85, 302 N.Y.S.2d 775 (1969).
34. NPCL § 1501 ("cemeteries shall be conducted on a non-profit basis").
35. *See* Rev. Rul. 67-170.
36. Treas. Reg. § 20.2053-2.



Recent New York State Decisions

By Ira M. Bloom and William P. LaPiana

Ira M. Bloom

ELECTIVE SHARE

Incorrect Statutory Reference and Lack of Disclosure Does Not Invalidate Waiver as Matter of Law

Surviving spouse's guardian filed a notice of election in the deceased spouse's estate. The executor commenced a proceeding to determine the validity of the election and guardian moved for summary judgment, which was denied. Guardian appealed and the Appellate Division affirmed. The guardian argued that a waiver, earlier executed in May 2012, was invalid because it referred to EPTL 5-1.1 and not to EPTL 5-1.1-A, it contained a false statement about the spouse's consultation with her attorney before executing the wavier, and the surviving spouse had not been provided any information on the extent and nature of the other spouse's assets.

The appellate court found that the mistaken reference to the statute was not a ground for invalidating the waiver. There was no basis to conclude that the surviving spouse was aware of the distinction between the two sections and the court agreed with the Surrogate that it would be "illogical" to conclude that the surviving spouse had intended to waive rights that did not exist. The surviving spouse had intended to waive all rights in the decedent's estate and the wavier as executed substantially complied with the statute.

Nor do the other argued grounds change the result. There is no requirement that a waiver be executed on advice of counsel or that the spouse waiving rights under EPTL 5-1.1-A be furnished with financial information. There are no grounds, therefore, to invalidate the wavier as a matter of law absent any proof of fraud or other misconduct. *In re Bordell*, 150 A.D.3d 1446, 55 N.Y.S.3d 762 (3d Dep't 2017).

RENUNCIATION

Renunciation Was Valid Because Person Renouncing Did Not Accept the Interest Renounced

Decedent died intestate. Decedent's parent qualified as administrator and was also decedent's sole distributee. Parent renounced all interest in the estate. Assuming a valid renunciation, the decedent's six nieces and nephews (the administrator's grandchildren) became the decedent's distributees. The administrator petitioned for approval of the account; the nieces and nephews objected and moved for summary judgment. The administrator cross-moved for summary judgment on the ground that the objectants lacked standing. The administrator argued that the renunciation was invalid because the administrator had directed that the interests of the nieces and nephews be placed in trust. The Surrogate agreed with the administrator and granted the cross-motion.

William P. LaPiana

The objectants appealed and the Appellate Department reversed. The court held that the renunciation was valid because the administrator failed to adduce any evidence that he had accepted an interest in the estate "by exercising control over it as its beneficial owner" prior to making the renunciation. The objectants therefore had standing as the decedent's distributees. *In re Kaplan*, 150 A.D.3d 852, 55 N.Y.S.3d 265 (2d Dep't 2017).

TRUSTS

Oral Agreement to Make a Will May Be Enforced but Not Under Facts of the Case

Decedent made an oral promise to two of decedent's grandchildren that decedent's will would include a provision directing the estate to discharge a mortgage on real property deeded to the grandchildren in which the decedent had reserved a life estate and a power of appointment, the objects of which were de-

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cedent's issue other than the two grandchildren. The proceeds of the mortgage were used to make gifts to decedent's relatives, including the two grandchildren. The donees then loaned their gifts to the business conducted on the real property. Eventually the business bought out the donees other than the grandchildren. The decedent made the promise at the request of the grandchildren, who saw their mortgage payments as subsidizing the gifts to the other family members.

Decedent did execute a will including a direction to the executor to discharge the mortgage, but two years later executed a new will that revoked the prior will and did not mention the mortgage. The later will was admitted to probate. Decedent never exercised the power of appointment and the grandchildren became the fee simple owners of the real property. The grandchildren filed a claim against the estate under SCPA 1803, which the executor rejected, and then began a proceeding under SCPA 1809 to determine that validity of their claim. Both the grandchildren and the executor moved for summary judgment, the grandchildren resting on the deposition testimony of the decedent's attorney recounting the promise and the inclusion of the provision regarding the mortgage in the prior will as fulfillment of the promise. The executor did not dispute the grandchildren's factual allegations but relied in part on an appraisal showing the value of the land was almost three times the outstanding mortgage.

Surrogate's Court granted the grandchildren's motion, holding that promissory estoppel required the result and a divided Appellate Division affirmed. The appellate court agreed with the executor that the decedent's promise was never reduced to writing and therefore enforcement would violate the Statute of Frauds and EPTL 13-2.1(a)(2), but the elements of promissory estoppel were met and application of the Statute of Frauds would be unconscionable.

The executor appealed to the Court of Appeals as of right. The high court reversed, for the first time expressly holding that promissory estoppel will allow a promise to be enforced notwithstanding the Statute of Frauds so long as the injury to the party who relied on the promise would be so great that enforcement of the Statute of Frauds would be "unconscionable." That test was not satisfied by the facts of this case. The grandchildren did not claim that their work maintaining the business carried out on the real property prevented them from pursuing other opportunities and, in any event, the work benefited them because it maintained the value of property they own. In addition, the value of the property exceeds the mortgage, there was no guarantee that the real property would have any particular value when the life estate came to an end, and had the decedent exercised the power of appointment the grandchildren would have no interest in the real property. *In re Hennel*, 29 N.Y.3d 487, 80 N.E.3d 1017, 58 N.Y.S.3d 271 (2017).

Child in Utero at Time of Class Closing Is a Beneficiary

Under the terms of the lifetime trust created by the decedent, the trust property not otherwise disposed of by the decedent is to be held in further trust for a class consisting "solely" of the decedent's great-grandchildren "living at the time of [the decedent's] death." Decedent died in 2005 without having disposed of the trust property so that the gift to the great-grandchildren took effect. In connection with the settlement of its account for the period January 1, 2012 through May 31, 2016, the corporate trustee asked for advice and direction on the status of the one of the decedent's great-grandchildren born five months after decedent's death.

The Surrogate found that the great-grandchild is a beneficiary. Under EPTL 2-1.3(a)(2) a class gift described in terms of family relationship includes members of the class in utero at the time the class closes if later born alive "unless the creator expresses a contrary intention." Cases have held that a limitation to class members living at the time the class closes does not express such an intention. In addition, the decedent did know how to limit class membership as shown by the terms of the trust excluding adopted persons from the class of "descendants" of any person, effectively overriding EPTL 2-1.2(a)(1), which includes adopted persons in the absence of expression of a contrary intention.

Because the Surrogate found that the language of the trust is unambiguous, the court rejected extrinsic evidence offered by those opposing the inclusion of the great-grandchild. The Surrogate likewise rejected the suggested construction of "living at the time of [the decedent's] death" as showing the decedent's intention that the class of beneficiaries include only those great-grandchildren alive at the decedent's death and with whom the decedent was personally acquainted. Such a construction would exclude a great-grandchild born shortly before the decedent's death at a distant geographical location, an untenable result. *In re Wolfenson 1999 Trust*, 57 Misc.3d 362, 56 N.Y.S.3d 848 (Sur. Ct., Erie Co. 2017).

WILLS

Otherwise Unfunded Back-up Testamentary Trust May Be Beneficiary of IRA

Testator executed a revocable trust and a pour-over will on the same day. The will included a "back-up" testamentary trust with terms identical to the lifetime trust. The nominated trustee of the testamentary trust is the beneficiary of the residuary disposition if the lifetime trust has terminated at the testator's death or is "ineffective for any reason." Less than a month before executing the will and trust, the testator had executed

an IRA beneficiary designation form making "the trust under my last will" the beneficiary. Ten days after the execution of the will and trust, the testator executed an IRA beneficiary designation identical to the first. The testator's spouse and child were the lifetime beneficiaries of the trust and the testator's grandchildren were the remainder beneficiaries.

At the testator's death the IRA was the only significant asset of his estate. The lifetime trust was in existence. The child petitioned for a determination that the testamentary trust was the beneficiary of the IRA. The Surrogate found otherwise because the testamentary trust had not come into existence, the condition on its creation not having been met. The Surrogate ordered the IRA be distributed to the surviving spouse as the default beneficiary.

The testator's child appealed and the Appellate Division reversed because the object of construction is to ascertain the decedent's intent and effectuate the will's purpose, an object which must be reached by considering the will as a whole and as manifesting a general testamentary scheme. Here, the intent as to who should receive the decedent's assets is clear, that is, that the child and spouse should benefit from the IRA according to their interests in the trust. The drafter of the will's deposition testimony was that the IRA was the only asset intended to fund the living trust. Since it was undisputed that the trust could not receive the IRA, it was ineffective "in carrying out the very purpose for which it was created." Under the terms of the will creating the testamentary trust, therefore, that trust "became available to receive the IRA proceeds." *In re Perlman*, 150 A.D.3d 1012, 57 N.Y.S.3d 54 (2d Dep't 2017).

Agreement Not to Revoke Cannot Be Enforced Before Survivor's Death Nor Does It Prohibit Inter-Vivos Transfers.

Decedent's child brought an action seeking an injunction preventing decedent's surviving spouse (also child's parent) from transferring property received by surviving spouse from decedent's estate and from executing any will or codicil, and for a judgment declaring null and void any transfers of property received from the decedent's estate and any will or codicil executed by the surviving spouse after decedent's death. The basis for the action was the written contract entered into by the decedent and the spouse in which they agreed to execute wills leaving all property to the survivor, and on the death of the second to die to the couple's issue. They further agreed not to revoke or modify the wills executed pursuant to the agreement or to execute any new will unless both parties agreed.

The Supreme Court granted the summary judgment motion by the surviving spouse, and the child appealed. The Appellate Division affirmed because the agreement does not forbid the survivor's making lifetime transfers, and because the law forbids the child from maintaining an action based on the agreement not to revoke or modify the will executed in conformity with the agreement, and not make a new will before the death of the surviving party to the agreement. *Tretter v. Tretter*, 150 A.D.3d 1039, 55 N.Y.S.3d 301 (2d Dep't 2017).

Restriction on Sale of Real Property Is Valid

Decedent's will devised real property to her four children subject to the condition that the property not be sold so long as any of her children are unmarried and an unmarried child resides in the property. When all of the children are married or when they all live somewhere other than the property, the property is to be sold and the proceeds divided equally among the decedent's four children.

Two of the children petitioned pursuant to SCPA 1420 for a construction of the will finding that the restrictions on the sale of the real property were invalid and that the four children were tenants in common in fee simple without any restrictions. The Surrogate denied the petitioners' motion for summary judgment. They appealed and the Appellate Division affirmed.

The appellate court found that the decedent's intent was to provide a home for her unmarried child or children until all her children married or resided elsewhere. Such a restriction is not an unreasonable restraint on alienation nor is it a restraint on marriage that violates public policy. *In re Bonanno*, 151 A.D.3d 718, 55 N.Y.S.3d 437 (2d Dep't 2017).

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

By Ilene Sherwyn Cooper

Disqualification of Counsel

Before the Surrogate's Court, Bronx County, in *In re Stanescu*, was a contested probate proceeding in which the objectant, one of the decedent's two sons, moved to disqualify counsel for the petitioner, who was the nominated executor under the propounded will and nominated successor trustee of the decedent's revocable trust.

The decedent died survived by two sons and a daughter. Approximately two months before her death, she executed a will that directed that the residue thereof pour over into an inter vivos trust executed on the same day. Both instruments were attorney drafted and supervised, and were witnessed by two attorneys and a paralegal from the drafting attorney's law firm.

In support of his motion for disqualification, the objectant alleged, *inter alia*, that counsel previously represented him in a substantially similar matter that related to the estate, that the interests of the petitioner and counsel were materially adverse to his interests, thereby creating a conflict of interest for the firm, and that counsel assisted the petitioner in shielding income belonging to the decedent's estate. In opposition to the motion, counsel asserted that it never represented the objectant in any matter, and that the same issue was decided against disqualification in a Supreme Court action involving the objectant and the same facts. Counsel further noted that objectant's motion was brought more than five years after the commencement of the proceeding, and, thus, was designed solely to delay the matter and harass the petitioner.

The court opined that a party's entitlement to counsel of his or her own choosing should not be abridged absent a clear showing that disqualification is warranted. A party seeking to disqualify an attorney or law firm must establish the existence of a prior attorney-client relationship, and that the former and current representations are both adverse and substantially related. Based on these criteria, the court found that although the interests of the proponent and objectant were adverse, there was no evidence, in the form of a written retainer agreement or otherwise, that counsel ever represented the objectant previously. In view thereof, as well as the objectant's delay and apparent tactical purpose in seeking disqualification, the objectant's motion was denied.

***In re Stanescu*, N.Y.L.J., May 26, 2017, p.23, col. 3 (Sur. Ct., Bronx Co.).**

Motion to Strike

In a contested probate proceeding, the objectant moved to dismiss the petition on the grounds that the proponent had failed to comply with disclosure directed in a prior court order, and a direction that he pay costs for a stenographer and transcript arising from the SCPA 1404 examinations of attesting witnesses. The objectant was the decedent's daughter and sole distributee of the decedent's estate, but was not a beneficiary under the propounded will. She served pre-objection disclosure demands on the proponent, and received largely unresponsive answers. In addition, the attorney-draftsman of the will was uncooperative during the course of his SCPA 1404 examination.

The court directed the proponent to pay the stenographer's invoice, including one copy of the transcript of each of the two attesting witnesses. Further, although the court noted that it was unclear whether proponent was willfully refusing to provide the requested documents, it granted objectant's motion to the extent of directing proponent to produce the requested documents, or risk the striking of the probate petition upon a failure to comply.

***In re Dziubkowski*, N.Y.L.J., June 19, 2017, p.31 (Sur. Ct., Kings Co.).**

Receipt and Release

In *In re Salz*, the Surrogate's Court concluded that the terms of a Receipt, Release and Indemnification Agreement executed by the petitioner barred her claims for an inquiry and turnover pursuant to SCPA 2103. The proceedings had been instituted against the decedent's surviving spouse, by one of the decedent's sons from a prior marriage, who was a beneficiary under his will. Notably, prior to the decedent's death, his spouse, who was his conservator, was the subject

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of a contested accounting proceeding, in which the propriety of her stewardship had been questioned by the petitioner and his brother. In pertinent part, they alleged that the decedent's spouse had failed to account for all of the artwork owned by their father. This litigation continued for several years after the decedent's death, at which time it was resolved pursuant to the terms of a "Stipulation of Settlement and Discontinuance," providing, *inter alia*, for the decedent's spouse to be released "individually and in her capacity as Conservator, and in any other capacity . . . from any and all claims which they now or ever had" upon her payment of a sum certain.

A year later, the co-executors of the decedent's estate, of which the decedent's spouse was one, accounted for their stewardship to the estate beneficiaries and the trustee of the trust created under the decedent's will. In connection therewith, the petitioner and his brother executed a receipt and release agreement that stated that they had examined the executors' account, found it to be complete, and "released and forever discharged the Executors, individually and as executors, from any and all claims and causes of action, liabilities and obligations whatsoever . . .".

Ten years later, the petitioner instituted the subject proceedings requesting an inquiry and turnover alleging, *inter alia*, that artwork was missing from the decedent's estate as a result of fraud and misconduct committed by the decedent's spouse.[1] The respondents moved to dismiss the proceedings, in pertinent part, on the grounds that petitioner's claims had been released. In granting the motion on this basis, as well as others, the court found that during the course of the co-executors' accounting, the petitioner, after having received and examined the account, and while represented by counsel, had released any claims and causes of action he had against the fiduciaries, in their representative capacity and individually. The court held that the broad language of the release, discharging the decedent's spouse from any claim petitioner had or could have, was sufficient to encompass any fraud claims. Further, the court concluded that petitioner's pleadings failed to identify a separate fraud from the subject matter of the release that could serve as a basis for a claim that the execution of the release was induced by fraud.

***In re Salz*, N.Y.L.J., July 27, 2017, p.22, col. 3 (Sur. Ct., N.Y. Co.).**

Receipt and Release

In *In re Lee,* the Second Department affirmed three decrees of the Surrogate's Court, Nassau County (McCarty III, S.) which granted the motions of the Bank of New York Mellon (BNY) and Merrill Lynch Trust Company ("Merrill Lynch") to dismiss the petitions for judicial accountings of four separate trusts, two testamentary trusts, and two inter vivos trusts, which had

been created by the decedent and his post-deceased spouse. The petitioners were beneficiaries of each of the trusts. Initially, BNY served as co-trustee of the trusts until it resigned and was succeeded by Merrill Lynch. Upon its resignation, the petitioners each executed a release in favor of BNY regarding its management of the trusts. Following the death of the decedents' son, and the succession by Merrill Lynch as trustee, all four trusts terminated, whereupon the petitioners each executed releases in favor of Merrill Lynch releasing it from any claims based upon its management of the trusts.

Approximately four years later, the petitioners instituted proceedings to compel BNY and Merrill Lynch to account with respect to each of the trusts. Motions to dismiss by the respondents were granted, and the petitioners appealed. Significantly, the Appellate Division held that the Surrogate's Court should not have dismissed the petitions against BNY on the basis that the claims asserted were barred by the releases, inasmuch as BNY failed to affirmatively demonstrate that all of the petitioners, who were not represented by counsel when the instruments were signed, were fully aware of the nature and legal effect of the releases at that time. Nevertheless, the court held that the Surrogate's Court had properly found that the claims against BNY for an accounting were time-barred, inasmuch as the claims for an accounting accrued when Merrill Lynch succeeded BNY as trustee in 2001 and 2002. Further, the court held that the Surrogate's Court had properly concluded that the claims against BNY were not tolled by fraud, and that the doctrine of equitable estoppel did not apply.

With respect to Merrill Lynch, the court held that the Surrogate's Court had properly determined that the releases executed by the petitioners were valid, inasmuch as upon executing the instruments the petitioners confirmed receipt of an informal accounting, and discharged Merrill Lynch from all liability and any claim for a formal accounting upon the advice of counsel and after negotiations.

***In re Lee*, 153 A.D.3d 831, --- N.Y.S.3d --- (2d Dep't 2017).**

Receipt and Release

Before the court in *In re Cozza* was a motion by the objectant/executor of the estate, who was one of the decedent's daughters, for summary judgment seeking dismissal of a proceeding instituted by her sister to compel her to account. In support of the motion, the executor submitted documentary evidence indicating that the petitioner had executed a receipt, release, waiver and refunding agreement after receiving an informal account prepared by the accountant for the estate. The informal account was supported by annotated schedules, and an acknowledgment by the petitioner that prior to signing the receipt and release she had been given the opportunity to consult an attorney and seek the advice of her own accountant, and to review and ask questions about the informal account. Additionally, the petitioner consented to the settlement of the executor's account and the entry of a decree judicially settling same without further notice to her.

In opposition to the motion, the petitioner claimed that she was caused to sign the release because she was in need of her inheritance, and acknowledged that she contacted the attorney and accountant for the estate prior to signing the document. Moreover, it appeared that she had been represented by her own counsel, albeit for a brief period of time.

Based on the record, the court found that the petitioner was provided with detailed information regarding the informal account, and had the benefit of her own counsel in advance of signing the receipt, release, waiver and refunding agreement. Thus, the petitioner had freely signed the document after being given the opportunity to consult professionals of her own choosing. Moreover, given the small size of the estate, the court found, in its discretion, that its best interest would not be served by requiring the executor to undertake the expense of a formal accounting proceeding.

Accordingly, the executor's motion for summary judgment was granted.

***In re Cozza*, N.Y.L.J., July 21, 2017, p. 25, col. 3 (Sur. Ct., Bronx Co.).**

Receipt and Release

In *In re Ingraham,* the Surrogate's Court, New York County, was confronted by a petition by the successor trustee of two separate inter vivos trusts to compel two former trustees of the trusts to account. One of the trustees, who had been removed by the Grantor, filed his accountings; the other trustee, who had resigned, objected to the petitions, relying on language in the trust instruments which she claimed relieved her of any duty to account, as well as releases executed by the Grantor and the other trustee.

At the time the objectant resigned, the Grantor executed instruments by which she was released from any and all claims related in any way to her role as trustee, with the exception of claims arising from fraud or willful misconduct. The release further acknowledged that the Grantor desired to forgo a formal account. The accounting trustee signed a similar release, and assented to any account (former or informal) rendered by the objectant. Further, it appeared that the terms of each trust instrument dispensed with the need for the trustees to file periodic judicial accountings.

The court held that the objectant's reliance on the releases to insulate her from her duty to account was

misplaced, inasmuch as the instruments reserved the releasors' rights to seek relief for any fraud or willful misconduct. Further, the court rejected any claim by the objectant that the releases relieved her of her duty to account, a responsibility that was incidental to the trustee's duty and fundamental to any fiduciary relationship. Indeed, the court found that while the release executed by the Grantor may have arguably consisted of a waiver of her right to an accounting, the court found that it did not constitute a clear and unambiguous waiver of an accounting by the other trustee and trust beneficiaries.

Additionally, the court held that the provisions of the trust instruments only exempted the objectant from filing periodic accountings, but did not relate to the final accounting sought by the proceedings. Finally, the court observed that where a former trustee has failed to account within a reasonable time and full releases do not relieve her of the duty to account, the court may *sua sponte* direct an accounting pursuant to SCPA 2205.

Accordingly, the objectant was directed to account with respect to each of the subject trusts.

***In re Ingraham*, N.Y.L.J., June 26, 2017, p. 22, col. 3 (Sur. Ct., N.Y. Co.).**

Surcharge

In *In re Colt*, the Surrogate's Court, New York County, exercised its authority to review *sua sponte* the fiduciary's commissions as executor and trustee.

Before the court were contested accountings of the fiduciary as executor of the decedent's estate and successor trustee of a revocable trust created by the decedent in 2006. Following the dismissal of certain objections and the withdrawal of others, the court held a hearing on the remaining issue of the legal fees payable to the fiduciary's counsel. The record at the hearing revealed that much of the work performed by counsel related to conflicting claims to the assets of the estate and trust. More specifically, it appeared that in 2004, the decedent had executed a pour-over will and revocable trust into which he transferred his condominium and brokerage account. Two years later, he executed the subject 2006 trust, as well as a new will, which, again, contained a direction that his residuary estate pour over into the trust. The 2004 trust and 2006 trust essentially had the same legatees, however, the beneficiaries of the decedent's residuary estate differed.

Significantly, the fiduciary was the draftsperson of both wills and trusts. Of equal note was the fiduciary's acknowledgment that the decedent intended his assets to pass pursuant to the 2006 trust, and his admission that he failed to have the decedent revoke the 2004 trust and fund the 2006 trust. Although the controversy regarding the rightful owners of these assets was settled, the court found that the decedent's estate had a claim against the fiduciary for the legal fees incurred to resolve the trust issues that arose from his failure to properly advise the decedent. Indeed, regardless of whether the statute of limitations on any claim for malpractice had expired or the fiduciary had been shielded from claims based upon the privity doctrine, the court concluded that the fiduciary's duty as executor required that he make the estate whole for the legal fees resulting from his negligence. His failure to fulfill this duty was exacerbated by his affirmative approval of the considerable legal fees incurred, which he apparently made no attempts to control.

In view thereof, the court held that the fiduciary had demonstrated a gross neglect of his duty and a substantial disregard of the rights of the beneficiaries, warranting a denial of his commissions both as executor and trustee.

***In re Colt*, N.Y.L.J., Apr. 14, 2017, p. 22, col. 2 (Sur. Ct., N.Y. Co.).**

Spoliation

In *Fischette v. Savino's Hideaway*, an action for personal injuries stemming from a fall on defendant's premises, the plaintiff moved for sanctions against the defendant for alleged spoliation of evidence, and sought an order for an adverse inference.

Following commencement of the action, plaintiff's counsel sent a form demand letter to defendant advising defendant that they believed that plaintiff's injuries were sustained as a result of defendant's negligence. The correspondence requested that defendant forward information pertaining to plaintiff's claim to defendant's liability insurance carrier. The letter did not make any demands or requests that defendant preserve or maintain any evidence pertaining to the claim.

During the course of discovery, an employee of the defendant, with knowledge of its video recorder and surveillance system, testified. According to his testimony, the surveillance system held two weeks' of footage at a time, which was reviewed on an ad hoc basis for theft or vandalism. The record indicated that one of the video cameras utilized by the defendant captured surveillance of plaintiff's accident scene. Nevertheless, it appeared that the footage had been erased or recorded over, since plaintiff's demand letter had not been received by defendant until well after two weeks from the incident.

As a result of the foregoing, plaintiff moved for sanctions, claiming that the defendant negligently allowed the destruction of the surveillance video. Plaintiff further argued that the video evidence was relevant and material to her claim since the lighting on the date

of her accident was a disputed issue that could have been resolved by the video, but for its destruction. In opposition, defendant alleged, *inter alia*, that because plaintiff had failed to provide it with reasonable notice of impending litigation, it was under no duty to preserve or retain the video evidence. As such, the defendant claimed that the video footage was destroyed pursuant to its ordinary course of business and protocol, and sanctions were therefore unwarranted.

The court opined that a party seeking sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and "'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support the claim or defense'" (citations omitted). The court noted that sanctions for spoliation may be warranted even if the evidence was destroyed in good faith before the spoliator became a party to the subject lawsuit, provided that it was on notice that the evidence might be needed for future litigation.

Within this context, the court found that while the plaintiff had sent a demand letter to the defendant, it was not received until almost 2 months had passed since the incident in question, and well after the video footage had been destroyed. Thus, the court held that plaintiff's letter was ineffective to provide defendant with reasonable notice of litigation intended to insure preservation of evidence. Moreover, and in any event, the court concluded that the language of the subject letter was insufficient to put defendant on notice for spoliation purposes, inasmuch as it made no reference to the video, or requested that it be preserved.

Accordingly, plaintiff's motion was denied.

***Fischetti v. Savino's Hideaway,* N.Y.L.J., June 27, 2017, p. 27 (Sup. Ct., Suffolk Co.).**

Suspension of Letters

In the context of a pending proceeding to revoke letters of administration, the court was confronted with an application for the immediate suspension of the fiduciary, and the issuance of limited letters to one of the decedent's distributees. The court noted that despite the fiduciary's claims of good faith, she failed to establish an estate account for estate assets, even after the proceeding for her removal was commenced. This, in addition to the apparent continued use of estate funds to pay her personal expenses, led the court to conclude that the fiduciary lacked the basic understanding of her duties as a fiduciary, and lent credence to the claims that she had commingled estate funds and had engaged in self-dealing. Accordingly, the application was granted, and the fiduciary's letters of administration were suspended.

***In re Barletta,* N.Y.L.J., June 23, 2017, p. 45 (Sur. Ct., Suffolk Co.).**

Vacate Decree

In *In re Bilde,* the court denied an application to vacate a decree of probate, finding that the movant failed to establish a valid excuse and absence of willfulness for her default, or a meritorious claim. The movant, who was the girlfriend of the decedent's late brother, resided at one of the properties that the executor of the probated will sought to sell. In response to an action for eviction, the movant claimed that she had been devised the subject property pursuant to the terms of a purported holographic will of the decedent's brother. The court found that there was no basis for probate of the holographic will, and that the mandates of EPTL 3-2.1 had not been satisfied. Accordingly, the motion was denied.

***In re Bilde,* N.Y.L.J., June 16, 2017, p. 33 (Sur. Ct., Suffolk Co.).**

Endnote

1. In the interim, the decedent's spouse died, resulting in the trustee of the inter vivos trust into which her estate passed on death being made a party to the proceedings.

Florida Update

By David Pratt and Jonathan A. Galler

David Pratt

DECISIONS OF INTEREST

Filing a Claim Before Filing a Lawsuit

Comfort Line sued the estate of Michael J.P. O'Brien and the company he founded, Oceantis, for patent infringement. The estate moved to dismiss the complaint because Comfort Line failed to file a claim against the estate in Florida probate court. Comfort Line, however, argued that federal patent law preempts Florida probate requirements on filing a claim against an estate.

The court granted the motion to dismiss. The court reasoned that section 733.702, Florida Statutes, provides that no cause of action against a decedent's will survive his death unless a claim is filed against the estate within specified periods. Further, a claim not filed is barred absent an extension by the probate court.

The court rejected Comfort Line's preemption defense because the federal law and Florida probate law do not stand in sharp conflict; it is possible to comply with both. Comfort Line could have filed a claim, and after the objection to the claim was asserted, it would then have been permitted to pursue its patent infringement claim in federal court.

Comfort Line Products, Inc. v. Oceantis LLC, 2017 WL 3582695 (M.D. Fla. 2017) (not yet final).

Standing to Revoke Probate

Appellant was one of three sons of the decedent, Leon Delbrouck. An ex-girlfriend of one of the other sons was the decedent's personal representative. Appellant filed a petition to revoke probate, alleging undue influence by the ex-girlfriend.

The ex-girlfriend, who was now the personal representative, filed and won a motion for summary judgment. She claimed that appellant lacked standing as an interested person because appellant was a one-third beneficiary of the estate, and he would have been a one-third beneficiary even if the decedent had died intestate. Thus, he was unaffected by the outcome of a petition to revoke.

But the appellate court reversed, finding that appellant was an interested person because he was a beneficiary and he would have been affected by a petition to revoke in that the personal representative would not, in such a case, have been nominated in a testamentary document by the decedent. Although the personal representative filed affidavits from the other two brothers showing that she would have been appointed nonetheless, this was not enough to dismiss appellant's claim—particularly in light of the fact that she was alleged to have unduly influenced the decedent.

Jonathan A. Galler

Delbrouck v. Eberling, 2017 WL 3727050 (Fla. 4th DCA 2017) (not yet final).

Standing to Pursue Wrongful Death Action

Robert Markland sued Insys Therapeutics for the wrongful death of his wife, Carolyn. Insys moved to dismiss the complaint because, among other things, Robert lacked standing as he was not the personal representative of his wife when he commenced the lawsuit, and only a personal representative can sue for wrongful death.

Robert conceded that he had already closed the estate by the time he filed, but he then went back to probate court and re-opened the estate. Although the Court ultimately dismissed the wrongful death action, it found that Robert did have standing to purse the lawsuit. The Court held that where the personal representative of an estate is appointed after the commencement of a wrongful death lawsuit, the appointment relates back to the commencement of the lawsuit. Section 733.601, Florida Statutes, provides that the "powers of the personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effects as those occurring after appointment." Accordingly, Robert had the requisite standing as personal representative.

David Pratt is the Chair of Proskauer's Private Client Services Department and the Managing Partner of the Boca Raton office. His practice is dedicated to estate planning, trusts and fiduciary litigation, as well as estate, gift and generation-skipping transfer taxation, and fiduciary and individual income taxation. **Jonathan A. Galler** is a senior counsel in the firm's Probate Litigation Group, representing corporate fiduciaries, individual fiduciaries and beneficiaries in high-stakes trust and estate disputes. The authors are members of the firm's Fiduciary Litigation group and are admitted to practice in Florida and New York.

Markland v. Insys Therapeutics, Inc., 2017 WL 4102300 (M.D. Fla. 2017) (not yet final).

Homestead Exempt From Creditors

An attorney, Elliot Miller, sought to enforce a fee arrangement that he had with the decedent, Marie Davis Young. Pursuant to the fee arrangement, Young granted Miller a specific lien on her home as security for the anticipated fees. Miller earned his fees, and he brought an action against Young's personal representative seeking to foreclose on the lien. The court, however, held on summary judgment that he could not succeed on such an action because the Florida probate court had ruled that the property in question constituted Young's homestead within the meaning of the Florida Constitution. Therefore, the title to the property was validly devised to her family, and the constitutional exemption (from the claims of her creditors) inured to her family's benefit. The court based its decision on the Florida Supreme Court case of *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007), in which the Supreme Court held that a homeowner cannot waive the homestead exemption without formally mortgaging his property.

Miller v. Brazzel, 2017 WL 2269128 (Fla. Cir. Ct. 2017) (not yet final).

Probate Court's Inherent Jurisdiction

David Landau was the personal representative and trustee of his late wife. Pursuant to an order of the probate court, David was required to transfer two million dollars from the estate to the trust.

In addition, although he had a lifetime beneficial interest in the trust, appellee and two other children of the deceased wife were to be the remainder beneficiaries. After seeking information revealing that the two million dollars had not been funded, appellee moved to compel an accounting of the trust.

After receiving a deficient accounting, she amended her complaint seeking breach of trust, removal and a temporary injunction to freeze the assets of the trust. Ultimately, the trial court did, in fact, freeze the assets of the trust, and David appealed.

The appellate court agreed with the trial court, though, and held that "the probate court's inherent jurisdiction to protect the assets under its supervision is well established."

Landau v. Landau, 2017 WL 4158841 (Fla. 3d DCA 2017) (not yet final).

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

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Scenes from the TELS Fall Meeting in Buffalo

Attendees of the Trusts and Estates Law Section Fall Meeting visit the Darwin D. Martin House for a tour.

Jill Choate Baier, of Lake Placid, a member of the Trusts and Estates Law Section Executive Committee.

Former Trusts and Estate Law Section Chairman Gary Friedman, right, and Brandon Sall, of the Westchester County Surrogate's Court.

The Great Pavillion of the Darwin D. Martin House Complex, where the Section held a reception and dinner after the tour.

Publication of Articles

The Newsletter welcomes the submission of articles of timely interest to members of the Section. Submissions may be e-mailed to Jaclene D'Agostino (jdagostino@farrellfritz.com) in Microsoft Word. Please include biographical information.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor or the Trusts and Estates Law Section, or as constituting substantive approval of the articles' contents.

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TRUSTS AND ESTATES LAW SECTION NEWSLETTER

NYSBA CLE & STEP USA

14th Annual International Estate Planning Institute

Thursday and Friday, March 22 – 23, 2018
Day 1: 8:30 a.m. – 5:30 p.m.
Day 2: 8:30 a.m. – 1:00 p.m.

Crowne Plaza Times Square, Manhattan
1605 Broadway, New York, NY 10019

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Trusts and Estates Law Section
International Section
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Society of Trust & Estate Practitioners (STEP)

Institute Chair:
G. Warren Whitaker, Partner, Day Pitney LLP, New York, NY

Program Description:
The New York State Bar Association and The Society of Trust and Estate Practitioners USA (STEP USA) are pleased to present the 14th Annual International Estate Planning Institute. Chaired by G. Warren Whitaker, this Institute is a much anticipated annual event at which trust and estate practitioners, bankers and accountants from around the world gather to hear the leaders in their fields exchange ideas and discuss developments regarding cross-border planning with a U.S. component.

There will be plenty of networking time, permitting you to pose questions to the faculty, compare notes with fellow practitioners in the legal, banking and accounting fields and visit with sponsors. A luncheon on the first day of the Institute and an evening cocktail reception will afford attendees opportunities for networking and enjoying the company of your peers.

Who Should Attend:
- Tax and Estate Attorneys
- Tax Attorneys
- Trust Officers
- Investment Advisors
- Bankers
- Estate Planners
- Bank Attorneys
- Accountants
- Financial Planners

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