



SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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ZOOM PROGRAM

SUMMER TRUSTS & ESTATES SERIES #2 WILLS & ESTATES

FACULTY

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June 10, 2020
Suffolk County Bar Association, New York

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David J. DePinto practices in the areas of trusts, estate planning, asset protection, charitable entities, business and succession planning for closely held businesses, estate and gift taxation, income taxation, [elder law](#), guardianship, probate and administration of trusts and estates, estate litigation and also provides representation to Guardians, Trustees and other fiduciaries.

Mr. DePinto received his LLM [Master of](#) Laws degree from NYU Law School, his JD degree from Brooklyn Law School and his Master of Science degree in Taxation, with academic honors, from Long Island University CW Post and his BBA degree from Hofstra University. He is a NYS Certified Public Accountant (CPA) and a (CELA) Certified Elder Lawyer certified by the National Elder Law Foundation as accredited by the American BAR Association. He is the recipient of the Edith Blum Foundation Award for Excellence in Taxation and the professor's Award for Academic Achievement in Taxation. He was recently named to the 2013-2019 list of [Super Lawyers](#)®.

He was an adjunct professor in the Masters Program at Long Island University. He has spoken for the New York State BAR Association on complex trust and Estate Planning topics and regularly lectures before the Nassau and Suffolk BAR Association centers for continuing Legal Education, and their committees and sub committees. He is frequently asked to speak on trust topics for (NBI) the National Business Institute and other providers of legal education. He was technical editor for the publication "Fundamentals of Trust Accounting Income and Principal under the Revised NYS Laws" (ABA Publication 2013). Known in the community for his expertise on trusts and related matters, he acts as counsel to many large and small law firms, providing advice and guidance in his areas of concentration.

ROBERT K. HOWARD

Counselor at Law

Robert K. Howard counsels clients in the areas of estate planning, trust and estate administration, elder law and charitable organizations, with a particular emphasis on all tax-related concerns. He advises families in various personal legal matters, including business succession and planning for incapacity and long-term care. Mr. Howard's practice includes matters involving litigation in Surrogate's Court and representing clients before the Internal Revenue Service.

Mr. Howard continues his practice on Long Island, having received his training and experience as a practitioner in Manhattan. He is of Counsel to the law firm of Haley, Weinblatt and Calcagni, LLP and maintains a presence in the Hamptons. Before commencing his practice as a private attorney, Mr. Howard was a trust officer at a major New York City private bank.

Mr. Howard graduated with honors from Harpur College of Binghamton University and earned his juris doctor degree at Fordham University School of Law. He is admitted to practice in the States of New York and Connecticut and is a member of the bar association in each jurisdiction. He is active in several local bar associations and serves on various committees concentrating on all facets of estates practice. Mr. Howard is a past President of the Estate Planning Council of Suffolk County, Inc. and has served on the Advisory Committee of the Suffolk Academy of Law. He is a past co-chair of the Surrogate's Court Practice Committee of the Suffolk County Bar Association.

Mr. Howard grew up in Northport, Long Island, and now resides in Southampton with his wife, Joanne, and his three college-aged children.

SUFFOLK ACADEMY OF LAW presents . . .

Summer Trusts & Estates Series:

*An In-depth Look at Estate Planning
and Estate Administration*

Wills and Trusts

Wednesday, June 10, 2020

Faculty: David J. DePinto, Esquire
Robert K. Howard, Esquire

ASCERTAINING THE CLIENT'S OBJECTIVES:

I. Initial Contact.

A. Receiving the initial call (begin information gathering).

1. Information obtained by receptionist/assistant:
 - a. Correct name (spelling)
 - b. Telephone number and address (contact preference)
 - c. Referral source
 - d. Nature of concerns
2. Matters to be covered by attorney:
 - a. Identity of prospective client(s)(more than just his, her or their name(s))
 - b. Potential for conflict of interest (or other reason you may need/want to decline representation)
 - c. Nature of services requested and special concerns
 - d. Manner of setting fee (*e.g.*, fixed fee or time basis) and estimate of overall costs (whether to charge for initial consultation)
 - e. Information/documentation required (to develop effective plan)

B. Scheduling initial consultation.

1. Follow-up letter confirming date, time and location of initial consultation and enclosing estate planning questionnaire or list of documents to bring

II. Initial “Will Intake” Consultation.

A. **Continue gathering of information/areas of inquiry:**

1. General information about client(s)
2. Relatives (“Natural objects of bounty”)
3. Assets (and liabilities) (Estate) – true value!!
4. Disposition of estate (how disposition of estate relates to relatives)

[Sound familiar? 2-4 above = elements of “testamentary capacity”]

B. **Considerations in each area of inquiry (detailed review of completed Estate Planning Questionnaire):**

1. General information:

a. Documents to be reviewed:

Current Wills, codicils, trust agreements or other advance directives (i.e., powers of attorney, living wills, health care proxies)

Citizenship - naturalization papers (and for spouse)

Military benefits – discharge papers

Litigation – pertinent papers for or against

2. Relatives and family tree:

a. Understanding “intestate” distribution and identifying “distributees” (See, Article 4 of the Estates, Powers and Trusts Law - Descent and Distribution of an Intestate Estate)

b. Identifying potential fiduciaries

c. Ascertaining special problems – avoiding or preparing for “Will Contest”

d. Documents to be reviewed:

Marital - pre- or postnuptial agreements, separation agreements, divorce decrees

Adoption papers – for client(s) as well as any other relatives who may benefit

3. Assets and liabilities:

a. Review ways in which property passes at death:

(1) *By operation of law* (e.g. joint tenancy with rights of survivorship);

(2) *By contract* (e.g., “in trust for” bank account, “paid on death” brokerage accounts, life insurance policy or retirement plan); or

(3) *By Will or trust agreement* (other special forms of contract).

b. *Identify need to confirm title to or registration of property and to assess restrictions or limitations on alienability. Documents to be reviewed:*

General - personal financial statements and tax returns (income, gift, business and estate for inherited property)

Real estate – deeds, real estate tax bills, title insurance policies, appraisals, leases (including proprietary lease and stock certificate for cooperative apartment)

Stocks and bonds – brokerage statements, inventory/copies of securities held in certificate form

Cash, notes and bank accounts – statements, passbooks, promissory notes, mortgages

Life insurance – policies insuring life of client and spouse or others, premium notices, summary provided by agent(s), beneficiary designations

Other – appraisals or insurance riders for personalty, royalty agreements, copyrights, trademarks and patents, documents relating to inheritances, powers of appointment or other property interests, inventory and location of safe deposit box(es)

Annuities - contracts and statements of value

c. *Business interests (succession planning). Documents to be reviewed:*

Operating, partnership, shareholder, joint venture, professional practice or other agreement concerning redemption or cross-purchase of interest

Life insurance policy, including beneficiary designation, and premium statements, related to business agreements

Other business agreements (e.g., consultation/employment agreements, etc.)

d. *Retirement accounts (retirement planning) and other employee benefits. Documents to be reviewed:*

Employer or other retirement plan agreements for stock options, deferred compensation, pension, profit-sharing, life insurance, bonus or post-death compensation, together with employee benefit plan statements, summaries and beneficiary designations

Individual retirement account/Keogh statements with beneficiary designations

e. *Liabilities (including estate taxes) – assess liabilities and other cash requirements and determine how to provide for; avoid forced sale of assets*

C. Formulating estate planning objectives.:

1. Review need for a Will/Trust.

- a. State law determines who receives estate (subject to administration) if decedent dies without a Will (all outright; no trusts)

- b. State determines priority of who administers estate if decedent dies without a Will – if no one steps forward, Public Administrator to be appointed
- c. *Consider whether primary estate planning vehicle to be a Will or lifetime Trust. Factors that may indicate use of a trust (to avoid probate):*
 - (1) Unknown distributees
 - (2) Real property owned in multiple jurisdictions (consider domicile)
 - (3) Concern for advanced age or incapacity
 - (4) Potential for “Will contest”
 - (5) Other

2. Understand testamentary wishes (developing estate planning objectives).

a. For spouse.

- (1) Provide for surviving spouse (consider children or other obligations from prior marriage (union) and protection from creditors)
- (2) Avoid or reduce estate and generation-skipping transfer taxes (use of “exclusions” with unlimited marital deduction)(evaluate need to transfer assets between spouses)
- (3) Gift-giving (consider splitting gifts to reduce taxable estate, or shift income)
- (4) Discuss/analyze limitations regarding:
 - Exempt property
 - Right of election
 - Community property

Contractual (marital or business agreements)

Rights of non-marital partners (common law marriages, contracts for services rendered (express or implied) and constructive trust) - consider cohabitation or life partnership agreement

(5) Consider disposition if spouse predeceases

b. Children or other issue.

(1) Assess need for holding assets in trust and duration (consider age, capacity, health related concerns and need for spendthrift protection)

(2) Consider gift-giving (under annual, medical or tuition exclusions, and use of irrevocable trust or gifts to “529 Plan” account)

(3) Consider additional life insurance (to provide liquidity or to cover estate taxes)

(4) Consider if children or other issue predecease (use and operation of *per stirpes*, *per capita* and “by right of representation,” and provision for takers of last resort)

c. Providing for *others* (identify specific asset, amount or proportion and manner of disposition)

d. Determine *charitable* intent (consider various vehicles available and impact on estate and generation-skipping taxes)

3. Identifying fiduciaries.

a. Discuss roles and qualities of each fiduciary to be considered (e.g., executor, trustee, guardian, attorney-in-fact, and health care agent)

b. Assist with identifying fiduciaries and structure of appointment (whether need for appointing more than one (1) to serve and providing for successors)

c. Address compensation of fiduciaries

4. Analyzing disposition of “non-probate” assets and impact on overall objectives.
 - a. Consider use of trust, joint tenancy or life estate (e.g., for out-of-state real property to avoid ancillary probate)
 - b. Review/revise beneficiary designations (e.g., designation of trust under Will)

D. Formulating lifetime objectives.

1. Identify need for power of attorney and other advance directives (i.e., living will and health care proxy, including organ donation and HIPAA);
2. Discuss forms of power of attorney (durable or “springing”) and statutory “gifts” rider for asset protection planning and whether to waive conflict of agent/beneficiary. Also consider whether to grant powers in addition to those provided by statute. For example, power to:

Create, revoke or amend revocable trusts, and to contribute assets thereto

Deal specifically with tax matters, retirement accounts and health care matters (HIPAA)

3. Protecting against possible long-term care costs (i.e., obtaining long-term care insurance or advance planning to qualify for government benefits/entitlements, “Medicaid Planning”)
4. Consider continuation of business upon disability or retirement
5. Review adequacy of insurance: health, life, disability, malpractice, casualty and liability (including umbrella)

E. Formalizing engagement.

1. Summary of plan and services to be rendered and discussion of fee. Memorializing with an engagement letter.
2. Special concern – sample “dual representation” of husband and wife

CHOOSING BETWEEN A WILL OR A REVOCABLE (“LIVING”) TRUST AS THE PRIMARY PLANNING VEHICLE:¹

I. The Revocable Trust as the Primary Document in an Estate Plan.

- A. There has been a growing trend in the use of a revocable trust instead of a will as the primary estate planning document.
 - 1. Although both a will and a revocable trust dispose of a person’s property upon death, there are significant differences between these two estate planning documents.
 - 2. It is important for the attorney to review each client’s particular situation in order to determine whether a will or a revocable trust should be the primary estate planning document.
- B. The growing use of revocable trusts in New York can be attributed in part to the elimination of the “merger” doctrine.
 - 1. The “merger” doctrine, which prohibited the grantor from being the sole trustee and sole income beneficiary, was eliminated with the enactment of EPTL 7-1.1, effective June 25, 1997.

¹ Richard A. Weinblatt, Esquire, a partner of the law firm, Haley Weinblatt & Calcagni, LLP, and an active member of the Suffolk County Bar Association and Suffolk Academy of Law, prepared substantial portions of this outline, and we gratefully acknowledge his insight.

2. Under EPTL 7-1.1, the grantor may be the sole trustee and sole income beneficiary provided that one or more *other* persons hold a beneficial interest in the trust. The beneficial interest may be vested or contingent and may be created by express provisions or as a result of the reversion to the grantor's estate.

II. When is a Trust Revocable.

Many of the documents we write for estate planning purposes are revocable. A Last Will and Testament Will can be revoked by a later Will or amended by codicil. A trust is revocable or can be amended if the grantor expressly reserves the (unilateral) right to revoke or amend it (Estates, Powers and Trusts Law (“EPTL”) § 7-1.17) or can be amended or revoked by Will (EPTL § 7-1.16). If a revocable trust has been funded, and several changes are indicated or desired, it may be preferred to “re-state” the trust agreement in its entirety. (Consider, however, that persons whose interests were created in the initial trust agreement may become aware of the later decrease or elimination of their initial interest.)

III. Advantages of the Revocable Trust.

A. **Avoidance of probate.**

1. If all assets are titled in the name of the trust, or pass outside of the will, no probate proceeding is needed upon the death of the creator of the trust.
2. Depending upon the particular facts and circumstances, probate may be a difficult and time consuming process. In many cases, however, probate is a simple proceeding that can be completed quickly.

B. Avoid the payment of executor's commissions.

1. Since no executor is appointed by the Court, there are no executor's commissions to be paid.
2. The trust, however, is responsible for the payment of trustee's commissions. Trustees' commissions are generally lower than executors' commissions.²

C. Property Management.

1. Upon the creator's death, the trustee may continue to manage the trust property. There is no delay in waiting for the court to appoint an executor.
2. Should the creator become incapacitated, the trustee may continue to manage the property.
 - a. A guardianship proceeding can be avoided.
3. The drawbacks of a durable power of attorney can be avoided.
 - a. Powers of attorney may not be readily accepted by financial institutions.

D. Privacy.

1. A will is a public document whereas a revocable trust is not.
 - a. However, if a will pours over into a trust, the court may require the filing of the trust.
 - b. Financial institutions may require a copy of the trust document.

² Executors' commissions are set forth in SCPA 2307. Trustees' commissions are set forth in SCPA 2309.

E. Avoidance of Ancillary Probate.

1. Where a person owns real property in more than one state, an ancillary probate proceeding will be required in each state. This can be avoided by having title to the real property in the name of the trust rather than the individual.

F. Will Contest May Be Avoided.

1. Although a will contest may be avoided, the validity of the trust itself may be challenged.
2. More difficult and expensive to challenge a trust than to object to the admission of a will to probate.
3. Existence and operation of the trust over a long period of time may favor a finding that the trust is valid.
4. Statute of limitations for contesting a trust is not entirely clear. It may be six years, from the date of Grantor's death.³
5. Capacity needed to create a trust may be greater than for a will.⁴

G. Avoiding Exempt Property.

1. Property placed in a trust that would otherwise be exempt under EPTL 5-3.1 will pass to trust beneficiaries.⁵

³ *Matter of Heumann*, Westchester Co., Sur., NYLJ 11/2/06 p.32, col 2

⁴ See *In re ACN*, 133 Misc.2d 1043, 509 N.Y.S. 2d 966 (Sur.Ct.New York County 1986) requiring capacity greater than testamentary capacity. See also *In re Aronoff*, 171 Misc.2d 172, 653 N.Y.S.2d 844 (Sur.Ct.New York County 1996) indicating that testamentary capacity may be the standard.

⁵ EPTL 5-3.1 applies only to property an individual owns at time of death.

IV. **Disadvantages of the Revocable Trust.**

A. **Expense of Creation and Ongoing Management.**

1. Legal fees will be incurred to prepare the trust document.
2. Fees to transfer ownership of property into the trust. For example: legal fees and recording fees to convey real property.
3. Separate trust income tax returns may be required.
4. Pour-over will is still needed.

B. **No Executor's Commissions.**

1. Estate tax deductible executor's commissions may result in an overall tax savings for the family.

C. **Income tax rules for the trust after the creator's death are less favorable than the rules for estates.**

1. Estate may deduct charitable bequests that have been permanently set aside. Trust may deduct only what is paid.
2. Estate may achieve tax deferral by election of fiscal year. Trusts must use calendar year.
3. Trusts may be treated as part of the estate for a period of time if an election is made by both the executor and trustee. The elections and future filings may cause additional expense.

V. **Creation of the Revocable Trust.**

A. **Who May Create a Revocable Trust.⁶**

1. A revocable trust may be created by a natural person eighteen years of age or older.
2. A revocable trust may also be created by an association, board, any corporation, court, governmental agency, authority or subdivision, partnership or other firm and the state.

B. **Writing Requirement.**

1. Effective December 24, 1997, all revocable trusts must be in writing.⁷
2. The writing should identify the property that will be subject to the trust, name the trustee, identify the beneficiaries and set forth the terms and conditions of the dispositions.

C. **Execution of the Revocable Trust.**

1. There are two methods for executing the trust:⁸
 - a. The trust may be acknowledged in the manner required for the conveyance of real property by the initial creator, and, unless such creator is the sole trustee, by at least one trustee.
 - b. In lieu of an acknowledgment, the trust may be executed in the presence of two witnesses who affix their signatures to the trust instrument.

⁶ EPTL 7-1.14 and EPTL 1-2.12

⁷ EPTL 7-1.17(a)

⁸ Id.

D. Revocation or Amendment of the Trust.

1. A lifetime trust is irrevocable unless the trust instrument expressly provides that it is revocable.⁹
2. A revocable trust may be revoked or amended by an express direction in the creator's will.¹⁰
3. A revocable trust may also be revoked or amended by a person authorized to do so in the trust instrument with the same formalities as for creation, i.e. acknowledgment or witnessing. Additionally, the creator may provide an alternative method of revocation in the trust instrument.
4. If the revocation or amendment is made by a person other than the sole trustee, written notice of the revocation or amendment is required to be given to at least one other trustee.
 - a. Failure to give the required notice does not affect the validity of the revocation or amendment. However, no trustee shall be liable for any act reasonably taken if such trustee did not receive notice.
5. At least one case has held that a guardian appointed for the creator under Article 81 of the Mental Hygiene Law may revoke or amend the trust.¹¹

⁹ EPTL 7-1.16

¹⁰ *Id.*

¹¹ See *In re Elsie B.*, 265 A.D.2d 146, 707N.Y.S. 2d 695 (3d Dep't 2000), *distinguished by*, *Matter of Chiaro*, 28 Misc.3d 690, 903 N.Y.S.2d 673 (N.Y. Sup. Ct. 2010)

VI. **Funding Requirements.**

A. **General rule.**

1. A trust is valid as to any assets that have been transferred to it.¹²
2. Transfer is not accomplished merely by a recital of assignment in the trust instrument.
 - a. For example, a provision in the trust agreement that states “Grantor hereby assigns all of the property described in Schedule A”.
3. The standby “pour-over” trust is an exception to the funding requirement.¹³

B. **Creator as sole trustee.**

1. Assets capable of registration must be registered in either the name of the trust or the trustee.
2. For an asset not capable of registration, the creator must assign the asset to the trust in a writing that describes the asset with particularity.

C. **Creator is not the sole trustee.**

1. The statute does not address the funding requirements where the creator is not the trustee.
2. Existing case law should still apply.
 - a. Existing case law requires delivery of the asset to the trustee with the intent to make a transfer to a trust.¹⁴

¹² EPTL 7-1.18 Effective for trusts created on or after December 25, 1997

¹³ EPTL 3-3.7(a)

¹⁴ See Farmers’ Loan and Trust Co. V. Winthrop, 238 N.Y. 477, 144 N.E. 686 (1924)

VII. Drafting Considerations.

A. **Dispositive provisions upon death of the Creator.**

1. The revocable trust may provide for disposition of the trust assets upon the creator's death in the same manner as a testator may provide in a will.
 - a. May include estate tax planning with credit shelter dispositions and dispositions that qualify for the marital deductions.
 - b. Dispositions may be made outright or in further trusts.

B. **Anti-lapse provisions.**

1. The anti-lapse statute¹⁵ does not apply to trusts.
 - a. A will bequest to issue or siblings will not lapse if such issue or siblings predecease the testator. The same disposition in a trust will lapse unless the creator provides otherwise.

C. **Ademption.**

1. If property that is subject to a specific bequest by will is disposed of prior to the testator's death, the bequest adeems.¹⁶
2. There are no statutory provisions that govern the disposition of property specifically disposed of in a trust instrument if the property is disposed of prior to the creator's death.

D. **Abatement.**

1. The statutory order of abatement does not apply to trusts.¹⁷

¹⁵ EPTL 3-3.3

¹⁶ EPTL 3-4.3

¹⁷ EPTL 13-1.3

E. Failure of remainder.

1. If a trust contains a remainder disposition to two or more designated beneficiaries and such disposition is ineffective in part, the ineffective part passes to the other designated beneficiaries ratably.¹⁸
2. This rule is similar to the rule for wills under EPTL 3-3.4.
 - a. EPTL 3-3.4, however, is subject to the anti-lapse provisions of EPTL 3-3.3, whereas the anti-lapse provisions do not apply to trusts.

F. Effect of divorce.

1. Divorce after the execution of a will revokes all dispositions to the former spouse as well as the provisions naming the former spouse as executor or trustee.¹⁹
2. There are no similar statutory provisions for trusts.

G. *In Terrorem* clauses.

1. EPTL 3-3.5 sets forth the requirements for enforceability of an *in terrorem* clause for wills. No similar provisions exist for trusts.

VIII. Taxes.

A. Estate taxes.

1. All property remaining in the trust at time of the creator's death is included in the creator's taxable estate.

¹⁸ EPTL 2-1.14

¹⁹ EPTL 5-1.4

2. There is no estate tax savings achieved by using the revocable trust as the primary estate plan document.
3. Apportionment of estate taxes.
 - a. Tax payment provisions in the will and the revocable trust should be coordinated.
 - b. Unless provided otherwise in the will or trust, the default rule is for taxes to be apportioned.²⁰
 - c. A will that is later in date than a trust may change the direction in the trust by specific reference thereto.²¹
 - d. A trust that is later in date than a prior will or trust may change the prior instrument by specific reference thereto.²²
 - e. A trust direction only relates to payment from the trust and it cannot exonerate the trust from its proportionate share of the tax.²³

B. Gift taxes.

1. The funding of the revocable trust does not result in a taxable gift.
2. Gifts from the trust are treated as having been made from the creator.

²⁰ EPTL 2-1.8

²¹ EPTL 2-1.8(d)(1)

²² EPTL 2-1.8(d)(2)

²³ EPTL 2-1.8(d)(3)

C. **Income taxes.**

1. During the creator's lifetime.

- a. The income earned by the trust is treated as being earned by and is taxable to the creator.
- b. If the creator is a trustee, the creator's social security number may be used and no separate income tax return for the trust is required.
- c. If the creator is not a trustee, a separate tax identification number is required. The trust files a tax return (Form 1041) stating that all items of income and deductions have been reported on the creator's individual income tax return.

2. After the creator's death.

- a. The trust becomes a separate taxpayer.
- b. The trust must file its return using the calendar year. This is different than an estate, which may choose to file based upon a fiscal year.
- c. An election is available to have the trust taxed as part of the creator's estate.
 - (1) The election must be made by both the trustee and the legal representative of the estate, if one has been appointed.
 - (2) The election is irrevocable.
 - (3) The election begins on the date of the creator's death.
 - (4) The election period terminates two years after the creator's death or, if later, six months after the final determination of the estate tax liability for estates that are required to file a federal estate tax return.

IX. **Procedural Issues in Challenges to a Revocable Trust.**

A. **General.**

1. Will contests are governed by SCPA Article 14. However, no similar statutory provisions govern challenges to revocable trusts. Thus, little guidance is available to the attorney confronted with a challenge to the trust.
2. The EPTL-SCPA Legislative Advisory Committee has recommended the enactment of legislation to address proceedings involving lifetime trusts; however, these recommendations have not been adopted.²⁴

B. **Unresolved Issues.**

1. Who may commence a proceeding to set aside the trust?
2. Who are the necessary parties to the proceeding?
3. When may the proceeding be commenced?
4. Is there a right to a jury trial (the courts are split on this issue)?
5. What is the statute of limitation and when does it begin to run?

X. **Joint Revocable Trusts.**

A. Should a joint revocable trust for husband and wife be used?

1. In most cases, it may be best to avoid a joint revocable trust.
 - a. Credit shelter planning may be ineffective if it is unclear as to which spouse's assets are funding the trust.

²⁴ See, A Trust Code for New York, NYLJ 01/16/2020, for a discussion of the need to adopt a new code to resolve many of the outstanding questions and issues concerning New York trust law.

XI. **Medicaid Issues.**

A. **Medicaid eligibility.**

1. Assets held in a revocable trust are available resources for purposes of determining Medicaid eligibility.
2. Transfers from a revocable trust subject the creator to a five (5) year lookback period.

B. **Avoidance of estate recovery.**

1. Assets held in a revocable trust created by a refusing spouse are not subject to an estate recovery claim.
2. Estate recovery is limited to the probate estate.

C. **Supplemental Needs Trust.**

1. Protection of assets by use of a supplemental needs trust for a spouse under EPTL 7-1.12 is only available for testamentary trusts (*i.e.*, under a Will).

XII. **“Pour-over” Will.**

A. **Backup to the Revocable Trust.**

1. Even if the primary estate planning document is a revocable trust, a backup or “pour-over” will should be executed.
 - a. All assets may not be titled to the trust at the time of the creator’s death.
 - b. The trust may be invalid for failure of proper execution.
 - c. The trust instrument may be lost or inadvertently destroyed.

2. Should the “pour-over” will recite all of the dispositive provisions of the trust agreement.
 - a. New York does to recognize incorporation by reference.
 - b. Privacy lost?