TRUSTS & ESTATES

Steven Cunningham†

CONTENTS

INTRODUCTION

This article covers notable regulatory, statutory, and case law

† Mr. Cunningham is an Associate with Sullivan & Worcester, LLP; J.D., *summa cum laude*, 2012, Syracuse University College of Law; B.A./M.A., *magna cum laude*, 2009, Boston University. The author would like to thank the staff of the *Syracuse Law Review* for their assistance, as well as Lisabeth Jorgensen, Esq., whose input was invaluable.

developments related to trusts and estates for the *Survey* period of July 1, 2016 to June 30, 2017.[1]

Part I of this Article discusses changes that occurred at the federal level. This discussion will summarize noteworthy administrative activity and case law from the United States Tax Court, including the proposed regulations under Internal Revenue Code § 2704 and the United States Tax Court decisions in *Estate of Powell v. Commissioner* and *Estate of Heller v. Commissioner*. Part II surveys the trust and estate developments specifically in New York, including new legislation, regulations, and case law.

As a threshold matter, it is worth noting the federal and New York exemption amounts applicable in the *Survey* period. At the federal level, the amount of combined gross assets and prior taxable gifts needed to trigger an estate tax rose from $5,450,000 in 2016 to $5,490,000 in 2017.[2] The federal annual gift tax exclusion remained at $14,000 throughout the entire *Survey* period.[3] The threshold for gifts to a noncitizen spouse not includable in a taxpayer's gifts increased from $148,000 in 2016 to $149,000 in 2017.[4] Meanwhile, New York continues to adhere to a schedule where equalization between the state exemption amount and the federal amount will begin on January 1, 2019.[5] Accordingly, the basic exclusion amount in New York rose from $4,187,500 (for decedents who died on or after April 1, 2016 and on or before March 31, 2017) to $5,250,000 (for decedents who died on or after April 1, 2017 and on or before December 31, 2018).[6]

I. Developments at the Federal Level

A. Proposed Regulations on Valuation Discounts under I.R.C. § 2704

On August 2, 2016, the U.S. Department of the Treasury ("Treasury Department") issued proposed regulations under Internal Revenue Code § 2704 which, if enacted, would have significantly limited valuation discounts for family-owned businesses by subjecting

1. As in previous years, two sources used in the creation of this Article deserve special note: the NEW YORK STATE BAR ASSOCIATION'S *Trusts and Estates Law Section Newsletter* (released quarterly), and Sharon L. Klein, *NY's Latest Legislative Session: What Passed, What Didn't, What's Next*, N.Y.L.J. (Aug. 29, 2016).

2. *Compare* Rev. Proc. 2015-53, 2015-53 C.B. 615 § 3.33, *with* Rev. Proc. 2016-55, 2016-45 I.R.B. 707 § 3.35.

3. *Compare* Rev. Proc. 2015-53, 2015-53 C.B. 615 § 3.35(1), *with* Rev. Proc. 2016-55, 2016-45 I.R.B. 707 § 3.37(1).

4. *Compare* Rev. Proc. 2015-53, 2015-53 C.B. 615 § 3.35(2), *with* Rev. Proc. 2016-55, 2016-45 I.R.B. 707 § 3.37(2).

5. *See* N.Y. TAX LAW § 952(c)(2)(A) (McKinney Supp. 2018).

6. *Id.*

transfers of minority and nonvoting interests to intra-family members to more restrictive requirements.[7] However, despite the initial shockwave sent through the estate planning community by the proposed regulations, valuation discounts pursuant to I.R.C. § 2704 remain unchanged under the new administration. Under current law, individuals can continue to shift wealth to their family members by utilizing valuation discounts on transfers of closely held enterprises.[8] This is accomplished through the creation of minority and nonvoting interests that are transferred to other members of the family.[9] Because each family member receiving the ownership interest lacks control of the entity, the value of each such interest was reduced to reflect that lack of control.[10] In addition, the value of each minority interest is further reduced because there is a limited market for selling a minority or non-voting interest in a closely held entity.[11] Combined, these discounts relating to a minority or nonvoting intra-family member's control and marketability can significantly reduce the value of the asset for estate and gift tax purposes.[12] Meanwhile, since all or the majority of the ownership interest remains within the family, the family retains control over the entity and could theoretically enjoy a value greater than the discounted value.[13]

B. Gender-Neutral Definition of Married Couple

In September 2016, the Treasury Department issued final regulations setting forth gender-neutral definitions of "spouse," "wife," and "husband."[14] According to Treasury Regulation § 301.7701-18, "[f]or federal tax purposes, the terms spouse, husband, and wife mean an individual lawfully married to another individual. The term husband and wife means two individuals lawfully married to

---

7. 81 Fed. Reg. 51413, 51413–25 (proposed Aug. 2, 2016) (withdrawn 82 Fed. Reg. 48779 (Oct. 20, 2017)). For a comprehensive discussion of the proposed regulations, see Quincy Cotton et al., Roberts & Holland LLP, *A Sea Change in the Valuation Discounts Rules: Proposed Regulations under the Special Valuation Rules*, EST. & GIFT TAX PLAN. NEWSL., Aug. 2016; see also Martin A. Schwab, *Trust and Estate: Time-Sensitive: Give it Away While There is Still Time*, BOND SCHOENECK & KING ATT'YS (Aug. 12, 2016), https://www.bsk.com/media-center/3530-trust-estate-time-sensitive-give-it-away-while-there-still-time-8-16.

8. I.R.C. § 2704(b)(4) (2012).

9. *See id.* § 2704(b)(4), (c)(2).

10. *Id.* § 2704(b)(2).

11. *See id.* § 2704(b)(4).

12. *See id.* § 2704(b)(2), (4).

13. *See* I.R.C. § 2704.

14. T.D. 9785 (2016); 81 Fed. Reg. 60609, 60616 (Sept. 2, 2016) (codified at Treas. Reg. § 301.7701-18 (2017)).

each other."[15] The issuance of the final regulations clarifies that the federal government, consistent with the rulings by the Supreme Court of the United States, now treats marriages between two individuals, whether of the same sex or different sexes, as equals for federal tax purposes, if that marriage is recognized by any state, possession, or territory of the United States.[16] The issuance of these regulations underscores that same-sex married couples now have the opportunity to use a host of estate planning techniques that they could not previously take advantage of until recently.

C. Tax Court Examines Inclusion of Limited Partnership Interest

Another potential blow to the discounts of family-held business interests came from a 2017 decision of the United States Tax Court. In *Estate of Nancy Powell v. Commissioner of Internal Revenue*, the Tax Court examined the tax consequences of the decision by Nancy Powell's son to transfer approximately ten million dollars in cash and securities from her revocable trust to a limited partnership in exchange for a ninety-nine percent limited partnership interest.[17] Ms. Powell's two children (including the son who made the transfer on her behalf) shared the remaining one percent partnership interest.[18] The partnership agreement allowed for the entity's dissolution with the written consent of all partners.[19] At the same time as this transfer, Ms. Powell's son (as attorney-in-fact) also transferred her limited partnership interest to a charitable lead annuity trust (CLAT), the terms of which provided an annuity to a charitable organization for the rest of her life, with the remainder passing to Ms. Powell's children.[20] Ms. Powell died one week after these transfers.[21]

The court concluded that the full value of the assets transferred to the limited partnership were includible in the decedent's estate, but employed an unusual rationale to arrive at that result.[22] As a threshold matter, the court did not decide whether the partnership was valid, viewing that issue as a question of fact not properly presented for

15. Treas. Reg. § 301.7701-18 (emphasis omitted).

16. *See generally* Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015) (holding that same-sex couples have a fundamental right to marry); United States v. Windsor, 570 U.S. 744 (2013) (finding the Defense of Marriage Act unconstitutional on the basis that it denied state-granted benefits to same-sex married couples).

17. 2017 U.S. Tax Ct. LEXIS 19, at *1–2 (2017).

18. *See id.* at *4.

19. *Id.*

20. *Id.* at *4–*5.

21. *Id.* at *14.

22. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *20 (first citing I.R.C. § 2036(a) (2012); and then citing I.R.C. § 2035(a) (2012)).

review.[23] Therefore, assuming the validity of the partnership, the court first analyzed what property was included in the decedent's estate under I.R.C. § 2036(a)(2).[24] That section requires inclusion in the gross estate of all property "to the extent of any interest therein of which the decedent has at any time made a transfer . . ." if the decedent retained "the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."[25] Because Ms. Powell had retained such a power via her authority to participate in the dissolution of the partnership, § 2036(a)(2) applied.[26]

However, the court concluded that § 2036(a) did not require "the inclusion in the value of [the] decedent's gross estate of the full date-of-death value of the cash and securities" despite the fact that the statute, "read in isolation, would require that result . . . ."[27] Instead, the court held that § 2036(a)(2) only required the inclusion in Ms. Powell's gross estate of the value of the cash and securities (ten million dollars) minus the value of the limited partnership interest that the decedent got in exchange.[28] The court applied § 2036(a) in this manner to avoid the possibility that the ten million dollars could be included in her estate twice: first via § 2036(a)(2), and potentially again via her partnership interest (separately includible as property of the estate under I.R.C. § 2033).[29]

Instead, the court explained:

> [W]hen section 2036(a) (either alone or in conjunction with section 2035(a)) requires the inclusion in a decedent's gross estate of the value of assets transferred to a family limited partnership in exchange for an interest in that partnership, the amount of the required inclusion must be reduced under section 2043(a) by the value of the partnership interest received by the decedent-transferor. Consequently, when applicable, section 2036(a) (or section 2035(a)) will include in the value of a decedent's gross estate only the excess of the value of the transferred assets (as of the date of the decedent's death) over the value of the partnership interest issued in return (as of the date of the transfer).[30]

---

23. *Id.* at *45–*46 (Lauber, J., concurring).

24. *Id.* (citing I.R.C. § 2036(a)(2)).

25. I.R.C. § 2036(a)(2).

26. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *15–*16 (majority opinion) (citing I.R.C. § 2036(a)(2)).

27. *Id.* at *21–*22 (citing I.R.C. § 2036(a)(2)).

28. *Id.* at *43–*44 (citing I.R.C. § 2036(a)(2)).

29. *Id.* (first citing I.R.C. § 2036(a); and then citing I.R.C. § 2033 (2012)).

30. *Id.* at *35 (first citing I.R.C. § 2036(a); then citing I.R.C. § 2035(a) (2012); then citing I.R.C. § 2043(a) (2012); and then citing Estate of Magnin v. Comm'r of Internal Revenue, 184 F.3d 1074, 1082 (9th Cir. 1998)).

To clarify its rationale, the court turned to the analogy of a "doughnut" and a "doughnut hole." The Court explained that a combination of § 2036(a) (or § 2035(a)) and § 2043(a) functioned to bring back into the gross estate "the amount of any discounts (that is, the doughnut holes) allowed in valuing the partnership interest."[31] Put another way,

> section 2036(a)(2) or section 2035(a), in either case as limited by section 2043(a), includes in the value of [the] decedent's gross estate the amount of any discounts applicable in valuing the 99% limited partner interest in NHP issued in exchange for the cash and securities (an amount that could colloquially be characterized as the "hole" in the doughnut). Only if the gift to the CLAT of [the] decedent's limited partner interest in NHP were either void or revocable (and thus subject to section 2038(a)) would the value of her gross estate also include value of that interest (the "doughnut").[32]

Because Ms. Powell's son did not have authority under the power of attorney to gift her property, the court determined that the transfer of the partnership interest to the CLAT was revocable and, therefore, the value includible in the decedent's gross estate.[33] Thus, when this amount included under § 2033 was added to the value included under § 2036(a)(2) or § 2035, the entire value of the assets transferred to the limited partnership were included in the decedent's estate.[34]

Judge Lauber wrote a concurring opinion (joined by six others) in which he agreed with the result but not with the majority's reasoning.[35] First, the concurrence noted that the partnership may have been invalid ab initio.[36] If so, "the assets purportedly transferred to it were in fact owned by [Ms. Powell] when she died one week later. In that event, the ten million dollars of cash and securities would be includible in the value of her gross estate under § 2033."[37]

In questioning whether a valid partnership was ever formed, Judge Lauber observed that,

> [i]n comparison with the [ten million dollars] in cash and securities that the decedent relinquished for her alleged partnership interest, the other

---

31. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *26 (first citing I.R.C. § 2036(a); then citing I.R.C. § 2035(a); and then citing I.R.C. § 2043(a)).

32. *Id.* at *25–*26 (first citing I.R.C. § 2036(a); then citing I.R.C. § 2035(a); and then citing I.R.C. § 2038(a) (2012)).

33. *Id.* at *36.

34. *Id.* at *43–*44 (first citing I.R.C. § 2033; then citing I.R.C. § 2036(a)(2); and then citing I.R.C. § 2035)).

35. *Id.* at *45 (Lauber, J., concurring).

36. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *45.

37. *Id.* (citing I.R.C. § 2033).

> two supposed partners—her sons and heirs—contributed nothing more than unsecured promissory notes. [The] [d]ecedent's contribution was made by one of her sons, ostensibly on her behalf as trustee of her revocable trust, a week before her death and while she was hospitalized and in intensive care. That son was essentially nego-tiating (sic) with himself: He signed the partnership agreement both as general partner of the partnership and for his mother as her trustee.[38]

Nonetheless, Judge Lauber acknowledged that the court had determined that this issue was not properly before it.[39]

Turning to the court's analysis on the inclusion issue, Judge Lauber agreed that § 2036(a)(2) applied because Ms. Powell "clearly 'made a transfer' of the ten million dollars in cash and securities" but "retained the proverbial 'string' that pulls these assets back into her estate."[40] However, he criticized the court's expanded application of § 2043(a) and would have preferred the straightforward approach applied by the court historically.[41] To avoid the double-counting problem, he would have "read [§] 2036(a)(2), *as it always has been read*, to disregard a 'transfer with a string' and include in the decedent's estate what she held before the purported transfer—the [ten million dollars] in cash and securities."[42]

The concurring judge criticized the majority's decision to reject this straightforward solution in favor of expanding the application of § 2043(a), noting:

> Neither party in this case advanced any argument based on section 2043(a); indeed, that section is not cited in either party's briefs. And as the [c]ourt recognizes, we have not previously applied section 2043(a), as the [c]ourt does here, to limit the amount includible in a decedent's gross estate under section 2036(a).[43]

Judge Lauber noted: "This theory seemingly validates the estate's claimed discount for lack of marketability, which seems highly suspect on the facts presented."[44] More fundamentally, he opined that "[t]he [c]ourt's exploration of [§] 2043(a) seems to me a solution in

38. *Id.* at *45–*46.

39. *Id.* at *46.

40. *Id.* at *46–*47 (first citing I.R.C. § 2036(a)(2) (2012); and then citing Estate of Strangi v. Comm'r of Internal Revenue, No. 4102-99, T.C. Memo 2003-145, at 35–37 (2003)).

41. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *48 (citing I.R.C. § 2043(a) (2012)).

42. *Id.* (emphasis added) (citing I.R.C. § 2036(a)(2)).

43. *Id.* at *48–*49 (first citing I.R.C. § 2043(a); then citing I.R.C. § 2036(a); and then citing Estate of Harper v. Comm'r of Internal Revenue, No. 19336-98, T.C. Memo 2002-121, at 48 (2002)).

44. *Id.* at *49.

search of a problem. It is not necessary; the parties did not think it was necessary; and our prior cases show that it is unnecessary."[45] He further stated that,

> even if the section 2043(a) issue were properly presented, I am not sure that the [c]ourt's application of that provision is correct. It is far from clear to me that the decedent's partnership interest—a consequence of the now-disregarded transfer—can constitute 'consideration in money or money's worth' within the meaning of section 2043(a).[46]

In closing, Judge Lauber cautioned that,

> [b]y adopting an untried new theory without first hearing from the parties, we risk creating problems that we do not yet know about. The more prudent (and conservative) approach in my view would be to adhere to the letter and spirit of our precedent, leaving the law in the relatively stable position it appears to occupy now.[47]

It is not yet clear what impact the court's decision in *Estate of Powell* will have on future intra-family transfer cases. Numerous commentators have opined that *Estate of Powell* is a classic instance of bad facts making bad law.[48] Nonetheless, both the Tax Court's majority opinion and the distinctions raised by the concurrence will be important considerations for practitioners advising clients on leveraging popular discounts, as it sets forth a potential path for the IRS to pursue double taxation.[49]

D. Availability of Theft Loss Deduction under I.R.C. § 2054

In *Estate of Heller v. Commissioner of Internal Revenue*, the Tax Court considered a matter of first impression—whether an estate could take a theft loss deduction under I.R.C. § 2054 for property held by an

45. *Id.* at *49–*50 (citing I.R.C. § 2043(a)).

46. *Estate of Powell*, 2017 U.S. Tax Ct. LEXIS 19 at *50 (citing I.R.C. § 2043(a)).

47. *Id.*

48. *See, e.g.*, STEVE R. AKERS, BESSEMER TRUST, ESTATE OF POWELL V. COMMISSIONER 12 (June 2017), http://www.bessemertrust.com/portal/binary/com.epicentric.content management.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Powell% 20Summary_Website.pdf; Joseph Percopo, *Estate of Powell: A New Example of Failed Deathbed Tax Planning*, 11 WEALTHCOUNSEL Q. 44, 49–51 (2017), http://www.bluetoad.com/publication.

49. AKERS, *supra* note 48, at 3.

> The fact that eight judges adopted the double inclusion analysis may embolden the IRS to take that position in future cases, even though we do not yet know how a majority of the Tax Court judges would rule as to that issue. This raises a risk that contributing assets to an FLP (or for that matter, any entity) may leave a taxpayer in a significantly worse tax position than if the taxpayer merely retains the assets.

Id.

LLC.[50] James Heller died in 2008 owned owning a ninety-nine percent interest in James Heller Family, LLC.[51] His two children owned the remaining one percent.[52] The LLC's only asset was an account with Bernard L. Madoff Investment Securities, LLC.[53]

During the administration of James's estate, the estate received $11,385,000 from the Madoff account, which it used to pay taxes and administrative expenses.[54] Thereafter, in December 2008, the chairman of Madoff Investment Securities, Bernard Madoff, was arrested and charged with "securities fraud relating to a multibillion-dollar Ponzi scheme."[55] When Bernie Madoff subsequently pleaded guilty to various federal crimes, the interest of the James Heller Family, LLC in its Madoff account become worthless.[56]

When the estate filed its estate tax return in April 2009, it reported a $26,296,807 gross estate, which included the value of James's ninety-nine percent interest in the LLC ($16,560,990).[57] The estate tax return also included "a $5,175,990 theft loss deduction relating to the Ponzi scheme, the amount of which reflects the difference between the value of the estate's interest in [the LLC] reported on the estate tax return and the estate's share of the amounts withdrawn from the [LLC] Madoff account."[58] The IRS issued a notice of deficiency to the estate, determining that the estate could not take a theft loss deduction because no theft loss occurred *during* its settlement.[59] The estate petitioned the Tax Court for relief.

The Tax Court rejected the IRS's determination. As an initial observation, the court noted that "[w]hether an estate is entitled to a [§] 2054 theft loss deduction relating to property held by an LLC is an issue of first impression."[60] The court rejected the IRS's contentions that "the estate is not entitled to a [§] 2054 deduction because [the LLC] incurred the loss" and that "pursuant to New York law, [the LLC], not the estate, was the theft victim."[61] The Tax Court explained that the statute permits a theft loss deduction "if there is a sufficient

50. 147 T.C. 370, 373 (2016) (citing I.R.C. § 2054 (2012)).
51. *Id.* at 371.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Estate of Heller*, 147 T.C. at 371.
56. *Id.* at 372.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Estate of Heller*, 147 T.C. at 373 (citing I.R.C. § 2054 (2012)).
61. *See id.* at 373 (citing I.R.C. § 2054).

nexus between the theft and the estate's loss."[62] Applying that rationale to the case before it, the court concluded that "[t]he nexus between the theft and the value of the estate's [LLC] interest is direct and indisputable. The loss suffered by the estate relates directly to its [LLC] interest, the worthlessness of which *arose from* the theft."[63] Moreover, the court explained, the estate's entitlement to a theft loss deduction was consistent with the purpose of the estate tax: "[D]eductions are designed to ensure 'that the tax is imposed on the net estate, which is really what of value passes from the dead to the living.'"[64] Given that "[t]he theft extinguished the value of the estate's [LLC] interest, thereby diminishing the value of property available to James Heller's heirs . . . ," the Tax Court determined that "the estate's entitlement to a [§] 2054 deduction is consistent with the overall statutory scheme of the estate tax."[65]

II. Developments at the State Level

A. Enactment of N.Y. Tax Law § 632(a)(1) Pertaining to Nonresident Partners and Electing Shareholders of S-Corporations

On April 10, 2017, the New York Legislature closed a loophole in the Tax Law relating to nonresident partners and electing shareholders of S-corporations.[66] Previously, a nonresident of New York could sell a partnership interest holding business assets in New York under I.R.C. § 1060 without triggering New York income tax if the transaction was classified as a sale of an intangible partnership interest.[67] Now, under the new April 2017 amendment, the nonresident seller is no longer able to classify the sale as one of an intangible partnership interest.[68] The Tax Law now provides:

> In determining New York source income of a nonresident partner of any

62. *Id.* (first citing I.R.C. § 2054 (explaining how the value of the taxable estate shall be determined in the event that loss is incurred, arising from enumerated events and where such losses are not compensated for by insurance or otherwise); and then citing White v. Comm'r of Internal Revenue, 48 T.C. 430, 435 (1967)).

63. *Id.* at 373–74.

64. *Id.* (quoting Jacobs v. Comm'r of Internal Revenue, 34 B.T.A. 594, 597 (1936)).

65. *Estate of Heller*, 147 T.C. at 374 (citing I.R.C. § 2054).

66. Act of Apr. 10, 2017, McKinney's Sess. Law News no. 2, ch. 59, at 281 (codified at N.Y. Tax Law § 632(a)(1) (McKinney Supp. 2018)).

67. N.Y. Tax Law § 632(a)(1) (McKinney 2014).

68. N.Y. Tax Law § 632(a)(1) (McKinney Supp. 2018).

> partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-one of this part. If a nonresident is a partner in a partnership where a sale or transfer of the membership interest of the partner is subject to the provisions of section one-thousand sixty of the internal revenue code, then any gain recognized on the sale or transfer for federal income tax purposes shall be treated as New York source income allocated in a manner consistent with the applicable methods and rules for allocation under this article in the year that the assets were sold or transferred.[69]

This amendment now forces the buyer and seller to treat the transaction as an asset sale, which requires the seller to pay income tax on the gain.[70]

B. Extension of Deduction Limits for Charitable Contributions

In recent years, New York has limited the itemized charitable tax deduction to fifty percent of the federal deduction for individuals with adjusted gross income of between one million dollars and ten million dollars.[71] Additionally, for individuals with adjusted gross income over ten million dollars, the State has capped the itemized charitable tax deduction to twenty-five percent of the federal deduction.[72] With these limitations scheduled to expire at the end of 2017, this year's budget legislation extended the deduction limitations until the end of 2019 (for individuals with adjusted gross income of between one million dollars and ten million dollars) and 2020 (for individuals with adjusted gross income over ten million dollars).[73]

C. Impact of Trustee's Power to Adjust on Calculating Commissions

Estates, Powers, and Trusts Law (EPTL) § 11-2.3 allows a trustee "to pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk

69. *Id.*
70. *See id.*
71. N.Y. STATE DIV. OF THE BUDGET, FY 2018 N.Y. STATE EXECUTIVE BUDGET, REVENUE ARTICLE VII LEGISLATION, MEMORANDUM IN SUPPORT 21 (2018), https://www.budget.ny.gov/pubs/archive/fy18archive/exec/fy18artVIIbills/ REVENUE_ArticleVII_MS.pdf.
72. *Id.*
73. N.Y. TAX LAW § 615(g)(1) (McKinney Supp. 2018).

and return objectives reasonably suited to the entire portfolio."[74] In accordance with this prudent investor standard, a trustee is authorized

> to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make appropriate present and future distributions in accordance with [EPTL § 11-2.3] if the trustee determines . . . that such an adjustment would be fair and reasonable to all the beneficiaries.[75]

However, prior to 2017, the law did not clarify "whether and when adjusted amounts should be re-characterized for purposes of calculating trustee's commissions."[76] As a result, there was a "potential for conflict between co-trustees of a trust as to the method for computing commissions on re-characterized amounts."[77]

In 2017, both houses of the New York Legislature signed a bill to amend EPTL § 11-2.3(b)(5) by adding a new subpart "(G)" that attempts to create consistency and eliminate uncertainty in a trustee's power to adjust on calculating commissions.[78] EPTL § 11-2.3(b)(5)(g) will now read:

> Any exercise of the power to adjust under this subparagraph, whether from income to principal or from principal to income, shall constitute a re-characterization of the transferred amount from income to principal or from principal to income, as the case may be, for purposes of calculating commissions under article twenty-three of the surrogate's court procedure act and, for such purposes, such re-characterization shall be deemed to take effect on the date that such transfer from income to principal or from principal to income, as the case may be, is made on a trust's records.[79]

The bill's sponsor explained the addition as follows: "Effectuating a re-characterization at the time such adjustment is made is consistent with the precepts of the [Prudent Investor Act] and serves to clarify the calculation of trustee's commissions in situations where such commissions are based on the amount of the trust's income or the trust's principal."[80] Moreover, the sponsor opined, "[t]he proposed amendment will result in a consistency of practice, eliminating

---

74. N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(3)(A) (McKinney Supp. 2018).

75. N.Y. E.P.T.L § 11-2.3(b)(5)(A).

76. Legislative Memorandum of Assem. Weinstein, *reprinted in* 2017 McKinney's Sess. Law News no. 5, ch. 278, at A-340.

77. *Id.*

78. Act of Sept. 12, 2017, 2017 McKinney's Sess. Law News no. 5, ch. 278, at 842 (codified at N.Y. E.P.T.L. § 11-2.3(b)(5)(G)).

79. *Id.* The Governor subsequently signed the bill, and accordingly, the provision has since gone into law. *See id.*

80. Legislative Memorandum of Assem. Weinstein, *supra* note 76, at A-340.

uncertainty under current law."[81]

D. New York Case Law

1. Revocation of Beneficiary Designation under EPTL § 5-1.4

In *McCauley v. New York State & Local Employees' Retirement System*, the Third Department considered the impact of a divorce on a previously-signed beneficiary designation.[82] Maureen McCauley had married Richard Ely in 1970.[83] During the time that Richard worked for the Division of Criminal Justice Services, he completed three beneficiary forms designating Maureen as his primary beneficiary of his retirement benefits.[84] The most recent designation took place on May 14, 1992.[85] Thereafter, in 1999, Maureen and Richard entered into a separation agreement that was incorporated, but not merged, into a 2004 judgement of divorce.[86]

When Richard died in 2009, Maureen attempted to collect his retirement benefits, as she was still listed as the primary beneficiary.[87] In response, the Retirement System informed Maureen that the 1992 beneficiary designation had been revoked under EPTL § 5-1.4.[88] After additional administrative proceedings, the Supreme Court rejected Maureen's application and dismissed the petition.[89] Maureen appealed.[90]

The Third Department affirmed the dismissal.[91] In reaching its decision, the Third Department confirmed that, under EPTL § 5-1.4, unless expressly stated otherwise, the entering of a divorce decree or separation agreement "revokes any revocable . . . disposition or appointment of property made by the divorced individual to, or for the benefit of, the former spouse[,]" including retirement accounts.[92] Moreover, the appellate division observed:

> According to legislative history, the pertinent amendment to EPTL 5-

---

81. *Id.*
82. 146 A.D.3d 1066, 1067, 46 N.Y.S.3d 262, 264 (3d Dep't), *lv. denied*, 29 N.Y.3d 906, 80 N.E.3d 403, 57 N.Y.S.3d 710 (2017).
83. *Id.* at 1066, 46 N.Y.S.3d at 264.
84. *Id.* at 1066–67, 46 N.Y.S.3d at 264.
85. *Id.* at 1067, 46 N.Y.S.3d at 264.
86. *Id.*
87. *McCauley*, 146 A.D.3d at 1067, 46 N.Y.S.3d at 264.
88. *Id.* (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney Supp. 2018)).
89. *Id.*
90. *Id.*
91. *Id.*
92. *McCauley*, 146 A.D.3d at 1067, 46 N.Y.S.3d at 264 (omission in original) (citing N.Y. E.P.T.L. § 5-1.4).

> 1.4 [implementing this automatic revocation], which was enacted prior to [the] decedent's death, "would take effect immediately and shall apply [to a] disposition [that] takes effect only at the death of the person who executes it and such person dies on or after the effective date of this act."[93]

The court also emphasized that "EPTL 5-1.4 was enacted to prevent a [decedent's] inadvertent disposition to a former spouse where the parties' marriage terminated by annulment or divorce and the former spouse is a beneficiary in a[n] . . . instrument which the [decedent] neglects to revoke."[94]

Based on this context, the Third Department rejected the petitioner's argument that applying EPTL § 5-1.4 retroactively denied her vested rights to death benefits prior to the statute's amendment.[95] The Third Department explained that the "[d]ecedent could have altered his death benefits up until his death, which occurred after the relevant amendment to EPTL § 5-1.4, and [the] petitioner had no vested right to the death benefits at any time prior that amendment."[96] Finally, the court noted:

> According to the separation agreement between [the] petitioner and [the] decedent, the parties waived "any claim in and to the pension of the other," and that "[e]ach pension shall hereafter be the sole and separate property of the respective parties and each waives his or her claim to any and all other rights, including survivorship benefits."[97]

2. Renunciation of Executorship in Exchange for Oral Promise to Pay

In *Cherofsky v. Cherofsky*, the Second Department considered an appeal by an administrator of an estate to recover damages on behalf of a decedent for an alleged breach of an oral promise to pay money in exchange for decedent's agreement to forgo serving as a personal representative on an estate.[98] The plaintiff-appellant, Robert

---

93. *Id.* at 1067–68, 46 N.Y.S.3d at 265 (third and fourth alteration in original) (quoting Senate Introducer Mem in Support, Bill Jacket, L 2008, ch. 173).

94. *Id.* at 1068, 46 N.Y.S.3d at 265 (alterations in original) (omission in original) (quoting Kho v. Cacici, 88 A.D.3d 803, 804, 930 N.Y.S.2d 666, 667 (2d Dep't 2011)) (citing N.Y. E.P.T.L. § 5-1.4).

95. *Id.* (first citing N.Y. E.P.T.L. § 5-1.4; then citing Blackmon v. Estate of Battock, 78 N.Y.2d 735, 739, 587 N.E.2d 280, 282, 579 N.Y.S.2d 642, 644 (1991); and then citing Scism v. Fiala, 122 A.D.3d 1197, 1198, 997 N.Y.S.2d 798, 800 (3d Dep't 2014)).

96. *Id.* (first citing N.Y. E.P.T.L. § 5-1.4; then citing *Blackmon*, 78 N.Y.2d at 739, 587 N.E.2d at 282, 579 N.Y.S.2d at 644; and then citing *Scism*, 122 A.D.3d at 1198, 997 N.Y.S.2d at 800).

97. *McCauley*, 146 A.D.3d at 1069, 46 N.Y.S.3d at 265 (third alteration in original).

98. 145 A.D.3d 850, 850, 43 N.Y.S.3d 521, 522 (2d Dep't 2016).

Cherofsky, administrator for the estates of his parents, sought to recover damages from each of the defendants, his cousins, who had, during his father's life, allegedly breached their oral promises to pay his father the amount of $16,000 individually in exchange for his father's renouncement of the right to be named as co-executor of his deceased wife's estate.[99] The supreme court dismissed the complaint on the basis that Robert had failed to state a cause of action.[100]

On appeal, the Second Department affirmed the dismissal.[101] The court concluded that "even accepting [Robert's] allegations as true and giving [him] the benefit of every favorable inference, the complaint fails to state a cause of action, as the agreements alleged are void as against public policy."[102] Accordingly, the appellate division determined that the supreme court had properly dismissed the complaint.[103]

3. Construction of Will through Gift by Implication

In *Warren v. Warren*, the Third Department reviewed whether the surrogate's court properly determined that a decedent had intended to include both children and stepchildren under the residuary clause of her will.[104] Florence Warren had eight children with her husband Leonard Warren.[105] Leonard also had two children from a prior marriage, whom Florence raised but did not formally adopt.[106]

In 1993, Florence executed a will bequeathing $2,000 to each of her ten children.[107] She also directed that

> "property equal in value to the maximum amount which can pass . . . free of [f]ederal estate tax" be used to establish a testamentary trust for

99. *Id.*

100. *Id.* (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

101. *Id.*

102. *Id.* at 851, 43 N.Y.S.3d at 522 (first citing Oakeshott v. Smith, 104 A.D. 384, 388–89, 93 N.Y.S. 659, 662 (1st Dep't 1905) (holding that a contract whereby an executor agrees, for a consideration, to renounce his right to exercise the functions of his office, is void as against public policy); then citing Vill. Taxi Corp. v. Beltre, 91 A.D.3d 92, 99, 933 N.Y.S.2d 694, 699 (2d Dep't 2011); then citing Charap v. Willett, 84 A.D.3d 1003, 1004, 925 N.Y.S.2d 94, 95 (2d Dep't 2011); then citing Rimberg & Assoc. v. Jamaica Chamber of Commerce, Inc., 40 A.D.3d 1066, 1067, 837 N.Y.S.2d 259, 260 (2d Dep't 2007); then citing Ungar v. Matarazzo Blumberg & Assoc., 260 A.D.2d 485, 486, 688 N.Y.S.2d 588, 589–90 (2d Dep't 1999); and then citing Lanza v. Carbone, 130 A.D.3d 689, 691, 13 N.Y.S.3d 472, 475 (2d Dep't 2015)).

103. *Cherofsky*, 145 A.D.3d at 850, 43 N.Y.S.3d at 522.

104. 143 A.D.3d 1110, 1111, 39 N.Y.S.3d 282, 284 (3d Dep't 2016) (citing N.Y. SURR. CT. PROC. ACT § 1420(1) (McKinney 2011)).

105. *Id.* at 1110, 39 N.Y.S.3d at 283.

106. *Id.*

107. *Id.*

> [Leonard's] benefit and that, upon [his] death, the trust corpus be "divided equally among those of his [ten] children who survive him" or their descendants.[108]

The will then left the residuary of the estate to Leonard outright.[109] Florence's will did not address the possibility that Leonard would die first.[110] Leonard died in 2006, followed by Florence in 2014.[111]

The surrogate's court admitted Florence's 1993 will to probate and issued letters of administration to one of her sons.[112] Due to lifetime giving, no assets could pass from Florence's estate "free from estate tax liability."[113] The son serving as executor asserted that, "given the failure of the residuary clause in the will, the remaining assets in the estate must pass under the laws of intestacy to decedent's issue, namely, her eight biological children."[114] One of the children from Leonard's first marriage petitioned to commence a construction proceeding, "seeking . . . a determination that the will demonstrated decedent's intent to leave her residuary estate to her biological children *and* her two stepchildren."[115] The surrogate's court agreed that Florence intended to benefit all ten children and granted that part of the petition.[116]

On appeal, the Third Department affirmed.[117] As an initial matter, the court emphasized that "[t]he primary rule of testamentary construction is that a will should be read so as to reflect the actual intent of the testator"[118] and that "[e]qually well established is the axiom of testamentary construction that the testator is presumed to have intended to dispose of the whole estate by will, and did not intend intestacy as to any part of it."[119] Taken together, these principles demonstrate

> the well-settled doctrine of gift by implication . . . available in rare and

108. *Id.* (first alteration in original) (omission in original).
109. *Warren*, 143 A.D.3d at 1110, 39 N.Y.S.3d at 283.
110. *Id.* at 1110–11, 39 N.Y.S.3d at 283.
111. *Id.* at 1111, 39 N.Y.S.3d at 283–84.
112. *See id.* at 1111, 39 N.Y.S.3d at 284.
113. *Id.*
114. *Warren*, 143 A.D.3d at 1111, 39 N.Y.S.3d at 284 (citing N.Y. EST. POWERS & TRUSTS LAW §§ 1-2.10, 4-1.1(a)(3) (McKinney 2012)).
115. *Id.* (citing N.Y. SURR. CT. PROC. ACT § 1420(1) (McKinney 2011)).
116. *Id.*
117. *Id.* at 1112, 39 N.Y.S.3d at 285.
118. *Id.* (internal quotations omitted) (quoting Occhipinti v. Cappadoro, 143 A.D.2d 1015, 1017, 533 N.Y.S.2d 758, 759 (2d Dep't 1988)).
119. *Warren*, 143 A.D.3d at 1112, 39 N.Y.S.3d at 285 (alteration in original) (internal quotations omitted) (quoting Dausey v. Orans, 91 N.Y.2d 520, 525–26, 695 N.E.2d 1119, 1122, 673 N.Y.S.2d 38, 41 (1998)).

> exceptional cases where a reading of the entire will reveals that the testator intended to dispose of his [or her] property in a certain manner but through error or omission failed to make clear his [or her] exact intent or purpose.[120]

Applying this rationale to the facts before it, the appellate division determined that "while the residuary clause of the will is silent as to what would happen if decedent outlived [Leonard], all of her other testamentary dispositions evince the goal of equally divided her assets among all [ten] children, either at the time of her death or [Leonard's] death."[121] The court observed:

> [T]here is nothing in the will to suggest that [Florence] intended a contrary result with regard to the residuary estate . . . , or that she had any interest in excluding [the] petitioner and his sister from that part of her estate. The will implies the contrary and that [the] decedent considered all [ten] children as her own[.][122]

Thus, the Third Department concluded that the surrogate's court had correctly construed Florence's will as leaving the residuary estate to all ten children.[123]

4. Limitation on Reformation for Settlor's Intent

In re Carcanagues provides practitioners a lesson for avoiding one particular estate-planning pitfall for married same-sex couples involving Qualified Terminable Interest Property (Q-TIP) trusts.[124] In 1997, Jacques Carcanagues created a revocable trust.[125] The terms of the trust provided that, upon his death, the trust property would pass to an irrevocable trust for the sole benefit of Jacques's then-partner, Sergio Francescon.[126] The trust would pay all of its "net income" to Sergio and permit discretionary distributions of principal for his

---

120. *Id.* (quoting *In re* Galluci, 143 A.D.2d 1015, 1017, 553 N.Y.S.2d 758, 759 (2d Dep't 1988)).

121. *Id.* at 1113, 39 N.Y.S.3d at 285.

122. *Id.* at 1113, 39 N.Y.S.3d at 285–86.

123. *Id.* at 1113, 39 N.Y.S.3d at 286 (first citing Selner v. Selner, 261 A.D. 618, 622, 26 N.Y.S.2d 783, 787 (2d Dep't 1941); then citing *Dausey*, 91 N.Y.2d at 525–26, 695 N.E.2d at 1122, 673 N.Y.S.2d at 41; then citing Sarafan v. Landis, 18 N.Y.2d 186, 193–94, 219 N.E.2d 397, 399, 273 N.Y.S.2d 33, 36–37 (1966); then citing Mfr. & Traders Tr. Comp. v. Wimpfheimer, 281 A.D. 383, 385–86, 119 N.Y.S.2d 843, 845–46 (4th Dep't 1953); then citing *In re* Estate of Kronen, 67 N.Y.2d 587, 589, 496 N.E.2d 678, 679, 505 N.Y.S.2d 589, 590 (1986); and then citing Standish v. Standish, 4 A.D.3d 858, 859, 772 N.Y.S.2d 430, 431 (4th Dep't 2004)).

124. No. 3399/2014, 2016 N.Y. Slip Op. 31765(U), at 2 (Surr. Ct. N.Y. Cty. Aug. 17, 2016).

125. *Id.* at 1.

126. *Id.*

health, support, and maintenance.[127]

In 2013, facing a terminal illness, Jacques begin organizing his estate plan.[128] In May 2013, Jacques executed a holographic will, naming Sergio—"whom he described as his partner in a civil union, as the sole beneficiary of '[his] estate.'"[129] Thereafter, in October 2013, Jacques transferred his interests in an apartment and commercial condominium in Manhattan to his revocable trust.[130] On the day following this transfer, Jacques married Sergio.[131] Unfortunately, Jacques neglected to amend his revocable trust to allow the irrevocable trust for Sergio to qualify as a QTIP trust eligible for the estate tax marital deduction.[132]

After Jacques died in 2014, Sergio and the remainder beneficiaries of the irrevocable trust petitioned the surrogate's court to reform the trust so that it would qualify as a QTIP trust.[133] "Without the marital deduction, [Jacques's] estate would be liable for substantial estate taxes that would otherwise be deferred until the death of [Sergio]."[134] They also noted that "neither the estate nor [Sergio] has the liquid assets to pay such taxes and that any payment required would have a 'catastrophic' effect on [Sergio's] financial affairs."[135] Moreover, the petitioners argued that the reformation was necessary to effectuate Jacques's "intent to take advantage of the marital deduction."[136]

The surrogate's court declined to reform the language of the trust agreement. The court explained that "the paramount duty of the court is to determine the intent of the testator from a reading of the will in its entirety."[137] However, the court reasoned, Jacques "did not express an intent to secure the specific tax advantages sought through reformation. Indeed, [Jacques] could not have intended that the Trust qualify for the marital deduction, since, at the time of the Trust's creation in 1997, same-sex marriages were prohibited in every

127. *Id.*
128. *Id.* at 1–2.
129. *In re Carcanagues*, 2016 N.Y. Slip Op. 31765(U) at 1–2 (alteration in original).
130. *Id.* at 2.
131. *Id.*
132. *Id.* (citing I.R.C. § 2056(7)(B) (2012)).
133. *Id.* at 1–2.
134. *In re Carcanagues*, 2016 N.Y. Slip Op. 31765(U) at 2–3.
135. *Id.* at 3.
136. *Id.* at 4 (internal quotations omitted).
137. *Id.* at 5 (first citing Dausey v. Orans, 91 N.Y.2d 520, 525, 695 N.E.2d 1119, 1122, 673 N.Y.S.2d 38, 41 (1998); and then citing Snide v. Johnson, 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981)).

state."[138] Thus, the court reasoned, "[c]ontrary to [the] petitioners' contention, the requested reformation would require the court to ignore [Jacques's] intent as reflected in unambiguous language in the Trust."[139] Although the court stated that it "considered the unfortunate tax consequences of this result," it ultimately shifted responsibility for that outcome back to Jacques, who "had the power to amend the Trust so that it would qualify for the marital deduction, but he did not do so."[140]

5. Decanting to a Supplemental Needs Trust to Avoid Loss of Benefits

In *Kroll v. New York Department of Health*, the Second Department considered whether the trustees of an irrevocable trust could exercise a power of appointment to transfer the principal of such trust to a new supplemental needs trust for the benefit of the same individual in order to preserve his eligibility for Medicaid and other government benefits.[141] Moses Ratowsky had created the original trust for the benefit of his grandson, Daniel Schreiber, and provided him with the right to withdraw the entire principal when Daniel became twenty-one.[142] At age twenty, Daniel had certain disabilities and received Medicaid and Social Security income.[143] Concerned that Daniel's right to withdraw would make the principal of the original trust an available resource thereby disqualifying him from receiving those government benefits, the trustees sought "the [s]urrogate's [c]ourt's approval, pursuant to EPTL [§] 10-6.6, to exercise a power of appointment of assets from the original trust to a new trust, which would contain the same terms, conditions, beneficiaries, and trustees, and which also contains supplemental needs trust protection."[144] As framed by the trustees, the transfer to the new trust would allow Daniel "to continue receiving governmental benefits and, at the same time,

138. *Id.* at 7.

139. *In re Carcanagues*, 2016 N.Y. Slip Op. 31765(U) at 8. The court noted that the most problematic language in the trust was the disability provision, which could serve to limit the income interest needed to qualify the trust as a QTIP trust. *Id.* at 8.

140. *Id.* at 10.

141. 143 A.D.3d 716, 717, 39 N.Y.S.3d 183, 184 (2d Dep't 2016).

142. *Id.* at 717, 39 N.Y.S.3d at 184–85.

143. *Id.* at 717, 39 N.Y.S.3d at 184.

144. *Id.* at 717, 39 N.Y.S.3d at 185 (citing N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney Supp. 2018)).

permit the assets in the new trust to be used to enhance [his] quality of life."[145]

The New York State Department of Health objected to the petition on the basis that the new trust would be considered a "self-settled" trust because Daniel's assets were used to create it.[146] As a "self-settled" trust, the Department of Health contended that the trust must contain a "payback" provision pursuant to EPTL § 7-1.12, which would allow the State to recover all amounts remaining in the new trust upon Daniel's death, up to the total value of all medical assistance paid on his behalf.[147] Because the new trust did not contain a payback provision, the Department of Health argued that the surrogate's court must not approve the exercise of the power of appointment.[148] The court rejected the Department's argument and approved the exercise.[149] The Department of Health appealed.[150]

In affirming the surrogate's court's decision, the Second Department explained that "[c]ontrary to the State's contention, at the time that the trustees exercised their power of appointment, the principal contained in the original trust did not constitute a 'resource' or 'income' of [Daniel] as those terms are defined under state and federal law."[151] The appellate division noted that Daniel had not funded the original trust, so the principal of that trust could not be a resource or income of his.[152] Accordingly, the court reasoned, "[i]nasmuch as the principal of the original trust was not [Daniel's] asset at the time that it was decanted into the new supplemental needs trust, it cannot be said that [Daniel] 'created' the new trust."[153] Because Daniel was not the "creator" of the new trust, the appellate division concluded that a payback provision was not required.[154]

---

145. *Id.*

146. *In re* Kroll, 41 Misc. 3d 954, 957, 971 N.Y.S.2d 863, 865 (Sup. Ct. Nassau Cty. 2013).

147. *Id.* (citing N.Y. SOC. SERV. L. § 366(2)(b)(2)(ii), (iii) (McKinney Supp. 2018)); N.Y. EST. POWERS & TRUSTS LAW § 7-1.12 (McKinney 2002).

148. *Id.*

149. *Id.* at 959, 971 N.Y.S.2d at 866.

150. *Kroll v. N.Y. Dep't of Health*, 143 A.D.3d 716, 718, 39 N.Y.S.3d 183, 185 (2d Dep't 2016).

151. *Kroll*, 143 A.D.3d at 720, 39 N.Y.S.3d at 186 (first citing SOC. SERV. § 366(5)(e)(1)(iv), (v); then citing 42 U.S.C. §§ 1382a, 1382b (2012)).

152. *Id.* at 720, 39 N.Y.S.3d at 186–87 (citing 42 U.S.C. § 1382b(e)(2)(A)) (first cross referencing 42 U.S.C. § 1382a(a)(2)(G); and then cross referencing 42 U.S.C. § 1382b(e)(3)).

153. *Id.* at 720, 39 N.Y.S.3d at 187 (citing 18 N.Y.C.R.R. § 360-4.5(b) (2017)).

154. *Id.* at 719, 39 N.Y.S.3d at 186 (first citing SOC. SERV. § 366(2)(b)(2)(iii); and then citing N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(a)(5)(iv) (McKinney 2002)).

6. Exercising a Power of Appoint to Eliminate a Beneficiary

In *In re Hoppenstein*, the New York County Surrogate's Court examined a situation where the trustees of a trust exercised a decanting power in order to remove one of the trust settlor's children as a beneficiary, but did not do so in accordance with the requirements of EPTL § 10-6.6.[155] Reuben Hoppenstein had created a 2004 irrevocable life insurance trust for the benefit of his children, including his daughter Cheryl.[156] Subsequent to the trust's creation, Reuben grew unhappy with Cheryl due to what he perceived as "her excessive demands for money."[157] As a result, in 2008, Reuben exercised his right under the trust instrument to eliminate the withdrawal rights of Cheryl and her branch of the family.[158] Thereafter, in 2012, the trustees exercised their discretionary power to distribute principal by transferring the life insurance policy from the 2004 trust to a newly-created 2012 trust.[159] As noted by the surrogate's court, "[t]he 2012 Trust was similar in all respects to the 2004 Trust, except that it eliminated Cheryl and her descendants as beneficiaries."[160] When Reuben died in 2015, the ten-million-dollar proceeds from the life insurance policy were paid to the 2012 trust.[161]

Cheryl and her children objected to the distribution of the ten million dollars to the 2012 trust rather than the 2004 trust.[162] In particular, they asserted "that the transfer did not comply with the requirements of EPTL § 7-1.9 (allowing a trust creator to revoke a trust with the consent of all beneficiaries) or EPTL § 10-6.6 (the 'decanting' statute)."[163] The surrogate's court observed that the trustees had relied on neither of those statutes, but made the transfer based on "their power to make discretionary distributions of principal" under the trust instrument.[164] Noting that "[t]he procedure for decanting outlined in EPTL § 10-6.6 has no bearing on this case," the court pointed to the language of EPTL § 10-6.6(k): "This section shall

155. *In re* Hoppenstein, 2015/2918/A, 2017 N.Y. Slip Op. 30940(U), at 4–6 (Surr. Ct. N.Y. Cty. Mar. 31, 2017) (citing N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney Supp. 2018)).

156. *Id.* at 2–4.

157. *Id.* at 4.

158. *Id.*

159. *Id.*

160. *In re Hoppenstein*, 2017 N.Y. Slip Op. 30940(U) at 4.

161. *Id.* at 4–5.

162. *Id.* at 5.

163. *Id.* at 6 (first citing N.Y. EST. POWERS & TRUSTS LAW § 7-1.9 (McKinney Supp. 2018); and then citing N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney Supp. 2018)).

164. *Id.*

not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law. . . ."[165] After rejecting the remaining arguments advanced by Cheryl and her children, the surrogate's court determined that "the transfer of the policy was valid," granting summary judgment on that issue in favor of the trustees.[166]

CONCLUSION

Similar to the last *Survey* year, this year did not involve a seismic shift in trust and estate law. Although the proposed regulations under I.R.C. § 2704 would have qualified if enacted, the momentum behind them slowed with the results of the 2016 election. *Estate of Powell* may prove to have significant implications for estate planning, but the import of that decision is not yet clear. Instead, this year's trust and estate law developments mostly consisted of refinements to existing law. However, with the passage of tax reform at the end of 2017, next year's *Survey* will certainly detail significant developments in this area of the law.

165. *In re Hoppenstein*, 2017 N.Y. Slip Op. 30940(U) at 6 (quoting N.Y. E.P.T.L. § 10-6.6).

166. *Id.* at 8–9.