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Protecting a Married Child's Inheritance: The Benefits of a Parent Using a Trust

BY HERB FINEBURG
Special to the Legal

When a client's child is getting married, it is common for the family attorney to receive a call before the wedding ceremony. The principal concern is how to protect the client's assets, ultimately the child's inheritance, from a child's divorce. The initial reaction is to have the engaged couple immediately sign a prenuptial agreement. The added stress for the children of signing a legal contract covering a divorce is not the ideal way to start a new marriage. Moreover, the potential damage between the parent and the new son- or daughter-in-law by creating distrust for raising the need for a prenuptial agreement could be permanent. A common fear is that this could impact the ability of the parents to see their grandchildren.

It is typically advisable for the parents to leave their estate in trust for their children to solve the issues of divorce, the death of their child and the child's potential general creditor issues. Without a trust, it would not be unusual for a child's inheritance to be claimed by an ex-spouse in a divorce, or to pass upon death to the child's surviving spouse, who may remarry and have other children (including stepchildren). As a result, some of the client's assets regrettably and not surprisingly too often never reach their grandchildren, the undeniable primary intended benefactors of a grandparent. Instead, unrelated strangers will succeed to your client's wealth when left to the child outright and unprotected.

A prenuptial agreement is a contract between the child and the child's spouse, which can cover a child's inheritance. However, that prenuptial agreement can be later modified by the couple, even terminated or otherwise voluntarily circumvented in any manner by the child. The parent has no rights regarding the maintenance, amendment or termination of the child's prenuptial agreement and no right to be notified of any change in or termination of the prenuptial agreement.

Further, the ex-spouse can seek to invalidate a prenuptial agreement. For example, it is time consuming to organize the preparation of a prenuptial agreement and engage counsel for both parties. It may be difficult to establish whether an objecting party, who ultimately signs the negotiated prenuptial agreement on the eve of his or her

HERB FINEBURG *is a shareholder of Offit Kurman and managing partner of its Philadelphia office. Fineburg focuses his practice on tax law, where he provides his clients with strategic and cost-saving benefits in connection with business structuring and transactions, income and estate taxation, and wills and trusts.*

wedding, did so voluntarily and with a full understanding and with adequate disclosures and consideration.

In contrast to a prenuptial agreement, the parent's trust cannot be disturbed or invalidated by the child's ex-spouse and is the best shield against a child later compromising your client's estate in a divorce or upon death. The trust is an agreement between the parent and the trustee, of which the child is merely a limited qualified beneficiary. The ex-spouse is not involved.

The general rule is that inherited and gifted assets are not part of a child's marital estate subject to division in the event of divorce. Therefore, some argue the trust and prenuptial agreement are unnecessary to protect the parent's estate. However, as a practical matter, it is very typical for child to re-title assets jointly with a spouse or to purchase jointly owned property with the child's inheritance. Simply stated, the inheritance is usually eventually co-mingled with the couple's other assets. Once an asset is re-titled or co-mingled in any manner it is permanently and irrevocably part of the marital estate subject to division in divorce. Consider the 37 year-old son who called his mother at her retirement party asking for his "inheritance" so his wife could buy a business. Moreover, regardless of what a prenuptial agreement provides concerning death, the child will invariably name his or her spouse as the primary beneficiary under the child's last will regardless of what the prenuptial agreement provides.

Although gifts and inheritances are not part of the child's marital assets, it is practical to assume that a few judges will consider those assets in a divorce when addressing alimony and although less likely, when exercising the judicial discretionary authority in the equitable division of marital assets. The trust has material benefits in this situation since it is literally not owned by the child and includible on the couples statement of

> *"Under the trust agreement, the court must recognize that the trustee has a duty to preserve the trust assets for other current or contingent trust beneficiaries, which the judge should not ignore.*

assets and must be respected as such by the court as a matter of law. In fact, under the trust agreement, the court must recognize that the trustee has a duty to preserve the trust assets for other current or contingent trust beneficiaries, which the judge should not ignore. Consider the parent who gifted a 2% business interest to his son who was divorced six months later. The parent and child spent significant sums on attorney fees on two years of discovery litigation in the son's divorce proceedings, which would have been eliminated or minimized with a transfer in trust.

Regardless of whether your child is married, the trust established by a parent for a child is the safest way to protect the parent's assets for their children, grandchildren, and other descendants, or if the child has no children, for the family of other children, or other relatives or favorite charities. Also, it should be anticipated that the parents of the child's spouse will have an inheritance for their child, which may also be in a trust that does not include the client's child as a trust beneficiary. Basically, it is most common for a client to exclude a son- or daughter-in-law from the client's estate plan. Regardless of the wealth of their parents, it is still up to the child and the child's spouse to earn and accumulate their own independent wealth for each other and their children.

To review, a multigenerational trust allows the parent's assets to pass to the child protected from all the child's creditor claims including claims of an ex-spouse in divorce. The multigenerational trust also assures that the inheritance to pass from the child to the grandchildren if a child predeceases his or her spouse and can also avoid future estate and inheritance taxes. Trusts may be structured to create the opportunity for multigenerational wealth to pass without being depleted by death taxes. Further, it is not uncommon for anyone who inherits wealth to be subjected to requests for money or loans. Stating that their inheritance is "in trust" protects the child from the emotional difficulty of saying "no" to a relative or a friend, or the child succumbing to questionable cause seeking donations. A prenuptial agreement addresses none of these issues and is not a substitute for proper estate and gift planning through a trust.

For the same reasons, trusts are also recommended for lifetime gifts to children. Consider the widow who transferred the 100-year family ocean-front vacation house to her single daughter. Five years later the daughter died of cancer and left all her assets to her boyfriend. When the widow went to "her" shore house she discovered the locks were changed. The boyfriend answered the door and explained how he now owned the widow's treasured family home. A simple trust would have avoided this regrettable nightmare.

A properly prepared trust agreement can assure the child full access to enjoy the trust assets while protecting those assets from outsider claims. The trust can even cover large expenses, such as the purchase of the child's home. The trust can take title to the home and allow the child's family to live there for free or require the child to cover some or all expenses. If the child does later divorce, the child's trust will keep the house and the spouse will be asked to leave. While if the couple owned the house directly, the son may be asked to leave and he will typically lose the house if there are children of the marriage primarily cared for by his spouse. Alternatively, the couple can purchase the house in their names and the trust can lend the couple the money to purchase the home. The loan would preserve the trust's equity in the home through a mortgage.

In conclusion, utilizing trusts is the most responsible course of action for a parent in protecting his or her wealth for children and other descendants, whether or not the child is married. In the case of marriage, if desired the prenuptial agreement can still be used as the so called "belt and suspenders," knowing that a prenuptial agreement has greater exposure to being unenforceable or unilaterally circumvented by the child. •

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Five Reasons Estate Planning Is Essential for Women

BY NICOLE L. PHATAK
Special to the Legal

Women control one-third of total household financial assets in the United States, yet the majority of women do not have an estate plan in place. Even those who do have an estate plan may not understand how it works or where their assets go upon their deaths. As more women become business owners and high-earning professionals, it is more important than ever for women to take control of their estate plan in order to achieve their financial goals and pass on wealth to the next generation. Here are five reasons why is it imperative for every woman to have an estate plan:

- **To Reduce Estate Taxes**

In 2021, the federal estate tax exemption is $11.7 million per individual. If an estate is worth more than $11.7 million at the time of death, the value of assets over the exemption amount will be taxed at a rate of 40%. It is important to keep in mind that the value of an estate includes all assets at the time of death including life insurance, retirement accounts and real property. Many states also have state death taxes that may be assessed at the time of death.

The concept of portability allows the executor of an estate to transfer the unused federal estate tax exemption amount to the surviving spouse to utilize at the time of his or her death. Therefore, a married couple can effectively pass a total of $23.4 million of wealth at time of death in 2021 without implicating federal estate tax. In order to make a portability election, the executor must file IRS Form 706, the "United States Estate (and Generation-Skipping Transfer) Tax Return."

A well-drafted estate plan may help avoid death taxes and preserve your family's wealth while passing assets to the next generation. For example, you may create generation-skipping trusts for the benefit of your children. A generation-skipping trust (sometimes referred to as a dynasty trust) allows your children to pass the trust assets down to the next generation, and so on, without any additional death taxes being paid. Generation-skipping trusts are one of many drafting techniques that an estate attorney can include in your estate plan to reduce death taxes for future generations.

- **To Take Advantage of the Benefits of Gifting**

In 2021, you can gift up to $15,000 to any person you know without any tax consequences (i.e., the "annual exclusion amount"). If you wish to give away more

NICOLE L. PHATAK *is a member of Clark Hill's Pittsburgh office as a member in the tax and estate planning group. She focuses her practice in estate planning, estate administration and gift and individual taxation.*

than the annual exclusion amount, you may do so, but you will be required to file a Federal Gift Tax Return (Form 709). The good news is that you will not be required to pay any federal gift tax until your total lifetime gifts exceed the federal estate tax exemption amount which is $11.7 million in 2021. Wealthy women take advantage of gifting to lower the value of their taxable estates at the time of death.

Another benefit of gifting is to create a philanthropic legacy for your family. By making charitable gifts during your lifetime you can not only reduce the size of your taxable estate, but also teach future generations the value of supporting charities that important to you. Charitable trusts are a great way to reduce the size of your taxable estate during your lifetime while benefitting a charity and your family. A charitable remainder trust provides for fixed annual payments to you and other beneficiaries for a specified period of time, at the conclusion of which the assets remaining in the trust are distributed to the charity you specify. On the other hand, a charitable lead trust provides an income stream for the named charitable beneficiary for a period of time and the remaining assets are distributed to non-charitable beneficiaries. There are many variations of charitable trusts that could be explored as part of the planning process.

- **To Protect Your Beneficiaries**

Most women assume that if they die tomorrow, all their assets will be distributed to their surviving spouse, or if they do not have a surviving spouse, to their children. In reality, if you die without an estate plan, your assets will be distributed pursuant to the intestate laws of the state in which you reside at the time of your death. For example, in Pennsylvania, if you die with a surviving spouse and no children, but your parents also survive you, your surviving spouse only receives the first $30,000 of your estate plus one-half of the remaining estate. Your parents would be entitled to the remaining one-half of your estate. The only way to be certain that your assets will be distributed as you wish at the time of your death is to work with your attorney to create an estate plan.

> *"While it is easy for women to let estate planning fall to the bottom of their constantly growing to-do list, having a well thought out and up-to-date estate plan is one of the most important things she can do to protect her family for generations to come.*

When was the last time you confirmed who you have listed as the beneficiaries of your retirement accounts and life insurance policies? Many women do not realize that retirement accounts and life insurance policies pass pursuant to the beneficiary designation form on file with the company at the time of death and not pursuant to your will or trust. It is essential to coordinate your beneficiary designation forms with your estate plan in order to protect your beneficiaries.

- **To Protect Family Wealth/Family Business**

As women become wealthy, particularly business owners, they are often subject to frivolous lawsuits. One common technique for avoiding potential liability is to create an irrevocable trust to hold your assets. An irrevocable trust could be created for the benefit of one or more beneficiaries during their lifetimes. The beneficiaries could then access the trust funds for their health, support, maintenance, and education. The trust agreement can be drafted to allow the beneficiaries to use trust funds to start or invest in a business, purchase a new home or even finance a wedding.

When the individual creating the trust (known as the grantor) makes a contribution of assets to the trust, the individual is making a gift for the purposes of federal gift tax and the gift must be reported on a Federal Gift Tax Return (Form 709). Since the grantor is making a completed gift, the assets transferred to the trust are no longer part of her taxable estate for death tax purposes. This type of estate planning is particularly valuable if you have assets or closely held business interests that you anticipate will significantly grow over time. The downside to drafting an irrevocable trust for the benefit of another is that the grantor must divest herself of the assets. The assets are now owned by the trust and grantor cannot receive any benefit from them.

Further, if you are the owner of a closely held business it is imperative that you develop a succession plan for passing the business on to the next generation. Does anyone in your family have the knowledge (or the desire) to keep the business going? Is the business liquidated or sold at the time of your death? Your estate plan should answer these questions and allow for an efficient transfer of your business at the time of your death.

- **To Determine Who You Can Trust**

It is vital for a woman to have a network of advisors that she can trust. Do you have an attorney? A financial adviser? What about an accountant or an insurance agent? By having these trusted individuals in place now you can avoid the fear and indecision that occurs during an emergency or upon a death in the family.

How do you start? Schedule an initial meeting. Don't be afraid to ask the tough questions, such as: How much will this cost? How much help and guidance can you provide? What is your level of experience with these types of issues? What should I be concerned about? It is much easier to ask the tough questions now than to be surprised later when an emergency occurs.

Equally important is appointing the right fiduciaries in your estate planning documents. A fiduciary is an individual who has a duty to act on behalf of someone else, such as an executor or a trustee. It is important to determine who will serve in these roles when you are in a calm state of mind and to consider all options before making any major changes.

While it is easy for women to let estate planning fall to the bottom of their constantly growing to-do list, having a well thought out and up-to-date estate plan is one of the most important things she can do to protect her family for generations to come.

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Estate Planning Considerations for Women After an Unprecedented Year

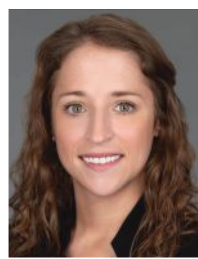
BY STEFANIE PATE
AND MELANIE CUDDYRE
Special to the Legal

The year 2020 was challenging for everyone. Parents assumed the role of teachers and tutors, family members became primary caregivers, loved ones were lost, and everyone had to adapt to the "new normal." Areas in our lives that required additional support, and the need for improvement in communication with our families, friends and advisers were highlighted. Individuals were forced to ask the question: "What if?" What if something happened to me and my spouse, what if my business lost its leader, what if I had to take control of my family's future?

For many women, a "what if?" situation leaves them in the dark with regard to finances and wealth. In the past, women played a more traditional role in their households. Women were responsible for homemaking and were less likely to be employed outside of the home. In 2021, while many women still choose to stay at home, that is no longer the expectation. Women are the primary or sole breadwinners in 40% of U.S. households. Additionally, four out of 10 U.S. businesses are owned by women. See, "Women & Wealth, Prosper Manning & Napier's Guide to Financial Planning," July 2020, at 15-17.

Despite this advancement, women continue to be less involved in estate planning and wealth management than men. If they have estate plans, married women are rarely included in their preparation, and are often simply told where to sign. Today, women are increasing their monetary contribution to their families, and generating wealth in their individual names. Yet 65% of women are less likely to talk about finances with friends than topics such as health or work issues. Why is this? Perhaps it is because women don't know how to initiate these discussions or don't understand the implications of a basic estate plan. Women both with and without an estate plan may not know the answer to their "what if?" questions. After a year that highlighted the lack of answers, now more than ever women should take control of their ability to answer that question.

PATE


CUDDYRE

STEFANIE PATE *is a partner in Leech Tishman Fuscaldo & Lampl's estates and trusts and taxation practice groups, as well as the nonprofit organizations team. She is based in the Pittsburgh office.*

MELANIE CUDDYRE *is an associate with the firm and a member of the estates and trusts and taxation practice groups, as well as the nonprofit organizations group. She is also based in the Pittsburgh office.*

A basic estate plan addresses many "what if?" situations. What if I am unable to make my own financial and health care decisions?

What if I become incapacitated? Included in a basic estate plan are a financial power of attorney, health care power of attorney and living will. A financial power of attorney allows an individual to appoint an agent to make their financial decisions if they are unable to do so. Individuals may consider their spouse, sibling, friend, or close advisor. A health care power of attorney allows an individual to appoint an agent to make their health care decisions if they are no longer able to do so. Individuals often choose someone who lives locally. A living will allows an individual to set forth their wishes with regard to their preferences for treatment and care when in an end-stage medical condition. This document outlines guidance for their healthcare agent and providers to follow while on a life support system.

> *"Working to answer some of these major "What if?" scenarios allows women to protect their future, their family's future and the future of their business.*

What if something happens to me or my spouse? A will is a document in which an individual directs where their assets will go upon their death. The will may include specific bequests to individuals or charities, establish trusts, or divide assets into shares and distribute them accordingly. An individual also designates an executor or personal representative who is responsible for the distribution of assets, payment of taxes, and other administrative duties. Also important for many parents, a will allows you to designate a guardian for minor children. The guardian will be who your children live with, who emotionally supports them, and who cares for them until they reach the age of majority. For individuals who may have loved ones with a disability, any inheritance can be tailored to that person's specific needs. If that person receives or could receive government benefits in the future, proper planning can avoid any disqualification from those benefits.

A basic estate plan allows a person to make these choices for themselves. If the individual never executes an estate plan, then these important decisions are made by a court or pursuant to state law. Both of those scenarios may lead to unintended outcomes and can be avoided through the execution of the above estate planning documents.

Business owners should ask themselves "What if?" What if I am unable to run my business? Who will take over? What happens to my interest?

For business owners, a business succession plan will address those questions. An attorney will review the business's formation and governing documents, financials, and any existing estate planning documents of the business owner. By modifying those documents or existing estate plans, a business owner can determine who will fill their shoes when they are no longer a part of the business by reason of retirement, disability, death and more. Will it be existing co-owners, a family member, or a third-party? Selecting that person requires careful consideration of the nature of the business and its future objectives. A business succession plan may also provide for the buyout of an owner's interest. You worked hard during your lifetime, how will your interest in the business be monetized? Should you apply for women-owned small business certification? All of these decisions should be made prior to your death. Otherwise, existing governing documents or state law determine what happens, which may be unfavorable for everyone involved.

Working to answer some of these major "What if?" scenarios allows women to protect their future, their family's future and the future of their business. Women work hard every day. Whether they are tackling the role of homemaker or employed outside of the home, women deserve to take part in decisions related to their wealth and future. Meeting with an estate planning attorney and other wealth advisers provides opportunities to initiate these conversations. 2020 has shown women that now, more than ever, is the time to become an active participant in their estate and wealth planning. Engaging in the decision-making process eliminates some uncertainty so that the next time women are asked "What if?," they already know the answer. ●

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Top 10 Developments, Lessons and Reminders of 2020

BY SHARON L. KLEIN, JENNA M. COHN AND SAMANTHA Q. ADAMS
New York Law Journal

2020 saw significant developments, lessons and reminders:

(10) Tax Preparers Can Use Electronic Signatures To File Tax Documents. Although tax preparers are permitted to sign electronically to file returns on behalf of their clients for federal purposes, preparers were previously required to obtain a "wet signature" on an e-file authorization for New York purposes. As a result of a law enacted on Aug. 24, 2020 and immediately effective, preparers are now authorized to accept electronic signatures on e-file authorizations to file tax documents on behalf of their clients (N.Y. Tax Law §177-aa). According to guidance (TSB-M-20(1) C, 2(I), issued Oct. 6, 2020) from the Department of Taxation and Finance (the Department), the Department will not require that any specific technology be used, but the electronic signature process must identify and authenticate the taxpayer. For remote transactions, the preparer must record the name, Social Security number, address, and date of birth of the taxpayer, and verify that the personal information on record is consistent with the information provided through record checks with the applicable agency or institution or through credit bureaus or similar databases.

(9) Adopted Persons Can Finally Access Their Birth Certificates. An adoptee's birth records have been sealed in New York for decades. Whether the original intent was to protect the adoptive parties or guard the confidentiality of the birth mother, after years of intense lobbying, the Clean Bill of Adoptee Rights Law (A5494/S3419) became effective on Jan 15, 2020. Under the new law, adult adoptees can receive their birth certificates. According to Gov. Andrew Cuomo "Where you came from informs who you are, and every New Yorker deserves access to the same birth records—it's a basic human right." Indeed, the legislation itself provides that denial of access to self-identifying data is "a violation of that person's human rights and is contrary to the tenets of government." More than 3,600 adoptees filed applications for their birth certificates within 48 hours of the law's effect. If the adopted person is deceased, the adopted person's descendants or legal representative can obtain a copy of the adopted person's birth certificate.

(8) The Attorney-Client Privilege, a Trio of Reminders and Developments. *(1) The protections of the attorney-client privilege have been extended to lifetime trustees.* Previously, under Civil Practice Law and Rules (CPLR) §4503(a)(2), the attorney-client privilege extended to clients who were personal representatives. No beneficiary of an estate was treated as a client of the attorney solely by reason of their status as beneficiary, and the existence of the fiduciary relationship between the personal representative and the beneficiary did not by itself constitute a waiver of the privilege between the attorney and the personal representative. CPLR §4503(a)(2) has now been amended to extend the protection of the attorney-client privilege to lifetime trustees (A7601/S6409).

SHARON L. KLEIN *is President of Family Wealth for the Eastern U.S. Region at Wilmington Trust, N.A. The author wishes to thank her Family Wealth colleagues* **JENNA M. COHN** *and* **SAMANTHA Q. ADAMS** *for their valuable assistance. This article includes developments through Dec. 31, 2020.*

(2) An executor may waive a decedent's attorney-client privilege. An executor's ability to waive a decedent's attorney-client privilege is not limited to circumstances where the waiver benefits the estate. In *Matter of Thomas,* 113 N.Y.S.3d 447, the executor was self-interested in the testimony of the decedent's attorney to establish the transfer of an asset from the decedent to the executor. The court allowed the waiver as the attorney's testimony provided the best evidence of the decedent's intent and rejected the notion that an executor can waive the attorney-client privilege only if the waiver benefits the estate.

(3) Attorneys should separate personal and work emails to avoid attorney-client privilege preventing release of personal emails. In *Matter of Estate of Paragon*, 2019 NY Slip Op 33893(U), the administrator requested that the contents of the decedent's Google email account be released to her to provide insight into the decedent's wishes about the disposition of real property. The decedent used the email account for his law practice in addition to his personal email correspondence. Estates, Powers & Trusts Law (EPTL) §§13-A-3.1 and 13-A-3.2 distinguish between access to the content of an electronic communication and access to a catalogue of electronic communications (like the "to" and "from" lines of an email, without content). The default rule for personal representatives is that privacy is on: The custodian may disclose the catalogue of digital communications, but content access is not permitted unless the decedent consented to disclosure or the court determines that disclosure is reasonably necessary for the administration of the estate.

In *Paragon*, the decedent neither used an online tool offered by Google to allow his executor access nor had a will that controlled disposition of his digital assets. If Google released the contents of decedent's electronic communications, even if the contents of those emails were reasonably necessary to the administration of the estate, it was very likely that the contents would contain communications protected by the attorney-client privilege. Accordingly, the court granted the administrator access to the non-content information of the emails only.

> *"The protections of the attorney-client privilege have been extended to lifetime trustees.*

(7) Was the Statute of Limitations for Civil Cases Tolled by Executive Orders? In light of the COVID-19 pandemic, on March 20, 2020, Gov. Andrew Cuomo issued Executive Order (EO) 202.8, tolling the time limit for the commencement, filing, and service of legal actions and proceedings. The tolling was extended through repeated EOs until Nov. 3 by EO 202.67, which ended the extension as of Nov. 4. The original EO used the word "toll," while other EOs used the word "suspension." This discrepancy in wording has led to conflicting interpretations as to whether the EOs operate as a true tolling (so the total number of days in the successive EO orders would be added to the statute of limitations [SOL]), or whether the SOL was just suspended during that period. If the latter, no additional time would be added to the SOL period, which would have expired Nov. 3. Even if the EOs operated to toll the SOL, if a claim would not have expired during the EO extension period, it is unclear whether the tolled days can still be added to the SOL period. It might be that the legislature has to clarify the situation. In the meantime, it may be prudent for practitioners to memorialize the toll to preserve their positions.

(6) Electronic and Remote Procedures … During the Pandemic and Beyond. *(1) Remote Witnessing and Notarization.* On March 19, Gov. Cuomo issued EO 202.7 to allow virtual notarization and on April 7 issued EO 202.14 to allow virtual witnessing. The EOs have been extended through Jan. 29, 2021 (EO 202.87).

Virtual notarization. Remote notarization will be valid if the following conditions are met: (1) if not personally known to the notary, the person seeking notary services must present valid photo identification during the video conference; (2) the video conference must allow for direct interaction between the signatory and the notary (no pre-recorded videos); (3) the signatory must affirmatively represent that he or she is physically situated in New York; (4) the signatory must transmit by fax or electronic means a legible copy of the signed document directly to the notary on the same date it was signed; (5) the notary may notarize the transmitted copy of the document and transmit it back to the signatory; and (6) the notary may repeat the notarization of the original signed document as of the date of execution provided the notary receives the original signed document together with the electronically notarized signed document within 30 days after the date of execution.

Virtual witnessing. Virtual witnessing of documents, including wills and trusts, will be valid if the following conditions are met: (1) if not personally known to the witnesses, the person seeking witnesses must present valid photo identification during the video conference; (2) the video conference must allow for direct interaction between the signatory, the witnesses and the supervising attorney, if applicable (no pre-recorded videos); (3) the witnesses must receive a legible copy of the signature pages by fax or electronic means on the same date of signing; (4) the witnesses may sign the transmitted copy of the signature pages and document and transmit back to the signatory; and (5) the witnesses may repeat the witnessing of the original signature pages provided the witnesses receive the original signature pages together with the electronically witnessed copies within 30 days after the date of execution.

Legislation was introduced to codify the EOs and allow virtual notarization and witnessing permanently (A10569/S8317), but did not pass in the 2019-20 legislative session.

(2) Electronic Filing. On March 22, the Chief Administrative Judge suspended all nonessential paper and electronic filings in New York State courts (Administrative Order [AO] 78/20). Electronic filing (e-filing) of new non-essential matters through New York State Courts Electronic Filing System (NYSCEF) was phased into all New York counties during May 2020. Beginning June 10, new actions or proceedings in pending actions were permitted exclusively by electronic filing through NYSCEF where available (AO 121/20). AO 267/20 ended the requirement of e-filing as of Nov. 4, allowing parties to commence new matters and proceed in pending matters by any means of filing and service normally permitted, unless the filing is inconsistent with the health and safety needs of the public and court personnel. Nevertheless, AO 267/20 strongly urges parties to avoid in-person filing and service during the pandemic, and to rely instead on e-filing. There are 47 counties with authorized electronic filing programs through NYSCEF in the Surrogate's Courts (AO 247/20, Appendix A). If NYSCEF is unavailable, the Electronic Document Delivery System (EDDS), is available in most other courts. EDDS permits users to securely transmit documents to the courts that may be considered filed upon request.

Considering the uncertainty created by COVID-19, it may behoove practitioners to e-file where possible to prevent delays that may arise if future restrictions are imposed on usual court proceedings. Undoubtedly, the pandemic has accelerated the move to electronic filings, which

2020 continues on 6

Adapting Asset Protection Trusts to Changes in Circumstances

BY MELISSA NEGRIN-WIENER AND MARCUS O'TOOLE-GELO
New York Law Journal

An Irrevocable Trust used for asset protection may have a different name depending on who you ask (Irrevocable Income Only Trust, Asset Protection Trust, Medicaid Qualifying Trust, etc.), but its primary purpose remains the same. This type of trust, after the passing of the applicable look-back period, exempts the assets contained within from being counted as an available resource for qualifying for homecare or institutional Medicaid.

As long-term care needs and financial circumstances can change, the key to drafting these trusts is maintaining flexibility. For senior clients in particular, having a trust with maximum flexibility is essential.

As an example, an attorney prepares an Irrevocable Trust for a couple in their early 70s, and their home and some liquid assets are transferred to the Trust.

The following are two possible circumstances that may occur in the future that would require flexibility in the drafting of this document:

(1) One or both clients require homecare or institutional care before the expiration of the applicable lookback period.

(2) There is a falling out with one or more beneficiaries or trustees.

A properly drafted trust should address both of these potential situations.

REVOCATION

If the grantor of the Trust requires care before the expiration of the applicable lookback period, an asset protection trust may need to be revoked (in favor of spousal refusal or a promissory note plan, for example). While this type of trust is explicitly stated to be irrevocable, EPTL §7-1.9 permits revocation in certain circumstances. To allow this procedure to be used, the trust should not have any specific directions as to revocation. It should merely state that the trust is irrevocable. Then, the interested parties can revoke the otherwise irrevocable trust by following the statutory procedures of EPTL §7-1.9.

Revoking an irrevocable trust requires the consent of all of the living beneficiaries, contingent or otherwise. The statute specifically excludes dispositions to "heirs, next of kin or distributees (or by any term of like import)." Id. Absent from

MELISSA NEGRIN-WIENER *is a partner at elder law and estate planning firm Cona Elder Law PLLC in Melville. She can be reached at 631.390.5000 or mnegrin@conalaw.com. Senior associate* **MARCUS O'TOOLE-GELO** *can be reached at motoole@conalaw.com.*

this list is a disposition to issue, which is not considered to be a term of like import. *Matter of Dodge*, 25 N.Y.2d 273, 283 (1969). As such, practitioners should take care when naming issue per stirpes as remainder beneficiaries. This may create an expansive list of contingent beneficiaries including minors (grandchildren or great-grandchildren), who cannot consent to revocation, even if a guardian is appointed. *Smith v. Title Guarantee & Trust Co.*, 287 N.Y. 500, 504 (1942).

The best way to manage this issue is to have the grantor reserve a limited power of appointment over the remainder of the trust. EPTL 10-3.2. The power of appointment should be limited by excluding the grantor, creditors, the grantor's estate, or creditors of the grantor's estate. The limited power of appointment can be exercised by will or written instrument. From there, there are two options. First, the trust can be limited to beneficiaries who can consent (children, for example), and the grantor simultaneously executes a last will and testament exercising the limited power of appointment to designate their issue per stirpes as beneficiaries.

Second, the trust could instead have full beneficiary dispositions, but if the need ever arose to revoke it, the grantor (or their agent under a power of attorney) can exercise that power of appointment by written instrument and delete the non-consenting beneficiaries. The first method is preferable to some practitioners, as it does not rely on an agent under a power of attorney (if the grantor is incapacitated, as is often the case) being asked to change beneficiaries, which can lead to estate litigation. See *Matter of Ferrara*, 7 N.Y.3d 244, 254-55 (2006). One should also be aware that if the Trust has two grantors, it cannot be revoked after the death of one of the grantors. *Culver v. Title Guarantee & Trust Co.*, 296 N.Y. 74, 77-78 (1946).

CHANGING TRUSTEES AND BENEFICIARIES

Medicaid planning aside, estate plans should be malleable. Clients' wishes and

> *"As long-term care needs and financial circumstances can change, the key to drafting these trusts is maintaining flexibility. For senior clients in particular, having a trust with maximum flexibility is essential.*

desires change over time, principally with regard to fiduciaries and beneficiaries. An Asset Protection Trust should be drafted so that changes can be made as the grantor desires.

First, the trust should include a provision that allows the grantor to add or remove Trustees, with the caveat that they cannot appoint themselves or their spouse. This can be helpful if there are disagreements among the trustees or if they are not cooperating with respect to the grantor's wishes (for instance, to sell or buy a residence). The grantor can simply remove the offending trustee and appoint a more cooperative one.

Second, using the tools discussed above, the grantor can reserve a limited power of appointment to change beneficiaries of both the principal and the remainder beneficiaries upon the grantor's death. The grantor can make changes to the inheritance arrangements, as well as removing any uncooperative beneficiaries.

AMENDMENT

Elder law practitioners will on occasion encounter a trust drafted by another attorney which does not have the necessary flexibility. Thankfully, EPTL §7-1.9 not only allows revocation, but also allows amendment of irrevocable trusts. This is an important tool, when available (assuming the beneficiaries can and will consent), to make changes to a Trust that was drafted without appropriate flexibility. For instance, a trust amendment could be used to grant the grantor the necessary limited power of appointment to make changes to beneficiaries as they wish.

UTILIZING POWERS OF ATTORNEY

Many times, when needing to make changes or take advantage of flexibility in a trust, one or more of the grantors will be incapacitated. It is thus essential that the grantor has an expansive power of attorney with explicit trust powers and a statutory gifts rider with unlimited gift making authority, including to the agent. An agent under a properly drafted power of attorney can exercise the grantor's power to change trustees or beneficiaries, consent to revocation, or even create a trust in the first place.

Agents and their attorneys should be mindful that an agent must always act in the best interest of the principal. Prudent Medicaid planning is, of course, in the principal's best interest. Caution, however, should be taken if an agent is being asked to change beneficiaries or make transfers, and there is discord in the family. The power of attorney gifting statute (GOL §5-1514(5)) requires any gift to be in the best interest of the principal, and courts take this requirement very seriously, as seen in *Matter of Ferrara*.

While the General Obligations Law is not specific as to the power to amend or revoke a trust, courts have held that an agent can do so as long as the powers include "estate transactions" and "all other matters" as defined by the statute. *Matter of Perosi*, 98 A.D.3d 230, 238 (2d Dept. 2012). This can be especially helpful if the client first comes to you when the grantor is already incapacitated, and you must rely on an older power of attorney drafted by someone else. If you are the attorney creating the plan in the first place, make sure that the modification section of the power of attorney and the gifts rider specifically includes the authority to create, amend, and revoke trusts.

With the escalating costs of long-term care, seniors are increasingly recognizing the importance of protecting their assets. A Trust is a core part of an asset protection plan, but one that requires precision in drafting. The goal of the drafting attorney should be to maximize flexibility while complying with eligibility rules for Medicaid. By providing tools to adapt to changes in circumstances, practitioners can best protect their senior clients. ●

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likely will continue even after the current health crisis is over.

(3) Remote Meetings. Through EOs 202.8 and 202.18 Gov. Cuomo modified New York's Business Corporation Law and Not-for-Profit Corporation Law to allow New York business and not-for-profit organizations to hold meetings remotely or by electronic means. Legislation codifying the EOs, provided certain guidelines and procedures are met, and extending them to religious institutions was enacted on June 17 and is effective through Dec. 31, 2021 (A10498/S8412). Due to its success during the pandemic, a bill was introduced (A10768/S8706) to permanently permit business and not-for-profit corporations, religious institutions, and cooperatives to hold virtual meetings of shareholders, members, and trustees. The bill failed to pass in the 2019-20 legislative session.

(5) Telecommuting, New York's Long Income Tax Reach and the Impending Tristate Battle ... The coronavirus pandemic has upended how people work, with millions telecommuting. Generally, an employee pays taxes in the state in which the employee physically performs services. Even prior to the pandemic, however, New York imposed a so-called "convenience of employer rule," taxing an employee in the employee's telecommuting location if the employee is working from home through the employer's

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necessity. If, however, the employee telecommutes for their own convenience, the employee's wages for those workdays will be classified as if the employee was working from their employer's physical office (20 CRR-NY 132.18(a)). With coronavirus-imposed telecommuting, the question becomes, at whose convenience is the employee working from home?

On Oct. 19, the Department posted FAQs regarding telecommuting, including the following question: "My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?"

The Department responded that, if a nonresident's primary office is in New York state, even if they are telecommuting from outside the state due to the pandemic, their days telecommuting are considered days worked in New York, unless their employer has established a bona fide employer office at their telecommuting location. For an office to be considered a bona fide employer office, the office must either contain or be near specialized facilities or satisfy a number of secondary and other factors (which can include the home office being a requirement of employment, the employee performing some core duties at the home office, meeting with clients on a regular and continuous basis at the office and using a specific area of the home exclusively to conduct the business of the employer that is separate from the living area) (TSB-M-06(5)I, issued May 15, 2006).

New York's long reach comes at the expense of its neighbors: New Jersey and Connecticut award their residents credits for taxes paid to New York, prompting those states to be among the latest to have filed an amicus brief in New Hampshire's Motion for Leave To File Bill of Complaint Against Massachusetts in the Supreme Court (*New Hampshire v. Massachusetts*, 2020, court file No 220154). The Complaint challenges a state's constitutional authority to tax a nonresident who is telecommuting from their home state and neither lives nor physically works in the taxing state. According to New Jersey's amicus brief (Amicus Curiae Brief for States of New Jersey, Connecticut, et. al. in Support of New Hampshire, filed Dec. 22, 2020), New Jersey may credit up $1.2 billion to its residents for taxes paid to New York while working at home in New Jersey just for the 12-month period beginning March 2020. Connecticut may credit residents up to $444.5 million for income taxes they paid to New York. As the states prepare for battle, with the constitutionality of the convenience of the employer rule potentially at stake, it will be prudent for taxpayers to keep careful track of days worked remotely, particularly since tax credits may not eliminate double taxation.

(4) Post-Mortem Right of Publicity Enacted—Estate Tax Issues to Follow? The right of publicity is an individual's right to control and profit from the commercial use of their name, image or likeness, and to prevent others from exploiting their persona for commercial gain. The right of publicity is governed by state law. While some states, like California, recognize post-mortem publicity rights, New York extended the right of publicity to living New Yorkers only. As a result of a bill (A5605C/S5959D) signed into law on Nov. 30, effective as of May 29, 2021 (N.Y. Civ. Rights Law §50-f), celebrities domiciled in New York who die after the effective date will be afforded post-mortem rights of publicity for 40 years after death. The statute explicitly provides that those rights are property rights, freely descendible and transferable by the deceased or any subsequent owner, including by contract, gift, trust or any other testamentary instrument. In the absence of an express testamentary transfer, these rights will pass under a residuary disposition.

The law applies only to celebrities: Subject to certain exceptions, deceased personalities (defined as those whose name, voice, signature, photograph or likeness has commercial value at the time of, or because of, their death) have a cause of action against anyone who uses those features for commercial purposes without consent. Deceased performers (actors, singers, dancers and musicians) can prevent unauthorized digital replicas.

While the new law provides heirs with important rights to enable them to profit from commercial use of a celebrity's persona and police unauthorized commercial exploitation, creating a specific post-mortem right of publicity will probably also have estate tax consequences. Whether or not heirs are planning to exploit the publicity right, this property right will likely be includible in the gross estate for estate tax purposes—a right that is not susceptible to easy valuation. Consider Michael Jackson's estate, where it was widely reported that the estate tax value of his right of publicity was filed with a value of $2,105 and the IRS' initial valuation was over $435 million, and Whitney Houston's estate, where the IRS initially increased her right of publicity income valuation from the reported $200,000 to over $11.7 million. It will be prudent for practitioners to consider this new post-mortem right in planning. Restricting the right of publicity after death would likely reduce its estate tax value, but at the cost of reducing its value to heirs. Transferring the right to a trust if a celebrity is early in their career and the value is low may be one solution; others may involve investigating different ownership structures designed to minimize estate tax value. Considering insurance to offset the increased value of the estate may merit consideration.

(3) Sweeping Legislation Regarding Third-Party Reproduction Modernizes New York Law. The Child-Parent Security Act (CPSA [N.Y. Fam. Ct. Act §581-101]), signed into law on April 3, 2020 and effective Feb. 15, 2021, revolutionizes New York law by legally establishing a child's relationship to his or her parents where the child is conceived through assisted reproduction. The CPSA modernizes the definition of parent by overhauling existing law in tying parent to intent, particularly before conception, and setting out rules for determining parentage in the third-party reproduction context. The CPSA institutes pre-birth judgement procedures, which allows those seeking to be recognized as parents, as well as those looking to be released from parenting duties, to obtain a judgement prior to birth that clarifies the status of the child and the intended parents.

The CPSA allows gestational surrogacy and provides the surrogates with a Bill of Rights, including the right to health and life insurance, overturning New York's current law which criminalizes paid surrogacy arrangements.

In the event of divorce, the CPSA recognizes an embryo disposition agreement between parties with joint dispositional control over the embryos, allowing them to enter into a written agreement giving all legal rights and dispositional control to one of the parties. The party relinquishing control is absolved of parental responsibility and, unless he or she agrees in writing prior to the embryo transfer to be a parent, will not be considered a legal parent of a resulting child.

(2) New York Finally Revises Its Power of Attorney Form. New York will finally have a new power of attorney (POA) form, ending years of lobbying to replace the overly complex current form. Among the most significant changes, the new legislation (A5630/S3923), which was signed into law on Dec. 15, 2020, reforms New York's POA form by: (1) eliminating the Statutory Gift Rider (SGR), which has different execution formalities from the POA, and inserting the SGR gifting provisions in the POA's Modifications Section; (2) allowing for substantially compliant language instead of the exact statutory wording; (3) providing safe harbors for those who accept a POA in good faith without actual knowledge that the signature is not genuine; (4) establishing a procedure for a third party to reject a POA, setting forth the reasons for the rejection, and allowing the proponent to respond within 10 business days; (5) allowing damages to be recovered against those who unreasonably refuse to accept a valid POA; (6) expanding an agent's power to make gifts totaling $5,000 in a calendar year (instead of the current $500) without requiring a modification to the form.

The new POA law becomes effective on June 14, 2021. Any POA and SGR that was previously validly executed will remain valid.

(1) Planning Remains Critical To Minimize New York Estate Tax. Effective for those dying on or after Jan. 1, 2019, New York's state tax exemption amount is linked to the 2010 federal exemption amount of $5 million, indexed for inflation (N.Y. Tax Law §952(c)(2)(B)). The 2021 New York exemption amount has increased to $5.93 million. President-elect Biden's plan calls for lowering the federal estate exemption, possibly to $3.5 million. New York's exemption will not automatically adjust to federal decreases in the exemption. Accordingly, in a strange twist of events, New York could potentially have a *higher* estate tax exemption than the federal amount until it acts affirmatively to lower its exemption.

The New York estate tax regime maintains its built-in "cliff" (N.Y. Tax Law §952(c)(1)). Only estates that are less than or equal to the exemption amount on the date of death will pay no tax; for those estates that are between 100% and 105% of the exemption amount, there's a rapid phase-out of the exemption; and those estates that exceed 105% of the exemption amount will lose the benefit of the exemption amount entirely and be subject to tax from dollar one, potentially subjecting the assets that cause an estate to fall off the cliff to estate tax rates that exceed 100%.

To minimize the risk of falling off the cliff, practitioners can consider a number of techniques to reduce estates to or below the exemption level. Some practitioners include so-called "santa clauses," provisions that direct payments to charity of the amount that causes an estate to fall off the cliff and generate an estate tax of over 100%. Since New York does not impose a current gift tax, lifetime gifting can leverage the federal exemption while reducing the New York estate tax (provided the donor survives three years since the New York gross estate will be increased by the amount of any taxable gift made within three years of death). Spousal Lifetime Access Trusts (SLATs) and Delaware Asset Protection Trusts (DAPTs) are popular gifting techniques because they can allow the donor access to trust funds through the spouse (SLATs) or directly (DAPTs). New Yorkers can also purchase real or tangible property located outside New York (being mindful of other states' tax consequences), since that out-of-state property will not be subject to New York estate tax.

The fact that the New York estate tax exemption is not portable between spouses makes it key to utilize the exemption amount of the first to die. Failure to do so potentially exacerbates the cliff threat if all assets of the first-to-die pass to the survivor and that pushes the second estate into cliff territory. In general, the use-it-or-lose-it nature of the New York exemption makes it prudent for practitioners to consider techniques that maximize flexibility after death, including disclaimer trusts (the first-to-die leaves everything outright to the survivor, who can disclaim some portion or all of the New York exemption amount into a credit shelter trust), utilizing partial Qualified Terminable Interest Trust (QTIP) elections (the first-to-die leaves assets to the survivor in a QTIP Marital Trust, and the fiduciary can make a partial QTIP election, using the first-to-die's exemption amount to the extent the QTIP election is not made) or Clayton QTIPs (the first-to-die's estate is eligible to pass into a QTIP Marital Trust, but only if the executor makes a QTIP election, otherwise property typically passes into a credit shelter trust). ●

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