



## Will Contests

By Christopher Miehl, Esq.

In New York State, a Will of a deceased person is given legal effect only after it is admitted to probate by the Court. In the event someone objected to the admission of the Will to probate, i.e. a Will contest, the Court must consider four issues: (1) Did the Testator have mental capacity



to make the Will; (2) was the Will signed in accordance with the legal formalities of New York law; (3) was the Will caused by fraud; and (4) was the Will the product of undue influence upon the Testator. These issues must be resolved prior to the Will's admission into probate.

The proponent of the Will has the

burden of proving the first two issues for the Court. For a person to have the mental ability to make a Will, it must be shown that she understood the purpose and effect of a Will, knew what property she owned, and knew who her nearest relatives were. The burden of proving that a Will was

properly signed is met by showing that the Will was signed by the Testator in the presence of two witnesses and that each witness signed the Will in the presence of the Testator and the other witness.

While proving capacity and proper execution may be difficult, the proponent of the Will benefits from several

*continued on next page*

## INSIDE THIS ISSUE

### Will Contests

..... page 1

### IRS In the News

..... page 2

### Net Investment Income Tax

..... page 3

### Need To Know

..... page 4



Rivkin Radler LLP  
926 RXR Plaza, Uniondale NY 11556  
[www.rivkinradler.com](http://www.rivkinradler.com)

©2013. Rivkin Radler LLP.  
All Rights Reserved.

Left blank for mailing purposes.

## Will Contests

*continued from page 1*

legal presumptions which are unique to probate proceedings. These presumptions make it easier to make a case on the issues of capacity and execution. When the signing of a Will is supervised by an attorney, New York State law presumes that the Testator had sufficient mental capacity to make a Will and that the signing of the Will adhered to the formalities of New York law. These presumptions are further bolstered when the Will contains a "Self-Proving Affidavit." In this type of Affidavit, the attesting witnesses represent that the Testator had sufficient mental capacity to make a Will, the Will was properly signed, and that the Testator freely and voluntarily signed the Will.

If the proponent successfully meets her burden on these issues, it is then up to the adversary to offer proof to the contrary. And if the Court determines that the adversary fails to do this, the adversary's objections regarding capacity and execution will be dismissed. The adversary then has the burden of proof on the remaining two issues: fraud and undue influence.

To establish fraud, the objecting party must demonstrate that false statements were made to the Testator that caused her to make a Will that disposed of her property differently than she otherwise would have done. Undue influence is more nebulous and even the courts have difficulty describing it succinctly. To prove undue influence, the objecting party must show that the Testator was improperly influenced to such an extent that the resulting Will does not represent her actual wishes, but those of the person exercising the influence. If the Court finds that the adversary fails to offer sufficient proof on the issues of fraud and undue influence, the Court will dismiss those objections as well and – with no remaining objections to the Will – admit the Will that is being offered for probate. ■

## IRS IN THE NEWS

*By Sarah B. Rebosa*

### Sequestration and the IRS

Earlier this year, the previously little-known word of "sequestration" was catapulted to the forefront of the news because effective March 1, 2013 the American Taxpayer Relief Act of 2012 mandated an approximate \$1 trillion spending cut for federal agencies over a 10-year period. So, what exactly is sequestration and how does it affect the IRS?

To implement its share of the budget cuts, the IRS announced that it will close all IRS operations on 5 separate days: May 24th, June 14th, July 5th, July 22nd and August 30th. All IRS employees will be furloughed on these days – unpaid leave – at a cost savings of approximately \$25 million dollars per day. The days are scheduled so that employees only have 1 unpaid day per pay period. The IRS may announce additional furlough days for 2013, and additional future cuts are still unknown.

Importantly, the furlough dates do not extend tax filing deadlines (although the IRS will not be able to accept or acknowledge e-filed returns on such dates), nor do they extend court deadlines. Similarly, the furlough dates do not extend the time to make necessary employment or excise tax deposits due on any of these dates, since the mandatory Electronic Federal Tax Payment System will remain open.

However, if a taxpayer's deadline to respond to the IRS (for certain docu-

ment related requests), falls on a furlough date, then the taxpayer will have until the next business day to submit such response.

### What is a 501(c)(4)?

In recent weeks, there has been a lot of press on whether the IRS inappropriately "targeted" conservative political groups, such as the Tea Party and patriot groups. According to a Treasury Department report issued on May 14,

2013, the IRS "targeted" entities that applied for exempt status under IRC §501(c)(4). So, what is a §501(c)(4) corporation and why would the IRS (allegedly) take such affirmative steps to scrutinize these applications?

A 501(c)(4) is not a charity – contributions to a (c)(4) are

not tax deductible. It is a social welfare organization that has the ability to lobby and participate in political activities. A (c)(4) can lobby as its exclusive activity and it can engage in campaign activities to support or oppose a political candidate. By contrast, 501(c)(3) charities can only lobby to a limited extent, and they are prohibited from engaging in any campaign activity. Although campaign activity cannot be the primary activity of a (c)(4), and it must pay taxes on certain political expenditures, it can still be involved to a much greater extent than a (c)(3).

In fact, according to the Treasury Department report, some Congressional members have raised concerns that (c)(4) entities may be engaging in

*continued on next page*



# Net Investment Income Tax

By Moira A. Jabir

The "Obamacare" tax on net investment income came into effect on January 1, 2013 although the guidance on the regulations under Section 1411 is not effective until after December 31, 2013.

First and foremost - what is this new tax? Basically, taxpayers must add an additional 3.8% tax on the lesser of their net investment income or their modified adjusted gross income less the applicable threshold. HUH? Exactly. Lets get some definitions under our belt.

Net Investment Income is (1) interest, dividends, capital gains, rent and royalty income and non-qualified annuities; (2) income and gains from passive activities; (3) income and gains from businesses involved in the trading of financial instruments and commodities; and (4) gains from the sale of interests in partnerships and S-corporations to the extent the taxpayer is a passive owner. Of course, if any

of the income set forth in items (1) – (4) are derived in an active trade or business (see below), then it is not Net Investment Income.

Net Investment Income also DOES NOT include (1) active trade or business income; (2) distributions from IRAs or other qualified retirement plans; and (3) income taken into account for self-employment tax purposes.

Modified Adjusted Gross Income is your adjusted gross income plus any net foreign earned income.

The Applicable Threshold is \$250,000 for married taxpayers filing jointly; \$125,000 for married taxpayers filing separately; \$200,000 for all other taxpayers and \$11,950 for trusts and estates.

Example: Joe and Jane Smith earned \$350,000 in compensation and \$40,000

*continued on last page*



## IRS In the News

*continued from page 2*

a "substantial, or even predominant, amount of campaign activity." The concern is that §501(c)(4) entities are being used as a loophole to campaign while keeping their donors anonymous. A §527 political organization is also an exempt entity, but one that can campaign exclusively. An important distinction between a (c)(4) and a §527 entity is that a (c)(4) does not have to publicly disclose its donors (neither does a (c)(3)). Therefore, (c)(4)'s are appealing to groups who want to ensure the anonymity of their donors, but also want to lobby and campaign. Arguably, this may be more of a campaign finance issue than a tax

issue.

### Deadlines Relating to Foreign Assets & Income

June 17, 2013 – deadline for U.S. citizens or resident aliens living abroad (and certain non-resident aliens with U.S. source income) to file their individual income tax return; taxpayers should ensure that they include Form 8938 Statement of Foreign Financial Assets, if required.

June 30, 2013 – deadline to file Report of Foreign Bank and Financial Accounts (FBAR) (Form TD F 90-22.1). ■



## TRUSTS, ESTATES & TAXATION BULLETIN

is published for informational purposes and is not intended to serve as legal advice.

We welcome your questions and feedback:

Scott A. Eisenmesser, partner  
[scott.eisenmesser@rivkin.com](mailto:scott.eisenmesser@rivkin.com)

Bernard Feigen, partner  
[bernard.feigen@rivkin.com](mailto:bernard.feigen@rivkin.com)

Jeffrey S. Greener, partner  
[jeffrey.greener@rivkin.com](mailto:jeffrey.greener@rivkin.com)

Walter J. Gumersell, partner  
[walter.gumersell@rivkin.com](mailto:walter.gumersell@rivkin.com)

Moira A. Jabir, associate  
[moira.jabir@rivkin.com](mailto:moira.jabir@rivkin.com)

John M. McFaul, partner  
[john.mcfaul@rivkin.com](mailto:john.mcfaul@rivkin.com)

Christopher Miehl, associate  
[christopher.miehl@rivkin.com](mailto:christopher.miehl@rivkin.com)

Albert W. Petraglia, partner  
[albert.petraglia@rivkin.com](mailto:albert.petraglia@rivkin.com)

Sarah B. Rebosa, associate  
[sarah.rebosa@rivkin.com](mailto:sarah.rebosa@rivkin.com)



Rivkin Radler LLP  
926 RXR Plaza, Uniondale NY 11556  
[www.rivkinradler.com](http://www.rivkinradler.com)

©2013. Rivkin Radler LLP.  
All Rights Reserved.

## Net Investment Income Tax

*continued from page 3*

from interest and dividend income. They are subject to net investment income tax on the lesser of their net investment income (\$40,000) or their MAGI (\$350,000) less the applicable threshold (\$250,000). They owe an additional 3.8% tax on \$40,000 or \$1,520.

Estates and certain trusts<sup>1</sup> are not immune to this new tax and the applicable threshold is low. In order to reduce the 3.8% tax, estates and electing trusts must select the proper year. Example: Mary Smith dies January 2013 and the estate elects a November 30, 2013 year end, the surtax will not apply until the year beginning December 1, 2013. And while this tax does not apply to charitable remainder trusts it does apply to net investment income paid to the non-charitable beneficiary.

Another twist in this new tax occurs for the taxpayer who owns a sole proprietorship, a single member LLC disregarded as separate from the owner or an interest in a partnership or S corporation, as the income or gain generated will be net investment income UNLESS:

- The activity generating the income or gain is from an active trade or business; and
- The income generated is derived from the ordinary course of that trade or business; and
- The activity is not passive activity to the taxpayer per Section 469; and

- The activity is not trading in financial commodities or instruments.

Keep in mind that all four exceptions must be met in order for the income or gain to avoid being treated as net investment income. And under Section 469, rental activities are always treated as passive income, so unless the taxpayer meets the definition of "real estate professional," (think material participation and 750 hours in the taxable year), the surtax will apply. The IRS, feeling generous, is giving taxpayers a one-time opportunity in the first year beginning after 12/31/13 in which the taxpayer meets the applicable threshold and has net investment income, to change their activity groupings,<sup>2</sup> making it easier to achieve or avoid material participation and thus treat income and losses as passive or non-passive income.

This is a very simple summary of a new and complex tax. We always recommend you reach out to your estate planning attorney to obtain a more in depth understanding of the tax and its impact.

<sup>1</sup>Non grantor trusts, electing small business trusts, pooled income trust, cemetery perpetual care funds, qualified funeral trusts, Alaska Native Settlement Trusts and foreign trusts with U.S. beneficiaries.

<sup>2</sup>Consistency rule for activity grouping under regulation Section 1-469-4(e) generally prohibits regrouping of activity unless original grouping was clearly inappropriate or there was a change in facts and circumstances rendering original grouping clearly inappropriate. ■

## 2013 Income Tax Changes

### Need-To-Know

*by Moira A. Jabir, Esq.*

Single Filer	Married Filing Jointly	Head of Household (Single with Dependent(s))
<b>Income</b> Marginal Tax Rate now 39.6% Capital Gains and Dividends Tax 20% Net Investment Income Tax 3.8%	<b>Income</b> Marginal Tax Rate now 39.6% Capital Gains and Dividends Tax 20% Net Investment Income Tax 3.8%	<b>Income</b> Marginal Tax Rate now 39.6% Capital Gains and Dividends Tax 20% Net Investment Income Tax 3.8%
<b>Income</b> <b>\$183,250-\$400,000</b> Marginal Tax Rate now 33% Net Investment Income Tax 3.8% Phase-out on personal exemptions and itemized deductions for individuals earning <b>\$250,000+</b>	<b>Income</b> <b>\$223,050-450,000</b> Marginal Tax Rate now 33% Net Investment Income Tax 3.8% Phase-out on personal exemptions and itemized deductions for married filers earning <b>\$300,000+</b>	<b>Income</b> <b>\$203,150-\$425,000</b> Marginal Tax Rate now 33% Net Investment Income Tax 3.8% Phase-out on personal exemptions and itemized deductions for individuals earning <b>\$250,000+</b>
<b>Income</b> <b>\$87,850-183,250</b> <b>Very little change</b> Payroll Tax increases by 2% for payroll earnings up to <b>\$110,000</b>	<b>Income</b> <b>\$146,400-223,050</b> <b>Very little change</b> Payroll Tax increases by 2% for payroll earnings up to <b>\$110,000</b>	<b>Income</b> <b>\$125,450-203,150</b> <b>Very little change</b> Payroll Tax increases by 2% for payroll earnings up to <b>\$110,000</b>