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

A. American Taxpayer Relief Act of 2012

President Obama signed the American Taxpayer Relief Act of 2012 ("The Act") on January 2, 2013.[1] The Act became effective in an attempt to ward off what is popularly referred to as the "fiscal cliff."[2] The Act made significant changes in federal estate, gift, and income tax laws. A summary of those changes is discussed below.

1. Estate and Gift Tax Exemption

The Act fixed the basic estate and gift tax exemption amount at $5 million per individual, to be adjusted upwards for future inflation.[3] Adjusted for inflation, the exemption amount is $5.25 million for decedents dying in 2013.[4] The Act increased the maximum rate for estate and gift tax from 35% to 40%.[5]

This exclusion continues to be a unified amount that applies both to lifetime taxable gifts and death-time transfers.[6] To the extent the exclusion is used during one's lifetime, it will not be available at death.[7]

2. Generation-Skipping Transfer Tax Exemption Amount

The exemption amount for the generation-skipping transfer tax ("GSTT") in 2013 and 2014 is $5.25 million per person.[8] This amount

1. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112–240, 126 Stat. 2313 (2013).

2. *See generally id.* The fiscal cliff refers to a budget crisis that was expected to occur in January 2013 as a result of laws that were going to expire (i.e., Bush-era tax cuts), laws that were to go into effect, and the automatic spending cuts mandated by the Budget Control Act of 2011. *See generally* Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240 (2011).

3. *See generally* American Taxpayer Relief Act of 2012.

4. Rev. Proc. 2013-15, 2013-5 I.R.B. 444.

5. American Taxpayer Relief Act of 2012 § 101(c)(1).

6. *Id.*

7. *Id.*

8. *See generally id.*

applies to the total of all lifetime and at-death generation-skipping transfers.[9] It applies concurrently with the estate and gift tax exemptions, meaning the same gift will consume both GSTT exemption and estate and gift tax exemption. The Act provided for a maximum federal GSTT rate of forty percent.[10]

3. Gift Tax Annual Exclusion

The 2013 and 2014 gift tax annual exclusion amount rose to $14,000.[11]

4. Increase in Tax Rates

Tax rates were increased for both estates and individuals. The Act not only increased the maximum rate for estate, gift, and GST from thirty-five percent to forty percent, but it also created two new brackets, thirty-seven percent on amounts over $500,000 and thirty-nine percent on amounts over $750,000.[12]

Additionally, the maximum income tax bracket increased from a rate of 35% to 39.6% on the undistributed net income of estates and trusts.[13] The Act also added new fifteen percent and twenty percent tax rates on qualified dividends and long-term capital gains.

5. High Income Taxpayers

The Act altered the top income tax bracket for individuals, effectively creating a new category of taxpayers, called "high income taxpayers."[14]

The "high income" threshold amount for married couples filing jointly is $450,000, and for other individuals it is $400,000.[15] However, estates and trusts are treated as "high income" taxpayers if they have taxable income of only $11,950 (for 2013).[16] High income taxpayers will have a combined effective rate of 43.4% on ordinary income and 23.8% on qualified dividends and long-term capital gains.[17]

9. *See generally id.*
10. American Taxpayer Relief Act of 2012 § 101(c)(1).
11. Rev. Proc. 2012-41, 2012-45 I.R.B. 539.
12. American Taxpayer Relief Act of 2012 § 101(c)(1).
13. *Id.* § 101(b)(3)(A).
14. *Id.* § 101(b).
15. *Id.* § 101(b)(3)(B).
16. Rev. Proc. 2013-15, 2013-5 I.R.B. 444.
17. *Id.* (calculated by combining the Federal Income Tax Rates found in Rev. Proc. 2013-15 and the 3.8% Medicaid surcharge). *See generally* Rev. Proc. 2013-15, 2013-5 I.R.B. 444; American Taxpayer Relief Act of 2012 § 102(b).

6. Portability

The Act made permanent the portability of an unused exemption amount from a decedent to a surviving spouse.[18] To date, none of the states that collect a state estate tax have adopted portability between spouses.

7. State Death Tax Credit/Deduction

The Act extended the deduction for state estate taxes.[19]

8. Gifts from IRA to Charity

A taxpayer over seventy-and-a-half years of age is permitted to transfer up to $100,000 directly from an Individual Retirement Account ("IRA") to a qualified charity.[20] The distribution may count towards the taxpayer's required minimum distribution for the year, but will be excluded from the taxpayer's gross income.[21]

B. Patient Protection and Affordable Care Act

In March 2010, the Patient Protection and Affordable Care Act ("PPACA") was signed into law.[22] Among other provisions, the PPACA implemented a 3.8% Medicare tax on the lesser of net investment income or taxable income above $11,950 for estates and trusts.[23]

II. FEDERAL REGULATIONS AND CASES

A. Increase in Gift Tax Annual Exclusion and Gifts to Non-Citizen Spouses

Revenue Procedure 2012-41, the Internal Revenue Service's ("IRS") annual revenue procedure, made necessary inflation adjustments set to begin in 2013.[24] The gift tax annual exclusion increased from $13,000 to $14,000 in 2013.[25] Also, the total amount of gifts to non-citizen spouses, which are not included in a taxpayer's total

18. American Taxpayer Relief Act of 2012 § 101(b)(2).
19. *Id.* § 101(b)(2)(A).
20. *Id.* § 208; I.R.C. § 408(d)(8)(A)-(B)(ii) (2012).
21. I.R.C. § 408(d)(8)(A).
22. *See generally* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).
23. *See generally id.*
24. Rev. Proc. 2012-41, 2012-45 I.R.B. 539.
25. *Id.*

taxable gifts, was raised to $143,000.[26]

B. Inflation Adjustments for Basic Estate and Gift Tax Exclusion and Taxable Income of Trusts

The IRS announced various inflation adjustments in Revenue Procedure 2013-15, including the rise in the basic exclusion amount for estates of decedents who died in 2013. The basic estate and gift tax exclusion amount is $5,250,000 for 2013, up from $5,120,000 for estates of decedents who died in 2012.[27] In addition, as indicated earlier in this *Survey*, estates and trusts will be treated as high income taxpayers if they have taxable income over $11,950.[28]

C. The Defense of Marriage Act Is Overturned

When we left off in the last *Survey*, certiorari had been granted by the U.S. Supreme Court in the case of *United States v. Windsor*.[29] *Windsor* concerned Edith Windsor, who was widowed when her wife, Thea Spyer, died in 2009.[30] Windsor and Spyer were legally married in 2007 in Canada, but, since they were a same-sex couple, their marriage was not recognized by the U.S. federal government.[31] Therefore, Windsor was required to pay estate tax on Spyer's estate. Windsor argued that she would not have to pay if she had been Spyer's spouse and claimed that the Defense of Marriage Act ("DOMA") unconstitutionally prevented her from being considered Spyer's spouse for federal tax purposes.[32]

On June 26, 2013, the Supreme Court agreed with Edith Windsor.[33] In a 5-4 decision, the Court held that section three of "DOMA is unconstitutional as a deprivation of the [equal] liberty of the person[s that is] protected by the Fifth Amendment."[34] The far-reaching effect of *Windsor* changes the legal landscape for same-sex couples in trusts and estates law and beyond. Based on the *Windsor* decision, the

26. *Id.*

27. Rev. Proc. 2013-15, 2013-5 I.R.B. 444.

28. *Id.*

29. 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2675 (2013).

30. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013); 1 U.S.C. § 7 (2012) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

31. *Windsor*, 133 S. Ct. at 2682.

32. *Id.*; *see also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7; 28 U.S.C. § 1738 (2012).

33. *Windsor*, 133 S. Ct. at 2682.

34. *Id.* at 2695.

IRS issued new guidance on the interpretation of the sections of the Internal Revenue Code that refer to taxpayers' marital status.[35]

III. NEW YORK STATE CASES

A. Amending a Trust Using a Power of Attorney

In *Perosi v. LiGreci*, the grantor executed an irrevocable trust in 1991.[36] In April 2010, the grantor, as principal, executed a durable power of attorney.[37] The durable power of attorney authorized the agent to manage estate transactions as well as "all other matters" as defined in General Obligations Law sections 5-1502A to 5-1502N.[38] The Major Gifts Rider further authorized the agent to "establish and fund revocable or irrevocable trusts, transfer assets to a trust, make gifts, and act as grantor and trustee."[39]

Soon after execution of the power of attorney, the attorney-in-fact and all three trust beneficiaries executed an amendment to the 1991 irrevocable trust pursuant to Estates, Powers and Trusts Law ("EPTL") section 7-1.9.[40] The amendment removed the existing trustee and successor trustee and appointed a new trustee and successor trustee.[41]

The grantor died fifteen days after the trust amendment was executed.[42] Soon thereafter, the attorney-in-fact and new trustee sought a trust accounting and demanded possession of all of the trust property and records from the original trustee.[43] The trust property consisted of a $1,000,000 survivorship life insurance policy insuring the lives of the grantor and his predeceased spouse.[44]

The original trustee moved to have the trust amendment invalidated.[45] The original trustee argued that the trust was irrevocable, and that neither the power of attorney nor the General Obligations Law authorized the attorney-in-fact to exercise such authority on behalf of

35. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. Issued on August 29, 2013, this provided that same-sex marriages that were legal where they were performed would be recognized for federal tax purposes. *Id.* This ruling does not fall under the time period covered by this Estate Planning update and will be discussed in the next *Survey*.

36. 98 A.D.3d 230, 232, 948 N.Y.S.2d 629, 630 (2d Dep't 2012).

37. *Id.*

38. *Id.* (citing N.Y. GEN. OBLIG. LAW §§ 5-1502A to 5-1502N (McKinney 2009)).

39. *Id.* at 232, 948 N.Y.S.2d at 631.

40. *Id.*

41. *Perosi*, 98 A.D.3d at 232, 948 N.Y.S.2d at 630.

42. *Id.* at 232, 948 N.Y.S.2d at 631.

43. *Id.* at 233, 948 N.Y.S.2d at 631.

44. *Id.*

45. *Id.*

the grantor of the trust.[46]

The court held that an agent granted broad authority under a power of attorney does have the power to amend or revoke an irrevocable trust in compliance with EPTL section 7-1.9.[47] The court, citing previous case law, interpreted the powers enumerated in the statutory power of attorney to permit an attorney-in-fact to exercise broad authority to act as the principal's "alter ego" in a variety of matters, including the authority to amend or revoke an irrevocable trust.[48]

B. Avoiding Summary Judgment Against Claim of Undue Influence Requires Substantial Evidence

In *In re Aoki*, there was considerable discord among family members with regard to the decedent's multimillion dollar estate.[49] The decedent's children objected to probate of a will that benefitted their stepmother.[50] The children argued that the decedent's illnesses rendered him susceptible to the stepmother's strong will and influence.[51] The children contended that the decedent was coerced into making testamentary dispositions of his property that he would not otherwise have made.[52]

The surrogate's court granted summary judgment and admitted the will to probate.[53] The appellate division affirmed and noted that summary judgment was appropriate as the evidence equally supported a finding of no undue influence.[54] In order to prevail, the children were required "to adduce substantial evidence of undue influence," not merely "equivocal evidence."[55]

C. Beneficial Rights of Child Surrendered for Second Adoption

In *In re Svenningsen*, a husband created two irrevocable trusts, one in 1995 and one in 1996.[56] The 1995 Trust benefited the grantor's

46. *Perosi*, 98 A.D.3d at 233-34, 948 N.Y.S.2d at 631-32.

47. *Id.* at 234-38, 948 N.Y.S.2d at 632-35; *see* N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (McKinney 2014).

48. *Perosi*, 98 A.D.3d at 237, 948 N.Y.S.2d at 634 (citing Zaubler v. Picone, 100 A.D.2d 620, 621, 473 N.Y.S.2d 580, 582 (2d Dep't 1984) (listing authority)).

49. *In re* Aoki, 99 A.D.3d 253, 256, 948 N.Y.S.2d 597, 599 (1st Dep't 2012).

50. *Id.* at 260-62, 948 N.Y.S.2d at 602-03.

51. *Id.* at 261, 948 N.Y.S.2d at 602-03.

52. *Id.* at 261, 948 N.Y.S.2d at 603.

53. *Id.* at 262, 948 N.Y.S.2d at 603.

54. *Aoki*, 99 A.D.3d at 267-68, 948 N.Y.S.2d at 607.

55. *Id.*

56. 105 A.D.3d 164, 166-67, 959 N.Y.S.2d 237, 239-40 (2d Dep't 2013).

children.[57] The definition of "children" included the grantor's four living birth children and "any additional children born to or adopted" by the grantor after the creation of the trust.[58] Soon after the creation of the 1995 Trust, the grantor and his wife had another birth child and adopted a child, leaving the couple with five birth children and one adopted child, a daughter.[59]

The 1996 Trust established six equal and separate irrevocable trusts, one for each of the decedent's birth and adopted children.[60] The husband's will, executed on March 17, 1997, created credit shelter testamentary trusts for the benefit of the husband's issue, which included children "legally adopted" at the date of his death.[61]

The husband died on May 28, 1997.[62] In 2004, the surviving spouse surrendered her parental rights to her adopted daughter so that she could be adopted by another couple.[63] The second adoption was final in 2006.[64]

After learning that their daughter was the beneficiary of the decedent's trusts, the child's secondary adoptive parents petitioned for compulsory accountings of the trusts on the grounds that their daughter was a beneficiary of such trusts.[65] The surrogate ordered the trustees to account, and the intermediate appellate court affirmed, holding that, under the language of the various trusts, the child was both included in the definition of children and mentioned by name in two of the trusts and that her subsequent adoption out of the family was irrelevant.[66]

D. Surcharge Not Warranted for Delay in Distribution of Stocks Where Beneficiaries Did Not Request Sale of Shares

In *In re Lasdon*, two trust beneficiaries objected to a trustee's accountings because of a long delay following the request that trusts be distributed in kind.[67] The beneficiaries argued that the trustee should be surcharged in the amount of the difference between the value of the stocks at the time of the respective requests and at the time of

57. *Id.* at 167, 959 N.Y.S.2d at 239.
58. *Id.*
59. *See id.*
60. *Id.* at 167, 959 N.Y.S.2d at 240.
61. *Svenningsen*, 105 A.D.3d at 167-68, 959 N.Y.S.2d at 240.
62. *Id.* at 169, 959 N.Y.S.2d at 241.
63. *Id.*
64. *Id.*
65. *Id.* at 170, 959 N.Y.S.2d at 242.
66. *In re Svenningsen*, 105 A.D.3d at 171, 959 N.Y.S.2d at 242.
67. 105 A.D.3d 499, 499, 963 N.Y.S.2d 99, 100 (1st Dep't 2013).

distribution. Further, the objectants requested that the trustee be required to pay their legal fees.[68]

The surrogate imposed the requested surcharges on the trustee, but denied the objectants' request for legal fees and awarded commissions and legal fees to the trustee.[69] Both the objectants and the trustee appealed.[70]

The appellate division reversed the surcharges and affirmed the denial of legal fees and the allowance of commissions.[71] The appellate division noted that, "[t]o be sure, the beneficiaries were deprived of the ability to do what they wanted, with the stocks during the period of delay in distribution"; however, the beneficiaries were in the same position they would have been had the stock been distributed sooner.[72] It could not be proven that the objectants would have sold the stocks themselves, as there was no evidence to suggest that the objectants asked the trustee to sell the stocks during the delay.[73] The appellate division also expressed that damages cannot be calculated on the assumption that the beneficiaries would have sold the stock once it was distributed to them.[74]

The trustee was permitted to take commissions because the trustee did not engage in "fraud, gross neglect of duty, intentional harm to the trust, sheer indifference to the rights of others or disloyalty."[75] Further, the delay in the distributions was not a sufficient ground to require the trustee to pay the beneficiaries' legal fees.[76]

E. Co-Executor Has Standing to Object to Account Filed by Co-Executor

In *In re Schultz*, two of the decedent's six adult children, a son and a daughter, qualified as co-executors of her will.[77] The will stated that since the decedent had gifted real property to the co-executor son and another sibling during her life, the decedent was only bequeathing them some personal property.[78] The co-executor daughter and the three

68. *Id.* at 500, 963 N.Y.S.2d at 100.
69. *Id.* at 499, 963 N.Y.S.2d at 100.
70. *Id.*
71. *Id.*
72. *In re Lasdon*, 105 A.D.3d at 499, 963 N.Y.S.2d at 100.
73. *Id.* at 499-500, 963 N.Y.S.2d at 100.
74. *Id.* at 499, 963 N.Y.S.2d at 100.
75. *Id.* at 500, 963 N.Y.S.2d at 100.
76. *Id.*
77. 104 A.D.3d 1146, 1146-47, 961 N.Y.S.2d 618, 620 (4th Dep't 2013).
78. *Id.* at 1147, 961 N.Y.S.2d at 620.

remaining siblings were the residuary beneficiaries.[79]

The daughter filed a petition for judicial settlement of her account.[80] The son filed objections arguing that the accounting did not properly list the personal property given to him and, second, that the account did not list all uncollected debts owed to the estate, specifically a debt owed by one of the other beneficiaries.[81]

The surrogate dismissed the son's objections for lack of standing.[82] The appellate division reversed, holding that, as a beneficiary, the son's standing was limited to the objection related to the personal property.[83] Since the son was not a residuary beneficiary, the appellate division held that he is unable to benefit from a finding regarding the objection related to the alleged uncollected debt.[84]

The appellate division further held that the son had standing as a co-executor to file both objections because he has a duty to collect the decedent's assets and cannot be prevented from fulfilling that duty.[85]

F. Surviving Spouse Has Right to Object to Accounting for Revocable Trust Which Is a Testamentary Substitute

In *In re Garrasi Family Trust*, a husband and wife created a joint revocable trust in 1991.[86] Following the wife's death in 1995, their two children became co-trustees with their father.[87] The father remarried and then died in 2005.[88] He was survived by his second spouse.[89]

After the husband's death, the two children filed a petition for judicial settlement of the trust and submitted an accounting for the period of 1991 to 2006.[90] The surviving spouse objected to the petition and the accounting.[91] Following a trial, the surrogate surcharged the children co-trustees, finding that the "accounting was not complete and accurate, that the trustees failed to exercise diligence in managing the trust and that petitioner [son] breached his fiduciary duties by engaging

79. *Id.*
80. *Id.*
81. *Id.*
82. *Schultz*, 104 A.D.3d at 1147, 961 N.Y.S.2d at 620.
83. *Id.* at 1147-48, 961 N.Y.S.2d at 620.
84. *Id.*
85. *Id.* at 1148, 961 N.Y.S.2d at 620-21.
86. 104 A.D.3d 990, 990, 961 N.Y.S.2d 594, 595 (3d Dep't 2013).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Garrasi Family Trust*, 104 A.D.3d at 990, 961 N.Y.S.2d at 595.

in self-dealing."[92] The son appealed on the ground that the surviving spouse lacked standing because she was only a contingent beneficiary of the trust until her husband died.[93]

The appellate division affirmed the surrogate, finding that, although the surviving spouse was not a beneficiary of the trust, the trust itself was a testamentary substitute for elective share purposes.[94] Therefore, the surviving spouse was entitled to a portion of the trust "by operation of law," and she had standing to object to the accounting. [95]

G. Construction of Will Bequeathing Land "Appurtenant Thereto"

In *In re Phillips*, the decedent's will left his estate to his three daughters and to his live-in girlfriend.[96] In part, the decedent's estate consisted of his home, the lot on which the home was situated, and eighty-eight acres of farmland adjacent to the lot.[97] The decedent bequeathed his residence and the "plot of land appurtenant thereto" to his girlfriend, and he devised the remainder of his estate to his daughters in equal shares.[98]

One of the decedent's daughters sought a determination that the bequest of the decedent's home include only the land on which it was situated and not the adjacent farmland.[99] The daughter attached extrinsic evidence supporting the proposed construction.[100] The girlfriend opposed the petition and the petitioner's use of extrinsic evidence to support her application.[101] The girlfriend asserted that the will was clear and unambiguous in that she was entitled to the decedent's home, lot, and farmland.[102] Both sides moved for summary judgment, and the surrogate found for the girlfriend, concluding that the decedent's intent could be inferred from the will and that reference to extrinsic evidence was improper.[103]

The appellate division, however, disagreed and determined that, while the best indicator of a testator's intent will generally be found

92. *Id.*
93. *Id.* at 991, 961 N.Y.S.2d at 595.
94. *Id.* at 991, 961 N.Y.S.2d at 596.
95. *Id.*
96. 101 A.D.3d 1706, 1706, 957 N.Y.S.2d 778, 778 (4th Dep't 2012).
97. *Id.* at 1707, 957 N.Y.S.2d at 780.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Phillips*, 101 A.D.3d at 1706, 957 N.Y.S.2d at 780.
102. *Id.* at 1707, 957 N.Y.S.2d at 780.
103. *Id.* at 1707-08, 957 N.Y.S.2d at 780.

within the four corners of the will, where a provision in the instrument is ambiguous, extrinsic evidence may be properly considered.[104] Due to conflicting extrinsic evidence, the court concluded that the parties should be given the opportunity to present their evidence at a hearing before the surrogate.[105]

H. A Deal's a Deal: Settlement Agreed to Before Surrogate Is Final

In June 2011, the parties involved in *In re McLaughlin* participated in settlement negotiations before the surrogate's court.[106] The minutes of the proceeding indicate that the petitioner offered the respondent $125,000 in full satisfaction of her claim against the decedent's estate.[107] The respondent's counsel, after conferring with the respondent, accepted the offer.[108] Thereafter, the respondent refused to comply with the terms of the settlement agreement.[109] The petitioner moved to either compel the respondent to settle the matter or, in the alternative, dismiss the respondent's claim against the estate with prejudice.[110]

Following a second appearance by the parties, the surrogate's court issued an order directing the respondent to execute the appropriate release to settle the claim as previously agreed to.[111] Once again, the respondent failed to comply, arguing that she was mistaken when she agreed to the settlement of $125,000.[112] The respondent asserted that she agreed to the settlement because she believed that the settlement included both the $125,000 and personal property belonging to the decedent.[113] She also argued that, due to depression resulting from the recent death of a family member, she lacked the mental capacity to enter into the stipulation.[114] Despite the respondent's arguments, the surrogate's court dismissed the respondent's claim with prejudice.[115]

The respondent appealed, and the appellate division affirmed the surrogate's decision, stating that "[s]tipulations of settlement—

104. *Id.* at 1708, 1709, 957 N.Y.S.2d at 781-82 (citations omitted).
105. *Id.* at 1710, 957 N.Y.S.2d at 783.
106. 97 A.D.3d 1051, 1052, 949 N.Y.S.2d 264, 265 (3d Dep't 2012).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *McLaughlin*, 97 A.D.3d at 1052, 949 N.Y.S.2d at 265.
112. *Id.* at 1052, 1053, 949 N.Y.S.2d at 265.
113. *Id.* at 1053, 949 N.Y.S.2d at 265-66.
114. *Id.* at 1053, 949 N.Y.S.2d at 266.
115. *Id.*

particularly ones entered into in open court—are judicially favored and, as such, will not be set aside absent grounds sufficient to invalidate a contract, i.e., fraud, collusion, mistake or accident."[116] The court found that the respondent's "unilateral mistake" was insufficient to overturn the settlement.[117] The appellate division went on to opine that, "[w]hile respondent indeed has experienced a change of heart, 'neither hindsight nor regret establishes incompetency.'"[118]

116. *McLaughlin*, 97 A.D.3d at 1052, 949 N.Y.S.2d at 265.

117. *Id.* at 1053, 949 N.Y.S.2d at 266.

118. *Id.* (quoting Sears v. First Pioneer Farm Credit, ACA, 46 A.D.3d 1282, 1285, 850 N.Y.S.2d 219, 222 (3d Dep't 2007)).