NCBA Offers Membership to Paralegals and Legal Administrators

Do you have paralegals or legal administrators in your law office who wish to expand their skill sets in a welcoming and inclusive environment? The NCBA has opened membership to paralegals and legal administrators to accommodate these valuable professionals of the legal community. In addition, the NCBA has introduced two new committees to cater to their professional needs.

In coordination with the Paralegal and Legal Administrator Committees, the Nassau Academy of Law has planned a number of programs and seminars this spring designed to develop and enhance the skills of your law office employees, while simultaneously allowing them to network with other Members of the NCBA.

Paralegals and legal administrators who wish to join the NCBA now have the opportunity to take advantage of special member rates, and begin an active membership in the Bar Association where they can learn and meet with other paralegals and legal administrators.

NCBA Paralegal Committee

The NCBA Paralegal Committee promotes the exchange of information between paralegals and attorneys and provides a networking opportunity between paralegals and other legal professionals. The Committee is lead by Chair Maureen Dougherty and Vice-Chair Cheryl Cardona.

NCBA Legal Administrators Committee

The NCBA Legal Administrators Committee provides a forum for legal administrators to share information, learn about updates to HR and labor law, gain knowledge about topics relevant to their position, and network with other administrators, while at the same time increasing visibility and understanding related to the administrator’s role within law firms. The Committee is lead by Co-Chairs Dede S. Unger and Virginia A. Kawoehka.

Join the NCBA as a Paralegal or Legal Administrator

If a paralegal or legal administrator wishes to join the NCBA to take advantage of the new committees and programs, please have them contact Donna or Stephanie in the NCBA Membership Office at (516) 747-4070. Special reduced rates are now available for these groups of members for the remainder of the 2019-2020 Bar year.
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HON. RAYMOND T. LYONS (RET.)
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District of New Jersey

HON. RICHARD B. MCQUADE, JR. (RET.)
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HON. ANDREW J. PECK (RET.)
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HON. ARTHUR J. GAJARSA (RET.)
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When confronted with the loss of an original will instrument, estate practitioners have traditionally responded with a briefcase containing affidavits explaining the circumstances behind the document’s disappearance. It is therefore not surprising that such a loss can serve as a potential death knell for any probate proceeding. However, hope is not lost. In New York, probating a copy of a lost or destroyed will is, to quote a line from The Godfather Part II, “difficult, not impossible.” Pursuant to SCPA §1407, a copy of a lost or destroyed will may be admitted to probate only upon (1) establishing that the will has not been revoked, (2) proving execution in the manner required for probate of an existing will, and (3) clearly and distinctly proving all of the provisions of the will by at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

This threshold poses a daunting task for estate practitioners, particularly those seeking to probate copies of wills that are several decades old. Most courts require the copy of the will to be a minimum of thirty years old in order for the ancient document rule to apply; however, Nassau County Surrogate’s Court has adopted the more lenient twenty-year-old federal rule.1

In these instances, the court will ascertain whether the location from which the copy was obtained constitutes a “natural place of custody” and will also examine the appearance of the copy to determine whether the drafting language contained therein, or the physical state of the copy are suspicious in nature, before admitting the copy to probate.2 If, however, the ancient document rule is inapplicable, the petitioner will be obligated to comply with the requirements of SCPA §1407.

As a general rule, the second requirement of SCPA §1407, namely proving execution in the manner required for probate of an existing will, is easily surmountable. This is particularly true if there is evidence that the will was executed with attorney supervision, which in and of itself creates a presumption of due execution.3 If any or all of the witnesses to the will are deceased, their testimony may be dispensed with pursuant to SCPA §1405 regarding the due execution of the instrument, provided that the petitioner is able to submit handwriting samples for the testator and one witness.4

The first prong of SCPA §1407—establishing that the will has not been revoked, can be a bit more troubling. In most instances, a presumption of revocation arises when the original testamentary instrument, known to have been in possession of the testator prior to death, cannot be located after death.5 When it is alleged that the decedent’s will was destroyed during his lifetime, petitioners are required to provide proof that the testator or someone acting at his direction, had not previously revoked the will.6

Accordingly, the practitioner is faced with the formidable task of proving a negative, that the testator did not revoke the will at any time since the date the subject will was executed. While it is entirely possible that proof exists that the testator formed such a bond with his existing estate plan that revocation would be seen as implausible, often such proof is wanting. Furthermore, witness testimony may be subject to dismissal for being either speculative or mere conjecture. Some petitioners have managed to successfully probate a copy of the will with the submission of an affidavit from the drafting attorney. The submission may include a copy of the will that was executed. It may also set forth the attorney’s personal recollection of the terms which were drafted in the original instrument, in an effort to confirm that they are identical to the terms set forth in the copy of the will now being submitted for probate.7

For the attorneys charged with the task of probating a lost or destroyed will, tracking down the drafting attorney is pivotal for a successful probate petition. If the drafting attorney is deceased or cannot be located, petitioners may still seek to probate a copy by submitting evidence establishing that it was the attorney-draft that retained possession of the original will.

Evidence which has previously been accepted by the courts has included correspondence from the drafting attorney which indicates that the original will remained in their possession, or a “COPY” stamp affixed to the decedent’s instrument to indirect...
The news cycle was flooded recently with stories of repeat crimes committed by those freed without statutory conditions under New York’s new bail reform law. One recent case involved a “homeless” man accused in several random attacks in Manhattan who had been released on bail. Another involved a woman confined with slapping three Orthodox Jewish women in Brooklyn who was released, then rearrested a day later, for a new crime of hitting someone else.

Bail reform opponents proudly seized the opportunity to blame the new statute. Having served in the criminal justice system as a prosecutor and then a defense lawyer, I have a few takes I’d like to offer based on the individuals referenced above, along with thousands of people just like them living on the streets or languishing in our jails, are examples of our societal failure to deal with the underbelly of the modern world.

Instead of leaving people with untreated mental illness to live on the streets, and in the jails is growing nationwide.

Efforts to relax the standards for involuntary hospitalization meet aggressive resistance. Just this month in Hawaii, which has among the most significant homeless populations in the nation, a new bill (HB2680) was introduced in the House seeking to tackle the problem. State Representative Cynthia Thielen is a sponsor of the bill to restore the terms “gravely disabled” and “obviously ill” as standards for coerced care. The bill’s restoration of these terms, defining lesser standards than an imminent danger standard, was rejected in committee.

While the immediate dangerous standard protects civil liberties, it offers no help to the expanding population of homeless Americans with serious mental illness. “My response is that the [civil libertarians] took it too far,” says Rep. Thielen. “They said hands off those who have serious mental illness but no fixed address, nor do they help people who need hospitalization—there are not imminently dangerous. As a result, the population of seriously mentally ill people on the streets and in the jails is growing nationwide.

What about New York? Is it time to rethink the imminent danger standard for those living on New York’s streets? Can a lesser standard adequately protect due process rights and civil liberties? Instead of leaving people with untreated mental illness to live on the streets or languish in jails, legislation to provide broader rescue discretion coupled with an expanded system of safe, secure and professional treatment facilities (with safeguards against abuse such as surveillance monitors) seems like a much better option.

I have directed the Chairs of our NCBA Mental Health Committee and our Hospital and Health Committee to explore this subject in future committee meetings and to educate our membership, perhaps in a public town hall. There are experts and advocates with lots to say about the issues, including Linda Dailey and also Elizabeth Kelley, a criminal defense lawyer with a nationwide practice defending persons with mental illness against criminal accusations, and NCBA member and nationally recognized mental health law attorney, Carolyn Reinach Wolf. They have all offered to speak for us at Domus. It is my hope that our association can help play a role in bringing care, compassion, and an eventual solution to this crisis.
The freedom to dispose of one’s assets however he or she sees fit is one of the basic maxims of American society. Very few restraints are placed on the testamentary freedom of an individual. As long as he has capacity, Dad can leave all of his assets in trust for his prized parakeet, leaving nothing to his children.

One of the few restraints on alienation is the inability to completely disinherit a spouse. The ability of a surviving spouse to claim a portion of a decedent’s estate when the decedent left him or her little or nothing is called the right of election.

The Elective Share

The statutory framework for the surviving spouse’s right of election for decedents dying on or after September 1, 1992 is found in Section 5–1.1–A of the Estates, Powers and Trusts Law. The surviving spouse is entitled on or after September 1, 1992 to one-third of the net estate. The surviving spouse's elective share is entitled to one-third of the net estate subtracting any estate assets that the surviving spouse received by operation of law or beneficiary designation.

Additionally, certain assets are set off for the benefit of the surviving spouse and/or children under the age of twenty-one. These assets are not considered property of the estate, but vest in the surviving spouse and/or children upon death and they are not included in the calculation of the net estate. This family exemption includes, but is not limited to: household furnishings, clothing and jewelry of the decedent not exceeding $20,000; books, electronics, photos and videos not exceeding $2,500; one motor vehicle not exceeding $20,000; books, electronics, photos and videos not exceeding $2,500; one motor vehicle not exceeding $20,000; and money not exceeding $25,000.

It is important to note that a surviving spouse may be barred from asserting his or her right of election if it can be established that one of the grounds for disqualification exist, application of the “slayer rule” is applicable, or a valid waiver or release of the right of election has been executed.

Testamentary Substitutes

Testamentary substitutes play an important role in protecting the rights of surviving spouses. Without this “add back” of certain assets when calculating the net estate for elective share purposes, a decedent could gift his entire estate to someone the spouse never even heard of and of the purpose of the statute would be defeated.

EPTL §5–1.1–A(b) lists the following as testamentary substitutes:

- Gifts causa mortis, made in contemplation of death.
- Gifts over the yearly gift tax exclusion, made within one year before death.
- Totten Trust Accounts, bank accounts on deposit at death, held jointly
- Life insurance. This presents a loophole in the law allowing an insurance policy and name someone other than the decedent as the beneficiary. In this case, the policy would be paid to the named beneficiary at death, if the named beneficiary survives the decedent, and would be defeated if the named beneficiary did not survive the decedent.
- Joint bank accounts (created after August 31, 1966)
- Gifts over the yearly gift tax exclusion, made within one year before death.
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Life Estate Deed: Pitfalls and Considerations

Clients commonly seek the advice of an elder law attorney so that they can protect and preserve their assets for their loved ones. Often, a client’s largest asset is his or her home. There are a variety of estate planning tools available to accomplish the client’s goal of protecting his or her home while ensuring that it is left to his or her loved ones. One such tool is a life estate deed. Although a life estate deed has its benefits, the attorney must also consider its drawbacks in relation to the client’s personal circumstances before determining if it is the best plan for the client.

What is a Life Estate Deed?

A “life estate” refers to a present ownership interest in a piece of real property for the duration of an individual’s life. The owner of the life estate is sometimes referred to as a “life tenant.” The life tenant retains the ability to remain in the property for the remainder of his or her life. The creation of a life estate is a relatively straightforward process. The property is conveyed by the grantor(s) to at least one other party by deed and includes special language allowing the grantor to retain a life estate in the property. The life estate deed establishes two forms of ownership for the same property: the life estate and the “remaindermen’s” interest. The remainderman has a future interest in the property. The remainderman will acquire full ownership of the property upon the termination of the life estate which typically occurs upon the death of the life tenant.

The life estate has a financial value that is calculated based on the life tenant’s life expectancy and the fair market value or sale price of the property. As the life tenant’s age increases, the value of the life estate decreases, and the remainderman’s interest increases. Upon the death of the life tenant, the life estate is extinguished and the remainderman owns a fee simple interest in the property. It is important to note that a life estate is more than a mere right to occupy the premises. While the life estate is not a form of fee ownership, the life tenant is the owner of the property and is entitled to all of the rights and obligations associated with ownership. Courts have traditionally held that the life tenant, for example, is required to make necessary repairs, pay taxes, and prevent waste in the property. Benefits of a Life Estate Deed

There are several reasons why a life estate deed is an attractive estate planning vehicle for many people. First, the cost of preparing and filing a life estate deed is less expensive than executing a Medicaid trust, for example. Often, clients find life estate deeds to be cost-effective and ready faster than a Medicaid trust. While trusts can take weeks to prepare, review, and finalize, a deed and the supporting documents can take an estate lawyer a mere few hours to prepare.

Another benefit of a life estate deed is that it allows the property to pass outside the probate process. The remainderman automatically takes full legal ownership of the property upon the death of the life tenant. The property can be sold or transferred without waiting for the appointment of an estate representative. This same goal can be achieved with a Medicaid trust, but clients are often wary of the cost in preparing a trust document or may be intimidated by its language.

In addition, the life tenant has the right to collect all rental income during his or her life, akin to a Medicaid trust. The life tenant also enjoys the absolute right to reside in the property for the remainder of his or her life. The life estate also ensures that a Medicaid trust does not detract from any and all STAR exclusions and veterans’ exemption for real estate tax purposes. Furthermore, the remainderman receives a stepped-up basis in the value of the property at the death of the life tenant, obviating the concern for capital gains taxes upon sale or transfer.

Drawbacks to a Life Estate Deed

While there are obvious benefits to a life estate deed, clients can also experience unforeseen pitfalls when these deeds are executed. Many individuals use life estate deeds to avoid probate and reduce the costs of administering the estate at death. Unfortunately, when someone uses a life estate deed, they risk losing control over the distribution of their property when things turn out differently than expected.

Most important, a life estate deed makes the grantor’s financial interest in the property vulnerable to adverse circumstances of the remaindermen who often are the children of the life tenant. For example, if one of the remaindermen goes through a divorce, files bankruptcy, or has creditor issues, it is possible that a lien could be filed against their interest in the life tenant’s property.

Another downside of a life estate deed is that all of the owners, including the remaindermen, must agree to a future sale. Upon the creation of the life estate, the life tenant loses the right to solely control when and if the property is sold. If one of the remaindermen refuses to sign the deed or participate in the sale, the life tenant will be required to initiate a partition action in order to force a sale. Not only can this create family discord, but it could result in delays, additional legal proceedings, and potentially losing a prospective buyer who does not want to wait for the proceedings to be finalized.

In addition, there are potential tax consequences that may have not been considered at the time of the transfer. For example, if the home is sold during the life of the life tenant, he or she may not qualify for the full $250,000 capital gains tax exclusion ($500,000 if married and filing jointly). Rather, the life tenant would be entitled to a partial qualification relative to the value of the life estate. Additionally, the remaindermen are entitled to no tax exemptions, making the property a whole more vulnerable to capital gains tax liability.

Another common issue encountered with life estate deeds which is sometimes overlooked, is the impact that the deed transfer can have on the life tenant should he or she need long-term care in the future. In the event that a life tenant requires nursing home care within five years of establishing the life estate, Medicaid will take the conveyance to the remaindermen as an uncompensated transfer and impose a penalty period. During the length of the penalty period, Medicaid will not finance the cost of the nursing home
Drafting Estate Planning Documents for Non-English Speaking Clients

One communication barrier that some clients face is they speak very little or no English. A language barrier issue should not bar a competent client from making his or her own wishes known just like any other client. It is important for the attorney drafting estate planning documents for a client who does not speak English to take certain steps, as discussed herein, to not only ensure proper drafting and execution of the documents, but to also minimize the risk of the documents being challenged on grounds such as lack of testamentary capacity or undue influence or fraud, which could be based on a language barrier argument.

**Last Will and Testament**

In New York, every person eighteen years of age or over, of sound mind and memory, may execute a Will.1 The potential issue that based on a language barrier argument. grounds such as lack of testamentary capacity the risk of the documents being challenged on

In addition, there are formalities for the due execution of a Will, which include the testator's signature at the end of the Will performed in the presence of at least two attesting witnesses, or acknowledged by the testator to the attesting witnesses, and the testator declaring to the attesting witnesses that the instrument is his or her Will.2 The fact that a testator cannot speak, read, or write English does not preclude him or her from making a valid Will in the English language where the Will is drawn by an attorney pursuant to the client's instructions, and at the time of execution, the Will is first read to the client in English, and then those matters which the client does not understand are explained to him or her in his or her native tongue.3 It is critical that the attorney establish that the non-English speaking client understands the nature and contents of the Will and communicates such understanding to the attesting witnesses.

To overcome these hurdles, the attorney should obtain the services of a certified translator who speaks the same language as the client.

This step should be taken at the outset of the relationship during the initial meeting and followed through until execution of the documents. Furthermore, the attorney should be mindful to take impeccable notes to help support the validity of the Will should there ever be a challenge to it. In addition, the attorney should consider asking the translator for a transcript of the translation or an affidavit as to the circumstances surrounding the communications that took place.

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The SECURE Act and Its Effects on Estate Planning

Since it was introduced over 40 years ago, the individual retirement account (IRA) has been a popular choice for retirement savings and a core part of most estate plans. The recent Setting Every Community Up for Retirement Enhancement (SECURE) Act, which was integrated into the Further Consolidated Appropriations Act, 2020, made major changes to IRAs that attorneys should become familiar with. Those changes include increasing the age to start taking required minimum distributions (RMDs) to age 72, eliminating the age cap for contributions, and, most importantly for estate planning, eliminating the stretch IRA for most non-spouse beneficiaries.

**Stretch IRAs**

For the owner, an IRA is an essential tool to save for retirement and leave a legacy for heirs, while deferring taxes as long as possible. Under pre-SECURE Act law, non-spouse individual beneficiaries were generally able to rollover an IRA into an inherited IRA and take advantage of what is known as the “stretch IRA,” which allowed for continuation of the tax deferral benefits of an IRA. The beneficiary would only be required to withdraw RMDs based upon the beneficiary’s life expectancy, rather than that of the older original IRA owner. As a result, the IRA would continue to grow tax-deferred for the lifetime of the beneficiary. For a beneficiary much younger than the original owner, such as a child or grandchild, this deferral could last decades.

Now, under the SECURE Act, most non-spouse IRA beneficiaries are required to withdraw (and for a traditional IRA, pay income taxes on) the entire IRA within ten years of the original owner’s death. The SECURE Act provisions on the stretch IRA are effective for dates of death starting January 1, 2020. If the IRA owner died before January 1, 2020, the prior rules apply.

Beneficiaries who are not “eligible designated beneficiaries” (discussed below) will now have to carefully consider the timing of withdrawals from the inherited IRA over the required ten year period. The SECURE Act does not require the withdrawals to be spread evenly or that a withdrawal be taken each year. The only requirement is that the entire account be withdrawn within ten years. Beneficiaries should consider spreading the withdrawals over the course of the ten years to keep the withdrawals in lower marginal tax rate brackets, or timing withdrawals to offset losses. Tax planning considerations will now likely determine when withdrawals are made.

**Eligible Designated Beneficiaries**

Certain beneficiaries, referred to as “eligible designated beneficiaries,” are exempt from the new ten year withdrawal rule. They include beneficiaries who are a surviving spouse, minor child, chronically ill, disabled, or no more than ten years younger than the deceased IRA owner. Generally, these beneficiaries can use their own life expectancy to determine RMDs based upon the pre-SECURE Act rules. The list of eligible designated beneficiaries is exclusive:

- A surviving spouse beneficiary is treated as if he or she were the original owner of the IRA, and is allowed a full rollover. The spouse can use the new increased age (72) for starting RMDs and can use his or her own life expectancy for calculating RMDs. The spouse would not need to withdraw the account within ten years.
- A minor child of the IRA owner can take RMDs based upon the child’s life expectancy until they reach majority. At majority (as determined under state law), the child is no longer exempt and the new rules apply, requiring them to withdraw the account within ten years thereafter.
- A chronically ill beneficiary is one who needs substantial assistance with activities of daily living or has a severe cognitive impairment. The SECURE Act adopts the existing definition of chronically ill contained in IRC § 7702B(c)(4), but adds that the condition is expected to be indefinite in length. As with a disabled beneficiary, a chronically ill beneficiary does not need to be related to the IRA owner and an SNT can be used.
- The final eligible category is a beneficiary who is no more than ten years younger than the IRA owner, such as a sibling.

For most non-spouse beneficiaries, the elimination of the stretch IRA will result in beneficiaries paying increased taxes on their
Irrevocable Trusts and Crisis Planning for Medicaid Benefits

For 2020, the New York State Department of Health has assessed the average monthly cost of nursing home care on Long Island at $13,407.1 Without proper Medicaid planning, in just one year, over $150,000 of a lifetime of savings could be lost paying for nursing home care. Due to the five-year look back period, “Medicaid planning,” is crucial to maximizing a client’s estate by protecting assets from the cost of long-term nursing home care. While early Medicaid planning is best, all is not lost if a Medicaid crisis lands on your doorstep.

Irrevocable Trusts and Medicaid

Utilization of an irrevocable trust is one valuable tool at the practitioner’s Medicaid planning disposal. A “trust” is generally defined as “a legal instrument by which an individual gives control over his/her assets to another (the trustee) to disburse according to the instructions of the individual creating the trust.” Regardless of the type of trust created, all trust-related transfers are subject to the 60-month look back period.

Two common types of trusts are the revocable and irrevocable trust. A revocable trust is a trust created by an individual which the individual has the right to cancel. An irrevocable trust on the other hand, is a trust created by an individual which the individual may or may not be able to exercise some control, but which may not be cancelled under any circumstances. For Medicaid purposes, any portion of the principal of the trust, or the income generated from the trust that can be paid to or for the benefit of the Medicaid applicant/recipient (the “A/R”), is considered an available resource.

Accordingly, to be an effective Medicaid tool, the irrevocable trust must have certain basic provisions that restrict the trust principal (and, if desired, the trust income) from the A/R. 

On the most basic level, the grantor (A/R) cannot be the trustee. Moreover, to avoid the principal of the trust being deemed an available resource, the trust must prohibit invasion of the trust principal for the benefit of the A/R (or his or her spouse). The trust should also provide a provision that waives the right of invasion by a court under EPTL 7-1.8(b). Absent the waiver of invasion, under certain circumstances, a court could invade the principal of the trust for the support of the A/R and the principal could become an available resource for the Department of Social Services. Since access to the trust funds often becomes necessary, such trusts generally allow an invasion of principal for the benefit of a class of individuals, usually the children of the A/R.

Medicaid considers the funding of an irrevocable trust as a gift that would create a period of ineligibility based on the value of the assets funded into the trust. As such, these trusts are most valuable when planning is done before the A/R becomes ill and needs long term care. Such a trust could be used at the eleventh hour in conjunction with the use of a Medicaid-compliant promissory note, as discussed below.

Crisis Planning for Medicaid

Crisis planning refers to planning that is done when the A/R is about to need or already is in need of Medicaid to fund long-term care expenses. Depending on the family makeup of the Medicaid applicant, an A/R in crisis seeking nursing home care can still protect between 40 to 100 percent of their assets. Any asset, in any amount, can be transferred without penalty to:

• the applicant’s spouse, or to another for the sole benefit of the applicant’s spouse;
• a blind or disabled child, or a trust established for the sole benefit of such child;
• a trust established solely for an individual under 65 years of age who is disabled.

Typically, the most valuable asset a client has is his home. Under the DRA, the primary residence occupied by the A/R is an exempt asset for purposes of Medicaid eligibility, up to a certain equity level. In New York, the equity limit in the homestead is $878,000. Homesteads with an equity above $878,000 would render an A/R ineligible. Homeowners can reduce their equity through a reverse mortgage or home equity loan, but not with medical bills. Regardless of the equity, the homestead is exempt if a spouse, a child under 21, or a child who is blind or disabled resides in the home. In addition, the transfer of the homestead is an exempt transfer if made to any of the following individuals:

• a spouse
• a minor child under age 21, or a blind or disabled child of any age
• a sibling of the individual who has an equity interest in the home and was residing in the home for at least one year immediately before the date of institutionalization.
• an adult non-disabled son or daughter, who was residing in the home for at least two years immediately before the date of institutionalization and who has provided care to the A/R

Open to NCBA Members admitted to practice less than 10 years.

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• Explore other practice areas
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See MEDICAID, Page 11
Benefits of Life Insurance in Estate Planning

There are a number of estate planning benefits to owning a life insurance policy, some of which may vary depending on an individual's financial and personal situation. A significant benefit of life insurance for all individuals, regardless of asset level, is the ability for others to pay expenses after death. If an insured names a beneficiary on her or his policy, the beneficiary can put in a claim for the proceeds immediately upon the insured's passing, and receive the proceeds within weeks. This allows the beneficiary to be reimbursed for burial costs quickly, as well as pay for the cost of administering the estate.

Individuals without significant assets may seek to purchase life insurance in order to replace income for their heirs. This may be the case for parents seeking to replace wealth for young children, or a predeceased spouse seeking to replace a non-working surviving partner. Naming dependents as the beneficiaries of a life insurance policy provides the beneficiaries with income and wealth if the insured's passing would leave them financially stricken. Furthermore, wealthy individuals may seek to purchase life insurance in order for their heirs to conveniently pay federal and/or state estate taxes.

Without the benefit of life insurance proceeds, heirs may be forced to liquidate assets or otherwise reduce their inheritance. For the year 2020, at the federal level, estate tax is imposed on assets in excess of $11,580,000, at a maximum rate of 40%. In New York, an additional state estate tax is imposed on assets in excess of $5,850,000, at a maximum rate of 16%. In both situations, practitioners must understand the importance of recommending life insurance, either as income or wealth replacement for the insured's beneficiaries, or as liquidity for paying estate taxes.

The use of life insurance is also becoming more prominent for those clients owning closely held businesses. From 2017 to 2019, there was an 18% increase in those individuals purchasing life insurance for business purposes.4 When structuring a client's estate plan, practitioners must get a full picture of the assets, including any business interests. When there are multiple owners in a business, the owners should consider the acquisition of life insurance to fund any potential buy-out or provide working capital. If one of the owners were to pass away, the remaining owner(s) would need to have enough liquid funds to compensate the deceased owner's family or estate. Additionally, the company would be faced with the burden of replacing the deceased owner, in the event there is an operating business.

If, however, there was available life insurance, those funds could be utilized to pay the deceased owner's estate with no negative monetary impact on the company. Either the owners or the company could be the owner(s) of the policy, and the coverage amount could be the basis for the valuation of the deceased owner's interest. Insurance is a valuable tool when planning the succession of a business because it alleviates a financial burden upon an owner's passing. It also dictates who will succeed to the insured's ownership interest, based on the ownership structure of the life insurance. The interplay of utilizing life insurance for a client's business succession must be taken into consideration when building an estate plan.

Estate Planning Considerations for Life Insurance

When considering insurance as part of an estate or business succession plan, it is important to review the ownership of the policy. The value of an insurance policy owned by an individual will be included when calculating his or her asset value, and therefore may increase the client's taxable estate. Ownership of a life insurance policy by an Irrevocable Life Insurance Trust (an “ILIT”), can provide tax and other advantages when compared to the policy being owned individually.

An ILIT is a lifetime, irrevocable trust set up by the insured individual, that either purchases an insurance policy on the insured’s life or is the recipient of an insurance policy as a gift from the insured. If the ILIT purchases the insurance policy directly, the value of the death benefit is not includable in the insured’s estate assets and therefore will not be used when calculating whether estate taxes are due. If, however, the insured makes a gift of the insurance policy to the ILIT, three years must elapse before the value of the policy is removed from the insured’s taxable estate.

By utilizing an ILIT, upon the insured’s passing, the terms of the trust determine how the proceeds are to be distributed, which is a valuable estate planning tool in a variety of situations. For example, proceeds can be held in trust for young beneficiaries, or for beneficiaries who otherwise need financial protection as a result of creditor issues or marital problems. In the case of a blended family utilizing an ILIT allows an insured’s spouse to be named the beneficiary for his or her lifetime, but ultimately distribute the balance of the death benefit to the insured’s descendants.

There are certain procedures that must be followed in order to ensure that the value of any policy transferred to an ILIT is removed from the insured’s taxable estate. First, the trust must be irrevocable, and the insured cannot act as a trustee. Instead, an independent third party must act as trustee and administer the trust in the beneficiaries’ best interests. Additionally, the trustee must make the premium payments on behalf of the insured from a trust bank account. Before each premium payment is made, the insured must transfer the premium amount to the trust bank account, and should simultaneously advise the beneficiaries of their right to withdraw a portion of the contributions from the trust within a certain time frame. This right of withdrawal ensures that the transfer to the trust is treated as a present interest gift, eligible for the annual gift tax exclusion ($15,000 per donee during 2020), enhancing the transfer tax benefits of the use of an ILIT.

Insurance policies are also flexible in the sense that the death benefit can be changed or increased at any time, when compared to the sale of insurance. Attorneys cannot simply gather a client’s asset information without considering the potential need for life insurance. Advisors must be more proactive in communicating to their clients the numerous benefits of purchasing life insurance, as well as in considering the ownership options and how it will coincide with a client’s overall estate plan.

Neil D. Katz is the managing partner of Katz Chwat, P.C., in Melville, handling firm matters involving tax controversies, business planning and transactions, and estate planning. Neil can be contacted at Neil@katzchwat.com.

Alyssa R. Danziger is an associate at Katz Chwat, P.C., practicing predominantly in the areas of business planning and transactions and estate planning. Alyssa can be contacted at Alyssa@katzchwat.com.
The sole exception being “deposit accounts” allowed employees and former employees who period based upon the amount returned. To a lien on a business, a business owner and personal property would have been another individual employee or a class of employees. would also have been able to obtain such liens based on a mere allegation of unpaid wages. In would not have had to prove that they were employees who may be owed small amounts of monies by small employers, due to the increasing difficulty of collecting against any judgment. Thus, the legislature hoped this bill would have increased the ability of workers to secure and collect wages for work already performed. The following example illustrates this point. When an A/R does not have any exempt transfers, all is not lost. If the A/R would transfer some portion of his/her monthly income, to pay the nursing home privately for the penalty period. One would then have funds, plus the balance of the assets, pursuant to the terms of a Medicaid compliant promissory note. This would create a penalty period, but the loan would not. The loan would then be repaid to the A/R, with interest, generally for a term that coincides with the penalty period. The A/R would then have funds, plus his/her monthly income, to pay the home privately for the penalty period. One requirement for this plan to succeed is that the payment must be somewhat less than the actual private monthly cost.

The Bottom Line

An applicant transfers title of her home to a revocable trust. This is not a gift and does not affect eligibility. However, when the A/R needs nursing home care, she transfers her interest in the trust to her husband. This transfer from the A/R’s trust to a spouse is not an exempt transfer, however. To effectuate a proper return of this non-exempt transfer, the husband must deed title back to the wife’s trust, then from the wife’s trust back to the A/R (wife), and then from the A/R directly to the husband. When an A/R does not have any exempt transfers and cannot show that the gift was done for a purpose other than to qualify for Medicaid, there is still a way to protect approximately half of the A/R’s assets, depending upon the cost of the nursing home and the A/R’s income. In such a case, the A/R would transfer some portion of his/her assets, keep the amount Medicaid allows (currently $15,750) while making a loan of

David S. Feather

David S. Feather is the managing partner of Feather Law Firm, P.C., an employment and labor law firm located in Garden City, Mr. Feather is also an employment law arbitrator and mediator for NAM.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
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<tbody>
<tr>
<td>March 2, 2020</td>
<td>Forever Solutions to Forever Chemicals: Exploring Drinking Water Alternatives for Long Island</td>
<td>With the NCBA Environmental Law Committee and the NYSBA Environmental and Energy Law Section. Program 6:00–8:00 PM. Credits offered: 2 credits in professional practice.</td>
</tr>
<tr>
<td>March 3, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: Practicing Law in the Cloud</td>
<td>Sponsored by NCBA Corporate Partners Champion Office Suites and Tradition Title Agency, Inc. With the NCBA Legal Administrators and the General, Solo and Small Law Practice Committees. Program 12:45–1:45 PM. Credits offered: 1 credit in professional practice or skills.</td>
</tr>
<tr>
<td>March 4, 2020</td>
<td>Dean’s Hour: Debtor and Creditor Law Update: New York’s New Voidable Transactions Act</td>
<td>Sponsored by NCBA Corporate Partner Dime Community Bank. With the NCBA Bankruptcy Law Committee. Program 12:45–1:45 PM. Credits offered: 1 credit in professional practice or skills.</td>
</tr>
<tr>
<td>March 5, 2020</td>
<td>Purely Paralegal: E-Filing in Nassau County</td>
<td>With the NCBA Paralegal Committee. Program 6:00–7:00 PM. Credits offered: none.</td>
</tr>
<tr>
<td>March 6, 2020</td>
<td>Dean’s Hour: Holmes and the Crafting of American Constitutional Jurisprudence: The Ambiguous Legacies of Oliver Wendell Holmes, Jr.</td>
<td>Program 12:45–1:45 PM. Credits offered: 1 credit in professional practice.</td>
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<tr>
<td>March 12, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: LGBTQ Issues in Employment Law</td>
<td>Sponsored by NCBA Corporate Partners Champion Office Suites, Dime Community Bank and Tradition Title Agency, Inc. With the NCBA LGBTQ and Labor and Employment Law Committees. Program 12:45–1:45 PM. Credits offered: 1 credit in diversity, inclusion and elimination of bias.</td>
</tr>
<tr>
<td>March 12, 2020</td>
<td>Aging in the Legal Profession: Be Aware and Be Prepared</td>
<td>With the NCBA Lawyer Assistance Program. Program 5:30–7:30 PM. Credits offered: 2 credits in ethics.</td>
</tr>
<tr>
<td>March 14-15, 2020</td>
<td>Hon. Joseph Goldstein Bridge-the-Gap Weekend</td>
<td>Completely free to NCBA members. Sign-up for a class, a day, or the full weekend.</td>
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<tr>
<td>March 16, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: Religious Exemptions from Vaccines</td>
<td>Sponsored by NCBA Corporate Partners Champion Office Suites and Dime Community Bank. With the NCBA Civil Rights Committee. Program 12:45–1:45 PM. Credits offered: 1 credit in professional practice.</td>
</tr>
<tr>
<td>March 18, 2020</td>
<td>Champion Office Suites Lecture Series Presents: Dean’s Hour: Legal Responses to the Growing Menace of Cyberharassment, Digital Torts, and Identity Theft</td>
<td>Sponsored by NCBA Corporate Partner Champion Office Suites. With the NCBA Civil Rights Committee. Program 12:45–1:45 PM. Credits offered: 1 credit in professional practice or skills.</td>
</tr>
<tr>
<td>March 24, 2020</td>
<td>Hon. Elaine Jackson Stack Moot Court Competition—Finals Round</td>
<td>Round begins at 7:00 PM in the Great Hall. Come watch the next generation compete in the Academy’s annual competition for law schools. Credits offered: 1 credit in professional practice.</td>
</tr>
<tr>
<td>March 27, 2020</td>
<td>Everything You Need to Know About Becoming a Judge</td>
<td>Franklin H. Williams Judicial Commission is pleased to partner with the Nassau County Bar Association in presenting this program. The program will be held at the Maurice A. Deane School of Law at Hofstra University. Reception will follow program. Program 9:00AM–1:00 PM. Credits offered: 3 credits in professional practice and 1 credit in ethics.</td>
</tr>
<tr>
<td>March 31, 2020</td>
<td>Cold Noses and Warm Hearts: Laws that Protect You and Your Pets</td>
<td>With the NCBA Community Relations and Public Education Committee and the NCBA Animal Law Committee. Light supper will be provided courtesy of Fass &amp; Greenberg, LLP. Program 5:30–8:30 PM. Credits offered: 3 credits in professional practice.</td>
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### ACADEMY CALENDAR

#### March 2020

<table>
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<tr>
<th>Date</th>
<th>Time</th>
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<tr>
<td>March 2</td>
<td>8:00 PM</td>
<td><strong>Hon. Elaine Jackson Stack Moot Court Competition</strong></td>
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<tr>
<td>March 5</td>
<td>1:45 PM</td>
<td><strong>Court Judges.</strong></td>
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<tr>
<td>March 6</td>
<td>1:45 PM</td>
<td><strong>Everything You Need to Know About Becoming a Judge</strong></td>
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<tr>
<td>March 8</td>
<td>9:30 AM</td>
<td><strong>Hon. Joseph Goldstein Bridge-the-Gap Weekend</strong></td>
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<tr>
<td>March 12</td>
<td>5:30 PM</td>
<td><strong>Aging in the Legal Profession: Be Aware and Be Prepared</strong></td>
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<tr>
<td>March 12</td>
<td>12:45 PM</td>
<td><strong>Identity Theft: Responses to the Growing Menace of Cyberharassment, Digital Torts, and Exemptions from Vaccines</strong></td>
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<tr>
<td>March 18</td>
<td>12:45 PM</td>
<td><strong>Court Judges.</strong></td>
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**Notes:**
- **Dean’s Hours:** Considerations in Negotiating Contractual Indemnification Clauses
- **An Evening With the Tri-County Surrogates: What’s Hot and What’s Not**
- **Til Death (or Divorce) Do Us Part: Understanding the Intersection of Divorce and Estate Planning (Networking and Seminar)**
- **Purely Paralegal: Title Report Basics**
- **Champion Office Suites Lecture Series Presents: Dean’s Hour:** #MeToo in the Healthcare Environment

**Registration:**
- Pre-registration is required for all Academy programs. Call (516) 747-4464 for ease of registration or email academy@nassaubar.org.
- Light supper will be provided courtesy of Fass & Greenberg, LLP.
- Completely free to NCBA members. Sign-up for a class, a day, or the full weekend.
- Credits offered: 2 credits in ethics
- Credits offered: 3 credits in professional practice
- Credits offered: 2 credits in professional practice or skills
- Credits offered: 1 credit in professional practice
- Credits offered: 1.5 credits in professional practice or skills
- Credits offered: none
- Credits offered: 1 credit in professional practice

**Contact:**
- Pre-registration is permitted at Dean’s Hours. Lunch is available for purchase through in-house caterer.
- Considerations in Negotiating Contractual Indemnification Clauses
- With the NCBA In-House Counsel Committee
- Program 12:45–1:45 PM
- Credits offered: 1 credit in professional practice

**Event Details:**
- **Sponsored by NCBA Corporate Partner BST & Co.**
- **With the NCBA Family Court Law and Procedure Committee and the Assigned Counsel Defenders Plan Inc. of Nassau County**
- **Program 5:30–7:30 PM**
- Credits offered: 2 credits in professional practice

**Program Registration:**
- Registration fees: NCBA Member $50; Non-Member Attorney $100; Non-Attorney $25
- For more information, call (516) 747-4464 or email academy@nassaubar.org.
Gentlemen of the court, there are times that I am ashamed to be a member of the human race and this is one such occasion. It is impossible for me to summarize the case for, if you will pardon the expression, it is not a case for the defense, since the Court never allowed me a reasonable opportunity to present my case….

The attack yesterday morning was no stain on the honor of France, and certainly no disgrace to the fighting men of this nation. But this court martial is such a stain and such a disgrace. The case made against war we've never got to win. Those men didn't fight, so they were shot. You bring charges against General Mireau, so I insist that he answer them. Where have I gone wrong?

The film concludes with Dax and his men being ordered to the front once more. This was the First World War in microcosm. It was a war of attrition carried out by the European powers or, if you will, a mutual suicide pact on the installment plan. The site being paid by the commoner for a soldier. A price the officers, it seems, never have to pay.

There is, however, final denouement of pathos. In a crowded beer hall, a young German girl is brought out to entertain the weary, battle-scarred men. To the initial wail of catscalls and wolf whistles, the room falls silent as a young woman's song, sung in German, touches their battered souls providing a brief moment of solace.

Paths of Glory is a remarkable film. Upon its initial release, it was not commercially successful. The movie ran afoul of many of the strictures of the 1950s, when the Cold War was at its height. The film was so controversial in fact that it was not shown in France until 1954.2

This was Stanley Kubrick's first major film and a harbinger of things to come. It can rightfully be said that Dr. Strangelove (1964), A Clockwork Orange (1971), and Full Metal Jacket (1987) can trace their lineage within the director's oeuvre to Paths of Glory. For aficionados, it was an auspicious beginning.

For the legal profession, Paths of Glory merits repeated viewing.3 It is a film which captures the flaws of a system that was. It shows that under such circumstances the law becomes not a search for truth, but instead a twisted incarnation of the machinations of those in positions of authority, wielding their power with casual regard for human life.

The law plays a prominent role in the story as it unfolds. For as gripping as the combat scenes are, the film's moral center revolves around the court martial of three soldiers wrongly charged with 'cowardice in the face of the enemy.' The trial of these unfortunate men, on part with the brutality visited them and their comrades on the battlefield. French and German forces are mired in a bloody stalemate. As the movie's opening narration informs the audience, "By 1916, after two grizzly years of trench warfare, the battle lines had changed very little. Successful attacks were measured in hundreds of yards and paid for thousands of lives." This situation was untenable, both militarily and politically.

General Broulard (Menjou), of the French General Staff, initiates the film's action by manipulating a vain-glory martinet, General Mireau (Macready), into attacking an impregnable German position, known fittingly by the "Ant-Hill." Mireau, ever hungry for promotion, in turn orders his field commandant Colonel Dax (Douglas) to carry out these orders over Dax's own better judgement.

In spite of the valor of Dax's men, the offensive falters. Taking the Ant-Hill was not only impossible, it was a disaster. The men who viewed the failed assault as a personal affront to him boasts, takes the extraordinary step of ordering a French artillery battery to fire on his own troops. The battery commander refuses to do so without a written order from the general.

The search for blame, more properly put, for scape-goats, begins almost at once. Ultimately three men, one of these men, are selected to be court martialed. One is chosen by lot. Another is chosen because his company commander sees him as a social undesirable. And a third is chosen in order to keep him silent after witnessing his company's command's cowardice and incompetence.

Dax, the foremost criminal lawyer in France before the war, volunteers to represent the soldiers. Moreau, his reputation on the line, sees Dax as disloyal for taking on the case. He threatens to "break him thru the ranks." Dax is given only three hours to prepare his defense.

Moreau's chief-of-staff, Major Saint-Auban, is set to prosecute. During the trial, Mireau hovers on the periphery of the proceedings as an overbearing presence. With Mireau intercepting at will, the trial quickly degenerates into a farce.

No formal charges are filed nor is a written indictment presented in open court. No stenographic transcript is kept. The court's presiding officer adroitly restricts Dax in his every attempt to offer an effective defense. Dax is literally reduced to pleading for mercy on behalf of his clients. To call this a Kangaroo Court is to do a disservice to that noble animal.

The conviction of the soldiers is a foregone conclusion. Preparations for their executions are underway while the court is supposedly still deliberating. The men are sentenced to death by firing squad, the sentence to be carried out at dawn the following morning.

The machinery engendered by the court martial is determined to see the men convicted and executed as quickly as possible. Once set in motion, nothing will be permitted to interfere. When one of the men is severely injured in a jail-house brawl, he is strapped to a stretcher, lined up against the wall, and his checks pinched so that he can attain momentary consciousness before being shot.

Just prior to the executions, Dax obtains a sworn statement from the artillery officer charging that Mireau had given the order to fire on his own trenches. Dax takes the affidavit to Broulard in an eleventh hour appeal for clemency. Broulard does nothing to stop the executions.

The following day however, Broulard cleverly uses the affidavit against Mireau, forcing his hand with talk of a public inquiry. Broulard, acknowledging that France cannot afford to have fools guiding her military destiny, then offers Dax Mireau's command.

Dax is taken aback. More in revulsion than in anger, he lashes out at Broulard calling him "a degenerate, sadistic old man." Broulard, for his part, assumed that Dax was solely interested in standing as Mireau's successor to realize that Dax genuinely sought to spare the soldiers' lives.

Thus the confrontation reverberates long after the film is over. For his part, Broulard, ever the Machiavellian, compares Dax to the village idiot, pitting him for his idealism against a war we've got to win. Those men didn't fight, so they were shot. You bring charges against General Mireau, so I insist that he answer them. Where have I gone wrong?

For estate planning attorneys, it is important to keep the rigid requirements of SCPA § 1407 in mind when executing wills. If the client leaves the ceremony with a copy only of the client leaves the ceremony with a copy only in hand, estate planners should distinctly mark the client's document as a “copy” and provide a cover letter to the client which confirms their retainment of the original. Maintaining a paper trail or paperless trail via email is vital. These small steps may serve to alleviate potential problems in the future, if the original will cannot be located at the time of the testator's death.

Andrew P. Niklewicz is a partner at Cullen and Dykman LLP and Chair of the firm's Trusts & Estates Department. Andrew concentrates his practice in the area of Estate Litigation. He can be reached at Aniklewicz@cullenllp.com.

Fabiana Furgal is an associate in the Trusts & Estates Department at Cullen and Dykman and can be reached at Furgal@cullenllp.com.

5. Sz. e.g., Golvy v. Golvy, 110 N.Y. 481 (1888).
WE ARE VERY PLEASE TO ANNOUNCE THAT

JUSTIN F. Pane, Esq.
HAS BEEN PROMOTED TO
MANAGING MEMBER & PRINCIPAL

MR. Pane’S PRACTICE WILL CONTINUE TO FOCUS IN THE AREA OF FORECLOSURE DEFENSE, AS DEMONSTRATED BY THE RECENT APPELLATE DIVISION REVERSAL HE WON IN THE MATTER OF DEUTSCHE BANK V GORDON, 2020 NY SLIP OP 00261 (FORECLOSURE DISMISSED AS TIME-BARRED, MORTGAGE DISCHARGED, AND BORROWER AWARDED STATUTORY ATTORNEYS’ FEES & COSTS).

JANUARY 1, 2020

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Steven Schlesinger, Co-Managing Partner of Jaspian Schlesinger LLP has announced that Jothy Narendran, a partner in the firm’s Banking and Financial Services Practice Group, has been named Co-Managing Partner. Partner Jessica M. Baquet, a member of the firm’s labor and employment, litigation, appellate, and trusts & estates practice groups, has been named to the Management Committee of the 60-member firm.

Marc L. Hamroff, managing partner of Moritt Hock & Hamroff, LLP, announced the appointment of Julia Gavrilov, an attorney with the firm’s secured lending and equipment finance practice area and member of the Equipment Leasing and Finance Association, to the Equipment Leasing & Finance Foundation’s Foundation Research Committee. Ms. Gavrilov, who is the sole attorney to welcome to the firm’s year term, will serve a two-year term.

Forchelli Deegan Terrana LLP is pleased to welcome Jeremy M. Musella to the firm’s corporate mergers and acquisitions and veterinary practice groups as an associate.

Bond, Schoeneck & King is pleased to announce that Emily E. Iannucci, a management-side labor and employment law attorney from the firm’s Garden City office who represents and counsels New York employers in both the public and private sectors, has been elected as a member (partner) of the firm.

Jay M. Herman, a partner at Herman Katz Cangemi & Clyne, LLP is pleased to announce that the Wilkes Law Group, PLLC of Tarrytown, NY has merged its practice into the firm. The new firm name is Herman Katz Cangemi Wilkes & Clyne, LLP and will continue the statewide practice of property tax and eminent domain matters with offices in Manhattan,Melville and Westchester.

Ronald Fatoullah of Ronald Fatoullah & Associates had the honor of introducing AARP New York State Director, Beth Finkel, who led a discussion of recent legislative updates and issues facing seniors in 2020. In addition, Mr. Fatoullah provided educational lectures to caregivers at PSS Circle of Care, R.A.I.N. Alzheimer’s Link Program and the NYC Alzheimer’s Association.

The In Brief column is compiled by Marian C. Rice, a Partner in the firm’s Commercial Real Estate Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

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The Master of the Inns-Hon. Cheryl Helfer on her election Suffolk County District Court

Hon. Linda K. Mejias and Dorian R. Glover, Congratulations on your wedding.

Hon. David J. Gugerty, on his induction to the Nassau County Supreme Court

The Master of the Inns-Hon. Cheryl Helfer on her election Suffolk County District Court

Hon. Eric Sachs, Belated Congratulations on your election to the Bench

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SECURE ACT ...
Continued From Page 8

inherited IRA more quickly. As such, estate plans will need to take into account the new rules when planning for beneficiaries, and for trusts in particular.

Trust Beneficiaries

Trusts are commonly named as beneficiaries of IRAs, rather than an individual beneficiary, as part of a well-constructed estate plan. For a minor beneficiary, a trust allows the minor’s inheritance to be managed on the minor’s behalf until the minor reaches an appropriate age. For some adult beneficiaries, a lifetime trust is necessary due to concerns about creditors, bankruptcy, divorce, substance abuse, or other long term financial instability. For a disabled or chronically ill beneficiary, an SNT may be necessary to ensure that the inheritance does not compromise the beneficiary’s eligibility for any means-tested government benefits, such as Supplemental Security Income (SSI) or Medicaid.

Under prior law, non-individual beneficiaries, a lifetime trust is necessary due to concerns about creditors, bankruptcy, divorce, substance abuse, or other long term financial instability. For a disabled or chronically ill beneficiary, an SNT may be necessary to ensure that the inheritance does not compromise the beneficiary’s eligibility for any means-tested government benefits, such as Supplemental Security Income (SSI) or Medicaid.

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Trusts that were intended to be named as IRA beneficiaries were generally structured as either a conduit trust or an accumulation trust. The conduit trust required the trustee to withdraw the RMDs from the IRA at least annually and distribute it directly to the beneficiary. In an accumulation trust the trustee was still required to withdraw the RMDs, but could use his or her discretion on whether or not to distribute it to the beneficiary or keep it in the trust. The benefit of the conduit trust was that by distributing the RMDs to the beneficiary, the income taxes triggered by the RMD would be paid by the beneficiary rather than the trust, usually at a lower tax rate (trusts have compressed income tax brackets).

The SECURE Act did not change most of the rules pertaining to trusts. If a trust qualifies as a see-through trust, the characteristics of the trust beneficiary still apply to the trust. For example, if the sole trust beneficiary is an eligible designated beneficiary, then the trust is treated as an eligible designated beneficiary, and is not required to withdraw the IRA within ten years. Likewise, an SNT whose beneficiary is disabled or chronically ill is considered an eligible designated beneficiary, and will be allowed to withdraw RMDs from an IRA that named the trust as beneficiary based upon the beneficiary’s life expectancy. However, if the beneficiary is not an eligible designated beneficiary, the ten year withdrawal requirement now applies.

Trust Planning Considerations

Existing estate plans with IRA trusts may need to be altered to account for the statutory changes and the elimination of the stretch IRA. Many wills contain conduit IRA trusts that will no longer function in the way they were intended, to pass through the RMDs to the beneficiary over their lifetime. With the new changes there is no annual RMD for beneficiaries who are not eligible designated beneficiaries. Depending on how the trust is drafted, this could lead to the entire account being withdrawn in one year (year ten) and distributed to the beneficiary, rather than being spread out over a lifetime. In addition to likely causing the beneficiary to pay more taxes by having the distribution all in one year, the balance of the account would then be left in the hands of the beneficiary outright, without the protection of a trust.

Conduit trusts will need to be rewritten, either to provide for more discretion and flexibility to the trustee (similar to accumulation trusts), or to have structured distribution provisions that take into account the elimination of the RMD for beneficiaries. For discretionary trusts, it will be essential to allow the trustee discretion in the timing of withdrawals from the IRA to minimize taxes.

Practitioners may also start running into trusts that can no longer be amended, including irrevocable trusts, possibly leading to unintended acceleration of distributions. One option may be to decant into a new trust using New York Estates, Powers and Trusts Law § 10-6.6(b), depending on the discretion the trust document grants to the trustee. Trust reformation could also be considered on the grounds that the changes in tax law would frustrate the intent of the grantor or testator.

Every estate planner should become familiar with the SECURE Act and how it alters the planning landscape. While the SECURE Act may be seen as a benefit for IRA owners because it increases the starting age for RMDs to 72, it has the potential to hit certain beneficiaries hard, and the classic conduit trust is no longer a viable option. With the elimination of the stretch IRA for most non-spouse beneficiaries, more nuanced planning for IRA beneficiaries and trusts is now essential.

Marcus O’Toole-Gelo is a senior associate at Genser Cona Elder Law in Melville.

1. IRC § 401(a)(9)(E)(i).
2. IRC § 401(a)(9)(H)(ii).
<table>
<thead>
<tr>
<th>ETHICS</th>
<th>Monday, March 2</th>
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<tr>
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<td>Matthew K. Flanagan</td>
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<td>IN-HOUSE COUNCIL</td>
<td>Tuesday, March 3</td>
<td>6:00 p.m.</td>
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<td>Tagiana Souza-Tortorella</td>
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<td>MEDICAL-LEGAL</td>
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<td>Susan W. Darlington/Mary Anne Walling</td>
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<td>CONDEMNATION LAW AND TAX</td>
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<td>Douglas W. Atkins</td>
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<td>HOSPITAL &amp; HEALTH LAW</td>
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<td>Leonard M. Rosenberg</td>
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<td>Christie R. Jacobson/Jennifer L. Koo—Women in the Law</td>
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<td>Thursday, March 5</td>
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<td>COMMUNITY RELATIONS &amp; PUBLIC EDUCATION</td>
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<td>Joshua D. Brookstein</td>
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<td>PLAINIFIC’S PERSONAL INJURY</td>
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<td>EDUCATION LAW</td>
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<td>SURROGATE’S COURT ESTATES &amp; TRUSTS</td>
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<td>Jennifer Hillman/Lawrence N. Berwitz</td>
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<td>BUSINESS LAW, TAX &amp; ACCOUNTING</td>
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<td>Jennifer L. Koo/Scott L. Kestenbaum</td>
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<td>COMMERCIAL LITIGATION</td>
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<td>Michael DiFalco</td>
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<td>DIVERSITY &amp; INCLUSION</td>
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<td>Hon. Maxine S. Broderick</td>
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<td>DISTRICT COURT</td>
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<td>WOMEN IN THE LAW</td>
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<td>CRIMINAL COURT LAW &amp; PROCEDURE</td>
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<td>CONSTRUCTION LAW</td>
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<td>Katie A. Barbieri/Patricia A. Craig</td>
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<td>APPELLATE PRACTICE</td>
<td>Wednesday, April 1</td>
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<td>Barry J. Fisher</td>
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<td>MATRIMONIAL LAW</td>
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<td>COMMUNITY RELATIONS &amp; PUBLIC EDUCATION</td>
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<td>LABOR &amp; EMPLOYMENT</td>
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<td>GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT</td>
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<td>12:30 p.m.</td>
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Honor Norman St. George, Administrative Judge of Nassau County, Receives Prestigious Norman F. Lent Memorial Award

Hon. Norman St. George, Administrative Judge of Nassau County, was honored with the Norman F. Lent Memorial Award presented by the Criminal Courts Bar Association of Nassau County. The prestigious award was presented by the honorary president F. Scott Carrigan at the Association’s Annual Dinner Dance on Thursday, January 23 at the Fox Hollow in Woodbury.

The award is presented each year to an individual who through actions and deeds has consistently maintained the highest standards of the legal profession. Judge St. George was recognized for his extraordinary and efficient leadership of the Nassau County Courts, his fairness, compassion, and judicial temperament.

As Administrative Judge of Nassau County, Judge St. George oversees the operations of all the courts in Nassau County, with direct supervision of nearly 90 judges and more than 900 non-judicial employees.

DEED ... Continued From Page 6

A Medicaid trust may enable individuals to retain a significant degree of control over assets during their lifetime, while providing for protection from creditors.

### Example 1:

A woman dies with no will, leaving behind a $300,000 life insurance policy payable to her daughter; life insurance at death with an outstanding mortgage of $266,666.67. The net elective share payable to the surviving spouse is $55,500, which is the elective share amount. Again, this amount is reduced by the assets already passing to the surviving spouse, which is one-third of the residuary estate, $266,666.67. The net elective share payable to the surviving spouse would be $288,333.33. This amount would be payable ratably between the decedent’s daughter and her brother.

The actual value of the elective share must be calculated before the surviving spouse executes his or her right of election. The value of the assets received under a will may be higher than the amount that would be received pursuant to the elective share. If it is determined that the surviving spouse would receive more under a will, then he or she may request that the court issue an order cancelling the election. The court may only grant such order, however, if there is no prejudice shown to the creditors and other parties interested in the estate.19

Exercising the Right of Election

The right of election is personal to the surviving spouse, with few exceptions. When authorized by the court having jurisdiction, the right can be exercised by the guardian of the property of an infant spouse; the committee of an incompetent spouse; the conservator of a conservatorship; the guardian ad litem for the surviving spouse; and a guardian authorized under Article 81 of the Mental Hygiene Law.20

The surviving spouse or such authorized person must file the notice of election with the court within six months from the date of the probate or testamentary administration, but not later than two years after the date of decedent’s death.21 The notice must be served by mail on the personal representative of the estate, or the named executor if the will has not yet been admitted to probate.22 The surviving spouse can request an extension of time to file, in six-month increments, so long as the original time to make the election has not expired.23 If the original time to file has passed, then the surviving spouse may submit an application for relief from the default and for the extension provided there is reasonable cause.24

Once the notice of election has been filed, a petition to determine the validity of the right of election under Section 1421 of the Surrogate’s Court Procedure Act will likely be filed by the personal representative of the estate, along with an order to show cause as to why the determination should not be made that the surviving spouse is a valid spouse and entitled to the elective share. If there is any property not in the hands of the estate representative, the value of which is required to satisfy the elective share, the petition can also request an order restraining the party holding the property from transferring said property. Process needs to issue to all persons interested in the estate,25 in the question being posed.26 For example, if a joint account with Son is held by Chase bank, the order to show cause will enable Chase bank from transferring the account and process will issue to both Son and Chase bank.

Conclusion

New York’s right of election statute was enacted to provide a surviving spouse, typically the surviving homemaker wife, at the time, with some means of financial support when the deceased husband disinherited his wife. Although times have changed, the public policy behind the legislation has not.

There are many factors that go into determining whether or not a surviving spouse should exercise his or her right of election. Careful attention should be paid to this statute anytime a surviving spouse is left less than the 50-50 split.

Christina Lamm is an associate at Makofsky Law Group, P.C., located in Garden City. The firm concentrates its practice on trusts, estates, Medicaid planning, Medicaid applications, guardianships, and estate administration.

### Notes

1. EPTL § 5-1-1-1 A.
2. Id.
3. EPTL § 5-1-1-1A(4)(a).
4. EPTL § 5-3.
5. EPTL § 5-1-2.
6. The defendant stands for the proposition that a person cannot profit from his or her fraud or crime. See Riggs v. Hitchcock, 115 U.S. 264 (1885).
7. In order for a waiver to be valid it must be in writing and “acknowledged or proved in the manner required by the laws of the State of New York for conveyance of real property” see EPTL § 5-1-1-1A(1).
8. EPTL § 5-1-1-1A(2)(b).
9. EPTL § 5-1-1-1A(2)(c).
10. EPTL § 5-1-1-1A(2)(c).
11. EPTL § 5-1-1-1A(2)(c).
12. EPTL § 5-1-1-1A(4)(a).
13. EPTL § 5-1-1-1A(4)(b).
14. EPTL § 5-1-1-1A(4)(c).
15. EPTL § 5-1-1-1A(4)(d).
16. EPTL § 5-1-1-1A(4)(e).
17. EPTL § 5-1-1-1A(4)(f).
18. EPTL § 5-1-1A(3)(a)(E).
19. EPTL § 5-1-1A(3)(a)(E).
20. EPTL § 5-1-1A(3)(d)(1).
21. Id.
22. EPTL § 5-1-1A(3)(d)(2).
23. Id.
24. See SCPA § 1421.
Since the age of four. In 1958, Steven Bernstein graduated from the University of Pennsylvania, Wharton School of Finance and Commerce, with a B.S. in Economics. From there, he went on to New York University School of Law and earned an LLB in 1961. His article titled “Collegiate Jurisdiction of the State Commission Against Discrimination,” was published at 16 N.Y.U. Intra Law Review 286 (1961). His first honor was being chosen as a community ambassador to Israel in 1961. He had a fantastic three-month trip with the “Experiment in International Living.” He returned home and briefed the community on his experiences living with an Israeli family, working on a kibbutz, and meeting judges of the Israeli Supreme Court.

Mr. Bernstein started his remarkable legal journey in private practice, gaining experience in litigation and developing advocacy skills to assist underserved and vulnerable populations. This was the beginning of a distinguished career and lifelong commitment to civil rights and service to others. From 1968 through 1973, he served as a senior trial attorney, and then as the attorney in charge of the Civil Division of the Legal Aid Society in Rockaway, Queens. In 1974, he became the founding project director for Legal Services, NYC at the Brooklyn Branch and served there through the end of 2009. Through his dedication and leadership, he nurtured a staff of excellent attorneys who protected the legal rights of countless Brooklyn residents and improved the lives of many who did not have the resources to secure the legal protection. His work involved civil litigation, including housing, consumer fraud, disability, and welfare rights. Mr. Bernstein clearly has a unique ability to connect with clients and understand their needs. Shortly after his retirement, Mr. Bernstein began working for the New York Peace Institute as a certified mediator and continues to offer his time and expertise to this project. Fifty percent of conflicts brought before these mediators result in settlements that promote the beneficial interests of all parties. He began volunteering with the Nassau County Bar Association’s Pro Bono Mortgage Foreclosure Project in September 2018 and remains an active and invaluable contributor. Some five years finds it time to offer additional volunteer hours to Cordova Law School as a judge for its Moot Court Program.

Mr. Bernstein has been married to his beloved Gloria for 55 years and they have one son who is a paramedic. Throughout his life, he has also volunteered extensively with his religious communities, including the Lido Beach Synagogue and Young Israel of Rockaway Beach. He served as President of the Lido Beach Synagogue and was involved in reforming its constitution and charter.

When he is not helping others, Mr. Bernstein enjoys walking on the boardwalk and traveling, especially cruising. The Mortgage Foreclosure Project and the Nassau County Bar Association are immensely grateful that this outstanding and generous attorney and truly wonderful human being has joined our mission to serve homeowners in Nassau County.

Karen Marie Scaduto was the Settlement Coordinator for the Mortgage Foreclosure Project and has relocated for an opportunity in Manhattan. We wish her all the best and know she will be missed. Anyone who wishes to volunteer can contact Gale D. Berg, Director of Pro Bono for the Nassau County Bar, at gberg@nassaubar.org.
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