



ESTATES UPDATE

BY DAVID N. ADLER

The year in Trusts and Estates was highlighted by the implementation of new estate and gift tax rules, greater options for the creation of new trusts, and continued participation by the Surrogate's Court in Bar Association Activities

I) FEDERAL TAXATION

As of December, 2010, the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act seriously modified tax consequences of estates for the years 2011 and 2012. For those years the exemption equivalent is set at \$5,000,000 and indexed for inflation. As such, all estates worth less than \$5,000,000 have no Federal Tax consequences. Further, the top tax rate is 35%, a marked lowering of the top tax rate of prior years.

For assets owned by an individual at death, the step up in basis was reinstated. Thus, for purposes of computation of capital gains on a particular asset, the basis upon which such gain is computed shall be its fair market value as of the date of death. This basically wipes away any and all gains occurring between acquisition of that asset and death.

II) GIFT TAXATION

The gift tax lifetime exemption was reunified with the estate tax lifetime exemption, and set at \$5,000,000, also adjusted for inflation. Thus, lifetime transfers provide the same numerical tax free benefit as do testamentary transfers, subject to the unified cap. The new exemption also remains subject to prior gifts, in that any amount of the gift tax exemption utilized previously shall be deducted from the present lifetime exemption. As an example, if one utilized \$500,000 of his gift tax exemption prior to 2011, his present available exemption is now \$4,500,000.

Further, the gift tax annual exclusion of \$13,000 per person per year was preserved. This is an often neglected planning tool. For example, a married couple can pass \$26,000 to any individual every year completely free of gift tax, and not chargeable to any lifetime exemption. When dealing with chil-



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dren and grandchildren as donees, the amount transferred over a period of years can be significant.

Finally, the generation skipping tax exemption amount, applying to transfers to individuals 2 or more generations younger than the transferor (ie grandchildren), was also set at \$5,000,000. This comprises an entire second level of taxation and is often addressed in large estates.

III) PORTABILITY

A unique aspect of the new law consists in the fact that any unused portion of a spouse's exemption amount, may be utilized by the surviving spouse. This approach mirrors one facet of the traditional by-pass trust. In the event that spouse #1 (first spouse to die) only utilizes \$ 2,000,000 of his exemption equivalent (estate/gift), the surviving spouse would be able to utilize \$8,000,000 of exemption equivalents (her own \$5,000,000 plus the unused \$3,000,000 from spouse #1). Portability must be formally elected by the executor on the deceased spouse's estate tax return (form 706). Such election must occur even if no estate tax is due on the deceased spouse's estate.

IV) NEW YORK STATE

New York State has not altered its estate tax thresholds in many years. The New York exemption equivalent (state credit) is \$1,000,000. As such, many estates will be required to pay New York estate taxes and file a New York estate tax return, but not a federal estate tax return. The State tax rates are significantly lower than federal rates and are capped out at 16%. As a practical matter, the New York estate tax return (ET-706) essentially requires the preparation and annexation of the federal estate tax return, as part of its return, even if the federal return is not itself required to be filed.

Kindly note that all the above federal taxation laws only operate until December 2012. It is widely anticipated that the exemption equivalents, and tax rates will change by 2013. If is therefore prudent for all tax planners to maintain flexibility in their options, conduct ongoing and frequent document review,

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QVLP Wins NYSBA Award

BY MARK WELIKY*



Mark Weliky

The Queens County Bar Association's Volunteer Lawyers Project has been named the recipient of the New York State Bar Association's (NYSBA) 2012 Angelo T. Cometa Award. The award is in recognition of its significant community outreach and free legal services in various areas of civil law.

The award, sponsored by NYSBA's Committee on Lawyer Referral Service, annually recognizes individuals or groups in New York that demonstrate an extraordinary commitment toward advancing the goals of the State Bar's Lawyer Referral and Information Service (LRIS), which is a program that helps coordinate a lawyer referral and information system, as well as provides the public with information about available legal services. Named after NYSBA past President Angelo T. Cometa, the award will be presented on March 30th at the State Bar's House of Delegates Dinner in Buffalo. QCBA past President and QVLP board member, David L. Cohen will accept the award on behalf of the project.

The committee recognized QVLP for its Foreclosure Prevention Program, CLARO-Queens Consumer Debt and for the various other areas of civil law which free legal assistance is provided for, such as landlord-tenant matters, uncontested divorce, Family Court matters and the drafting/execution of wills and ancillary documents. The vast majority of the legal assistance

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Non-compete Agreements

BY RICHARD H. APAT

The phone rings and your client tells you he has been served with a summons and complaint alleging he has violated a non-compete agreement he had with his former employer. Most employees unless they are at the higher levels of compensation will not seek private counsel to review these agreements before signing them. Unfortunately your client did not understand the implications of the agreement when signing it and did not consult counsel when starting a new job with a competing company or opening their own company.

Even agreements which seem clear and unambiguous can often be subject to varying interpretation based upon the industry involved, whether or not trade secrets are involved, whether confidential customer lists are really confidential and whether or not

activity your client has engaged in was actually prohibited by the agreement.

More often than not, we see these agreements at the litigation stage when the facts have already transpired. In today's electronic age, transactions are often documented by e-mails and other forms of electronic media and communication.

Many of these cases are litigated in Federal District Court, however in both District Court as well as in State Court. Most of these agreements provide for injunctive relief if violated. The requirements for a preliminary injunction are: 1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in favor of the movant's position (see *Family-Friendly*



Richard H. Apat

Media, Inc. v. Recorder Tel. Network, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80; *Glorious Temple Church of God in Christ v. Dean Holding Corp.*, 35 A.D.3d 806, 807, 828 N.Y.S.2d 442). "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (*Omakaze Sushi Rest., Inc. v. Ngan Kam Lee*, 57 A.D.3d 497, 497, 868 N.Y.S.2d 726). *Radiology Associates of Poughkeepsie, PLLC v. Drocea*, 87 A.D.3d 1121, 930 N.Y.S.2d 594, 2011

Another complicating factor in this litigation is that the employer often times makes the case personal and pursues the case beyond what they are entitled to just for the purpose of hurting the former employee who they feel has betrayed

their trust. Given the fact that the employer usually has far superior resources and that this type of litigation has many forms of disclosure available, (notices to admit, notices for document production, interrogatory demands, bills of particular etc.) it is very easy for the employer to try and crush their opponent. Representing a client in this position, who is facing the stress of this litigation can be challenging. The client must know they are in good hands and reminded on a regular basis what to expect in these cases.

In future articles on this topic we will explore the law related to this area, practical suggestions and techniques for discovery, depositions, trial preparation and the actual trial.

Editor's Note: Richard H. Apat is a partner in the firm of Pearlman, Apat, Futterman, Sirotkin & Seinfeld, LLP, with offices in Kew Gardens, New York and Hicksville.



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POETIC JUSTICE

SOMETHING I ATE

While sitting in court
And forced to wait -
Mind wanders afar -
Tends to ruminate.

The Judge tells the D.A.
To set a new date
And hopes the defendant
Won't beat up his mate.

A warrant will issue
If this gal is late - Or
A death certificate causes
That case to abate.

A decision is made
It becomes a mandate -
A prior directive
It tends to vitiate.

For the objective observer
It can fascinate
More than Houdini, who
could self-levitate.

To watch the players
All coordinate -
In seeking to determine
Another guy's fate.

The crack addict approaches
With wobbly gait -
The judge takes note
That his pupils dilate.

He wants to get out
His breath does bate -
"Time served, you say?
Yo, man, that's great!"

Then back to the streets
"Where I can operate -
My favorite 'product'
I can again disseminate!"

An old man
appears
his veins pulsate
At the side of
his temples
Beneath his
balding pate.

A feeling of
pity
Does permeate
For he sat in his car
to masturbate.

Or maybe he wanted
to excavate,
Or perhaps to merely,
Propagate.

If he goes to jail
We'll all pay the freight
We'll clothe him, amuse him
Put food on his plate.

And send him to school
Teach him to conjugate
And give him a diploma
he can laminate.

I can continue my musing
At this pace and rate
You'll easily perceive
My bemused mental state.

So I'll give up the ghost
And call it a fait
(accompli)
An blame the whole thing
on something I ate.



Robert E. Sparrow

Bob Sparrow

FRIVOLOUS VERBIAGE

Bombastic with endless vocal rants
An advocate with irate tones who prance
Vituperate and slanderous beyond compare
Whom, but the deluded will he really ensnare?

"Silence is golden," oft repeated
A cerebral attorney has him deleted
His paucity of words with biting irony
Humbles him with acid mockery.

Has not our verbose profession learned
That needless language is truly spurned?
Cogent judges separate wheat from chaff
Their erudite opinions sow our meticulous craft.

The cataline conspiracy in assembled court
Emasculated by Cicero with seething fire
Averting a sanguinary quagmire
Castigating each conspirator an unmitigated liar
Words of expressive emotional import.

Frivolous verbiage in discarded debris
Inanities littering a contaminated sea
The bon mot in splendor regal dress
Embellishes our language with a flavorful zest.

Arnold H. Ragano, Esq.



Arnold H. Ragano

QVLP Awarded

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provided by QVLP is performed by our pro bono volunteer lawyer panels, which are comprised of several hundred attorneys from Queens and neighboring counties. Administrative support for the program is provided by QVLP staff attorneys Corry McFarland and Jason Gang with significant support services provided by student interns. Many of these students are from the St. John's University School of Law and from the Touro Law Center. In addition, legal studies majors from the St. John's University Service Learning Program have provided significant support both in the screening and referral process for applicants to our program as well as at the CLARO-Queens Consumer Debt Clinic. The staff of

the Queens County Bar Association's Lawyer Referral Service, Janice Ruiz, Sasha Khan and Shakema Oakley has also been crucial in assisting many applicants to our program who may not be eligible for pro bono assistance.

Of course, most of the credit for this award must go to the many pro bono volunteers, who have made QVLP a success since its inception in 1991 and incorporation as a not-for-profit charitable organization in January, 1992. Through these years QVLP has had the strong backing of QCBA's Officers and Board of Managers and has been the recipient of grant support from the New York State Interest on Lawyers Account Fund (IOLA) every year since 1991.

**Mark Weliky is Pro Bono Coordinator for the Queens County Bar Association and Executive Director of the Queens Volunteer Lawyers Project, Inc.*

Estates Update

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and advise clients with respect to the volatility of the tax environment

V) TRUSTS

The capability for creation of new trusts has been expanded by the enactment of Estates, Powers and Trusts Law (EPTL) 10-6.6 (b)-(t). Traditionally, EPTL 10-6.6 permitted a trustee who had absolute discretion to invade the principal of a trust to create a new trust for the individuals for whom he could have invaded that principal. This is generally referred to as decanting. The restrictions on this invasion and creation consist in the fact that no fixed income interest of any income beneficiary is reduced, and no violation of public policy is effected. The reasons for new trust creation include tax benefits, consolidation of administration expenses, limitation of liability and ease of management. The essential statutory prerequisite to said secondary trust creation was the power of absolute trustee discretion to invade principal. The new law no longer makes absolute discretion a prerequisite.

Specifically, a trustee with any authority to invade principal on behalf of a beneficiary may utilize said principal in creation of a new trust. An ascertainable standard for invasion (such as health, maintenance, support, and education), or other limited purpose may substantiate appropriate invasion and creation. Yet, the new trust must maintain the same standards of distribution, and incorporate the same class of beneficiaries as the original invaded trust. Finally, at all times the creator's intent must be considered and the

beneficiaries rights protected. The above represents a basic summary of major provisions, as the new statute is relatively complex and only 6 months old. Its breadth and impact remain to be seen.

VI) QUEENS COUNTY

The Surrogate's Court, in conjunction with our Bar Association continues to play a leading role in legal education of all types in this County. In the Spring, Surrogate Peter J. Kelly and Chief Clerk Margaret Gribbon attended a Meet and Greet reception at the Bar Association Building. Both interacted in an informal capacity with our members, and gave interesting and timely presentations on recent Court activity.

In November, Judge Kelly participated as a moderator and speaker in our seminar on Guardian Ad Litem Training. Additional outstanding speakers included Louis M. Laurino, Scott G. Kaufman, John R. Dietz, Gerard J. Sweeney and Michael F. Mongelli.

The seminar served as an accreditation tool and incorporated training in a wide variety of areas, including, but not limited to Probate, Administration, Accounting, Supplemental Needs Trusts, Wrongful Death Actions and Fiduciary Ethics. Both the Meet and Greet, and the Seminar were well attended and continue to enhance our reputation as a source of professional education for the Bar at large. Much thanks to our Surrogate for his interest in our Association, and to our speakers who continue to make our seminars vibrant and state of the art. Let's go Giants!

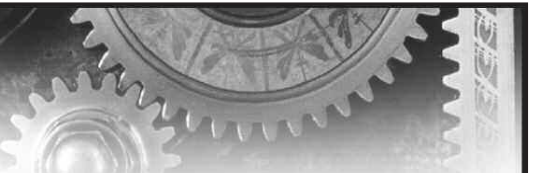
David N. Adler is a Past President (98-99) of the Queens County Bar Association and Chairperson of its Surrogate's Court, Estates and Trusts Committee.

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