Problem Areas in Will Drafting Under New York Law

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PROBLEM AREAS IN WILL DRAFTING UNDER NEW YORK LAW

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INTRODUCTION

Many of the difficulties experienced by attorneys in surrogate's practice can be traced directly to their own misguided efforts in the preparation or drafting of wills. Interestingly, most of such difficulties stem from but a few oft repeated errors. Of course, defective draftsmanship readily may be emended during the life of a testator. Nevertheless, executed wills frequently are not reviewed by practitioners, and errors, although few in variety, may remain undetected until probate. Accordingly, it is incumbent upon practitioners to be alert to those drafting problems which most frequently frustrate their clients' testamentary desires. In order of their frequency of occurrence, these errors include: (1) alterations to executed wills; (2) poor grammar and sentence structure; (3) failure to dispense with a fiduciary's bond; (4) failure to name successor or substitute fiduciaries; (5) creation of testamentary trusts which are violative of the Rule Against Perpetuities; (6) creation of trusts which are invalid pursuant to the doctrine of merger; (7) attorney-draftsman named as beneficiary; and (8) unanticipated legal consequences of joint and reciprocal wills.

This Article briefly will survey each of the above drafting concerns. In addition, the Article will, when appropriate, suggest simple and efficacious measures designed to forestall most instances of faulty draftsmanship. Of course, the author concedes that each of the will-drafting problems discussed in the course of the Article properly could be the subject of lengthy and independent treat-

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1 In the words of Justice Crane, "If as much effort were spent in preparing a will as is devoted to either breaking or construing it, we would not have all these perplexing questions." In re Will of Watson, 262 N.Y. 284, 298, 186 N.E. 787, 790, modifying 237 App. Div. 625, 262 N.Y.S. 394 (1st Dep't 1933), modifying 144 Misc. 213, 258 N.Y.S. 755 (Sur. Ct. Westchester County 1932).
ment. Nevertheless, the author believes that a brief recitation of those problems which most frequently work to confound the intentions of testators is warranted.

**Altering Executed Wills**

Surely the most common, but nevertheless, most easily averted will-drafting blunder is committed after execution of a will. That is, handwritten changes made on testamentary instruments by deletion, insertion, and correction. Such practice clearly is prohibited by the Statute of Wills, which requires strict adherence to the prescribed formalities of execution. Indeed, unless it can be established that a handwritten change was made before or during execution or, if made thereafter, that the formalities of execution were adhered to, the change will be legally ineffective.

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*The Statute of Wills was originally enacted in England in 1540. P. MEchem & T. ATKINSON, CASES AND MATERIALS ON WILLS AND ADMINISTRATION 138 n.1 (5th ed. 1961). Under the original enactment, the sole requirement was that the will be in writing. Id. A later statute extended the formalities to include the testator's signature and acknowledgement in the presence of two witnesses. See id. at 138-39. The New York Statute of Wills, which contains substantially the same provisions, requires the following: (1) the instrument must be signed “at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction”; (2) the signing must take place before two attesting witnesses and be accompanied by a declaration to the witnesses that he is affixing his signature to his will; and (3) the witnesses must sign and affix their addresses to the will. N.Y. Est., POWERS & TRUSTS LAW § 3-2.1 (McKinney 1981).

Although not as extensive in qualifying its provisions, the Model Probate Code has essentially the same requirements as the New York Statute, with the exception that the witnesses' addresses are not necessary. L. SIMES & P. BAYE, MODEL PROBATE CODE § 47 (1946). For a comprehensive examination of the Statute's appearance in America, see Rees, American Wills Statutes: I, 46 VA. L. REV. 613 (1960).

The requirements for altering a will previously were codified in section 34 of the Decedent Estate Law. Id. It has since been replaced by the Estates, Powers & Trusts Law (EPTL) section 3-4.1, which provides: “(1) A will or any part thereof may be revoked or altered by: (A) Another will. (B) A writing of the testator clearly indicating an intention to
Two New York cases are illustrative of the invalidity of unattested alterations. In In re Estate of Lewandowski, the testator altered his will approximately 2 years after its execution. The change involved the addition of a legatee to those named in the main paragraph of the will and was effected by inserting in ink the would-be legatee's name. The court held that "the attempted unattested change in ink was not made by the testator in conformity with the statute. Accordingly, [the] change is wholly ineffective . . . ." Similarly, in In re Will of Lewis, the testator executed a typewritten will. Subsequently, he attempted to revoke certain portions of the will by scribing an "X" across entire pages and passages, drawing lines through words, and writing "VOID" next to various provisions. Despite the fact that these changes patently evidenced the testator's change of heart, the court invalidated the alterations and admitted the original document to probate. In so doing, the court observed that the statute controlling revocation and alteration of wills was "specific and unqualified and [hence] is to be strictly construed." The lesson, therefore, is clear: the practitioner and his testator-client must be fully aware that unattested alterations simply are ineffectual.

effect such revocation or alteration, executed with the formalities prescribed by this article for the execution and attestation of a will (§ 3-2.1). N.Y. Est., Powers & Trusts Law § 3-4.1 (McKinney 1981). According to the statute, any alterations must comply with the same statutory requirements that must be adhered to in an original execution of a will. 2 W. Bowe & D. Barker, Page on the Law of Wills § 22.1 (3d ed. 1960).

5 Id. at 1006-07, 304 N.Y.S.2d at 265.
6 Id. at 1007, 304 N.Y.S.2d at 265.
7 Id. at 1007, 304 N.Y.S.2d at 265-66.
9 Id. at 610-11, 360 N.Y.S.2d at 762-63. All of the alterations were made in ink, id., but because they were made after execution of the will and were unwitnessed, the court held that they failed to comply with section 3-4.1 of the New York Estates, Powers & Trust Law, 79 Misc. 2d at 613, 360 N.Y.S.2d at 764.
10 Id. at 613, 360 N.Y.S.2d at 764.
11 Id. at 611, 360 N.Y.S.2d at 763.
12 The existence of an alteration to a will raises no presumption in law with respect to when the alteration was made, In re Will of Steffenhagen, 77 Misc. 2d 624, 630-31, 353 N.Y.S.2d 361, 368, 369 (Sur. Ct. Cattaraugus County 1974), and the burden of proof concerning the time of alteration is on the proponent. Id. If it is proven that the alteration was made before execution, the will will be admitted to probate in its altered form. Id. at 625, 353 N.Y.S.2d at 364. Otherwise, the will may be probated without the alteration. Id. When, however, the courts are confronted with an instrument whose alterations are unexplained or unaccompanied by "persuasive evidence," difficulty and uncertainty result. Id. The court of appeals, in Crossman v. Crossman, 35 N.Y. 145 (1884), shed some light on this issue:

[W]here an interlineation or erasure in a will is fair upon its face, and is entirely
Poor Grammar and Sentence Structure in the Drafting of Wills

Wills containing grammatical errors, ambiguous phraseology, and typographical errors are, perhaps, as many in number as those whose content has been altered by unattested changes. In both instances, of course, a testator's intentions may be thwarted. Whereas unattested alterations to executed wills must be ignored upon probate, inexact terminology and sentence structure may lead to ambiguities of language sufficient to work a more subtle unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration... all the... circumstances must be submitted as questions of fact... in deciding whether the alterations were made before execution or not.

Id. at 153-64. A threshold issue, therefore, is whether an unexplained alteration is "fair upon its face." Hoffman, Revocation of Wills and Related Subjects, 31 Brooklyn L. Rev. 220, 241 (1965). The court of appeals' failure to define when an alteration is "fair on its face," however, has caused many inconsistencies and difficulties in the application of the standard by New York courts. See In re Will of Steffenhagen, 77 Misc. 2d 624, 627, 353 N.Y.S. 2d 361, 365-69 (Sur. Ct. Cattaraugus County 1974).

The execution of multiple copies of a will, like alterations made after execution, also may lead to unanticipated and undesirable consequences. Indeed, although multiple copies may be thought of as a safeguard against loss or fraudulent destruction, P. Mchenry & T. Atkinson, supra note 2, at 443, the practice often has the opposite effect, for when a number of copies of an instrument are executed, all copies must be produced or their nonproduction accounted for before any one paper may be probated, 1 B. Butler, New York Surrogate Law and Practice § 251 (1950); See In re Will of Robinson, 257 App. Div. 405, 406-07, 13 N.Y.S. 2d 324, 326 (4th Dep't 1939). Significantly, failure to account for any one of the executed instruments after the testator's death raises a presumption of revocation. In re Will of Heyward, 13 App. Div. 2d 671, 672, 213 N.Y.S. 2d 488, 491 (2d Dep't) (Kleinfield, J., dissenting), aff'd mem., 10 N.Y. 2d 923, 179 N.E. 2d 713, 223 N.Y.S. 2d 873 (1961); In re Will of Levin, 26 Misc. 2d 866, 866, 208 N.Y.S. 2d 731, 732 (Sur. Ct. Bronx County 1960); see In re Will of Suarez, 281 App. Div. 870, 872, 119 N.Y.S. 2d 765, 767 (1st Dep't 1953) (per curiam). The presumption of revocation can be rebutted, see In re Will of Staiger, 243 N.Y. 468, 471-72, 154 N.E. 312, 313-14 (1926), by a showing that the copy not produced was either in existence at the time of death or fraudulently destroyed. 2A Warren's Heaton, Surrogates' Courts § 180, ¶ 6(b) (G. Markuson rev. ed. 1978). The burden of proof is upon the proponent of the produced copy. Id. at § 180, ¶ 6(a).

A corollary to the preferred practice of executing only one copy of a will is that a carbon or photocopy should not be used as the executed instrument instead of the original or ribbon copy since such use raises a question as to whether the instrument from which the copy was made also was executed. In re Estate of Lewis, N.Y.L.J., Nov. 1, 1979, at 11, col. 2 (Sur. Ct. Bronx County). Although the EPTL does not require the executed writing to be an "original" or "ribbon copy," see N.Y. Est., Powers & Trusts Law § 3-2.1 (McKinney 1981), failure to use an original "is clearly not a preferred practice and is fraught with peril." In re Estate of Lewis, N.Y.L.J., Nov. 1, 1979, at 11, col. 2 (Sur. Ct. Bronx County). For a discussion of cases in which carbon copies were held not to be barred from probate, see 2A Warren's Heaton, supra, § 180, ¶ 6(b), at 31-120.
contravention of testator intentions. Indeed, words treated as synonymous by the lay person may, in the course of a will construction proceeding, prove to be antonymous. The term “personal belongings,” for example, has been held to be “an extremely broad classification and, in the absence of restriction, may include most of testator's personal property.” In contradistinction, the term “personal things” has been defined as “goods and items of property having a more or less intimate relation to the person of the possessor.” Consequently, irrespective of whether the drafter of a will intended the words “belongings” and “things” to be treated synonymously, a converse inference may arise, for courts are “bound to assume that each and every word . . . was written for a purpose.”

Significantly, the true meaning of will provisions must survive more than mere objective inspection by the courts. Such provisions, indeed, must also withstand scrutiny by the “reader in bad faith,” that is, by a “disappointed heir who wants the will to read in a way that would defeat the testator's intention.” If, for instance, a will provides that property should be “divided equally between all of our nieces on my wife's side and my niece,” and there are ten nieces in all, a question arises as to the amount each heir would be entitled to receive. Although, in Lefevre v. Pennington, the court held that use of the word “between” indicated that the testator's niece was to receive one-half, it is conceivable that the testator wished his estate to be distributed to his nieces on a pro rata basis. Surely, such ambiguity quite easily may be avoided.

**Failure to Dispense with Bond**

Although the omission of a will provision dispensing with the bond filing requirement of the Surrogate’s Court Procedure Act

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17 217 Ark. 397, 230 S.W.2d 46 (1950).
18 *Id.* at 398, 230 S.W.2d at 47.
(SCPA) is neither as common nor as deleterious as unattested alterations and ambiguous drafting, it is, nevertheless, a frequent error. The filing of bond by administrators, trustees, and executors acting in a trustee capacity is, of course, designed to shield interested parties from losses incurred in the course of estate administration. Nevertheless, given the sizable expense of bond premium charges which would otherwise be exacted upon the estate, failure to dispense with bond surely is an unwarranted oversight.

Fortunately, in the case of failure to dispense with the bond of an executor, there is a statutory reprieve. Section 710(1) of the SCPA provides that "[n]o bond shall be required of an executor unless required by the will or by 806 or by this section." Accordingly, the failure of the draftsman to dispense with the bond of an executor need not prove too troublesome. Unfortunately, however, there is no similar statutory relief in the case of failure to dispense with the bond of a trustee or of an executor who is given trust duties. Indeed, section 806 of the SCPA provides:

Whenever a testamentary trustee is appointed by will or order of the court or an executor is appointed who is required to hold, manage or invest real or personal property for the benefit of another, he shall unless the will provides otherwise, execute and file a bond.

In other words, bond is compulsory unless dispensed with by will or unless a financial institution is appointed. Of course, section 801(1)(c) specifically provides that the amount of the bond shall be fixed "[i]n such amount as the court directs." Nevertheless, in the overwhelming majority of cases, the court is obliged to fix a full bond because of the presence of interested persons who are under

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22 N.Y. Banking Law § 100-a(5) (McKinney 1971).

a disability.24 Indeed, if only one such interested person, legally incapable of consenting to a reduced bond, is present, the court will be precluded from exercising its discretion as to the amount of the bond required.25

Failure to Name Successor of Substitute Fiduciaries

The failure to name successor or substitute fiduciaries is associated with the problem of failure to dispense with bond. If the unnamed fiduciary is an executor, an administrator c.t.a.26 must be appointed pursuant to section 1418 of the SCPA27 and a bond must be filed pursuant to section 805,28 unless properly dispensed with as provided by that section. The amount of the bond will be fixed by the court pursuant to section 801.29 If the unnamed fiduciary is a trustee, section 80630 will control and a full bond usually will be required. Because financial institutions are not required to file bonds, testators frequently will name a bank or trust company as fiduciary.31 Notably, however, the appointment of a bank or

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25 Section 805 of the SCPA provides:
   Before letters are issued to an administrator . . . he shall execute and file a bond provided, however, that where . . . acknowledged consents that a bond be dispensed with or fixed at a reduced amount are executed and filed by all persons interested in the estate the court may dispense with a bond or fix the amount at such sum as will adequately protect the right of all creditors. If such consent be filed by some but not all of the persons interested in the estate, such consent must also specifically release any claim under the bond required and the court may fix the amount at such sum as will adequately protect the rights of all creditors and of the non-consenting persons interested. Id. § 805(1) (McKinney 1967). Consents must be filed by all “persons interested,” 2A Warren’s Heaton, supra note 12, at § 158, ¶ 3(b), that is, “person[s] entitled either absolutely or contingently to share as beneficiary in the estate.” N.Y. Surr. Ct. Proc. Act § 103(39) (McKinney Supp. 1980-1981). It necessarily follows that if an “interested” person is legally incapable of consenting, the bond cannot be discharged or reduced. See generally 2A Warren’s Heaton, supra note 12, at § 158, ¶ 13.
28 Id. § 805 (McKinney 1967).
30 Id. § 806.
31 The New York Banking Law provides that “[n]o bond or other security . . . shall be required from any trust company . . . appointed executor, administrator, guardian, [or]
trust company in the will does not render it unnecessary to name substitute or successor fiduciaries. Financial institutions can renounce their appointments, be removed, or resign. In short, the naming of a financial institution as a fiduciary is no guarantee that a bond will not be required.

Although the SCPA does provide some relief for a fiduciary troubled by a bond requirement, as a practical matter, the relief is limited. Therefore, rather than relying upon the SCPA to rescue probate from a precarious position, the careful draftsman should avert the peril in the first instance by providing for substitute or successor fiduciaries.

Invalidation of Interests Due to Violation of the Rule Against Perpetuities

Aside from the failure to dispense with the bond of a trustee, another common source of drafting errors in the trust field involves
the Rule Against Perpetuities.\textsuperscript{37} In New York, the rule is possessed of two aspects,\textsuperscript{38} the first of which, codified in section 9-1.1(a)(2) of the EPTL, deals with unlawful suspension of the power of alienation.\textsuperscript{39} A second aspect, found in section 9-1.1(b), deals with re-

\textsuperscript{37} In 1697, a “perpetuity” was defined as “an estate unalienable, though all mankind join in the conveyance.” L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1211, at 91 (2d ed. 1956) (quoting Scatterwood v. Edge, 1 Salk. 229 (1697)). From this and similar statements, the modern Rule Against Perpetuities was created, see id., and since has evolved to state that “[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest,” R. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

A principal concern of the rule is the point at which the interest vests. G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 213, at 153 (rev. 2d ed. 1979). Hence, when A devises an estate to “his own grandchildren to vest at the age of twenty-one,” the rule is not violated, for the interests of the grandchildren will vest 21 years after “some life in being,” namely, the life of A’s own children. L. SIMES & A. SMITH, supra, § 1223, at 108. When, however, A devises an estate to B and B’s heirs, “to begin from a day fifty years after testator’s death,” the rule is violated. R. GRAY, supra, § 201, at 191-92 n.3. For a concise overview of the rule and its application, see Leach, Perpetuities in a Nutshell, 51 HARV. L. REV. 638 (1938).

\textsuperscript{38} The New York rule was originally contained in sections 42 and 43 of the Real Property Law and section 11 of the Personal Property Law. 7 WARREN’S HEATON, supra note 12, § 22, ¶ 2(b). In 1967, these provisions were combined and reenacted as section 9-1.1 of the EPTL, see N.Y. EST., POWERS & TRUSTS LAW § 9-1.1, commentary at 168 (McKinney Supp. 1980-1981), so that both real and personal property are covered under the same provision. 7 WARREN’S HEATON, supra note 12, § 22, ¶ 2(b). In addition, the former provisions were slightly revised in order to embrace present as well as future estates. N.Y. EST., POWERS & TRUSTS LAW § 9-1.1 (McKinney 1967) (Reviser’s Notes). Presently, New York’s statutory rule is directed against both “suspension of absolute ownership,” and “remoteness of vesting.” Banker’s Trust Co. v. Topping, 180 Misc. 596, 599, 41 N.Y.S.2d 736, 738 (Sup. Ct. New York County 1943). This duality perhaps had its origin in the common-law treatment of perpetuity. Throughout its common-law history, “perpetuity” has been used to refer to (1) “an inalienable or indestructible interest,” and (2) “a remote executory or contingent future interest.” L. SIMES & A. SMITH, supra note 37, § 1211, at 94. In fact, the reference to both of these interests has led to a controversy as to the character of the rule. See R. GRAY, supra note 37, §§ 1-4; L. SIMES & A. SMITH, supra note 37, § 1222. Such academic dispute may account for New York’s statutory safeguard against both types of interest. See 45 N.Y. JUR. Perpetuities and Restraints on Alienation § 2, at 102-03 (1973).

\textsuperscript{39} N.Y. EST., POWERS & TRUSTS LAW § 9-1.1(a)(2) (McKinney 1967). This provision states, “[e]very present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years.” Id. (emphasis added). The term “absolute power of alienation” means “the power of conveying an absolute fee.” S. CHAPLIN, SUSPENSION OF THE POWER OF ALIENATION, AND POSTPONEMENT OF VESTING § 64 (1981). The test for satisfying this section is whether there are “lives in being” who can convey an absolute fee, regardless of how many parties or how diverse the property interests. Id. As long as their consolidation is an absolute fee, id., the property is not withdrawn from the stream of commerce, prevention of which is the general policy underlying the rule, Leach, supra note 37, at 640.
moteness of vesting. Both elements must be considered when drafting a trust instrument because an interest can be invalid under the suspension rule while valid under the remoteness of vesting rule. Moreover, the mere existence of a possibility that the rule may be violated in either respect will, in and of itself, violate the rule.

Under either aspect of the rule, the period in which the interest must either vest or be suspended is 21 years after lives in being at the time of the creation of the interest. Because a testamen-

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40 N.Y. Est., Powers & Trusts LAW § 9-1.1(b) (McKinney 1967). This section provides that no estate “shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved.” Id. (emphasis added). The term “must vest” does not mean the interest must be certain to vest, for no contingency is certain. S. Chaplin, supra note 39, § 317. Rather, it contemplates that the interest must be limited so as to either vest at the end of the term, or by “the terms of its creation cease to be a possibility.” Id.


42 In New York, the validity of the interest created by a will is to be determined as of the testator's death. 3 H. Jessup, Law and Practice in the Surrogates' Courts in the State of New York § 2689 (E. Bohm ed. 1947). The courts do not consider facts which occur after the inception of the will. Id. Therefore, at the time of the testator's death, the requirements of the rule must be met, 45 N.Y. Jur. Perpetuities and Restraints on Alienation § 12, at 123, and the interest is void if it is at all possible that the interest might vest after the statutory period. Maudsley, Perpetuities: Reforming the Common-Law Rule—How to Wait and See, 60 Cornell L. Rev. 355, 355 (1975). The policy of examining facts which occur after the inception of the instrument in order to determine whether the interest does, in fact, properly vest is known as the “wait and see” approach. L. Smith, supra note 37, § 1230. Because such approach has been rejected in New York, the property interest will stand or fall as of the instrument's inception. N.Y. Est., Powers & Trusts LAW § 9-1.1, commentary at 168 (McKinney Supp. 1980-1981). In the words of the court of appeals, “[i]t is settled beyond dispute that in determining whether a will has illegally suspended the power of alienation, the courts will look to what might have happened under the terms of the will rather than to what has actually happened since the death of the testator.” In re Fischer, 307 N.Y. 149, 157, 120 N.E.2d 588, 592 (1954); accord, Bishop v. Bishop, 257 N.Y. 40, 51-52, 177 N.E. 302, 305-06 (1931) (Cardozo, C.J.).

In addition, section 9-1.1 does not empower the courts to adopt a cy pres approach, that is, “to alter or shave down an invalid limitation to conform as closely as possible with the grantor’s or settler’s intention (while at the time complying with the perpetuity period).” N.Y. Est., Powers & Trusts LAW § 9-1.1, commentary at 169 (McKinney Supp. 1980-1981). If, however, a trust can be severed into a primary trust (a trust presently in force), and secondary trusts (conditional alternatives of a remainder), with the validity of the primary trust established, the court will suspend judgment on the validity of the secondary trusts until the primary trust terminates. See, e.g., In re Will of Mount, 107 App. Div. 1, 7-8, 95 N.Y.S. 490, 491 (1st Dep't 1905), aff'd per curiam, 185 N.Y. 162, 167-68, 77 N.E. 999, 1000-01 (1908).

43 The statute grants a period of gestation in addition to the lives in being and 21 years. See N.Y. Est., Powers & Trusts LAW § 9-1.1 (McKinney 1967). A “life in being” is defined to include a child “conceived before creation of the estate but born thereafter.” Id. There-
tary trust or interest is created at the death of the testator, the “measuring lives” must be those which were in being at the testator’s death\textsuperscript{44} and as provided in section 9-1.1(b) of the EPTL, such lives cannot “be so designated as to make proof of their end unreasonably difficult.”\textsuperscript{45}

The most common violation of the rule occurs when a trust is created to pay funds to the testator’s children for life and then to the grandchildren for life, with the remainder usually vesting in the great-grandchildren or their issue. A problem which typically arises in this regard is that, either conceivably or actually, some of these grandchildren may not be alive at the time of the testator’s death, the starting point of the permissible period. While their income interests would vest within the permissible period, that is, within 21 years after the death of their parents (who are children of the testator and therefore lives in being at testator’s death), the vesting of the remainder in the great-grandchildren could conceivably take place beyond the permissible period (at the death of a grandchild who was not a life in being at the testator’s death).\textsuperscript{46}

fore, a person can be “in being” if, when the testator died, they were begotten but not born. L. Simes & A. Smith, supra note 37, § 1224, at 112. A second manifestation of this principle is that the donee of the future interest may be born as late as 9 months after a “life in being” plus 21 years. Id. Finally, the posthumous child must be actual, that is, the 9 months cannot be a period in gross. Id.

\textsuperscript{44} Although the measuring lives may be those of complete strangers to the trust objects, In re Estate of Friedman, 67 Misc. 2d 304, 307, 323 N.Y.S.2d 499, 503 (Sur. Ct. Westchester County 1971), they must be human lives, In re Estate of Mills, 111 N.Y.S.2d 622, 625 (Sur. Ct. Queens County 1952). Hence, the lives of animals and of corporations are not proper measuring lives. 45 N.Y. Jur. Perpetuities and Restraints on Alienation § 31, at 157 (1973).

\textsuperscript{45} The statute does not limit the number of measuring lives, 45 N.Y. Jur. Perpetuities and Restraints on Alienation § 31, at 158 (1973), but does provide that the lives cannot “be so designated as to make proof of their end unreasonably difficult.” N.Y. Est., Powers & Trusts Law § 9-1.1 (McKinney 1967). Accordingly, it has been held that seven lives is not unreasonable. See In re Cary, 25 Misc. 2d 727, 730, 204 N.Y.S. 334, 338 (Sup. Ct. New York County 1960); accord, In re Will of Getty, 201 N.Y.S.2d 922, 925 (Sur. Ct. Westchester County 1960) (five “lives in being” not violative). See generally L. Simes & A. Smith, supra note 37, § 1223.

\textsuperscript{46} The measuring lives must be in being at the death of the testator; it is not enough that they merely come into being within the permissible period. Leach, supra note 37, at 641. Professor Leach offers the following example:

Bequest ‘to accumulate the income for 21 years and then to pay the income to such of my grandchildren as shall then be living for life and upon the death of the survivor to pay the principal to my great-grandchildren then living.’ The life estates to the grandchildren are valid, since they vest within 21 years; but the remainders to great-grandchildren are invalid.

Id. It is to be assumed for purposes of the above that the testator had children at his death and that other grandchildren possibly would be born, for if not, the grandchildren would be
Moreover, the interest of each grandchild born after the testator's death will run afoul of the unlawful suspension of the power of alienation since, during the course of that grandchild's life, there may be no other person alive who was a life in being at the testator's death. The power of alienation would then be suspended beyond lives in being at the time of the creation of the trust.

While the Rule Against Perpetuities is difficult to master, the attorney-draftsman effectively can avoid an unwitting violation of the rule by inserting a "savings clause" into the will. Such a clause may be structured as follows:

Anything in this article to the contrary notwithstanding, no trust created hereunder shall endure (if it has not previously terminated) beyond 21 years after the death of the last trust beneficiary hereunder (or name the person) who was alive at the time of my death. All remaining principal and undistributed income of such trusts shall be paid to [name of residuary legatee].

The practitioner should also be aware of an important change which has occurred in the law governing trusts. The rule against unlawful suspension of alienation has been greatly relaxed since the amendment of section 7-1.5(a)(1) of the EPTL. Prior to September 1, 1973, all income interests in trusts were given statutory spendthrift protection. The statute now provides that an income

the lives in being and the bequest to the great-grandchildren would be valid. Id. at 641 n.5.

47 The clause discussed in text effectively "saves" the trust by presenting an immediately available outlet for funds which are the subject of dispute. Alternatively, a savings clause may provide for the appointment of a corporate donee to distribute the funds "in such a manner as to approximate the intention of [the testator]." Leach & Logan, Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule, 74 Harv. L. Rev. 1141, 1141 (1961). Another form of savings clause provides that any interest violative of the Rule Against Perpetuities "shall be reformed by the court, within permissible limits, to conform most closely to the intention of the creator of the interest." Id. at 1146 (discussing clause proffered by Mr. Owen Tudor of the Boston Bar). For additional techniques worthy of consideration, see Comment, Trusts—Unlawful Suspension of Power of Alienation—Construction to Avoid Invalidity by Use of Doctrines of Separability and Excision in New York, 32 N.Y.U. L. Rev. 1009, 1017-18 (1957).


49 A "spendthrift" trust is one which can be neither assigned by a beneficiary nor reached by the beneficiary's creditors. G.G. Bogert & G.T. Bogert, supra note 37, § 221, at 375; A. Scott, Abridgment of the Law of Trusts § 151 (1960). The purpose of such a trust, and the apparent reason for its label, is to protect a beneficiary against self-imposed misfortune. Id. The earlier provision of the EPTL accorded ipso facto spendthrift protection to any beneficiary of an express trust, see N.Y. Est., Powers & Trusts Law § 7-1.5, commentary at 71 (McKinney Supp. 1980-1981), by providing, "[t]he right . . . to receive the income from property and apply it to the use of or pay it to any person may not be trans-
beneficiary may not transfer or assign his or her interest in the trust "unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust." Thus, while New York remains a "spendthrift trust" state, the spendthrift protection easily may be waived by the trust settlor. Accordingly, whereas previously a problem concerning unlawful suspension of the power of alienation could void the trust, today the very existence of a power to alienate will obviate that problem. Thus, another means to avoid a violation of the Rule Against Perpetuities would be for the draftsman to insert an alienation in the trust, assuming the grant of such a power comports with the testator's wishes.

The Merger Problem

The doctrine of merger, which arises when the entire legal and beneficial interest in a trust is vested in the same person, is referred by assignment or otherwise," id. § 7-1.5(a)(1) (McKinney 1967).

50 N.Y. Est., Powers & Trusts Law § 7-1.5(a)(1) (McKinney Supp. 1980-1981). The original version of this section granted automatic spendthrift protection. As a result of the 1973 amendment, the settlor is free to grant a beneficiary the power to transfer his right to receive trust income. Id., commentary at 71 (McKinney Supp. 1980-1981). In short, where a settlor previously could not, as a matter of law, make trust income interests alienable, he can now do so by providing for such power in the instrument. See id. at 71-72. For the current status of spendthrift trusts in the various states, see G.G. Bogert & G.T. Bogert, supra note 37, § 222, at 408-38 & n.94.

51 L. Simes & A. Smith, supra note 37, § 1419, at 272; see, e.g., Kalish v. Kalish, 166 N.Y. 368, 372-73, 59 N.E. 917, 919 (1901).

52 See N.Y. Est., Powers & Trusts Law § 7-1.5, commentary at 74 (McKinney Supp. 1980-1981) ("[i]f these interests are readily alienable by the income beneficiaries, they should be treated as alienable for perpetuity purposes"); L. Simes & A. Smith, supra note 37, § 1419, at 272 ("[i]f . . . the trustee or the beneficiary or the settlor or any other ascertained person or group of persons have the power to terminate the trust and pass an absolute interest in the subject matter, then the trust does not suspend the absolute power of alienation").

53 For further suggestions to ensure nonviolation of the rule, see Leach, supra note 37, at 669-71.

54 The doctrine of merger mandates that there can be no trust when a single individual has the entire legal and beneficial interest of such trust. See Des Moines Terminal Co. v. Des Moines Union Ry., 52 F.2d 616, 633 (8th Cir.), cert. denied, 295 U.S. 537 (1931); Restatement (Second) of Trusts § 99(5) (1959).

The statute governing the merger doctrine in the trust field is section 7-21 of the New York Estates, Powers & Trust Law which provides that when an express trust is created, it vests the entire legal estate in the trustee subject only to the execution of the trust. N.Y. Est., Powers & Trusts Law § 7-2.1 (McKinney 1967 & Supp. 1981-1982). The beneficiary of the income receives only an equitable interest, that is, the right to enforce the trust. Id. When these two interests are vested in one person at the creation of the trust, there is a
other fertile source of drafting errors. The problem occurs when one person is named both sole income beneficiary and sole trustee. Should this be done when the trust is created, there can be no valid trust and the owner of the beneficial interest will take the principal outright, free of the trust.\textsuperscript{55}

It must be emphasized that merger is a problem only if it arises at the creation of the trust. If one person should become both the sole trustee and the sole beneficiary due to circumstances occurring after the trust has been created, a merger does not necessarily follow to invalidate the trust. For example, assume that initially two trustees are appointed in the will, one as the sole beneficiary and the other as a nonbeneficiary cotrustee. If the nonbeneficiary cotrustee subsequently dies, the problem of merger arises. The problem may be resolved, however, by ascertaining whether the testator intended to continue the trust rather than convert the trust interest to an outright disposition.\textsuperscript{56} If the testator's intention was to continue the trust, the court will honor it by merger sufficient to nullify the trust.

\textsuperscript{55} When the positions of sole trustee and sole beneficiary are, in a sense, "merged" into one person, a valid trust cannot be created. The very nature of a trust contemplates one person holding property for the benefit of another. Weeks v. Frankel, 197 N.Y. 304, 310, 90 N.E. 969, 971 (1910); see Reed v. Browne, 295 N.Y. 184, 189, 66 N.E.2d 47, 49 (1946). This is the general rule in New York and in most jurisdictions. Nevertheless, the New York rule varies somewhat from the general rule in other jurisdictions. In New York, when a person is named as sole trustee with directions that all the income of the trust go to him during his life, with the remainder to another at the trustee's death, the courts have held that a merger occurs. See Weeks v. Frankel, 197 N.Y. 304, 311, 90 N.E. 969, 971 (1910). In the majority of jurisdictions, however, the titles do not completely merge and the trust continues for the benefit of the successive beneficiaries as intended by the testator. See 2 A. Scott, \textit{The Law of Trusts} § 99.3 (3d ed. 1967). It is submitted that the New York rule is unsound since "for all practical purposes, the courts will preserve all of the rights which the remainderman would have if the trust were . . . valid." N.Y. Surrogate Ct. Proc. Act § 1502, commentary at 116 (McKinney Supp. 1981-1982); see Weeks v. Frankel, 197 N.Y. 304, 311, 90 N.E. 969, 971 (1910).

\textsuperscript{56} See, e.g., \textit{In re Will of Phipps}, 2 N.Y.2d 105, 108-09, 138 N.E.2d 341, 343, 157 N.Y.S.2d 14, 17 (1956). In Phipps, the testator named a friend and his wife as cotrustees of certain income producing real property with the benefits going to the wife. The friend died, leaving the wife as sole trustee and sole beneficiary. Although the testator's brother petitioned the Surrogate's Court to be named as successor trustee, the widow maintained that a merger of her legal and equitable life estate had occurred, leaving no trust to which a successor trustee could be appointed. Id. at 108, 138 N.E.2d at 343, 157 N.Y.S.2d at 16. Noting that the testator had authorized his trustees "or their successor or successors" to sell, mortgage, or lease the property, the court concluded that the death or removal of one of the trustees named by him was not to operate as an extinguishment of the trust. Id. at 108-09, 138 N.E.2d at 343-44, 157 N.Y.S.2d at 17-18; see G.G. Bogert & G.T. Bogert, \textit{The Law of Trusts & Trustees} § 129 (2d ed. 1965).
appointing an additional trustee. Of course, the merger pitfall easily may be avoided by providing, in the will, for additional trustees and successors to serve in the place of a trustee who for any reason is incapable of acting.

Attorney-Draftsman Named as Beneficiary: The Putnam Problem

Testators' intentions frequently are confounded not by drafting errors per se, but rather, by the poor judgment of an attorney-draftsman. Such is the nature of the Putnam problem, so named

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67 N.Y. Surr. Ct. Proc. Act § 1502(1) (McKinney Supp. 1981-1982) provides: The court may appoint a trustee or successor or successors or co-trustee or cotrustees whenever there is no trustee able to act or all or one of the trustees is unable to act and a successor or co-trustee in his or their place is necessary in order to execute the trust or execute any power created by a will or lifetime trust instrument creating a trust, the execution of which has devolved upon the court or upon the supreme court. Id. This provision empowers the court to appoint an additional trustee even though the will does not authorize such appointment. Therefore, to prevent the destruction of the trust by operation of law, the court may appoint a cotrustee. N.Y. Surr. Ct. Proc. Act § 1502, commentary at 580 (McKinney 1967). The power effectively may render the merger problem obsolete. In In re Estate of Seidman, 88 Misc. 2d 462, 389 N.Y.S.2d 729 (Sur. Ct. Kings County 1976), aff'd, 58 App. Div. 2d 72, 395 N.Y.S.2d 674 (2d Dep't 1977), Judge Sobel concluded that "the doctrine of 'merger' no longer exists as applied to modern testamentary trusts." 88 Misc. 2d at 470-71, 389 N.Y.S.2d at 736. In that case, a widow, as decedent's executrix, petitioned for construction of her husband's will, contending that a residuary trust created for her benefit was, by operation of law, an outright disposition because she was both sole income beneficiary and sole trustee. The court rejected the application of the merger doctrine, noting that it has led to absurd results. Id. at 469, 389 N.Y.S.2d at 734. Judge Sobel, relying upon In re Will of Phipps, 2 N.Y.2d 105, 108-09, 138 N.E.2d 341, 343, 157 N.Y.S.2d 14, 17 (1956), reasoned that "no testator intends that a trust which he has expressly created shall be extinguished . . . by operation of law." 88 Misc. 2d at 471, 389 N.Y.S.2d at 736.

68 There are many situations in which a testamentary trustee may become unable to act. Among these are: death of the trustee before execution of the trust; an instrument in writing renouncing the appointment as trustee; decree of the surrogate's court removing or allowing a trustee to resign; and lunacy, illness, or other incapacity. 2B Warren's Heaton, supra note 12, § 201, ¶¶ (2)-(3); see N.Y. Surr. Ct. Proc. Act § 707 (McKinney 1967). It appears that the impact of such events readily may be ameliorated by the appointment of additional or successor trustees. See In re Will of Phipps, 2 N.Y.2d 105, 108-09, 138 N.E.2d 341, 343, 157 N.Y.S.2d 14, 17 (1956). The actual will may provide for any number of cotrustees and may enable them to appoint their own successors in the event they cannot fully execute the trust. See, e.g., Belmont v. O'Brien, 12 N.Y. 394, 405 (1855). When there is no appointed trustee able to act, the court will use its power to appoint a successor or cotrustee. See In re Estate of Seidman, 88 Misc. 2d 462, 471, 389 N.Y.S.2d 729, 736 (Sur. Ct. Kings County 1976), aff'd, 58 App. Div. 2d 72, 395 N.Y.S.2d 674 (2d Dep't 1977); N.Y. Sur. Ct. Proc. Act § 1502 (McKinney 1976 & Supp. 1981-1982). Reliance upon the courts' discretionary power, however, is the less desirable approach since a merger may be found absent express language in a will appointing additional trustees.
because of the seminal case of *In re Will of Putnam*, wherein the New York Court of Appeals cautioned attorneys against drafting bequests to themselves in their clients' wills. In such situation, stated the *Putnam* court, an inference arises that the attorney, because of his confidential relationship with a testator, used undue influence to secure the bequest.

Because section 1408 of the SCPA mandates that before the court may admit a will to probate it must "inquire particularly into all the facts and must [be satisfied] with the genuineness of the will and the validity of its execution," Surrogates routinely investigate *Putnam* bequests, even in the absence of allegations of undue influence. The investigation or inquiry may consist simply of an affidavit submitted by the attorney explaining the facts and circumstances of the gift. Such affidavit, which must explain the circumstances of the gift to the Surrogate's satisfaction, is particularly appropriate when the bequest to the attorney-draftsman is not disproportionate to the estate as a whole. If, however, the gift

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59 257 N.Y. 140, 177 N.E. 399 (1931).
60 Id. at 143, 177 N.E. at 400. In *Putnam*, the will of the testatrix was admitted to probate over the objections of the only living relative, the testatrix's much adored niece. Id. at 142, 177 N.E. at 400. Previous wills had evidenced that it was the testatrix's intention to leave all of the income from her estate to her niece for life. This also was true of the contested will. In the previous wills, however, the residuary estate had been left to charity while, in the disputed will, the residuary estate was left to the attorney who drew the instrument. Id. at 143, 177 N.E. at 400. Therefore, the niece contested the will on the ground of undue influence. Id. Judge Crane, in a unanimous opinion in which Judges Cardozo and Lehman joined, affirmed the finding of the surrogates court that there had been no undue influence. Many evidentiary questions were presented by the case and it was upon those matters that the case turned. The court made it clear, however, that the attorney had caused "all the trouble" and cautioned that attorney-draftsman bequests should be avoided. Id.
61 N.Y. SURR. CT. PROC. ACT § 1408(1) (McKinney 1967). This provision mandates that the court inquire into the facts necessary to prove the will. The court, however, may use its discretion as to the extent of its inquiry. Id., commentary at 226 (McKinney 1967); e.g., *In re Estate of Hayes*, 49 Misc. 2d 152, 153, 267 N.Y.S.2d 452, 454 (Sur. Ct. Bronx County 1969).
62 The late Surrogate S. Samuel DiFalco of New York County stated that his court dealt with thirty *Putnam* cases per month. DiFalco, *Pitfalls in Confidential Relationships and Observations on Privileged Communications*, N.Y.L.J., May 24, 1967, at 4, col. 2. Having presided at *Putnam* hearings while Law Assistant Referee, this author can only believe the number given was a misprint. Thirty *Putnam* cases per year is the more likely figure, based upon approximately 4,500 probates annually.
63 Use of attorney affidavits is the practice in the Westchester County Surrogate's Court. Other courts, however, uniformly hold hearings when *Putnam* questions arise. See *In re Estate of Eckert*, 93 Misc. 2d 677, 681, 403 N.Y.S.2d 633, 634 (Sur. Ct. New York County 1978).
is of an inordinate amount or if the Surrogate is not satisfied with the proffered explanation, a Putnam hearing will be held. This hearing usually is conducted before a law assistant referee who examines the attorney in the presence of interested parties or their counsel. A transcript of the proceeding is made and presented to the Surrogate for his review, but the hearing is essentially informal. Thus, the rules of evidence are not strictly applied. As a matter of courtesy and as an aid to the court, interested parties or their counsel are permitted to question the attorney-draftsman.

While adhering to the informal nature of the Putnam hearing, some courts conduct the procedure with a few more formalities. In Westchester and Nassau counties, for example, the Surrogate signs a formal order designating one of his law assistants as a referee under section 506 of the SCPA. The referee, upon completing an

(2d Dep't 1951). In Moskowitz, the attorney-son of the decedent assisted in the drafting of the will, under which the estate was bequeathed equally to himself and another son, but to the exclusion of a daughter. In reversing the denial of probate, the court held that, under these circumstances, it was essential for undue influence to be proved. Id.

But see Trial Transcript at 14, In re Will of Poisnett (Sur. Ct. Queens County July 11, 1979), where Surrogate Laurino of Queens County personally presided at the Putnam hearing.


In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report. Id. (emphasis added). While section 506 specifically excludes a probate proceeding, Surrogates nonetheless routinely employ this section, rather than SCPA § 1408, for the appointment of a referee. See note 61 supra. The referee, of course, is the equivalent of an advisory jury. The court may accept or reject his report and may make new findings. N.Y. Surr. Cr. Proc. Act § 506, commentary at 449 (McKinney 1967). The purpose of a referee is to conserve the Surrogate's time on involved questions of fact which would congest the calendar. The referee, therefore, is given all the powers of a court and acts as a Surrogate with respect to the referred issues. In re Estate of Smith, 3 Misc. 2d 642, 643, 149 N.Y.S.2d 124, 126 (Sur. Ct. Kings County 1956). The Surrogate will not disturb the referee's findings of fact unless there is some clear error. In re Estate of Winsweiler, 146 Misc. 436, 436-37, 262 N.Y.S. 383, 383-84 (Sur. Ct. Kings County 1933).

Notably, a 1971 amendment to section 506 added subdivision (6), which allows an attorney on the court's staff, such as a clerk or law assistant, to take testimony in any proceeding other than one where a right to trial by jury exists. N.Y. Surr. Cr. Proc. Act § 506(6)
informal factfinding procedure, drafts a formal report.8

Usually, the procedure will terminate once the Surrogate ren-
ders a formal decision. If, however, the court determines that the
gift appears tainted, it will schedule a formal hearing at which time
it will either sustain the gift or, if the gift is of the entire estate or
a major portion thereof, it will reject the will.9 When the gift to
the attorney involves only a portion of the testamentary estate, the
court may grant partial probate by merely excising the offensive
portion of the will and admitting the balance to probate.10

Any difficulty thus far encountered by the attorney-draftsman


8 While the court must always be satisfied as to the genuiness of the will and the
validity of its execution, the Surrogate, pursuant to his authority under section 1408 of the
SCPA, may avoid the formal reference procedure by accepting affidavits pursuant to section
1406 of the SCPA. Such affidavits may be taken by any officer authorized to administ-
Leitstein, 46 Misc. 2d 656, 657, 260 N.Y.S.2d 406, 408 (Sur. Ct. Queens County 1965) (atte-
testation clause used in lieu of affidavit). But see In re Estate of Eckert, 93 Misc. 2d 677, 681,
Midonick stated "[t]he Surrogate's Court, New York County, has in practice instituted the
requirement of a full 'Putnam hearing' in place of the submission of affidavits before a will
in which an attorney-draftsman receives a legacy of substance can be admitted to probate."11
Id.

9 See In re Estate of Hayes, 49 Misc. 2d 152, 153, 267 N.Y.S.2d 452, 454 (Sur. Ct.
Bronx County 1966). In Hayes, an 80-year-old testatrix left her entire estate to the attor-
ney-draftsman and his son, to the exclusion of the natural objects of her bounty. Id. The
court rejected the will in its entirety, reasoning that in the absence of an adequate explana-
tion by the attorney it was compelled to hold that the testatrix was subject to undue influ-
ence. Id.; see In re Will of Zimmerman, 254 App. Div. 630, 630, 3 N.Y.S.2d 212, 213 (4th
Dep't 1938).

10 See, e.g., In re Estate of Lawson, 75 App. Div. 2d 20, 29-30, 428 N.Y.S.2d 106, 112
(4th Dep't 1980). In Lawson, a $20,000 bequest was made to the attorney-draftsman out of
an estate of $150,000. While the court agreed with the Surrogate's finding of undue influ-
ence as to that bequest, it believed that expunging the specific bequest and submitting the
remainder of the will to probate would be equitable and consistent with the intent of the
testatrix. Id. at 29, 428 N.Y.S.2d at 111. Since the jury had rejected the entire will on undue
influence grounds, however, the appellate court remanded to the surrogate's court for con-
sideration of whether the undue influence of an attorney-draftsman should cause only his
bequest to be invalidated. Id. at 29-30, 428 N.Y.S.2d at 112.

A part of a will may be rejected in the probate decree on the ground of undue influence
when it is clearly severable from other parts not so tainted. In re Will of McCaffrey, 105
Misc. 433, 443, 173 N.Y.S. 392, 397 (Sur. Ct. Kings County 1918); see In re Will of Wein-
modified, 47 App. Div. 2d 542, 363 N.Y.S.2d 104 (2d Dep't 1978), rev'd, 40 N.Y.2d 1, 351
N.E.2d 647, 386 N.Y.S.2d 1 (1976). The portion of the will that is excised may be distrib-
uted proportionately among the residuary legatees pursuant to section 3-3.4 of the EPTL.
County 1978).
may be compounded if, during the court's investigation, an interested party files an objection to the will based upon the attorney's alleged undue influence in securing the legacy. In such a case, the court will suspend its inquiry and let the probate take its course as a contested proceeding. A major problem confronted by the attorney in such a proceeding is the Dead Man's Statute, found in section 4519 of the CPLR. Upon objection by an interested party, the attorney will be precluded from testifying on his own behalf to remove the cloud of suspicion and to establish the gift. Invocation of the statute poses a dilemma to the attorney for, although he may be asked to explain the circumstances of the gift, the law may prevent him from so testifying.

At common law, the Dead Man's Statute rendered witnesses who were "parties to the suit or pecuniarily interested in the event thereof" incompetent to testify. W. Richardson, Law of Evidence § 386 (10th ed. R. Prince 1973) [hereinafter cited as Richardson]. Presently, all persons interested in the event are competent to testify by virtue of N.Y. Civ. Prac. Law § 4512 (McKinney 1963), although the witnesses' interest may still be shown in order to attack his credibility. Richardson, supra, § 395. One exception to section 4512 is found in the "Dead Man's Statute," N.Y. Civ. Prac. Law § 4519 (McKinney 1963 & Supp. 1981-1982), which provides that when there is an interested party, such person is incompetent to testify in his own behalf to unwritten transactions or communications with a deceased or mentally ill person. Id. The purpose of section 4519 is to preclude any unfair advantage had by the living witness. Therefore, "where death [or insanity] silences one the law will silence the other." In re Estate of Erdmann, 198 Misc. 1087, 1091, 98 N.Y.S.2d 111, 114 (Sur. Ct. Richmond County 1950). See generally Note, Disqualification of Witness as to Transactions with Deceased or Lunatic—Recent Exception, 22 St. John's L. Rev. 310 (1948).

The protection afforded by section 4519 may be waived expressly, Dean v. Halliburton, 241 N.Y. 354, 361-62, 150 N.E. 141, 143-44 (1925), or impliedly by failing to object to the proffered testimony, In re Estate of Remlinger, 258 App. Div. 911, 911, 16 N.Y.S.2d 367, 368 (2d Dep't 1939). But see In re Will of Honigman, 8 App. Div. 2d 969, 970, 190 N.Y.S.2d 845, 847 (2d Dep't 1959) ("failure to object to [incompetent] evidence . . . does not open the door to additional incompetent evidence"), rev'd on other grounds, 8 N.Y.2d 244, 168 N.E.2d 676, 203 N.Y.S.2d 859 (1960).

Since the Putnam situation does not fall within any exception to the Dead Man's Statute, the attorney will not be permitted to explain his legacy under the contested will. An objection to testimony by the attorney relating to conversations and transactions with the testator must be sustained even though the attorney is bound to comply with the Putnam rule. Estate Administration—Problems in Practice and Procedure—Will Contests, 8 N.Y.L.F. 360, 379-80 (1962) (statements of Surrogate DiFalco). Of course, the statute is waived when the executor testifies in his own behalf concerning a personal transaction with the deceased or when the testimony of the deceased concerning the same transaction is entered into evidence. N.Y. Civ. Prac. Law § 4519 (McKinney 1963 & Supp. 1981-1982).

Hence, the interested witness will be able to testify as to that transaction. In re Estate of Christie, 167 Misc. 484, 492, 4 N.Y.S.2d 484, 494 (Sur. Ct. Kings County 1938). Such testimony must be strictly confined to the same transaction or communication. The adverse party may not testify as to any other independent transaction with the deceased. Merchants Nat'l Bank v. Prescott & Son, Inc., 139 Misc. 603, 609, 249 N.Y.S. 6, 14 (Sup. Ct. Clinton
should testify on his own behalf rather than remain mute. Indeed, the attorney has an affirmative duty to show the propriety of the gift, and if no evidence or explanation is offered on his behalf, the law will infer or even presume wrongdoing.

Another practical problem facing the attorney is the loss of any settlement option. While, normally, every litigated case has a settlement value, the attorney possessed of a Putnam bequest may be reluctant to settle for fear that any compromise would be construed as a concession of wrongdoing. Moreover, even if the matter eventually is settled by the parties, the proceeding will thereupon

County 1931), aff'd mem., 235 App. Div. 878, 257 N.Y.S. 900 (3d Dep't 1932). This exception is not to be confused with the case in which a party or interested witness is examined by the adverse party concerning a personal transaction with the deceased. Such examination does not "open the door" for that witness to testify in his own behalf concerning the same transaction. In re West, 252 App. Div. 919, 919, 300 N.Y.S. 146, 148 (4th Dep't 1937). Rather, the principle to be applied in such situations is the rule of evidence where a party examines a witness as to a particular part of a communication or transaction thereby allowing the other party to elicit the whole communication or transaction to further explain or qualify the communication or transaction. In re Estate of Anooshian, 13 App. Div. 2d 626, 626-27, 213 N.Y.S.2d 278, 279 (1st Dep't 1961) (per curiam). Such an occurrence would be deemed a waiver of the disqualification to that extent.

See In re Estate of Hayes, 49 Misc. 2d 152, 153, 267 N.Y.S.2d 452, 453-54 (Sur. Ct. Bronx County 1968). In Hayes, both the attorney-draftsman and the contestants rested after the proponent—the attorney's son—completed his prima facie case without offering any additional proof concerning the propriety of the gift. The court observed:

In view of the rule laid down in the Putnam case, it is the opinion of this court that, in addition to the factum of the will, it was incumbent upon the attorney draftsman to come forward and explain the circumstances under which he became a principal beneficiary of the decedent's will; and to show that no unfair advantage was taken of his client and that the alleged gift was freely and willingly made. Id. at 153, 267 N.Y.S.2d at 454 (citations omitted) (Surrogate McGrath presiding).

Although the burden of proving undue influence lies with the contestant of a will, the attorney-draftsman has the affirmative "burden of satisfying the court that the will . . . [reflects] the free, untrammled and intelligent expression of the wishes and intention of the testatrix." In re Will of Smith, 95 N.Y. 516, 523 (1884); see In re Estate of Smith, 170 Misc. 572, 578, 10 N.Y.S.2d 775, 780 (Sur. Ct. Kings County 1939). In re Estate of Weinstock, 40 N.Y.2d 1, 351 N.E.2d 647, 386 N.Y.S.2d 1 (1976), the New York Court of Appeals referred to the "rule that a bequest to an attorney-draftsman [sic] gives rise to an inference or perhaps a presumption of undue influence." Id. at 6 n.*, 351 N.E.2d at 649 n.*, 386 N.Y.S.2d at 3 n.* (1976) (emphasis added). Regardless of the characterization, the attorney who drafts the will must explain the circumstances surrounding the bequest. In re Will of Putnam, 257 N.Y. 140, 143, 177 N.E. 399, 400 (1931). See generally Note, Attorney Beware—The Presumption of Undue Influence and the Attorney-Beneficiary, 47 Notre Dame Law. 330 (1971).
revert to an uncontested proceeding wherein the Surrogate must still "be satisfied with the genuineness of the will and the validity of its execution" before he may admit the will to probate.\textsuperscript{76} Accordingly, the examination of the attorney by the court or its representative may continue, depending on how far the proceeding went in this respect while the contest was pending.

Of course, all of the aforementioned Putnam-related inquiries may be forestalled by one simple measure. As noted by Judge Crane in \textit{Putnam}, "[a]ttorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer."\textsuperscript{77} As a practical matter, however, an attorney who has prepared a complicated estate plan for a wealthy client may fear that he will not receive a bequest should the client seek the aid of another attorney.\textsuperscript{78} In such a situation, it may be advisable for the attorney to draw the client's will, but without any "tainted" legacy to the attorney. Thereafter, the attorney should recommend that the client retain another attorney to draft a codicil effectuating the gift.\textsuperscript{79} Thus, the estate plan, as well as the gift,

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\item \textsuperscript{77} \textit{In re} Will of Putnam, 257 N.Y. 140, 143, 177 N.E. 399, 400 (1931) (citations omitted).
\item \textsuperscript{78} The attorney is advised to follow the ethical guidelines offered by the Code of Professional Responsibility:

\begin{quote}
A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. \textit{Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.}
\end{quote}


\item \textsuperscript{79} A codicil is a supplement to an existing will which must be executed with all the formalities of a will. Any number of codicils may be appended to a will which add to, supplement, alter, qualify, modify, or revoke the will provisions. Upon the will's probate, all of the writings must be read together as one instrument. \textit{In re} Will of Mucklow, 242 App. Div. 111, 114, 272 N.Y.S. 776, 780 (3d Dep't 1934); \textit{In re} Will of Phelps, 133 Misc. 450, 452, 232
Joint and Reciprocal Wills

Although like Putnam bequests, the drafting of joint and reciprocal wills is not per se unfounded, good judgment dictates that such wills should be avoided. Joint and reciprocal wills are instruments signed by two testators, usually husband and wife, in which each bequeaths his or her entire estate to the survivor, and on the survivor’s death the assets are bequeathed to certain persons, usually their children.60

These wills are problematic because of their legal consequences. Immediately upon executing joint or reciprocal wills, the parties are deemed to have entered into a formal contract which provides for the disposition of their property just as effectively as if they had done so in a separately drawn instrument.61 Although the joint will is entirely executory during the lives of both parties,62

60 A joint will is one in which two persons execute their respective wills in a single instrument. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 222 (2d ed. 1953). Because it is regarded as the will of each person, it is probated twice. See W. CASEY, FORMS OF WILLS, TRUSTS AND FAMILY AGREEMENTS WITH TAX IDEAS ¶ 116 (2d ed. 1963). Reciprocal wills, also called mutual wills, are separate instruments in which two or more persons make reciprocal provisions in favor of each other. See T. ATKINSON, supra, at 222. Reciprocal wills typically contain identical provisions wherein each party devises and bequeaths all of his or her property, both real and personal, to the other party. See W. CASEY, supra, ¶ 116; see, e.g., S. GORDON, STANDARD ANNOTATED FORMS OF WILLS 719-20 (1947). It has been argued that it is impossible to have a will that is both joint and reciprocal, since the former contemplates a single instrument, while the latter involves multiple instruments. See T. ATKINSON, supra, at 222. Notwithstanding this anomaly, the term “joint and mutual will” is often used to refer to a single document. See T. ATKINSON, supra, at 223. See also 1 G. THOMPSON, THE LAW OF WILLS § 34 (3d ed. 1947); 97 C.J.S. Wills § 1364 (1957).


upon the death of one, the rights and duties of the survivor become fixed and equity will specifically enforce the will's provisions.83

The most significant consequence of such wills, little recognized among members of the bar, is that the obligation of the survivor to faithfully dispose of his or her assets in accordance with the terms of the joint will attaches to all of the survivor's property, not just the property inherited from the one who predeceased. Thus, the disposition of the wealth that the survivor may independently accumulate before his own death will be governed by the terms of the joint will.84


8 See In re Estate of Coffed, 59 App. Div. 2d 297, 299, 399 N.Y.S.2d 548, 550-51 (4th Dep't 1977), aff'd, 46 N.Y.2d 514, 387 N.E.2d 1209, 414 N.Y.S.2d 893 (1979). When one party dies and the survivor accepts the benefits of the joint and reciprocal will, the survivor is no longer free to dispose of the property as he or she sees fit. Id. In addition, the survivor cannot circumvent the agreement by making gifts in lieu of a testamentary disposition, so-called "Totten Trusts." In re Estate of Hassan, 98 Misc. 2d 80, 82-83, 413 N.Y.S.2d 273, 276 (Sur. Ct. Bronx County 1979). Surrogate Gelfand of Bronx County stated the concept succinctly: "The essence of a joint will involves a contract between two parties that whatever they may possess at the time of their respective deaths, they will leave in accordance with the testamentary instrument which they are jointly executing by which they agree to be contractually bound." Id.

83 See Rubenstein v. Mueller, 19 N.Y.2d 228, 233-34, 225 N.E.2d 540, 543-44, 278 N.Y.S.2d 845, 849 (1967). This obligation includes property which the survivor may have inherited by means other than from the joint will, such as joint bank accounts and real property held as tenants by the entirety. Id. The surviving testator, however, is under no obligation to accumulate income from the property acquired through the joint will or otherwise and may do whatever he wishes with any income generated. Di Lorenzo v. Ciancio, 49 App. Div. 2d 756, 758, 373 N.Y.S.2d 167, 171 (2d Dep't 1975). Specific property mentioned in the joint and reciprocal will may not be transferred to meet the daily needs of the surviving testator. Schwartz v. Horn, 31 N.Y.2d 275, 280, 290 N.E.2d 816, 819, 338 N.Y.S.2d 613, 616 (1972). Good faith is the test in determining whether property may be transferred. See Dickinson v. Seaman, 193 N.Y. 18, 24-25, 85 N.E. 818, 820 (1908). A provision may be included in the original agreement limiting the survivor's use of property only to the extent of its value at the time of the decedent's death. This is an extraordinary interpretation, however, and absent a clear indication that it represents the intention of the parties, courts are not likely to adopt it. See In re Estate of Wiggins, 45 App. Div. 2d 604, 607, 360 N.Y.S.2d 129, 133 (4th Dep't), aff'd, 39 N.Y.2d 791, 350 N.E.2d 618, 385 N.Y.S.2d 287 (1974). Even codicils which recognize the primary purpose of the original will and only attempt to effec-
Another negative aspect of joint or reciprocal wills is the loss of the marital deduction under both federal and New York estate tax laws. The taxing authorities have held that upon the death of one party to a joint will, the survivor merely takes the equivalent of a legal life estate; the disposition thereby becomes tainted with a "terminable interest." There is no absolute power of disposition and, thus, the survivor's interest will fail to qualify for the marital deduction. Accordingly, as a sine qua non to the creation of a joint or reciprocal will, the prudent lawyer should carefully explain to his client the resulting loss of the marital deduction.

Litigation in this area arises when the survivor, who has reaped the benefits of the joint will upon the death of the spouse, remarries and makes different testamentary arrangements. If, for example, the survivor makes a second will which leaves his estate to his new spouse, the children from the first marriage may successfully sue to enforce the first will in their capacity as third party beneficiaries.


86 The marital deduction routinely is rejected by the courts once a contract not to revoke a joint and reciprocal will has been established. See, e.g., Dekker v. United States, 245 F. Supp. 255, 256 (S.D. Ill. 1965); In re Estate of Ryan, 61 Misc. 2d 390, 392, 305 N.Y.S.2d 698, 700 (Sur. Ct. Nassau County 1969); In re Estate of Rothwacks, 57 Misc. 2d 152, 158, 290 N.Y.S.2d 781, 783 (Sur. Ct. Kings County 1968). The practitioner should be aware of the 1981 federal tax provision regarding the marital deduction, see note 85 supra, which permits, under certain conditions, a marital deduction even though the survivor takes only a life estate. Whether the new provision will cause the courts to permit a marital deduction to the surviving party to a joint will is as yet unknown. In any event, the attorney should warn the testator of the possible loss of the deduction.

87 Glass v. Battista, 43 N.Y.2d 620, 625, 374 N.E.2d 116, 118, 403 N.Y.S.2d 204, 206-07 (1978); Rubenstein v. Mueller, 19 N.Y.2d 228, 233-34, 225 N.E.2d 540, 543, 278 N.Y.S.2d 845, 849 (1967). The Rubenstein court was divided over the question whether the second spouse would have a right of election against the first will. In holding that she had no such
Of course, not every joint or reciprocal will has been held to be contractual and, therefore, sufficient to dispose of property in accordance with its terms. Indeed, such a determination will depend upon the language of the instrument and the intention of the signing parties. Clearly, however, joint and reciprocal wills create more trouble than they are worth, and unless the practitioner has a compelling reason for using such wills, he should not do so.

CONCLUSION

Will drafting unquestionably is fraught with perils which prey upon the unwary practitioner—and testator. Perhaps more so than in any other area of law, "[i]ts many avenues are replete with pitfalls to be avoided and roadblocks to be overcome in order to effectuate the intentions of testators. It is hoped, in this regard, that this Article has afforded practitioners and their clients heightened insight into the pitfalls of will drafting so that they may act to better effect their objectives.

right, the majority distinguished an irrevocable obligation to devise collective property from a separation agreement, over which the spouse's right of election may take precedence. The court reasoned that, in a separation agreement, any provision for a future legacy is only incidental to the overall settlement of joint property and a husband's obligation to support his children. Rubenstein v. Mueller, 19 N.Y.2d at 234, 225 N.E.2d at 544, 278 N.Y.S.2d at 850.

See In re Estate of Zeh, 24 App. Div. 2d 983, 984-95, 265 N.Y.S.2d 257, 260 (2d Dep't 1965), aff'd, 18 N.Y.2d 900, 223 N.E.2d 43, 276 N.Y.S.2d 635 (1966). In Zeh, the survivor was given all the property passing under the will, meaning that "the survivor...shall be absolute owner, to him or to her to have and to hold, his or her heirs and assigns absolutely and forever of all that both of us possess." 24 App. Div. 2d at 984, 265 N.Y.S.2d at 260 (emphasis added by court). The court focused upon the word "absolutely" and construed the language to negate the existence of a limited life estate in the survivor.

Language stating that "children of the marriage take 'in the event of the death of both of us'" was held to be a provision referring to a mutual disaster only and not an expression of intent to make a joint will contractually binding. In re Estate of Bainer, 71 App. Div. 2d 728, 729, 419 N.Y.S.2d 222, 220 (3d Dep't 1979). The Bainer court also emphasized that the intent to make a joint will contractually binding must be clear and not left to conjecture. Id.