TRUSTS & ESTATES

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CONTENTS

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I. FEDERAL LEGISLATION: CONTINUATION OF THE TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION AUTHORIZATION ACT

In the last *Survey*, the effects of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("Tax Relief Act") on estates and gifts was reviewed and highlighted.[1] During 2012, the estate and gift tax lifetime exemption remained at $5 million plus inflation, moving the exemption to $5,120,000.[2]

The period of time covered by this *Survey* was largely spent in anticipation of whether lawmakers would allow the changes under the Tax Relief Act to lapse, effectively returning us to a $1 million estate tax exemption, or pass new legislation to extend and/or alter the exemption and rates. By the time this *Survey* is published, the wait will be over.

II. FEDERAL REGULATIONS AND CASES

A. Expanded Definition of Spouses for New York State Estate Tax Purposes

As discussed in the previous *Survey*, the New York Marriage Equality Act,[3] which became effective on June 24, 2011, affected the interpretation of many New York laws. For New York State estate tax purposes, TSB-M-11(8)M (issued on July 29, 2011) expanded the term "spouse" to include same-gender spouses and opposite-gender spouses.[4] The amended definition granted deductions and elections to same-gender spouses that were previously available only to opposite-gender

1. *See generally* Emilee K. Lawson Hatch, *Trusts & Estates, 2010-11 Survey of New York Law*, 62 SYRACUSE L. REV. 845 (2012); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010) (codified at scattered sections throughout 26 U.S.C.).

2. 26 U.S.C. § 2010(3)(A) (2006).

3. Act of June 24, 2011, ch. 95, 2011 McKinney's Sess. Laws of N.Y. 749 (to be codified at N.Y. DOM. REL. LAW §§ 10(a), (b) (2012).

4. N.Y. State Dep't of Taxation & Fin. Tech. Adv. Mem. TSB-M-11(8)M (July 29, 2011), *available at* http://www.tax.ny.gov/pdf/memos/estate_&_gift/m11_8m.pdf.

spouses.[5] However, at the present time, the Federal Defense of Marriage Act ("DOMA") continues to recognize only opposite-gender spouses.[6] This creates complications for same-gender spouses in New York when filing both estate and income tax returns. For income tax purposes, same-gender spouses must compute and file a "single status" federal income tax return, but prepare their New York State personal income tax returns using their married status.[7]

B. Completed Gift to Trust

Donor taxpayers asserted that transfers made to an irrevocable trust were not completed gifts.[8]

Taxpayers transferred property into an irrevocable trust that would terminate at the death of both of the donors.[9] The trust provided that the donors renounced control over the income or principal of the trust.[10] The donors appointed one of their children as sole trustee. [11] The trustee was given discretionary power, limited to an ascertainable standard, over distributions to the donors' children, lineal descendants and their spouses, and charitable entities.[12]

The trust gave each beneficiary the power to withdraw an amount equal to the annual exclusion in any year in which a transfer is made to the trust.[13] However, the trustee was given an additional power to void the withdrawal rights after any additions were made.[14] In addition, the terms of the trust prevented a beneficiary from enforcing his or her withdrawal right in a state court.[15]

The donor taxpayers argued that although they had released control and dominion of the trust property, they retained limited testamentary

5. *Id.*

6. Defense of Marriage Act, Pub. L.104-199, § 3., 110 Stat. 2419, 2419-20 (1996) (codified at 1 U.S.C. § 7 (2006)); 28 U.S.C. § 1738C (2006)).

7. N.Y. State Dep't of Taxation & Fin. Tech. Adv. Mem. TSB-M-11(8)C, (8)I, (7)M, (1)MCTMT, (1)R, (12)S (July 29, 2011), *available at* http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf.

8. Memorandum from Curt G. Wilson, Assoc. Chief Counsel, Internal Revenue Serv., to Frances F. Regan, Area Counsel, Internal Revenue Serv., and Mary P. Hamilton, Senior Attorney, Internal Revenue Serv. 3 (Feb. 24, 2012), [hereinafter Wilson Memorandum] *available at* http://www.irs.gov/pub/irs-wd/1208026.pdf..

9. *Id.*

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. Wilson Memorandum, *supra* note 8, at 3; *see also* 26 U.S.C. § 2503(b) (2012).

14. Wilson Memorandum, *supra* note 8, at 3.

15. *Id.*

powers of appointments that prevented the gifts from being completed.[16]

The IRS Chief Counsel found that not only were the gifts to the trust completed, but the withdrawal rights provided for in the trust agreement were "unenforceable and illusory" and no annual exclusion exemptions were permitted to be applied to the gifts to the trust. [17]

Interestingly, the IRS Chief Counsel Memorandum contained a peculiar ending wherein the Chief Counsel noted that "our belief in this regard carries certain hazards to the extent further study is required. Should you wish to pursue this argument, please coordinate with the National Office."[18]

C. Crummey Forgiveness—Estate of Turner v. Commissioner

The Tax Court found in *Estate of Turner v. Commissioner* that the failure to send Crummey notices to beneficiaries may be forgiven, assuming the trust includes the proper language.[19] Although the *Turner* case may be interpreted as leniency from the IRS, many practitioners will recommend that trustees continue to send Crummey notices.

In *Turner*, the Tax Court also held that assets contributed to a family limited partnership were to be included in the general partner's gross estate under §§ 2036(a)(1) and (2) of the Internal Revenue Code.[20] The Court found that there was no "bona fide" sale for adequate consideration because there were no legitimate and substantial non-tax business reasons for establishing the partnership.[21]

D. Final Regulations Issued to Clarify Calculation of Estates Under I.R.C. § 2036

On November 8, 2011, the IRS issued final regulations amending Treasury Regulations § 20.2036-1 (proposed regulations were published in the Federal Register on April 30, 2009).[22] The regulations apply to the amount of property includable in a grantor's gross estate under I.R.C. § 2036 if the grantor retained the use of the property, retained the right to an annuity or unitrust, or maintained a graduated retained interest or other payment from the property.[23] The calculation of the

16. *Id.*
17. *Id.* at 2.
18. *Id.*
19. *See* Estate of Turner v. Comm'r, 102 T.C.M. (CCH) 214, *2 (2011).
20. *Id.* at 60.
21. *Id.* at 53; 26 U.S.C. § 2036(a) (2006).
22. T.D. 9555, 2011-50 I.R.B. 838-43 (Nov. 7, 2011).
23. *Id.*

grantor's gross estate under I.R.C. § 2036 applies to property owned by the grantor during life, during any period not ascertainable without reference to the grantor's death, or during a period that does not end before the grantor's death.[24]

These regulations apply to the estates of decedents who die after November 7, 2011 and affect estates filing a federal estate tax return. [25]

E. Final Regulations Regarding Disclosure of Transactions Relating to GSTT

The IRS issued final regulations, effective November 14, 2011, that add transactions that reduce or eliminate the generation-skipping transfer tax ("GSTT") as listed transactions or transactions of interest.[26] The final regulations also require the disclosure of those transactions under IRS Regulation section 301.6112-1.[27] Material advisers have thirty calendar days from the date the list maintenance requirement first arises to prepare the required list.[28]

The final regulations require that any provision in a trust, will, or local law that specifies the source out of which amounts are to be paid, permanently set aside, or used for a charitable purpose must have an independent economic effect aside from income tax purposes.[29] The regulations directly impact charitable lead trusts, and any other trusts or estates making payments to, or setting aside amounts for, a charitable purpose.[30]

If the applicable provision does not have economic effect independent of income tax consequences, income distributed for a purpose specified in section 642(c) will be "deemed to consist of the same proportion of each class of the items of income as the total of each class bears to the total of all classes."[31]

Due to concerns received after the IRS published the proposed regulations in 2008, including claims that the regulations discouraged charitable giving and protecting charities, the IRS added an example of

24. *Id.*

25. *Id.*

26. T.D. 9556, 2011-51 I.R.B. 862 (Dec. 19, 2011). These regulations adopt proposed regulations issued in 2009 (REG-136563-07).

27. T.D. 9556, 2011-51 I.R.B. 864 (Dec. 19, 2011).

28. *See* 26 C.F.R. § 301.6112-1(b) (2012); *see also* 26 C.F.R. § 301.6112-1(c)(1) (defining "material advisers").

29. T.D. 9582, 2012-18 I.R.B. 870-71 (Apr. 30, 2012) (amending Treas. Reg. §§ 1.642(c)-3(b)(2), 1.643(a)-5(b) (2013)).

30. *Id.* at 871.

31. *Id.*

a provision in a governing instrument that would have economic effect independent of income tax consequences.[32]

F. Extension of Time to File 2010 Federal Estate Tax Return

The IRS released Notice 2011-76, which gave executors or administrators of estates of decedents who died in 2010 an automatic six-month extension of time to file their 2010 federal estate tax return and Form 8939 Carryover Basis Election, and to pay the estate tax due if such return is timely filed.[33]

G. Portability of a Deceased Spousal Unused Exclusion Amount

IRS Notice 2011-82[34] announced the intent of the Treasury Department and IRS to issue regulations implementing the portability of a Deceased Spousal Unused Exclusion Amount ("DSUEA") allowed for in the Tax Relief Act.[35] In an effort to make portability as "straightforward and uncomplicated as possible to reduce the risk of inadvertently missed elections," the Notice explains that a federal estate tax return must be filed timely and properly in order to claim portability of a DSUEA.[36] Notice 2011-82 provides that estates of deceased spouses who choose not to make the portability election may simple not timely file a federal estate tax return.[37]

III. NEW YORK LEGISLATION

A. Increased Decanting Opportunities

When New York's Estates, Powers and Trusts Law ("EPTL") section 10-6.6 was enacted in 1992, New York was the first state to allow the decanting, or rather the effective rewriting, of an irrevocable trust by permitting trust assets to be decanted to another trust.[38] After the statute went into effect, decanting was limited to trusts where an authorized trustee of the invaded trust had absolute discretion to distribute principal.[39] A trustee with unlimited discretion to invade

32. *Id.* (illustrated in example 2 of the final regulations).

33. I.R.S. Notice 2011-76, 2011-40 I.R.B. 479 (Sept. 13, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-76.pdf.

34. I.R.S. Notice 2011-82, 2011-42 I.R.B. 516 (Sept. 30, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-2011-82.pdf.

35. 26 U.S.C. § 2010(c)(5)(A) (Supp. V 2011).

36. I.R.S. Notice 2011-82, *supra* note 34.

37. *Id.*

38. *See generally* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002).

39. *Id.*

principal can decant in favor of some or all of the trust beneficiaries, to the exclusion of other beneficiaries.[40]

On August 17, 2011, EPTL 10-6.6 was amended and expanded the opportunities to decant irrevocable trusts.[41] Below is a short summary of the primary changes to the statute:

1. A trustee is no longer required to have absolute discretion in order to invade the principal or the original trust; any power to invade principal is sufficient to decant.[42]
2. A spendthrift clause or a provision prohibiting amendment or revocation of the trust does not prohibit decanting.[43]
3. A power of appointment may be granted to a current beneficiary of the invaded trust.[44]
4. When the trustee's power to distribute principal under the original trust is limited, all of the beneficiaries of the appointed trust must remain the same.[45]
5. A trust's term may be extended beyond the term of the original trust.[46]
6. The decanting trust is not effective until thirty days after notice, including a copy of the old trust and the new trust, is given to all interested persons (including the grantor and any individual with the power to remove the trustee). [47] Notice can be obtained if all persons entitled to notice consent to an earlier effective date.[48]
7. The new trust may provide the trustees with additional administrative powers, or provide different provisions governing the appointment of co-trustees or successor trustees.[49]
8. Objections to the decanting may be made by serving notice on the trustee prior to the effective date of the decanting.[50]
9. The trustee must exercise a fiduciary duty when decanting.[51]

40. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)-(c) (McKinney 2013).
41. *Id.*
42. *Id.* § 10-6.6(c).
43. *Id.* § 10-6.6(m).
44. *Id.* § 10-6.6(b).
45. N.Y. E.P.T.L. § 10-6.6(c).
46. N.Y. E.P.T.L. § 10-6.6(e) (McKinney Supp. 2013).
47. *Id.* at § 10-6.6(j).
48. *Id.*
49. *Id.* § 10-6.6.
50. *Id.* § 10-6.6(j)(4).
51. N.Y. E.P.T.L.§ 10-6.6(h).

However, the statute does not create a duty to decant, and no inference of wrongdoing will be made from a failure to decant.[52]

10. A standard of fiduciary duty is now applied to the trustee performing the decanting. [53] The standard requires the trustee to exercise "power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstance."[54] Additionally, if there is substantial evidence of contrary intent of the grantor of the original trust and it cannot be established that the grantor would likely have changed such intention, then the trustee should not exercise the power.[55]
11. Provided there is no Surrogate's Court proceeding relating to the trust, there is no longer a requirement that the trustee of an inter vivos file the instrument exercising the power to appoint with the clerk of the court maintaining jurisdiction over the trust.[56]

B. Medicaid: Regulations Expanding the Definition of "Estate" Repealed

Following the April 1, 2011 changes to Medicaid estate recovery under New York's Social Services Law, emergency regulations from the Commissioner of the New York State Department of Health were issued on September 8, 2011.[57] The amended law expanded the definition of "estate" and provided that Medicaid can now recover an individual's "real and personal property" and other assets that can pass outside of a will or intestacy, including joint bank accounts, retirements accounts, and some trusts, within Medicaid's reach.[58] In an effort to clarify the September regulations and implement the expanded definition of "estate" for Medicaid recovery purposes, the New York State Department of Health issued an administrative directive.[59]

52. *Id.* § 10-6.6(l).

53. *Id.* § 10-6.6(h).

54. *Id.*

55. *Id.*

56. N.Y. E.P.T.L. § 10-6.6(j)(2).

57. N.Y. COMP. CODES R. & REGS. tit. 18, § 360-7.11 (2012); *see* Act of August 3, 2011, ch. 385, 2011 N.Y. Laws 1170; Act of August 3, 2011, ch. 386, 2011 N.Y. Laws 1171-72.

58. 18 NYCRR 360-7.11(a).

59. Directive, Jason A. Helgerson, Deputy Comm'r, Medicaid Dir., Office of Health Ins. Programs, N.Y. State Dep't of Health, to Comm'rs of Soc. Servs., 11 OHIP/ADM-8, Expanded Definition of "Estate" for Medicaid Recoveries (Sept. 26, 2011), *available at*

However, the regulations and clarification were short-lived, as the emergency regulations expired on December 6, 2011.[60] On March 30, 2012, the New York State legislature voted to repeal the law that expanded Medicaid estate recovery to non-probate assets.[61]

IV. NEW YORK STATE CASES

A. DOMA Held to Be Unconstitutional

In the case of *Windsor v. United States*, the United States Court of Appeals for the Second Circuit affirmed the U.S. District Court for the Southern District of New York's decision, which found section 3 of DOMA unconstitutional, in its definition of "marriage" as "a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or a wife."[62] Certiorari was granted by the United States Supreme Court on December 7, 2012.[63]

B. Power of Attorney—Initials Are Required When Granting Authority Using Statutory Short Form Power of Attorney

In *In re Estate of Marriott*, the court found that while hospitalized, decedent executed a durable general power of attorney using the New York statutory short form, which purported to grant certain powers to her agents.[64] After the power of attorney was executed, one of the agents transferred her real property.[65]

The power of attorney statute in effect at the time the form was executed, as well as the directions on the form itself, required the principal to place her or his initials in designated spaces on the form to indicate the specific powers granted to her agents.[66]

Rather than place her initials on the form, the decedent placed an "X" in the space next to line "Q" (now line "P"), which purported to grant certain powers to the agents, including the power to conduct real

http://www.health.ny.gov/health_care/medicaid/publications/docs/adm/11adm8.pdf.

60. 18 NYCRR 360-7.11.

61. Press Release, Assemb. Speaker Sheldon Silver, 2012-13 Health and Mental Hygiene Budget Maintains Vital Programs and Enacts Historic Medicaid Reforms (Mar. 30, 2012), *available at* http://www.assembly.state.ny.us/Press/20120330c/.

62. 699 F.3d 169, 176, 188 (2d Cir. 2012) (citing Windsor v. United States, 833 F. Supp. 2d 394, 396 (S.D.N.Y. 2012)); *see also* 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006).

63. United States v. Windsor, 133 S. Ct. 786, 787 (2012).

64. 86 A.D.3d 943, 944, 927 N.Y.S.2d 269, 269-70 (4th Dep't 2011).

65. *Id.*, 927 N.Y.S.2d at 270.

66. N.Y. GEN. OBLIG. LAW § 5-1513(f) (McKinney 2010).

estate transactions.[67] The decedent's initials did not appear anywhere on the power of attorney form.[68] The court stated that

> although an 'X' or another such mark may be sufficient where a principal routinely signs his or her name with such a mark, i.e., where the principal lacks the capacity for a standard signature, that is not the case here. Indeed, decedent signed her full name on the POA form, thus rebutting any suggestion that she was unable to affix her initials to the form or that it was her practice to execute documents with an 'X.'[69]

The appellate division found that the purported conveyance of the property was unauthorized, as it was made pursuant to a power of attorney that did not validly grant the decedent's agents the proper authority.[70] The court held that the transfer of the property was void and the proceeds from the sale were ordered to be returned to the decedent's estate.[71]

C. Slayer Rule Applied to Indirect Inheritance

In *In re Estate of Edwards*, decedent died testate leaving her estate to her daughter.[72] Before the decedent's estate assets were distributed, the decedent's daughter died intestate of an accidental drug overdose.[73] The daughter's surviving husband was serving a prison term in connection with the decedent mother-in-law's death.[74] Although the husband would normally be the beneficiary of his wife's estate, including the assets passing from his mother-in-law's estate, the slayer rule was applied.[75]

The surrogate court found that a link was created between the wrongdoing of the son-in-law and the benefits sought.[76] The surrogate court held that, under the slayer rule, an intentional killer cannot inherit from the estate of his victim, nor from the estate of the victim's post-deceased legatee.[77]

67. *See id.*; *In re Estate of Marriott*, 86 A.D.3d at 945, 927 N.Y.S.2d at 270.
68. *In re Estate of Marriott*, 86 A.D.3d at 945, 927 N.Y.S.2d at 270.
69. *Id.* (internal citations omitted).
70. *Id.* at 945, 927 N.Y.S.2d at 271 (citation omitted).
71. *Id.*
72. N.Y.L.J., Apr. 13, 2012, at 35 (Sur. Ct., Suffolk Cnty. Mar. 28, 2012).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *In re Estate of Edwards*, N.Y.L.J., Apr. 13 2012, at 35; *see also* Riggs v. Palmer, 115 N.Y. 506, 513, 22 N.E. 188, 190 (1889) (establishing the New York slayer rule).

D. Gifts

1. No Lack of Capacity of Undue Influence Where Gifts Were Made as Part of a Donative Plan

In *In re Rella*, a contested accounting proceeding, the executor moved for partial summary judgment dismissing the objections contesting a gift that was made to him several months before the decedent's death.[78]

The decedent, a widow, died testate survived by five children.[79] The decedent's will divided her estate equally among four of her children.[80] She named her fifth child, Gilbert, and her daughter, Marie, as co-executors.

During her life, the decedent transferred her 50% interest in a fuel distribution company to Gilbert.[81] Gilbert owned the remaining 50% interest of the company.[82] A gift tax return was filed to reflect the transfer.[83]

Two of the decedent's other children objected and claimed that the decedent lacked the capacity to make the gift to Gilbert, and that the purported gift was made under undue influence.[84]

A. Incapacity

In addressing the claim of incapacity, the court explained that while it is the donee's burden to prove "by clear and convincing evidence that the donor made a present transfer knowingly or 'understandingly,'" there is a presumption that every individual has capacity, and old age and mental weakness do not automatically represent a lack of capacity to transfer property.[85]

The court found that the testimony of three disinterested witnesses, along with the presumption of capacity, established a prima facie case that the decedent had the capacity to make the gift to Gilbert.[86]

78. *In re* Rella, N.Y.L.J., Apr. 10, 2012, at 22 (Sur. Ct., N.Y. Cnty. Apr. 1, 2012).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *In re Rella*, N.Y.L.J., Apr. 10, 2012, at 22 (citations omitted).
84. *Id.*
85. *Id.*
86. *Id.*

B. Undue Influence

The court found that Gilbert established a prima facie finding that the decedent had made a voluntary gift to him.[87] The court found that the donor was "cogent," the gift was part of a donative plan, and that the plan "was implemented in accordance with the advice and assistance of professionals of decedent's choosing."[88] Dismissal of the objections was granted in Gilbert's favor.[89]

2. Delivery of Gifts

During an accounting proceeding in *In re Albert Nathan Eisenberg Revocable Trust*, an issue arose about whether delivery of purported gifts to the decedent's companion had been made from the decedent's revocable trust during his life.[90] The trustee of the revocable trust made a motion for summary judgment arguing that although the gifts may have been discussed, the gifts were never actually delivered to the companion.[91]

The court opined that delivery of a gift requires that the donor divest himself of full control over the subject property.[92] However, because proof of delivery can be difficult, in order to avoid inequities, courts will recognize, in certain circumstances, symbolic or constructive delivery in lieu of physical delivery.[93]

Two gifts were at issue.[94] The court found that no delivery had occurred where the funds constituting one of the alleged gifts remained in the decedent's trust account and were subject to his dominion and control.[95] With respect to the second gift, no delivery had occurred where the assets could have been transferred, but no transfer was effectuated.[96] The court also found that a "deed of gift" at issue was invalid due to its failure to describe the subject matter of the gift.[97] As the element of delivery had not been sufficiently established with respect to either of the alleged gifts, the court granted the trustee's

87. *Id.*
88. *In re Rella*, N.Y.L.J., Apr. 10, 2012, at 22.
89. *Id.* at 23.
90. N.Y.L.J., Mar. 26, 2012, at 41 (Sur. Ct., N.Y. Cnty. Mar. 9, 2012).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *In re Albert Nathan Revocable Trust*, N.Y.L.J., Mar. 26, 2012, at 41.
96. *Id.*
97. *Id.*

motion for summary judgment.[98]

3. Gifts Made by Agent Considered Self-Dealing

In the case *In re Goodwin*, decedent's son brought a motion for summary judgment alleging that his sister, the executrix, made improper transfers of the decedent's assets during the decedent's life.[99]

The executrix claimed that she made the subject transfers while acting as the decedent's attorney-in-fact.[100] However, the power of attorney used by the executrix was silent as to the gift-giving authority of the agent.[101] The executrix also alleged that the transfers were made at the decedent's direction, and in the decedent's best interests, and that the decedent had capacity to make such decisions.[102]

The petitioner claimed that the decedent suffered from dementia at the time the transfers were made, as supported by the decedent's medical records.[103] Petitioner submitted a copy of a family contract, signed by the executrix, which indicated that the subject transfers were made in order to qualify the decedent for government programs, that the assets were to be for the sole benefit of the decedent, and that the funds were to be distributed at the decedent's death pursuant to the terms of her will.[104]

The surrogate asserted that pre-death transfers made by an agent to herself or himself as power of attorney carry with them a presumption of impropriety and self-dealing. [105] This presumption can be overcome by a "clear showing of intent on the part of the principal to make the gift."[106] Any gifts must be made subject to the principal's best interests to carry out her "financial, estate, or tax plans."[107] The court concluded that the petitioner had made a *prima facie* case in favor of summary judgment, and the court directed that the assets represented by the

98. *Id.*

99. *In re* Goodwin, N.Y.L.J., Apr. 10, 2012, at 31 (Sur. Ct., Suffolk Cnty., Apr. 1, 2012).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *In re Goodwin*, N.Y.L.J., Apr. 10, 2012, at 31.

105. *Id.*

106. *Id.* (citing *In re* Maikowski, 24 A.D.3d 258, 260, 808 N.Y.S.2d 174, 176 (1st Dep't 2005)).

107. *In re Goodwin*, N.Y.L.J., Apr. 10, 2012, at 31 (quoting *In re* Ferrara, 7 N.Y.3d 244, 254, 852 N.E.2d 138, 144, 819 N.Y.S.2d 215, 221 (2006)); *see also* N.Y. GEN. OBLIG. LAW § 5-1505(1) (McKinney 2010).

transfers in issue be restored to the estate.[108]

E. Surrogate's Court Cannot Award a Fee in Excess of Amount Listed in Retainer Agreement

In *In re Benware*, an agreement was entered into by co-executors to retain an attorney to represent them in the administration of their mother's estate.[109] The retainer agreement set the attorney's fee at 5% of the taxable value of the estate.[110] The agreement further provided for additional payment at $250 per hour, subject to pre-approval by the co-executors, for any legal services required by "extenuating circumstances."[111]

During the administration, a co-executor requested an accounting and determination of the attorney's fee.[112] The surrogate's court used the $250 per hour rate, and directed that 20% of the fee be assessed against the other co-executor's share of the residuary estate because her actions caused the estate to incur unnecessary legal expenses.[113]

On appeal, the appellate division reversed the surrogate's court's calculation of the attorney fees, as the surrogate's court did not determine whether legal services required by the extenuating circumstances were actually performed, whether the total fees were reasonable, and whether the co-executors gave prior approval of such work.[114] The court also stated that "[w]hile Surrogate's Court has broad discretion to determine whether compensation for those services is reasonable, it cannot award legal fees in excess of what has been agreed to by the parties in a retainer agreement."[115]

The appellate division upheld the surrogate's court's decision as to the assessment against the co-executor citing the respondent's behavior as creating "acrimony" during the administration of the estate.[116]

108. *In re Goodwin*, N.Y.L.J., Apr. 10, 2012, at 31.

109. 86 A.D.3d 687, 687, 927 N.Y.S.2d 173, 174 (3d Dep't 2011).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 687-88, 927 N.Y.S.2d at 175; *see also* N.Y. SURR. CT. PROC. ACT LAW § 2110 (McKinney 2011).

114. *In re Benware*, 86 A.D.3d at 688-89, 927 N.Y.S.2d at 175-76.

115. *Id.* at 689 n.4, 927 N.Y.S.2d at 176 n.4 (internal citations omitted) (internal quotation marks omitted).

116. *Id.* at 688, 927 N.Y.S.2d at 175.

F. Order of Compromise: Procedure to Be Strictly Followed, Particularly When an Interested Party Is Disabled

The supreme court in *In re Stokes* issued an order of compromise to distribute proceeds of a wrongful death action.[117] As required by EPTL 5-4.6, the Supreme Court, Queens County, made an application to the surrogate's court for approval of the order.[118] Three issues arose during the surrogate's court's review of the application. The surrogate's court found that the order improperly allowed payment of attorney fees and expenses without requiring that the funds be held in an interest-bearing escrow account pending final approval and distribution.[119] In what was referred to as "one of the most consistent errors" found in orders of compromise, no guardian ad litem was appointed, or even considered, for a distributee who was under a legal disability.[120] Also, service was not executed upon all the interested parties to the decedent's estate.[121]

The surrogate's court ordered the petitioner's counsel to return all attorney fees previously paid to the escrow account, and directed the petitioner to amend her petition and accounting to include all necessary parties and a request for payment of the legal fees previously approved.[122]

G. Wills—Undue Influence

In *In re Estate of Krzyck*, decedent's purported will dated July 20, 2009, nominated her son as executor and sole beneficiary.[123] Decedent eventually died from complications due to cancer.[124] The distributees included the decedent's son, who was the petitioner in this matter, an adult grandson who consented to the probate of the will, and an infant grandson.[125]

The guardian ad litem appointed for the infant found no basis to

117. *In re* Stokes, 2006-1184/A, 2012 NY Slip Op. 22144, at 1 (Sup. Ct. Queens Cnty. 2012).

118. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-4.6(a)(2) (McKinney Supp. 2013)).

119. *In re Stokes*, 2012 NY Slip Op. 22144, at 1.

120. *Id.* at 4; N.Y. E.P.T.L. § 5-4.6(b); N.Y. SURR. CT. PROC. ACT LAW § 403(2) (McKinney Supp. 2013).

121. *In re Stokes*, 2012 NY Slip Op. 22144, at 1.

122. *Id.* at 5.

123. *In re* Estate of Krzyck, 2009-2405, 2012 NY Slip Op. 51028(U), at 1 (Sur. Ct. Bronx Cnty. 2012).

124. *Id.*

125. *Id.*

object to the admission of the will.[126] However, the infant's father, also the guardian of the property of the infant, objected to the admission of the purported will.[127] The infant's father claimed that the decedent suffered from mental and physical distress when she executed her will, and that her will was not "natural", in that it left all of her property to her son, rather than to her infant grandson, who lived with her at the time of her death.[128] The petitioner moved to preclude the father from offering any evidence or testimony in the proceeding on the grounds that the father's bill of particulars was untimely served.[129] The court relieved the guardian ad litem from representation of the infant, and counsel was retained by the infant's father.[130]

Most of the objections that were raised by the father were stricken.[131] The court pointed out that an objection indicating that an "[instrument] is not the last will [and testament] of the decedent" is not a "cognizable independent objection where . . . there is no allegation of a forgery and there are objections alleging lack of testamentary capacity, undue influence and fraud."[132] The objections allowed to stand included claims of incompetency, fraud, and undue influence.[133]

126. *Id.*
127. *Id.*
128. *In re Estate of Krzyck*, 2012 NY Slip Op. 51028(U), at 1.
129. *Id.*
130. *Id.* at 1-2.
131. *Id.*
132. *Id.* at 3.
133. *In re Estate of Krzyck*, 2012 NY Slip Op. 51028(U), at 3-4.