ESTATES UPDATE - 2010

By: David N. Adler

The year in Trusts and Estates was highlighted by the institution of new Federal Estate Tax rates and exemptions, an expanded statutory mechanism for proof of kinship, and a changing of the guard in Queens County.

I) TAXATION

After a roller coaster decade during which the estate tax threshold has evolved from 675,000 to its abolition last year, new standards have been promulgated as of December, 2010 under the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Said Act sets the exemption equivalent for the years 2011 and 2012 at $5,000,000 per person. Further, the maximal tax rate for that period is set at 35%, and any share of an exemption that remains unused at one's death, may be utilized by their spouse, in addition to that spouse's exemption.

Finally as in all prior years except last year, all property owned by a decedent will receive a stepped up basis to its fair market value at the date of death. This both minimizes and simplifies the capital gains impact on any property owned by a decedent.

Apparently due to the drastic tax laws in effect during the year 2010, estates of individuals passing away last year have been granted an election. They may elect to function under last year's rules and pay no estate tax, but receive a modified carryover basis in their property; or they may elect to function under this year's rules, and pay the 35% tax rate over their 5,000,000 exemption, but receive a fully stepped up basis in property. In determining said election, the valuation, nature, and date of acquisition of each item of property in an estate must be

considered.

II) PROOF OF KINSHIP

As noted in this column last year, both pre-death, and post death DNA testing had been confirmed as one component of proof of paternity of non-marital children. Yet, said component did not stand alone as exclusive proof, but required other evidence, normally open and notorious acknowledgement of the child by the father, as a second prong in the establishment of paternity. Further, the statute was inconsistent and confusing as different sections, pursuant to case law interpretation, applied either to pre-death or post death testing.

This year, Estates, Powers and Trusts Law Section 4-1.2
(c) was modified and rewritten streamlining the prior statute, and indicating that paternity must be established by clear and convincing evidence. Said evidence may include DNA testing (genetic marker testing) or open and notorious acknowledgement. Thus, either prong of the prior mode of proof of paternity may be applied on its own. Of course, in meeting a clear and convincing standard, the inclusion and utilization of all manner of proof is beneficial.

III) RENUNCIATION

Renunciation of interests has been a valuable tool for post mortem estate planning, as well as indirect gifting. It is addressed by Internal Revenue Code Section 2518, and New York Estates, Powers and Trusts Law Section 2-1.11. It constitutes a refusal to accept an interest in property. It must be in writing, received by a fiduciary within 9 months of death, and must state that no consideration was received. Yet, depending on the nature of property, the parameters of Federal and State renunciations were different. In dealing with joint bank accounts, or joint

brokerage accounts, in New York only, any disclaimer had been held not to apply to any portion of the account contributed by the surviving joint tenant. This conflicted with Federal Law, which permitted a qualified disclaimer of any survivor's full one half interest, regardless of the amount of that survivor's contribution. As such, Estates, Powers and Trusts Law Section 2-1.11 has been amended in Sections (c) (i) to permit full renunciation of interests in conjunction with Federal Law.

IV) MISCELLANEOUS

The Simultaneous Death Law (EPTL 2-1.6) has been modified to provide that in the event that the order of demise is relevant, and that there exists no clear and convincing evidence that one individual survived the other by at least 120 hours, then that individual is deemed to have predeceased the other. There was no time period contained in the prior statute, and said statute remains subject to any contradictory terms of the Will or Trust.

There were a series of relatively minor technical modifications to the Power of Attorney Law that went into effect last year. (General Obligations Law Section 5-1501). An updated version of the Power of Attorney documentation is available at the State Bar web site. Please note that the agent still must execute the document, a monitor may still be designated, and that the Statutory Major Gifts Rider remains a vital component of this form.

V) QUEENS COUNTY

A primary reason for the success in this County of legal education in the area of Trusts and Estates over the past 20 years has been the participation of Surrogate Robert L. Nahman. He has always played a vital role in moderating, planning and organizing our seminars, and has

continually opened up his Courtroom and excellent staff to the legal community. This year, two seminars were conducted in the areas of electronic filing, and Probate and Execution of Wills. Special thanks to Gerard J. Sweeney and Scott Kaufman for serving as speakers this year. Judge Nahman is officially leaving the Surrogacy this year, after 19 years. We thank him for his efforts expended on behalf of our Bar Association, and wish him well in his future endeavors. His successor, Surrogate Peter J. Kelly maintains an extensive background himself in the area of Trusts and Estates, and has a strong history with this Court and this County, and we eagerly anticipate his arrival.

Happy New Year to all.