

TRUSTS & ESTATES

Steven Cunningham†

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INTRODUCTION

This article covers notable regulatory, statutory, and case law developments related to trusts and estates for the *Survey* period of July 1, 2014 to June 30, 2015.¹

Part I of this article discusses the significant changes that occurred at the federal level. This discussion will touch upon noteworthy legislative action, revenue procedures, and case law from the Supreme Court of the United States and the United States Tax Court. Included in this Part are overviews of topics such as the impact that *Obergefell v. Hodges*² could have on federal tax issues in estate planning and the final regulations on portability elections.

Part II surveys the trust and estate developments in New York, including new legislation, regulations, and case law. In particular, the discussion of New York case law focuses on the Court of Appeals's opinions in *Lawrence v. Miller*³ and *In re Estate of Lewis*,⁴ as well as important decisions from the appellate division departments.

As a threshold matter, it is worth noting the federal and New York exemption amounts applicable in the *Survey* period.

At the federal level,⁵ the amount of combined gross assets and prior taxable gifts needed to trigger an estate tax rose from \$5,340,000 in 2014 to \$5,430,000 in 2015.⁶ The annual gift tax exclusion remained at \$14,000 throughout the entire *Survey* period.⁷ Lastly, the amount of gifts to a non-citizen spouse not includable in a taxpayer's gifts increased from \$145,000 in 2014 to \$147,000 in 2015.⁸

As many sources have noted, including last year's *Survey*,⁹ New

1. Several sources have proven valuable in monitoring the developments in Trusts & Estates throughout the *Survey* period, but two deserve special mention: the New York Bar Association's *Trusts and Estates Law Section Newsletter* (released quarterly) and Sharon L. Klein's article *New York's Legislative Activity: What Passed, What Didn't, What's Next*, N.Y.L.J., Aug. 31, 2015.

2. 135 S. Ct. 2584 (2015).

3. 24 N.Y.3d 320, 23 N.E.3d 965, 998 N.Y.S.2d 698 (2014).

4. 25 N.Y.3d 456, 34 N.E.3d 833, 13 N.Y.S.3d 323 (2015).

5. Rev. Proc. 2014-61, 2014-2 C.B. 860; Rev. Proc. 2013-35, 2013-2 C.B. 537.

6. Rev. Proc. 2014-61 § 3.33; Rev. Proc. 2013-35 § 3.32.

7. Rev. Proc. 2014-61 § 3.35(1); Rev. Proc. 2013-35 § 3.34(1).

8. Rev. Proc. 2014-61 § 3.35(2); Rev. Proc. 2013-35 § 3.34(2).

9. Julia J. Martin, *Trusts and Estates, 2013-14 Survey of New York Law*, 65 SYRACUSE L. REV. 945, 950 (2015) (citing N.Y. TAX LAW § 952(c)(2)(A) (McKinney Supp.

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York has created a schedule whereby the state exemption amount will equalize with the federal amount beginning January 1, 2019.¹⁰ Accordingly, the basic exclusion amount in New York rose from \$2,062,500 (for decedents who died on or after April 1, 2014 and on or before March 31, 2015) to \$3,125,000 (for decedents who died on or after April 1, 2015 and on or before March 31, 2016).¹¹

I. DEVELOPMENTS AT THE FEDERAL LEVEL

A. Statutory Law

As has become an annual exercise,¹² on December 19, 2014, the federal government extended the Individual Retirement Account (IRA) charitable rollover provision to transfers made during 2014, ending almost year-long “will they, won’t they” speculation.¹³ Under the Tax Increase Prevention Act, IRA owners over the age of 70 ½ in 2014 could transfer up to \$100,000 from their retirement accounts to a qualifying charity, tax-free.¹⁴ As with other years, amounts distributed are excluded from the owner’s income, but the owner does not receive an additional charitable deduction to use against other income.¹⁵

*B. Regulatory Law**1. No Letter Rulings Under IRC § 1014*

Every year, the Internal Revenue Service (IRS) releases a revenue procedure that compiles the situations where the IRS will not issue letter rulings or determination letters.¹⁶ During this *Survey* period, the IRS also added a new subject on which it will not opine:

Section 1014. Basis of Property Acquired from a Decedent. Whether

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10. N.Y. TAX LAW § 952(c)(2)(A).

11. *Id.*

12. Fortunately, the annual exercise came to an end in 2015. As will no doubt receive fuller treatment in next year’s *Survey*, on December 18, 2015, the federal government made the charitable rollover provision permanent moving forward. Protecting Americans from Tax Hikes Act of 2015, div. Q, § 112, Pub. L. 114-113, 129 Stat. 2242, 3047 (to be codified at I.R.C. § 408).

13. Tax Increase Prevention Act of 2014, § 108, Pub. L. 113-295, 128 Stat. 4010, 4013–14.

14. I.R.C. § 408(d)(8) (2012). Although it is the owner directing the transfer, in order to receive the deduction, the funds must be transferred directly from the IRA trustee to the eligible charity. *Id.* § 408(d)(8)(B)(i).

15. *Id.* § 408(d)(8).

16. Rev. Proc. 2015-3, 2015-1 I.R.B. 129.

the assets in a grantor trust receive a section 1014 basis adjustment at the death of the deemed owner of the trust for income tax purposes when those assets are not includible in the gross estate of that owner under chapter 11 of subtitle B of the Internal Revenue Code.¹⁷

Based on this language, it appears that the IRS will no longer issue letter rulings regarding basis adjustments under section 1014 of assets in certain grantor trusts.

2. Estate Tax Closing Letter No Longer Automatic

Although not a regulatory change in the law (yet), the IRS took a strange step when it altered its procedure for issuing a closing letter after the filing of Form 706. On June 16, 2015, the IRS announced—via its website for “Frequently Asked Questions on Estate Taxes”—that it would no longer automatically issue closing letters after the filing of an estate tax return.¹⁸ Instead, for estates filing a return after June 1, 2015, the IRS now requires that the taxpayer request a closing letter after the passage of four months from filing.¹⁹ In a June 23, 2015 statement, the IRS explained that the catalyst for this new procedure was a dramatic increase²⁰ in the number of returns being filed.²¹ However, it is difficult to see how implementing a new procedure processing requests for a document previously issued as a matter of course would reduce the administrative burden occasioned by more filings.²² After all, most estates will request the letter because it is a prerequisite to closing the estate.

17. Rev. Proc. 2015-37, 2015-26 I.R.B. 1196.

18. *Frequently Asked Questions on Estate Taxes*, INTERNAL REVENUE SERV., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Frequently-Asked-Questions-on-Estate-Taxes> (last updated Dec. 4, 2015).

19. *Id.*

20. Due to the portability election.

21. Kenneth Pun & James Dougherty, *New Estate Tax Closing Letter Procedure Issued*, WEALTHMANAGEMENT (Jun. 26, 2015), <http://wealthmanagement.com/estate-planning/new-estate-tax-closing-letter-procedure-issued>.

22. One article examining the IRS’s change in procedure described the move as follows: “While the strains of additional workload on the IRS’[s] resources are understandable, the method of addressing this problem is akin to cracking a nut with a sledgehammer.” *Id.*

3. Highlights of the Final Regulations on Portability

On June 16, 2015, the IRS issued its final regulations on the “Portability of a Deceased Spousal Unused Exclusion Amounts” under sections 2010 and 2505 of the Internal Revenue Code.²³ These regulations made several significant pronouncements about the procedure for, and impact of, a portability election for a deceased spousal unused exclusion (DSUE) amount. First, the IRS addressed the availability of an extension for making the election:

[T]he final regulations provide that an extension of time to elect portability will not be granted under § 301.9100-3 to any estate that is required to file an estate tax return because the value of the gross estate equals or exceeds the threshold amount described in section 6018, but may be granted under the rules set forth in § 301.9100-3 to estates with a gross estate value below that threshold amount and thus not otherwise required to file an estate tax return.²⁴

In addition, the final regulations mirrored the temporary regulations in that both require the executor to make the portability election.²⁵ In limiting the ability to make an election to the executor, the IRS rejected requests from commenters that a surviving spouse who is not executor be allowed to make the election.²⁶

The final regulations also address the application of the portability election rules to qualified domestic trusts (QDOTs). In particular, the IRS clarified that a DSUE amount is available to a surviving spouse who becomes a U.S. citizen:

Because a surviving spouse who becomes a U.S. citizen is subject to the estate and gift tax rules of chapter 11 and 12 that apply to U.S. citizens and residents, the Treasury Department and the IRS believe it is appropriate that such a surviving spouse be permitted to take into account the DSUE amount available from any deceased spouse as of the date such surviving spouse becomes a U.S. citizen, provided the deceased spouse’s executor has made the portability election.²⁷

Moreover, the final regulations set forth provisions for the recalculation of the DSUE amount when a non-citizen spouse becomes a citizen, providing that,

[I]f the surviving spouse of the decedent becomes a citizen of the

23. T.D. 9725, Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. 34,279, 34,279 (June 16, 2015) (to be codified at 26 C.F.R. pts. 20, 25, 602).

24. *Id.* at 34,280 note (Summary of Comments and Explanations of Revisions).

25. *Id.* at 34,281.

26. *Id.*

27. *Id.* at 34,283–84.

United States and the requirements under section 2056A(b)(12) and the corresponding regulations are satisfied so that the tax imposed by section 2056A(b)(1) no longer applies, then the decedent's DSUE amount is no longer subject to adjustment and will become available for transfers by the surviving spouse as of the date the surviving spouse becomes a citizen of the United States.²⁸

C. Case Law

1. *The Implications of Obergefell v. Hodges for Estate Planning Purposes*

Last year's *Survey* discussed the impact of the Supreme Court's ruling in *United States v. Windsor*, which found three sections of the Defense of Marriage Act (DOMA) unconstitutional.²⁹ In June 2015, the Supreme Court extended the legacy of *Windsor* when it decided *Obergefell v. Hodges*.³⁰ In that case, the Court held that a state ban on same-sex marriage violates the equal protection afforded to individuals under the Fourteenth Amendment.³¹ As a result of this violation, the Court struck down all state bans on same-sex marriages.³² In addition, the Supreme Court vitiated the remaining provision of DOMA that survived *Windsor*—Section 2—which had permitted states to deny recognition to same-sex marriages performed in other states.³³ Thus, as a result of *Windsor* and *Obergefell*, the federal government and all state governments must recognize same-sex marriages.

From an estate planning perspective, the rulings in these two cases have presented same-sex couples with many new estate planning opportunities previously unavailable to them. While this *Survey* period does not cover the IRS proposed regulations formally implementing the update in the law,³⁴ it is clear that *all* married couples will have access

28. Portability of a Deceased Spousal Unused Exclusion Amount, 80 Fed. Reg. at 34,282 note (Summary of Comments and Explanations of Revisions).

29. Julia J. Martin, *Trusts and Estates, 2013–14 Survey of New York Law*, 65 SYRACUSE L. REV. 945, 948 (2015) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013)); 1 U.S.C. § 7 (2012) (“The 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.”); see *Windsor*, 133 S. Ct. at 2682.

30. 135 S. Ct. 2584 (2015).

31. *Id.* at 2604.

32. *Id.* at 2607.

33. *Id.* at 2608.

34. See Definition of Terms Relating to Marital Status, 80 Fed. Reg. 64,378, 64, 378 (proposed Oct. 23, 2015) (to be codified at 25 C.F.R. pts. 1, 20, 25, 26, 31, 301).

to the same planning techniques used to achieve tax savings—such as the unlimited marital deduction—at both the federal and the state level. Accordingly, same-sex couples should review their estate plan to ensure that they have taken advantage of this expansion of rights.

2. *The Fifth Circuit Considers Trust Valuation*

In *Estate of Elkins v. Commissioner*, the Court of Appeals for the Fifth Circuit engaged in a review of the “fractional-ownership discount.”³⁵ The case involved the valuation of John Elkin’s fractional interest in sixty-four pieces of art at the time of his death.³⁶ His children had owned the other fractional shares.³⁷ At various times during his life, John and his children “voluntarily subjected their respective interests in the works of art to various restraints on possession, partition, and alienation.”³⁸ After John’s death, his estate reported more than \$102 million in tax liability, including his fractional interests in the pieces of art, for which the estate listed a discount to reflect partial ownership.³⁹ Following an audit, the IRS accepted all of the valuation information on the estate tax return, *except* it “refused to allow any discount” for John’s fractional-ownership interest.⁴⁰

John’s estate commenced an action in Tax Court to “address[] the single substantive issue of the taxable values of [John’s] fractional interest in the [sixty-four] items of art.”⁴¹ After the estate offered ample support for receiving a fractional-ownership discount and the IRS failed to present any evidence that no discount was available, the Tax Court concluded that John’s interest should receive a fractional-ownership discount, but reduced the amount of the discount to ten percent.⁴² The estate appealed.⁴³

The Fifth Circuit reversed the order of the Tax Court insofar as it limited the fractional-ownership discount to ten percent.⁴⁴ The Fifth Circuit identified the “narrow, straightforward, and easily posed” issues as follows:

Given the parties’ stipulation of the FMV of each of the works of art

35. 767 F.3d 443, 445 (5th Cir. 2014).

36. *Id.* at 446.

37. *Id.*

38. *Id.* at 446.

39. *Id.* at 447.

40. *Elkins*, 767 F.3d at 447 (emphasis omitted).

41. *Id.*

42. *Id.* at 448–49.

43. *Id.* at 445–46.

44. *Id.* at 450.

in which Decedent owned fractional interests at his death, is the Estate taxable on Decedent's undiscounted pro rata share of those FMVs, as the Commissioner contended on audit and throughout the Tax Court proceedings, or is it taxable only on those values reduced by fractional-ownership discounts of either (1) a uniform 10 percent each, as held by the Tax Court, or (2) the various percentages that the Estate advanced through the testimony and reports of its expert witnesses?⁴⁵

The Fifth Circuit determined that:

Just as it was obvious to the Tax Court that the Commissioner had no viable basis for rigidly insisting that no fractional-ownership discount was applicable, it should have been equally obvious that, in the absence of any evidentiary basis whatsoever, there is no viable factual or legal support for the court's own nominal 10 percent discount.⁴⁶

Moreover, the court observed that "the Estate's uncontradicted, unimpeached, and eminently credible evidence in support of its proffered fractional-ownership discounts is not just a 'preponderance' of such evidence; it is the *only* such evidence."⁴⁷ Accordingly, the Fifth Circuit adopted the fractional-ownership discounts as supported by the evidence presented by John's estate.⁴⁸

3. Arbitration and In Terrorem Clauses Do Not Jeopardize the Annual Gift Tax Exclusion

In *Mikel v. Commissioner*, the United States Tax Court considered that gift tax liability of a husband and wife who had made gifts to a family trust containing: (1) a clause requiring arbitration of any dispute; and (2) an *in terrorem* clause.⁴⁹

In 2007, Israel and Erna Mikel created an irrevocable family trust for the benefit of their "children and lineal descendants and their

45. *Elkins*, 767 F.3d at 445, 446.

46. *Id.* at 450. Despite its stern criticism of the Tax Court, or perhaps because of it, the Fifth Circuit was careful to express its respect for the Tax Court judge:

We are never comfortable in disagreeing with, much less reversing, a jurist of the experience, reputation, and respect enjoyed by the Tax Court judge whose work product we are called on to review today. Yet, our review of the court's extensive explication of this case and its ultimate conclusion that the proper discount is 10 percent, leaves us with the "definite and firm conviction that a mistake has been made."

Id. at 453 (citing *Green v. Comm'r*, 507 F.3d 857, 866 (5th Cir. 2007)).

47. *Id.* at 451.

48. *Id.* at 453.

49. T.C. Memo. 2015-64, ___ T.C.M. (RIA) 509, 109 T.C.M. (CCH) 1355 (2015).

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respective spouses”—a class that allegedly contained sixty total individuals.⁵⁰ Shortly after the trust’s creation, the Mikels transferred property to the trust “with an asserted value of \$3,262,000.”⁵¹ The trust required the trustee to “notify [the] beneficiaries” of any contribution to the trust, whereupon they would have time to exercise a limited withdrawal that corresponded to the annual gift tax exclusion.⁵² In addition, the trust also gave the trustee sole discretion over distributions for “health, education, maintenance, or support of any beneficiary or family member.”⁵³

In addition to these distribution terms, the trust also contained two novel provisions.⁵⁴ First, the trust stated that if a dispute arose concerning the proper reading of the agreement, the disagreement “shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith,” known as a “beth din.”⁵⁵ Second, the trust utilized an *in terrorem* clause, which provided:

In the event a beneficiary of the Trust shall directly or indirectly institute, conduct or in any manner whatever take part in or aid in any proceeding to oppose the distribution of the Trust Estate, or files any action in a court of law, or challenges any distribution set forth in this Trust in any court, arbitration panel or any other manner, then in such event the provision herein made for such beneficiary shall thereupon be revoked and such beneficiary shall be excluded from any participation in the Trust Estate.⁵⁶

The Mikels failed to timely file a gift tax return in 2007.⁵⁷ In 2011, after the IRS had inquired into the gifts, the Mikels each filed a separate Form 709 reporting a gift to the trust in the amount of \$1,631,000.⁵⁸ Both Israel and Erna claimed an annual gift tax exclusion of \$720,000—calculated on the theory that each had made a separate \$12,000 gift to every one of the sixty beneficiaries.⁵⁹ After this exclusion was combined with the unified credit, neither Israel nor Erna reported any gift tax due.⁶⁰ In response to the gift tax returns, the IRS

50. *Mikel*, ___ T.C.M. (RIA) at 512.

51. *Id.* at 511–12.

52. *Id.* at 512.

53. *Id.*

54. *Mikel*, ___ T.C.M. (RIA) at 512.

55. *Id.*

56. *Id.*

57. *Id.* at 511.

58. *Id.* at 513.

59. *Mikel*, ___ T.C.M. (RIA) at 512.

60. *Id.* at 513.

notified the Mikels that each had a deficiency.⁶¹ The IRS determined that the Mikels could not claim the annual exclusion due to the arbitration and *in terrorem* clauses.⁶² The Mikels petitioned the Tax Court for a determination that they could claim the annual gift tax exclusion amounts listed on their returns.⁶³

The Tax Court noted that both the IRS and the Mikels agreed that the 2007 gifts constituted completed gifts within the meaning of the Internal Revenue Code.⁶⁴ Instead, the court observed the relevant inquiry was whether the Mikels had made a gift of a present or future interest.⁶⁵ The Internal Revenue Code provides an annual exclusion for gifts of a “present interest in property,” which is defined as “[a]n unrestricted right to the immediate use, possession, or enjoyment of property or the income from property.”⁶⁶ In contrast, “[n]o part of the value of a gift of a future interest may be excluded” from taxation.⁶⁷

The Tax Court summarized the IRS’s argument as follows:

[The IRS] starts by hypothesizing that the trustees might refuse, without legal basis, to honor a timely withdrawal demand. In that event, article XXVI of the declaration would require the beneficiary to submit the dispute to a beth din. If the beth din, again without legal basis, sustained the trustees’ refusal to honor the demand, [the IRS] agrees that the beneficiary could seek redress in a New York court despite the State’s general reluctance to disturb arbitral decisions. But a beneficiary would be extremely reluctant to go to court, [the IRS] insists, because he would thereupon forfeit all his rights under the trust by virtue of article XXVI’s *in terrorem* clause. Practically speaking, therefore, [the IRS] contends that the beneficiaries’ withdrawal rights are “illusory” and do not constitute a “present interest in property.”⁶⁸

61. *Id.*

62. *Id.*

63. *Id.*

64. *Mikel*, ___ T.C.M. (RIA) at 513.

65. *Id.* (citing I.R.C. § 2503(b)(1) (2012)).

66. Treas. Reg. § 26.2503-3(b) (2015).

67. *Id.* See also I.R.C. § 2503(b)(1) (allowing an exclusion for taxable gifts “other than gifts of future interests in property”).

68. *Mikel*, ___ T.C.M. (RIA) at 514. The Tax Court also engaged in a lengthy discussion of *Crummey v. Commissioner*, the decision of the Ninth Circuit Court of Appeals which created the type of “demand trust” at issue in *Mikel*. For the purposes of this Article, it will be sufficient to know that the court’s holding in *Crummey* stated that “all that is necessary is to find that the demand could not be resisted,” and by that, the court meant “legally resisted.” 397 F.2d 82, 88 (9th Cir. 1968). A similar principle was articulated in *Estate of Cristofani v. Commissioner*, wherein the Tax Court emphasized that the inquiry is

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The Tax Court rejected the IRS's reasoning. As an initial matter, the court saw no reason that recourse to the beth din would not provide sufficient protection to a beneficiary's withdrawal rights. Moreover, the court explained that—even assuming that a beneficiary must have withdrawal rights enforceable in state court—the IRS has misapprehended the import of the *in terrorem* clause, which it categorizes as a provisions “to discourage legal challenges to decisions by the trustees to make discretionary distributions of trust property.”⁶⁹ In the Tax Court's view, the *in terrorem* clause has no impact on a beneficiary's right to enforce his withdrawal rights.⁷⁰

II. DEVELOPMENTS IN NEW YORK STATE

A. Legislative

1. Technical Correction in the 2015–2016 Executive Budget

In its 2014–2015 iteration the budget had made the significant change of imposing a gradual annual increase to the New York estate tax exclusion amount from \$1 million to the federal level so that the two exclusions would be equal by January 1, 2019.⁷¹ Although the budget managed to raise the exclusion amount, it did not contain the terms needed to impose an estate tax on anyone dying after March 31, 2015.⁷² Accordingly, throughout much of 2014 and the beginning of 2015, the existence of the estate tax beyond March 31, 2015 remained unclear to practitioners. However, the oversight was corrected by the 2015–2016 Executive Budget: the New York estate tax would apply to all decedents, regardless of the date of their death.⁷³

not “the likelihood that the minor beneficiaries would actually receive present enjoyment of the property,” but rather “the legal right of the minor beneficiaries to demand payment from the trustee.” 97 T.C. 74 (1991).

69. *Mikel*, ___ T.C.M. (RIA) at 516.

70. *Id.*

71. Act of Mar. 31, 2014, ch. 59, pt. X, § 2, 2014 N.Y. Laws 290, 466–68 (codified at N.Y. TAX LAW § 952(c)(2)(A) (McKinney Supp. 2016)).

72. *Id.*

73. *Id.* pt. BB, § 1, 2014 N.Y. Laws at 531–32 (codified at N.Y. TAX LAW § 952 (McKinney Supp. 2016)).

2. *Decanting Statute*

During the *Survey* period, both houses of the New York Legislature passed an amendment to New York's decanting statute.⁷⁴ As many know, New York Estates, Powers, and Trusts Law section 10-6.6 authorizes a trustee to “decant” one trust (the “invaded” trust) into a new trust (the “appointed” trust) under certain circumstances.⁷⁵ In exercising such power, subsection (j) requires that the interested parties receive notice of the decanting. Once notice is given, the decanting becomes effective thirty days after the date of service *unless* the interested parties consent to an earlier date.⁷⁶

The new law clarifies the trustee's authority during the thirty-day notice period by expressly stating that “[p]rior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade a new trust.”⁷⁷ The revocation of a decanting occurs by the trustee again serving notice of the revocation to the interested parties.⁷⁸ As noted in the *New York Law Journal*, “[p]resumably 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.”⁷⁹

3. *Amendment to the Posthumously Conceived Children Statute*

Another measure that passed both houses in the *Survey* year but did not reach the Governor's desk for signature during that time is an amendment to the Posthumously Conceived Children Statute.⁸⁰ As received considerable treatment in last year's *Survey*, New York created a statute detailing the requirements that a posthumously conceived child—that is, one conceived through genetic material and medical technology following the death of a genetic parent—must meet in order to participate in an inheritance or under intestacy.⁸¹ The amendment addresses the intersection of this new statute and EPTL 11-A-2.1, which

74. The Governor subsequently signed the bill and, accordingly, the provision has since gone into law. *See generally* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney Supp. 2016).

75. *Id.* § 10-6.6(b).

76. *Id.* § 10-6.6(j).

77. *Id.* § 10-6.6(j)(7).

78. *Id.*

79. Klein, *supra* note 1.

80. Act of Nov. 20, 2015, ch. 438, 2015 McKinney's Sess. Laws of N.Y. 438 (codified at N.Y. EST. POWERS & TRUST LAW § 11-A-2.1 (McKinney Supp. 2016)).

81. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney Supp. 2016).

imposes interest on an outright pecuniary legacy that is not distributed at the end of the seven-month creditor period following the issuance of letters.⁸² As described by the Sponsor's memorandum in support of the legislation, the Legislature has offered the following logical solution to the issue: "interest upon a pecuniary gift left to a genetic posthumous child who is entitled to inherit will commence upon the later of seven months from the date of death (or date upon which the beneficiary has a right to receive such payment) or the genetic child's date of birth."⁸³

4. Changes in the Interest Rate for an Unpaid Legacy

Keeping with EPTL 11-A-2.1, the Legislature also made significant changes to the availability and rate of interest for delayed payment of a pecuniary legacy.⁸⁴ First, the amendments eliminated the need for a legatee to demand interest, making the availability of such a demand automatic.⁸⁵ In addition, the amendments substantially reduced the interest rate on the delayed payment of a legacy. Under the earlier statutory scheme, interest on a pecuniary legacy was imposed by EPTL 11-1.5(d) and (e) at the rate of six percent.⁸⁶ As noted by the Trusts, Estates and Surrogate's Courts Committee, the problem with using the six percent figure was that, "[i]n a low interest rate environment, a fixed [six percent] interest rate artificially enriches the legatee to the detriment of the residuary beneficiaries. The opposite is true in a high interest rate environment."⁸⁷

With the 2014 amendments, the interest rate for any given year now corresponds to the federal funds rate as announced by the Federal Reserve Board.⁸⁸ Moreover, the interest paid on a delayed legacy is characterized as accounting income, which allows the estate to take an income tax deduction for the distributable net income carried out to the legatee.⁸⁹ Thus, the amendments have created a scheme wherein the

82. See generally N.Y. E.P.T.L. § 11-A-2.1.

83. HELENE WEINSTEIN, MEMORANDUM IN SUPPORT OF LEGISLATION, A. 06024 (2014), http://assembly.state.ny.us/leg/?default_fld=&bn=A6024A&term=2015&Memo=Y.

84. N.Y. E.P.T.L. § 11-A-2.1(3).

85. *Id.* The removal of the demand requirement appears motivated in part by a conflict among the surrogate's courts as to what exactly constitutes a demand. Memorandum from the N.Y. State Bar Ass'n, Memorandum Urging Approval 2 (Apr. 4, 2013), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51596>.

86. Memorandum from the N.Y. State Bar Ass'n, *supra* note 85, at 1.

87. SHARON KLEIN, N.Y.C. BAR, REPORT ON LEGISLATION BY THE TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE 1 (May 2013), <http://www2.nycbar.org/pdf/report/uploads/20072278-Supportsproposedchangestolegaciesinterestpayments.pdf>.

88. N.Y. E.P.T.L. § 11-A-2.1(3).

89. *Id.*; see also KLEIN, *supra* note 87, at 2.

delayed payment of an accrued legacy still accrues interest, but does so at a rate not unduly burdensome to the residuary beneficiaries.

B. Regulatory Law

Another significant development in New York law occurred with the issuance of TSB-M-14(6)M by the New York State Department of Taxation and Finance on August 25, 2014.⁹⁰ In that technical advice memorandum, the Department of Taxation addressed another significant omission in the 2014–2015 Executive Budget.⁹¹ The budget appeared to imply that New York’s “gift add-back” provision would allow a New York resident who died owning out-of-state property to exclude such property from his or her gross estate, but that a New York resident who gifted the same out-of-state property during life would not benefit from the exclusion.⁹² As noted in the *New York Law Journal*,

[t]his could lead to anomalous results: For example, if a New York resident gifted an out-of-state residence within three years of death, the value of the real property would be added back to that individual’s estate, but if that same individual had died with that same out-of-state property, it would not be included in the New York gross estate.⁹³

The Department of Taxation addressed this concern by stating that the three-year add-back provision does not apply to out-of-state property, and the 2015–2016 Executive Budget settled the issue.⁹⁴

C. Case Law

1. Gifts to Attorneys under Lawrence v. Miller

In *Lawrence v. Miller*,⁹⁵ the New York Court of Appeals considered the unusual issue of whether gifts made to an attorney during the course of continuing representation are subject to the six-year statute

90. See TAXPAYER GUIDANCE DIV., N.Y. STATE DEP’T OF TAXATION & FIN., TSB-M-14(6)M, NEW YORK STATE ESTATE TAX REFORMED (2014) [hereinafter *Estate Tax Technical Memorandum*], https://www.tax.ny.gov/pdf/memos/estate_&_gift/m14_6m.pdf.

91. *Id.*

92. Klein, *supra* note 1.

93. *Id.*

94. See *Estate Tax Technical Memorandum*, *supra* note 90, at 1; see also Act of April 13, 2015, ch. 59, pt. BB, § 2, 2015 McKinney’s Sess. Laws of N.Y. (to be codified at N.Y. TAX. LAW § 954(a)(3)).

95. 24 N.Y.3d 320, 23 N.E.3d 965, 998 N.Y.S.2d 698 (2014). A discussion of the potential ethical issues raised by *Lawrence* are beyond the scope of this *Survey* topic.

of limitation, or if such period is tolled during the representation.⁹⁶ Before settling in 2005 for more than \$100,000,000, litigation related to the estate of Sylvan Lawrence had dragged on for twenty-two years.⁹⁷ During that period, the litigation team for Sylvan's widow—Alice—had won a particularly significant distribution of the estate for their client: \$84 million.⁹⁸ After this victory, Alice advised the three members of her legal team that she intended to make substantial gifts to them, eventually making separate payments of \$2 million, \$1.55 million, and \$1.5 million.⁹⁹ Alice reported these amounts as gifts and paid the accompanying taxes of approximately \$2.7 million.¹⁰⁰

Following Alice's death, her estate attempted to recoup the gifts.¹⁰¹ In response, Alice's legal team asserted that any claims were time-barred by the six-year statute of limitations.¹⁰² The surrogate's court concluded that the gifts were invalid, and the appellate division affirmed.¹⁰³ In its decision, the appellate division explained that the continuous presentation doctrine tolled the statute of limitations.¹⁰⁴ Alice's legal team appealed.¹⁰⁵

The Court of Appeals reversed.¹⁰⁶ As an initial matter, the Court noted that “[t]here is a difference between an attorney's alleged malfeasance in the provision of professional services on his client's behalf, and a dispute between an attorney and his client over a financial transaction, such as legal fees or, in this case, a gift.”¹⁰⁷ The Court explained:

We have never endorsed continuous representation tolling for disputes between professionals and their clients over fees and the like, as opposed to claims of deficient performance where the professional continues to render services to the client with respect to the objected-to matter or transaction. Nor do the rationales underlying continuous representation tolling support its extension beyond current limits.¹⁰⁸

96. *Id.* at 334, 23 N.E.3d at 979–80, 998 N.Y.S.2d at 712.

97. *Id.* at 326–27, 23 N.E.3d at 969–70, 998 N.Y.S.2d at 702–03.

98. *Id.* at 331, 23 N.E.3d at 972, 998 N.Y.S.2d at 705.

99. *Id.* at 332, 23 N.E.3d at 973, 998 N.Y.S.2d at 705–06.

100. *Lawrence*, 24 N.Y.3d at 332, 23 N.E.3d at 973, 998 N.Y.S.2d at 706.

101. *Id.* at 333, 23 N.E.3d at 974, 998 N.Y.S.2d at 706.

102. *Id.* at 341, 23 N.E.3d at 979–80, 998 N.Y.S.2d at 712.

103. *Id.* at 335, 23 N.E.3d at 975, 998 N.Y.S.2d at 707.

104. *Id.*

105. *Lawrence*, 24 N.Y.3d at 336, 23 N.E.3d at 976, 998 N.Y.S.2d at 708.

106. *Id.*

107. *Id.* at 342, 23 N.E.3d at 980, 998 N.Y.S.2d at 712.

108. *Id.* at 342, 23 N.E.3d at 980, 998 N.Y.S.2d at 713. Although the Court ruled in favor of Alice's legal teams, it did note that “the attorneys' acceptance of the checks may

Accordingly, the Court declined to “expand the continuous representation rule to encompass a financial dispute between a professional and his client” and such a decision “would fundamentally alter the doctrine, which requires a claim of misconduct concerning the manner in which professional services were performed, and the ongoing provision of professional services with respect to the complained-of matter or transaction.”¹⁰⁹

2. *In re Estate of Lewis Revisited*

This year, the New York Court of Appeals ruled on a case described in last year’s *Survey*.¹¹⁰ In *In re Estate of Lewis*, the Court considered the impact of a lost will under the following set of circumstances.¹¹¹

Robyn R. Lewis died in March 2010 without a spouse, without issue, and—it appeared at first—without a will.¹¹² Accordingly, her parents were the sole distributees of her estate, and the surrogate’s court issued letters of administration to them.¹¹³ Thereafter, Ms. Lewis’s parents renounced their interests in her New York residence in favor of her brothers, Ronald L. Lewis II and Jonathan Lewis.¹¹⁴

In December 2010, James R. Simmons filed a petition to revoke the parents’ letters of administration and to admit to probate a 1996 will executed by Ms. Lewis in Texas.¹¹⁵ James R. Simmons was the father of James A. Simmons—the spouse of Ms. Lewis until their divorce in

fairly be (and has been) characterized in many unflattering ways.” *Id.* at 344, 23 N.E.3d at 982, 998 N.Y.S.2d at 714.

109. *Lawrence*, 24 N.Y.3d at 345, 23 N.E.3d at 982, 998 N.Y.S.2d at 714–15. In her dissent, Judge Rivera stated that she “would hold that the challenged gifts are not valid for the reasons stated by the Appellate Division and the Surrogate, except insofar as the Surrogate suggests that Mrs. Lawrence’s age, by itself, is a factor weighing against finding the gifts were freely given.” *Id.* at 345, 23 N.E.3d at 983, 998 N.Y.S.2d at 715 (Rivera, J., dissenting in part). Judge Rivera emphasized that Alice’s legal team may have (1) “elevated their own interests above those of their clients,” (2) “had an ethical responsibility to disclose the gifts because Mrs. Lawrence was not their sole client,” and (3) “implicated the attorneys’ fiduciary duties to the firm’s partners regarding their shared compensation.” *Id.* at 346, 23 N.E.3d at 983–84, 998 N.Y.S.2d at 715–16.

110. *See* *Martin*, *supra* note 9, at 965.

111. *See* 25 N.Y.3d 456, 34 N.E.3d 833, 13 N.Y.S.3d 323 (2015).

112. *Id.* at 459, 34 N.E.3d at 835, 13 N.Y.S.3d at 325.

113. *Id.*

114. *Id.*

115. *Id.*

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2007.¹¹⁶ In the 1996 will, Ms. Lewis left her estate to James A. Simmons and named him as executor, designating James R. Simmons as the alternate executor and beneficiary.¹¹⁷ When James A. Simmons had discovered that his ex-wife had died, he located the will and had his father file the petition to revoke the letters of administration issued to Ms. Lewis' parents.¹¹⁸ Ms. Lewis's parents and brothers objected to the 1996 will.¹¹⁹

In the litigation that followed the proffer of the 1996 will, James A. Simmons testified that the 1996 will was one of four identical instruments that had been executed in a single session.¹²⁰ Based on this testimony, the surrogate's court concluded that it was not clear whether Ms. Lewis had created four original instruments or one original with three copies.¹²¹ Accordingly, the surrogate's court admitted the 1996 will to probate.¹²² The appellate division affirmed that holding.¹²³ Ms. Lewis's parents and brother moved for leave to appeal, and the Court granted leave.

The Court modified the appellate division order by remitting for further proceedings before the surrogate's court and, as so modified, affirmed.¹²⁴ As an initial matter, the Court determined that the courts below had properly rejected the argument that Ms. Lewis had revoked the 1996 will by executing a subsequent will because no witnesses could attest to the due execution of such an instrument.¹²⁵ However, the Court determined that "[a]lthough [the] claim of revocation by a subsequent writing was properly rejected, it does not follow that the

116. *In re Estate of Lewis*, 25 N.Y.3d at 459, 34 N.E.3d at 835, 13 N.Y.S.3d at 325.

117. *Id.*

118. Although the elder Simmons commenced the proceeding, the Court noted that "Mr. Simmons senior made no bones about the fact that he was not the real party in interest. He testified that he was 'not the petitioner' and was 'just along for the ride.'" *Id.* n.1. But as the Court explained, "[a]lthough the son was disqualified . . . from serving as her executor or taking under the proffered pre-divorce will, decedent's former father-in-law, who was named in the will as decedent's alternate executor and beneficiary, was not so disqualified under New York law." *Id.* (citations omitted).

119. *Id.* at 460, 34 N.E.3d at 835, 13 N.Y.S.3d at 325.

120. James A. Simmons explained that "we had four sets of everything at each house for a reason. We both traveled. We knew one house could burn down, this, that and the other." *In re Estate of Lewis*, 25 N.Y.S.3d at 460, 34 N.E.3d at 836, 13 N.Y.S.3d at 326.

121. *Id.* at 461, 34 N.E.3d at 836, 13 N.Y.S.3d at 326.

122. *Id.* at 462, 34 N.E. 3d at 837, 13 N.Y.S.3d at 327.

123. *Id.* (citing *In re Estate of Lewis*, 23 N.Y.3d 906, 992 N.Y.S.2d 794, 16 N.E.3d 1274 (2014)).

124. *Id.* at 463, 34 N.E. 3d at 838, 13 N.Y.S.3d at 328.

125. This issue was discussed at length by the appellate division and, thus, treated in last year's *Survey*. See Martin, *supra* note 9.

1996 will was proved.”¹²⁶ As the Court observed, “the evidence before the Surrogate raised a most serious, and unresolved, question as to whether the 1996 will had been otherwise revoked, and while that question persisted the will should not have been admitted to probate.”¹²⁷

The Court identified two separate inquiries for consideration by the surrogate’s court on remand. First, the Court stated that the courts below had not resolved the issue of whether Ms. Lewis had executed one will with three copies, or four functionally equivalent instruments.¹²⁸ The Court noted that, although the ex-husband referred to the documents as composed of one original and three copies, “the natural, albeit less than certain, import of his testimony was that each copy was intended to be a functional instrument.”¹²⁹ Indeed, the Court hinted that “the facts of record, adduced in critical part through the testimony of petitioner’s son, supported inferences that decedent executed her 1996 will in quadruplicate, with each document having been meant to possess the force of an original instrument.”¹³⁰

Second, the Court instructed that, if the surrogate’s court resolved the threshold issue by finding that four original instruments existed, it should consider whether Ms. Lewis revoked her will by destroying one of the originals.¹³¹ As the Court explained, James R. Simmons “was required not merely to exclude the possibility, but to rebut the legal presumption of revocation, sufficiently raised by the ex-husband’s testimony as to the existence of will duplicates, one of which had been kept, but was not found after decedent’s passing, at her post-divorce residence.”¹³²

Judge Pigott concurred in the result.¹³³ He explained that:

126. *In re Estate of Lewis*, 25 N.Y.3d at 462, 34 N.E. 3d at 837, 13 N.Y.S.3d at 327.

127. *Id.*

128. *Id.* at 463, 34 N.E. 3d at 838, 13 N.Y.S.3d at 328.

129. *Id.* at 460, 34 N.E.3d at 835–36, 13 N.Y.S.3d at 325–26.

130. *Id.* at 462, 34 N.E.3d at 837, 13 N.Y.S.3d at 327.

131. *In re Estate of Lewis*, 25 N.Y.3d at 462, 34 N.E.3d at 837, 13 N.Y.S.3d at 327.

The Court noted some of the relevant, pointing out that:

one of the will duplicates was kept at the Clayton, New York home where decedent resided after her divorce; and that, after a thorough search, no will was found there. Plainly, these circumstances sufficed to raise the presumption that decedent revoked her 1996 will by destroying it. It is equally plain that that presumption was not rebutted. None of the other duplicate wills was produced or otherwise accounted for.

Id.

132. *Id.* at 463, 34 N.E.3d at 838, 13 N.Y.S.3d at 328.

133. *Id.*

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[w]hile I agree with my colleagues that remittal to Surrogate Court is the appropriate result, I write separately to express my disagreement with the majority's dicta, in the hope that this added language will not be misinterpreted as a holding by this Court and lead the Surrogate to believe the issue has already been decided.¹³⁴

Judge Pigott stated that:

[t]he issue for the Surrogate to resolve on remittal is whether there were four original instruments or one original and three copies of the decedent's will. If the Surrogate determines that there were four original instruments, it must then decide whether the presumption of revocation was triggered and whether that presumption was rebutted.¹³⁵

He cautioned that

[t]he quality and weight afforded to ex-husband's testimony, as well as any other testimony, is clearly in the province of Surrogate Court. In other words, whether there were "four equally functional counterparts" of the decedent's will is a question of fact that is left to be resolved by the Surrogate.¹³⁶

3. *Expansion of the Slayer Rule in In re Edwards*

In *In re Edwards*, the Appellate Division, Second Department, addressed an issue of first impression that expanded upon the well-established principles underlying what many know as the "slayer statute" or "slayer rule."¹³⁷ In 2007, Deanna Edwards Palladino and Brandon Palladino married.¹³⁸ The following year, Brandon strangled his mother-in-law (Dianne Edwards) to death.¹³⁹ Thereafter, Brandon was indicted for murder in the second degree.¹⁴⁰ Despite the indictment, Deanna believed in Brandon's innocence.¹⁴¹

As the only child of Dianne and sole beneficiary of her will,

134. *Id.*

135. *In re Estate of Lewis*, 25 N.Y.3d at 463–64, 34 N.E.3d at 838, 13 N.Y.S.3d at 328.

136. *Id.* at 464, 34 N.E.3d at 838, 13 N.Y.S.3d at 328. As Sharon L. Klein notes in an article for the *New York Law Journal*: "Perhaps the most poignant lesson to draw from *Lewis* . . . is not to rely on state default law at all: Divorced spouses should give immediate attention to their planning documents, to ensure they reflect their intent." Klein, *supra* note 1.

137. 121 A.D.3d 336, 337, 991 N.Y.S.2d 431, 432 (2d Dep't 2014).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Deanna stood to inherit the entirety of her mother's estate.¹⁴² However, in February 2010, prior to any distribution of Dianne's estate, Deanna herself died as the result of an accidental drug overdose.¹⁴³ Deanna had only one distributee at the time of her death: Brandon.¹⁴⁴ Accordingly, Brandon designated his mother as administrator of Deanna's estate, which "consisted only of funds received as the beneficiary of [Dianne's] retirement plan and the expected inheritance from [Dianne]."¹⁴⁵

In October 2010, Brandon pleaded guilty to manslaughter in the first degree.¹⁴⁶ Thereafter, the executor of Dianne's estate commenced a proceeding for judicial settlement of the account of the estate.¹⁴⁷ During the proceeding, Donna Larsen—Dianne's estranged sister—submitted objections, "arguing that Brandon forfeited his interest in any property which would pass to him from [Dianne's] estate through Deanna's estate, due to his conviction for causing [Dianne's] death."¹⁴⁸ Instead, Donna asserted that she should inherit Dianne's estate.¹⁴⁹

The surrogate's court concluded that "Brandon forfeited any claim to assets inherited through Deanna's estate that are attributable to the decedent's estate."¹⁵⁰ The court ordered the distribution of Dianne's estate to Brandon's mother "solely for the purpose of paying any outstanding creditors of Deanna's estate."¹⁵¹ Thereafter, Brandon's mother would hold the funds pending final resolution of any appeals related to Brandon's conviction.¹⁵² Brandon's mother appealed.¹⁵³

The Appellate Division, Second Department affirmed. As an initial observation, the court noted that "[t]he principle that a wrongdoer may not profit from his or her wrongdoing is deeply rooted in this state's

142. *In re Edwards*, 121 A.D.3d at 337, 991 N.Y.S.2d at 432.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 337–38, 991 N.Y.S.2d at 432. During the plea proceeding, Brandon admitted that he had entered Dianne's home on the night of her death for the purpose of stealing jewelry. *In re Edwards*, 121 A.D.3d at 338, 991 N.Y.S.2d at 432. While in the process of this theft, Dianne discovered Brandon, and a physical altercation ensued. *Id.* at 338, 991 N.Y.S.2d at 432–33. "Brandon admitted that he intended to cause the decedent serious physical injury, but asserted that he did not intend to kill her." *Id.*

147. *Id.* at 338, 991 N.Y.S.2d at 433.

148. *Id.*

149. *In re Edwards*, 121 A.D.3d at 338, 991 N.Y.S.2d at 433.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 339, 991 N.Y.S.2d at 433.

common law.”¹⁵⁴ The court also recounted the facts of the “seminal case” concerning the slayer principle: *Riggs v. Palmer*.¹⁵⁵ Having articulated the basic law on the subject, the court identified that:

The issue here is whether the *Riggs* doctrine may be extended to prevent a wrongdoer from indirectly profiting from his or her own wrongdoing. More specifically, we are asked to determine whether Brandon may inherit assets of the decedent’s estate indirectly through Deanna’s estate. While it is clear that Brandon would not be able to inherit from the decedent’s estate directly, the issue of whether he may do so indirectly through Deanna’s estate is less settled. Indeed, this is an issue of first impression, as there is no appellate precedent from New York addressing whether the *Riggs* doctrine applies where a killer seeks to inherit assets from his or her victim indirectly through the estate of a person not implicated in the unlawful killing.¹⁵⁶

In resolving this issue against Brandon, the appellate division turned to two decisions for guidance. First, the court emphasized another Second Department holding, *Campbell v. Thomas*, which considered a widow’s right of election when she had improperly coerced her husband into marriage despite his lack of capacity.¹⁵⁷ In that case, the court had “observed that the wife’s wrongful conduct put her in a position to obtain benefits that became available by virtue of her being the decedent’s spouse.”¹⁵⁸

Second, the appellate division cited a case from the Appellate Court of Illinois, Fifth District—*In re Estate of Vallerius*.¹⁵⁹ In that case, the Illinois court relied upon the state’s “slayer statute”¹⁶⁰ to determine that two grandsons could not profit from murdering their grandmother, even though the grandsons would receive the grandmother’s property through the estate of their subsequently-deceased mother.¹⁶¹ The Illinois court reasoned that “[t]he fact that there is an intervening estate should not expurgate the wrong of the murderer or thwart the intent of the

154. *In re Edwards*, 121 A.D.3d at 339, 991 N.Y.S.2d at 433.

155. 115 N.Y. 506, 22 N.E. 188 (1889). *See also In re Estate of Covert*, 97 N.Y.2d 68, 74, 761 N.E.2d 571, 575, 735 N.Y.S.2d 879, 883 (2001) (the holding in *Riggs* “prevents wrongdoers from acquiring a property interest, or otherwise profiting from their own wrongdoing”).

156. *In re Edwards*, 121 A.D.3d at 339, 991 N.Y.S.2d at 434.

157. *Campbell v. Thomas*, 73 A.D.3d 103, 897 N.Y.S.2d 460 (2d Dep’t 2010).

158. *In re Edwards*, 121 A.D.3d at 340, 991 N.Y.S.2d at 434 (citing *Campbell*, 73 A.D.3d at 118, 897 N.Y.S.2d at 471).

159. *Id.*

160. 755 ILL. COMP. STAT. ANN. 5/2-6 (1993).

161. 629 N.E.2d 1185, 1186 (Ill. App. Ct. 1994).

legislature that the murderer not profit by his wrong.”¹⁶²

Applying the rationales in *Campbell* and *Vallerius*, the appellate division observed that a clear causal link existed between Brandon’s wrongdoing and the benefits he sought:

But for Brandon’s killing of [Dianne], the estate of Deanna would not likely include any assets from [Dianne’s] estate. Furthermore, since only a relatively short period of time elapsed between [Dianne’s] death and the death of Deanna, it is clear that Deanna’s estate would include assets traceable to [Dianne].¹⁶³

Thus, the court concluded, “[u]nder these circumstances, the Surrogate’s Court appropriately exercised its equitable powers in extending the *Riggs* doctrine to prevent Brandon from inheriting any portion of [Dianne’s] estate through the estate of Deanna.”¹⁶⁴ However, the court did offer a word of caution moving forward:

[W]e observe that application of the *Riggs* doctrine is not amenable to a bright-line rule. In determining whether the *Riggs* doctrine applies to a particular case, the court must examine the facts and circumstances before it, and determine whether the causal link between the wrongdoing and the benefits sought is sufficiently clear that application of the *Riggs* doctrine will prevent an injustice from occurring. Different facts and circumstances may lead to different results, but that does not prevent this Court from applying the *Riggs* doctrine in this case, where no speculation is required to see a clear causal connection between the wrongdoing and benefits sought.¹⁶⁵

4. *The Meaning of Intent Examined in In re Estate of Wagner*

In *In re Estate of Wagner*, the Appellate Division, Fourth Department considered the issue of what happens when a trustee opts to terminate an uneconomical trust.¹⁶⁶ The will of John Wagner established a trust for the benefit of Sally Baumann.¹⁶⁷ The trust provided that Sally could reside in John’s residence and would receive the income from the trust.¹⁶⁸ The trust also authorized the trustee, Canandaigua National Bank and Trust Company (CNB), to use trust principal for capital

162. *Id.* at 1189.

163. *In re Edwards*, 121 A.D.3d at 341, 991 N.Y.S.2d at 435.

164. *Id.* (citations omitted).

165. *Id.* at 341–42, 991 N.Y.S.2d at 435 (citation omitted).

166. 120 A.D.3d 919, 991 N.Y.S.2d 235 (4th Dep’t 2014).

167. *Id.* at 920, 991 N.Y.S.2d at 236.

168. *Id.*

improvements to the residence.¹⁶⁹ Upon Sally's death, the remaining trust principal would pass to John's grandchildren.¹⁷⁰ The will stated that if any trust created under the will was terminated as uneconomic, the trustee must distribute the remaining assets to the "income beneficiary or beneficiaries."¹⁷¹

CNB commenced a proceeding in surrogate's court seeking to terminate the trust for Sally under EPTL section 7-1.19 as uneconomical.¹⁷² John's grandchildren moved for summary judgment, seeking distribution of the trust assets.¹⁷³ Sally cross-moved for the same relief.¹⁷⁴ The surrogate's court terminated the trust and ordered the distribution of trust assets to Sally.¹⁷⁵ The grandchildren appealed.¹⁷⁶

The Fourth Department, with two justices dissenting, modified the Surrogate's order by removing the distribution to Sally and remitted the case to determine "[t]he distribution of the trust assets . . . in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator."¹⁷⁷ The court explained that "[i]n determining decedent's intention, we must engage in 'a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed.'"¹⁷⁸ Thus, the court reasoned, "[i]f a 'dominant purpose' can be discerned from reading the will, the individual provisions of the will must be read and given effect in light of that purpose."¹⁷⁹ Viewing the trust term granting the grandchildren a remainder interest as in competition with the provision for distribution to an income beneficiary in the event a trust became uneconomical, the court remitted the issue to the Surrogate's court for further consideration.¹⁸⁰

169. *Id.*

170. *Id.*

171. *In re Estate of Wagner*, 120 A.D.3d at 920, 991 N.Y.S.2d at 236.

172. *Id.* at 919, 991 N.Y.S.2d at 236.

173. *Id.* at 919–20, 991 N.Y.S.2d at 236.

174. *Id.* at 920, 991 N.Y.S.2d at 236.

175. *Id.* at 920, 991 N.Y.S.2d at 237.

176. *In re Estate of Wagner*, 120 A.D.3d at 920, 991 N.Y.S.2d at 237.

177. *Id.* at 921, 991 N.Y.S.2d at 237 (quoting N.Y. EST. POWERS & TRUSTS LAW § 7-1.19(a)(2) (McKinney Supp. 2016)).

178. *Id.* at 920, 991 N.Y.S.2d at 237 (quoting *In re Fabbri's Will*, 2 N.Y.2d 236, 240, 140 N.E.2d 269, 271, 159 N.Y.S.2d 184, 187 (1957)). It is worth noting that *In re Fabbri* is easily distinguishable from the facts in *Wagner* given that the trust in *Fabbri* had no clear provision of where the trust assets would go if it failed.

179. *Id.* (citing *In re Fabbri*, 2 N.Y.2d at 240, 140 N.E.2d at 271, 159 N.Y.S.2d at 188).

180. *Id.* at 921, 991 N.Y.S.2d at 237.

Justices Peradotto and Lindley dissented and voted to affirm the Surrogate's order distributing the trust property to Sally.¹⁸¹ The dissenting justices emphasized that "testamentary instruments are strictly construed so as to give full effect to the testator's clear intent,"¹⁸² and that "the best evidence of the testator's intent is found in the clear and unambiguous language of the will itself."¹⁸³ The justices cautioned against rewriting a will "in order to give effect to an intention which possibly the testator may have had but which is not revealed by the language used in the will."¹⁸⁴ Guided by these principles, the dissenting justices discerned no conflict, concluding:

The two articles may be read in harmony as providing that, if the trust exists upon Baumann's death, the trust principal shall go to the grandchildren, but that the principal shall go to Baumann if the trust is terminated as uneconomical while Baumann is still alive. We thus agree with the Surrogate that a "plain reading of the Will compels a logical progression that once the Trust is collapsed, the prohibition against principal distributions is no longer operable and the corpus on hand is payable to the Beneficiary."

In our view, the conclusion reached by the majority is premised on the unstated assumption that decedent made a mistake in his will, and that he did not intend for Baumann to receive the trust proceeds upon termination of the trust as uneconomical, as clearly and unambiguously provided for in [the will].¹⁸⁵

181. *In re Estate of Wagner*, 120 A.D.3d at 921, 991 N.Y.S.2d at 237 (Peradotto & Lindley, JJ., dissenting).

182. *Id.* (quoting *In re Estate of Covert*, 97 N.Y.2d 68, 74, 761 N.E.2d 571, 575, 735 N.Y.S.2d 879, 883 (2001)).

183. *Id.* (citations omitted)

184. *Id.* at 921, 991 N.Y.S.2d at 238 (quoting *In re Estate of Rutherford*, 125 A.D.2d 312, 313, 508 N.Y.S.2d 596, 597 (2d Dep't 1986)).

185. *Id.* at 922, 991 N.Y.S.2d at 238.