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In the Spotlight:

Gideon Rothschild and **Daniel S. Rubin** were selected by their peers for inclusion in the 2011 edition of *The Best Lawyers in America*® in the area of Trusts and Estates. They were also listed in the 2010 *New York Super Lawyers*® by *Law & Politics*.

Gideon Rothschild was quoted in the article "You Don't Have To Move Your Money Offshore To Get Asset Protection" published by *Forbes.com* on July 21, 2010. Gideon reveals that more clients are opting to set up onshore trusts to protect their assets and diversify their holdings.

Daniel S. Rubin was a featured expert on the blog "TheTrustAdvisor.com" concerning Hawaii's new trust law. Dan discusses why Hawaii's Permitted Transfers in Trust Act won't work.

NY Enacts Law Regarding Interpretation of Wills of Decedents Dying in 2010

By Vanessa Kanaga

A new law was recently enacted in New York which may affect the estate plans of decedents dying in 2010 leaving wills or revocable trusts governed by New York law. As you are likely aware, as of January 1 of this year, the federal estate and generation-skipping transfer ("GST") taxes were repealed and will be reinstated on January 1, 2011, with higher rates and lower exemption amounts than those in place in 2009, unless Congress acts prior to such reinstatement. Many estate planning documents executed prior to this year included, for good reason, so-

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Please join us on October 21, 2010 for a webinar on "Current Developments in Asset Protection Planning." Click [here](#) to register.

NY Amends Provisions of Recently-Enacted Law on Powers of Attorney and Power of Attorney Form

By Vanessa Kanaga

As of September 1, 2009, a major overhaul of New York law regarding powers of attorney came into effect. As attorneys and other professionals began to utilize the revised form of power of attorney, significant concerns were raised. The most recent legislation, enacted August 13, 2010, takes into account some of these concerns. While the new legislation makes a number of amendments, many of which relate only to "technical" issues; some of the more substantive amendments are as follows:

- The execution of a new power of attorney does not automatically revoke any prior power of attorney. Agents granted the same authority under separately executed powers of attorney may now act separately unless otherwise specified by the principal.

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New York Enacts Legislation...***

called "formula clauses," used to carve out an amount equal to the decedent's exemption from federal estate tax (often referred to as the "credit shelter" amount, which was \$3.5 million in 2009) and/or the decedent's remaining exemption from GST tax (the "GST exemption," which was also \$3.5 million in 2009). Often, such formula clauses included a bequest to a separate "credit shelter trust," using a phrase such as "the maximum amount which can pass free of federal estate tax," or alternatively a bequest to a surviving spouse or a marital trust, using a phrase such as "the minimum amount necessary to avoid imposition of a federal estate tax." The repeal of the federal estate and GST taxes thus could result in the disposition of the estate of a decedent dying this year in a manner contrary to the intent of such decedent; for example, such formula clauses can be interpreted as disposing of a decedent's entire estate to the credit shelter trust, which may have the effect of disinheriting the surviving spouse under certain wills or revocable trusts.

The new law attempts to avoid such unintended consequences by providing that wills or revocable trusts of decedents dying this year which contain such formula clauses will be interpreted to refer to the federal law regarding estate and GST tax as it existed on December 31, 2009. For example, if a decedent dies this year leaving a will executed in a prior year in which "the maximum amount which can pass free of federal estate tax" passes to a credit shelter trust with the remainder of the decedent's estate passing to the

surviving spouse, the will would now be interpreted as making a bequest of up to \$3.5 million to the credit shelter trust, with the remainder of the estate passing to the surviving spouse. This legislation will not apply to wills or revocable trusts which were executed or amended in 2010, or which were executed prior to 2010 but take into account, and provide for an alternate disposition in anticipation of, the repeal of the federal estate and/or GST tax.

The law also provides that any affected beneficiary or the executor or trustee may bring a proceeding within a year of the decedent's death to determine whether the decedent intended that the formula clause be interpreted as the law existed at the decedent's death.

Please do not hesitate to contact us if you have any questions as to the effect, if any, this new legislation will have on your estate plan.

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NY Amends Provisions...***

- Powers of attorney given for certain business transactions were included under the 2009 law. This was unintended since the statute was intended to address the perceived abuse of elder individuals. Accordingly, under the law as amended, certain powers of attorney given for specific purposes, including (among others) the following, are not governed by the provisions of the new law:
 - Powers of attorney given primarily for a business or commercial purpose, including powers given to facilitate the transfer or disposition of certain property, including real property;
 - Proxies or other delegations to exercise voting or management rights;
 - Powers authorizing financial institutions to take actions relating to accounts held by such financial institutions;
 - Powers given by an individual in such individual's capacity as owner or manager of a legal or commercial entity, including powers given to other owners or managers in the governing document of such entity;
 - Powers given in connection with certain real estate matters, including powers given to managing agents and real estate brokers; and
 - Powers, given pursuant to state or federal statutes, to make health care decisions or decisions regarding the disposition of one's remains.
- A divorce or annulment of a principal's marriage to his or her agent will terminate the agent's authority unless the principal expressly provides otherwise in the power of attorney.
- An agent's authority to make gifts to the principal's spouse, as provided in a "Statutory Gifts Rider" (formerly, a "Statutory Major Gifts Rider"), terminates upon the divorce or annulment of the marriage of the principal and his or her spouse.
- An agent can make gifts even where the principal has not executed a statutory gifts rider, if such gifts are to individuals or charities to which the principal customarily made gifts, provided that the aggregate amount of all such

gifts in any year may not exceed \$500. Under the 2009 statute, it was unclear if the \$500 limit was in the aggregate or per donee. All other gifting authority can be set forth in a separate "Statutory Gifts Rider."

If you have any questions regarding the new power of attorney form, or would like to review your current power of attorney, please do not hesitate to contact us.

NYS Department of Taxation and Finance Announces New Policy Regarding Filing of Fiduciary Income Tax Returns by Resident Trusts

By Vanessa Kanaga

The New York State Department of Taxation and Finance, on July 23, 2010, announced a new policy that now requires New York resident trusts to file New York State fiduciary income tax returns, even if such trusts are not subject to New York income tax.

By way of background, a New York "resident trust" is a trust which (1) consists of property transferred to the trust by the will of a decedent who was domiciled in New York at his or her death; (2) is a revocable or irrevocable trust consisting of property transferred by a person domiciled in New York at the time of transfer; or (3) was revocable at the time it was created, but has since become irrevocable and consists of property transferred by a person who was domiciled in New York at the time that the trust became irrevocable. A

resident trust is not required to pay New York State income tax if (1) all of the trustees of the trust are domiciled in a state other than New York; (2) the entire corpus of the trust is located outside of New York; and (3) all income and gains of the trust are derived from or connected with sources outside of New York.

Under the former policy of the New York State Department of Taxation and Finance, a resident trust was not required to file a New York State fiduciary income tax return if it met the requirements set forth above and was not subject to New York State income tax. Pursuant to the new policy, for tax years beginning on or after January 1, 2010, a New York resident trust which is required to file a federal income tax return for any tax year must file a New York State fiduciary income tax return for that year, even if the trust is not subject to New York State income tax. This income tax return must be accompanied by a *New York State Resident Trust Nontaxable Certification* form, certifying the reasons for the trust's exemption from New York State income tax.

If you, or your accountant, have any questions or would like to discuss this new filing requirement, please do not hesitate to contact us.

Breaking Up Is Easier To Do

By Rebecca A. Provder

On August 15, 2010, Governor Paterson signed legislation that stands to revolutionize divorce proceedings in New York State. The new legislation implements

no-fault divorce in New York. It also reforms the law governing awards of temporary maintenance, counsel fees and expert fees. The divorce reform package is aimed at decreasing the time, expense and contentiousness of matrimonial cases, while balancing the scales of justice so that the outcome of the litigation is not determined by the weight of the monied spouse's wallet.

No-Fault Divorce

No-fault divorce will allow New Yorkers to dissolve their marriages by one party claiming under oath that the marriage has irretrievably broken down for at least six months. The issues ancillary to the divorce, such as equitable distribution, support, custody and parenting time, must be resolved before the marriage can be dissolved.

New York was the last state in the nation to adopt no-fault divorce. Prior to the new legislation, to get a divorce, a party was required to show fault, such as adultery, cruelty, imprisonment, or abandonment. In the absence of grounds, the divorce would be denied. Since the fault requirement forced one spouse to take the blame for the demise of the marriage, it became commonplace for spouses to commit perjury in order to obtain a divorce. Divorce grounds (or the lack thereof) often gave one side a tactical advantage and were used as a bargaining chip.

Fault allegations and grounds trials heightened the conflict, increased the cost, and prolonged the duration of matrimonial cases. As a result of the no-fault divorce legislation, valuable judicial resources will

no longer have to be wasted on litigating whether or not a marriage should be dissolved.

No-fault divorce will come into effect on October 14, 2010 and applies to divorce cases commenced on or after the effective date. The legislation will not be retroactive.

Maintenance

Temporary maintenance awards have been unpredictable and inconsistent. The law has been amended in an attempt to alleviate these problems and help the non-monied spouse sustain himself/herself during the pendency of the matrimonial litigation.

The new law sets forth a formula to calculate awards of temporary maintenance. However, upon a finding that the presumptive amount of temporary maintenance would be unjust or inappropriate, the court may deviate from the guidelines and adjust the amount of the temporary maintenance. In addition, the parties can also agree to deviate from the temporary maintenance guidelines in a validly executed agreement or stipulation.

The new legislation also amends the factors that are to be taken into account in determining post-divorce maintenance awards.

Counsel Fees and Expert Fees

Presently, the burden of proof in a counsel fees application is on the moving party. Under the new legislation, the burden of proof shifts to the monied spouse. There will be a rebuttable presumption that counsel fees shall be awarded to the non-monied spouse. The

court may also direct the monied spouse to pay the expert fees of the non-monied spouse.

The reforms attempt to level the playing field and place spouses on a more equal footing throughout the divorce proceeding. Significantly, it will now be easier for the non-monied spouse to obtain counsel fees at the onset and during the matrimonial litigation, rather than being forced to wait until the conclusion of the case.

Creditor Protection of Inherited IRAs

By Vanessa Kanaga

Individual Retirement Accounts (often referred to as "IRAs") have become a popular and common tool for planning for retirement. Upon the death of the owner of an IRA, any assets remaining in the IRA will pass, pursuant to a beneficiary designation, either to the owner's surviving spouse, or to the owner's estate or one or more other beneficiaries in the form of an "inherited IRA." For this reason, IRAs must be considered in developing an estate plan. However, IRAs should also be considered in asset protection planning. The law is fairly well settled that an IRA is protected from most creditors of the initial contributor of the IRA. However, it remains unclear whether inherited IRAs receive the same protection with respect to the creditors of the IRA beneficiary. Two recent bankruptcy court cases, *In re Nessa* and *In re Tabor*, have held that inherited IRAs are afforded the same protection from the creditors of the beneficiary of the inherited IRA as would have been afforded the initial owner of the IRA prior to his or her death.

The extent to which these cases will impact the law in this area (which has previously held that inherited IRAs were not protected) remains unclear, so it is important to consider strategies to protect such inherited IRAs.

IRAs and Inherited IRAs

A traditional IRA (which differs from a Roth IRA, the tax treatment of which is not discussed here) is a trust or custodial account created for the benefit of an individual and/or his beneficiaries which meets certain requirements set forth in the Internal Revenue Code. Subject to certain limitations, contributions to a traditional IRA are generally deductible, up to a certain amount each year, and the income and gains within a traditional IRA are generally not taxed until distributed. The owner of an IRA must begin taking distributions from the IRA by a certain age, and will be penalized for taking distributions from the IRA before a certain age. Once the owner of an IRA dies, the designated beneficiaries of the IRA (other than the surviving spouse of the initial owner) receive the assets in the IRA in the form of an inherited IRA and must withdraw the entire amount of the IRA account by the end of the fifth year following the initial owner's death, or begin taking distributions from the IRA account based on the oldest beneficiary's life expectancy. The beneficiary of an inherited IRA cannot make additional contributions to the IRA, and different tax rules apply to inherited IRAs than apply to IRAs in the hands of their initial owners. An IRA of which the owner's surviving spouse is the designated beneficiary may be rolled over into his or her own

IRA and will likely remain protected from the spouse's creditors.

Creditor Protection of IRAs and Inherited IRAs

There is little doubt that an IRA is generally protected from most creditors of its initial contributor (one exception is the IRS). Federal bankruptcy law specifically exempts IRAs from the bankruptcy estate of their owners (with a \$1 million limitation for traditional IRAs). However, federal law does not provide such explicit protection for inherited IRAs. Additionally, some debtors in bankruptcy may be required to use the exemptions provided by state law, rather than the federal exemptions. With one exception, courts which have considered whether inherited IRAs are protected from the creditors of their beneficiaries in bankruptcy under state law exemptions have held that inherited IRAs do not receive such protection.

Recently, courts have decided the issue of whether inherited IRAs are protected from the claims of creditors under the exemption provided by federal bankruptcy law, rather than state law. In *In re Chilton*, decided in March of this year, the Bankruptcy Court for the Eastern District of Texas held that an inherited IRA is not protected from the claims of creditors under federal bankruptcy law because the inherited IRA was not created to provide for the beneficiary's retirement, and the beneficiary would be able to withdraw funds from the inherited IRA regardless of the beneficiary's age or retirement status without penalty. However, shortly after *Chilton* was decided, the Eighth Circuit reached the opposite conclusion

in *Nessa*, holding that an inherited IRA still contained "retirement funds" within the meaning of federal bankruptcy law, even though they were not the debtor's own retirement funds. Shortly thereafter, the Bankruptcy Court for the Middle District of Pennsylvania, in *Tabor*, agreed with the decision in *Nessa* and again concluded that the exemptions provided by federal bankruptcy law protect "retirement funds" without specifying that they must be the debtor's retirement funds.

Although these recent cases may indicate that the tide has turned with respect to providing creditor protection to inherited IRAs, it is too soon to know whether, and to what extent, other courts will follow these recent decisions. As the majority of the authority on this issue indicates that inherited IRAs are not protected from the claims of the beneficiary's creditors, it is not yet safe to assume that all inherited IRAs will receive such protection.

Planning to Protect Inherited IRAs

As it is at least unclear whether an inherited IRA will be protected from the claims of the beneficiary's creditors, it is important to consider asset protection planning in order to provide such creditor protection. One way of providing such protection is by designating a trust as the beneficiary of an IRA upon the death of the initial owner. A trust which is designated as the beneficiary of an IRA, and which includes certain provisions prohibiting the assignment or transfer of the beneficiaries' interests in such trust, can provide significant protection of the funds held in an inherited IRA until such funds are

distributed to the beneficiaries. Such a trust may be created *inter vivos* (during life), or under the initial IRA owner's will.

The trust may be drafted so that the trustee has complete discretion in determining whether to make distributions to the beneficiaries and in what amount. The trustee would also have the discretion to accumulate the distributions from the inherited IRA within the trust, providing greater protection from creditors, and preserving such funds for future generations. Alternatively, the trust could be drafted as a "conduit trust." A conduit trust is a trust which, as its name suggests, acts as a conduit for the distributions from the inherited IRA, by receiving the minimum required distributions from the inherited IRA, and paying them out to the beneficiary of the trust. A conduit trust will not provide as much protection from the claims of the beneficiary's creditors as a trust in which the trustee's ability to make distributions is completely discretionary. The trustee will be required to make distributions from the conduit trust and, once the distributions are made, the distributed amount is subject to the claims of the beneficiary's creditors. However, conduit trusts can provide certain tax advantages over purely discretionary trusts. The advantages and disadvantages of each type of trust should be considered, and the type of trust which works best for any individual will depend on the particular needs and objectives of the individual and his or her family.

Impact of Recent DOMA Rulings on Estate Planning for Same-Sex Couples

By Jenna Millman

In two separate decisions issued on July 8, 2010, the United States Federal District Court of Massachusetts held that Section 3 of the Defense of Marriage Act ("DOMA"), which defines the terms "marriage" and "spouse," for purposes of federal law, to include only the union of one man and one woman, is unconstitutional. These rulings, along with the recent California Federal District Court ruling finding Proposition 8 unconstitutional, are likely to continue on appeal until they reach the Supreme Court. In the meantime, married same-sex couples should consider revisiting their estate planning documents in light of this new case law.

In *Gil v. Office of Personnel Management*, the Court found that DOMA violates the equal protection principles embodied in the Fifth Amendment and in *Commonwealth of Massachusetts v. U.S.*, the Court found that DOMA violates both the Constitution's spending clause and state sovereignty under the Tenth Amendment. Although both Massachusetts cases are currently being appealed, the rulings indicate that same-sex couples who marry in a state or country where same-sex marriage is legal (including, Massachusetts, Connecticut, Vermont, Iowa, New Hampshire and the District of Columbia), may be entitled to federal benefits afforded to married couples both during lifetime and upon death.

Under current federal tax law, an individual may leave an unlimited amount of assets to a surviving spouse estate tax free, provided only that such spouse is a U.S. citizen and that such assets are left either outright or in a special marital trust called a qualified terminable interest property trust ("QTIP Trust"). Historically, same-sex couples have not qualified for this unlimited estate tax marital deduction because they were excluded from the definition of spouses under Section 3 of DOMA. However, if the recent rulings are upheld on appeal, then same-sex couples who are legally married should qualify for the unlimited federal estate tax marital deduction provided that the surviving spouse is a U.S. citizen and that such assets are either left outright or in a QTIP Trust. For now, legally married same-sex couples should consider updating their estate planning documents to ensure that any assets left to the surviving spouse would qualify for the federal estate tax marital deduction to the extent available.

In addition, if the recent rulings are upheld on appeal, then the unlimited federal gift tax marital deduction should also be available to same-sex couples who are legally married and such couples should consider implementing additional proactive estate planning during their lifetimes to maximize this deduction.

If you would like to review your estate planning in view of the new case law, please contact one of our Trusts & Estates attorneys.

Making Gifts on the Cheap

By Ira Zlotnick

As a result of Congress' failure to address the federal estate and generation-skipping transfer tax prior to January 1, 2010, individuals have a unique opportunity for the remainder of this year to transfer wealth at a significantly reduced transfer tax cost. Assuming that there is no attempt by Congress to retroactively change the gift tax regime for the current year, the federal gift tax rate for taxable gifts made in 2010 is thirty-five (35%) percent. This represents a significant reduction from the forty-five (45%) percent rate that was in effect for the 2009 calendar year and from the fifty-five (55%) percent rate that applied historically and that is slated to again apply after December 31, 2010 in the absence of further legislation.

Individuals have, however, been hesitant to make gifts in excess of their \$1,000,000 lifetime gift tax exemption and thus incur a gift tax, in part due to uncertainty in recent years regarding the future of the estate tax. In light of (i) the relatively low gift tax rate currently in effect for the remainder of the year, (ii) the fact that due to the economic slowdown, many asset values are at historic lows, and (iii) the strong likelihood that the estate tax will be reinstated as of January 1, 2011 at a rate in excess of the current gift tax rate, making taxable gifts should, at the very least, be considered by high net worth individuals.

In addition, given that the federal generation-skipping transfer tax has also been repealed for

the current year, it is also possible to make taxable gifts to grandchildren and more remote descendants (particularly in situations where children have significant wealth of their own) without incurring an additional generation-skipping transfer tax.

As an example of the potential savings of a gift to a grandchild in 2010 vs. 2011, let's assume a grandparent makes a \$3 million gift to a grandchild after having used up his \$1 million lifetime gift tax exemption. In 2011, assuming a 55% rate for each of the gift tax and the generation-skipping tax, the tax would be over \$4.2 million compared to a relatively cheap \$1.05 million today. Furthermore, neither New York nor New Jersey imposes a gift tax, thus making lifetime gifts even more attractive for residents of those states.

Another alternative, which would serve to further reduce the amount of the gift tax is a so-called "net gift". A net gift occurs when the donor and donee agree that the donee (rather than the donor) will pay any gift tax resulting from the transfer of property. The net gift is computed by reducing the gross value of the gift by the amount of gift tax the donee will have to pay. A determination of the amount of tax owed by the donee requires the use of an algebraic computation. As an example, if a donor made a net gift in 2010 of \$1 million to his daughter, obligating his daughter to pay the gift tax, the gift tax would be \$259,259 and thus the net gift would be \$740,741 (as opposed to the donor gifting his daughter the \$1 million and having to pay \$350,000 gift tax).

As a result of the unique gifting opportunities that will likely

exist for the remainder of 2010, we encourage our clients to consider whether such planning makes sense in light of their particular circumstances. Although the possibility of Congress retroactively reinstating the generation-skipping transfer tax effective January 1, 2010 exists, the odds of this happening seem less and less likely with each passing day.

Please feel free to contact any one of the attorneys listed below to discuss gifting opportunities in 2010 and beyond.

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for Your Referrals**

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