TRUSTS AND ESTATES

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I. LEGISLATION

As compared with the last few years, the 2010 Legislative Session had a large number of changes relating to trusts and estates. Perhaps the most significant change is the adoption, with modifications, of the Uniform Prudent Management of Institutional Funds Act.[1]

A. Health Care Decisions in Absence of Health Care Proxy

This chapter amends the Public Health Law, Mental Hygiene Law,

1. Discussed *infra* at notes 45-52.

and the Surrogate's Court Procedure Act.[2] In the absence of a valid health care proxy, the chapter provides a mechanism for certain third parties to make medical decisions on behalf of an individual who lacks "decision-making capacity," a defined term under the chapter.[3] The chapter is quite lengthy and this discussion will not attempt to summarize the entire chapter.

In summary, the chapter allows a third party, called a "surrogate," to make medical decisions.[4] The chapter establishes an order of priority for designation of a surrogate: a guardian authorized to decide health care pursuant to article 81 in the Mental Health Law; the spouse (if not legally separated from the patient) or the domestic partner (a defined term under the chapter); a son or daughter eighteen years of age or older; a parent; a brother or sister eighteen years of age or older; a close friend (also a defined term).[5]

A person who would qualify as the surrogate may designate another person on the list to be surrogate; in that instance, a person in a class higher in priority than the person designated may object.[6]

There is also a section dealing with decisions to withhold or withdraw life-sustaining treatment.[7]

Although the chapter indicates that it is to take effect immediately, i.e., on March 16, 2010, most of the operative sections take effect on June 1, 2010; hospitals were allowed to adopt policies consistent with the Act as of March 16 and thereafter.[8]

B. Amendment of Disclaimer Statute

The chapter amends the New York statute governing disclaimers in various ways.[9] First, the chapter indicates that a renunciation made in compliance with section 2-1.11 does not necessarily constitute a qualified disclaimer under the Internal Revenue Code (adding new subsection (a)).[10]

The second—and perhaps the most important change—made by

2. Act of March 16, 2010, ch. 8, 2010 McKinney's Sess. Laws of N.Y. 17 (codified at N.Y. PUB. HEALTH LAW arts. 29-CC, 29-CCC (McKinney Supp. 2011)).

3. N.Y. PUB. HEALTH LAW § 2994-a(5) (McKinney Supp. 2011).

4. *Id.* § 2994-a(29).

5. N.Y. PUB. HEALTH LAW § 2994-d (McKinney Supp. 2011).

6. *Id.*

7. *Id.* § 2994-d(5).

8. *Id.*

9. Act of March 30, 2010, ch. 27, 2010 McKinney's Sess. Laws of N.Y. 71 (to be codified at N.Y. EST. POWERS & TRUSTS LAW § 2-1.11). The Act is effective January 1, 2011. *Id.*

10. *Id.* (to be codified at N.Y. EPTL 2-1.11(a)).

the chapter is that it eliminates the "consideration tracing requirement" of the former law as it relates to disclaimers by the surviving joint tenant or tenant by the entirety.[11] Now, a surviving tenant may disclaim some or all of the survivorship interest, notwithstanding that he or she may have contributed to some or all of that interest.[12]

The third change is a technical amendment adding a reference to a Transfer on Death designation under article 13 of Estates, Powers and Trusts Law (EPTL).[13]

C. Threshold for New York Estate Tax

This chapter amends the Tax Law to clarify that the applicable exclusion amount under the Internal Revenue Code referred to in the Tax Law section is $1,000,000.[14] Thus, the chapter effectively eliminates the issue of the meaning of the section when there is no federal estate tax.

The chapter is effective immediately and shall apply to estates of decedents dying on or after January 1, 2010.[15]

D. Evidence of Paternity

The chapter amends EPTL section 4-1.2(a)(2)(C) to provide that paternity may be established by clear and convincing evidence which may include, but is not limited to, evidence derived from a genetic marker test.[16]

E. Amendment of Pet Trust Provision

The chapter amends EPTL section 7-1.8(a) and (b) to provide that the trust does not have to end at twenty-one years; instead, the "living animal" or animals who are the beneficiary or beneficiaries of the trust may be the measuring lives.[17]

11. *Id.* at 72 (to be codified at N.Y. EPTL 2-1.11(b)(2)).

12. *Id.* The change effectively conforms New York law to the federal rule. Treas. Reg. § 25.2518-2(c)(4) (2009).

13. 2010 McKinney's Sess. Laws of N.Y. at 72.

14. N.Y. TAX LAW § 951(a) (McKinney Supp. 2011).

15. *Id.*

16. Act of April 28, 2010, ch. 64, 2010 McKinney's Sess. Laws of N.Y. 125 (to be codified at N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C)). The Act is effective immediately and shall apply to the estates of decedents dying on or after April 28, 2010. *Id.*

17. N.Y. EST. POWERS & TRUSTS LAW § 7-8.1(a), (b) (McKinney Supp. 2010). The Act was effective immediately, i.e., May 5, 2010. *Id.*

F. Amendment of Power of Attorney Law

As discussed in a prior *Survey*, the New York law governing powers of attorney was substantially changed, effective September 30, 2009.[18] This chapter effectively refines the changes.[19] To summarize the changes: (a) the execution of new power does not automatically revoke existing powers;[20] (b) the chapter excepts out certain powers (generally, powers given in business and commercial transactions and those required in reporting to the government) from the requirements of the General Obligations Law;[21] (c) the chapter clarifies the process of revoking a power;[22] (d) the chapter clarifies that if there are different powers, the agents may act separately unless the later power provides that they are to act together;[23] (e) the chapter provides that divorce or annulment automatically revokes a power granted by a former spouse unless there is an explicit savings clause;[24] (f) the chapter allows a principal to provide rules for the order of succession of agents;[25] and (g) the chapter clarifies that the gifting authority under a power of attorney (as distinguished from a statutory major gifts rider) is limited to $500.00 per year, regardless of the number of donees.[26]

The effective date is thirty days after the bill was signed; thereafter, the provisions shall be deemed to have been in effect on and after September 1, 2009 (the effective date of the provisions of the prior legislation).[27] Any post-August 31, 2009 short form POA or statutory major gifts rider that is valid continues to be valid as well as any revocation of a prior power that was delivered to the agent before the

18. Martin W. O'Toole, *Trusts & Estates*, *2007-08 Survey of New York Law*, 59 SYRACUSE L. REV. 1067, 1072-75 (2009).

19. Act of August 13, 2010, ch. 340, 2010 McKinney's Sess. Laws of N.Y. 1089 (to be codified at various sections of N.Y. GEN. OBLIG. LAW art. 5).

20. *Id.* at 1099 (amending N.Y. GEN. OBLIG. LAW § 5-1511(6)).

21. *Id.* at 1089 (adding new N.Y. GEN. OBLIG. LAW § 5-1501C). For a good explanation of the scope of the exception, see the Sponsor's Memo, available at http://public.leginfo.state.ny.us/menugetf.cgi (select "2010" for the year, click on "A08392C" next to Chapter 340 on the list, click on "Sponsor's Memo" and then "search").

22. 2010 McKinney's Sess. Laws of N.Y. 1099 (amending N.Y. GEN. OBLIG. LAW §§ 5-1511(3) (how a principal revokes a power), 5-1511(4) (revoking a power that has been recorded)).

23. *Id.* at 1100 (amending the statement to the principal in the model short form provided for under N.Y. GEN. OBLIG. LAW § 5-1513).

24. *Id.* at 1097 (amending N.Y. GEN. OBLIG. LAW § 5-1504(5) by adding new subsection (d)).

25. *Id.* at 1098 (amending N.Y. GEN. OBLIG. LAW §5-1508).

26. *Id.* at 1095 (amending N.Y. GEN. OBLIG. LAW §5-1502I by amending subsection (14)). There is a corresponding change to the model short form section 5-1513 of the General Obligations Law.

27. 2010 McKinney's Sess. Laws of N.Y. at 1108.

effective date of the new legislation.

G. Chapter 349: Construction of Clauses in Light of Status of Federal Estate and GST Tax

This chapter adds a new section to the EPTL to provide for construction of clauses referring to various federal transfer tax provisions where there is no federal estate or gift tax.[28] The chapter provides that in the event that there is a disposition of property under a will, trust, or a beneficiary designation that contains a disposition referring to "unified credit," "estate tax exemption," "applicable exclusion amount," "applicable exemption amount," "applicable credit amount," "payroll deduction," "maximum marital deduction," "unlimited marital deduction," "charitable deduction," "maximum charitable deduction," or "several words or phrases relating to the federal estate tax," then the clause is to be interrupted with respect to federal estate tax as it existed on December 31, 2009.[29]

There is similar provision for the generation skipping transfer tax.[30]

The chapter is to take effect immediately, i.e., August 13, 2010, and is to apply to wills, trusts, and beneficiary designations of decedents who died after December 31, 2009, and before January 1, 2011, or such earlier date that the federal estate tax or generation-skipping transfer tax becomes applicable.[31]

The enactment of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 in mid-December 2010, which reinstated the federal estate and generation-skipping transfer tax as of January 1, 2010, mooted the chapter except where the executor of an estate opts out of the application of the federal estate tax.[32]

H. Expansion of Family Allowance

The chapter amends section 5-3.1 of the EPTL to: (a) include jewelry unless disposed of in the will;[33] (b) increase the amount allowed

28. Act of August 13, 2010, ch. 349, 2010 McKinney's Sess. Laws of N.Y. 1123 (to be codified at N.Y. EST. POWERS & TRUSTS LAW § 2-1.13(a)(1)) (the current section 2-1.13 is renumbered beginning with section 2-1.14 etc.).

29. *Id.*

30. *Id.* (to be codified at N.Y. EPTL 2-1.13(a)(2)).

31. *Id.* at 1124.

32. Pub. L. No. 111-312, § 301, 124 Stat. 3296, 3300 (2010).

33. Act of August 30, 2010, ch. 437, 2010 McKinney's Sess. Laws of N.Y. 1260 (to be codified at N.Y. EST. POWERS & TRUSTS LAW § 5-3.1(a)(1)). Note that there is no reference to a living trust.

for household utensils etc. under the section from $10,000 to $20,000 and provided that it does not apply to "items used exclusively for business purposes;"[34] (c) expand references to "other religious books" in addition to the "family bible" and various electronic media, such as DVDs and CDs, in the section;[35] (d) provide that the surviving spouse or the decedent's children may acquire the items referred to in the provision in excess of the amount of the statutory allowance;[36] and (e) increase the value of a motor vehicle from $15,000.00 to $25,000.00 and increase the specific dollar amount entitlement from $15,000.00 to $25,000.00.[37]

The chapter provides that any item or amount set off to a child under age twenty-one exceeding $10,000 shall be governed by section 2220 of the Surrogate Court Procedure Act (SCPA) as though the child were a beneficiary of the estate; any excess shall be governed by the guardianship statutes.[38]

The chapter is take effect on January 1, 2011.[39]

I. Acknowledgement of Living Trust

The chapter amends EPTL section 7-1.17 (providing for the manner of execution of lifetime trusts) to change the reference from the "initial creator" to "person establishing such trust" in apparent recognition that a trust may be created for someone by a third party (such as under a power of attorney).[40]

J. Prudent Management of Institutional Funds Act

The chapter[41] enacts New York's version of the Uniform Prudent

34. *Id.* (to be codified at N.Y. EPTL 5-3.1(a)(1)).

35. *Id.* (to be codified at N.Y. EPTL 5-3.1(a)(2)). In addition, the value is increased from $1,000 to $2,500. *Id.*

36. *Id.* (codified at N.Y. EPTL 5-3.1(a)(4)). In effect, the spouse or decedent's children have an option. There is no priority between them explicitly mentioned in the statute nor does the option have an expiration date. The provision (new section 5-3.1(a)(4)) states that if any item so acquired is the subject of a specific legacy in the will, the payment to the estate for such item shall vest in the legatee. 2010 McKinney's Sess. Laws of N.Y. at 1260.

37. *Id.* (to be codified at N.Y. EPTL 5-3.1(a)(5) (vehicle), 5-3.1(a)(6) (cash)).

38. *Id.* (to be codified at N.Y. EPTL 5-3.1(a)(7)).

39. *Id.* at 1261.

40. Act of August 30, 2010, ch. 451, 2010 McKinney's Sess. Laws of N.Y. 1280 (to be codified at N.Y. EST. POWERS & TRUSTS LAW § 7-1.17). The effective date is August 30 but it applies to all lifetime trusts created on or after December 15, 1997. *Id.*

41. Act of September 17, 2010, ch. 490, 2010 McKinney's Sess. Laws of N.Y. 1334 (to be codified at N.Y. NOT-FOR-PROFIT CORP. LAW art. 5-A, with conforming amendments

Management of Institutional Funds Act promulgated by the National Conference of Commissioners on Uniform State Laws.[42] The chapter should significantly affect investment and investment decisions by not-for-profit institutions.

The following are some highlights of the chapter: (a) institutional funds are to be managed and invested using what are essentially the Prudent Investor Act factors unless the gift instrument provides otherwise;[43] (b) an institution is to adopt a written investment policy setting forth guidelines on investment and delegation of management or investment functions;[44] (c) the chapter provides rules for expenditures from institutional funds that are similar to the Prudent Investor Act factors;[45] (d) effectively, the section on expenditures does away with the notion of "historic dollar value" except as donors may opt out of the new regime;[46] (e) for gift instruments executed *after* the effective date, an expenditure above seven percent creates a rebuttable presumption of imprudence;[47] and (f) provides for release or modification of restrictions on management, investment or purpose of institutional funds.[48]

II. REGULATORY ANNOUNCEMENTS

A. QTIP Election for New York Purposes When No Federal Return Is Required

The Advisory concerns the situation where an estate is required to file a New York estate tax return but not a federal return.[49] The Department of Taxation and Finance stated that a QTIP election may be made on a pro forma federal estate tax return attached to the New York State estate tax return.[50] According to the Department, if there is no federal estate tax for 2010, an estate should use a Form 706 for a 2009

made to various other provisions (not discussed here)). Pursuant to section 16 of the Act, its effective date is September 17, 2010. *Id.*

42. UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/umoifa/2006final_act.htm.

43. N.Y. NOT-FOR-PROFIT CORP. LAW § 552 (McKinney 2009).

44. *Id.* § 552(f).

45. N.Y. NOT-FOR-PROFIT CORP. LAW § 553(a) (McKinney 2009). The Prudent Investor Act factors are codified at N.Y. EST. POWERS AND TRUSTS LAW § 11-2.3(b)(3)(B)). The Act makes no apparent change to the standard of care in making the decision but there is a requirement that a contemporaneous record be kept of expenditure decisions. *See id.* (flush language after section 553(a)(8)).

46. *Id.* § 553(e)(1).

47. N.Y. NOT-FOR-PROFIT CORP. LAW § 553(d) (McKinney 2009).

48. N.Y. NOT-FOR-PROFIT CORP. LAW § 555 (McKinney 2009).

49. Op. Dep't of Taxation & Fin., TSB-M-10(1)M (Mar. 16, 2010).

50. *Id.*

date of death.[51]

B. Filing Requirement for Resident Trusts

Under TSB-M-96(1)I, a trust that was a resident for New York purposes, but which qualified under Tax Law section 605(b)(3)(D) (all trustees domiciled out of New York, entire corpus of trust located out of New York, all income and gains derived from non-New York sources determined as though the trust were a non-resident), did not have to file a New York return.[52]

In a change in policy, the Department announced that all resident trusts will have to file a New York return for tax years beginning on or after January 1, 2010. For "[section] 605(b)(3)(D) trusts" there is a new form, IT-205-C, to file with the Form IT-205.[53]

The Department indicated that the IT-205-C will be available on its website.

C. Alternate Valuation for Transfer on Death Assets

The Advisory Opinion concludes that registering securities in TOD form will not preclude an estate from claiming alternate valuation for them: in other words, the assets will not be considered sold or distributed simply on account of the designation.[54]

The Department had previously issued guidance, NYT-G-09(1)M, that deals with claiming the election in the absence of a federal estate tax return.[55]

D. Includibility of LLC Interests

The Advisory Opinion deals with a non-resident owning minority interests in several New York limited liability companies that owned real property in New York.[56] The Department concluded that the LLC interests were not assets sitused in New York.[57]

E. Includibility of Trust Interests

A New York non-resident set up various trusts with New York real property, including a qualified personal residence trust (QPRT) and a

51. *See* N.Y. NOT-FOR-PROFIT CORP. LAW 553(e)(1).
52. Op. Dep't of Taxation & Fin., TSB-M-96(1)I (July 23, 2010).
53. *See* N.Y. NOT-FOR-PROFIT CORP. LAW 555.
54. Op. Dep't of Taxation & Fin., TSB-A-09(2)(M) (Sept. 22, 2009).
55. Op. Dep't of Taxation & Fin., NYT-G-09(1)M (Jan. 14, 2009).
56. Op. Dep't of Taxation & Fin., TSB-A-10(1)(M) (Apr. 8, 2010).
57. *Id.*

grantor retained annuity trust (GRAT).[58] The non-resident died during the term of her retained use.[59] The Department stated that the properties were subject to New York estate tax owing to the inclusion of the assets in the decedent's gross estate.[60]

III. FEDERAL REGULATIONS AND CASES

A. Federal Transfer Tax Legislation

Owing to the time period covered by the *Survey*, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[61] will not be discussed.

B. Update on Deductibility of Investment Advisory Fees

As discussed in previous *Surveys*, the Internal Revenue Service promulgated regulations on the issue of the applicability of section 67 of the Code to investment advisory fees.[62] In Notice 2010-32, the Service indicated that taxpayers will not be required to determine the portion of a bundled fiduciary fee that is subject to the two percent floor for any taxable year beginning before January 1, 2010.[63] The apparent expectation is that regulations will be finalized before the end of 2010, which given the steady stream of similar Notices in the past, seems like institutional wishful thinking.

C. Annual Exclusion for Gifts of Interests in Closely Held Entities

The case involved the qualification of gifts of limited partnership interests made in 2000, 2001, and 2002 for the annual exclusion.[64] The gifts in question involved a limited partnership with a one percent general interest (a corporation) and ninety-nine percent limited interests.[65]

The partnership initially consisted of stock in a closely held corporation (a heavy equipment dealership) and three parcels of commercial real estate leased to the corporation and another company.[66] Prior to the tax years in question, the partnership sold the stock in the

58. Op. Dep't of Taxation & Fin., TSB-A-10(2)(M) (May 4, 2010).
59. *Id.*
60. *Id.*
61. Pub. L. No. 111-312, § 301, 124 Stat. 3296, 3300 (2010).
62. *See, e.g.*, O'Toole, *supra* note 18, at 1072.
63. I.R.S. Notice 2010-32, 2010-16 I.R.B. 594 (Apr. 19, 2010).
64. Price v. Comm'r, T.C. Memo 2010-2 (Jan. 4, 2010).
65. *Id.* at 3.
66. *Id.* at 3.

closely held corporation and reinvested the proceeds in marketable securities.[67]

The partnership agreement prevented a partner from withdrawing capital and contained restrictions on the transfers of a partnership interest (essentially requiring consent from all partners unless the transfer was to a partner).[68] The agreement provided for an option to the partnership first and second, to the other partners in the event of an attempted assignment of a partnership interest.[69] Distributions, when made, were to be proportionate to the partnership interests.[70] The general partner had discretion to make distributions, unless directed by a majority of the partnership interests.[71]

The gift tax returns for the years in questions had valuation reports attached; the reports took "substantial" discounts for lack of control and lack of marketability.[72]

According to the Tax Court, the taxpayers bore the burden of showing that the gifts qualified for the annual exclusion.[73] Invoking the decision in *Hackl*, the Tax Court held the taxpayers failed to show that the donees had immediate use, possession, or enjoyment of the property or the income there from.[74] With respect to the lack of enjoyment from the property, the court cited the inability to withdraw capital, the prohibition on assignment without consent, and the option to buy as indicating that the donees did not have immediate use (the Tax Court also suggested that it was not clear from the agreement whether the donees were partners or assignees).[75]

With respect to enjoying the income from property, the taxpayers had to show that: (1) the partnership would generate income at or near the time of the gifts; (2) some portion of the income would "flow steadily" to the donees; and (3) the portion of the income flowing to the donees can be readily ascertained.[76]

The Tax Court found that the rental stream on the leases satisfied the first test but the record did not establish that the second and third

67. *Id.*
68. *Id.* at 5.
69. *Price*, T.C. Memo 2010-2 at 6.
70. *Id.*
71. *Id.*
72. *Id.* at 7.
73. *Id.* at 10.
74. *Price*, T.C. Memo 2010-2 at 5 (citing Hackl v. Comm'r, 335 F.3d 664 (7th Cir. 2003)).
75. *Id.* at 14-17.
76. *Price*, T.C. Memo. 2010-2 at 17.

tests had been satisfied.[77]

Moreover, the Court rejected the argument that the general partner had a "strict fiduciary duty," citing the absence of any withdrawal rights (analogizing the partners as the beneficiaries of a trust providing for discretionary income distributions) and the more limited scope of the general's duties (indicating that the duties were limited to loyalty and due care).[78]

IV. NEW YORK CASES

A. Liability for Estate Planning Malpractice

In a case likely to have a significant effect on the practice of estate planning, the Court of Appeals held that an attorney providing estate planning services to an individual could be liable to the legal representative of the individual's estate.[79]

A malpractice claim was brought by the executor of the estate of an individual who was insured on a policy that was owned by a limited liability partnership that the insured "controlled."[80] On advice of counsel, the partnership distributed the policy to the insured; he died owning it and, thus, the proceeds were includable in his estate for estate tax purposes, which allegedly resulted in an increased estate tax liability.[81]

The Second Department invoked "[t]he well-established rule in New York with respect to attorney malpractice . . . that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional malpractice."[82] Because the estate was not in privity with the attorney who had provided the advice, the action was dismissed.[83]

The Court of Appeals determined that the legal representative of the decedent's estate was in "near privity" with the lawyer such that the representative could maintain an action for malpractice.[84] The Court cited the trend in other jurisdictions and the absence of any effective

77. *Id.* at 17.

78. *Id.* at 22.

79. Schneider v. Finmann, 15 N.Y.3d 306, 310, 933 N.E.2d 718, 720-21, 907 N.Y.S.2d 119, 121-22 (2010).

80. Schneider v. Finmann, 60 A.D.3d 892, 893, 876 N.Y.S.2d 121, 122 (2d Dep't 2009).

81. *Id.*

82. *Id.* (citation omitted).

83. *Id.* at 893, 876 N.Y.S.2d at 123.

84. *Schneider*, 15 N.Y.3d at 309, 933 N.E.2d at 720, 907 N.Y.S.2d at 121.

recourse against a negligent attorney.[85]

The Court indicated that "strict privity remains a bar against beneficiaries' and other third party individuals' estate planning malpractice claims," citing the uncertainty and "limitless liability" that would be occasioned by such a relaxation of privity.[86]

The Court of Appeals and Second Department did not discuss what sorts of services are classified as "estate planning services" (other than providing advice about the ownership of insurance). A practitioner should assume that any service is an estate planning service if it involves (1) a probate asset or (2) has implications for the administration of an estate.

B. In Terrorem Clauses

1. Expansion of Safe Harbor for Discovery

The decedent executed a will and living trust, survived by two children, a son and a daughter.[87] Under the terms of the living trust, there was a disposition of the decedent's house, the "bulk of his tangible personal property," and a cash bequest to his daughter in recognition of the care that she had provided for him.[88] The "residue" was divided equally between the two children.[89] The decedent's will and living trust contained two *in terrorem* clauses: one directed to any beneficiary and one directed specifically to the decedent's son.[90]

As part of the probate proceeding, the son served a notice of discovery and inspection pursuant to article 31 of the Civil Procedure Law and Rules (CPLR) and SCPA section 1404 seeking copies of various documents and the deposition of certain witnesses, including the decedent's previous attorney (who, while he had drafted some of the decedent's prior wills, apparently did not draft the will offered for probate and thus was not one of the persons mentioned in SCPA section 1404(4)).[91] The previous attorney was deposed.[92]

Following the probate of the will (the decree specified that no objections had been filed and that the probate had not been contested),

85. *Id.* at 309-10, 933 N.E.2d at 720-21, 907 N.Y.S.2d at 121-22.

86. *Id.* at 310, 933 N.E.2d at 721, 907 N.Y.S.2d at 122.

87. *In re* Singer, 13 N.Y.3d 447, 449, 920 N.E.2d 943, 944, 892 N.Y.S.2d 836, 837 (2010), *mot. for reargument denied*, 14 N.Y.3d 795 (2010).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 450, 920 N.E.2d at 945, 892 N.Y.S.2d at 838.

92. *In re Singer*, 13 N.Y.3d at 451, 920 N.E.2d at 945, 892 N.Y.S.2d at 838.

the daughter brought a construction proceeding seeking a declaration that the deposition had violated the *in terrorem* clause.[93] The Surrogate's Court granted the relief and the Second Department affirmed.[94]

As articulated by the Court of Appeals, the statutory safe harbors of EPTL section 3-3.5 and SCPA section 1404 are not exclusive: "circumstances may exist such that it is permissible to depose persons outside the statutory parameters without suffering forfeiture."[95] Thus, the question is whether the inquiry violated the decedent's intent. The Court read the two clauses to express the intent that the son not commence a court proceeding of any type to contest the estate plan.[96] The conduct of the deposition, in the view of the Court, did not amount to an attempt to contest.[97] The Court also invoked the public policy argument that only genuine and valid wills ought to be admitted to probate.[98] The opinion also suggests that inquiry into the "medical and psychological condition of the testator at the time the will was executed" would be permissible.[99]

According to the Court, surrogates will have to address the issue of a clause's validity on a case-by-case basis.[100]

A concurrence by Judge Graffeo expressed the opinion that a draftsperson could draft an *in terrorem* clause to limit the "permissible inquiry" to that permitted by EPTL section 3-3.5 and SCPA section 1404.[101] Two other judges, Judges Read and Smith, joined the concurrence.[102] Given the public policy argument, it is not clear whether such a clause would be respected.

2. Scope of Permissible Discovery

In connection with a probate proceeding, the respondents sought an order permitting the deposition of, inter alia, the draftsperson of a "prior instrument."[103] The nominated executor objected that the respondents

93. *Id.*

94. *Id.* at 451, 920 N.E.2d at 945-46, 892 N.Y.S.2d at 838-39.

95. *Id.* at 452, 920 N.E.2d at 946, 892 N.Y.S.2d at 839.

96. *Id.*

97. *In re Singer*, 13 N.Y.3d at 453, 920 N.E.2d at 947, 892 N.Y.S.2d at 840.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 453-54, 920 N.E.2d at 947-48, 892 N.Y.S.2d at 840-41 (Graffeo, J., concurring).

102. *In re Singer*, 13 N.Y.3d at 454, 920 N.E.2d at 948, 892 N.Y.S.2d at 841.

103. *In re* Baugher, 29 Misc. 3d 700, 702, 906 N.Y.S.2d 856, 857 (Surr. Ct. Suffolk Cnty. 2010).

were seeking to circumvent the *in terrorem* clause by obtaining a court order.[104] The court granted the motion but cautioned the respondents that there could be no determination, prior to the admission of a will to probate, whether the conduct of the deposition would violate the *in terrorem* clause.[105] As articulated by the court: "respondents conduct [the examinations] at their own peril."[106]

C. Counsel Fees for Fiduciary on Judicial Settlement

1. Allocation of Fees under SCPA Section 2110

The Third Department had affirmed the Surrogate Court's dismissal of objections in two related accountings.[107] In the proceedings, some of the beneficiaries had filed an acknowledgment, attesting that they were non-objectors and thus, under the *pro tanto* rule, they would not be entitled to share in any surcharges.[108] The objections were dismissed; in charging the fiduciary's defense costs against the trusts as a whole, the Third Department indicated that it was constrained by *In re Dillon's Estate* to charge the trustees' counsel fees from the corpus of the relevant trust generally, rather than from the portion allocable to the objecting beneficiaries.[109]

The Court of Appeals reversed, finding that SCPA section 2110 gives a trial court discretion to allocate responsibility for payment of the attorneys' fees for a fiduciary, for which an estate or trust is obliged to pay, either from the estate or trust as a whole or from the shares of individual beneficiaries.[110] According to the Court of Appeals, "[i]n cases where a fiduciary is to be granted counsel fees under SCPA [section] 2110(2), the Surrogate's Court shall undertake a multi-factored assessment of the sources from which the fees are to be paid."[111]

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104. *Id.*

105. *Id.*

106. *Id.* at 704, 906 N.Y.S.2d at 859.

107. *In re* Hyde, 61 A.D.3d 1018, 1019, 876 N.Y.S.2d 196, 198 (3d Dep't 2009).

108. *Id.*

109. *Id.* at 1020, 876 N.Y.S.2d at 199 (discussing *In re* Dillon's Estate, 28 N.Y.2d 597, 268 N.E.2d 646, 319 N.Y.S.2d 850 (1971)).

110. *In re* Hyde, 15 N.Y.3d 179, 182, 933 N.E.2d 194, 196, 906 N.Y.S.2d 796, 798 (2010).

111. *Id.* at 186, 933 N.E.2d at 199, 906 N.Y.S.2d at 801.

> These factors, none of which should be determinative, may include: 1) whether the objecting beneficiary acted solely in his or her own interest or in the common interests of the estate; 2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; 3) the extent of an individual beneficiary's participation in the proceeding; 4) the good or bad faith of the objecting beneficiary; 5) whether there was justifiable doubt regarding the fiduciary's conduct; 6) the

2. Reduction in Award of Fees

This was the appeal of an order granting a petition for reimbursement of attorneys' fees, disbursements, and expenses in the amount of $1,500,000.[112] The appeal was taken by the objectants in an accounting proceeding in which the Fourth Department had reversed the determination that the trustee should be subject to a surcharge.[113] Subsequent to the appeal, the trustee petitioned for reimbursement of fees, disbursements, and expenses.[114]

Citing the *Potts/Freeman* factors, the Fourth Department determined that the Surrogate had properly considered the factors with the exception of the amount involved.[115] In this instance, the reimbursement allowed constituted approximately forty percent of the corpus.[116]

Without explicitly discussing why forty percent was too large, the Fourth Department reduced the total reimbursement to $350,000, a reduction of just under seventy percent.[117] The court also did not discuss why it determined that the reduced amount, which was approximately twelve percent of the corpus, was appropriate.[118]

D. Fiduciary Liability

1. Significance of Investment Plan

The matter involved the trial of certain objections in a contested accounting for a testamentary trust.[119] The primary issue at trial was the trustee's liability for an alleged retention of a concentration of Kodak

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portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and 7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally.

Id. at 187, 933 N.E.2d at 199, 906 N.Y.S.2d at 801 (citations omitted).

112. *In re* Chase Manhattan Bank, 68 A.D.3d 1670, 1671, 893 N.Y.S.2d 406, 408 (4th Dep't 2009).

113. *Id.* at 1671, 893 N.Y.S.2d at 407.

114. *Id.*

115. *Id.* (citing *In re* Potts, 213 A.D. 59, 62, 209 N.Y.S. 655, 658 (4th Dep't 1925), *aff'd*, 241 N.Y. 593, 150 N.E. 568 (1925); *In re* Freeman, 34 N.Y.2d 1, 9, 311 N.E.2d 480, 484, 355 N.Y.S.2d 336, 341 (1974)).

116. *Id.*

117. *Id.*

118. All percentages extrapolated from the original award and the reference to "40%" in the opinion.

119. *In re* JP Morgan Chase Bank, No. 1973-30/A, 2010 N.Y. Slip Op. 50548(U), at 2 (Surr. Ct. Westchester Cnty. 2010).

common stock in a trust.[120]

As is typically the case on those sorts of proceedings, the issue became a battle of the experts. According to the court, the trustee's expert relied largely on facts which the trustee did not establish: namely, that there was an investment plan; that there was constant monitoring of the trust assets; and that the trustee considered views of professional analysts as to the strength of Kodak.[121] Moreover, the court found that the trustee acted contrary to internal policies with respect to maintaining a concentration.[122] Finally, the court held that the trustee failed to consider the best interests of the beneficiaries.[123]

The court concluded that an experienced investor would have seen that, in the early summer of 1987, the market for Kodak had improved to the point where it was prudent to sell at least ninety-five percent of the shares (apparently adopting the objectants' position that this would reduce the concentration).[124] The court indicated that, once imprudence is established, the court may designate a reasonable time within which divestiture should have occurred.[125] So, the court found that the trustee should have sold ninety-five percent of the shares on July 30, 1987.[126]

The court's discussion of whether the trustee had an investment plan is noteworthy. The objectant's expert had testified that the investment plan for a portfolio consists of four stages: "[first], the establishment of investment objectives to address the need for income and possible risks; [second], the selection of specific investments to meet such objectives; [third], execution of such objectives; and, [finally], maintaining flexibility to address uncertainties and risks as they arise."[127] It is not entirely clear from the court's discussion whether it accepted this formulation of an investment plan: it is clear, however, that the court felt that the trustee had not established that it did have such a plan.

2. Efficacy of Informal Settlement

The decision of the Steuben County Surrogate's Court on appeal in

120. *Id.*
121. *Id.* at 9.
122. *Id.* at 5.
123. *Id.* at 12.
124. *In re JP Morgan Chase Bank*, 2010 N.Y. Slip Op. 50548(U), at 13.
125. *Id.*
126. *Id.*
127. *Id.* at 11.

this matter was discussed in last year's *Survey*.[128] On appeal,[129] the Fourth Department decided that the court properly dismissed the breach of fiduciary duty claim against the corporate fiduciary, finding that the corporate fiduciary fulfilled its duty to provide petitioners with a full accounting and that the petitioners failed to object to the accounting, executing releases waiving their rights against the corporate fiduciary.[130]

Another matter involved an informal settlement.[131] An inter vivos trust was established by agreement dated December 7, 1971; the grantor died October 16, 1972, at which point the trust divided into five separate trusts.[132]

The agreement provided that during the lifetime of the grantor's son, the trustees were supposed to accumulate the net income of the trusts.[133] Notwithstanding the accumulation, the trustees (other than the son if he was then trustee) had discretion to pay all or such part of the income as the trustees should determine in their sole and absolute discretion.[134] The son also had a power of appointment over the trusts.[135]

By "resolution" dated August 24, 1994, the trustees elected to distribute all of the income and principal of the trust to the grantor's son, thereby terminating the trusts.[136] Shortly before this resolution, a child of the grantor's son filed suit against each one of the trustees and unnamed others for breach of fiduciary duty, common law fraud, securities fraud, and, finally, violation of the RICO statute.[137] The federal action was settled pursuant to an agreement.[138] The settlement resulted in payment of $1.5 million and mutual releases.[139]

The grantor's son died in 2005; his will did not exercise the power

128. Martin W. O'Toole, *Trusts & Estates*, *2008-09 Survey of New York Law*, 60 SYRACUSE L. REV. 1123, 1130 (2010).

129. *See generally In re* HSBC Bank, 70 A.D.3d 1324, 895 N.Y.S.2d 615 (4th Dep't 2010), *lv. denied*, 14 N.Y.3d 710, 929 N.E.2d 1003, 903 N.Y.S.2d 768 (2010).

130. *Id.* at 1326, 895 N.Y.S.2d at 616. The Fourth Department cited *In re* Hunter, 4 N.Y.3d 260, 827 N.E.2d 269, 794 N.Y.S.2d 286 (2005) and *In re* Schoenewerg, 277 N.Y. 424, 14 N.E.2d 777 (1938)).

131. Estate of Benenson, N.Y.L.J., Oct. 30, 2009 at 26 (Surr. Ct. Kings Cnty. 2009).

132. *Id*.

133. *Id.*

134. *Id*.

135. *Id.*

136. *Benenson*, N.Y.L.J. at 26.

137. *Id*.

138. *Id*.

139. *Id*.

of appointment.[140] In March 2006, the child who had brought the RICO action filed a statement of claim before an appropriate court, alleging that his father had wrongfully diverted trust assets.[141] In March 2007, the child withdrew his lawsuit.[142] In December 2008, the child filed a petition in Kings County Surrogate's Court to compel an accounting of the administration of the trust.[143]

The respondents moved to dismiss. Their first ground was that the proceeding was barred by the statute of limitation (N.Y. CPLR section 3211(a)(5)), for proceeding for an action for accounting under N.Y. CPLR section 213.[144]

The court held that the executors of a deceased trustee's estate were unsuccessful in arguing that the statute of limitation had begun to run when he was removed, finding that there was no evidence to counter the plaintiff's assertion that he did not learn that the deceased trustee had been removed until the litigation was brought.[145] Moreover, the claim that the statute of limitations began to run when the trust was terminated in 1994 was denied because there was no evidence that plaintiff knew or should have known that the trust terminated.[146]

The court admitted that it was a "closer question" whether the statute began to run in 1996, when the plaintiff sued for improper diversion of trust assets.[147] Giving the plaintiff all favorable inferences, the court determined that the allegation was that the assets were improperly transferred, not that the trust was terminated.[148]

The court then moved to an analysis of whether the stipulation of settlement and release were sufficient.[149] The court found that it was clear that the parties intended to resolve all of the issues between them, citing the title of the release as a "Mutual General Release."[150] Also, the release was sufficiently unambiguous on its face and was knowingly and voluntarily entered into.[151] The court dismissed the challenge to the stipulation and release on the ground that the attorney advising the

140. *Id.*
141. *Benenson*, N.Y.L.J. at 26.
142. *Id.*
143. *Id.*
144. N.Y. C.P.L.R. 213, 3211(a)(5) (McKinney Supp. 2011).
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. N.Y. CPLR 213, 3211(a)(5).
150. *Id.*
151. *Id.*

plaintiff was retained by the plaintiff's father.[152] The court indicated that the stipulation indicated that each party had received independent legal advice and that the plaintiff had not shown what facts provided him by his attorney were untrue.[153]

Finally, the court dismissed the claim that the plaintiff only learned that the trust had been completely depleted in 1994 in 2007 and the court indicated it knew that the assets were diverted: "If he failed to realize the extent of the diversion, this is a risk he took."[154] Citing black letter law, the court found that "[a] party to a release bears the risk of a mistake when he is aware of, at the time the release was entered into, that he only had limited knowledge of the facts."[155]

3. Claim of Abuse of Discretion in Making Distributions

The matter involved a contested proceeding by a corporate fiduciary and an individual to settle their first intermediate account as co-trustees of a lifetime trust.[156] According to the court, in 1972, the grantor had established separate trusts for the benefit of three daughters and their respective issue.[157] According to the court, in 1976 the individual co-trustee, was an attorney.[158] The grantor created a separate trust, apparently designed to be a generation-skipping trust, which had sprinkle provisions for the decedent's great-grandchildren and their issue.[159] The agreement allowed the trustees to deduct and retain, without court approval, commissions that may be allowed under applicable New York law.[160] The court's opinion details the income distributions to various beneficiaries and the amount of commissions taken by the trustees.[161]

Various claims alleged abuse of discretion in not paying income and allegedly favoring one family over other families.[162] The court found that there was no abuse of discretion in the determination for paying income, citing the corporate fiduciary's procedures for handling requests for distribution; also, the trustees had developed a policy of administrating the trust to produce sufficient income to provide the

152. *Id.*
153. *Id.*
154. N.Y. CPLR 213, 3211(a)(5).
155. *Id.*
156. *In re* Manny, N.Y.L.J., June 4, 2010, at 26 (Surr. Ct. Westchester Cnty. 2010).
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *In re Manny*, N.Y.L.J. at 32.
162. *Id.*

opportunity to attend prep school and college, which meant that distributions would not be made for primary or secondary school.[163] The court indicated that in implementing the policy, the co-trustees consistently monitored the trust's portfolio to ensure the availability of sufficient income.[164] The court described communications to all beneficiaries that attended the denial of request by any of the individual beneficiaries for expenditures not related to the policy.[165]

With respect to the complaint about excessive tax, the court found that the objectants had failed to show that the income taxes paid from income were not the direct result of the trustees' compliance with the express directive in the trust to retain undistributed income.[166]

The court rejected the contention about favoring one family group by pointing out that of the nearly $940,000 of income distributed during the accounting period, the difference between the two family groups was only $40,000.[167]

With respect to the objection regarding the payment of commissions, the court indicated that it was undisputed that the annual statements under SCPA section 2309 (4) and/or section 2312(6)[168] had not given in certain years (totaling seventeen years). The court held that the trustees had to pay statutory interest on the commissions improperly taken, but did not have to repay the commissions themselves.[169] The court did not discuss the language in the trust agreement that seemingly freed the trustees of the obligation to provide the statements.

With respect to the amount of the commissions paid to the corporate fiduciary, the court analyzed the "reasonable compensation" standard of SCPA section 2312.[170] The court found that the bank had provided sufficient evidence to establish its entitlement to reasonable compensation, citing the increase in the market value during the accounting period, the level of the bank's responsibility, the quality of its work and the results achieved, the language in the agreement allowing compensation to be taken in accordance with the applicable laws, and, finally, the bank's service as co-trustee from the trust's inception.[171]

163. *Id.*
164. *Id.*
165. *Id.*
166. *In re Manny*, N.Y.L.J. at 32.
167. *Id.*
168. N.Y. SURR. CT. PROC. ACT §§ 2309(4), 2312(6) (McKinney Supp. 2011).
169. *In re Manny*, N.Y.L.J. at 32.
170. *Id.*
171. *Id*.

Although no objection had been made to the bank's calculation less commissions, the court sua sponte determined that the bank had improperly calculated its unpaid principal paying commissions.[172]

4. Successful Surcharge Against Individual Fiduciary

The matter involved four contested intermediate accountings brought by the former trustee of the testamentary trust;[173] it is illustrative of the risks to a fiduciary not sufficiently sensitive to the responsibilities of being a fiduciary. The accounting period in question was approximately fourteen years.[174] The trusts were each initially funded with $50,000.[175] According to the court, over the course of the accounting period, the beneficiaries repeatedly sought information from the trustee, but the trustee disregarded their requests, culminating in the compulsory accounting proceeding and the request to remove the petitioner.[176] Following a court conference, the parties agreed that the trustee would resign and would file his accounts.[177]

As detailed by the court, the objectant sought to deny the trustee commissions and to surcharge him for failure to create separate trusts, failure to fully fund the trusts, taking commissions without court order, making an unauthorized loan to himself in the amount of $137,000, paying himself administrative fees without court order, failing to maximize the return on investments, failing to provide the beneficiaries with annual statements, failing to timely file income tax returns, and, finally, failing to distribute the trust funds in accordance with the will.[178]

According to the court, the four accounts submitted in the proceeding reflected the trustee's attempt to reconstruct the administration of the funds as though four separate trusts were created.[179] The court found that the trustee had lent trust funds to himself, which were repaid without interest.[180] The court also found that the trustee paid himself excessive commissions without court order.[181]

172. *Id.*

173. *In re* Carner, No. 1993-1820/E, 2009 N.Y. Slip Op. 52317(U), at 1 (Surr. Ct. Westchester Cnty. 2009).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 2.

179. *Id.*

180. *Id.*

181. *Id.*

The trustee never established separate trusts as directed under the will.[182] In addition, the trustee deposited the $200,000 from the estate into a personal account.[183] The trustee did, however, later establish an account in the name of the trust without differentiating among the four trusts.[184] For an approximately seven and one-half year period, the trustee did not make any distribution to the beneficiaries.[185] The court found that at no time did the trustee provide any of the beneficiaries or their parents with annual cash statements.[186] In addition to not providing the statements, the amount of commissions taken far exceeded what may be allowed under SCPA section 2309.[187] Finally, the court noted that the trustee had made a loan to himself.[188]

The trustee defended his actions as unintentional, made in accordance with incorrect advice from professionals, and suggested that little or no harm resulted to the beneficiaries.[189] The court rejected as relevant the trustee's advanced age and poor health.[190]

In terms of damages, the court indicated that there was no authority for taking so-called "administrative fees."[191] The court indicated that if the fees reflected reimbursement of expenses, then the trustee has the burden to establish the propriety of the expenses.[192] The trustee, however, was unable to provide any support for the proper fees.[193] Accordingly, the fees were disallowed in their entirety, with the direction to repay with statutory interest.[194] Similarly, the trustee was surcharged on the loan that he took from the trust at statutory interest.[195] Moreover, the trustee was surcharged, again at statutory interest, for the period of time in which trust funds were commingled.[196] The trustee was surcharged for a modest amount of interest and penalties for failure to timely file income tax returns.[197]

The court did deny the objection based upon the failure to achieve

182. *Id*.
183. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 2.
184. *Id.* at 2-3.
185. *Id.* at 3.
186. *Id.*
187. *Id.*, N.Y. SURR. CT. PROC. ACT § 2309 (McKinney Supp. 2011).
188. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 3.
189. *Id.*
190. *Id.* at 4.
191. *Id.*
192. *Id.*
193. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 3.
194. *Id.*
195. *Id.* at 4.
196. *Id.*
197. *Id.*

a higher rate of return, finding that the trustee had complied with the direction in the will as to the investment of trust funds.[198]

With respect to commissions, the trustee was ordered to repay the so-called "excess commissions" with statutory interest.[199] With respect to the commissions that would have been allowable under SCPA section 2309, had annual statements been provided, the request for statutory commissions was denied in its entirety (citing the various breaches of trust).[200] The petitioner's request for payment of attorneys' fees and accountant's fees from the trust were denied in the entirety; the court surcharged the petitioner for the objectants' legal fees.[201]

5. Purchase of Estate Property by Administrator

An action was brought by the administrator of an estate, who was also the guardian of property for the decedent's two infant distributees (the distributees were also the non-marital children of the petitioner and decedent).[202] According to the court, the petitioner proposed to buy the property for $325,000—the value was based upon a broker's opinion attached to the petition.[203] The administrator would then transfer a sum of approximately $304,000 (after deducting broker's commission and transfer tax) to himself as guardian of the property of the infants.[204] The court declined to grant the relief of finding that the guardian had an obvious conflict of interest.[205]

Given that a court of equity can authorize self-dealing,[206] it appears that the court's judgment was influenced by the petitioner's intention to allow a niece of the decedent to reside in the property, which allegedly was in furtherance of the decedent's wishes.[207]

6. Amendment of Account to Include Commissions

In the contested accounting proceeding, the trustee moved for an order permitting him to amend the accounting to include trustee's commissions, more specifically, the two-thirds of the annual commissions allocable to principal (according to the court,

198. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 5.
199. *Id.*
200. *Id.* at 5, N.Y. SURR. CT. PROC. ACT § 2309 (McKinney Supp. 2011).
201. *In re Carner*, 2009 N.Y. Slip Op. 52317(U), at 6.
202. *In re* Woodcock, No. 2009-97855A, 2010 N.Y. Slip Op. 50312(U), at 1 (Surr. Ct. Dutchess Cnty. 2010).
203. *Id.*
204. *Id.*
205. *Id.* at 2.
206. *See generally* RESTATEMENT (SECOND) OF TRUSTS § 170, cmt. f (1959).
207. *In re Woodcock*, 2010 N.Y. Slip Op. 50312(U), at 2.

approximately $183,600).[208] The motion was opposed by a beneficiary who argued that the waiver occurred in a receipt and release agreement signed by the trustee in connection with the informal settlement of the trust.[209]

Not all of the beneficiaries agreed to the informal settlement, necessitating a formal settlement. The court indicated that the waiver in the release could not be used against the trustee as he had not received consideration for it, i.e., saving the time and expense involved in a formal settlement.[210]

The court rejected a challenge based on the alleged failure to supply the annual statements provided under SCPA section 2309(4), noting that only principal commissions were at issue.[211]

7. Disclosure of Self-Dealing

A grantor set up various irrevocable lifetime trusts in 1927.[212] After the grantor's death in 1953, the corporate trustee's first intermediate accounts for all the trusts were settled and approved by the New York County Supreme Court.[213] In 1974, the court approved the corporate fiduciary's second intermediate account for two of the trusts and second and final accounts for two other trusts.[214]

According to the court, in 2001 certain beneficiaries moved for compulsory accountings for several of the trusts.[215] Accounts were filed that took the accountings through 2004.[216] In 2005, the movants in the current proceeding moved to vacate the prior orders approving the accountings.[217] The court denied the motion and the denial was upheld by the First Department. After the supreme court issued the decision, but before the appeal, the movants filed a supplemental objection in Surrogate's Court, alleging the fiduciary had violated its duty of loyalty by investing trust assets in companies in which it had an interest.[218] The movants sought damages in the approximate amount of $42,500,000.[219]

208. *In re* Estate of Homelsky, No. 199852, 2009 N.Y. Slip Op. 52692(U), at 1 (Surr. Ct. Nassau Cnty. 2010).
209. *Id.*
210. *Id.*
211. *Id.* at 2-3.
212. *In re* De Sanchez, N.Y.L.J., Apr. 5, 2010, 18 (Sup. Ct. N.Y. Cnty. 2010).
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *In re De Sanchez*, N.Y.L.J. at 18.
218. *Id.*
219. *Id.*

The surrogate transferred the motion to the supreme court.[220]

The precise issue was whether the facts regarding the alleged conflict was sufficiently disclosed in the first accounting.[221]

The court discussed various cases in which courts had granted motions to vacate decrees of judicial settlement.[222] In this instance, however, the court denied the motion finding that in 1953, judicial settlement was conclusive on the issue.[223] Although the petition on account did not state that there were common officers and directors or that the bank had ongoing business relationships with the issuers of the bonds, the court denied the motion, citing correspondence between the bank and the grantor.[224] It is not entirely clear how communications with the grantor could serve to put the beneficiaries on notice with respect to the self-dealing issue.[225]

8. Contempt Proceeding for Failure to Amend Trust

In what the court described as a "contentious Mental Hygiene Law article 81 proceeding," one of an incapacitated person's four sons moved for an order: punishing his brothers for contempt; compelling and accounting of a family revocable trust and as attorneys-in-fact; compelling the amendment of the revocable trust to include all four sons as equal remainder beneficiaries; cancelling declaring certain amendments to the trusts null and void; and directing the trustees to pay all expenses and legal fees incurred in the motion.[226] One of the co-trustees cross-moved for an order vacating a stipulation of settlement and the court's subsequent judgment and order.[227]

According to the court, a husband and wife established a family revocable trust with the spouse as the grantor's initial trustees.[228] In early January 2007, the husband and wife amended the trust to provide that their four sons were to have equal shares of the remainder.[229] In May, two physicians treating the wife for Alzheimer's disease stated

220. *Id.*

221. The alleged self-dealing was the purchase of $9,500 in bonds when, allegedly, the bank had common officers and directors with the issuers of the bonds.

222. *In re De Sanchez*, N.Y.L.J. at 18.

223. *Id.*

224. *Id.*

225. *Id.*

226. *In re* Chiaro, 28 Misc. 3d 690, 691-92, 903 N.Y.S.2d 673, 674-75 (Sup. Ct. Suff. Cnty. 2010).

227. *Id.* at 692, 903 N.Y.S.2d at 675.

228. *Id.*

229. *Id.* at 692-93, 903 N.Y.S.2d at 675.

that she lacked the capacity to make informed decisions.[230] In late May 2007, the husband amended the trust to provide that only two of the four sons were remainder beneficiaries.[231] The husband died in July 2007.[232]

In an article 81 proceeding, held on the record in August 2008, the parties set forth the terms of their stipulation providing for an equal share of the remainder among the four sons.[233] The subsequent order and judgment reflected the stipulation, directing the guardians of the wife's property to execute an amendment to the revocable trust to provide for the equal division of the remainder.[234]

The court found that the failure to amend the trust was not contemptuous because once the wife was found incapacitated, the guardian of her property had no power to amend the trust.[235] Although concluding that there was no ability to amend the trust, the court found that the stipulation was a contract among the sons to make a renunciation of the requisite portion of the remainder.[236]

The court did not discuss the issue of whether the renunciation, having been provided for in a contract that was presumably supported by consideration, would violate the requirement under the disclaimer statute that no consideration be received for a disclaimer unless authorized by a court.[237] As a practical matter, the ability to assign a remainder interest would be the functional equivalent. It is noteworthy that the agreement specifically provided that, in the event of the death of one of the grantors, the surviving grantor had the right to modify the whole of the trust.

9. Constructive Trust

One member of a couple in a non-marital relationship moved for a constructive trust with respect to her former partner.[238] The matter before the court was on a motion to dismiss for failure to state a cause of action and lack of documentary evidence.[239] As recited by the court, the defendant, denominated the "father," (the couple had a child together), made representations to the effect that all of their work was

230. *Id.*
231. *In re Chiaro*, 28 Misc. 3d at 693, 903 N.Y.S.2d at 675.
232. *Id.*
233. *Id.*
234. *Id.* at 693-94, 903 N.Y.S.2d at 676.
235. *Id.* at 697, 903 N.Y.S.2d at 678.
236. *In re Chiaro*, 28 Misc. 3d at 701, 903 N.Y.S.2d at 681.
237. *See* N.Y. ESTATES, POWERS & TRUSTS LAW § 2-1.11 (McKinney Supp. 2011).
238. Ericson v. Baron, N.Y.L.J., Mar. 26, 2010, at 48 (Sup. Ct. N.Y. Cnty. 2010).
239. *Id.* at 49.

"for us and for our future," "what's mine is yours, what's yours is mine, doesn't make a difference," and "I will always take care of you."[240]

With respect to the cause of action for a constructive trust, the promise to take care of an individual is too indefinite to form a meaningful promise or a binding oral contract.[241] The mother admitted in the affidavit that the partner "never specifically promised me an ownership interest or a percentage interest in the assets he was acquiring while we co-habited."[242]

With respect to the claims regarding the mother's time and efforts in connection with the partner's business, having to care for their daughter and her half-siblings, and to decorate an apartment, the court found that the expenditure of time and energy, without anything more, was insufficient to trigger a constructive trust.[243]

10. Removal of Trustee

The matter involved a motion by the surviving spouse of the creator of the Atkins Diet, a co-trustee and beneficiary of a marital trust, to remove three individuals who served with her as trustee.[244] The instant matter was before the court on a motion for summary judgment.[245] Apart from the surviving spouse, the co-trustees were business associates of the decedent.[246] Subsequently, the initial two co-trustees resigned and were replaced by three individuals.[247] The individuals were a certified public accountant and a lawyer, both of whom had been retained by the surviving spouse, and a third individual.[248]

According to the court, Dr. Atkins' will did not specifically address the subject of trustee commissions, but did allow fiduciaries "additional reasonable compensation" for any services they were called upon to provide beyond the usual because of special demands of the business.[249] Relying on the payments made from the trust to an entity controlled by the trustees (other than the surviving spouse) to market the Atkins Diet and their lawsuit against the surviving spouse, the court

240. *Id.*
241. *Id.* (citing Bankers Sec. Life Ins. Soc'y v. Shakerdge, 49 N.Y.2d 939, 406 N.E.2d 440, 428 N.Y.S.2d 623 (1980)).
242. *Id.*
243. *Ericson*, N.Y.L.J. at 49.
244. *In re* Atkins, N.Y.L.J., Apr. 1, 2010, at 25 (Surr. Ct. N.Y. Cnty. 2010).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *In re Atkins*, N.Y.L.J. at 25.

granted the relief.[250]

E. Validity of Release of Power of Appointment/Conflict of Interest

Two of a decedent's children brought an action to declare the validity of a partial release of a power of appointment.[251] The preliminary executor, who was the decedent's surviving spouse and stepmother to the petitioners, opposed the relief.[252] The matter was before the court on a motion for summary judgment.[253]

According to the court, the decedent had created a trust, apparently governed by New York law, that named himself and his six children as discretionary beneficiaries with the decedent also retaining a general testamentary power of appointment.[254] At the time of the creation of the trust, the decedent was unmarried; subsequently, he remarried.[255]

The court indicated that the decedents became concerned about their inheritance.[256] The new spouse rebuffed the suggestion by some of the children that she sign a post-nuptial agreement.[257] After the rebuff, two of the children approached the decedent's two lawyers (the decedent's long-time personal lawyer of thirty years and a trusts and estates lawyer from his firm who drafted the trust) as to how they might protect their inheritance.[258] The court's discussion indicates that the lawyers were also representing the children and therefore had a conflict of interest, which conflict was not discussed with the decedent.[259]

The decedent later executed a partial release of the power—essentially, the power could now only be exercised to appoint the children (later, how much discussion was had about the release was a matter of dispute).[260] Three months later, the decedent signed another release (eliminating as potential donees any descendant who was a non-resident alien); again, there was a dispute as to the discussion with the decedent about the effect of the release.[261]

Using new counsel, the decedent executed a codicil leaving

250. *Id.*
251. *In re* Estate of Aoki, N.Y.L.J., May 17, 2010, at 18 (Surr. Ct. N.Y. Cnty. 2010).
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *In re Aoki*, N.Y.L.J. at 18.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *In re Aoki*, N.Y.L.J. at 18.

twenty-five percent of the trust to his spouse.[262] The new counsel requested an opinion letter from prior counsel as to the validity of the codicil.[263] Prior counsel opined that the codicil was invalid owing to the release.[264] It is noteworthy that, as part of the process, the trusts and estates lawyer in the prior firm wrote a memorandum to the file noting the conflict of interests.[265]

Subsequently, the decedent executed a new will (exercising the power to appoint twenty-five percent of the trust to the surviving spouse outright with the balance in trust for the benefit of the spouse and providing her with a power of appointment as to the decedent's children; there was an alternate provision in the event that the partial releases were valid).[266] The surviving spouse defended the motion on the basis of fraud.[267] In the court's view, the fraud here was one of omission, namely, failure to advise the decedent of the effect of the releases and the failure to advise him of the consequences of foregoing the benefits of the marital deduction.[268] The court indicated that while a person signing an instrument typically cannot complain if he or she did not read it prior to signing, the rule does not apply if the parties were in a fiduciary relationship such that it was reasonable for the signer to rely upon representations of the other party.[269] In that instance, the burden shifts to the other party to show that the person signed voluntarily and not as result of the misrepresentations.[270] Thus, the court denied the motion on this basis, but did find in favor of the plaintiffs on four other defenses.[271]

F. Construction Cases: Liability for Estate Tax

The first matter involved a voluntary accounting proceeding; the responsibility for payment of estate taxes was the issue.[272] Under the decedent's 1992 will, the residue passed to a trust for the benefit of the decedent's spouse and son.[273] The will directed that taxes be paid from

262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *In re Aoki*, N.Y.L.J. at 18.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *In re Aoki*, N.Y.L.J. at 18.
272. *In re* Walrod, No. 2007/490/A, 2009 N.Y. Slip Op. 51974(U), at 2 (Surr. Ct. Chautaqua Cnty. 2009).
273. *Id.* at 1.

the residue, without apportionment.[274] The decedent also had a revocable trust, the first iteration of which was executed five years after the will.[275] The last iteration of the revocable trust provided for certain "pre-residuary" dispositions; the "residue" of the trust was to pass to a charitable lead trust (CLT) for the benefit of the decedent's son and two charities.[276] The final iteration of the trust provided that estate taxes and administrative expenses were to be paid from trust principal before funding the residuary CLT; the trust agreement also provided that taxes were to be paid from the residue of the trust without a right of reimbursement of any of the beneficiaries.[277]

The court's decision recites the decedent's fluctuating wealth at the time of each iteration of the trust (as high as $19 million, with assets at the decedent's date of death of $5 million).[278]

The parties agreed that the probate residuary was to bear the tax burden.[279] The decedent's probate estate was insufficient to bear all of the tax: the precise issue was whether the "pre-residuary" dispositions under the revocable trust bore any part of the tax.[280] If the answer was no, the CLT would either not be funded or would have minimal funding.[281]

The court read the "no right of reimbursement" language as providing for no apportionment of the tax.[282] The court rejected what it characterized as a request to ignore the trust language and apply EPTL section 2-1.8(c), which would have resulted in the pre-residuary dispositions bearing some part of the tax and exempting the charitable share.[283] The court rejected the contention that the two clauses were inconsistent and, to the extent that there was an inconsistency, the more specific of the two clauses would control.[284]

The court rejected the notion that the decedent's estate plan included a "self-defeating" trust, finding that he had had similar planning structures in earlier iterations, that the decedent, given his fluctuating wealth, might have believed that his assets would

274. *Id.* at 2.
275. *Id.* at 1.
276. *Id.*
277. *In re Walrod*, 2009 N.Y. Slip Op. 51974(U), at 1.
278. *Id.*
279. *Id.* at 2.
280. *Id.*
281. *Id.*
282. *In re Walrod*, 2009 N.Y. Slip Op. 51974(U), at 2.
283. *Id.* at 3.
284. *Id.* at 4.

increase,[285] and the decedent's apparent ignorance of the "considerable gift taxes and penalties" his estate would have to pay.[286] Finally, the court rejected an attempt to "equitably reform" the trust, finding that the proposed reformation did not effectuate the decedent's intent.[287]

The second proceeding involving an apportionment clause was a construction proceeding and was brought by an executor asserting an ambiguity between the tax apportionment clauses in a will and revocable trust (the will was dated May 1, 2008 and the last iteration of the trust agreement was also dated May 1, 2008).[288]

The trust agreement provided that taxes were to be paid first from "any trust" under one section of an article in the trust (Section A); if the trust(s) was insufficient, taxes were to be paid from any property disposed of under another section of the same article (Section C).[289] The will provided that estate taxes were to be paid pursuant to the direction in the trust agreement and, to the extent that the trust was insufficient, from the decedent's residuary estate without apportionment.[290]

The alleged ambiguity arose because Section A did not provide for the creation of a trust; instead, it was an outright disposition of the "credit shelter amount" to children.[291] Section B (not referred to in the tax clause) provided for a marital trust and Section C provided for a bequest "in trust" to a charitable foundation.[292]

The court held that the language was clear and unambiguous, construing it to mean that the decedent only wanted taxes paid from Section A if a trust was created (finding that "any trust" meant that a trust may or may not have been established under Section A).[293] Perhaps more cogently, the court noted that the proffered construction would eliminate the disposition to the daughters (there is no explanation as to why).[294]

285. The court did not discuss the composition of the decedent's assets; so, it is not clear how realistic this belief might have been.

286. *In re Walrod*, 2009 N.Y. Slip Op. 51974(U), at 4.

287. *Id.* at 5.

288. *In re* Coudert, No. 356365, 2009 N.Y. Slip Op. 33161(U), at 1 (Surr. Ct. Nassau Cnty. 2009).

289. *Id.* at 2.

289. *In re* Coudert, 2009 N.Y. Slip Op. 33161(U), at 2.

290. *Id.*

291. *Id.*

292. *Id.*

293. *In re Coudert*, 2009 N.Y. Slip Op. 33161(U), at 4.

294. *Id.*

G. Cy Pres Proceedings

Reflecting the effects of the recession, the Polytechnic Institute of New York University petitioned to transfer $38 million in restricted funds to unrestricted funds so as to meet loan covenants and to meet financial standards under the Federal Family Education Loan Programs.[295] Taking pains to emphasize the funds so reclassified were not being spent and that the funds would be reclassified (back to restricted funds) by the earlier of the year 2036 or the time that the funds were no longer needed to satisfy the loan covenants or financial standards, the court granted the relief.[296]

A second matter involved an application by Columbia University to use the "excess income" from a bequest to establish a chair in medicine—the University indicated that it had guidelines for endowed chairs and expenses: in a nutshell, the guidelines did not want a chair to be too rich so as to encourage faculty "to obtain research grants and maintain a medical practice."[297] Finding that cy pres was applicable,[298] the court authorized the creation of an endowment fund to support professorships.[299]

H. Probate Proceedings: Capacity and Due Execution

In the first case to be discussed, eight of a decedent's eleven distributees objected to the admission of a will to probate that named ten charities and four individuals as equal beneficiaries on the grounds of lack of due execution, lack of testamentary capacity, and undue influence.[300] The matter was before the court on a motion for summary judgment by the New York State Attorney General, as statutory representative of charities.[301]

The lack of due execution claim arose because the attorney draftsperson (who, as the nominated executor, was the proponent of the will) asked whether the testator wanted the witnesses to act, rather than the testator asking the witnesses herself.[302] The testator replied "[y]es"

295. *In re* Othmer, No. 1686/98, 2009 N.Y. Slip Op. 51935(U), at 4 (Sup. Ct. Kings Cnty. 2009).

296. *Id.* at 6.

297. *In re* Uris, No. 235876, 2010 N.Y. Slip Op. 50552(U), at 2 (Surr. Ct. Nassau Cnty. 2010).

298. *Id.* at 2.

299. *Id.* at 4.

300. *In re* Estate of Feller, No. 2008-582, 2010 N.Y. Slip Op. 50001(U), at 1 (Surr. Ct. Monroe Cnty. 2010).

301. *Id.*

302. *Id.*

to the questions regarding whether she had read the will, whether the document was her will, and whether the testator wanted two individuals to act as witnesses.[303]

The court determined that the requirement that the testator make an express declaration was satisfied by the announcement of the attorney draftsperson in the testator's presence.[304] The requirement that the testator ask the witnesses to sign the will was inferable from the circumstances surrounding the execution.[305]

With respect to the claim of lack of capacity, the proponent was able to establish a prima facie case of the requisite capacity: the testator had sought out his services; she had met with him with detailed notes of her testamentary plan; there was an inquiry into her family; a draft will was reviewed with the client and the client had made changes to the draft.[306] Finally, the proponent and another individual in his office testified as to the engagement of the testator in the process and her lack of any apparent cognitive, auditory, or visual difficulties.[307]

According to the court, the only evidence proffered by the objectants was the testimony of an individual who recounted two visits with the testator approximately ten months prior to her death, which was the time the will had been executed.[308] The testimony was that the testator, normally talkative and friendly, appeared to be distracted, was not talkative, and was unresponsive to questions.[309] The court determined that the testimony did not raise a triable issue as to the decedent's capacity.[310]

As for the claim of undue influence, the court stated that an objectant must prove three elements: motive, opportunity to act, and actual acts.[311] The claim failed because there was no showing of a motive on the part of the proponent (who also testified that he had made no recommendation as to decedent's plan or choice of charities) or the exercise of influence (the court cited the specific instructions to the draftsperson made by the testator and the lack of advice (both advice sought and advice given) with respect to the plan).[312] Thus, the motion

303. *Id.*
304. *Id.*
305. *In re Feller*, 2010 N.Y. Slip Op. 50001(U), at 1.
306. *Id.* at 2.
307. *Id.*
308. *Id.*
309. *Id.*
310. *In re Feller*, 2010 N.Y. Slip Op. 50001(U), at 3.
311. *Id.*
312. *Id.* at 3-4.

was granted.[313]

In the second matter, the administrator of an estate brought an action against the trustee and beneficiary of a revocable living trust seeking the return of property.[314] The administrator moved for summary judgment; the trustee/beneficiary cross-moved to dismiss the action.[315] In addition to the trust, the administrator challenged the transfer of a house to the trust.[316]

The motions of both the petitioner and the respondent included medical reports; the petitioner included a "medical affirmation" with his motion and the defendant had a deposition of a doctor who had treated the decedent (it is not clear from the court's discussion when the doctor had treated the decedent).[317]

In assessing the entitlement to summary judgment, the court rejected the attorney affirmations because neither attorney had firsthand knowledge of the facts and the depositions attached to the affirmations were unsworn and unsigned (and there was no showing that would justify relief under N.Y CPLR section 3116(a) regarding adeponent's failure to sign a deposition).[318]

The respondent acknowledged that she had the burden of showing mental capacity; in attempting to meet the burden, the defendant relied on the medical records, the deposition of the attorney draftsperson, the deposition of a social worker in the nursing home who had acted as a witness to the trust, and the deposition by the doctor mentioned above.[319]

As indicated above, the court rejected the deposition testimony and determined that the respondent had not made out a prima facie case that the decedent had capacity (citing also the affidavits of a neurologist and psychiatrist and medical records).[320]

The parties disagreed about the burden of showing either the presence or absence of fraud and undue influence.[321] As to fraud, the

313. *Id.* at 4.

314. *In re* Estate of Delgatto, No. 4139/2008, 2010 N.Y. Slip Op. 50516(U), at 1 (Surr. Ct. Kings Cnty. 2010).

315. *Id.*

316. *Id.*

317. *Id.* at 1-2.

318. *Id.* at 2.

319. *In re Delgatto*, 2010 N.Y. Slip Op. 50516(U), at 2.

320. *Id.* It is not clear why the court, having determined that the respondent had failed to make out a prima facie case as to mental capacity, did not grant summary judgment on this basis: it is possible that the court was looking for an alternate ground to sustain a denial of the respondent's cross-motion.

321. *Id.*

court determined that petitioner had not alleged a false statement knowingly made that caused the decedent to dispose of his or her property in a manner differently than he or she would otherwise have done.[322]

As to the claim of undue influence, the court relied on the respondent's admissions in a notice to admit to determine that a confidential relationship existed and determined that, while the petitioner had not made out a sufficient case for summary judgment, the burden had shifted to the respondent to explain the circumstances of the creation of the trust and the transfer of the property.[323]

In the third matter, a petition and cross-petition for appointment of a guardian of the person and property of their mother by two of her children was mooted by her death and the issue of the validity of a two-step conveyance of real property in 2007 by the decedent to the cross-petitioner remained.[324] Under the terms of the decedent's will (executed in 1986), the property was given equally to the children.[325] The court's decision was rendered after a trial.[326]

The parties presented conflicting testimony as to the decedent's mental condition.[327] The court credited the testimony of a granddaughter (testifying for the petitioner (her mother)), who as a dentist had received some formal training with respect to the recognition of Alzheimer's disease.[328] The court also found that the testimony of the attorney who prepared the deed and the donee (the only two witnesses at trial who testified as to the execution of the deeds) were not credible because: first, the testimony lacked detail: and second, elements of the testimony were in conflict on several points (e.g., whether the decedent had visited the attorney's office before the execution of the first of two deeds).[329] The donee apparently hurt his case by acknowledging his sister's frequent contacts with their mother while also asserting that she "was never around."[330]

With respect to the expert testimony, the qualifications of the petitioner's expert, who was board certified in psychiatry and neurology with "added qualifications" in geriatric psychiatry and "recognized as

322. *Id.* at 2-3.
323. *Id.* at 3-4.
324. *In re* Marie F., N.Y.L.J., May 10, 2010, at 20 (Sup. Ct. Richmond Cnty. 2010).
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *In re Marie F.*, N.Y.L.J. at 20.
330. *Id.*

one of the foremost authorities on Alzheimer's Disease," trumped that of the expert for the cross-petitioner, a board certified psychiatrist.[331]

The court concluded that the decedent lacked the mental capacity to make a valid conveyance.[332] The court then proceeded to consider the evidence of undue influence, finding that there was undue influence (citing, inter alia, the fact that the transaction occurred while the petitioner was out of state, lack of disclosure to petitioner after the conveyances, alteration of the decedent's testamentary plan, the decedent's physical condition, and use of an attorney selected by the donee).[333] The court did find, however, that notwithstanding the family relationship, the son was not in a confidential relationship with his mother.[334]

The final matter involved a miscellaneous proceeding for the discovery of property allegedly withheld by the respondent.[335] The respondent moved for an order dismissing the petition, brought by the limited administrators of an estate.[336] According to the court, the decedent and his son resided together in the father's home.[337] In 1999, an attorney prepared powers of attorney, health care proxies and living wills for the father and son, and deeds to transfer the father's real property to his son.[338] At the same time the documents were to be executed, the father was either hospitalized or in a nursing home.[339]

On January 29, 1999, the father executed the power of attorney; on that same date and again on February 3, 1999, the son, as attorney-in-fact for his father, executed deeds transferring parcels of realty to himself.[340] The attorney/draftsperson testified that she did not supervise the execution of the deeds.[341] According to the court, on October 21, 1999, the father executed "an instrument" in which he left small general bequests to the administrators (who were the children of a predeceased child of the decedent) and the residuary estate to his son.[342] The court

331. *Id.*
332. *Id.*
333. *Id.*
334. *In re Marie F.*, N.Y.L.J. at 20.
335. *In re* Lyon, No. 2008-2637/A, 2009 N.Y. Slip Op. 51967(U), at 1 (Sup. Ct. Westchester Cnty. 2009).
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *In re Lyon*, 2009 N.Y. Slip Op. 51967(U), at 1.
341. *Id.*
342. *Id.* at 1-2.

indicated that the 1999 instrument was not offered for probate.[343] The son died on August 12, 2008 and the respondent in the instant action received letters testamentary for his estate.[344]

The fiduciary for the deceased son's estate moved to dismiss the discovery petition based upon testamentary evidence (N.Y. CPLR section 3211(a)(1)), the statute of limitations (N.Y. CPLR section 3211(a)(5)), and failure to state of cause of action (N.Y. CPLR section 3211(a)(7)).[345] With respect to the dismissal based upon documentary evidence, the respondent cited the Medicaid notification letter that "[feels] that the transfer of [the father's] real estate was in his best interest since it resulted in Medicaid eligibility."[346] In response, the movants argued that the Medicaid documents did not negate the fact that the son perpetrated a fraud on his father and on them and that the statute of limitations had not expired because they learned of the matter of the transfers only after the son's death and the date of fraud in sufficient detail clearly informed the respondent of their claims.[347]

The court concluded that the motion to dismiss based upon documentary evidence was denied.[348] The notices of intent and notices of decision with respect to Medicaid eligibility were not conclusive on the issue of whether the son breached a fiduciary duty by conveying the father's real estate to himself.[349] The court indicated that issues of fact existed as to whether the son had properly used the power of attorney, whether the transfers were in the father's best interests and, finally, whether adequate notice was given to the Department of Social Services.[350]

With respect to the statute of limitations, the court held that the correct limitations period in a discovery proceeding for actions taken as an attorney-in-fact under N.Y. CPLR section 213(1) is six years, i.e., "an action for which no limitation is specified prescribed by law."[351] Citing *Spallsholz v. Sheldon*,[352] the court indicated that for the statute of limitations to begin to run, there had to be an open repudiation of trust by the fiduciary *or* judicial accounting by the fiduciary.[353] Further, the

343. *Id.* at 2.
344. *Id.*
345. *In re Lyon*, 2009 N.Y. Slip Op. 51967(U), at 2.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *In re Lyon*, 2009 N.Y. Slip Op. 51967(U), at 2.
351. *Id.*
352. *Id.* (citing Spallsholz v. Sheldon, 216 N.Y. 205, 209, 110 N.E. 431, 431 (1915)).
353. *Id.* at 3.

court indicated that the death of the principal revoked the authority of the attorney-in-fact, and would therefore logically commence the limitations period.[354] The court indicated that there was no evidence that the movants were aware of the agency, however, the motion to dismiss based on the statute of limitations was denied.[355]

I. Claims

The first matter was a proceeding to determine the validity of a claim; the court treated the executor's motion to dismiss the claim as a motion for summary judgment.[356]

Under the decedent's will, a child was the specific legatee of a $1 million bequest and the remainderperson of a $500,000 trust for the benefit of a sibling.[357] The residue of the estate was given to the decedent's surviving spouse, a step-parent to the claimant.[358] The child filed a claim for twenty-five percent of the net estate, citing a settlement agreement (later incorporated and referred to in an interlocutory California divorce judgment) between the decedent and her mother; the final judgment referred to the interlocutory judgment without specifically stating the provision relied on.[359]

Reviewing California law, the court determined the settlement agreement merged with the final judgment of divorce and thus could only be attacked by a motion for a new trial, an appeal, suit in equity, or a motion for relief from the judgment.[360] The court determined that none of those avenues had been pursued.[361] Turning next to a full faith and credit analysis, the court held that the California court had jurisdiction over the parties and enforcing the judgment did not violate any public policy in New York.[362] The court indicated that even if there had not been a merger, the court would have found the agreement enforceable.[363]

The second matter involved a proceeding to determine the validity

354. *Id.*
355. *In re Lyon*, 2009 N.Y. Slip Op. 51967(U), at 3.
356. *In re* Will of Cassini, No. 343100, 2009 N.Y. Slip Op. 52491(U), at 1 (Surr. Ct. Nassau Cnty. 2009).
357. *Id.* at 1-2.
358. *Id.* at 1.
359. *Id.* at 2.
360. *Id.* at 4.
361. *In re Cassini*, 2009 N.Y. Slip Op. 52491(U), at 4.
362. *Id.* at 4-5.
363. *Id.* at 5.

of a claim.[364] The petitioner, who was allegedly the decedent's domestic partner under the laws of Singapore, sought records of the decedent and a company allegedly controlled by the decedent.[365] The basis of the claim was the decedent's oral promise to provide "funding sources" for the claimant's benefit.[366] The estate rejected the claim on the basis of the statute of frauds and a release signed by the claimant.[367]

The estate argued that it did not own the company and thus had no control over its books and records.[368] This response was seemingly belied by the attachment of some corporate records that showed the transfer of $3 million from the company to the claimant.[369] The court directed that the respondents turn over any corporate records in their possession; it also indicated that it would entertain a proceeding, brought pursuant to SCPA section 702(10), to grant limited letters to the petitioner to seek corporate information in the "appropriate" jurisdiction.[370]

The claimant also sought drafts and correspondence relating to the release.[371] Respondents resisted on the grounds of attorney-client confidentiality.[372] The attorney who drafted the release (which was a letter from the decedent to the claimant that was to be countersigned by the claimant to indicate agreement) indicated that he was representing the family with respect to "the family's assets."[373] The attorney acknowledged not having obtained a retainer agreement in advance of producing the release.[374] It was not clear who asked the lawyer to produce the letter.[375]

The court rejected the argument that the privilege extended to the estate (under a "common enterprise" theory) because there was no actual litigation in progress.[376] Moreover, the court agreed that if the letter was to be used as a "sword" against the claimant's claim that she be allowed to inquire into the circumstances of its preparation: so, there

364. *In re* Cheng Ching Wang, No. 2006-2422/A, 2010 N.Y. Slip Op. 50253(U), at 1 (Surr. Ct. Westchester Cnty. 2010).
365. *Id.*
366. *Id*. at 2.
367. *Id*.
368. *Id.*
369. *In re Cheng Ching Wang*, 2010 N.Y. Slip Op. 50253(U), at 2-3.
370. *Id.* at 3.
371. *Id.* at 2.
372. *Id.* at 4.
373. *Id.*
374. *In re Cheng Ching Wang*, 2010 N.Y. Slip Op. 50253(U), at 4.
375. *Id.*
376. *Id.*

was an implied waiver of the attorney-client privilege.[377]

J. Attorney's Fees for Estate Administration Services

The first matter involved a petition brought by the executor of an estate pursuant to SCPA section 2110(2) to determine the compensation to be paid to the former counsel for the estate, directing the counselor to turn over and deliver the complete estate file to the current estate counsel and, finally, directing former counsel to turn over and deliver to the new counsel all assets and documents belonging to the estate.[378]

In this instance, the executor was a resident of New Mexico.[379] Shortly after being appointed as executor, the executor executed a durable power of attorney naming counsel as attorney-in-fact to act on his behalf.[380] Approximately six months after the execution of the power, the executor obtained new counsel and executed a revocation of power of attorney.[381]

As indicated by the court, the proceeding presented a "potpourri of issues," including the delegation of authority to the attorney, the decision to charge a fee based upon a fixed percentage of the gross estate, the attorney's non-compliance with Rule 1215.1 (requirement to provide an engagement letter) and, finally, the attorney billing the estate at an hourly rate plus disbursements for mailing, copying and printing.[382]

The court indicated that the duties of a fiduciary cannot be divested by delegation; thus, the executor is not authorized to give a power of attorney that serves the attorney plenary powers.[383] The counsel was ineligible to seek compensation for actions under the power of attorney since its issuance was void ab initio.[384]

Turning to the question of the engagement letter, the court indicated that counsel stated that she would charge a flat rate of six percent based upon the value of all assets comprising the estate.[385] It is not entirely clear from the court's discussion how this was

377. *Id.*

378. *In re* Estate of Sadlo, No. 2009-97727/A, 2009 NY Slip Op. 51981(U), at 1 (Surr. Ct. Dutchess Cnty. 2009).

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at 1-2; N.Y. COMP. CODES R. & REGS. tit. 1, § 1215.1 (2010).

383. *In re Sadlo*, 2009 N.Y. Slip Op. 51981(U), at 2. Although there is no discussion of the ability to delegate under the Prudent Investor Act, section 11-2.3(b)(4)(C) of the EPTL, the Act is distinguishable because it does not assume wholesale delegation.

384. *Id.*

385. *Id.*

communicated to the executor. Prior to the commencement of the action, the former counsel had submitted an invoice for services and disbursements showing the amount of hours and the hourly rate (it is not entirely clear whether the individual items comprising the time were detailed).[386] In analyzing the request, the court took into account the failure to comply with the engagement letter rule, the apparent change in the method of compensation (from a flat fee to hourly), and the performance of executorial services under the power of attorney.[387] Accordingly, the court indicated that counsel could only recover in *quantum meruit*.[388]

In an accounting proceeding, the preliminary executor asked a court to fix attorney's fees; a hearing was waived.[389] The decedent had executed a form will that named a sibling as sole beneficiary.[390] The alternate beneficiaries were a niece and nephew (twenty-five percent shares) and a church (fifty percent).[391] The pastor of the church was named as the executor; in addition, the pastor was the only witness to the will.[392] According to the court, beneath the decedent's signature was the signature and stamp of a notary (who was an employee of a nursing home in which the decedent was a resident).[393] The pastor signed the self-proving affidavit, which was notarized by the nursing home employee.[394]

The decedent's sister predeceased him.[395] In the petition for probate, the nominated executor listed himself and the notary as witnesses.[396] Preliminary letters were granted, but probate ultimately was denied; subsequently, letters of administration were granted to the decedent's niece.[397] The preliminary executor filed an account in which he requested attorney's fees (in the approximate amount of $2,600).[398]

Citing, inter alia, the fact that the proponent had secured the execution of the instrument and the contradiction between the

386. *Id.*
387. *Id.* at 3.
388. *In re Sadlo*, 2009 N.Y. Slip Op. 51981(U), at 3.
389. *In re* Estate of Karschmidt, 26 Misc. 3d 905, 906, 895 N.Y.S.2d 778, 779 (Surr. Ct. Westchester Cnty. 2009).
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *In re Karschmidt*, 26 Misc. 3d at 906, 895 N.Y.S.2d at 779.
395. *Id.*
396. *Id.*
397. *Id.* at 906-07, 895 N.Y.S.2d at 779-80.
398. *Id.* at 907, 895 N.Y.S.2d at 780.

instrument and the affidavit of attesting witness filed by the notary five and one-half years after the execution of the instrument, the court determined that the proponent of the will was lacking in the good faith required by SCPA section 2302(3).[399]

K. Medicaid

This matter involved the availability of income payments to a supplemental needs trust for the benefit of the grantor's disabled child for purposes of the grantor's net available monthly income (NAMI).[400]

In September 2004, an individual created a supplemental needs trust for the benefit of an adult child who was disabled and receiving Social Security Disability Insurance and Medicare (but not Medicaid).[401] The initial funding was $250.[402] The grantor subsequently transferred her monthly Social Security benefits to the Supplemental Needs Trust (SNT).[403] The agreement for the SNT provided that, upon the child's death, the trustee reimburse a government provider of Medicaid for the child before distributing the balance of the trust assets to the child's estate.[404] In January 2005, the grantor applied for Medicaid herself, retroactive to October 2004.[405] As part of her application, the grantor advised the Department of Social Services of the SNT and her transfer of income to it.[406] The grantor died in January 2009.[407]

As described by the Second Department, the issues were whether: first, the transfer of the grantor's recurring income must be counted toward the grantor's NAMI after she is determined Medicaid-eligible; and second, the obligation of the estate of the deceased grantor for the reimbursement of a "certain portion" of those benefits.[408]

The Department of Social Services had determined that the funds deposited in the SNT could be excluded from determining the grantor's eligibility for Medicaid but could be treated as available income for purposes of computing the grantor's NAMI.[409] The fair hearing

399. *In re Karschmidt*, 26 Misc. 3d at 908, 895 N.Y.S.2d at 781. The section provides for payment from an estate of the costs of an unsuccessful proponent of a will.

400. *In re* Jennings, 71 A.D.3d 98, 99, 893 N.Y.S.2d 103, 104 (2d Dep't 2010).

401. *Id.* at 100, 893 N.Y.S.2d at 105.

402. *Id.* at 101, 893 N.Y.S.2d at 105.

403. *Id.* at 101, 893 N.Y.S.2d at 106.

404. *Id.* at 101, 893 N.Y.S.2d at 105-06.

405. *In re Jennings*, 71 A.D.3d at 101, 893 N.Y.S.2d at 106.

406. *Id.* at 101, 893 N.Y.S.2d at 106.

407. *Id.* at 104, 893 N.Y.S.2d at 107.

408. *Id.* at 100, 893 N.Y.S.2d at 105.

409. *Id.* at 102, 893 N.Y.S.2d at 106.

confirmed the determination of the Department of Social Services, and the grantor brought an article 78 proceeding.[410] The supreme court reversed the determination.[411]

The Second Department reversed, finding that the Department of Health's interpretation was not irrational.[412] The court also cited the use of Social Security benefits to fund the trust, which were meant to assist the grantor with her needs during her lifetime.[413]

The matter involved a proceeding to construe or reform a testamentary trust to permit the establishment of a SNT for the benefit of a residuary legatee, who was receiving Social Security Disability Insurance, Medicare, and Medicaid.[414] The will contained a clause that allowed the executor to defer making a distribution provided for under the will and, in the event that a beneficiary is receiving or is likely to receive a form of "governmental entitlements," the executor was authorized to create a trust (the provision was silent on the provisions of the trust).[415] The application was opposed by the Department of Health and Department of Social Services as an attempt to circumvent the lien for Medicaid payments.[416]

Citing the cases decided in the wake of the Court of Appeals' decision in *Escher*,[417] the court determined that, first, there was an intent to supplement, rather than, supplant, government benefits and, second, the reformation would not change the decedent's dispositive plan.[418] The court refused to follow the New York County Surrogate's decision in *In re Rubin*,[419] where the court had declined to reform various trusts created for two disabled individuals.[420]

L. Marriage

The initial matter involved an appeal by the defendant in an action seeking a judgment declaring that the marriage between a decedent and

410. *In re Jennings*, 71 A.D.3d at 103, 893 N.Y.S.2d at 107.
411. *Id.* at 103-04, 893 N.Y.S.2d at 107.
412. *Id.* at 113, 893 N.Y.S.2d at 114.
413. *Id.* at 111, 893 N.Y.S.2d at 113.
414. *In re* Estate of Roventini, N.Y.L.J., Jan. 15, 2010, at 25 (Surr. Ct. Nassau Cnty. 2010).
415. *Id.*
416. *Id.*
417. *See generally In re* Escher, 52 N.Y.2d 1006, 420 N.E.2d 91, 438 N.Y.S.2d 293 (1981).
418. *In re Roventini*, N.Y.L.J. at 25.
419. *See generally In re* Rubin, 4 Misc. 3d 634, 781 N.Y.S.2d 421 (Surr. Ct. N.Y. Cnty. 2004).
420. *In re Roventini*, N.Y.L.J. at 25.

the defendant was null and void.[421] According to the court, the decedent was diagnosed with terminal prostate cancer and severe dementia in early 2000.[422] In February 2001, one of the decedent's children, who was his primary caretaker, went on a one-week vacation and left the decedent, then seventy-three years old, in the care of the defendant, then fifty-eight.[423] The decedent's daughter, one of two other children, later learned that the temporary caretaker had married the decedent within that week and had transferred his assets into her name.[424]

The decedent died in August 2001 and in November 2001 the children brought an action in supreme court for a judgment declaring the marriage void.[425] At the same time, one of the children brought a petition in surrogate's court for probate of the decedent's Will and letters of administration c.t.a.[426] After the will was admitted to probate, the defendant filed a right of election.[427]

In the supreme court proceeding, the children moved for summary judgment on the issue of the invalidity of the marriage, submitting affidavits from the children and a grandchild as to the deterioration of the decedent's mental condition.[428] In addition to the affidavits from family members, the plaintiff submitted medical records as well as an affidavit from the decedent's primary care physician who treated him for the last thirteen years of his life, and one from a neurologist.[429]

In opposition to the motion for summary judgment and in support of a cross-motion for summary judgment, the defendant submitted her own affidavit detailing the relationship that she had with the decedent, including the four previous marriage proposals from the decedent (in 1979, 1980, 1981, and in 2001).[430] The defendant also submitted affidavits from the pastor who performed the wedding ceremony and two witnesses to the marriage.[431]

The court discussed the distinction between void and voidable marriages, indicating that the parties to a void marriage (and all other

421. Campbell v. Thomas, 73 A.D.3d 103, 103, 897 N.Y.S.2d 460, 461 (2d Dep't 2010).

422. *Id.* at 105, 897 N.Y.S.2d at 462.

423. *Id.*

424. *Id.* at 105-06, 897 N.Y.S.2d at 462.

425. *Id.* at 106, 897 N.Y.S.2d at 462-63.

426. *Campbell*, 73 A.D.3d at 106, 897 N.Y.S.2d at 463.

427. *Id.* at 106, 897 N.Y.S.2d at 463.

428. *Id.* at 106-07, 897 N.Y.S.2d at 463.

429. *Id.* at 108, 897 N.Y.S.2d at 464.

430. *Id.* at 108-09, 897 N.Y.S.2d at 464.

431. *Campbell*, 73 A.D.3d at 109, 897 N.Y.S.2d at 465.

third parties) may treat the marriage as a nullity, without the involvement of a court, while a voidable marriage may be treated as a nullity only if the court has made the requisite pronouncement.[432]

After reviewing of the precedent concerning the effect of marriages declared annulled, the court considered whether the annulment of the marriage affected the defendant's right of election.[433] The court declined to read EPTL section 5-1.2(a) to provide that a posthumous declaration of annulment did not affect the right of election.[434] Invoking the *Riggs* principle[435] that no one should profit from his or her wrongdoing, the court inquired as to whether the defendant was aware that the decedent lacked capacity.[436] The court concluded that the defendant was aware of the decedent's dementia and the prognosis as to the decedent's cancer.[437] The court also cited the defendant's waiting until the decedent's primary caregiver had left on vacation and her failure to inform the caregiver, or any other family member, of the marriage until after the fact.[438] The court also pointed to changes in assets, claiming the beneficiary had a retirement plan that was changed as a result of the defendant's actions.[439]

In a companion case to the *Campbell* case discussed immediately above, the Second Department considered an appeal from a decision involving the marriage of an individual, then age ninety-nine, and his caretaker, then age forty-seven.[440] The lower court's decision was discussed in the 2009 *Survey*.[441] It "involved a motion for summary judgment on a surviving spouse's entitlement to take an elective share."[442] "The surviving spouse had served as the decedent's caretaker during the last decade of his life."[443] "The decedent's sons challenged the surviving spouse's entitlement to elective share on the ground that the father did not have the mental capacity to enter into a marriage contract and further alleged that the marriage was procured by force,

432. *Id.* at 111, 897 N.Y.S.2d at 466.
433. *Id.* at 114, 897 N.Y.S.2d at 468.
434. *Id.* at 115-16, 897 N.Y.S.2d at 469.
435. Riggs v. Palmer, 115 N.Y. 506, 511, 513, 22 N.E. 188, 190 (1889).
436. *Campbell*, 73 A.D.3d at 117, 897 N.Y.S.2d at 470.
437. *Id.* at 117, 897 N.Y.S.2d at 470-71.
438. *Id.* at 117, 897 N.Y.S.2d at 471.
439. *Id.*
440. *In re* Berk, 71 A.D.3d 883, 883-84, 897 N.Y.S.2d 475, 476 (2d Dep't 2010).
441. *See* O'Toole, *supra* note 18, at 1108-09 (discussing *In re* Hua Wang, 20 Misc. 3d 691, 864 N.Y.S.2d 710 (Surr. Ct. N.Y. Cnty. 2008)).
442. *Id.* at 1108.
443. *Id.*

duress, or fraud."[444] "The court held that a voidable marriage is void only from the time its nullity is declared by a court."[445] "Thus, the surviving spouse's right to an elective share would not be disturbed, even if the marriage was later annulled."[446]

The Second Department reversed, holding that a triable issue of fact existed as to whether the spouse had forfeited her elective share right.[447]

A third case concerning the validity of a marriage involved a special proceeding under article 81 of the Mental Hygiene Law seeking in declaration of incapacity, an annulment of a marriage to a third party, a declaration that a quit claim was null and void, and restitution of any monies or property improperly transferred to the alleged incapacitated person's spouse.[448] Based upon the testimony and medical records, the court determined that the alleged incapacitated person was indeed incapacitated.[449]

Following this determination, the court turned to the question of the validity of the individual's marriage.[450] Based upon the medical records and testimony of the doctor, the court determined that as of the date of the marriage, the individual was incapacitated and not able to make decisions for herself.[451] The court had no difficulty in voiding the transfer of the house to the spouse, claiming that he did not establish that the transfer to him was fair and free of undue influence.[452]

M. Waiver of Retirement Plan in Pre-Nuptial Agreement

The issue before the court was whether the parties' prenuptial agreement contains an enforceable waiver of the defendant wife's interest in the marital portion of the plaintiff husband's retirement assets.[453] The court was considering its earlier determination that, under ERISA, only a spouse can waive spousal rights to employee plans.[454]

Reading the prenuptial agreement as a whole, the First Department determined that the intent was to waive the rights to all assets not

444. *Id.* at 1108-09.
445. *Id.* at 1109.
446. O'Toole, *supra* note 18, at 1109.
447. *In re Berk*, 71 A.D.3d at 885-86, 897 N.Y.S.2d at 477.
448. *In re* Jerry M. v. Geraldine P., N.Y.L.J., June 28, 2010, at 18 (Sup. Ct. Bronx Cnty. 2010).
449. *Id.* at 19.
450. *Id.*
451. *Id.*
452. *Id.*
453. Strong v. Dubin, 75 A.D.3d 66, 67, 901 N.Y.S.2d 214, 216 (1st Dep't 2010).
454. *Id.*

specifically designated as "marital property" (essentially, perspective joint banking, savings or investment accounts, or assets purchased from the proceeds of the joint accounts).[455] The court rejected the contention that the waiver with respect to applicable distribution or distributive awards was meant to apply only to property in existence at the time the prenuptial agreement was executed, citing the generic designation of the property to which the waiver applied.[456]

The court recognized that a prenuptial agreement will not constitute an effective waiver of spousal survivorship benefits unless it conforms to ERISA.[457] It is found that ERISA does not preempt or preclude the recognition, implementation, or enforcement of an otherwise valid prenuptial agreement with regard to a divorce proceeding.[458]

N. Guardianship Cases

1. Periodic Reporting by Guardian of Person

The matter involved an article 17-A proceeding commenced by the guardian of an individual with "profound" mental retardation and autism.[459] In addition to being the ward's guardian, the petitioner was co-trustee, along with a corporate fiduciary, of a testamentary trust for the benefit of his ward.[460] In the midst of the proceeding, the guardian/co-trustee acknowledged that no trust income or principal had been spent for the ward's benefit.[461] Based upon that acknowledgment, the Surrogate's Court appointed a guardian ad litem to investigate whether the ward and/or Medicaid were aware of the existence of the trust.[462] The corporate fiduciary appeared at a later hearing and admitted that it had done nothing to ascertain or meet the ward's needs, pleading a lack of "institutional competence."[463]

The court directed the guardian/co-trustee and the corporate fiduciary either to visit the ward personally (meeting with his care providers at the institution in which he resided and ascertaining needs that could be satisfied with funds from the trust) or to secure services of

455. *Id.* at 69-70, 901 N.Y.S.2d at 217-18.
456. *Id.* at 71, 901 N.Y.S.2d at 219.
457. *Id.* at 72, 901 N.Y.S.2d at 219.
458. *Strong*, 75 A.D.3d at 72, 901 N.Y.S.2d at 219.
459. *In re* Mark C.H., 28 Misc. 3d 765, 766, 906 N.Y.S.2d 419, 420 (Surr. Ct. N.Y. Cnty. 2010).
460. *Id.* at 767, 906 N.Y.S.2d at 420.
461. *Id.*
462. *Id.*
463. *Id.*

a qualified professional to visit, make inquiry, and provide recommendations.[464] The fiduciaries chose the latter option.[465]

The main part of the court's discussion concerns whether article 17-A passes constitutional muster in light of the absence of any requirement for periodic reporting by the guardian of the person.[466] Employing a due process analysis, the court concluded that "it is clear that a court granting guardianship of the mentally retarded and developmentally disabled must require periodic reporting and review—or 'monitoring'—by 17-A guardians of the person, even as it does, by statute, of 17-A guardians of the property."[467] Thus, the court concluded that "Article 17-A should be read to include a requirement of yearly reporting (whether in response to a questionnaire from the court, or through the guardian's obligation to file a report, as contained in the letters of guardianship)," with review by the court.[468]

Thus, the petitioner was appointed the guardian and required to provide such information as required by Mental Hygiene Law section 81.31.[469] Finally, in order to "meet the court's due process obligations to its wards," the court indicated that there should be a relatively simple questionnaire sent to guardians yearly on the anniversary of their appointment.[470] The court noted that in certain instances, on the appointing order the court may require the guardian to provide more and more nuanced information.[471]

2. Valuation/Disposition of Life Estate

The guardian of an incapacitated person's ("IP") property sought leave to "extinguish" the IP's interest in real property, which meant that the actuarial value of the life estate would be paid to the guardian.[472]

The first issue before the court was the calculation of the IP's life estate.[473] The court directed use of the life estate and remainder interest tables of the Health Care Financing Administration of the federal Department of Health and Human Services (the "HCFA table").[474]

464. *In re Mark C.H.*, 28 Misc. 3d at 767, 906 N.Y.S.2d at 420-21.
465. *Id.* at 768, 906 N.Y.S.2d at 421.
466. *Id*. at 768-69, 906 N.Y.S.2d at 422-34.
467. *Id.* at 786-87, 906 N.Y.S.2d at 435.
468. *Id.* at 787, 906 N.Y.S.2d at 435.
469. *In re Mark C.H.*, 28 Misc. 3d at 787, 906 N.Y.S.2d at 435.
470. *Id*. at 782, 906 N.Y.S.2d at 431.
471. *Id*. at 782-83, 906 N.Y.S.2d at 464.
472. *In re* Giordano, 28 Misc. 3d 519, 520, 905 N.Y.S.2d 462, 463 (Sup. Ct. N.Y. Cnty. 2010).
473. *Id.* at 521, 905 N.Y.S.2d at 464.
474. *Id.* at 522, 905 N.Y.S.2d at 464.

Other parties to the proceeding had urged use of the table under article 4 of the Real Property Actions and Proceedings Law or the Internal Revenue Service valuation tables for gift and estate tax.[475]

The court disagreed with the Department of Social Services' position that no part of the closing costs could be charged against the life estate, thus apportioning the transfer tax, statutorily required closing costs, and the broker's commission between the life estate and remainder as per the HCFA table.[476] The guardian was authorized to pay any real property taxes through the date of closing based on the allocation of such expenses to the life tenant under New York common law.[477]

3. Gifting by Guardian

The matter involved a motion for leave to expend a guardian's powers to gift and make loans; the bequest for relief was to be effective *nunc pro tunc* to the date of appointment of the guardian.[478]

According to the court in its initial decision, the incapacitated person, age eighty-seven, was in a nursing home with assets of approximately $366,000 in addition to her monthly income.[479] The nursing home cost was $672 per day or $20,160 per month.[480] The Medicaid planning proposed was to have a combination of gift and loan, such that the income plus the loan repayments would be slightly below the private pay rate, by making the incapacitated person eligible for Medicaid, but for the penalty.[481] The court examiner argued for a Medicaid trust, provisions of which were not discussed in the opinion.[482]

The court was reluctant to rely on assurances of family members that they would use the money for the needs of the IP because they had no legal obligation to do so.[483] So, the court granted the relief to the extent of authorizing the guardian to set up a trust for the benefit of the individual.[484]

475. *Id.* at 522, 905 N.Y.S.2d at 464-65.

476. *Id.* at 523, 905 N.Y.S.2d at 465.

477. *In re Giordano*, 28 Misc. 3d at 524-25, 905 N.Y.S.2d at 465.

478. *In re* M.L., No. 92475/08, 2009 N.Y. Slip Op. 52160(U), at 1 (Sup. Ct. N.Y. Cnty. 2009).

479. *In re* M.L., 24 Misc. 3d 1036, 1037, 879 N.Y.S.2d 919, 920 (Sup. Ct. N.Y. Cnty. 2009).

480. *Id.*

481. *Id.* at 1038, 879 N.Y.S.2d at 921.

482. *Id.* at 1039, 879 N.Y.S.2d at 921.

483. *Id.* at 1041, 879 N.Y.S.2d at 923.

484. *In re M.L.*, 24 Misc. 3d at 1041, 879 N.Y.S.2d at 923.

On reargument, counsel for the guardian asked again for permission to use the gift and loan strategy, arguing that the appropriate standard for analyzing the transaction was not the "best interest" of the IP but rather the common law doctrine of substituted judgment that is incorporated in Mental Health Law section 81.21.[485] Notwithstanding continued objection by the court evaluator, the court reconsidered its previous denial and allowed the proposed gifting.[486]

4. Court-Provided Limitations on 17-A Guardians

In a contested proceeding, a father sought to be appointed as guardian of the person and property of his daughter under article 17-A.[487] The application was opposed by the guardian ad litem for the alleged mentally retarded child (who was age forty-three at the time of the decision), the Mental Health Legal Services, New York Civil Liberties Union, and New York Lawyers for Public Interest.[488] The opposition related both to the petitioner himself (and his ability to act as guardian) and the belief that an article 81 guardianship could be better tailored to the prospective ward's needs and would afford more protection than an article 17-A guardianship.[489]

While acknowledging that "Article 17-A does not specifically provide for the tailoring of a guardian's powers or for reporting requirements similar to Article 81,"[490] the court indicated that it had implicit authority under SCPA sections 1755 and 1758 to impose terms and conditions that meet the needs of the ward.[491] To address the concerns about the guardian, the court required an initial report (as guardian of the person) within six months of appointment and annual reports thereafter.[492] The court also discussed certain information that had to be included in the reports (which are similar to the requirements under article 81).[493]

5. Monitor Appointed under Article 81

In a hearing brought pursuant to a petition under article 81 of the

485. *In re* M.L., No. 92475/08, 2009 N.Y. Slip Op. 52160(U), at 2 (Sup. Ct. N.Y. Cnty. 2009).

486. *Id.* at 3.

487. *In re* Guardianship of Yvette A., 27 Misc. 3d 945, 946, 898 N.Y.S.2d 420, 421 (Surr. Ct. N.Y. Cnty. 2010).

488. *Id.*

489. *Id.*

490. *Id.* at 950, 898 N.Y.S.2d at 424.

491. *Id.*

492. *In re Yvette A.*, 27 Misc. 3d at 951, 898 N.Y.S.2d at 425.

493. *Id.*

Mental Hygiene Law for the appointment of a guardian, the court found that the alleged incapacitated person (AIP) was not presently incapacitated, but that a protective arrangement in the form of a monitor of his substantial affairs should be instituted.[494]

According to the court, the AIP was retired from a senior position at a large publicly traded corporation and his assets were over $3 million.[495] The testimony established that the AIP was hospitalized for severe depression; a course of treatment apparently resolved the depression, but resulted in a period of "hypo-mania."[496] According to the court, during the period of hypo-mania, the AIP engaged in excessive and irrational spending, citing various loans, including loans to strangers, and excessive spending on vehicles, appliances, and gifts.[497]

At the proceeding, the AIP "testified rationally and coherently" about his illness and his reasons for various actions.[498] He indicated that he was keeping his doctor's appointments and had been advised that there was at least a thirty percent chance of a relapse.[499] He testified that he made his own investment decisions in consultation with an account executive of a brokerage firm.[500]

The court evaluator did not recommend a long-term guardianship.[501]

Citing the authority under Mental Hygiene Law section 81.16(b) for protective arrangements, the court found that a protective arrangement was necessary to monitor and oversee the AIP's "financial activities and medical needs and appointments."[502] Thus, the court appointed the court evaluator, an attorney, to perform such monitoring duties with compensation at the attorney's normal hourly rates.[503] More specifically, the monitor had the right to receive and review copies of the AIP's bank and other financial records and to speak with and confer with employees of any institution holding his assets and accounts; second, to receive and review all of the AIP's physician, hospital, and other medical records and speak and confer with medical professionals;

494. *In re* John D., N.Y.L.J., Sept. 15, 2009, at 40 (Sup. Ct. Cortland Cnty.).
495. *Id.*
496. *Id.*
497. *Id.*
498. *Id.*
499. *In re John D.*, N.Y.L.J. at 40.
500. *Id.*
501. *Id.*
502. *Id.*
503. *Id.*

and, finally, to review and approve or disapprove any financial transaction in excess of $50,000.[504]

The appointment was to continue for a period of one year with the monitor authorized to apply to the court for an extension of her appointment.[505] The application for an extension would be on notice to the AIP.[506] Finally, in furtherance of the order, both the AIP and any financial institution holding any asset or account of the AIP were restrained from transferring, releasing, or paying to the AIP, or any other person, any amount over $50,000 or more without written approval of the monitor.[507]

The court acknowledged that the rules of the Chief Judge (Part 36) provided that a court evaluator is not to be appointed as guardian except under extenuating circumstances, which are to be set forth in writing by the court.[508] The final part of the court's decision is a recitation of those reasons.[509]

6. Reduction in Bond of Guardian

An order and judgment directed the guardian of the person and property to post a bond in the amount of $138,200.[510] The guardian had moved to resettle the order and judgment by reducing the bond to $45,000, to reflect the incapacitated person's assets after payments of bills and attorneys' fees.[511] The court evaluator opposed the motion, pointing out that the guardian had failed to post any bond and to obtain a commission while nonetheless exercising her powers as guardian.[512]

The court denied that the assets to be marshaled exceeded the amount of the bond.[513] The court also pointed out that the guardian made expenditures without first obtaining her bond and commission.[514] The court indicated that it had no way of determining, prior to the court examiner's review of expenditures made by the guardian, if they were appropriate.[515] The court stated that, following the filing of the first

504. *In re John D.*, N.Y.L.J. at 40.
505. *Id.*
506. *Id.*
507. *Id.*
508. *Id.*
509. *In re John D.*, N.Y.L.J. at 40.
510. *In re* Guardianship of C.C., No. 917XX/09, 2010 N.Y. Slip Op. 50759(U), at 1 (Sup. Ct. Bronx Cnty. 2010).
511. *Id.*
512. *Id.* at 2.
513. *Id.* at 3.
514. *Id.*
515. *In re C.C.*, 2010 N.Y. Slip Op. 50759(U), at 3.

annual report, if it was determined that all expenditures were properly made and the court examiner recommended the bond be reduced, the court would consider reducing the bond at that time.[516] Finally, the court refused to approve the attorneys' fees paid by the guardian to her attorney until the attorney submitted an affirmation of services.[517]

O. Small Estate Administrations: Effective Date of Increase in Threshold

According to the court, the issue was whether the increase in the small estate administration limit (to $30,000 on January 1, 2009) applied to decedents dying before that date.[518] Finding that the statute was remedial, that it lacked a legislative direction for an applicable date, and that the delay in administering the estate was not occasioned by a desire of the decedent's heirs to avail themselves of the change, the court accepted the application and issued the certificates.[519]

516. *Id.*

517. *Id.* at 4.

518. *In re* Estate of Garrick, 26 Misc. 3d 789, 790, 894 N.Y.S.2d 836, 836 (Surr. Ct. N.Y. Cnty. 2009).

519. *Id.* at 791, 894 N.Y.S.2d at 837.