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ESTATES UPDATE

by David Adler

The year in Trusts and Estates was highlighted by expanded fiduciary obligations and options, prospective inheritance rights of posthumously conceived children, and ongoing state estate tax rule changes

DISCLAIMER

One of the more effective post death planning techniques consist of one's right to disclaim or renounce their inherited testate or intestate share. Said renunciation, having Federal and State implications, is codified in New York State at EPTL§ 2-1.11. All traditional facets of the statute remain in effect-the renunciation must be in writing, signed and acknowledged by the person renouncing, duly served and filed, accompanied by an Affidavit that no consideration was received for said renunciation, and effected within (9) nine months after the date of disposition. The net effect of a renunciation is that the property passes as if the renouncing party predeceased, essentially bypassing him or her.

A renunciation may be made by, among others, the personal representative of a decedent, but historically only with Court authorization. As of late last year, the requirement of prior Court approval was eliminated. As such, a fiduciary may unilaterally renounce, subject to the other parameters of the statute.

INTEREST ON LEGACIES

Traditionally, interest payable on delayed testamentary pecuniary legacies (unless the will provided otherwise) was at the rate of 6%. Further, said interest charge was only payable if the beneficiary made a demand for the interest before initiating a judicial proceeding. This is referenced in EPTL§ 11-1.5.(c)(d)

Said law has now been amended to make interest automatically payable on a pecuniary legacy unpaid within (7) seven months from the issuance of letters. Yet, the interest charge will now be tied to the federal funds rate, not set at a fixed 6%.

That is a legislative acknowledgement of current market conditions, and the reality of fluctuating rates. The Court retains authority to disallow interest and, levy surcharge. The application of this law, enacted late last year, and yet to be more formally qualified by judicial scrutiny, targets the removal of a fixed 6% interest rate , and the removal of the requirement of beneficiary demand for said interest.

INHERITANCE BY POSTHUMOUSLY CONCEIVED CHILDREN

Traditionally, pursuant to EPTL§ 4-1.1, distributee children maintain the right to inherit only if natural, conceived before the decedent's death and born alive thereafter, or if adopted. The possibility of a child being conceived after the death of his genetic parents was not anticipated by this statute. As a result of certain scientific advances, this option is now a reality. It has been addressed by new statute EPTL § 4-1.3, which incorporates new definitions of terms genetic parent, genetic material, and genetic child. These (3) three new terms are geared to the acknowledgement of an individual providing physical specimens that will be subsequently used to "conceive a child after the death of the man or the woman".

Further, beyond the new statutory definitions, there are (4) four conditions that must be met in order to qualify a genetic child for inheritance purposes, as noted in EPTL§ 4-1.3 (b) (1) (2) (3) (4). They are briefly summarized, as follows:

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THE SUPREME COURT MOVES LEFT AS THE CONSEARVATIVE COALITION WEAKENS

By Spiros Tsimbinos

Supreme Court Analyst Adam Liptak in his article in the New York Times of July 1, 2015 at page A1, concludes "overall the story of the last nine months at the Supreme Court was of leftward movement." Several other analysts in reviewing the most recent term arrived at the same conclusion. In Mr. Liptak's article, he quotes, among others, Lisa S. Blatt, who has argued more than thirty cases in the Supreme Court and studied its work for two decades, who stated "it's clearly the most liberal term I have seen since I have been watching the Court." My own analysis confirms the Court's movement to the left.

The movement leftward can be largely attributed to three significant developments; the movement of Chief Justice Roberts to the liberal group on several more occasions than he has in the past; the significant increase in the number of times Justice Kennedy has joined his liberal colleagues; and the cohesive coalition of the four liberal members who voted together almost all of the time.

When former President Bush selected Chief Justice Roberts and Justice Alito to fill vacancies on the Court, conservatives were elated and assumed that along with the votes of Justices Scalia and Thomas and the frequent support of Justice Kennedy, a conservative majority would control the Court for many years. A key factor in this analysis was that Chief Justice Roberts and Justice Alito would usually vote together. In fact, in the first few years as colleagues on the Court (Chief Justice Roberts took office in 2005 and Justice Alito in 2006), the two judges often voted together and the Court was described as having conservative leanings based upon the Roberts-Alito partnership and the expected support of Justices Scalia and Thomas. During the 2010-2011 term

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1) A writing signed not more than (7) seven years before the parent's death, must expressly consent to the use of genetic material for posthumous reproduction, and designate
a person to decide how said genetic material is to be used.

2) The designated representative, noted above, must within (7) seven months of the issuance of letters (testamentary or administration), give notice of the existence of genetic material to the fiduciary of the genetic parent's estate.

3) The designated representative, noted above, must record the above referenced writing in Surrogate's Court within (7) seven months of the issuance of letters.

4) The genetic child must be in utero within 24 months or actually born within 33 months of the genetic parent's death

In the event that the definitions are properly applied and all conditions satisfied (writing, notice, filing, timing), said child will qualify as a distributee of the genetic parent for all inheritance and succession purposes, including class gifts. The statute further contains a printed form reflecting and satisfying the writing requirement. This statute, highly controversial for a variety of reasons, was enacted in late November last year, and also awaits the test of judicial scrutiny

NEW YORK ESTATE TAXATION
Again, as will be the case until 2019, the basic New York exclusion amount (amount exempt from any tax) changed during the year. Until March 31,2015, it was $2,062,500; from April 1, 2015 to March 31, 2016 it is $3,125,000; and as of April 1, 2016 it increases to $4,187,500. These threshold numbers provide exemption from tax for any taxable estate beneath them. Yet, any taxable estate exceeding the exclusion amount, maintains estate tax consequences. Further, any taxable estate greater than 5% of the threshold amount is fully subject to estate taxation, with no credit whatsoever allowed.

Kindly bear in mind that the federal concept of portability still does not apply to New York State. As such, the surviving spouse may not automatically acquire the first spouse to die's unused exclusion amount, (by election on a federal return). That may still be accomplished by utilization of the credit shelter trust.

QUEENS COUNTY
Our seminar last year focused on the Role of the Fiduciary in Estate Proceedings and incorporated a discussion of fiduciary duties, fiduciary powers, the Prudent Investor Rule, the role of the Public Administrator, and special problems fiduciaries face. We thank moderator and Surrogate Peter J. Kelly, and speakers Public Administrator Lois Rosenblatt, Scott G. Kaufman, Esq. and Gerard J. Sweeney, Esq., for their outstanding efforts and presentations.

Further, our Spring meeting included an update by Surrogate Kelly on the State of the Court, and a presentation by Louis M. Laurino, Esq. regarding the changing parameters of SCPA 1404 examinations. Wishing you all a happy and healthy year!

The Supreme Court Moves Left... Continued from p.1

for example, Chief Justice Roberts and Justice Alito voted together 96% of the time. In the 2011-2012 term, it was 90% of the time. The partnership helped to insure important conservative victories, such as, the decision on campaign financing in the Citizens United case. A recent survey by the New York Times based on an analysis of data from the Supreme Court Data Base published June 26, 2015, at page 13A indicated that the most conservative term of the Court since the Warren era occurred in 2008.

Beginning with the 2012-2013 term, however, Justice Roberts began to move more toward the middle of the Court and during that term the two Justices voted together only about 79% of the time with Justice Alito remaining firmly in the conservative camp. During the term which just ended, Chief Justice Roberts once again voted to uphold the Obama Healthcare Law and joined liberal members of the Court in several other cases. His record of voting together with Justice Alito was 84% with regard to the nineteen major cases I reviewed. On the conservative side, the strongest alliance this year was between Justice Alito and Justice Thomas who voted together 89% of the time.

Although Chief Justice Roberts continues to vote with the conservative group on several key cases, "the lean leftward" can largely be attributed to his movement to the center and his vote with the liberal block on several occasions this year, more so than in the past. The lean leftward was also accelerated by a more significant movement to the left by Justice Kennedy who this term voted more with the liberal block than with the conservative group. According to the article written by Adam Liptak, Justice Kennedy in thirteen controversial decisions involving 5-4 votes voted with the liberal group eight times and with the conservative block 5 times. In prior terms he had usually joined the conservative block approximately two-thirds of the time. My own analysis found that Justice Kennedy voted with Justice Kagan fourteen out of the nineteen major cases I reviewed or 73% of the time and thirteen times with Justice Ginsburg, or 68%.

As the conservative alliance between Chief Justice Roberts and Justice Alito weakened and Justice Scalia occasionally abandoned the conservative group to vote for the defense, the liberal group alliance of Justices Ginsburg, Sotomayor, Kagan and Breyer remained as strong as ever. Thus these Justices voted together in eighteen of the nineteen major decisions I reviewed or an astronomical 95% of the time. In the July 1, 2015 New York Times article by Adam Liptak, the author observed at pages A1 and A19:

"the stunning series of liberal decisions delivered by the Supreme Court this term was the product of discipline on the left side of the Court and disarray on the right. - - - Many analysts credit the leadership of Justice Ruth Bader-Ginsburg, the senior member of the liberal justices for leveraging their four votes. "We have made a concerted effort to speak with one voice in important cases." she said in an interview last year."

He further remarked at page A19, "The most interesting thing about this term is the acceleration of a long-term trend of disagreement among the Republican-appointed judges, while the Democratic-appointed judges continue to march in lock step, said Eric Posner, a law professor at the University of Chicago."

Although it is an often stated axiom that judges should be independent and should approach each case with an open mind and without any preconceived viewpoint, it is increasingly clear the four members of the liberal group have come to the Court with strongly held principles and ideological views with a purposeful intent to advance a particular agenda. Thus, the frank admission by Justice Ginsburg in the above cited interview "we have made a concerted effort to speak with one voice in important cases."

In addition, the four liberal Justices appear to be bound to the policies of and positions of the Presidents who appointed them. While Chief Justice Earl Warren issued many decisions which did not reflect the views of President Eisenhower who appointed him and Justice Kennedy has surely taken positions which would not be consistent with those of President Reagan who appointed him, the four liberal Justices have exhibited a strong allegiance to the policies and programs of the Presidents who appointed them. Thus, Justice Sotomayor and Kagan this term supported the positions of President Obama in every case in which the issue arose.

During this past term, while Chief Justice Roberts and Justice Kennedy voted with the liberal block on several occasions and even Justices Alito, Scalia and Thomas did so on some occasions, not once in the major decisions I reviewed, did a member of the liberal group vote with the conservatives.

Few people realize the critical importance the Supreme Court plays in American society. The term which ended resulted in a landmark decision and several very important rulings which will have a profound effect on the nation in the coming years. It also was a term in which the Court began moving toward a more liberal viewpoint on many social and political issues. A series of controversial issues continue to wait the Court's ruling as it opens its new term in October. Cases involving affirmative action, the meaning of one person one vote, abortion rights, religious freedoms, and additional death penalty issues are all on the Court's upcoming docket. Whether the Court continues its swing to the left or whether it will return to more conservative positions remains to be seen.