Trusts&Estates

Protecting Separate Property During **Marriage** and **Divorce**

BY JANE K. CRISTAL, DORIS L. MARTIN AND MADELIN ZWERLING

It is common knowledge that one in every two marriages ends in divorce, and it follows that it is becoming equally common for those with assets contemplating marriage to consider viable options available to protect assets in the event marital bliss turns sour and ends in divorce.

While discussing a prenuptial agreement in the same breath as choosing a centerpiece arrangement for the wedding reception may be awkward, prenuptial agreements serve to prevent undesirable divisions of property in divorce and death. With respect to the latter, they also play an important role in estate planning. But they are not the only tools used in such planning. Trusts, which can be drafted with myriad terms and conditions tailored to suit a variety of situations, should be considered as a valuable supplement to the prenuptial agreement.

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Prenuptial Agreement Basics

Public policy favors individuals deciding conflicts on their own; prenuptial agreements are valid contracts that, when properly drafted, withstand challenges when a marriage fails. In New York, strong public policy supports the idea that individuals decide their own interests through contractual arrangements, including prenuptial agreements. See *In re Fizzinoglia*, 118 A.D.3d 994, 988 N.Y.S.2d 648, 649 (2d Dep't 2014). Parties are given wide latitude with respect to the content of prenuptial agreements. The agreement may include provisions dictating asset distribution in the event of death or divorce, the burden of satisfying debts, and waiver of statutory marital rights during life and death.

There are multiple factors to consider in preparing an enforceable prenuptial agreement. See *Matter of Buzen*, N.Y.L.J., April 2, 1999 (Sur. Ct. Nas. Co.). It is critical, for example, that the agreement contain full, current and complete disclosure of assets and debts. Where disclosure is deemed inadequate, a court may be less inclined to enforce the agreement and more inclined to scrutinize the facts surrounding execution of the agreement. In the absence of a showing of an attempt to conceal or misrepresent the nature or extent of assets, however, a mere failure to disclose financial matters, by itself, may not be sufficient to undermine a prenuptial agreement. *Cohen v. Cohen*, 93 A.D.3d 506, 507, 940 N.Y.S.2d 250, 251 (1st Dep't 2012); *Strong v. Dubin*, 48 A.D.3d 232, 233, 851 N.Y.S.2d 428, 430 (1st Dep't 2008).

> In New York, strong public policy supports the idea that **individuals decide their own interests through contractual arrangements**, including prenuptial agreements.

The court also considers whether the parties were represented by their own attorneys to ensure that they understood the agreement. The mere absence of legal representation, without more, however, does not necessarily establish overreaching or require an automatic nullification of the agreement. See *In re Barabash*, 84 A.D.3d 1363, 1364, 924 N.Y.S.2d 544, 545 (2d Dep't 2011); *Forsberg v. Forsberg*, 219 A.D.2d 615, 616, 631 N.Y.S.2d 709, 710 (2d Dep't 1995). Even where a party is represented by counsel, the agreement may still be invalidated by the court where there is sufficient proof of duress. See *Chait v. Chait*, 256 A.D.2d 121, 681 N.Y.S.2d 269 (1st Dep't 1998) (finding of duress despite husband's representation by attorney supported by evidence that wife repeatedly threatened to take parties' child).

The timing of the execution of the agreement in relation to the marriage ceremony is another compelling consideration in evaluating whether a prenuptial agreement will be enforced. There is a correlation between enforceability and the length of time of presentation and execution, with a shorter time leading to charges of duress. See *Barocas v. Barocas*, 94 A.D.3d 551, 942 N.Y.S.2d 491 (1st Dep't 2012) (wife threat of no wedding on eve of wedding insufficient to demonstrate duress rendering agreement unconscionable); Cf. *E.C.-P. v. P.P.*, 2011 WL 6155727 (Sup. Ct. Nas. Co. 2011) (husband's presentation of the agreement shortly before the wedding date found to be calculated and agreement fraudulently induced).

Courts also scrutinize the agreement's fairness. New York's courts will invalidate prenuptial agreements deemed products of fraud, duress or inequitable conduct. See *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766, 960 N.Y.S.2d 152 (2d Dep't 2013). Absent proof of fraud, duress, overreaching, or unconscionability, however, if the prenuptial agreement is fair on its face, it should be enforced according to its terms. See *Herr v. Herr*, 97 A.D.3d 961, 962, 949 N.Y.S.2d 786, 788 (3d Dep't 2012).

For all of these reasons, prenuptial agreements must be written with care and deliberation and with due regard to the factors cited » Page 2

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N.Y. Legislation: What Passed, What Didn't, What's Next

BY SHARON L. KLEIN

The 2013-2014 legislative session ended on June 19, 2014. It is instructive to review what has passed so far, what failed to pass before the June recess and what lies ahead in the 2015-16 legislative session.[1]

Requirement for Personal Representative to Obtain Court Approval Before Renouncing Eliminated (Enacted Aug. 11, 2014).[2] Under prior law, personal representatives were required to obtain court authorization before renouncing any interest to which a decedent became entitled but did not receive prior to death. Even in the most common situation, in which spouses have reciprocal wills with identical beneficiaries who take upon the death of the surviving spouse, prior court approval to renounce was necessary. Where spouses die within nine months of each other, disclaimer is often used to minimize administration expenses by allowing the property of the first spouse to die to pass directly to the beneficiaries, instead of being subjected to another administration in the second spouse's estate. The new law removes the requirement of prior court approval in order to reduce expense as well as delays in implementing a disclaimer, which must be effected within nine months of death.

Non-Profit Revitalization Act of 2013 (Enacted Dec. 18, 2013, Amendments to Delay Effective Dates of Certain Provisions Enacted June 30, 2014).[3] On Dec. 18, 2013, Gov. Andrew M. Cuomo signed the Non-Profit Revitalization Act of 2013, designed to reduce burdens on the nonprofit sector while strengthening governance and accountability. The Act, most provisions of which took effect on July 1, 2014, creates enhanced oversight responsibilities, new requirements to guard against self-dealing and mandates the adoption of written conflict of interest policies and whistleblower policies to protect those who report suspected improper conduct from retaliation.

While the Act generally has been hailed as a welcome modernization and streamlining of New York law, the nonprofit sector expressed concern that there was insufficient time for affected organizations to understand and implement the sweeping changes required by the Act. Many nonprofits are required to change committee structures, reconsider board memberships, rewrite conflict of interest and whistleblower policies, and more. Accordingly, legislation was introduced to extend certain effective dates.[4] Under the Act, for example, in an effort to preserve the independence of board leadership, no employee of a corporation can serve as chair of the board (or hold any other title with "similar responsibilities"). That provision was originally slated to go into effect Jan. 1, 2015, but as a result of amendments enacted on June 30, 2014, will now take effect Jan. 1, 2016. Additionally, enhanced audit process requirements that went into effect on July 1, 2014 will not be applicable until Jan. 1, 2015 for any corporation or charitable trust with annual revenues below $10,000,000.

Trusts & Estates Related Changes of the Executive Budget for 2014-2015 (Enacted March 31, 2014).[5] Perhaps the most dramatic changes of this legislative session were those effected on March 31, 2014, when the New York state legislature passed the Executive Budget for 2014-2015.

Estate Tax Exclusion Increases, But "Cliff" Impact Can Be Dramatic. The new law increases the New York estate tax exclusion amount over the next several years, as indicated in the chart located at the end of this article.[6]

After Jan. 1, 2019, the New York exclusion amount will be linked to federal exclusion amount (projected in 2019 to be $5.9 million), including inflation indexing. However, the increase in the New York estate tax exclusion amount fully benefits only those estates equal to or below the New York exclusion amount in effect on the date of death. New York taxable estates that are between 100 percent and 105 percent of the applicable exclusion amount will rapidly lose the benefit of the exclusion due to a phase-out computation.[7] New York taxable estates that exceed 105 percent of the applicable exclusion amount will lose the benefit of the exclusion amount entirely. This can have a dramatic cliff effect: For example, if an individual dies with an estate valued at $5.25 million on May 1, 2017, when the New York » Page 6

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Injunctive Relief in Surrogate's Courts: **Trends** and **Considerations**

BRIAN P. CORRIGAN AND FAITH L. CARTER

An executor commencing a turnover proceeding for the return of a Picasso allegedly gifted by the decedent shortly before his death to the respondent, and now in respondent's possession, would be wise to seek injunctive relief safeguarding that painting pending the outcome of the proceeding.

The provisional remedy of a preliminary injunction is governed by CPLR 6301, which provides in part:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing … an act in violation of the plaintiff's rights respecting the *subject of the action*, and tending to render the judgment ineffectual… . (emphasis added).

In addition, the movant must demonstrate three elements: (1) a likelihood of success on the merits, (2) irreparable harm absent the injunctive relief, and (3) a balance of equities in movant's favor.[1]

Assuming the merits and equities are in the executor's favor, a preliminary injunction will likely issue as the "subject of the action" is a unique painting and the estate stands to be irreparably injured if possession is not secured.

Now assume the merits and equities again favor the movant, but rather than a unique chattel, the subject of the litigation is money, such as the return to the estate of cash gifts allegedly made by the decedent, a dispute over a joint account with right of survivorship, or an alleged monetary loss to the trust for which a surcharge is sought.

With respect to the "irreparable harm" element, it has long been recognized that alleged economic loss, compensable by money damages, does not constitute irreparable harm.[2] Similarly, courts have long recognized that the purpose of a preliminary injunction is not to secure an anticipated money judgment.[3] Thus, generally, where the subject of a dispute is money and a money judgment is sought, courts will not grant injunctive relief.[4]

Surrogate's Courts have adhered to this general rule and departed from it under certain circumstances. We examine these cases, identify patterns that emerge and explore considerations as to why strict adherence to this rule may not be appropriate in Surrogate's Court practice.

Judgment-Proof Respondent

Surrogate's Courts have granted preliminary injunctive relief when the responding party may not be able to satisfy a money judgment. *In Estate of Stanton*, 953 N.Y.S.2d 554 (Surr. Ct. Bronx Cty. 2012), the administrator of the estate brought a SCPA 2103 proceeding alleging the estate's entitlement to the » Page 4

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Mediation: Prevent Estate Litigation, Preserve Relationships

BY MELISSA NEGRIN-WIENER
AND LYNN KAY

There is no debating that the American population is aging at a rapid pace. In fact, by the year 2030, it is estimated that 19 percent of America's population will be over the age of 65.[1]

With an aging populace, our country has seen an emerging need for qualified professionals to deal with the problems that seniors encounter as part of the aging process as well as the post death needs of the senior's family. These needs have lead to the development of Elder Law.

Common Elder Law issues include long-term care matters, retirement benefits, estate planning, housing, abuse and neglect of the vulnerable senior, the potential need for guardians, health care, as well as post-death issues relating to probate and estate administration. When a family has a positive relationship and is making decisions together, these difficult issues can be dealt with smoothly and peacefully. However, when family members disagree or their interests are at odds, there is a great deal of opportunity for conflict to arise. During the life of the senior, these types of disputes can lead to contested guardianship proceedings. Post death, disagreements can be the cause of contested estate proceedings. Both of these types of litigation can have catastrophic financial and emotional impacts on a family.

Mediation has emerged as a valuable tool for seniors and their families as an alternative to costly litigation. Mediation can be a useful instrument to prevent post death conflict by dealing with a family's issues during the senior's life. However, issues often come to a head when a loved one dies that were never resolved or adequately discussed during the decedent's lifetime, leading to disputes regarding the decedent's estate.

There are many different types of estate disputes including outright will contests, contested accountings, or simply a dispute about the meaning of the language contained in a Trust or Will. As many of these disputes are among family members, mediation can be an alternative to court because of a mediator's exceptional ability to address conflicts while preserving family relationships.

Mediation Models

Mediation is a process by which a neutral third party is present to guide the parties in conflict through a conversation, often with the goal of reaching an agreement or settlement of some kind. A mediator does not make decisions for the parties and has no interest in a particular outcome.

There are a number of different mediation models; however, three of the most popular models are the facilitative or problem solving mediation model, the transformative mediation model and the evaluative mediation model.

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No matter which model is chosen, mediation can be presented to a client as a faster, more cost effective, less antagonistic tool to resolve family and estate related disputes. In fact, it is already heavily utilized in the court system to address Matrimonial and Family Law disputes.

Facilitative Mediation: Facilitative mediation is a problem solving approach to mediation. The underlying theme of this model is the idea that with the presence of a neutral third party, disputants will be able to reach agreements with respect to their conflicts. The mediator takes a very active role in this process, controlling the agenda, asking questions and laying ground rules for how the mediation sessions will be conducted. The mediator will try to identify and uncover the real issues behind each party's position and attempt to help the parties generate creative solutions to their mutual problem. Facilitative mediators utilize the caucus (a private and confidential meeting with each party) as a tool for information gathering and a way to seek out party interests.[2]

Transformative Mediation: An alternative and more recently developed type of mediation practice is transformative mediation. Transformative mediation is based on transforming the quality of the interaction between the parties involved in a particular dispute. The transformative model was first developed by Robert A. Baruch Bush and Joseph P. Folger in "The Promise of Mediation" in 1994.[3]

Transformative mediators do not drive the process themselves. Instead, the mediators take a back seat to the parties and let the parties themselves dictate the way in which the mediation session is run and what kind of agreement may be reached in the end. The real goal of the transformative mediator is to allow the parties to achieve empowerment and recognition shifts rather than to reach concrete agreements.[4] Transformative mediation is designed to change the way the parties interact in the hope that it will therefore lead to more sustainable conflict resolution and the improvement of their exchanges in the future.[5] This method is most successful when those involved believe that there is something to be gained by improving their relationship with the other party.[6] The model is grounded in the idea that when people are involved in a conflict they become weak and self absorbed and, therefore, grow to be hostile to the other party involved, which leads to conflict escalation.[7]

Evaluative Mediation: Evaluative mediation is a much more mediator-directed approach. The mediator is often a subject matter expert and mediates disputes related to said subject. The evaluative mediator will get much more involved in the discussion than either the transformative or facilitative mediator. The evaluative mediator will provide opinions on the strengths and weaknesses of each party's position and make recommendations or provide insight into what might occur if the matter were to go to court.[8]

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Estate, Elder Care Conflicts

An article published in the Elder Law Report in 2005 reported that approximately 40 percent of adult children caring for their aging parents experience serious disputes with their siblings regarding such care.[9] As one would imagine, caring for an aging parent is difficult for many families and emotions often run high. Therefore, the use of a third party to aid in the decision making process is thought to be beneficial.

Guardianships: Some types of issues addressed at Elder Law mediation sessions might include the current and future living arrangements for the senior, health care provisions and help with the activities of daily living, whether or not the senior is still capable of driving, whether and when to sell the senior's home, end of life care and treatment with respect to terminal illnesses, financial management and guardianship.[10]

There are a great number of decisions that need to be made with respect to the aforementioned care issues and many times the senior's family members will not agree on the best course of action with respect to one or more of these issues. This is often a result of a disagreement regarding the senior's capabilities or a situation where one family member bears the burden of providing or financing the caregiver services.

A Guardianship is a court proceeding in which a court makes a determination about whether an Alleged Incapacitated Person (an "AIP) is in need of an appointed guardian to make decisions regarding their financial affairs and/or personal matters because the AIP is no longer able to do so themselves. Disputes about guardianships can arise in a number of ways. For example, the AIP may vehemently oppose the appointment of a Guardian. Mediation can allow the AIP to voice his or her feelings prior to attendance at a hearing.

Conflicts may also arise between family members who want to be appointed as guardian of the AIP. Many times the dispute is truly about what is best for the AIP but in a great number of cases the dispute stems from something far deeper, such as a lengthy history of sibling rivalry. Mediation can help parties sort through these emotional issues. Mediation can also help parties come to unique solutions regarding the senior's incapacities.

Inheritance: Inheritance and estate disputes are not always about financial issues. These disputes can encompass a variety of issues: some stemming from individuals' and society's views of fairness and what is an appropriate and acceptable distribution of an estate, as well as the grief of the parties involved over the death of a loved one, a lack of communication and problems with the personal representative of the estate or the decedent's trustee(s).[11]

Many disagreements grow out of the fact that society generally shares the belief that those in an equal relative relationship to a decedent have an equal claim to the decedent's estate.[12] This can present a problem when relationships are hard to define and prioritize due to remarriage and other distinctive situations.[13] It can also be difficult for the family caregiver when they receive the same inheritance as those family members who have contributed far less to the decedent's care.[14]

Many people believe decedents should split their estate between those related to them by blood, marriage or adoption. When an individual chooses to deviate from this, those expecting to inherit often become upset.[15] Conflict can even be the result of a family member's continuing disapproval of a decedent's life choices.[16] The cause of the conflict may be more about negative feelings and lack of acceptance of a decedent's choices, which can be brought to light through mediation.[17]

When a decedent did not clearly express their wishes while they were alive, those left behind may be surprised by the contents of the decedent's will which can lead to legal action.[18] This lack of communication can also be between surviving relatives of the decedent and the decedent's chosen fiduciaries, causing arguments about the role of the fiduciary and whether they are acting properly.[19]

Estate attorneys are in the very unique role of being one of the first individuals contacted when a family member dies. Therefore, the estate attorney is in a particularly good position to recommend mediation to families as an option to resolve these estate and inheritance disputes.

Benefits of Mediation

As the field of Elder Law continues to expand, there has been a growing recognition by senior advocate and services groups that elder and estate related disputes are often effectively resolved through the use of mediation.[20] Evidence of the use of mediation in elder law and estate matters is evident in the abundance of elder training programs conducted around the country. In fact, in recent years, the New York State Bar Association has offered several Elder/Adult Family Mediation Trainings and the New York State Bar Association Alterative Dispute Resolution Section has even put forth a series of white papers on the topic.[21]

Disputes relating to probate and long-term care of the elderly are particularly suited to mediation as a means of alternative dispute resolution.[22] It has been long recognized that mediation provides "privacy and confidentiality, the promotion of therapeutic effects for the parties, the expanded possibility that an ongoing relationship between parties can be maintained, the potential for creating solutions uniquely suited to the problem at hand, and the possible reduction of financial costs as compared with those incurred in litigation."[23]

Mediation can help parties understand each other's views, lead to better communication, and faster solutions.[24] Since probate and elder care disputes are often taking place between family members, mediation is an especially important tool for these types of disputes.[25] Mediation is an important alternative to litigation in elder law and estate disputes because it respects family relationships, allows for the airing of personal and often non-legal issues and grievances and is uniquely suited to creating solutions tailored to the particular parties in conflict.

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Divorce

« Continued from page 1

above to achieve an enforceable agreement. Given that there may be scrutiny at the time of the marriage's and alternatives that exist to safeguard assets prior to entering into marriage should be examined.

Estate Planning Considerations

Under New York law, a surviving spouse who died after Sept. 1, 1992 has a right to the greater of $50,000 or one-third of the net estate. See EPTL 5-1.1-A(a)(2); *Matter of Richardson*, N.Y.L.J., July 3, 2008, at 40, col. 4, 2008 N.Y. Misc. (Sur. Ct. Richmond County). The net estate for purposes of the elective share consists of the decedent's probate assets (property passing under Will) and "testamentary substitutes," less certain deductions. Testamentary substitutes include certain gifts and trusts, accounts in the decedent's name and payable on death to another, jointly owned property, retirement plans, and transfers in which the decedent retained certain rights. The elective share cannot be satisfied with a Trust for the surviving spouse. The elective share cannot be satisfied with a Trust for the surviving spouse. In addition to an elective share right, a surviving spouse is entitled to certain property and one-half of the estate and to serve as the decedent's administrator in the event of intestacy.

An express written and informed document (e.g., one contained in a prenuptial agreement) is required for a waiver of an elective share, rights in intestacy, and a right to serve as fiduciary. Additionally, a prenuptial agreement should address the issue of the necessary documentation the parties agree to execute to change the beneficiary designations on retirement accounts in the event of divorce or waive spousal rights to retirement plan accounts to enable the account holder to name other beneficiaries.

While typically one thinks of young couples with assets as entering into prenuptial agreements, those entering second marriages also achieve important goals with prenuptial agreements. Although the driving force behind a prenuptial agreement in a second marriage is often the disparate resources between the parties, one should not sell short the value of such agreements where the soon-to-be spouses have children from a prior relationship and wish to ensure that those children inherit certain assets upon the death of their respective parent.

Keep Assets in the Family

Increasingly, parents ask their estate planners about how to protect gifts and inheritances given to a child from a spouse about whom they may have concerns or in the event the child's marriage ends. Grandparents also want to see family assets pass to their grandchildren after their child dies, not the second spouse of the child's widow or widower. The child can enter into a prenuptial agreement to address gifts and inheritance, but it is sometimes easier and less controversial for the parent to give a child a gift or inheritance in trust instead. A prenuptial agreement should still be used to protect a child's outright gift or inheritance from being placed by the child in joint name with his or her spouse. This has the negative effect of making gifted or inherited property, which would have otherwise been separate and not part of marital assets, into a marital asset subject to equitable distribution on divorce. Premarital planning tactics vary depending on whether the assets in question were generated by the spouse or their family. Assets from the family, by way of gifts or inheritance, may be best given or inherited in trust, rather than outright, as income generated by separate property and appreciation in value of the separate property may be considered a marital asset.

Trusts can be drafted in a variety of ways with provisions for distributions and a child's role ranging from liberal to circumscribed. To ensure maximum asset protection, an independent trustee should serve and only that trustee should be authorized to make distributions in his or her sole discretion. How a trust is structured determines the level of protection it affords, and factors to consider include the identity of the trustee, the method for distributions, and the succession plan for the assets at the child's death.

Asset Protection Trusts

Self-settled asset protection trusts (APTs) are touted as supplements or even alternatives to prenuptial agreements. An APT is a trust that seeks to insulate assets from creditors of its creator, including an estranged spouse. APTs are appealing as a form of premarital asset protection planning because their validity does not depend on the same requirements of a valid contract negotiated between two parties, such as disclosure, representation by counsel, timing and fairness. Whereas full and complete disclosure of one's assets is required to ensure the enforceability of a prenuptial agreement, that is not the case with APTs. To the contrary, the settlor of an APT does not have to disclose either his or her intention to form the trust or the assets that will fund it. Nor is the consent of the future spouse required to form the APT. Also, unlike prenuptial agreements that must be executed sufficiently in advance of the wedding in order to avoid being deemed coercive, an APT may be formed at any time.

Certain states (Alaska, Colorado, Delaware, Hawaii, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia and Wyoming) authorize the use of APTs. (New York law does not authorize an individual to escape creditors by creating a trust.) States that do authorize APTs provide some or no protection regarding marital claims. Other differences between such states relate to the amount of time the assets must be held in the APT before they are deemed protected from creditors and a cap on the amount of assets that can be insulated. While an individual who creates an APT does not have to live in the state that allows their creation for the trust to be upheld, the factors to be considered will be where the assets are located, the location of the trustee, the individual's access and control over the trust assets.

Asset protection trusts are not without risks, as evidenced by the recent decision of *In re Huber*, 493 B.R. 798 (Bankr. W.D. Wash. 2013). Huber, a Washington resident, finding himself in financial straits and the target of a number of litigations, admittedly set up an Alaska APT. Although an Alaska trust company was trustee and the trust owned an Alaskan corporation funded with assets he contributed, virtually all of the assets were physically located in Washington, the ultimate beneficiaries of the trust were Huber and his children, Huber's creditors were in Washington, and the attorney who prepared the documents was in Washington. The court would not honor the trust provision mandating that Alaska law govern and applied Washington state law, which does not recognize self-settled asset protection trusts. It found that under Washington law, Huber's transfer of assets into the trust were void as transfers made into a self settled trust.

As evidenced by *Huber*, the law regarding the protective nature of such trusts remains in a state of development and it is still unclear how APTs will fare in the face of a spousal challenge, particularly when the trust is created by an individual who is not a resident of the state whose law governs the trust. While asset protection trusts are not bullet proof, they still offer protection in certain situations.

Benefits of Prenups

While trust agreements may seem appealing to avoid the awkward nature of prenuptial agreements, there are certain issues that may be addressed only by a prenuptial agreement.

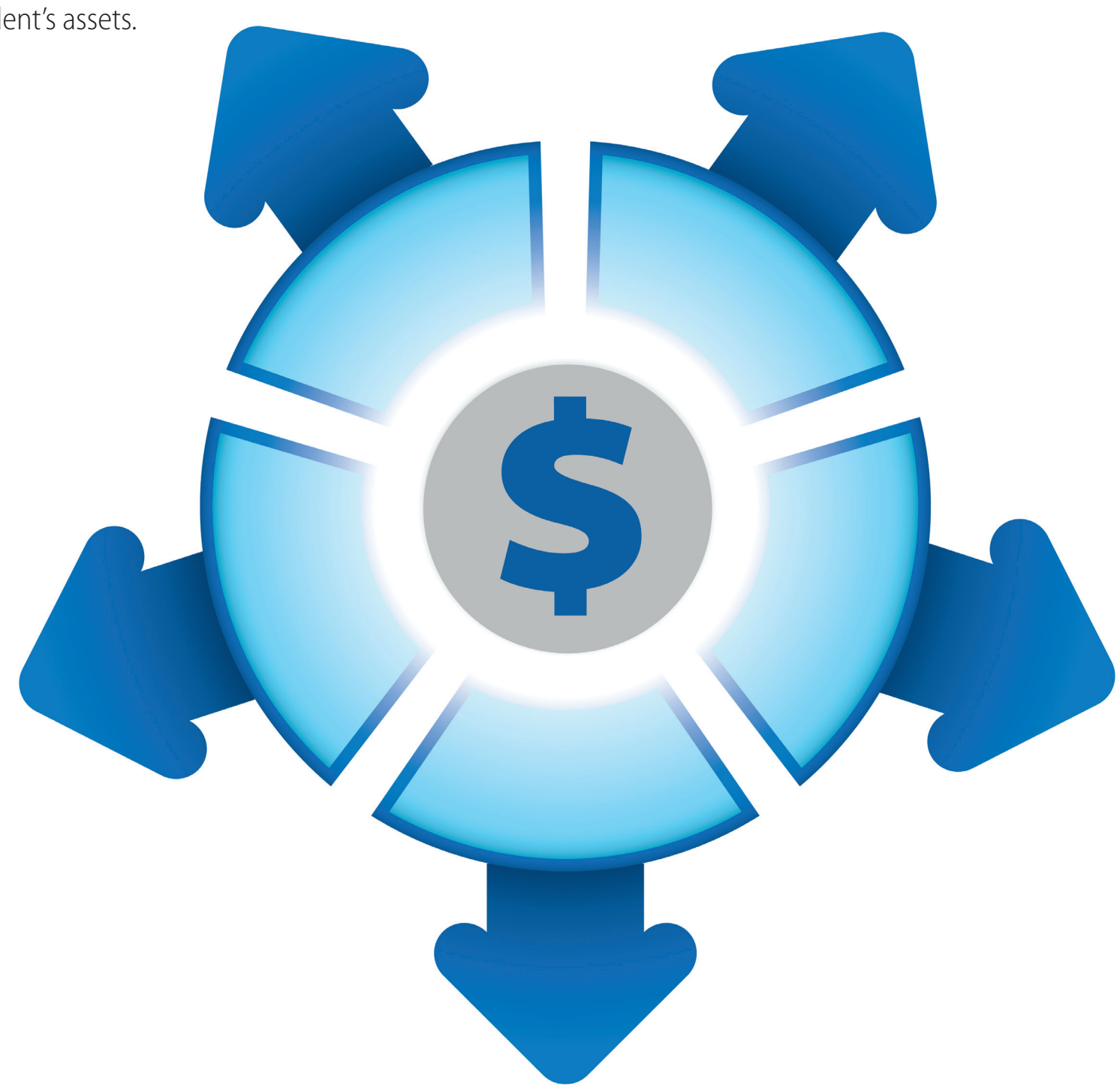
- To protect one spouse from the other's debts becoming marital debts;
- To pre-determine or waive spousal maintenance or, determine the amount and duration of spousal maintenance;
- To protect income from being considered a marital asset, and to define as separate property any enhanced value of separate property; and
- To set forth the rights and interests of each spouse during the marriage.

Conclusion

Individuals contemplating marriage have an array of estate planning tools available to insulate assets and provide for their distribution, including prenuptial agreements and trusts. Regardless of which estate planning mechanism an individual chooses, however, one conclusion is patently clear: Great care should be given when drafting the instrument or document in question to ensure its survival under judicial scrutiny and to accomplish the objective for which it was designed to achieve. The safest bet may be to combine trusts with prenuptial agreements—a "belts and suspenders" approach. Estate planning lawyers and matrimonial lawyers need to work in tandem to achieve the right result for each situation.

When There's **No Will**, There **Is** a **Way**

Intestacy laws direct the distribution of a decedent's assets.



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BY TERENCE E. SMOLEV AND CHRISTINA JONATHAN

Many people go through life without giving much thought to the distribution of their personal property and assets upon their demise. They typically believe that if they do not have a Will, their property will automatically pass to those closest to them, whether it be a relative, best friend or lover.

Although sometimes this may be the case, especially for smaller Estates, the norm is quite the contrary. The bottom line is if you do not have a Will, the state will write one for you.

If one dies without a Will, it is called dying "intestate." We will now take you through a tour of intestacy law, including the potential issues that may arise, by following a decedent named Mr. Smith. Mr. Smith, a fictitious character, was an older gentleman who recently passed away. He left behind his second wife, Mrs. Smith, two children from his first marriage, a sister that practically raised him and an uncle who loaned him almost a million dollars to start his thriving photography business. Mr. Smith was also indiscreet and left behind Jane, his six-months-pregnant girlfriend, whom no one else knew about.

Mr. Smith was a very successful man. His photography business was worth several million dollars. He was the proud owner of a waterfront house in the Hamptons, a Maserati, antiques and paintings from all over the world, fine watches and jewelry, and hundreds of thousands of dollars in various bank accounts.

Unfortunately, Mr. Smith was always too busy to visit his attorneys to draft a Will. Almost a month after he passed away, his mistress Jane showed up to demand her child's share of Mr. Smith's Estate; his uncle wanted to get repaid on the verbal business loan; his sister felt entitled to something, and of course his two children felt like Mrs. Smith should receive nothing due to the short length of their marriage. Now, the salient questions are who gets what, and what is the correct legal procedure for distributing Mr. Smith's property.

Intestacy distribution is governed by the Estates Power and Trust Law (EPTL), as well as the New York State's Surrogate Court Procedure Act (SCPA). Someone with an interest in Mr. Smith's Estate must petition the court to become the Administrator/Administratrix of his Estate. That is a fiduciary appointed by the Surrogate's Court to stand in Mr. Smith's shoes to marshal his assets, pay the Estate's debts and make appropriate distributions. Once the petition is granted, the court issues Letters of Administration (Letters), which serve as a certificate that the named Administrator/Administratrix is authorized to act on the decedent's behalf. With these Letters, the Administrator/Administratrix can open an Estate account and transfer title to property, including the house, car and bank accounts.

Pursuant to SCPA §1001, Letters must be granted to eligible distributees in the following order: "… (a) the surviving spouse, (b) the children, (c) the grandchildren, (d) the mother or father, (e) the brothers or sisters, (f) any other person who are distributees …" Accordingly, letters would go to Mrs. Smith, unless she is disqualified.

Mrs. Smith immediately filed an Administration petition with the Surrogate's Court in the county where Mr. Smith last resided. Mr. Smith's two children filed a cross-petition and filed "Objections" to disqualify Mrs. Smith due to the short duration of their marriage.

EPTL §5-1.2 clearly sets forth six grounds on which a spouse may be disqualified. A spouse may be disqualified if there was a final decree or judgment of divorce within this state or outside of the state, or that the marriage was void as incestuous, or that there was a final decree or judgment of separation, that the surviving spouse abandoned the deceased spouse, or that the surviving spouse failed to provide support.

Interestingly, New York is one of the few states that permit a marriage to be annulled post-mortem pursuant to Domestic Relations Law §140. However, this has very little force or effect on the laws regarding distribution. Pursuant to EPTL §5-1.2, the marital status of the parties at the time of death prevails. The law does not concern itself with the length of the parties' marriage, as long as the marriage was in effect and valid at the time of death. Accordingly, Letters must be granted to the surviving spouse, unless disqualified for some other reason, i.e., being a convicted felon.

Once Mrs. Smith obtains Letters, she has a fiduciary duty to collect all of decedent's assets and make appropriate distributions. Here is where Mrs. Smith became disappointed. As a surviving spouse, pursuant to EPTL §4-1.1 she would have been entitled to the entire Estate. However, since Mr. Smith also left children, Mrs. Smith is only entitled to the first $50,000 of the Estate and then half of the residuary Estate. The two children share equally in the other half of the residuary Estate.

She also has to deal with the issue regarding the unborn child from Mr. Smith's girlfriend, Jane. It has long been held that under New York law, an unborn child has certain rights, including, but not limited to, the right of inheritance, contingent on that child being born alive.

To protect that unborn child's inheritance rights, Jane filed a petition with the Surrogate's Court for a decree establishing that the child would be entitled to an intestate distribution. The court then appointed a limited guardianship over the property of the unborn child. The guardian then requested that the court stay any further proceedings until the child is born, so that paternity could be established.

For children born out of wedlock to establish their alleged inheritance, EPTL 4-1.2(a)(2)(c) mandates that paternity must be established by clear and convincing evidence. Paternity may be established by a genetic marker test. The court could issue an order to compel the production of the decedent's blood and/or tissue samples that are available for the purposes of conducting DNA testing.[1]

It was established that the baby was the decedent's child. The baby now shares in the half of the decedent's residuary estate with his other two children. The baby's interest would be advocated for by the court-appointed guardian.

Now that Mrs. Smith has an idea of who gets what initially, she begins to gather the decedent's assets. Certain items are non-testamentary, meaning that they automatically pass by operation of law. Such items include joint bank accounts, deeds written with a right of survivorship, life insurance policies naming a beneficiary, etc.

As Mrs. Smith was gathering the documents for the house in the Hamptons, she found the deed, which surprisingly still had Mr. Smith's ex-wife's name on it. It appeared that Mr. Smith intended to take her off the deed, but again, did not have time to go to his attorney to execute the necessary documents. She also found the separation agreement, wherein decedent's ex-wife agreed to relinquish her interest in the house and sign any necessary documents to effectuate the same. The separation agreement was then incorporated into a final judgment of divorce.

Accordingly, Mr. Smith's ex-wife could not claim any interest in his house. Furthermore, if Mr. Smith also neglected to remove the ex-wife's name on non-testamentary assets, the Surrogate's Court could intervene. For example, assuming the ex-wife relinquished her rights to the decedent's life insurance or pension plan, the court could direct her to disgorge any proceeds received from these non-testamentary assets. Those monies would then become part of decedent's residuary estate.[2]

Now that the house is part of the Estate, Mrs. Smith has a choice. She may keep the house and buy out the other half that would go to Mr. Smith's children, or she could simply sell the house and put the proceeds into the Estate account. Considering the length of their marriage and the problems the children were already raising, she thought it was best to sell the house.

That was just the beginning of the fight. Within the 40 days that she was married to Mr. Smith, they traveled for a month straight. During their travels, Mr. Smith bought her many exquisite art and antiques from Europe, Asia and the Middle East. The two children and the guardian over the baby's property argued that all of that personal property belonged to the Estate and that they were entitled to half of everything.

Instead of going to a hearing in the Surrogate's Court to determine whether or not the items were gifted to Mrs. Smith, Mrs. Smith decided to distribute her gifts as though the property belonged solely to the decedent. She followed the proper procedure by having all the valuables appraised and providing a detailed inventory to the children. Any items that Mrs. Smith wanted to keep had to be paid for at the appraised price; the same applied to the children. Everything else was sold and the monies went into the Estate account.

Mrs. Smith then had to make a decision regarding what she should do with the business, and of course decedent's uncle showed up to collect the alleged business loan of $99,500. Mrs. Smith had no idea how to run a photography business. She decided to target his competitors, and found another business that would buy decedent's photography business, including all of the equipment, and also retain his employees. She quickly jumped on the deal and hired a forensic accounting firm to complete the required business appraisal. She collected $2.5 million from the sale of the business.

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As far as decedent's uncle was concerned, he did not have any promissory note or documents evidencing the money that he loaned Mr. Smith. Instead, he had a copy of a cashed check made directly to Mr. Smith almost two years before he launched his business. This could be considered a gift, or a personal loan. Without more evidence, the uncle's only option would be to file a claim against the Estate as a creditor. Luckily, the children were on his side and convinced Mrs. Smith to pay him half of what was allegedly owed to settle the debt. Everything was put in writing and the uncle executed a Receipt and Release form, which was filed with the Surrogate's Court.

Mr. Smith's sister was unfortunately not entitled to anything pursuant to intestacy laws. However, the wife and children all knew how fond Mr. Smith was of his sister and collectively agreed to give her certain personal items and a percentage from their shares of the residuary Estate.

Mrs. Smith also had to figure out what to do with the Maserati. The entire time she thought that Mr. Smith owned the car outright. It turned out that he actually had a lease with over $50,000 owed. She had three choices as to how to proceed with this vehicle. Firstly, she could surrender the car, and then the Estate would be responsible for all of the additional costs on the lease. Secondly, she could take over the lease payments individually. Thirdly, she could sell the car and pay off what is owed to the bank, with any profits going into the Estate account. She chose the third option.

It has been almost six months since Mrs. Smith was granted Letters. She now has to file an inventory with the court. The inventory form lists all of decedent's assets, both testamentary and non-testamentary. The non-testamentary assets are used to determine the size of the decedent's Estate. In this case, there was the business at $2.5 million, the house at $1.5 million, all of the appraised property at $500,000 and the cash of $400,000, for a total of $4.9 million. The court's primary purpose in having this form filed is to ensure that the correct filing fee was paid by the petitioner.

Obtaining Letters is not free. The filing fee is paid by the petitioner, and is determined by SCPA §2402, based on the size of the Testamentary Estate. Here, the filing fee was $1,250. Mrs. Smith only paid $625 when she filed her Administration petition, thinking that the house and business were worth a lot less. She now has to pay the court the difference of $625 upon the filing on the Inventory form. The $1,250 fee is the maximum filing fee, and covers Estates that are valued over $500,000.

Mrs. Smith also needs to figure out if she has to file Estate tax returns. Estate tax is a tax on the decedent's right to transfer the decedent's property. In New York state, if required, an Estate tax return is due nine months after decedent's death, unless an extension is filed. An Estate is subject to New York Estate tax if the decedent was a resident of New York and the total of the federal gross estate, plus the federal adjusted taxable gifts and specific exemption, exceeds $2,062,500. Here, even after the adjustments, the total was greater than $2,062,500; therefore, Mrs. Smith had to file the required Form ET-706.

For the federal government, an Estate tax return is required if the Estate is greater than $5,340,000. This Estate was just shy of that number; therefore, no federal return was required. Nonetheless, it is recommended that a return be filed to prevent the IRS from subjecting the Estate to a potential future tax proceeding. The IRS could assert that the valuation of the decedent's assets were much greater than what was reported. This is fairly common when an Estate includes a lucrative business and extremely valuable art. The IRS could always audit and claim that the Estate was worth more than the threshold; however, if a return is filed, the IRS only has three years to make such an argument. Filing a return, whether or not Estate taxes are due, prevents the Estate from facing a potential audit after three years from when the return was filed.

Now that all of the decedent's property was distributed and sold, Mrs. Smith has to file another petition for Judicial Settlement of Account with the court. Therein, she will also have to submit a detailed accounting of all of decedent's assets and liabilities, including a schedule of creditor's claims. All interested parties, including the creditors will then be served with an Accounting Citation.

If there are no Objections filed to Mrs. Smith's accounting, once the creditor's claims are settled, the court will issue a final order and decree that allows Mrs. Smith to distribute the residuary Estate and close the Estate.

This entire procedure, although simplified in my example, could take several years. Mrs. Smith's story briefly outlines an Administrator's obligations. Each issue that she faced could have taken months to resolve, coupled with heated fights amongst the relatives. If only Mr. Smith had a Will, his surviving relatives could have also rested in peace after his demise.

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1. *Matter of Estate of Ray. F. Morningstar*, 17 A.D.3d 1060 (2005).
2. *Estate of Landy v. Sondra Landy*, 267 A.D.2d 142 (1999).

Relief

« *Continued from page 1*

proceeds of joint bank accounts with right of survivorship alleged to have been established when the decedent lacked capacity and/or was unduly influenced by the respondent. After decedent's death, respondent closed the accounts and deposited the proceeds into an account in his sole name. The court granted the administrator's motion for a preliminary injunction and enjoined both the respondent and the bank from transferring/utilizing the funds in respondent's account pending the conclusion of the proceeding.

The Surrogate noted that "respondent might have insufficient funds at the conclusion of the litigation to pay the judgment that may eventually be entered" (id. at *3), and referred to "respondent's own statement that the funds at issue might be necessary to support his lifestyle, together with his failure to document that he has sufficient assets to repay the estate should that be necessary." Id. The court further observed that questions as to "the elderly respondent's mental capacity, arising in part from his repeated inability to not remember events during his deposition, … also raise a concern as to whether he will retain sufficient assets to satisfy any judgment that might be entered." Id.

However, a Surrogate may not presume there is a risk of a judgment-proof respondent, where no such evidence has been proffered. *Testament of Raffe*, supra, involved the contested accounting of a testamentary trustee. A business owned by the trust, operating at a loss for years, was kept afloat by loans from the trust with an outstanding balance in excess of $5 million. The objectants contended the trustee permitting continued losses by the company was exacerbated by these loans of which, objectants claimed, the trustee had no reasonable expectation of repayment. The trustee disputed these allegations.

The court denied the objectants' motion for a temporary restraining order (TRO) restraining the trustee from transferring, loaning or otherwise using any trust assets for the benefit of the trust-owned company without further order of the court. The Surrogate concluded that a surcharge would make the objectants whole, observing that "there [was] no indication either way of [the accounting fiduciary's] financial ability to answer for any damages." Id. at *3.

On the other hand, where very significant potential damages are estimated, Surrogate's Courts have concluded that a surcharge would provide insufficient compensation, even absent evidence of the fiduciary's economic situation. Thus, the court in *Matter of Kalikow*, Surr. Ct. Nassau Cty. File No. 340361/Dec. No. 237 (March 28, 2007),[5] restrained preliminary executors from completing and filing that portion of any estate tax return concerning the valuation of the assets of a marital deduc-

tion trust, established for the decedent's benefit under her predeceased husband's will and now includable in her taxable estate.

The marital trust held a partnership interest, which in turn owned income producing real estate. The preliminary executors and decedent's children (who were co-trustees and beneficiaries of trusts continuing from the now terminated marital trust) each had obtained appraisals of the underlying real estate that, according to decedent's children, were over $10 million apart. The parties also disagreed over the valuation discount that was to be applied.

The decedent's children sought to restrain the preliminary executors from filing decedent's estate tax return until the children's request for suspension of the preliminary executors' letters, and for issuance of limited letters for the purpose of filing said return themselves, were determined. The children argued that if the preliminary executor's appraisal and stated discount were used for the return, the trust would be subject to substantial unnecessary estate tax—possibly upwards of $25 million—that might require liquidation of the trust's assets.

In granting the injunction, the court noted that decedent's children had established irreparable injury absent the injunction, observing that "a surcharge remedy in the accounting proceeding may be insufficient given the significant amount of potential damages … ." Id. at 15.

Potential for Asset Dissipation

Preliminary injunctions have been granted where there are serious allegations of wrongdoing by a party, thereby calling into question that party's trustworthiness to satisfy a money judgment. In *Matter of Kalichman*, 820 N.Y.S.2d 648 (3d Dept. 2006), the decedent suffered a severe brain injury in 1994. By 1999 his mental capacity deteriorated to the point where his long-time accountant and attorney each questioned decedent's capacity. Further, medical records indicated decedent was incompetent to make certain financial decisions after 1999.

Decedent's daughter commenced a proceeding challenging financial transactions allegedly orchestrated by, and benefitting, her mother and brother. Her primary claim was that, in March 2000, her mother and brother caused decedent to give all his stock in two closely-held corporations (valued at $10 million) to her mother who, in turn, placed the stock in a grantor retained annuity trust. Pursuant to this trust, drafted by the brother's attorney, the mother was the sole annuitant for its three year duration and the brother was the sole trustee and remainderman. Decedent's two daughters claimed this scheme reduced the probate estate from in excess of $10 million to $800,000.

The Surrogate granted a preliminary injunction restraining the mother and brother from transferring, encumbering or otherwise disposing of these assets.

In affirming, the Appellate Division viewed as "compelling" the testimony of the decedent's longtime attorney and accountant that decedent would not be able to comprehend the stock transaction and, further, that decedent had always emphasized his desire to treat his three children equally in his estate plan. The Appellate Division held: "Given the seriousness of the allegations of undue influence committed by both decedent's wife and son, petitioner's concern that the assets would be dissipated absent the preliminary injunction is well taken." Id. at 651.

Likewise, *Estate of Urban*, 2007 N.Y. Misc. LEXIS 6124 (Surr. Ct. Queens Cty., Aug. 20, 2007), addressed a temporary restraining order granted to the administrator of decedent's estate in the context of a turnover proceeding seeking the return of monies in joint accounts. The administrator alleged that decedent lacked the requisite mental capacity and that the respondent fraudulently induced and unduly influenced the decedent.

Respondent admitted to procuring and filling out the documents necessary to create the joint accounts, making gifts to herself and her family from these accounts, being decedent's attorney-in-fact and in a confidential relationship with the decedent, who, respondent further admitted, was suffering from mild dementia when the subject accounts were created.

The TRO restrained the respondent, and certain financial institutions, from withdrawing, encumbering or transferring the funds in the accounts until the conclusion of the proceeding. Citing *Kalichman*, supra, the court denied respondent's motion to vacate the TRO and found, inter alia: "Given the seriousness of the allegations of undue influence, fraudulent inducement, and decedent's lack of capacity, Petitioner's concern that the assets would be dissipated absent the [TRO] are well taken." Id. at *5.

Nevertheless, as with the alleged risk of a judgment-proof respondent, *Estate of Brooks*, supra, illustrates that Surrogate's Courts are not inclined to presume that a respondent is dissipating assets so as to render a potential money judgment ineffectual.

In *Brooks*, the objectant in a contested accounting proceeding sought a preliminary injunction enjoining an accounting fiduciary from encumbering or transferring the fiduciary's own assets pending the settlement of her account. In denying the requested injunctive relief, the court held that the objectant failed to establish the insufficiency of an award of money damages, as her "allegations that petitioner may dispose of her assets prior to [objectant] securing a judgment [were] insufficient to grant the relief requested." Id. at *4, citing *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541 (2000). The Surrogate further noted the objections sought a monetary award and that injunctive relief is not generally available where a party may be fully compensated with such an award.

> Generally, where the subject of a dispute is money and a money judgment is sought, **courts will not grant injunctive relief**. Surrogate's Courts have adhered to this general rule and **departed from it under certain circumstances.**

In *Credit Agricole*, the court of Appeals held that where a plaintiff fears that defendant will secret property during the pendency of the action and render a money judgment uncollectable, the appropriate remedy is generally attachment (CPLR 6201), not an injunction. Id., 94 N.Y.2d at 548.[6]

Difficulty With Damages

In certain cases, Surrogate's Courts have issued preliminary injunctions, although it was alleged that the petitioner could be compensated by money damages, upon finding that such damages would be prohibitively difficult to prove or compute. Thus, for example, in *Estate of Rothko*, 336 N.Y.S.2d 130 (Surr. Ct. N.Y. Cty. 1972), the court issued a preliminary injunction restraining the executors of artist Mark Rothko's estate from selling Rothko's paintings pending the proceeding to suspend and/or remove them.

Acknowledging that the petition sought money damages and the authority that irreparable harm is not shown when such damages are sought, the court found injunctive relief was warranted due to highly conflicting estimates of the paintings' values, based in part on decedent's artistic reputation. The court concluded that "irreparable damage has been amply demonstrated in this proceeding." Id. at 136.[7]

Further, in *Kalikow*, supra, injunctive relief was granted due, in part, to the difficulty decedent's children would face, absent the injunction, in proving that the IRS would have accepted a lower value of the trust assets had the lower value (based on their appraisals and proposed discount) been used in the estate tax return, a showing required in order to substantiate the preliminary executors' surcharge.

Joint Account Cases

Finally, as seen in *Stanton* and *Urban*, supra, Surrogate's Courts have granted injunctive relief where joint accounts are involved, even though "the subject of the action" is money. *Estate of Sanabria*, 2011 NY Slip Op. 51802(U) (Surr. Ct. Bronx Cty., Oct. 13, 2011), is another example.

In *Sanabria*, the temporary administrator alleged the sole asset of the estate was a joint account decedent held with his daughter. The temporary administrator noted the account's signature card did not contain survivorship language and, in correspondence with the daughter's attorney in August 2011, alleged it was a convenience account. The court granted a TRO restraining daughter from reducing the account to an amount less than $108,000, representing the approximate value of the decedent's spouse's elective share.

On the October 2011 return date, at which the daughter failed to appear, counsel for the administrator informed the Surrogate that he learned the daughter withdrew a total of $358,000 from the account and closed it, with most of the withdrawals occurring in August (the same time when the attorneys for the daughter and administrator were exchanging correspondence on the issue). The administrator requested that the court enjoin the daughter from transferring or disposing of all funds that had been in the joint account, regardless of current location. Observing the rule that injunctive relief is not generally available where a party may be fully recompensed with a monetary award, the Surrogate granted this relief.

The court concluded that the petitioner "demonstrated the estate will suffer irreparable injury and a balancing of the equities in his favor, as the alleged assets of the estate were entirely withdrawn [from the joint account] and transferred by [decedent's] daughter at a time when she was fully cognizant of the estate's claim of right thereto through the decedent … .Thus, the status quo should be maintained and the alleged assets of the estate preserved pending a determination of the competing claims of entitlement to the funds at issue." Id. at *2.

Conclusions

Although the subject of the litigation is money, and money is fungible, the joint account cases may be viewed as an extension of a line of cases, mostly in the context of commercial litigation, granting injunctive relief where a specific, identifiable fund is at issue.[8]

More broadly, though, the role of the Surrogate is different than that of a judge in another court deciding rights and claims as between a plaintiff and defendant. That the Surrogate has independent and ongoing responsibility to protect the estate (the overall "subject of the proceeding"), is seen, inter alia, in his or her power to remove a fiduciary sua sponte[9] and, in the absence of any objection, rule upon the sufficiency of an accounting[10] and the genuineness of an instrument offered for probate.[11]

As one Surrogate observed:

> [A]ny dispute over the assets of a decedent's estate necessarily involves more than just a plaintiff and defendant. Instead it involves the testator as well as all the beneficiaries and persons interested in the estate, who may be infants, incapacitated persons, unknown persons, charities or creditors of the decedent… . It is the unique responsibility of the Surrogate to consider the effect upon all these persons of any resolution of a dispute over estate assets and to see to it that the interests of all the beneficiaries of the estate are protected … .

The Surrogate in a turnover proceeding has just as much responsibility to see to it that all the beneficiaries of the estate are protected as he or she does in a probate or accounting proceeding. Furthermore, if assets are fraudulently or negligently removed from the estate, the intent of the testator is defeated.[12]

Thus, as seen above, considerations related to the unique function of the Surrogate's Court, including its responsibility to the estate and for the interests of those who may not be parties to the dispute in which injunctive relief is sought, support the Surrogate's being afforded broad discretion with respect to the application of the general rule that where money damages are sought, injunctive relief is not appropriate.

1. *Nobu Next Door v. Fine Arts Housing*, 4 N.Y.3d 839 (2005).
2. *Testament of Raffe*, 312197/S, NYLJ 1202647519848 (Surr. Ct. Nassau Cty., March 7, 2014).
3. *Fatima v. Twenty Seven-Twenty Four Realty*, 885 N.Y.S.2d 224 (2d Dept. 2009); *Dinner Club v. Hamlet on Olde Oyster Bay Homeowners Assn.*, 801 N.Y.S.2d 25 (1st Dept. 2005).
4. See, e.g., *Testament of Raffe*, supra; *In re Rice*, 963 N.Y.S.2d 327 (2d Dept. 2013) (affirming Surrogate's Court's denial of an injunction, where plaintiff sought money damages, underscoring the conclusion that money damages were sufficient); *Estate of Brooks*, 2005 N.Y. Misc. LEXIS 8282 (Surr. Ct. Suffolk Cty., Jan. 7, 2005); *Will of Nelson*, 487 N.Y.S.2d 777 (1st Dept. 1985) (vacating a TRO granted by the Surrogate's Court, where the party who obtained the TRO failed to show that money damages would not suffice, and in fact sought money damages).
5. The authors' law firm represented one of the preliminary executors in that case.
6. See also *Lauder v. Jacobs*, 809 N.Y.S.2d 482 (Surr. Ct. Westchester Cty. 2005), aff'd, 826 N.Y.S.2d 719 (2d Dept. 2006), denying estate administrator's motion for an order of attachment with respect to decedent's funds transferred to defendant, but directing defendant and account holders to notify plaintiff and court, in writing, of withdrawals over a certain amount.
7. See also *Matter of Brion*, 2012 WL 5456384 (Surr. Ct. Kings Cty. 2012).
8. See *Credit Agricole*, supra (denying injunction on the basis that, unlike in cases cited by the plaintiff, plaintiff did not claim rights to a specific fund rightly regarded as "the subject of the action" under CPLR 6301); see also *Destiny USA Holdings v. Citigroup Global Markets Realty*, 889 N.Y.S.2d 793, 798 (4th Dept. 2009) (recognizing that "preliminary injunctions have been awarded where the subject action involves a specific fund"); *Amity Loans v. Sterling Nat. Bank & Trust Co. of New York*, 575 N.Y.S.2d 854, 855 (1st Dept. 1991) (finding that, "[a]lthough injunctive relief is not appropriate in actions … where the movant has an adequate remedy at law for monetary damages, … injunctive relief is appropriate to remedy the conversion of identifiable proceeds").
9. SCPA 719.
10. *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995).
11. SCPA 1408.
12. *Matter of Milnes*, 11/22/2002 NYLJ 29, (col. 2) (Surr. Ct. Broome Cty.).

Legislation

« Continued from page 1

exclusion amount is $5.25 million, the estate will owe no New York tax. If instead that individual's New York taxable estate is 105.1 percent of $5.25 million (which is $5,517,750, or $267,750 more than $5.25 million), the estate would pay New York estate tax of $452,930. Ironically, reducing the taxable estate with a $267,750 charitable bequest (or even discarding that amount) would result in a tax saving of $452,930: The tax saving is greater than the amount of the bequest by pushing the estate value down to the exclusion level.

Many professional organizations, including the New York City and State Bars, urged the legislature to eliminate the cliff as inconsistent with Cuomo's objectives of making New York a more favorable environment for residents in their golden years. It is likely that this aspect of the Budget will continue to receive further attention in the coming legislative session.

Note, however, that due to modifications to the new bracket structure, if an estate does exceed 105 percent of the New York exclusion amount and is fully subject to New York estate tax, the estate tax owed will be the same amount that was owed under prior law. The end result:

- Under prior law, only estates under $1 million were exempt from New York tax. The new law exempts from tax estates that are less than or equal to the increased exclusion amount ($2,062,500 currently and rising to an estimated $5.9 million in 2019 when linked to the federal exclusion amount);
- There is no change to the estate tax consequence for estates under $1 million (not taxable under prior or current law); and
- There is no change to the estate tax consequences for estates that exceed 105 percent of the New York exclusion amount (same tax payable under prior and current law).

A Disappearing Estate Tax? Note that the estate tax may *disappear* after March 31, 2015: The estate tax rate schedule is expressed to apply to individuals dying between April 1, 2014 and March 31, 2015.[8] There is no rate schedule for individuals dying after March 31, 2015. This omission may have the effect of eliminating the estate tax for those dying outside the expressed timeframe, potentially signaling that the intent was to force the rate schedule to be revisited as part of next year's budget bill negotiations. Indeed, Cuomo had originally proposed reducing the top estate tax rate from 16 percent to 10 percent, but the rate reduction was eliminated from the final version of the Budget, and the top rate remains 16 percent.

Gift Add-Back. The New York gross estate of a deceased resident will be increased by the amount of any taxable gift made within three years of death, if the decedent is a New York resident at the time the gift is made and at the time of death.[9] This potentially subjects the amounts added back to New York estate tax at a maximum rate of 16 percent. The three-year lookback applies only to gifts made on or after April 1, 2014 and before Jan. 1, 2019 (although it could be extended).

Income Tax Changes for Certain Trusts. Under existing New York Tax Law, an income tax is imposed on the income of a "resident trust," which includes a trust created by a New York domiciliary. However, prior law provided that a resident trust would be exempt from tax if three conditions were met: (1) there were no New York trustees, (2) there was no trust property located in New York, and (3) there was no New York source income.

The Executive Budget includes changes to the taxation of resident trusts. While it does not impose a tax at the trust level, the new law does tax distributions of accumulated trust income to New York beneficiaries of these exempt resident trusts.[10]

In addition, changes are also made to the taxation of so-called "INGs"—incomplete gift, nongrantor trusts. These trusts were structured as incomplete gifts for gift tax purposes so that no gift tax was payable, but as separate taxpayers for income tax purposes. The goal was for a New York resident to structure the trust so it was not subject to income taxation that otherwise would have been payable had the New York resident grantor held or sold the trust property himself.

Under the new law, ING trusts will be treated as grantor trusts for New York purposes. That is, the income and gains of the ING trust will be includible in the income of the New York grantor, although the trust will remain a separate taxpayer for federal purposes.

The law is effective immediately and applicable to tax years beginning on or after Jan. 1, 2014.

Public Access to Surrogate's Court Documents Limited (New Surrogate's Court Rule Enacted by Administrative Order Feb. 19, 2014).[11] By Administrative Order dated Feb. 19, 2014, a new Surrogate's Court rule was adopted, which limits public access to certain documents. The rule attempts to strike a balance between two competing interests: public access to judicial proceedings and privacy concerns. By their nature, filings in Surrogate's Court proceedings often contain confidential identifying and financial information. To protect privacy and enhance security given the dangers of information misuse (including identity theft), the new rule limits access to certain documents. Only (1) persons interested in the decedent's estate[12] or their counsel, (2) the Public Administrator or counsel, (3) counsel for any federal, state or local governmental agency, or (4) court personnel can view the following documents:

- Guardianship proceeding filings pursuant to Surrogate's Court Procedure Act Articles 17 and 17A;
- Death certificates;
- Tax returns;
- Documents containing social security numbers;
- Inventories of firearms; and
- Inventories of assets.

Others can view these records with written permission of the Surrogate or Chief Clerk, which permission cannot be unreasonably withheld. In order to reduce the burden on court personnel and provide an additional safeguard, the Trusts, Estates and Surrogate's Court Committee of the New York City Bar had suggested also adding a partial redacting requirement on the filing party.[13] However, that recommendation was not adopted.

Necessity for QDOT Eliminated When No Federal Return Required (Enacted Dec. 18, 2013).[14] In order for a disposition to a non-U.S. citizen surviving spouse to qualify for the federal marital deduction, the disposition must pass in a Qualified Domestic Trust (QDOT). For estates below the federal filing threshold, the New York estate tax is based on the taxable estate computed on a pro-forma federal return. Although not required for New York purposes, dispositions to non-U.S. citizen spouses had to be in QDOT form because federal elections on the pro-forma return flow through to the New York return. The new law eliminates the requirement to create a QDOT if no federal return is required to be filed and the disposition would otherwise qualify for the federal estate tax marital deduction. The law takes effect immediately and applies to estates of individuals dying on or after Jan. 1, 2010, but expires and is deemed repealed on July 1, 2016.

Technical Corrections and Clarifying Amendments to Decanting Statute (Enacted Nov. 13, 2013).[15] Decanting is the mechanism whereby the trustee of an irrevocable trust can appoint the assets of that trust into a new trust with different terms. New York, which was the first state to enact decanting legislation in 1992, passed sweeping amendments to its statute in 2011. Recently enacted legislation clarifies that:

- A trustee with unlimited discretion to invade trust principal can decant to a new trust that excludes all successor or remainder beneficiaries of the original trust. Prior statutory language suggested that all but one of the successor or remainder beneficiaries could be excluded.[16]
- Whether a decanting begins the running of the six-year year statute of limitations on an action to compel an accounting will depend on all the facts and circumstances. The decanting notice required to be served on interested persons must state that the statute might begin to run and preclude the compelling of an accounting after a certain time period.[17]
- If a trust is decanted from a non-grantor trust to a grantor trust, the grantor will not be considered a beneficiary of the trust by reason of a trustee's authority to reimburse the grantor for income taxes attributable to the trust. Without this clarification, the grantor could have been considered a new beneficiary, invalidating the decanting because the addition of new beneficiaries in the appointed trust is prohibited.[18]
- The interest of a discretionary income beneficiary of the original trust may be continued in the new trust. Prior statutory language seemed to prohibit the continuation of such an interest.[19]
- A decision to decant requires a majority determination only, not unanimity.[20]

Informal Settlement of Account for Resigning Fiduciaries Permitted (Enacted Nov. 13, 2013).[21] The amendment changes current law to remove the requirement that a fiduciary seeking to resign must settle the fiduciary's account by formal judicial process. The amendment allows a court to approve an informal settlement of the resigning fiduciary's account, while preserving the ability of the court to compel a judicial accounting.

Uniform Act Regarding Adult Guardianship (Enacted Oct. 23, 2013).[22] The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) addresses the issue of jurisdiction over adult guardianships and other protective proceedings, providing a mechanism for resolving multistate jurisdictional disputes. It is modeled after an Act promulgated by the Uniform Law Commission (ULC),[23] which has now been adopted in 41 jurisdictions.

The goal of UAGPPJA is to ensure that only one state will have jurisdiction at any one time, and it defines a three-level priority system: home state, followed by a significant-connection state, followed by other jurisdictions. New York will have primary jurisdiction as the home state if the individual was physically present for at least six consecutive months immediately before the commencement of the proceeding. Factors relevant in determining significant connection might include location of family and property and other ties, such as voter or vehicle registration, and substantial evidence must be available. The Act also specifies procedures for transferring guardianships to New York from other state courts and vice versa, provides a framework for judges in different states to communicate with each other and outlines procedures for cooperation between state courts. A mechanism for registering and recognizing out-of-state guardianship and protective orders is included as well. The Act went into effect on April 21, 2014.

> During the 2014-2015 Executive Budget process, several organizations, including the New York City Bar Association, had **advocated for state-level portability** to match the federal regime and facilitate planning. Portability was not included in the final budget legislation, but professional organizations will likely **continue to advocate for it.**

Amendments to Anti-Lapse Statute (Enacted Sept. 27, 2013).[24] If issue or siblings of a testator die before the testator, New York's Estates, Powers, and Trusts Law (EPTL) §3-3.3 (the "anti-lapse" statute) prevents the lapse of a gift to them by providing that the gift passes instead to the deceased beneficiary's issue. The new law eliminates a conflict in the application of the anti-lapse statute (which excludes the surviving issue of a beneficiary who died before the execution of a will) and EPTL §2-1.2 (pursuant to which issue must take by representation) by removing the application of EPTL §3-3.3 to any multigenerational class. The amendment also clarifies that the anti-lapse statute applies to a gift of a future interest.

Posthumously Conceived Children (Passed Both Houses, Awaiting Delivery to Governor).[25] With sophisticated storage techniques for genetic material and advances in medical technology, a child can be conceived after the death of one or both of the child's genetic parents. Since New York law is unclear as to how such a child should be treated for inheritance, intestacy and other purposes, this proposal clarifies the circumstances under which a child born after the death of a genetic parent would be considered a child of that parent. Four requirements would have to be satisfied:

- In a written instrument signed not more than seven years before death, the genetic parent must have (1) expressly consented to the use of the genetic material for posthumous reproduction, and (2) authorized a person to make decisions about the use of the genetic material after the genetic person's death;
- The person authorized in the writing must have given notice of the existence of the stored genetic material to the personal representative of the genetic parent's estate within seven months of the issuance of letters;
- The authorized person must have recorded the writing in the Surrogate's Court within seven months of the genetic parent's death; and
- The genetic child must have been in utero within 24 months or born within 33 months of the genetic parent's death.

If these four requirements are met, the child would be considered a distributee of the genetic parent and a child of the genetic parent for purposes of gifts to children, issue, descendants and similar classes in instruments of the genetic parent or of others. With regard to dispositive instruments in which the genetic parent was not the creator, the provision is to be effective for wills of persons dying on or after Sept. 1, 2014, or lifetime trusts executed on or after that date. For instruments created by the genetic parent, the law will

apply regardless of date.

Interest Computation on Delayed Legacy Payments Revised (Passed Both Houses, Awaiting Delivery to Governor).[26] Under existing law, unless the will provides otherwise, 6 percent interest is payable on a testamentary pecuniary legacy that is unpaid seven months after letters issue. The interest charge is payable only if a legatee made a demand for the interest before initiating a judicial proceeding.

Under the proposal awaiting presentment to Cuomo:

(1) Interest is to be payable automatically on a pecuniary legacy unpaid within seven months from the issuance of letters. According to the legislative summary, the dual requirements for demand and a judicial proceeding have not been applied consistently, with some courts requiring both and other courts requiring one or the other. This makes the law unclear, leaving fiduciaries in the difficult position of potentially paying interest on a legacy at their peril in the absence of a judicial proceeding, or forcing an unnecessary, expensive judicial proceeding;

(2) The interest charge is to be tied to the federal funds rate. The current fixed statutory interest rate of 6 percent is too high based on current market rates, but may be too low in a different economic environment; and

(3) The interest charge is to be recharacterized as accounting income, so that its payment will carry out distributable net income and generate a deduction for the estate. Currently, the interest is not deductible.

Recant a Decanting (Passed Assembly, Died in Senate).[27] New York's decanting statute[28] requires that notice of the decanting be served upon interested persons. Unless those interested consent in writing to an earlier effective date, the decanting becomes effective 30 days after service. This proposal would have made explicit that the decanting becomes irrevocable after the 30-day notice period (or earlier agreed date), and can be recanted before that time. Presumably, the intent is to allow a trustee to recant a decanting if there are objections received within the 30-day period, so as to prevent litigation. Once the decanting has become effective, the new trust is irrevocable and can only be changed by a new decanting.

Fiduciary Access and Control Over a Decedent's Digital Assets and Accounts (Multiple Bills, Introduced in One or Both Houses, All Died).[29] As digitization in our modern world explodes, the ownership, transfer and disposition of digital assets present unprecedented challenges. Digital assets encompass social media websites such as Facebook, email accounts such as Yahoo, personal accounts like Shutterfly and financial accounts. Family members can face many challenges in unlocking a decedent's digital information, including establishing their rights to access that information, and retrieving confidential user IDs and passwords. Terms of Service (TOS) Agreements with individual providers (which are typically entered into by clicking "I agree" when opening) usually govern what happens to an account on the death of the owner. Oftentimes, they can provide that the account is not transferable and all rights to the account cease on death. Federal and state laws that criminalize unauthorized access to computers and prohibit the release of electronic account information can prevent fiduciary access to the digital assets.

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) was approved by the ULC on July 16, 2014. The goal of the UFADAA is to remove barriers to a fiduciary's access to electronic records by reinforcing the concept that the fiduciary "steps into the shoes" of the account holder. The Act uses the concept of "media neutrality": If a fiduciary would have access to a tangible asset, the fiduciary will also have access to a similar type of digital asset. "Digital asset" is very broadly defined to mean a record that is electronic. The Act:

- Goes beyond the estate situation and covers four common types of fiduciaries: personal representatives, guardians, agents acting under a power of attorney and trustees;
- Maneuvers around federal and state privacy and computer fraud/abuse laws by defining fiduciaries as authorized users; and
- Supersedes any contradictory TOS agreements: Provisions in TOS agreements broadly barring fiduciary access are void.

Upon the written request of a fiduciary with authority over digital property, a custodian must comply with the fiduciary's request for access, control or a copy of that property within 60 days. Custodians are granted immunity from taking any action in compliance with the statute.

After receiving the ULC's approval, a uniform act is officially promulgated for consideration by the states, and legislatures are urged to adopt it. A uniform law is not effective until a state legislature adopts it, sometimes with state-level massaging. Among the several proposals that were introduced regarding access to a decedent's digital assets, one[30] was modeled on a prior version of the UFADAA before the latest form was adopted. Given the final approval of the UFADAA, the continued proliferation of digital assets and the need to come to grips with another area in which technology has fast outpaced the law, it is likely that a proposal based on the final UFADAA will receive consideration during the next legislative session.[31]

Proposal Regarding Commissions Computations on Adjusted Income Payouts (Not Yet Introduced). Under New York's power to adjust regime in EPTL §11-2.3(b)(5), a trustee is permitted to make adjustments between income and principal to be fair and reasonable to all beneficiaries. In order to effect consistency in how adjusted amounts are treated for purposes of computing commissions, the proposal would treat an adjustment as a recharacterization of the adjusted amount from income to principal or principal to income, as the case may be.

Proposal Regarding Custodial Powers (Not Yet Introduced). Under New York's Uniform Transfers to Minors Act,[32] a custodial account can be created for a minor's benefit, and must be paid out to the minor at age 21. The New York City and State Bars are working on a proposal to make explicit the custodian's authority to transfer property to a Minor's Trust under Internal Revenue Code §2503(c), which could potentially delay the minor's outright receipt of the property.

Portability. "Portability" refers to the ability of a surviving spouse to utilize the federal unused gift and estate tax exclusion of the first spouse to die ($5.34 million for 2014). Portability has been permitted for federal purposes since 2011. During the 2014-2015 Executive Budget process, several organizations, including the New York City Bar Association, had advocated for state-level portability to match the federal regime and facilitate planning. Portability was not included in the final budget legislation, but professional organizations will likely continue to advocate for it.

1. Including developments through Sept. 1, 2014.
2. New York A.9355/S.7144 (2014); Estates Powers & Trusts Law §2-1.11(d)(5).
3. Non-Profit Revitalization Act of 2013, New York A.8072/S.5845.
4. New York A.10027A/S.7799A (2014).
5. New York A.8559D/S.6359D (2014).
6. N.Y. Tax Law §952(c)(2).
7. N.Y. Tax Law §952(c)(1).
8. N.Y. Tax Law §952(b).
9. N.Y. Tax Law §954(a)(3).
10. N.Y. Tax Law §658(f).
11. Administrative Order AO/43/14; 22 NYCRR §207.64.
12. As defined by Surrogate's Court Procedure Act §103(39), which includes any person entitled or allegedly entitled to share as beneficiary in the estate.
13. See http://www2.nycbar.org/pdf/report/uploads/20072616-SecureFilingofCertainDocuments.pdf.
14. New York A.6556-A/S.4851-A (2013); N.Y. Tax Law §951(b).
15. New York A.7061/S.3790A (2013).
16. EPTL §10-6.6(b).
17. EPTL §10-6.6(j)(5) & (6).
18. EPTL §10-6.6(s)(10).
19. EPTL §10-6.6(s)(4).
20. EPTL §§10-6.7, 10-10.7.
21. New York A.7062/S.4272 (2013); SCPA §715.
22. New York A.857/S.2534 (2013): N.Y. Mental Hyg. Law §§83.01-83.45
23. The Uniform Law Commission (ULC) is comprised of commissioners from each state who are appointed by their states to draft and promote enactment of uniform laws where uniformity is desirable and practical.
24. New York A.6555/S.4852 (2013).
25. New York A.7461/S.4779-A (2013).
26. New York A.1185/S.4952 (2013).
27. New York A.9761 (2014).
28. EPTL §10-6.6.
29. New York A.6034/S.6532 (2013); New York A.823 (2013); New York A.6729/S.4895 (2013); A.8851A/S.6176A (2014).
30. New York A.6729/S.4895 (2013).
31. A version of the uniform act was signed into law in Delaware (the first state to introduce legislation based on the model law) on Aug. 12, 2014. Delaware H.B. 345 (2014).
32. EPTL §7-6.

For individuals dying on or after:	For individuals dying before:	Exclusion amount:
April 1, 2014	April 1, 2015	$2,062,500
April 1, 2015	April 1, 2016	$3,125,000
April 1, 2016	April 1, 2017	$4,187,500
April 1, 2017	January 1, 2019	$5,250,000