

Reformation proceedings in the Surrogate's court

A proceeding to reform a trust or a will is a frequent proceeding entertained by the surrogate's courts. Generally speaking, the purpose of a reformation proceeding is to correct mistakes in the trust or will, in order to give effect to the intent of the settlor or testator. A proceeding to reform an *inter vivos* trust, brought during the settlor's lifetime, is governed by section 7-1.9 of the Estates Powers & Trusts Law (EPTL). A proceeding to reform a testamentary trust, or to reform an *inter vivos* trust subsequent to the death of the settlor, may be brought under section 1420 of the Surrogates Court & Practice Act (SCPA) which, by its terms, governs proceedings for the construction of a will. Proceedings to reform a will, while not specifically authorized by statute, are sometimes brought under the authority of section 1420 as well.¹

Reformation of a will or trust is available to correct a mistake in the instrument. For example, in *Matter of Snide*,² the decedent and his wife — Harvey and Rose Snide — "intending to execute mutual wills at a common execution ceremony, each executed by mistake the will intended for the other."³ The Court of Appeals held that Harvey's will, reformed to substitute the name "Harvey" wherever the name "Rose" appeared and the name "Rose" wherever the name "Harvey" appeared, was properly admitted to probate.⁴

A will or trust may also be reformed to effectuate the intent of the settlor or testator to take maximum advantage of available estate tax exemptions and deductions.⁵ The courts are guided in such proceedings by the presumption that a testator or settlor intends to take full advantage of available estate tax deductions and exemptions.⁶ Two recent decisions emanating from the Nassau County Surrogate's Court demonstrate the utility of reformation proceedings.

In *Matter of Shapiro*,⁷ the petitioners were concerned that the assets of the subject *inter vivos* trust would be included in the settlor's gross estate for estate tax purposes because, in the event of a trustee vacancy, the trust agreement did not expressly prohibit the settlor from appointing as a successor trustee a person related or subordinate to her within the meaning of Section 672 of the Internal Revenue Code (IRC).⁸

The court noted that in the case of a request to reform an *inter vivos* trust, "clear proof" of mistake is required.⁹ The settlor in *Shapiro* submitted an affidavit to the court in which she stated that it was her intention and objective in creating the trust to ensure that the assets would be excluded from her gross estate for estate tax purposes.¹⁰ Moreover, the petitioners contended that the requested reformation was consistent with the settlor's objective of

having independent persons serve as trustees, and that the attorney-draftsperson inadvertently omitted language prohibiting the settlor from appointing a successor trustee related or subordinate to her.¹¹

The petitioners acknowledged the unsettled state of the law on the question of whether the settlor's power to appoint a related or subordinate person as a successor trustee in the event of a vacancy would cause the trust to be included in her gross estate.¹² But, in view of the sizeable nature of the trust assets, and the settlor's purpose in creating the trust, the trustees requested that the court grant reformation.¹³ Given the proof offered by the petitioners, the court granted the relief requested.¹⁴

In *Matter of Hicks*,¹⁵ Surrogate Riordan entertained a petition by the decedent's wife, as a co-trustee of two testamentary trusts created under the decedent's will, to construe and reform the will. The will created a credit shelter trust, the net income of which was to be paid to the decedent's spouse during her lifetime, and a marital trust for the benefit of the spouse.¹⁶ The will gave the trustees discretion to pay to the decedent's spouse so much of the principal of both trusts as they determined for her "health, maintenance or support."¹⁷

Upon the spouse's death, the assets of the credit shelter trust were to be distributed to the decedent's then living issue.¹⁸ The balance of the property of the marital trust was to be paid, upon the spouse's death and absent a contrary direction in her will, to the decedent's then living issue, after the payment to the spouse's executors of the death taxes attributable to the inclusion of the marital trust in the spouse's estate.¹⁹

The decedent died owning shares of a subchapter S corporation which, the petitioner contended, was necessary to fund the trusts.²⁰ However, petitioner was concerned that neither trust met the requirements of a qualified subchapter S trust under section 1361 of the IRC,²¹ and that absent reformation, the corporation, if it were to become an asset of the trust, would lose its S-corporation status and the associated tax benefits.²² The petitioner, therefore, sought to reform the will to meet the requirements of a qualified subchapter S trust.²³ Specifically, the petitioner requested reformation of the will to provide that the spouse's income interest in the trust would terminate at the earlier of her death or the termination of the trust, and also to provide that if the trust were to terminate during the life of the spouse, all trust assets would be distributed to the spouse.²⁴ The court granted the application in that regard, determining that it effectuated the



Eric W. Penzer

REFORMATION ...

Continued From Page 11

intent of the testator.²⁵

But *Matter of Hicks* also demonstrates the principle that a court usually will not reform a will or trust to frustrate the intent of a testator or settlor. In addition to requesting reformation of the will to conform to the requirements of subchapter S, the spouse in *Hicks* also sought to modify the will to delete the provisions limiting the trustees' power to invade the trust principal to provide for the spouse's "health, maintenance or support."²⁶ The court denied that aspect of the relief sought, determining that deleting the ascertainable standard provisions would

be contrary to the testator's intent.²⁷

The above cases illustrate the general principal that a surrogate's court will reform a trust or will when necessary to give effect to the intent of the testator or settlor. The availability of reformation is important where there is a clear error in the will or trust, or where it is clear that the testator or settlor intended to take advantage of available estate tax exemptions or deductions but, for various reasons, the instrument does not accomplish that goal.

Eric W. Penzer is Counsel in the trusts and estates litigation department at Farrell Fritz, P.C., in Uniondale. He is a graduate of the State University of New York at Stony Brook and received his J.D. from Fordham University School of Law.