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The Surrogate's Court: *An Introduction*

By: John McFaul, Esq.

Our state constitution and statutes provide that each one of the counties of the State of New York has its own Judge of the Surrogate's Court, commonly referred to as the "Surrogate". The laws allow, when necessary, that a county may have more than one Surrogate. As of the time of the writing of this article, there are only two counties in the State that have two Surrogates: New York County (Manhattan) and Kings County (Brooklyn).

The Surrogate's Court is a county level court, but has statewide jurisdiction to adjudicate and enforce its orders and decrees. As a court of limited jurisdiction, the primary duty of the Surrogate's Court is to "exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents" (Surrogate's Court Procedure Act, §201(3)). For example, if a decedent dies leaving a will, the nominated executor, the person named in the will to administer the estate, would file the original Will with the Surrogate's Court in the county in which the person was domiciled at the time of his death to have that will "admitted to probate". Then the Court, upon the filing of certain documentation and court forms, issues a decree that grants probate to the will and authority to the executor to administer the estate. Once the will is admitted to probate, the provisions of the will are given full force and effect under the laws of the State of New York and the Surrogate has the jurisdiction to enforce the provisions of that will, and if necessary, to adjudicate disputes that may arise as a result of the probate of that will. In the event the will is contested by a party who has the standing to do so, the probate of the will becomes a matter of litigation and the Surrogate will oversee the pre-trial discovery proceedings, and, in the absence of a settlement, a will contest will ultimately be tried before the Surrogate, generally with the assistance of a jury. But there is more.

The Surrogate's Court also has the authority to appoint guardians for infants, which under New York Law, are persons under the age of 18 years, and in certain instances, to appoint guardians for adults who suffer from an infirmity or disability, which requires the assistance of a duly appointed guardian to monitor their personal and/or financial affairs. Once the Surrogate appoints a legal guardian, either for an infant or a person under a disability, he and the members of his administrative staff continue to monitor the activities of that guardian until they are duly discharged by the Court. In addition, the Surrogate has the power to process and authorize adoptions. In future articles, I will discuss the various roles of the Surrogate's Court and how you, the layman, can successfully maneuver through this complex arena. ■

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RIVKIN RADLER LLP
926 RXR Plaza
Uniondale NY 11556

Amending a Trust with a Power of Attorney

By Sarah B. Rebosa, Esq.

Under certain circumstances, a designated agent under a power of attorney ("POA") has the authority to amend an irrevocable trust. New York recently supported this authority in the Second Department case, *Perosi v. LiGreci*, 98 A.D.3d 230 (2012).

There are many variables involved to determine whether an agent (also referred to as an attorney-in-fact) has the power to amend a trust: whether the trust is irrevocable or revocable and whether the agent is acting under an old POA (pre-September 2009) or a new POA (post-September 2009). Further, if a new POA is involved, it must be determined whether and to what extent the principal signed a Statutory Major Gifts Rider ("SMGR"). The SMGR allows a principal to specifically identify the authority that an agent has with respect to certain gift giving and estate planning. This article focuses only on irrevocable trusts and new POA's.

The Perosi case involved an irrevocable trust. The irrevocable trust agreement had a generic boilerplate-type provision that the trust could not be amended. The agent, appointed under a new POA, amended the trust pursuant to NY E.P.T.L. §7-1.9, which allows the grantor of an irrevocable trust to amend if consent is obtained from all of the trust beneficiaries. The agent amended the trust by removing the existing trustee and appointed two new trustees. The grantor died two weeks later, and the removed trustee argued that the attorney-in-fact did not have the power to amend the trust.

The court held that the agent did have the power to amend the trust, and relied upon two different clauses in the power of attorney – the agent had the right to perform "estate transactions" and "all other matters". Notably, the court held that an attorney-in-fact is the "alter ego" of a principal. Therefore, since a grantor would have the power in their own right to amend a trust under E.P.T.L. §7-1.9, and since neither the power of attorney nor the trust prohibited such an amendment, the attorney-in-fact had this same power to amend.

Although Perosi allowed the amendment, this case in no way grants a blanket power for an attorney-in-fact to amend trusts. The trust amendment in Perosi dealt solely with removing and appointing trustees and there was no change made to the trust's dispositive provisions. Therefore, the court did not discuss in detail the SMGR as it was not necessary to the analysis.

If an agent wants to amend a trust to change the disposition of trust assets, there must be additional scrutiny of the powers granted under the SMGR to determine whether the attorney-in-fact has the power to make such an amendment. Since New York State revised its statutory power of attorney in 2009, the statutory POA form now includes the SMGR, which is optional and not mandatory. The SMGR was intended to call attention to the "gift giving" powers in a POA so that they could not be hidden within another benign power. The legislature interprets "gift giving" to include not only outright gifts, but also estate planning acts that modify the disposition of one's assets, such as creating and amending trusts, or changing beneficiaries on bank accounts, life insurance policies and retirement plans.

Clients may be hesitant to sign the SMGR because it gives considerable power to the agent. However, there can certainly be estate planning benefits to granting additional gift giving powers. Therefore, each client's circumstances must be carefully analyzed and the document drafted accordingly.

Home Is . . . Where the Domicile Is?

Part II of a two-part series • By Jeffrey Greener, Esq.

In our fall newsletter, we advised you of the intense review given a residency audit. In the second part of this article, we have outlined the following steps that should be taken to successfully transition into a new domicile:

- Declare your new state to be your place of domicile and residence in all forms or documents that require a recital of residence, such as Social Security Administration papers, passports, contracts, deeds, leases, credit cards, etc. Register to vote and have your name stricken from the voter rolls of your former state and to the extent that you engage in political activities, make an effort to see that these are centralized in your new state.

- Purchase or rent a residence in the new state and move in.

- If possible, dispose of your former principal residence in your former state (by sale, gift to children, Qualified Personal Residence Trust, etc.) unless you can clearly show that it is used only as a vacation home for less time than the residence in your new state is used. New York courts have in some cases held that if an individual has more than one home and other evidence of domicile is not conclusive, the home first acquired will be considered the domicile. Thus, disposition of your former residence may become important, particularly if it was purchased first, and/or if it is significantly larger in size or more valuable than your new residence. After the change in domicile, it is especially important that you avoid spending significant amounts of time in your former domicile, particularly without interruption by returns to your new domicile. Time spent in a permanent place of abode in your former domicile may subject you to taxation as a resident.

- Execute a new Will or Codicil in which you state that you are a resident of your new domicile.

- Notify all New York social and religious organizations of which you are a member of your change of domicile and, if possible, assume nonresident membership status or resign. If possible, the address to be published in any directories for New York organizations should be changed to show your new address. In addition, also join an organization, temple or church in your domicile and, if so inclined, become active in community affairs.

- File Federal Income Tax Returns using your new address. Stop filing income tax and gift tax returns in your former domicile, except when required on particular income originating in such state, and then file as a nonresident using your new address.

- Set up new banking and investment arrangements.

Finally, keep an annual calendar so you can show when you were in your new domicile each year and can prove your time outside your former domicile. Remember that phone bills, utility bills and credit card bills can be indicative of where you were living, so make sure your calendar is accurate. We hope this article is a helpful guide in making sure you will be treated as residents for income and estate tax purposes in your new domicile. ■

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We welcome your questions and feedback:

Scott A. Eisenmesser, partner
scott.eisenmesser@rivkin.com

Bernard Feigen, partner
bernard.feigen@rivkin.com

Jeffrey S. Greener, partner
jeffrey.greener@rivkin.com

Walter J. Gumersell, partner
walter.gumersell@rivkin.com

John M. McFaul, partner
john.mcfaul@rivkin.com

Albert W. Petraglia, partner
albert.petraglia@rivkin.com

Moira A. Jabir, associate
moira.jabir@rivkin.com

Christopher Miehl, associate
christopher.miehl@rivkin.com

Sarah B. Rebosa, associate
sarah.rebosa@rivkin.com

RIVKIN RADLER
ATTORNEYS AT LAW

Rivkin Radler LLP
926 RXR Plaza, Uniondale NY 11556
www.rivkinradler.com

American Taxpayer Relief Act

By Moira A. Jabir, Esq.

The fiscal cliff was averted on January 1, 2013 with the passage of the American Taxpayer Relief Act of 2012 (Act) which was signed by President Obama on January 2, 2013. The new law eliminates the "sunset" provisions of the 2001 and 2003 tax cuts, offering an increased degree of stability even with the tax increases on some higher income and net worth individuals. Below is a summary of the many tax provisions within the Act.

Estate and Gift Tax:

The federal estate tax is permanently modified to apply to estates in excess of $5,000,000, (indexed for inflation). The tax rate was increased from 35% to 40% .

The gift and GST tax is also permanently modified to apply to gifts and generation skipping transfers in excess of $5,000,000 (indexed for inflation). The tax rate was increased from 35% to 40%.

Spousal portability which allows surviving spouses to use the unused exemption of a predeceased spouse is now permanent.

Income Tax Rates:

The federal income tax rates for individuals with incomes less than $400,000 and joint filers with income less than $450,000 will remain as they were under the prior law. Individuals with income in excess of $400,000 and joint filers with income in excess of $450,000 will have a federal income tax rate of 39.6%. The tax on dividends and long term capital gain will also increase to 20% for these taxpayers. Also, the additional net investment income tax enacted as part of the Patient Protection and Affordable Care Act will apply for individuals with income in excess of $200,000 and joint filers with income in excess of $250,000, resulting in a maximum long term capital gains tax and qualified dividend rate of 23.8%.

Marriage Penalty Relief:

The 15% bracket for married individuals filing jointly is permanently set at 200% of the amount for individual filers.

Social Security Payroll Tax:

The payroll tax holiday in effect for the past two years expired on January 1, 2013 and an employee's portion of the social security payroll tax will increase by 2% from 4.2% to 6.2%.

Exemptions and Itemized Deductions:

The phase out of personal exemptions and the limitation on itemized deductions was reinstated for individuals with adjusted gross income exceeding $250,000 and joint filers with adjusted gross incomes exceeding $350,000. Now personal exemptions are reduced by 2% for each $2,500 (or portion thereof) by which the taxpayer's income exceeds the threshold and itemized deductions are reduced by 3% of the amount by which the taxpayer's adjusted gross income exceeds the applicable threshold to a maximum reduction of 80%.

Alternative Minimum Tax:

The alternative minimum tax is now permanently indexed for inflation.

Education Incentives:

Many education incentives were made permanent such as the student loan interest deduction, enhancements to Coverdell education accounts (also known as the Educational IRAs), exclusion from income of employer provided education assistance and exclusion from income of certain scholarships.

Temporary Provisions:

Section 179 – Section 179 of the tax code permits businesses to deduct the full purchase price of qualifying equipment and/or software purchased or financed during a tax year instead of depreciating such qualifying equipment and/or software over a period of years. The increased Section 179 deduction limits applicable to small business will be extended through 2013.

Business – Various business tax cuts will be extended, including a one-year extension of 50% bonus depreciation, 15 year recovery period for leasehold improvements, research credits and work opportunity credits.

Individual – Various individual tax cuts will be extended including deductions for state and local sales taxes, qualified tuition expenses, $100,000 tax free distributions from IRAs to charities for certain taxpayers and mortgage insurance premiums. ■