TRUSTS AND ESTATES

Steven Cunningham[†]

CONTENTS

INTRODUCTION 1179
I. DEVELOPMENTS AT THE FEDERAL LEVEL 1181
  A. Statutory Law 1181
    1. Charitable Rollover Provision 1181
    2. Valuation for Early Termination of NIMCRUTs 1181
  B. Regulatory Law 1182
  C. Case Law 1183
    1. Tax Court Examines Three Estate and Gift Tax Issues 1183
    2. Intergenerational Split-Dollar Life Insurance 1187
II. DEVELOPMENTS IN NEW YORK STATE 1191
  A. Legislative 1191
    1. Unnecessary Paperwork for Qualified Domestic Trusts 1191
    2. Attorney-Client Privilege for Revocable Trusts .. 1192
    3. Charitable Contributions Do Not Influence Domicile Determination for Estate Tax Purposes 1193
    4. Digital Assets 1193
  B. Case Law 1194
    1. Enforceability of Partial Releases of a Power of Appointment 1194
    2. Equitable Deviation 1198
    3. Civil Commitments after Obergefell v. Hodges .. 1200
    4. No Authority Under Surrogate's Court Procedure Act § 706 or § 1502 to Appoint a Co-Trustee 1200
CONCLUSION 1203

INTRODUCTION

This Article covers notable statutory and case law developments related to trusts and estates for the *Survey* period of July 1, 2015 to June

† Associate, Bond, Schoeneck & King, PLLC, Syracuse, New York; J.D., Syracuse University College of Law; B.A. & M.A., Boston University. The author would like to thank Lisabeth Jorgensen, Bill Rubenstein, Marty Schwab, Jim Seeley, Joe Greenman, and Georgia Crinnin for their guidance in producing the Article, and the editorial staff of the *Syracuse Law Review* for their helpful suggestions.

30, 2016.[1]

Part I of this Article discusses the significant changes that occurred at the federal level. This discussion will touch upon noteworthy legislative action and case law from the United States Tax Court. Included in this Part are overviews of the permanent extension of the charitable rollover provision, new valuation rules for net income with makeup charitable remainder unitrusts, and the economics benefit regime as applied to split-dollar life insurance arrangements.

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 decision of the Court of Appeals in *Aoki v. Aoki*,[2] as well as important decisions from the appellate division departments.

At the outset, it is worth noting the federal and New York exemption amounts applicable in the *Survey* period.

At the federal level, the amount of combined gross assets and prior taxable gifts needed to trigger an estate tax rose from $5.43 million in 2014 to $5.45 million in 2015.[3] The annual gift tax exclusion again remained at $14,000 throughout the entire *Survey* period.[4] Lastly, the amount of gifts to a non-citizen spouse not includable in a taxpayer's gifts increased from $147,000 in 2015 to $148,000 in 2016.[5]

New York continues its slow march wherein the state exemption amount will equalize with the federal amount beginning January 1, 2019.[6] Accordingly, the basic exclusion amount in New York rose from $3.125 million (for decedents who died on or after April 1, 2015 and on or before March 31, 2016) to $4,187,500 (for decedents who died on or after April 1, 2016 and on or before March 31, 2017).[7]

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1. Two sources used in the creation of this Article deserve special mention: the New York State Bar Association's *Trusts and Estates Law Section Newsletter* (released quarterly) and Sharon L. Klein's article *NY's Latest Legislative Session: What Passed, What Didn't, What's Next*, N.Y.L.J., Aug. 29, 2016.

2. *See generally* 27 N.Y.3d 32, 49 N.E.3d 1156, 29 N.Y.S.3d 864 (2016) (holding that attorneys drafting will for decedent did not directly benefit from the trust's assets, and that decedent understood what he was signing when he created his final will).

3. *Compare* Rev. Proc. 2014-61, 2014-47 C.B. 860, 867 § 3.33, *with* Rev. Proc. 2015-53, 2015-53 C.B. 615, 623 § 3.33.

4. *Compare* Rev. Proc. 2014-61, 2014-47 C.B. 860, 868 § 3.35(1), *with* Rev. Proc. 2015-53, 2015-53 C.B. 615, 623 § 3.35(1).

5. *Compare* Rev. Proc. 2014-61, 2014-47 C.B. 860, 868 § 3.35(2), *with* Rev. Proc. 2015-53, 2015-53 C.B. 615, 623 § 3.35(2).

6. *See* N.Y. TAX LAW § 952(c)(2)(A) (McKinney 2014 & Supp. 2017).

7. *Id.*

I. Developments at the Federal Level

A. Statutory Law

1. Charitable Rollover Provision

The charitable rollover provision of the Internal Revenue Code permits Individual Retirement Account (IRA) owners over the age of seventy-and-a-half to transfer up to $100,000 from their retirement accounts to a qualifying charity tax-free.[8] The amounts distributed are excluded from the owner's income, but the owner does not receive an additional charitable deduction to use against other income.[9] For the last few years, the government has waited until the last minute to extend the benefits of the rollover provision to the next year.[10] However, on December 18, 2015, the federal government ended the annual exercise of extending the charitable rollover provision. Under the Protecting Americans from Tax Hikes (PATH) Act of 2015, the federal government has made the benefits of the charitable rollover provision permanent.[11] Thus, moving forward, individuals can rely on the availability of charitable rollovers when considering income tax planning.[12]

2. Valuation for Early Termination of NIMCRUTs

With the PATH Act, the federal government also clarified the valuation rule for the early termination of certain charitable remainder unitrusts (CRUTs). Through the amendment of I.R.C. § 664(e), the I.R.C. now provides, "In the case of the early termination of a trust which is a charitable remainder unitrust by reason of subsection (d)(3), the valuation of interests in such trust for purposes of this section shall be made under rules similar to the rules of the preceding sentence."[13] Generally, this provision means that the value of a term or life interest on the early termination of a "net income with makeup charitable remainder unitrust" (NIMCRUT) or a "net income charitable remainder unitrust" (NICRUT) must be determined in the same manner as a fixed percentage CRUT.[14]

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8. 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).

9. *Id.* § 408(d)(8).

10. *See, e.g.*, Tax Increase Prevention Act of 2014, § 108, Pub. L. 113-295, 128 Stat. 4010, 4013–14 (codified at I.R.C. § 408(d)(8) (Supp. II 2014)).

11. Protecting Americans from Tax Hikes Act of 2015 (PATH Act), div. Q, § 112, Pub. L. 114-113, 129 Stat. 2242, 3047 (codified at I.R.C. § 408(d)(8) (Supp. III 2015)).

12. *See generally id.* (making charitable rollover provision benefits permanent).

13. *Id.* § 344(a)(1), 129 Stat. at 3115.

14. *See id.*

There are a couple of motivations for the early termination of a NIMCRUT or NICRUT: donation of the individual beneficiary's interest to the charitable remainder beneficiary, and division of the trust assets between an individual beneficiary and charitable remainder beneficiary.[15] Prior to the amendment, the IRS had issued private letter rulings that valued the interest of the individual beneficiary at a lower amount for a NIMCRUT/NICRUT than for the typical CRUT in the context of a trust *division*.[16] In those rulings, the IRS explained that the parties must value the interest using the lower of the unitrust percentage or I.R.C. § 7520 rate.[17] In contrast, the IRS reached exactly the *opposite* conclusion when it considered the issue of valuation in the context of an individual beneficiary's *contribution* of her unitrust interest to the charitable remainder beneficiary.[18]

With the PATH Act, Congress has resolved the inconsistency in these rulings, making clear that early termination interests for NIMCRUTs and NICRUTs should be valued in the same manner as a standard CRUT—based on the assumption that the noncharitable beneficiary will receive the entire unitrust amount each year.[19] Thus, moving forward, noncharitable beneficiaries can expect to have their unitrust interest appropriately valued in the case of an early termination, regardless of whether a division or donation is involved.

B. Regulatory Law

As detailed in last year's *Survey*, 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.[20] Instead, for estates filing a return after June 1, 2015, the IRS would now require that the taxpayer request a closing letter after the passage of four months from filing.[21] In a June 23,

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15. Conrad Teitell, *Early Termination of Some Charitable Remainder Trusts*, WEALTH MANAGEMENT.COM (Jan. 5, 2016), http://www.wealthmanagement.com/planned-giving/early-termination-some-charitable-remainder-trusts.

16. I.R.S. Priv. Ltr. Rul. 2013-25-018 (June 21, 2013); I.R.S. Priv. Ltr. Rul. 2007-25-044 (June 22, 2007).

17. I.R.S. Priv. Ltr. Rul. 2013-25-018 (June 21, 2013); I.R.S. Priv. Ltr. Rul. 2007-25-044 (June 22, 2007).

18. *See* I.R.S. Priv. Ltr. Rul. 2001-40-027 (Oct. 5, 2001); I.R.S. Priv. Ltr. Rul. 2001-24-010 (June 15, 2001).

19. PATH Act § 344(a)(1), 129 Stat. at 3115 (codified at I.R.C. § 664(e) (Supp. III 2015)).

20. *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 Feb. 23, 2017).

21. *Id.*

2015 statement, the IRS explained that the catalyst for this new procedure was a dramatic increase in the number of returns being filed.[22]

The IRS subsequently modified its website on November 2, 2015 and December 4, 2015. These modifications provided information about an alternative to the closing letter—an "account transcript."[23] According to the IRS, this transcript "reflects transactions including the acceptance of Form 706 and/or the completion of an examination."[24] Moreover, the transcript "may be an acceptable substitute for the estate tax closing letter."[25] Despite this pronouncement, it is unclear whether a transcript and closing letter are truly equivalent.[26] It will likely take some time before practitioners become comfortable with this alternative.

C. Case Law

1. Tax Court Examines Three Estate and Gift Tax Issues

In *Estate of Purdue v. Commissioner*, the United States Tax Court examined a trio of issues related to estate and gift taxation: (1) inclusion of LLC assets under I.R.C. § 2036, (2) exclusion of LLC interests under the annual gift tax exclusion, and (3) deductibility of loan interest to pay the estate tax.[27]

In 1999, Robert A. Purdue had a net worth of approximately $28 million, which consisted mostly of marketable securities valued at $24 million.[28] He also co-owned a one-sixth interest in a commercial building with his wife, the Hocking Building, which was worth $480,000.[29] At the advice of his attorney, Robert and his wife, Barbara Purdue, formed the Purdue Family Limited Liability Company (PFLLC) in order to (1) consolidate management and control of certain property, (2) avoid fractionalization of ownership, (3) ensure ownership remained in the family, (4) guard against creditor issues, (5) provide for flexible asset management, and (6) promote the involvement of family members in

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22. *Id.*

23. *Frequently Asked Questions on Estate Taxes*, *supra* note 20.

24. *Transcripts in Lieu of Estate Tax Closing Letters*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/transcripts-in-lieu-of-estate-tax-closing-letters (last updated Oct. 3, 2016).

25. *Id.*

26. Letter from Troy K. Lewis, Chair, Tax Executive Committee, Am. Inst. of Certified Pub. Accountants, to Alfredo Valdespino, Acting Dir., Specialty Exam Policy, Internal Revenue Serv. 5–6 (Jan. 11, 2016), http://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/aicpa-comments-on-faq-closing-letters-16-1-11.pdf.

27. 110 T.C.M. (CCH) 627, 2015 Tax Ct. Memo LEXIS 256, at *1–2 (Dec. 28, 2015) (citing I.R.C. §§ 2035(a), 2036(a) (Supp. II 2014)).

28. *Id.* at *3.

29. *Id.*

financial matters.[30] They also formed the Purdue Family Residence Trusts (PFRTs).[31] Barbara retained her right to income and distributions from the property she contributed to the PFLLC.[32]

In August 2000, Robert and Barbara gave Beverly Purdue a loan of $375,000 in exchange for a promissory note secured by a mortgage on the house that Beverly purchased with the loan.[33] In November 2000, Robert and Barbara funded the PFLLC with $22 million in marketable securities, their ownership interest in the Hocking Building (now valued at $900,000), the promissory note, and a certificate of deposit.[34] Also in that month, Robert and Barbara formed the Purdue Family Trust (PFT), which was created for the benefit of their descendants and the spouses of their descendants.[35] The PFT provided the beneficiaries with *Crummey* powers so that, when a trust addition was made, each beneficiary could withdraw the lesser of the annual gift tax exclusion amount or a per capita share of the assets added.[36]

Following the formation of these entities, Barbara made an annual exclusion gift of PFLLC interests to the PFT based on the number of current beneficiaries.[37] Each year, the beneficiaries waived any withdrawal rights.[38] However, the Purdue children still received cash distributions of $1,997,304 from the PFT through rents, loans, and dividends.[39]

Robert died in August 2001.[40] Under his will, he created three trusts for the benefit of Barbara, into which he placed his fifty percent interest in their community property.[41] One trust was a bypass trust, and the other two were non-GST-exempt and GST-exempt QTIP trusts.[42] In order to pay the estate tax, the estate used $5,040,090 in PFLLC dividend shares and a loan from the distributees of $1,233,897.[43] Although an alternate plan for paying the tax was proposed wherein the PFLLC would pay a large dividend to the estate to cover the liability, such a plan required the

30. *Id.* at *4–5.
31. *Id.* at *5.
32. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *5.
33. *Id.* at *5–6.
34. *Id.* at *6.
35. *Id.*
36. *Id.* at *6–7 (citing Crummey v. Comm'r, 397 F.2d 82, 86, 88 (9th Cir. 1968)).
37. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *3, *8, *18–19.
38. *Id.* at *9.
39. *Id.*
40. *Id.* at *10.
41. *Id.* at *12.
42. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *12.
43. *Id.* at *13.

unanimous consent of the shareholders.[44] When Beverly refused to consent to the dividend unless a lump sum dividend she wanted was also made, this alternative failed.[45]

At the time of her death in 2007, Barbara owned approximately $3,228,125 in assets outside of the QTIP trust and PFLLC.[46] However, the QTIP trust's share of the estate tax liability of Barbara's estate was $3,345,126 and the estate's share was $2,928,861.[47]

The estate filed its Estate Tax Return in March 2009.[48] The IRS issued an estate tax notice of deficiency on February 21, 2012 and a gift tax notice of deficiency for the years 2001, 2002, 2004, 2005, 2006, and 2007 on September 12, 2012.[49] Barbara's estate challenged the notices.[50]

The United States Tax Court examined three separate issues: First, the court considered whether the value of the interests in the PFLLC transferred during Barbara's lifetime are includable in her estate pursuant to I.R.C. § 2036(a).[51] That section states the following:

> [I]f a decedent makes an inter vivos transfer of property other than a bona fide sale for adequate and full consideration and retains certain enumerated rights or interests in the property which are not relinquished until death, the full value of the transferred property will be included in the value of the decedent's gross estate.[52]

Three conditions must be met in order for I.R.C. § 2036(a) to apply: (1) decedent made an inter vivos gift, (2) the transfer was not a bona fide sale for full and adequate consideration, and (3) decedent retained an interest or right that she did not relinquish before death.[53] While both sides agreed that Barbara had made an inter vivos gift, they disagreed on the two other factors.[54] On the bona fide sale determination, the court observed that the evidence "establish[ed] that a significant purpose of decedent's transfer of property to the PFLLC was to consolidate investments into a family asset managed by a single adviser," which "constituted a legitimate nontax motive for [Barbara's] transfer of

44. *Id.* at *26.
45. *Id.* at *13.
46. *Id.*
47. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *13–14.
48. *Id.* at *14.
49. *Id.*
50. *Id.* at *15.
51. *Id.* at *14.
52. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *14–15.
53. *Id.* at *15 (citing Estate of Bongard v. Comm'r, 124 T.C. 95, 112 (2005)).
54. *Id.*

property to the PFLLC."[55] Moreover, the court explained, Barbara received adequate consideration for the transfers insofar as her interests in the PFLLC were "proportional to the property she contributed."[56] Accordingly, the court concluded that "[b]ecause decedent's transfer was bona fide and for adequate and full consideration, [I.R.C. § 2036(a)] is inapplicable to the transfer and does not operate to include the value of the property in the value of decedent's gross estate."[57]

The Tax Court then considered whether Barbara's transfers of PFLLC interests in 2001, 2002, 2004, 2005, 2006, and 2007 were gifts of present interests that qualify for the annual gift tax exclusion I.R.C. § 2503(b).[58] As a threshold matter, the court noted,

> A gift in the form of an outright transfer of an equity interest in a business or property, such as limited partnership interests, is not necessarily a present interest gift. Rather, we must inquire . . . "whether the donees in fact received rights differing in any meaningful way from those that would have flowed from a traditional trust arrangement."[59]

In the court's view, the estate had to establish that "(1) the PFLLC would generate income, (2) some portion of that income would flow steadily to the donees, and (3) that portion of income could be readily ascertained."[60] The court determined that the estate had demonstrated these circumstances:

> First, the PFLLC held an interest in the Hocking Building, subject to a 55-year lease, expected to generate rent income, as well as dividend paying marketable securities. Second, the PFT made annual distributions from 2000 through 2008, totaling $1,997,304. Further, the PFLLC operating agreement and applicable State law impose a fiduciary duty on the PFLLC to make proportionate cash distributions sufficient for the QTIP Trust and the Bypass Trust to pay their income tax liabilities. Lastly, as previously stated, the property of the PFLLC consisted of marketable securities and the interest in the Hocking Building. The rent amount for the Hocking Building was readily ascertainable from the lease and the marketable securities were publicly

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55. *Id.* at *19, *21–22 (first citing Estate of Schutt v. Comm'r, 89 T.C.M. (CCH) 1353, 2005 Tax Ct. Memo LEXIS 126, at *61–62 (May 26, 2005); and then citing Estate of Hurford v. Comm'r, 96 T.C.M. (CCH) 422, 2008 Tax Ct. Memo LEXIS 276, at *70 (Dec. 11, 2008)).

56. *Id.* at *20–21 (citing *Estate of Bongard*, 124 T.C.M. at 123).

57. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *23–24.

58. *Id.* at *24.

59. *Id.* at *25 (first citing Hackl v. Comm'r, 118 T.C. 279, 292 (2002); and then citing Price v. Comm'r, 99 T.C.M. (CCH) 1005, 2010 Tax Ct. Memo LEXIS 2, at *13 (Jan. 4, 2010)).

60. *Id.* at *26 (first citing Calder v. Comm'r, 85 T.C. 713, 727–28 (1985); then citing *Hackl*, 118 T.C. at 298; and then citing *Price*, 2010 Tax Ct. Memo LEXIS 2, at *20–21).

traded. Therefore, the partners could estimate the expected dividends.[61]

Accordingly, the court held that the transfers by Barbara qualified for the annual gift tax exclusion.[62]

Finally, the court considered the issue of whether the interest "on the loans from the PFLLC members to the estate was necessarily incurred by the estate and, therefore, allowable as an administration expense deduction under [I.R.C. § 2053]."[63] The court emphasized that "[f]or an interest expense to be deductible, the loan obligation must be bona fide and actually and necessarily incurred in the administration of the decedent's estate and essential to the proper settlement of the estate."[64] The court determined that the estate had met its burden in showing that the loan interest was deductible, reasoning the following:

> [T]he facts prove that the loan was bona fide. The loan option presented by [the attorney] recognized the potential interest deduction but emphasized that the deduction was just a possibility. Moreover, [the attorney] suggested the second option, taking the distribution from the PFLLC, as opposed to the loan. The PFLLC operating agreement required its members to vote unanimously to make decisions. Beverly Purdue created the deadlock by not voting for the recommended option, making the loan necessary. Accordingly, we find that the estate can deduct the accrued interest on the loan.[65]

Thus, the Tax Court ruled in the estate's favor on all three issues.[66]

2. Intergenerational Split-Dollar Life Insurance

In *Estate of Morrissette v. Commissioner*, the United States Tax Court examined a situation where an individual entered into a split-dollar life insurance arrangement with three trusts and then contributed $29.9 million to those trusts to purchase insurance on the lives of her sons.[67] Clara Morrissette had three children, Arthur Jr., Donald, and Kenneth.[68] In 1994, she created a revocable trust and funded it with shares of the

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61. *Id.* at *26–27 (first citing WASH. REV. CODE § 25.05.165 (West 2005); then citing Estate of Wimmer v. Comm'r, 103 T.C.M. (CCH) 1839, 2012 Tax Ct. Memo LEXIS 156, at *13 (June 4, 2012); and then citing Estate of Petter v. Comm'r, 98 T.C.M. (CCH) 534, 2009 Tax. Ct. Memo LEXIS 285, at *40–41 (Dec. 7, 2009)).

62. *Estate of Purdue*, 2015 Tax Ct. Memo LEXIS 256, at *27.

63. *Id.* at *27–28.

64. *Id.* at *28 (first citing Treas. Reg. § 20.2053-1(b)(2) (2015); and then citing Treas. Reg. § 20.2053-3(a)).

65. *Id.* at *28–29.

66. *Id.* at *23, *29.

67. 146 T.C. 171, 177, 185 (2016).

68. *Id.* at 172.

family business.[69] In 2006, Clara created three separate Dynasty Trusts for her children, all of whom had joined the family business.[70]

Following the creation of these trusts, the revocable trust was amended to allow the trustee to (1) pay premiums on life insurance used to fund buy-sell provisions within a business succession plan and (2) enter into split-dollar life insurance agreements.[71] The amendment also allowed the revocable trust to transfer a receivable from the split-dollar life insurance arrangement—paid by a Dynasty Trust—*back* to the Dynasty Trust or to the son who was the beneficiary of such trust.[72] As assurance that the Dynasty Trusts could purchase the stock in the family business held in the revocable trust for Clara's benefit, each Dynasty Trust purchased universal life insurance policies on the brothers who were *not* the beneficiary of that Dynasty Trust.[73]

The revocable trust entered into a split-dollar agreement with the three Dynasty Trusts, whereby the revocable trust contributed $29.9 million to the Dynasty Trusts.[74] The Dynasty Trusts then used this money to pay a lump sum premium on each insurance policy, which would sustain the policy for the insured's life expectancy.[75] When an insured died, the revocable trust would receive proceeds from the life insurance policy equal to the greater of (1) the cash surrender value of the policy or (2) the aggregate premium payments.[76] Thereafter, each Dynasty Trust would receive the remaining death benefit, which would allow the trust to purchase the stock owned by the deceased insured.[77] The split-dollar arrangements expressly stated, "[T]he parties intend that this Agreement be taxed under the economic benefit regime of the Split-Dollar Final Regulations, and that the only economic benefit provided to the [Dynasty] Trust[s] under this arrangement is current life insurance protection."[78]

From 2006 to 2009, Clara filed gift tax returns for the transfers made to the Dynasty Trusts using the following methodology: the cost of the current life insurance protection under Table 2001, minus the premium paid by the Dynasty Trust.[79] For example, in 2009, the total cost of the

69. *Id.* at 173.
70. *Id.*
71. *Id.*
72. *Estate of Morrissette*, 146 T.C. at 173–74.
73. *Id.* at 174.
74. *Id.*
75. *Id.*
76. *Id.* at 174–75.
77. *Estate of Morrissette*, 146 T.C. at 175.
78. *Id.*
79. *Id.* at 176 (citing Treas. Reg. § 1.61-22 (2016)).

life insurance protection was $487,329 and the premiums paid by the Dynasty Trusts were $280,910.[80] Accordingly, Clara reported a gift of $206,419.[81]

Clara died in 2009.[82] In December 2013, the IRS issued two notices of deficiency to her estate, including one for gift tax liability in the amount of $13,800,179 (plus a penalty of $2,760,036) for failing to report total gifts in the amount of $29.9 million.[83] The estate filed a petition for redetermination.[84]

As a threshold matter, the Tax Court determined that the question of whether the revocable trust provided an economic benefit to the Dynasty Trusts *other than* the cost of life insurance protection—as contemplated by Treasury Regulations 1.61-22(d)(3)—is "purely legal."[85] The court explained that the regulations define a split-dollar

> insurance arrangement as an arrangement between an owner and a nonowner of a life insurance contract in which: (i) either party to the arrangement pays, directly or indirectly, all or a portion of the premiums on the life insurance contract; and (ii) the party paying for the premiums is entitled to recover all or any portion of those premiums, and such recovery is to be made from, or is secured by, the proceeds of the life insurance contract.[86]

The court also noted that split-dollar arrangements could fall into one of two regimes—the economic benefit regime or the loan regime.[87] The general rule for split-dollar arrangements provides that if the party owns the insurance policy, the economic benefit regime applies.[88] Conversely, if the party does not own the policy, the loan regime applies.[89] The court observed that "[u]nder this general rule, the Dynasty Trusts would be considered the owners of the policies and the loan regime would apply."[90]

However, the court explained that an exception exists "if the only economic benefit provided under the split-dollar life insurance

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80. *Id.* at 186.

81. *Id.*

82. *Estate of Morrissette*, 146 T.C. at 172.

83. *Id.* at 177.

84. *Id.*

85. *Id.* at 178 (citing Treas. Reg. § 1.61-22(d)(3) (2016)).

86. *Id.* (first citing Treas. Reg. § 1.61-22(b)(1)(i); and then citing Treas. Reg. § 1.61-22(b)(1)(ii)).

87. *Estate of Morrissette*, 146 T.C. at 178–79 (first citing Treas. Reg. § 1.61-22(b)(3)(i); and then citing Our Country Home Enters. v. Comm'r, 145 T.C. 1, 38 (2015)).

88. *Id.* at 179 (citing Treas. Reg. § 1.61-22(c)(1)(i)).

89. *Id.* (citing Treas. Reg. § 1.61-22(c)(2)(i)).

90. *Id.* (citing Treas. Reg. § 1.61-22(c)(2)(i)).

arrangement to the donee is current life insurance protection, then the donor will be the deemed owner of the life insurance contract, irrespective of actual policy ownership, and the economic benefit regime will apply."[91] But, the court cautioned, "If, on the other hand, the donee receives any additional economic benefit, other than current life insurance protection, then the donee will be considered the owner and the loan regime will apply."[92] Thus, the court emphasized,

> [T]he key question in this case that determines which party owns, or is deemed to own, a life insurance policy is whether the lump-sum payment of premiums made on the policies indirectly by the [revocable trust] generated any additional economic benefit other than current life insurance protection to the Dynasty Trusts.[93]

The court stated that "the relevant inquiry is whether the Dynasty Trusts had current access to the cash values of their respective policies under the split-dollar life insurance arrangements or whether any other economic benefit was provided."[94] On the first question, the court explained that "the Dynasty Trusts did not have a legally enforceable right to the cash values of the policies during the lifetime of the grantor" and that the revocable trust was not *required* to distribute its receivables to the Dynasty Trusts—it merely had that authority under the trust amendment.[95] Moreover, the court reasoned, the split-dollar arrangement itself did "not address the disposition of the receivables by the [revocable trust] and did not require or permit the receivables be distributed to the Dynasty Trusts. Thus, the Dynasty Trusts did not have a direct or indirect right in the cash values of the policies."[96]

On the second question—whether any other benefit existed—the court observed that "the receivables the [revocable trust] obtained in exchange for its advances provided the [revocable trust] sole access to the [cash surrender value] of the policies."[97] In addition, the court noted, the split-dollar arrangements did not *require* the Dynasty Trusts to pay any portion of the premium—it merely *permitted* such payment.[98] Indeed, it was the revocable trust that was obligated to pay the premiums.[99] Thus, the court explained, "regardless of how the [revocable trust] elected to

91. *Id.* (citing Treas. Reg. § 1.61-22(c)(1)(ii)(2)).
92. *Estate of Morrissette*, 146 T.C. at 179 (citing Treas. Reg. § 1.61-22(c)(1)(ii)(2)).
93. *Id.*
94. *Id.* at 181.
95. *Id.* at 182.
96. *Id.* at 183.
97. *Estate of Morrissette*, 146 T.C. at 185.
98. *Id.*
99. *Id.*

pay the premiums (whether in one lump sum or over any number of installments), the [revocable trust] would not relieve the Dynasty Trusts of any obligation to pay premiums because the Dynasty Trusts were not required to pay any premiums."[100] Accordingly, the court concluded that the economic benefit regime applied and ruled in favor of Clara's estate.[101]

II. DEVELOPMENTS IN NEW YORK STATE

A. Legislative

1. Unnecessary Paperwork for Qualified Domestic Trusts

In June 2016, the New York State Legislature addressed an issue that had arisen due to the sunset of a law it had previously enacted. On December 18, 2013, the Legislature eliminated the need for the creation of a Qualified Domestic Trust (QDOT) for dispositions to a non-U.S. surviving spouse.[102] Prior to the enactment of that law, New York required the filing of a federal estate tax in order for the marital deduction to apply for the purposes of the New York estate tax—even if there was no need to file the return for *federal* estate tax purposes.[103] However, the QDOT itself was not necessary for New York purposes, as the state does not tax the termination of, or principal distribution from, a QDOT in the same manner as the federal law.[104] The 2013 law streamlined this process by providing that if no federal return was required and the disposition to the non-U.S. spouse otherwise qualified for the marital deduction, New York would not force the filing of a return.[105]

Unfortunately, the benefits of the 2013 provisions were scheduled to end on July 1, 2016.[106] Because the federal and New York estate taxes will not match until 2019, this sunset would have given rise to the same unnecessary filing problem that existed prior to 2013.[107] Thankfully, on June 30, 2016, the New York State Legislature enacted a provision to

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100. *Id.*

101. *Id.* at 186 (citing Treas. Reg. § 1.61-22 (2016)).

102. Act of Dec. 18, 2013, 2013 McKinney's Sess. Laws of N.Y., ch. 538, at 1388 (codified at N.Y. TAX LAW § 951 (McKinney 2014)).

103. *See id.*

104. Klein, supra note 1.

105. Act of Dec. 18, 2013, 2013 McKinney's Sess. Laws of N.Y., ch. 538, at 1388 (codified at TAX § 951(b)).

106. DEP'T OF TAXATION & FIN., TSB-M-16(8)M, SUMMARY OF ESTATE TAX LEGISLATION ENACTED IN 2016 (2016), https://www.tax.ny.gov/pdf/memos/estate_&_gift/m16_8m.pdf; *see* Act of Dec. 18, 2013, 2013 McKinney's Sess. Laws of N.Y., ch. 538, at 1388 (codified at TAX § 951(b)).

107. Klein, *supra* note 1.

address the inadvertent issue created by the sunsetting of the 2013 law.[108] Under the provisions of the new law, the necessity of filing a federal estate tax return for estates under the federal filing threshold *merely* for the purpose of obtaining a marital deduction for a New York taxable estate has been eliminated.[109] The newly enacted provision is scheduled to sunset again in July 2019; however, at that point, the federal and New York estate tax will be the same, and the QDOT issue will no longer exist.[110]

2. Attorney-Client Privilege for Revocable Trusts

One of the well-established exceptions to attorney-client privilege set forth in Civil Practice Law and Rules (CPLR) 4503(b) is that—in an action involving the probate, validity, or construction of a will—an attorney "shall be required to disclose information as to the preparation, execution or revocation of any will."[111] Despite the fact that a revocable trust acts as a will substitute, the disclosure permitted by CPLR 4503(b) did not extend to those instruments.[112] This presented the incongruous result where discovery of certain information about a decedent's will was permitted, but discovery of the same information about the decedent's functionally equivalent revocable trust agreement was not.[113]

During the *Survey* period, both houses of the New York State Legislature addressed this incongruity.[114] Under the new CPLR 4503(b), an attorney is now "required to disclose information as to the preparation, execution or revocation of" a revocable trust in any action involving the "validity or construction" of that trust.[115] However, the Legislature limited such disclosure to "after the grantor's death"—preserving the equivalence of the provision's application to wills and revocable trusts.[116]

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108. Act of June 30, 2016, 2016 McKinney's Sess. Law News no. 4, ch. 80, at 464 (codified at N.Y. TAX LAW § 951(b) (McKinney Supp. 2017)).

109. *Id.*; Klein, *supra* note 1.

110. Klein, *supra* note 1.

111. N.Y. C.P.L.R. 4503(b) (McKinney 2007).

112. *Id.*

113. *Id.*; Robert M. Harper, *The Application of the Attorney-Client Privilege in Revocable Trust Contests*, 48 TR. & EST. L. SEC. NEWSL., Spring 2015, at 7, 7–8.

114. The Governor subsequently signed the bill and, accordingly, the provision has since gone into law. *See* Act of Aug. 19, 2016, 2016 McKinney's Sess. Law News no. 5, ch. 262, at 669–70 (codified at C.P.L.R. 4503(b) (McKinney Supp. 2017)).

115. *Id.*

116. *Id.*

3. Charitable Contributions Do Not Influence Domicile Determination for Estate Tax Purposes

Effective April 13, 2016, the Legislature amended the Tax Law to reflect the longstanding policy of the New York Department of Taxation and Finance not to consider an individual's charitable contributions or activities in determining domicile for the purposes of the New York estate tax.[117] Specifically, this amendment prevents the Department from considering the following in a domicile determination: "the making of a financial contribution, gift, bequest, donation or any other financial instrument or pledge in any amount or the donation or loan of any object of any value, or the volunteering, giving or donation of uncompensated time, or any combination of the [above]."[118] While this clarification merely formalizes an existing practice, statutory confirmation of the role of charitable contributions provides additional assurances that taxpayers will not be penalized for their good works.

4. Digital Assets

During the *Survey* period, the Legislature passed a bill to amend the Estates, Powers and Trusts Law (EPTL) to include a provision on the Administration of Digital Assets.[119] This bill is based on the *Revised Uniform Fiduciary Access to Digital Assets Act* passed by the Uniform Law Commission in 2014 and revised in 2015.[120] The bill outlines what access a fiduciary[121] has to someone's digital assets. Digital assets are defined as "an electronic record in which an individual has a right or interest."[122] Given the increasing amount of information available online, the bill hopes to clarify how fiduciaries can act without violating federal law.[123] It is also meant to help fiduciaries obtain necessary information

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117. Act of Apr. 13, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 60, at 322 (codified at N.Y. TAX LAW § 951-a(f) (McKinney Supp. 2017)).

118. *Id.*

119. *See generally* Act of Sept. 29, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 354, at 825 (codified at N.Y. EST. POWERS & TRUSTS LAW § 13-A (McKinney Supp. 2017)).

120. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 3, at 8 (2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

121. The statute applies to fiduciaries acting under a Will, Trust, or Power of Attorney, an Executor, Administrator, or Personal Representative, a Guardian appointed in a Guardianship Proceeding, a Trustee acting pursuant to a Trust, and a custodian if the user resides in the state or did at the date of death. Act of Sept. 29, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 354, at 827 (codified at E.P.T.L. § 13-A-2.1(a)(1)).

122. *Id.* at 826 (codified at E.P.T.L. § 13-A-1(i)).

123. *See generally* Legislative Memorandum of Assemb. Weinstein, *reprinted in* 2016 McKinney's Sess. Law News no. 6, ch. 354, at A-419 (discussing the effect of Electronic

without being limited by the internet providers Terms of Service Agreement.[124]

Under the bill, a catalog of electronic communications will be available to a decedent's fiduciary unless the decedent otherwise prohibited the fiduciary's access.[125] The content of a digital communication, however, will not be made available to the fiduciary without the decedent's consent or a court order.[126] As of the close of the *Survey* period, this bill was awaiting delivery to the Governor.[127]

B. Case Law

1. Enforceability of Partial Releases of a Power of Appointment

Only one Court of Appeals case during the *Survey* year involved a significant issue related to trusts and estates. In *Aoki v. Aoki*, the Court considered the validity of two partial releases of testamentary power of appointment.[128] In 1998, the founder of the Benihana restaurant chain, Hiroaki "Rocky" Aoki, formed the Benihana Protective Trust (BPT) to hold the stock and other assets of the chain.[129] The trust instrument named Rocky's attorney, Darwin Dornbush, and his two children, Kevin and Kana, as trustees.[130] The trust provided Rocky with "an unlimited power 'to appoint any of the principal and accumulated net income remaining at his death.'"[131] However, this power was "exercisable only by a provision in [Rocky's] Will specifically referring to and exercising the power."[132] The drafting attorney was Norman Shaw.[133]

Following Rocky's marriage to Keiko Aoki in 2002, Kevin and Kana expressed their concern to Dornbush that Rocky had not entered into a prenuptial agreement with Keiko.[134] Rocky, Kevin, and Kana subsequently met with Dornbush to discuss potential solutions to this

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Computer Privacy Act, the Stored Communications Act, and the Computer Fraud and Abuse Act).

124. *Id.*

125. Act of Sept. 29, 2016, 2016 McKinney's Sess. Law News no. 6, ch. 354, at 829 (codified at E.P.T.L. § 13-A-3.2).

126. *Id.* at 828–29 (codified at E.P.T.L. § 13-A-3.1).

127. On September 29, 2016, Governor Cuomo signed the bill into law, creating Article 13-A of the E.P.T.L. *See generally id.* at 825 (codified at E.P.T.L. § 13-A).

128. 27 N.Y.3d 32, 35, 49 N.E.3d 1156, 1157, 29 N.Y.S.3d 864, 865 (2016).

129. *Id.*

130. *Id.* at 35–36, 49 N.E.3d at 1157, 29 N.Y.S.3d at 865.

131. *Id.* at 36, 49 N.E.3d at 1157–58, 29 N.Y.S.3d at 865–66.

132. *Id.*

133. *Aoki*, 27 N.Y.3d at 36, 49 N.E.3d at 1157–58, 29 N.Y.S.3d at 865–66.

134. *Id.* at 36, 49 N.E.3d at 1158, 29 N.Y.S.3d at 866.

perceived problem.[135] When Keiko refused to sign a postnuptial agreement, "Shaw proposed that Rocky execute a partial release of his power of appointment whereby Rocky could appoint only his descendants at the time of his death."[136]

Thereafter, in September 2002, Rocky, Kevin, and Kana met with Dornbush to review the partial release, and Rocky signed the release the following day.[137] This September release provided the following:

> I hereby *irrevocably* partially release that power of appointment so that, from now on, I shall have only the following power:
>
> *I shall have a testamentary power to appoint any of the principal and accumulated net income remaining at my death to or for the benefit of any one or more of my descendants*. My right to select appointees from among my descendants, to decide the share of the appointive property that each appointee shall receive, and to decide the terms (in trust or otherwise) upon which each appointee shall take the appointive property, shall be unlimited in all respects. My power of appointment shall be exercisable only by a provision in my Will specifically referring to and exercising the power.[138]

In December 2002, Rocky executed a second release to further restrict his power to appoint, excluding his nonresident alien descendants.[139]

In 2003, Rocky engaged another attorney to prepare a codicil to his will.[140] In this codicil, Rocky appointed twenty-five percent of the trust assets to Keiko outright, and placed the other seventy-five percent in trust for her benefit, with income distributions for her lifetime.[141] The attorney who drafted the agreement for the BPT, Shaw, was asked to opine as to whether the codicil constituted a valid exercise of the power of appointment.[142] Shaw concluded that the portion granting Keiko a beneficial interest was invalid due to the September release.[143] Thereafter, Rocky executed an affidavit indicating that he did not understand the releases prevented him from leaving shares of Benihana to Keiko and, if he had, he would not have signed them.[144]

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Aoki*, 27 N.Y.3d at 36–37, 49 N.E.3d at 1158, 29 N.Y.S.3d at 866.
139. *Id.* at 37, 49 N.E.3d at 1158, 29 N.Y.S.3d at 866.
140. *Id.*
141. *Id.*
142. *Id.* at 37, 49 N.E.3d at 1159, 29 N.Y.S.3d at 866.
143. *Aoki*, 27 N.Y.3d at 37, 49 N.E.3d at 1159, 29 N.Y.S.3d at 866.
144. *Id.*

In 2007, Rocky executed a new will that contained an exercise of the power of appointment mirroring the disposition in the codicil.[145] However, Rocky also provided that, if such an exercise was "'invalid because, contrary to [his] desires, the [September and December Releases] . . . [were] found to be valid,' then he exercised his power 50% in favor of his daughter, Devon, and 50% in favor of his son, Steven."[146]

When Rocky died in 2008, he was "survived by Keiko and six children."[147] The trustees of BPT commenced a proceeding to determine the validity of the releases.[148] In response, Keiko asserted five affirmative defenses, including that the releases were procured through fraud.[149] Although the surrogate's court dismissed four of the defenses, it allowed the fraud defense to proceed, determining that

> there was a triable issue of fact on the issue of constructive fraud, and whether the proponents of the Releases (as opposed to Keiko) could meet their burden of demonstrating that Rocky's signature on the Releases was voluntary and not the result of misrepresentation or omission by attorneys Dornbush and Shaw.[150]

After trial, the surrogate's court concluded that a preponderance of the evidence showed Rocky did not understand that the releases were irrevocable.[151] Moreover, the court determined that Devon and Steven failed to prove the voluntariness of the releases.[152] Accordingly, the surrogate's court held that the releases were invalid.[153]

The Appellate Division, First Department unanimously reversed the surrogate's court.[154] In its ruling, the appellate division stated that the court below "erroneously shifted the burden of proof to Devon and Steven to prove that the releases were *not* procured by fraud."[155] The First Department emphasized that Dornbush and Shaw were not parties to the releases and, therefore, could not benefit from them.[156] Moreover, the court explained, the evidence demonstrated that Rocky understood the irrevocability of the releases.[157] Keiko moved for leave to appeal the

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145. *Id.* at 37, 49 N.E.3d at 1159, 29 N.Y.S.3d at 867.
146. *Id.*
147. *Id.*
148. *Aoki*, 27 N.Y.3d at 38, 49 N.E.3d at 1159, 29 N.Y.S.3d at 867.
149. *Id.*
150. *Id*
151. Aoki v. Aoki, 117 A.D.3d 499, 503, 985 N.Y.S.2d 523, 527 (1st Dep't 2014).
152. *Id.* at 502, 985 N.Y.S.2d at 526.
153. *Id.*
154. *Id.* at 499, 985 N.Y.S.2d at 524.
155. *Id.* at 503, 985 N.Y.S.2d at 527.
156. *Aoki*, 117 A.D.3d at 503, 985 N.Y.S.2d at 527.
157. *Id.*

appellate division's order, and the Court of Appeals granted leave.[158]

On appeal, the Court of Appeals affirmed the appellate division's order in a split decision.[159] Writing for the majority, Judge Pigott explained that "[i]t is a well-settled rule that 'fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to [be] relieve[d] . . . from an obligation on that ground.'"[160] After observing that the law of constructive fraud can shift the burden of proof to the party seeking to uphold a transaction, Judge Pigott noted, "We have applied the constructive fraud doctrine in different contexts, but in each one, the pertinent factor present is that the fiduciary stood to benefit from the transaction itself."[161]

In the present matter, Judge Pigott observed,

> Dornbush and Shaw were clearly Rocky's fiduciaries. But that is only one part of the equation. The critical inquiry is whether they were either parties to the Releases or stood to directly benefit from their execution, such that the burden shifted to Devon and Steven to demonstrate that the Releases were not procured by fraud.[162]

In the majority's view, Dornbush and Shaw were not parties to the releases and did not stand to benefit from them.[163] In light of this fact and the other supporting evidence demonstrating Rocky understood what he was signing when he executed the releases, the Court of Appeals determined that the surrogate's court erred when it shifted the burden of proof to Devon and Steven.[164]

In dissent, Judge Stein stated that she generally agreed with the majority's discussion of the law of constructive fraud.[165] However, she offered an alternate theory on how Dornbush and Shaw may have breached a fiduciary duty—as agents of two of Rocky's children, Kevin and Kana.[166] Judge Stein observed, "[T]he record reflects several

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158. Aoki v. Aoki, 27 N.Y.3d 32, 39, 49 N.E.3d 1156, 1160, 29 N.Y.S.3d 864, 868 (2016).

159. *Id.* at 39, 45, 49 N.E.3d at 1160, 1164, 29 N.Y.S.3d at 868, 872.

160. *Id.* at 39, 49 N.E.3d at 1160, 29 N.Y.S.3d at 868 (second and third alterations in original) (omission in original) (quoting Gordon v. Bialystoker Ctr. & Bikur Cholim, 45 N.Y.2d 692, 698, 385 N.E.2d 285, 288, 412 N.Y.S.2d 593, 597 (1978)).

161. *Id.* at 39–40, 49 N.E.3d at 1160, 29 N.Y.S.3d at 868 (citing *In re* Estate of Greiff, 92 N.Y.2d 341, 345, 703 N.E.2d 752, 754, 680 N.Y.S.2d 894, 896 (1998)).

162. *Id.* at 41, 49 N.E.3d at 1161, 29 N.Y.S.3d at 869.

163. *Aoki*, 27 N.Y.3d at 41, 49 N.E.3d at 1161, 29 N.Y.S.3d at 869 (first citing *Gordon*, 45 N.Y.2d at 698–700, 385 N.E.2d at 288–89, 412 N.Y.S.2d at 596–98; and then citing Fisher v. Bishop, 108 N.Y. 25, 29–30, 15 N.E. 331, 332–33 (1888)).

164. *Id.*

165. *Id.* at 42, 49 N.E.3d at 1162, 29 N.Y.S.3d at 870 (Stein, J., dissenting).

166. *Id.* at 36, 43, 49 N.E.3d at 1157, 1163, 29 N.Y.S.3d at 865, 871 (citing Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503, 965 N.E.2d 240, 242, 942 N.Y.S.2d 13, 15 (2012)).

instances of conflicting evidence with respect to the nature of the relationship between the attorneys and Rocky's children and, ultimately, whether the Releases should be set aside as the product of improper conduct by the attorneys."[167] For that reason, she voted to reverse the appellate division order and remit the case to that court for a review of the surrogate's court decision after trial.[168]

2. Equitable Deviation

In the case of *In re Chamberlin*, the Appellate Division, Third Department reviewed a surrogate's court order denying relief under Estates, Powers, and Trusts Law (EPTL) § 8-1.1(c)(1) to modify investment restrictions in a trust.[169] When Leon Chamberlin died in 1999, he made bequests to three churches.[170] The will directed that each bequest would be held in a separate trust for a church, but instructed the trustee to "invest only in insured bank accounts and government securities and use the net income for maintenance of the physical property of each church."[171]

After years of low investment returns, the trustees petitioned pursuant to EPTL § 8-1.1(c) to amend the investment restrictions and authorize investments in accordance with the Prudent Investor Act.[172] Although the Attorney General consented to this change, the surrogate's court denied the petition on the basis that there had been no unforeseen change in circumstances.[173] The trustees appealed.[174]

The Third Department reversed the order of the surrogate's court and granted the petition to amend the investment provisions.[175] As a threshold matter, the court articulated the difference between equitable deviation and cy pres relief:

> Equitable deviation involves altering or amending an administrative provision, whereas cy pres effects a substantive change. Thus, equitable deviation may be appropriate where cy pres is not because an administrative change can be made without altering the purpose of the

167. *Id.* at 44, 49 N.E.3d at 1163, 29 N.Y.S.3d at 871.
168. *Aoki*, 27 N.Y.3d at 45, 49 N.E.3d at 1164, 29 N.Y.S.3d at 872 (Stein, J., dissenting).
169. 135 A.D.3d 1052, 1052, 23 N.Y.S.3d 658, 659 (3d Dep't 2016) (citing N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c) (McKinney 2002 & Supp. 2015)).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 1053, 23 N.Y.S.3d at 659.
174. *In re Chamberlin*, 135 A.D.3d at 1053, 23 N.Y.S.3d at 659.
175. *Id.* at 1054, 23 N.Y.S.3d at 660.

trust or changing its disposition provisions.[176]

The court noted that "[s]ome cases addressing common-law equitable deviation required an *unforeseen* change in circumstances . . . , whereas the statutory provision applicable to charitable trusts does not require the change to be unforeseen."[177] Instead, the court emphasized,

> The statute provides that "whenever it appears to [surrogate's court] that circumstances have so changed since the execution of an instrument making a disposition for religious . . . purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application . . . make an order or decree directing that such disposition be administered and applied in such a manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein."[178]

Turning to the case at hand, the appellate division reasoned that Leon Chamberlin had intended to provide the churches with a principal amount of money to help fund maintenance costs of the physical properties.[179] Rather than seeking to alter this purpose, the trustees sought "limited additional authority regarding the manner in which investments of the principal [were] administered."[180] The court determined that such relief was appropriate because the trustees "established that the current investment restrictions [had] for many consecutive years reduced the income from each trust to essentially negligible amounts," which had frustrated the charitable purposes of the trusts.[181] Accordingly, the court concluded that equitable deviation in the form of broader investment powers was appropriate.[182]

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176. *Id.* at 1053, 23 N.Y.S.3d at 659 (first citing GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 396 (2d ed. 1991 & Supp. 2015); and then citing *In re* Uris, 910 N.Y.S.2d 409, 409 (Surr. Ct. Nassau Cty. 2010)).

177. *Id.* (first citing N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) (McKinney 2002 & Supp. 2015); and then citing N.Y. NOT-FOR-PROFIT CORP. LAW § 555(b) (McKinney 2015)).

178. *Id.* (alteration in original) (omissions in original) (quoting E.P.T.L. § 8-1.1(c)(1)).

179. *In re Chamberlin*, 135 A.D.3d at 1053, 23 N.Y.S.3d at 659.

180. *Id.* at 1053, 23 N.Y.S.3d at 659–60 (citing *In re* Hummel, 30 A.D.3d 802, 804, 817 N.Y.S.2d 424, 427 (3d Dep't 2006)).

181. *Id.* at 1053–54, 23 N.Y.S.3d at 660.

182. *Id.* at 1054, 23 N.Y.S.3d at 660 (first citing *In re* Aberlin, 264 A.D.2d 775, 775, 695 N.Y.S.2d 383, 383 (2d Dep't 1999); then citing *In re* Estate of Muir, N.Y.L.J., June 7, 2013, at 21 (Surr. Ct. N.Y. Cty. 2013); then citing *In re* Siegel, 174 Misc. 2d 698, 701, 665 N.Y.S.2d 813, 815 (Surr. Ct. N.Y. Cty. 1997); and then citing *In re* Talman, 126 Misc. 2d 860, 863, 484 N.Y.S.2d 406, 409 (Surr. Ct. N.Y. Cty. 1984)).

3. Civil Commitments after Obergefell v. Hodges

During this *Survey* year, New York courts had their first opportunity to consider the impact of the United States Supreme Court's ruling in favor of marriage equality on civil commitments that predated that landmark decision. In the case of *In re Leyton*, the Appellate Division, First Department examined whether David Hunter, an executor and beneficiary under a decedent's will, should be disqualified based on the dissolution of a civil commitment.[183] The court noted,

> The Supreme Court's recognition of same-sex couples' fundamental right to marry in *Obergefell v Hodges* does not compel a retroactive declaration that the 'Commitment Ceremony' entered into by decedent and Hunter in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage for purposes of the 'former spouse' provisions of [EPTL § 5-1.4].[184]

The appellate division explained, "Even assuming that decedent's and Hunter's union should be retroactively recognized as having constituted a legal marriage, in order for [EPTL § 5-1.4]'s 'former spouse' provisions to apply, the end of the marital relationship must have been effected by a formal judicial 'decree or judgment.'"[185] Decedent and Hunter had not received such a decree.[186] The court opined that "according the union between decedent and Hunter retroactive legal effect would be inconsistent with their understanding that they had never been legally married."[187] In support, the court emphasized that the separation of the parties had been "informal, with no dissolution ceremony analogous to the commitment ceremony."[188] Moreover, the court observed, "when same-sex marriage was legalized in New York, [the] decedent and Hunter took no steps to obtain any judicial decree declaring an end to their union."[189]

4. No Authority Under Surrogate's Court Procedure Act § 706 or § 1502 to Appoint a Co-Trustee

In the case of *In re Schuyler*, the Appellate Division, Third Department, examined whether a surrogate's court has the authority to appoint a successor co-trustee when an existing trustee is already

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183. 135 A.D.3d 418, 418, 22 N.Y.S.3d 422, 423 (1st Dep't 2016).
184. *Id.* (citing Obergefell v. Hodges 135 S. Ct. 2584, 2599 (2015)).
185. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (f)(2) (McKinney Supp. 2015)).
186. *Id.*
187. *Id.*
188. *In re Leyton*, 135 A.D.3d at 418, 22 N.Y.S.3d at 423.
189. *Id.* (citing N.Y. DOM. REL. LAW § 10-a(1) (McKinney Supp. 2015)).

serving.[190] When Philip Schuyler died, he left behind three children—Philip Jr., Sara, and Ann.[191] Under Philip's will, he disposed of his residuary estate in equal shares for his children.[192] While Philip gave Philip Jr. and Sara their shares outright, Philip created a trust for the lifetime benefit of Ann.[193] The will named KeyBank and Philip's son, Philip Jr., as trustees.[194]

Philip Jr. and KeyBank served as trustees together until Philip Jr.'s death in 2012.[195] At that time, Sara petitioned to have her son, James, appointed as successor co-trustee alongside KeyBank.[196] Certain remainder beneficiaries opposed the petition.[197] The surrogate's court rejected the objections and appointed James a successor co-trustee on the basis of Philip's "intent[ion] to have a family member and KeyBank or their successors serve as co-trustees for the duration of the [subject] trust."[198] The remainder beneficiaries appealed.[199]

The Third Department modified the surrogate's court's order by reversing the portion that granted the appointment of James as successor co-trustee.[200] In reaching its determination, the court cited to two sections of the Surrogate's Court Procedure Act (SCPA).[201] First, the court highlighted SCPA § 1502(2),[202] which states the following:

> The court shall not appoint a trustee, successor or co-trustee if the appointment would contravene the express terms of the will or lifetime trust instrument *or* if a trustee may be or has been named in the will or lifetime trust instrument as successor, substitute or co-trustee and is not disqualified to act.[203]

Second, the court quoted SCPA § 706(1)[204]: "Where one of two or more fiduciaries dies . . . , a successor to the deceased fiduciary . . . shall

190. 133 A.D.3d 1160, 1162–64, 20 N.Y.S.3d 456, 458–60 (3d Dep't 2015).
191. *Id.* at 1160–61, 20 N.Y.S.3d at 457.
192. *Id.* at 1161, 20 N.Y.S.3d at 457.
193. *Id.*
194. *Id.*
195. *In re Schuyler*, 133 A.D.3d at 1161, 20 N.Y.S.3d at 457.
196. *Id.* at 1161, 20 N.Y.S.3d at 457–58 (citing N.Y. SURR. CT. PROC. ACT § 1502 (McKinney 2011)).
197. *Id.*
198. *Id.* at 1161, 20 N.Y.S.3d at 458 (alterations in original).
199. *Id.*
200. *In re Schuyler*, 133 A.D.3d at 1164, 20 N.Y.S.3d at 460.
201. *Id.* at 1162, 20 N.Y.S.3d at 458.
202. *Id.* (quoting N.Y. SURR. CT. PROC. ACT § 1502(2) (McKinney 2011)).
203. S.C.P.A. § 1502(2) (emphasis added).
204. *In re Schuyler*, 133 A.D.3d at 1162, 20 N.Y.S.3d at 458 (quoting N.Y. SURR. CT. PROC. ACT § 706(1) (McKinney 1994)).

not be appointed, except where such appointment is necessary in order to comply with the express terms of a will or lifetime trust instrument."[205]

Based on these two provisions, the appellate division concluded that "it is clear that petitioner's application for letters of successor cotrusteeship must fail."[206] As an initial matter, the court noted, "KeyBank has at all times been—and remains—ready, willing and able to act as trustee of the subject trust, and nothing in the record suggests that KeyBank is incapable of—or has been disqualified from—performing the fiduciary duties imposed."[207] In addition, the court observed, the appointment of a co-trustee is not necessary to execute the provisions of the trust, nor was it expressly required by Philip's will.[208] In the court's view, "[D]ecedent's references to the subject trust's cotrustees and/or their successors in the plural form, although numerous, fall far short of constituting an express requirement that the trust forever be managed by a family member and a corporate entity."[209]

The Third Department also criticized the finding of the surrogate's court that Philip intended a family member and KeyBank to serve as co-trustees at all times.[210] The appellate division explained, "[H]ad this truly been decedent's intent from the outset, he easily could have included a provision in his will to that effect."[211] Moreover, the court reasoned, the surrogate's main argument—that Philip's wishes should be derived "from 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"—was entirely inconsistent with the provisions of SCPA § 706(1), which requires *express* terms.[212] As the Third Department wrote, "[T]hat which may be divined only by implication necessarily cannot

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205. S.C.P.A. § 706(1).

206. *Id.*

207. *In re Schuyler*, 133 A.D.3d at 1162, 20 N.Y.S.3d at 458–59 (first citing *In re* Seidman, 58 A.D.2d 72, 75–76, 395 N.Y.S.2d 674, 677 (2d Dep't 1977); and then citing *In re* Fernbach, 257 A.D.2d 537, 538, 684 N.Y.S.2d 241, 241 (1st Dep't 1999)).

208. *Id.* at 1162–63, 20 N.Y.S.3d at 459–60 (first citing S.C.P.A. § 1502(1); then citing *In re* Moser, 139 Misc. 2d 958, 960, 529 N.Y.S.2d 453, 454–55 (Surr. Ct. Nassau Cty. 1988); then citing S.C.P.A. § 706(1); then citing *In re* Statler, 27 A.D.3d 1163, 1164, 811 N.Y.S.2d 846, 847 (4th Dep't 2006); then citing *In re* Phipps, 2 N.Y.2d 105, 108–09, 138 N.E.2d 341, 343, 157 N.Y.S.2d 14, 17 (1956); and then citing Goldstein v. Trs. of Sailors' Snug Harbor, 277 A.D. 269, 280, 98 N.Y.S.2d 544, 555 (1st Dep't 1950)).

209. *Id.* at 1163, 20 N.Y.S.3d at 460.

210. *Id.*

211. *Id.* (citing *In re* Bensel, 127 A.D.2d 832, 832–33, 512 N.Y.S.2d 411, 412 (2d Dep't 1987)).

212. *In re Schuyler*, 133 A.D.3d at 1161, 20 N.Y.S.3d at 460 (quoting *In re* Prevratil, 121 A.D.3d 137, 146, 990 N.Y.S.2d 697, 704 (2d Dep't 2014)).

constitute an express testamentary provision."[213] Accordingly, the court agreed with the remainder beneficiary that Philip's "will neither permit[ed] nor requir[ed] the appointment of a successor cotrustee under these circumstances."[214]

CONCLUSION

As demonstrated above, this *Survey* year saw a number of clarifications and refinements made to the existing trust and estate law, but did not involve the type of tectonic shift that has marked some years.[215] This relative stability is sure to be short-lived, however, with next year promising to bring significant changes as a new administration enters the White House. Practitioners will do well to remain alert for new developments in this area of the law.

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213. *Id.* at 1163, 20 N.Y.S.3d at 460 (citing *In re* Stavin, 56 A.D.2d 68, 70–71, 391 N.Y.S.2d 412, 413–14 (1st Dep't 1977)).

214. *Id.* at 1161, 1164, 20 N.Y.S.3d at 457–58, 460.

215. *See, e.g.*, Steve Cunningham, *2014–15 Survey of New York Law: Trusts and Estates*, 66 SYRACUSE L. REV. 1099, 1100, 1110 (2016).