TRUSTS & ESTATES

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I. FEDERAL LEGISLATION: TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("Tax Relief Act") into law.[1] The Tax Relief Act extended the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), with some modifications.[2] While this legislation has far-reaching consequences on various areas of law, perhaps the most considerable impact is felt within the trusts and estates community.

Unless additional legislation is passed by Congress, the Tax Relief Act will only be in effect for a short time, and the tax law in effect prior to 2001 will return on January 1, 2013.[3] A general overview of the Tax Relief Act's most prominent changes are summarized below.

A. Estate Tax

For estates of decedents who died in 2010, the Tax Relief Act retroactively applies a thirty-five percent maximum estate tax rate and a $5 million estate tax exemption.[4] However, the Tax Relief Act allows the estates of decedents who died in 2010 to elect out of the estate tax system and into a carryover basis regime.[5]

Due to the retroactive estate tax changes, the IRS deadlines for filing and paying estate tax returns for decedents who died between

1. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010).

2. *Id.* § 101.

3. *See id.*

4. *Id.* § 302 (codified as amended at 26 U.S.C. § 2010 (2010)).

5. *Id.* § 301.

January 1 and December 17 of 2010 were extended multiple times, whereas decedents who died after December 17, 2010 fell under the normal nine-month rule.[6]

The Tax Relief Act provides that the federal estate taxes for 2011 and 2012 return to a thirty-five percent maximum rate on estates that are valued over the $5 million exclusion amount.[7] This results in a step-up in income tax basis for all of a decedent's assets. Previously, there was a $1.3 million increase in basis available to an estate under EGTRRA, with an additional $3 million increase in basis for appreciated assets received by surviving spouses.[8]

B. Portability

The Tax Relief Act contains a portability feature, which essentially allows a surviving spouse's estate to take advantage of any unused estate tax exemption of a deceased spouse who died after December 31, 2010.[9] To make use of this allowance, the executor of the deceased spouse must irrevocably assign the decedent's unused exclusion amount to the surviving spouse and file a timely estate tax return.[10] However, because a surviving spouse may only use the exemption of the last spouse they survived, if a survivor remarries, their portability could be affected.

C. Gift Tax

The 2010 Tax Relief Act left the 2010 gift tax rate and exemption the same as it was under EGTRRA. The annual exclusion amount remained at $13,000 per donee, individuals retained a $1 million lifetime gift tax exemption, and gifts exceeding the lifetime exemption would be taxed at a thirty-five percent rate.[11]

D. Generation-Skipping Tax

At the beginning of 2010, the generation-skipping transfer (GST) tax had been eliminated, along with the estate tax. The Tax Relief Act retroactively reinstated the GST tax for transfers made in 2010;

6. I.R.S. Notice 2011-76 (Sept. 13, 2011) *available at* http://www.irs.gov/pub/irs-drop/n-11-76.pdf.

7. *Id.* § 302.

8. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 1022, 115 Stat. 38, 76-77 (2001).

9. Tax Relief Act § 303. The $5 million GST tax exemption is not portable between spouses. *See id.* § 302.

10. *Id.* § 303.

11. *Id.* § 302.

however, the applicable exclusion amount was increased to $5 million[12] (up from $3.5 million for 2009 transfers) and the GST tax determined under Internal Revenue Code (IRC) secion 2641(a) for 2010 was zero.[13] This effectively means that there was no gift tax for GST in 2010. However, a donor could make an affirmative exemption allocation on IRS Form 709 filed for the year the gift was made. To make the GST allocation, a donor must file Form 709 even if they do not actually owe any GST or gift tax for 2010.

For GST transfers in 2011 and 2012, the Tax Relief Act provides a tax exemption of $5 million, and the GST tax rate is thirty-five percent.[14]

E. Charitable Giving and Qualified Charitable Distributions

The Tax Relief Act renewed qualified charitable distribution provisions for 2010 and 2011.[15] These provisions allow each individual (age 70.5 or over) the option to rollover up to $100,000 from an individual retirement account to a qualifying charity without recognizing the assets transferred as income.[16] In addition, these qualified charitable distributions may satisfy required minimum distributions for the donor during the applicable tax year.[17]

II. NEW YORK LEGISLATION

A. Marriage Equality Act

On June 24, 2011, Governor Cuomo signed into law the New York Marriage Equality Act[18] (the "Marriage Equality Act"), which recognizes the right of same-sex couples to marry in New York State. In addition to permitting same-sex marriage, the Marriage Equality Act also provides that:

> No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather

12. *Id.* (codified as amended at 26 U.S.C. § 2010 (2010)).
13. 26 U.S.C. § 2641(a).
14. Tax Relief Act § 302.
15. *Id.* § 725 (codified as amended at 26 U.S.C. § 408).
16. *Id.*
17. *Id.*
18. Act of June 24, 2011, ch. 95, 2011 McKinney's Sess. Laws of N.Y. 723 (codified at N.Y. DOM. REL. LAW § 10-a(1) (McKinney Supp. 2011)).

than a different sex.[19]

The Marriage Equality Act, which had an effective date of July 24, 2011, has a significant influence on many areas of law within New York, with notable impacts in the area of trusts and estates. A few examples include the following:

1. Inheritance

Perhaps the most important impact within the trusts and estates laws since the inception of the Marriage Equality Act is its influence on inheritance rights. The Marriage Equality Act makes it possible for the surviving spouse of a same-sex marriage to inherit from the deceased spouse's estate. Under the laws of intestacy, the surviving spouse would inherit the first $50,000 and one half of the residue if the decedent is also survived by issue, or all of the probate estate if the decedent is not survived by issue.[20]

2. Estate Tax

For the estates of decedents who died on or after July 24, 2011, the New York taxable estate of an individual in a marriage with a same-sex spouse is required to be computed in the same manner as if the deceased individual were married for federal estate tax purposes.[21] This means the same deductions and elections allowed for opposite-sex spouses are now allowed for same-sex spouses, whether or not a federal estate tax return is filed.[22]

3. Property Ownership: Tenancy by the Entirety

Generally, under Estates, Powers and Trusts Law (EPTL) section 6-2.2, when two or more people acquire property, they own the property as tenants in common, unless it is expressly stated that they wish to own the property as joint tenants.[23] However, New York law allows for a unique type of ownership if those two people are "a husband and wife."[24] If a married couple acquires property, title is established as tenants by the entirety, unless it is expressly declared that the ownership

19. N.Y. DOM. REL. LAW § 10-a(2).

20. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney Supp. 2011); N.Y. DOM. REL. LAW § 10-a(2).

21. *See* N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(8)C (July 29, 2011); *see also generally* N.Y. DOM. REL. LAW. § 10.

22. *See* N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(8)(C).

23. N.Y. EST. POWERS & TRUSTS LAW § 6-2.2.

24. *Id.*

is a joint tenancy or tenancy in common.[25] Not all married couples would even want to hold title as tenants by the entirety, nevertheless this form of ownership was previously only permitted for opposite-sex spouses.[26]

Although EPTL section 6-2.2 has not yet been amended to sex-neutralize its language, the Marriage Equality Act effectively provides that property acquired by same-sex spouses after July 24, 2011 will create a tenancy by the entirety between them just as though they were an opposite-sex married couple.[27] However, since the new legislation is not retroactive, in order for a same-sex couple who owned real property prior to July 24, 2011 to change title and now own that property as tenants by the entirety, the owners must have a new deed prepared and recorded in the property records where the property is situated.[28]

The examples of how the Marriage Equality Act has changed the landscape of trusts and estates law for same-sex couples are too numerous to fully explain in this *Survey*. It will be important for practitioners to recognize how the Act, in conjunction with case law, will influence their clients, particularly with regard to the examples discussed herein, and other situations, such as preference to serve as administrator as a surviving spouse, family exemptions, and the elective share, among many others.

B. Amendment to New York Power of Attorney Law

The previous *Survey* article discussed the changes in the New York law with regard to powers of attorney.[29] Beginning September 12, 2010, New York statutory powers of attorney must comply with the amended Article 5, Title 15 of the General Obligations Law.[30] In 2009, New York amended the statutory short form power of attorney law in an attempt to reduce abuses of power by agents.[31] Unfortunately, the 2009 amendments resulted in a number of unintended results and ambiguities. The 2010 amendments were drafted to clarify the previous amendments

25. *Id.*

26. *See id.*

27. *See* Act of June 24, 2011, ch. 95, 2011 McKinney's Sess. Laws of N.Y. 723 (codified at N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2011)).

28. N.Y. REAL PROP. LAW § 9-291 (McKinney 2006).

29. Martin W. O'Toole, *Trusts and Estates*, *2009-10 Survey of New York Law*, 61 SYRACUSE L. REV. 961, 965 (2011).

30. *See* Act of Aug. 13, 2010, ch. 340, 2010 McKinney's Sess. Laws of N.Y. 1089 (codified at N.Y. GEN. OBLIG. LAW §§ 5-1501-1514 (McKinney 2011)).

31. N.Y. GEN. OBLIG. LAW §§ 5-1501-1514 (McKinney 2009).

to the law which were made effective on September 1, 2009.[32]

The 2010 revisions are retroactive to September 1, 2009.[33] Powers of attorney that were properly drafted and executed before September 12, 2010 remain valid in New York. Also, powers of attorney executed outside of New York continue to be valid in New York, as long as they comply with New York law, or laws of the state in which they were executed.[34]

The primary changes to New York powers of attorney based on the 2010 amendments include the following: (a) there is no longer automatic revocation of existing powers of attorney and any revocation must be express and must comply with the notice requirements found in the 2010 amendments; (b) certain powers of attorney issued primarily for a business or commercial purposes are not subject to the requirements of this law; and, (c) powers of attorney may be used to make gifts of up to $500 per year in the aggregate; for gift-giving authority over the $500 limit, a separately executed statutory gifts rider must be executed at the same time as the power of attorney.[35]

C. Medicaid Recovery

In the 1993 Omnibus Budget Reconciliation Act (OBRA), the federal government required states to provide for a law containing an estate recovery provision and gave states the option to either limit or expand Medicaid recovery.[36] In response to OBRA, New York passed legislation expanding Medicaid recovery, by amending section 369 of the Social Services Law.[37] The effective date of the amended law is April 1, 2011. Regulations from the Commissioner of the New York State Department of Health were issued on September 8, 2011,[38] followed by an Administrative Directive on September 26, 2011.[39]

Previously, Medicaid estate recovery was limited to a person's estate passing by intestacy or under the terms of a valid will. Thus,

32. *See* Act of Aug. 13, 2010, ch. 340, 2010 McKinney's Sess. Laws of N.Y. 1089 (codified at N.Y. GEN. OBLIG. LAW §§ 5-1501-1514).

33. *See id.*

34. *See id.* at 1100.

35. *See id.* at 1099.

36. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13612(a), 107 Stat. 627 (enacted August 10, 1993).

37. Act of Mar. 31, 2011, ch. 59, 2011 McKinney's Sess. Laws of N.Y. 315 (codified at N.Y. SOC. SERV. LAW. § 369 (6) (McKinney Supp. 2012)).

38. 18 N.Y. COMP. CODES R. & REGS. tit. 360, § 7.11 (1989).

39. NEW YORK STATE DEP'T OF HEALTH, 11 OHIP/ADM-8, EXPANDED DEFINITION OF "ESTATE" FOR MEDICAID RECOVERIES (2011).

Medicaid could not recover a decedent's property that passed to a beneficiary outside of probate, which included property passing by operation of law or by virtue of a beneficiary designation.

The amended law expanded the definition of "estate" to include "any other property in which the individual has any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests."[40] This change effectively means that Medicaid can now recover an individual's "real and personal property" and other assets that can pass outside of a will or intestacy. This new law leaves non-probate assets, such as life estates in real property passing at death, joint bank accounts, retirement accounts, and some trusts, within Medicaid's reach.

III. REGULATORY ANNOUNCEMENTS

A. Filing Requirements for New York Estate and Generation-Skipping Transfer Taxes Not Affected by the Federal 2010 Tax Relief Act

TSB-M-11(1)M explains that the due date for filing the federal estate tax return for estates of individuals dying after December 31, 2009, and before December 17, 2010, was extended to September 19, 2011.[41] However, the extension does not apply for New York purposes, and New York State Estate Tax Returns must be filed within nine months after the date of death, unless an extension is received.[42]

B. Supplemental Information on New York State Estate Tax Filing Requirements Related to the Federal 2010 Tax Relief Act

As mentioned in a prior *Survey*, the New York State Department of Taxation and Finance (the "Department") advised that a separate qualified terminable interest property (QTIP) election can be made in New York when no federal return is required to be filed.[43] TSB-M-11(9)M (issued July 29, 2011) further clarifies that even if a federal estate tax return is filed solely to allocate GST exemption, elect portability, or otherwise, the same QTIP election reflected on the federal return must be made for New York estate tax purposes.[44] If a QTIP election is not made on the federal return, it may not be made for

40. *Id.*

41. N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(1)M (Feb. 3, 2011).

42. *Id.*

43. O'Toole, *supra* note 29, at 965; N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(9)M (July 29, 2011).

44. N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(9)M.

New York purposes.[45] This advisory also notes that the federal portability election allowed under the Tax Relief Act is not permitted for New York State estate tax purposes, where the unified credit is fixed at $1 million.[46]

In addition, although the time for making a qualified disclaimer under IRC section 2518 was extended the by the Tax Relief Act, the federal extension of time to file a disclaimer, until September 17, 2011, is not applicable in New York.[47] In New York, unless an extension of time is otherwise granted by a court, a disclaimer must be made within nine months of death.[48]

This advisory also provides that, in order to avoid penalties, if the New York State estate tax return is filed late, but not later than the federal extended due date, the return should be marked "late—federal 2010 tax relief act."[49] Although, subject to verification from the Department, the penalties will be abated, interest charges will still apply to any unpaid balance.[50]

C. Implementation of the Marriage Equality Act Related to the New York State Estate Tax

As discussed earlier in this Survey, the Marriage Equality Act changed the way many of New York's laws would be interpreted. TSB-M-11(8)M (issued on July 29, 2011) explains that for New York State estate tax purposes, the term "spouse" includes both same-sex spouses and opposite-sex spouses.[51] This expanded definition allows for deductions and elections that are available for opposite-sex spouses to now be allowed for same-sex spouses, whether or not a federal estate tax return is filed.[52] The advisory points out that this is different from the general rule requiring that when an estate tax return is filed for federal purposes, the amounts used to compute the gross estate and any elections reported on the federal return are binding for New York State purposes.[53] This clarification was needed, as the federal Defense of

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*; *see also* N.Y. EST. POWERS & TRUSTS LAW §2-1.11(c)(2) (McKinney 2012).
49. N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(9)M (July 29, 2011).
50. *Id.*
51. N.Y. Dep't of Taxation and Fin. Tech. Adv. Mem. TSB-M-11(8)M (July 29, 2011).
52. *Id.*
53. *Id.* at n.1.

Marriage Act (DOMA) only recognizes opposite-sex marriage, adding complexity for same-sex spouses who file their New York State income tax returns.[54]

D. Income Tax—Must File as Married Despite Different Federal Filing Status

This advisory, which was issued at the same time as TSB-M-11(8)M, further sought to give clarification to the taxpayers as a result of the Marriage Equality Act. The Department explains that same-sex spouses who file New York personal income tax returns *must* file their New York income tax returns using a *married* filing status, even though they may have used a filing status of single or head of household on their federal returns.[55] Same-sex spouses who are married as of December 31, 2011 are considered married for the entire year.[56] Therefore, they must file their personal income tax returns using a married filing status starting in tax year 2011.

In effect, same-sex spouses must compute and file their federal income tax as if they were single for federal purposes, and then, in order to complete their New York State personal income tax returns, they must recalculate their federal income tax as though they were married.[57] Essentially, the spouses must prepare a fictitious federal return in order to compute their New York State personal income taxes.[58]

IV. NEW YORK STATE CASES

A. Adopted Children

1. Adopted Child Surrendered for Re-Adoption After Decedent's Death Is Still a Child of Decedent for Purposes of Class Gifts

Under the facts of *In re Campbell*, a decedent established testamentary trusts and irrevocable inter vivos trusts, of which his children were beneficiaries.[59] The decedent's last will and testament

54. Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

55. N.Y. Dep't of Taxation and Fin. Tech. Adv. Mems. TSB-M-11(8)C, (8)I, (7)M, (1)MCTMT, (1)R, (12)S (July 29, 2011).

56. *Id.*

57. *Id.*

58. *See id.*

59. 29 Misc. 3d 786, 787, 907 N.Y.S.2d 419, 420 (Sur. Ct. Westchester Cnty. 2010).

included "adopted children" in the definition of children.[60] The inter vivos trust was executed after the decedent adopted a child from China (in 1996), and the decedent specifically named the adopted child in the trust document.[61]

At the time of the decedent's death, by virtue of the child's adoption, the child was listed in the probate petition as a child of the decedent and she joined the class of beneficiaries under the testamentary trusts.[62]

In 2004, citing bonding issues with the adopted child, the decedent's surviving spouse surrendered the child for re-adoption.[63] The child was thereafter adopted, and her new parents moved for summary judgment and sought to require the fiduciaries of the decedent's will and trusts to account.[64]

The court held that the child's status as a beneficiary did not terminate upon re-adoption.[65] Although, generally, a child's right to inherit from a family is terminated when a child is adopted out of that family, the court cited the decedent's clear intent, as illustrated in his estate planning documents, as well as the fact that the trusts vested before the re-adoption.[66]

2. Adopted Child as Remainder Beneficiary

In the case brought before the court in *In re Cook*, upon the decedent's death in 1934, the decedent left a will providing that her residuary estate would be held in trust for her daughter's lifetime, with the remainder passing to her daughter's surviving children.[67] After the decedent's death, the daughter gave birth to a biological child, and later adopted a child.[68]

Upon the daughter's death, the trustee of the trust argued that the remainder could only be distributed to the daughter's biological child.[69] The trustee cited former Domestic Relations Law section 117, which included a "precautionary addendum," which provided that if the

60. *Id.* at 788, 907 N.Y.S.2d at 421.

61. *Id.* at 789, 907 N.Y.S.2d at 422.

62. *Id*.

63. *Id*. at 790, 907 N.Y.S.2d at 422.

64. *Campbell*, 29 Misc. 3d at 791, 907 N.Y.S.2d at 423.

65. *Id.* at 796, 907 N.Y.S.2d at 427.

66. *Id.* at 797, 907 N.Y.S.2d at 427; N.Y. DOM. REL. LAW § 117(2)(a) (McKinney 2010).

67. No. 1792-1934, at 1 (Sur. Ct. N.Y. Cnty. Jan. 21, 2011).

68. *Id.*

69. *Id.* at 2.

adopted child's inheritance would defeat the rights of other remainder beneficiaries, then the addendum would apply to defeat the rights of the adoptee in favor of the other remainder beneficiaries.[70] The court found in favor of the adopted child, basing its decision on *Matter of Park*, which held that the precautionary addendum only applies when an adoptive parent dies without any natural heirs.[71] The court reasoned that since the decedent's daughter died with both natural and adopted heirs, and there is a presumption that the decedent had intended to include adoptees, any argument based on the precautionary addendum had to fail.[72]

3. Repealed Precautionary Addendum Does Not Apply

Decedent died leaving a 1924 will which created testamentary trusts for each of his children.[73] The trusts each provided that one-half of the principal would be paid to each child upon the child attaining age forty-five, with the other half being paid to the child's descendants at the child's death.[74] The decedent's daughter, Gladys, died at age ninety-six.[75] During her life she had adopted two children, one who survived her and one who predeceased her leaving children surviving.[76]

The trustee of Gladys' trust petitioned the court, asking whether the "precautionary addendum" in the now-repealed N.Y. Domestic Relations Law prohibited Gladys' adopted children from benefiting from the trust as remainder beneficiaries.[77]

The court explained that there was no evidence addressing the decedent's intent as to adopted persons,[78] the lack of a provision dealing with the death of a child after age forty-five without surviving issue did

70. *Id.* The repealed statute was applicable only to instruments executed before March 1, 1964 and provided: "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen." N.Y. DOM. REL. LAW § 115 (pre-March 1, 1964, later renumbered N.Y. DOM. REL. LAW § 117).

71. *Cook*, No. 1792-1934 at 3 (citing Matter of Park, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965)).

72. *Id.* at 4-5.

73. *In re* Claman, 31 Misc. 3d 852, 853, 919 N.Y.S.2d 810, 811 (Sur. Ct. N.Y. Cnty. 2011).

74. *Id.* at 853-54, 919 N.Y.S.2d at 811.

75. *Id.* at 854, 919 N.Y.S.2d at 811.

76. *Id.*

77. *Id*. at 854-55, 919 N.Y.S.2d at 811-12; N.Y. DOM. REL. LAW § 115 (McKinney 2010) (pre-March 1, 1964, later renumbered N.Y. DOM. REL. LAW § 117).

78. *Claman*, 31 Misc. 3d at 855, 919 N.Y.S.2d at 812.

not justify a windfall to the decedent's other issue,[79] and that the precautionary addendum did not apply because any other biological issue of the decedent would only take through intestacy (as he had not provided for them in the trust).[80] Based on this reasoning, the court construed that the precautionary addendum did not apply to this case and Gladys's surviving adopted child and grandchildren were deemed the proper remainder beneficiaries of the trust.[81]

B. Validity of Wills

1. Lack of Due Execution

The decedent in *In re Demis* died survived by his wife and eight children.[82] The surviving spouse submitted a petition and offered a will, and its duplicate original, for probate.[83] Decedent's children objected to probate, citing lack of due execution, duress, undue influence and fraud, and brought a motion for summary judgment.[84]

The court stated that the "[p]etitioner has the burden of proving due execution of a last will and testament . . . [and] must prove that the requirements of EPTL [section] 3-2.1 have been met."[85] The witnesses and scrivener, whose signatures were on the self-proving affidavit attached to the will, testified that the will provided to the court was not the same will that was prepared and executed in their office.[86] The scrivener also testified that the language contained in the will was not language that he used when drafting wills.[87]

In response to the testimony, the petitioner argued that the summary judgment motion should fail, since the motion relied on the faulty memory of witnesses.[88] Instead, the court found that the witnesses' recollections were clear and the petitioner had failed to

79. *Id*.

80. *Id.* at 857, 919 N.Y.S.2d at 813.

81. *Id.*

82. No. 2008-397, 2010 NY Slip Op 52372(U), at 1 (Sur. Ct. Albany Cnty. 2010).

83. *Id*.

84. *Id.* at 3.

85. *Id.* at 1-2. EPTL section 3-2.1 requires that for a will to be validly executed in New York, (1) it must be signed by the testator in the presence of two attesting witnesses, or such signature shall be acknowledged by the testator to the witnesses, (2) the testator must declare to each of the attesting witnesses that the instrument to which her or his signature is affixed is her or his will, and (3) the witnesses must both affix their signatures and addresses to the document in the presence of the testator and each other. N.Y EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2012).

86. *Demis*, 2010 N.Y. Slip Op 52372(U), at 2.

87. *Id.* at 3.

88. *Id*. at 2.

satisfy the elements of due execution, and granted summary judgment in favor of the decedent's children.[89]

2. Execution of Later Will

The facts of *In re Estate of Yuster* state that the decedent's will, dated 1989, left his entire estate of $4.9 million to his son, who was named the executor.[90] The decedent died in the fall of 2005 and the decedent's will, dated 1989, was admitted to probate in 2006.[91] Nearly three years after the decedent's death, the decedent's ex-wife petitioned to vacate the probate decree.[92] The ex-wife requested probate of an instrument dated June 2005, which she purported to be a will signed a few months before the decedent's death.[93]

In the 1989 will, the decedent named his son as executor and left his entire $4.9 million estate to his son.[94] Whereas the 2005 instrument consisted of one page and left the decedent's estate in trust for his son, with funds dispersed at the ex-wife's discretion, but made no provision for the remainder.[95]

The executor objected, and moved to dismiss the proceeding, arguing that the 2005 instrument was invalid on the grounds based on lack of due execution.[96]

The scrivener of both the 1989 will and the 2005 instrument testified.[97] However, the court noted that he did not testify with regard to any discussions with the decedent as to why he wanted to make a 2005 will, and why he would want to name his ex-wife as trustee of a trust for his son. The attorney had no memory of the information he might have relied on in drafting the will, and also had no notes of any meetings he may have had with the client in connection with the 2005 instrument.[98] The court found that the attorney's testimony failed to establish whether he had made any effort to determine decedent's intention as to the disposition of his estate if his son predeceased him, or what property was subject to disposition by the instrument.[99]

89. *Id*. at 3.
90. 2010 N.Y. Slip. Op. 52344(U), at 1 (Sur. Ct. N.Y. Cnty. 2010).
91. *Id.*
92. *Id.* at 1-2.
93. *Id.*
94. *Id*.
95. *Yuster*, 2010 N.Y. Slip Op. 52344(U), at 2.
96. *Id.*
97. *Id.*
98. *Id.* at 3.
99. *Id.*

In addition, on the date the 2005 will was signed, the decedent was in the hospital, and the attorney testified that the decedent appeared to be sick, and that while the decedent signed the instrument in the attorney's presence, he did not indicate that the decedent read the instrument, that anyone read the instrument to him, and he did not state that the decedent acknowledged the instrument as his will.[100] In light of the attorney's testimony and the fact that the second witness's testimony was contradicted by previous deposition testimony, the court granted the motion, concluding that due execution of the 2005 instrument had not been established and the petition for probate of the 2005 instrument was denied.[101]

3. Probate of Subsequent Valid Will

A wife and husband executed a joint will which provided that on the death of the first to die all of the decedent's estate and all property passed to the survivor.[102] Upon the death of the survivor, the estate passed into a trust for the couple's children and grandchildren.[103]

Eight years after the execution of the joint will, the couple divorced.[104] As part of their settlement agreement, which was later incorporated into the judgment of divorce decree, they both reaffirmed the joint will.[105]

After the divorce, the wife created an irrevocable trust, retaining a special testamentary power of appointment, to hold a condominium she had received under the settlement agreement.[106] The wife then executed a one-paragraph will, which reaffirmed the previously-executed joint will, and wherein she exercised the power of appointment in favor of the couple's four children.[107]

Thereafter the wife died, and both the joint will and the subsequent will were offered for probate.[108] The ex-husband commenced a proceeding against the trustee of the irrevocable trust and moved for summary judgment, in an effort to acquire the condominium pursuant to the terms of the joint will.[109] The surrogate granted the summary

100. *Yuster*, 2010 N.Y. Slip Op. 52344(U), at 3.
101. *Id.* at 5.
102. *In re* Murray, 84 A.D.3d 106, 108, 921 N.Y.S.2d 161, 162 (2d Dep't 2011).
103. *Id.*
104. *Id.*, 921 N.Y.S.2d at 163.
105. *Id.*
106. *Id.*
107. *Murray*, 84 A.D.3d at 109, 921 N.Y.S.2d at 163.
108. *Id.*
109. *Id.* at 110, 921 N.Y.S.2d at 164.

judgment motion and denied probate of the later will.[110]

The appellate division affirmed the grant of summary judgment, finding that the decedent was bound by the terms of the joint will and could only bequeath the condominium to her ex-husband.[111] However, the court reversed the denial of probate of the later will, holding that a validly executed will is entitled to probate even though its terms are not enforceable.[112]

4. Ancient Will

A nineteen-year-old will was not allowed to be admitted to probate under the common law "ancient document rule."[113] The rule allows for probate of a will that is at least thirty years old (or at least twenty years old under the federal rule) where all of the witnesses are unavailable or cannot be located to testify in support of the instrument.[114]

Although the nineteen-year-old will did not qualify as an ancient document, the court pointed out that the Surrogate Court Procedure Act provides another avenue for admission of the will.[115] Even when witnesses are unavailable, a will may be admitted to probate based upon the handwriting of the testator and of at least one of the attesting witnesses and such other facts as would be sufficient to prove the will.[116]

The court further suggested that the petitioner locate the handwriting of one of the witnesses, who also happened to have an original will on file with the court, and garner an affidavit from a handwriting expert to prove the validity of the witness' signature on the nineteen-year-old will.[117] The court also indicated that it would accept an affidavit from one of her children or other relatives as proof of the decedent's signature.[118]

C. Crematorium and Funeral Home Acted Reasonably In Cremation of Remains

In *Mack v. Brown*, the decedent died in 2008 at the defendant-

110. *Id.* at 111, 921 N.Y.S.2d at 165.

111. *Id.* at 117, 921 N.Y.S.2d at 169.

112. *Murray*, 84 A.D.3d at 116, 921 N.Y.S.2d at 169.

113. *In re* Will of Santoro, No. 2011-363488, 2011 N.Y. Slip Op. 50920(U), at 1 (Sur. Ct. Nassau Cnty. 2011).

114. *Id.* (citation in original omitted).

115. *Id.*

116. *Id.*

117. *See id.*

118. *Santoro*, 2011 N.Y. Slip Op. 50920(U), at 1.

hospital.[119] A woman, presenting a certificate of marriage,[120] and identifying herself as the decedent's surviving spouse, signed an authorization for cremation.[121] The decedent's body was released by the hospital to the defendant funeral home and thereafter cremated.[122]

Soon after, the decedent's issue and the decedent's actual surviving spouse, the plaintiffs, commenced an action alleging that the woman at the hospital was not the decedent's lawful wife.[123] The plaintiffs claimed that the lawful wife did not authorize the cremation, that the decedent was a practicing Catholic, and that the decedent had a burial plot.[124] They further claimed that the defendants had no authority to transfer his body from the hospital to the funeral home and then to the cemetery for cremation.[125] Plaintiffs argued that the marriage between the decedent and the woman who authorized the cremation was void as a result of bigamy, and she was thus not authorized to control the disposition of the decedent's remains.[126] The plaintiffs sought to recover damages for emotional distress resulting from the defendants' allegedly willful, wanton, wrongful, negligent, reckless, and careless conduct.[127]

The court found that the intent of Public Health Law (PHL) section 4201(7) is to protect those who act reasonably and in good faith on the authority of a person representing herself or himself as authorized to control disposition of the decedent's remains.[128] In this case, the purported surviving spouse presented the crematorium with an authorization which, on its face, satisfied PHL section 4201(7), and with a certified copy of a certificate of marriage identifying her as the decedent's spouse.[129] The court found that the crematorium acted reasonably and in good faith in carrying out her instructions, and that they had no reason to question the facially sufficient documents.[130]

119. 82 A.D.3d 133, 135, 919 N.Y.S.2d 166, 167 (2d Dep't 2011).
120. *Id.* at 140, 919 N.Y.S.2d at 171.
121. *Id.* at 135, 919 N.Y.S.2d at 167-68.
122. *Id.* at 135-36, 919 N.Y.S.2d at 168.
123. *Id.* at 136, 919 N.Y.S.2d at 168.
124. *Mack*, 82 A.D.3d at 136, 919 N.Y.S.2d at 168.
125. *Id.*
126. *Id.* at 140, 919 N.Y.S.2d at 171.
127. *Id.* at 136, 919 N.Y.S.2d at 168.
128. *See id.* at 139, 141, 919 N.Y.S.2d at 170, 172.
129. *Mack*, 82 A.D.3d at 140, 919 N.Y.S.2d at 171.
130. *See id.* at 141-42, 919 N.Y.S.2d at 172.

D. "After-Acknowledged" Children Unaccounted For

In June 1996, a decedent executed a will leaving his entire estate to one of his daughters.[131] Ten years later, the decedent learned that he was the biological father of two additional children who were born before the 1996 will was executed.[132]

In its opinion, the court noted that "[a] parent in New York State is under no obligation to leave any part of his or her estate to his or her children."[133] The court went on to explain that in situations where children are unintentionally left out of a parent's will, usually when such child was born after the will's execution, EPTL section 5-3.2 provides that after-born children share with the children provided for in the will.[134]

However, in this case, the two children were "pre-born" or "after-acknowledged" and thus, according to the court, not covered by EPTL section 5-3.2 in the same manner as after-born or after-adopted children.[135]

E. Trustee Liability

1. Failure to Diversify

The last few years have brought us numerous trustee liability cases.[136] These decisions can be helpful in assisting trustees in determining how the court will interpret their actions and whether they are meeting their trustee duties.

In *Knox*, HSBC acted as successor trustee for various family trusts.[137] As trustee, HSBC was accused of failing to diversify trust assets and self-dealing.[138] In their defense, HSBC claimed that it was

131. *In re* Gilmore, 87 A.D.3d 145, 147, 925 N.Y.S.2d 567, 568 (2d Dep't 2011).

132. *Id.*

133. *Id.* (citing McLean v. McLean, 207 N.Y. 365, 371, 101 N.E. 178, 179 (1913)).

134. *See id.* at 152, 925 N.Y.S.2d at 572; *see also* N.Y. EST. POWERS & TRUST LAW § 5-3.2 (McKinney 1999 & Supp. 2012).

135. *Gilmore*, 87 A.D.3d at 147, 925 N.Y.S.2d at 568.

136. *See, e.g.*, *In re* Janes, 90 N.Y.2d 41, 681 N.E.2d 332, 659 N.Y.S.2d 165 (1997); *In re* Rowe, 274 A.D.2d 87, 712 N.Y.S.2d 662 (3d Dep't 2000); *In re* Saxton, 274 A.D.2d 110, 712 N.Y.S.2d 225 (3d Dep't 2000); *In re* Will of Dumont, 26 A.D.3d 824, 809 N.Y.S.2d 360 (4th Dep't 2006); *In re* Trust of Hyde, 44 A.D.3d 1195, 845 N.Y.S.2d 833 (3d Dep't 2007); *In re* Judicial Settlement of Creighton, No. 1973-30/A, 2010 NY Slip Op. 50548(U) (Sur. Ct. Westchester Cnty. 2010); *In re* Judicial Settlement of Knox, No. DO-0659, 2010 NY Slip Op. 52251(U) (Sur. Ct. Erie Cnty. 2010) (ruling on damages); *In re* Judicial Settlement of Knox, No. DO-0659, 2010 NY Slip Op. 52234(U) (Sur. Ct. Erie Cnty. 2010) (ruling on liability).

137. *See Knox*, 2010 NY Slip Op. 52234(U), at 2 n.3.

138. *See id.*

merely following the wishes of the grantor.[139] However, the surrogate's court found that HSBC was responsible, as trustee, for the funds, and thus was required to manage them prudently for the benefit of the beneficiaries.[140] Ultimately, the court found that HSBC breached its fiduciary duty,[141] and awarded damages in excess of $20 million.[142]

2. Exoneration Clause Does Not Absolve Negligence and Breach of Trust in Lifetime Trust

In *Tydings*, the court found that, despite an exoneration clause, the trustee was liable for negligence and breach of fiduciary duty when the trustee acted with indifference with respect to transactions involving trust assets.[143]

In her defense, the trustee cited the broad language of the exoneration clause in the trust agreement.[144] Generally, exoneration clauses in a testamentary trust will not absolve a trustee of its fiduciary duties owed to the beneficiaries of the trust.[145] In spite of the absence of a similar statute applying to exoneration clauses in lifetime trusts, the court found that these clauses were also limited in lifetime trusts.[146]

The court found that the trustee's conduct exhibited a complete indifference to the best interests of the trust beneficiary.[147] The court ruled that the trustee would be denied statutory commissions, the trustee would be assessed a surcharge for the income lost on various interest-free loans; and the beneficiary was not barred from recovering lost profits from the trustee by reason of the trustee's self-dealing.[148] In addition, the court held that both parties should bear their own costs, respectively, for their legal fees and expenses.[149]

139. *See id.* at 4-5.
140. *Id.* at 20.
141. *Id.* at 16.
142. *Knox*, 2010 NY Slip Op. 52251(U), at 1, 7.
143. *In re* Accounting by Tydings, No. 2008-2623, 2011 NY Slip Op. 51177(U), at 10-11 (Sur. Ct. Bronx Cnty. 2011).
144. *See id.* at 2.
145. N.Y. EST. POWERS & TRUSTS LAW § 11-1.7(a)(1) (McKinney 2001).
146. *Tydings*, 2011 NY Slip Op. 51177(U), at 6.
147. *Id.* at 10-11.
148. *Id.* at 9-11.
149. *Id.* at 11.