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New York State has a long history of law governing dispositions made under a will to attesting individuals ("interested witnesses"). A recent decision by the New York County Surrogate's Court has arguably expanded the reach of New York's interested witnessed rule in a way many practitioners find problematic. This article discusses the decision in *In re Estate of Wu*,[1] its implications for trusts and estates practitioners and possible solutions to resolve the issue.

I. History of New York's Interested Witness Rule

New York's current statute governing testamentary dispositions to interested witnesses is set forth in N.Y. Estates, Powers & Trusts Law 3-3.2 (EPTL), which provides as follows:

> (a) An attesting witness to a will to whom a beneficial disposition or appointment of property is made is a competent witness and compellable to testify respecting the execution of such will as if no such disposition or appointment had been made, subject to the following:
>
> > (1) Any such disposition or appointment made to an attesting witness is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition or appointment thereunder.
> >
> > (2) Subject to subparagraph (1), any such disposition or appointment to an attesting witness is effective unless the will cannot be proved without the testimony of such witness, in which case the disposition or appointment is void.
> >
> > (3) Any attesting witness whose disposition is void hereunder, who would be a distributee if the will were not established, is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will, such share to be recovered as follows:
> >
> > > (A) In case the void disposition becomes part of the residuary disposition, from the residuary disposition only.
> > >
> > > (B) In case the void disposition passes in intestacy, ratably from the distributees who succeed to such interest. For this purpose, the void disposition shall be distributed under 4-1.1 as though the attesting witness were not a distributee.
>
> (b) The provisions of this section apply to witnesses to a nuncupative will authorized by § 3-2.2.

Based on the current statute, a "beneficial disposition or appointment of property" made to an attesting witness is void unless there are at least two other disinterested attesting witnesses at the time of the execution and attestation of the will. However, if the testimony of the interested witness is necessary to prove the will at probate, the mere existence of two disinterested witnesses may not be sufficient to preserve the disposition to the interested witness.[2] Further, where the interested witness is also a distributee of the testator, the interested witness is entitled to that portion of the disposition under the will that does not exceed his intestate share.[3] In other words, an interested witness who would otherwise be a distributee is effectively entitled to receive

the lesser of his intestate share or the disposition under the will.

Under the common law, a beneficiary under a will was prohibited from testifying as a witness to prove that will at probate. The concern was that the possible receipt of a benefit under the will would induce an interested witness to give false testimony in support of the will.[4] The potential for such fraud was addressed by simply barring the testimony of the interested witness. If the will could not be proved with the testimony of two other disinterested witnesses, then the will was void.[5] Although the application of the common law rule eliminated the potential for fraudulent testimony, the rule proved problematic for cases in which the testimony of the interested witness did not result in fraud. In such cases, voiding the will frustrated the testator's wishes if the will could not be admitted to probate without the testimony of the interested witness.[6]

As the law evolved in New York, it became possible to save a will and not void it entirely. This concession was made at the expense of the interested witness. Under an early statute in New York, the legislature sought to resolve some of the hardship caused by the common law interested witness rule by permitting the testimony of the interested witness, but voiding the disposition to the interested witness.[7] While the new law saved many wills from failure, it created a new dilemma for a particular interested witness, namely, an interested witness who was also a distributee of the testator (the "distributee-interested witness"). Under the new law, the distributee-interested witness would forfeit his disposition if he testified in favor of the will, leaving the distributee-interested witness with nothing. However, if he failed to testify, the will could not be admitted to probate, but the distributee-interested witness could receive his intestate share. Thus, the statute saved the will but left the distributee-interested witness in an economically worse position and potentially created a disincentive for the distributee-interested witness to testify in favor of the will.

In an attempt to eliminate the hardship caused by the common law and early legislation, an 1830 statute preserved for the distributee-interested witness an amount equal to the lesser of his intestate share or the disposition to him.[8] That statute, which was codified in New York as the Decedent Estate Law § 27 in 1909 and later amended in 1942, restored the competency of an interested witness to provide testimony in a probate proceeding.[9] Pursuant to the statute, the will could be admitted to probate with the testimony of the distributee-interested witness, subject to the limitation that the distributee-interested witness would receive his intestate share not in excess of the disposition provided for him under the will.[10] By revising the law, the New York legislature sought to strike a balance between perceived injustices suffered by interested witnesses and preserving the goal of guarding against fraud in the preparation and execution of wills.[11] Former Decedent Estate Law § 27 was later reenacted as EPTL 3-3.2.[12] Under the current New York statute, where the testamentary disposition to the interested witness is greater than the intestate share of the interested witness, the interested witness receives his intestate share regardless of whether the will is proved. The interested witness is, therefore, free from inducement to testify fraudulently in support of or against the will. However, in circumstances where the testamentary disposition is less than the potential intestate share, the safeguard against fraud is ineffective because the interested witness will receive a smaller portion of the estate if the will is admitted to probate than if it is deemed void.

As the courts heard cases involving the testimony of an interested witness, the application of the statute evolved. For example, in *In re Estate of Morea*,[13] the court upheld the disposition to a testator's friend who was one of three attesting witnesses, even though one of the two alternate attesting witnesses was also a child of the testator and a beneficiary under the will. One reason the court upheld the bequest was because the son's legacy under the will was less than his intestate share. The court further found that the testator's son qualified as a disinterested witness for the purpose of upholding the bequest to the testator's friend. The court examined the meaning of the word "beneficial," defined in Webster's Dictionary (New Twentieth Century Unabridged Second Edition) as "advantageous." The court found that the attesting witness who would receive a bequest under the will smaller than his intestate share was effectively disinterested for purposes of the statute: the disposition was not "beneficial" to him but actually adversely affected him. Under this reasoning, the court held that the allegedly interested attesting witness' disposition under the will was not void under EPTL 3-3.2.[14]

The progression of statutory revisions in New York law reflects the legislative intent to strike a balance between preventing fraud and carrying out the testator's intent. Amendments to the New York statute were made in accordance with the public policy of preserving the formalities surrounding the execution of wills while imposing measures necessary to protect against fraud and undue influence. In interpreting the statute, many courts,[15] including the *Morea* court, have looked to the legislative purpose behind its enactment, which is to preserve the testamentary scheme by rendering all witnesses competent while "preserving the integrity of the process of will executions by removing the possibility that attesting witnesses who receive a disposition under the will might give false testimony in support of the will to protect their legacies."[16]

II. The *Estate of Wu* Decision

In the April 27, 2009 decision of *In re Estate of Wu*, a case of first impression in New York State, the New York County Surrogate's Court held that a tax non-apportionment clause in a will constituted a "beneficial disposition" within the meaning of EPTL 3-3.2, thereby rendering that beneficial disposition void where the interested witness' testimony was essential to proving the will.[17] The result reached by the court's interpretation of EPTL 3-3.2 likely creates a trap for the unwary because many practitioners do not think of a benefit derived under a tax clause as a disposition under a will as such term is defined in the EPTL. In addition, the court's interpretation may frustrate the intent of the testator.

In *Wu*, the decedent's will contained a tax clause that directed the payment of all estate taxes on probate and non-probate property from the probate estate, without apportionment. The executor of the decedent's will sought an order directing Harry Wu, the decedent's brother and the beneficiary of two life insurance policies on the decedent's life valued at over $3.3 million (which were included in the taxable estate), to pay his ratable share of federal and New York State estate taxes. Harry was not a distributee, nor was he the beneficiary of any bequest, legacy or devise under the will. Any benefit he derived from the will was attributable solely to the tax clause. Harry was one of two attesting witnesses to his sister's will, which prompted the executor to argue that EPTL 3-3.2 rendered the tax clause ineffective as to Harry.

Harry argued that when he witnessed the will, he was unaware of his designation as beneficiary of the decedent's life insurance policies. He also argued that EPTL 3-3.2 was inapplicable to him because he did not receive a "beneficial disposition" within the meaning of that section. What he did receive, he argued, was at most an "indirect benefit,"[18] whereas a "beneficial disposition" relates to the transfer of title to "actual property." Finally, he argued that the application of EPTL 3-3.2 in such a case would produce too harsh a result, particularly since he claimed to be unaware, at the time he witnessed the will, of his designation as beneficiary of the insurance policies.

EPTL 2-1.8 governs the apportionment of federal and state estate taxes in the absence of a direction in the testator's will for the payment of such taxes. The court pointed out that, absent the application of the tax clause in the will, Harry would be liable for the estate tax attributable to the insurance policies under EPTL 2-1.8(c)(1), and the proceeds he received would be reduced accordingly. The court concluded that if the tax clause was effective, the tax liability attributable to the insurance policies "would be satisfied by a disposition from the residuary estate."[19] Having linked the tax liability to a disposition, the court deemed "such disposition *on behalf of* [Harry]—in discharge of what would otherwise be his obligation—as tantamount to a disposition *to* [Harry]," and found that the tax provision constituted a "beneficial disposition" within the meaning of EPTL 3-3.2(a).[20] Based on this analysis, the court held that the tax clause was void as to Harry and that he was obligated to pay his pro rata share of estate tax.

The court acknowledged that the outcome seemed unduly harsh, but stated that it was constrained to interpret the statute in light of clear legislative intent to prevent fraud or undue influence by preventing a witness to a will from receiving a benefit from that will. The court reasoned that "[t]he policy animating the invalidation of a legacy to a person whose testimony is required for probate is equally applicable to a benefit conferred by a tax clause."[21] Moreover, the court stated that Harry's lack of knowledge about his status as beneficiary of the life insurance policy was irrelevant and he was, just as a legatee would be, subject to the strict construction of the statute.

Significantly, the court pointed out the increased likelihood for harsh applications of EPTL 3-3.2 in the context of a tax non-apportionment clause:

> The Court is mindful that when a will is executed the identity of beneficiaries of non-testamentary assets is not readily apparent, whereas beneficiaries of testamentary gifts are ordinarily named in the will or can be ascertained fairly easily. *Any forfeiture resulting from unwitting use of a non-testamentary beneficiary as an attesting witness will most likely arise, as here, in the context of a tax non-apportionment clause covering assets passing outside of the will.* It behooves any drafter using such clause to be fully informed of the testator's non-probate assets to avoid unintended consequences, some of which may have even greater potential for frustrating the testator's intent.[22]

III. *Estate of Wu*'s Application of EPTL 3-3.2 Is Problematic

Central to the court's application of EPTL 3-3.2 is the term "beneficial disposition." Article 1 of the EPTL provides definitions for many commonly used terms that are referenced in EPTL 3-3.2. For example, EPTL 1-2.4 defines a "disposition" as "a transfer of property by a person during his lifetime or by will." The term "property" is defined by EPTL 1-2.15 as "anything that may be the subject of ownership, and is real or personal property."

An analysis of EPTL 3-3.2 in conjunction with the definitions provided in Article 1 suggests that the application of EPTL 3-3.2 made by the court in *Estate of Wu* is problematic in two respects. First, it is questionable whether the non-apportionment of taxes qualifies as a "transfer by will"[23] of something "that may be the subject of ownership, and is real or personal property."[24] Further, the application of EPTL 3-3.2 set forth in the decision can create a trap for the unwary in the context of tax non-apportionment clauses and will likely frustrate the intent of testators.

In arriving at its decision, the court used the tax apportionment rule of EPTL 2-1.8 as a framework and viewed the direction by the testator to pay all taxes from the residuary estate (i.e., non-apportionment) as a *transfer* of *property* by the decedent to the beneficiary of the amount of cash that the beneficiary would have needed to pay the estate taxes had there been no such direction in the testator's will. The court assumed that the estate tax liability attributable to the life insurance policies was essentially Harry's—even with the non-apportionment clause. Based on the direction in the will, however, Harry's liability did not have to be satisfied by Harry, but rather by the residuary estate. Thus, the residuary estate "discharged" Harry's liability. According to the court, it was this act of discharging the debt that constituted a disposition to Harry. However, it is arguable that EPTL 2-1.8 is irrelevant and should not play a role in characterizing the terms of the will given the existence of the tax non-apportionment clause. By its very terms, EPTL 2-1.8 does not apply "where a testator directs [the non-apportionment of taxes] in his will."

Moreover, it is not clear that the non-apportionment of estate taxes is something "that can be the subject of ownership" as contemplated in EPTL 1-2.4. Ownership connotes some form of control and the exercise of dominion over property. But consider the situation in which the testator does not expect his estate to be responsible for estate taxes because the value of his estate is below the threshold for taxation. Most practitioners would include a tax clause of some kind even though no estate tax is anticipated. Has the testator conferred a benefit on anyone or exercised (or transferred) control over any property through the tax non-apportionment clause? What if, after the testator's death, his estate becomes responsible for estate taxes? At what point was the benefit conferred? The testator certainly has no control over the tax laws. For these reasons, it is conceptually problematic to assign any ownership of property to the testator (or transfer of ownership to the beneficiary) when a benefit is derived from a tax non-apportionment clause.

Second, by the Court's own admission,[25] its application of EPTL 3-3.2 can create a trap for the unwary in the context of tax non-apportionment clauses, more so than in other contexts. Legal commentators have acknowledged the issue and expressed concern regarding the court's application of EPTL 3-3.2 in the context of tax non-apportionment clauses.[26] As demonstrated by the situation in *Estate of Wu*, it can be problematic with respect to identifying beneficiaries of non-probate assets. Many practitioners have experienced a situation in which a client did not disclose every asset that comprised the client's taxable estate. Assets such as a long-forgotten whole life insurance policy that no longer requires premium payments or an abandoned retirement account at a previous employer are just two examples. Practitioners have also encountered the scenario where a client devises an estate plan and later acquires non-probate assets but fails to notify his attorney that he has done so. Even the most diligent lawyer is vulnerable in these scenarios. A will drafted with a broad tax non-apportionment clause could result in the payment of estate taxes on the value of the forgotten or after-acquired asset from the client's residuary estate. Moreover, with the ever-changing federal tax laws, it may be difficult to predict whether an estate will even be subject to estate tax at the testator's death so as to accurately determine whether the attesting witness is also an interested witness.

IV. What Can Be Done?

Some commentators believe that the interested witness rule should be abolished outright. It should be noted that at least 19 states that follow the Uniform Probate Code (UPC) have abolished the interested witness rule. UPC § 2-505 (b) provides: "The signing of a will by an interested witness does not invalidate the will or any provision of it." Unlike the current law in New York, under the UPC the fact that a witness is interested does not cause the gift to such witness to be invalid or result in forfeiture of the gift.

According to the commentary to § 2-505 (b), the UPC approach is not to "foster the use of interested witnesses in execution of wills" but to ensure that the "rare and innocent use of a member of the testator's family" as a witness to a "home-drawn" will does not result in such person being penalized. The commentary notes the proposition that a substantial devise or bequest to a person who witnessed the will could always be challenged on the ground that such person exerted undue influence over the testator. The commentary also observes that the rule requiring a disinterested person to witness the will does not necessarily prevent fraud and undue influence, because in those cases where there is fraud or undue influence the person exerting the influence is usually careful to have disinterested individuals witness the will. A proposal to abolish the disinterest witness rule, however, may be too radical a departure from the firmly entrenched common law

principles in New York State and from the legislative purpose behind the enactment of the statute to protect testators.

Other commentators believe that the introduction of a rebuttable presumption concept would be a favorable "middle ground" between complete abolishment of the interested witness statute and making no change at all. A few states currently provide that an interested witness to a will must overcome the presumption that the bequest to the interested witness was obtained through fraud, duress, coercion or undue influence.[27] If the interested witness successfully rebuts the presumption, then the bequest under the will is valid and effective. The rebuttable presumption concept provides the "innocent" attesting witness the opportunity to demonstrate that a benefit derived under the will was not obtained by any illicit means.

The rebuttable presumption concept could also be used narrowly to apply only to individuals who derive a benefit from a tax non-apportionment clause. If the attesting witness could successfully rebut the presumption that the benefit was obtained through fraud, duress, coercion or undue influence, then the tax non-apportionment clause would be valid and effective. This application of the rebuttable presumption would put the practitioner on notice that the non-apportionment of estate taxes confers a benefit upon beneficiaries of non-probate assets, such that the rules of EPTL 3-3.2 would be triggered.

The rebuttable presumption approach would respect New York's long-standing common law concept that a benefit received by an interested witness should be subject to forfeiture. At the same time, this approach would address the potential trap for the unwary by providing an escape route for interested but innocent attesting witnesses.

Finally, another solution would be simply to overrule the decision in *Estate of Wu* by amending EPTL 3-3.2 to specifically exclude from the definition of a beneficial disposition a benefit derived from a tax non-apportionment clause. Like the rebuttable presumption approach, this alternative would serve to eliminate the potential trap for the unwary and also prevent frustration of the testator's intent.

Whichever solution is deemed best, it is time to consider a change in New York's treatment of interested witnesses.

Endnotes

1. 24 Misc. 3d 668, 877 N.Y.S.2d 886 (Sur. Ct., N.Y. Co. 2009).
2. EPTL 3-3.2(a)(2).
3. EPTL 3-3.2(a)(3).
4. *In re Walter's Estate*, 285 N.Y. 158, 162, 33 N.E.2d 72, 74, *remittitur amended*, 285 N.Y. 412, 35 N.E.2d 19 (1941).
5. *In re Dwyer*, 192 A.D. 72, 76, 182 N.Y.S. 64, 66 (4th Dep't 1920); *In re Smith*, 165 Misc. 36, 38, 300 N.Y.S. 1057, 1059 (Sur. Ct., Westchester Co. 1937), *aff'd*, 253 A.D. 731, 300 N.Y.S. 919 (2d Dep't 1937).
6. *Dwyer,* 192 A.D. at 76, 182 N.Y.S. at 66.
7. For a description of the statute, *see Jackson v. Denniston*, 4 Johns. 311 (1809).
8. New York Revenue Statute, 1830, pt. 2, c. 6, tit. 1, art. 3, § 51.
9. N.Y. Dec. Est. Law, 1909 N.Y. Laws, ch. 18, § 27; 1942 N.Y. Laws, ch. 622 (current version at EPTL 3-3.2 (McKinney 1967)).
10. *Dwyer*, 192 A.D. at 76, 182 N.Y.S. at 66.
11. Earlier statutory attempts in both England and America allowed the testimony of all witnesses to a will but rendered entirely void the disposition to the witness provided for under the will. While remedying concerns of fraud and inequity to such witnesses, these early statutes created an alternative problem by giving witness-beneficiaries who would otherwise have inherited a larger intestate share an incentive to testify fraudulently against the will.
12. EPTL 3-3.2 (McKinney 1967).
13. 169 Misc. 2d 415, 645 N.Y.S.2d 1022 (Sur. Ct., Bronx Co. 1996).
14. *Morea*, 169 Misc. 2d at 417, 645 N.Y.S.2d at 1023.
15. *See Dwyer*, 192 A.D. 72, 182 N.Y.S. 64 (4th Dep't 1920) ("…if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them."); *In re Margolis*, N.Y.L.J., Feb. 23, 2007, p. 32, col. 3 (Sur. Ct., N.Y. Co. 2007) (holding that the interested witness forfeit her bequest and settle for her intestate share after the notary who signed the self-proving affidavit denied that the decedent had asked him to sign as a witness); *In re Roberts*, N.Y.L.J., Aug. 6, 2007, p. 28, col. 4 (Sur. Ct., Kings Co. 2007) (explaining that surviving spouse did not forfeit his legacy under the will because as a distributee, he was permitted to receive the lesser amount of his share under intestacy or his legacy under the will, and he would therefore be counted as a disinterested witness); *In re Williams*, 176 Misc.2d 586, 672 N.Y.S.2d 1019 (Sur. Ct., Bronx Co. 1998) (holding that the New York statute, requiring that a will be attested to by two witnesses not receiving any disposition under the will, did not apply to wills executed in other states); *In re Sutton*, N.Y.L.J., Nov. 23, 1993, p. 33, col. 2 (Sur. Ct., Bronx Co. 1993) (demonstrating the statute's creation of the conclusive presumption that a beneficiary under a will who also served as an attesting witness is dishonest and coercive, except to the extent that he is related to the decedent as a distributee); *Estate of Fracht*, 94 Misc. 2d 664, 405 N.Y.S.2d 222 (Sur. Ct., Bronx Co. 1978) (recognizing that where a beneficial disposition had been made in the propounded instrument to all of the attesting witnesses, such legacies were void, but such fact did not constitute a bar to admission to probate); *In re King's Estate*, 68 Misc. 2d 716, 328 N.Y.S.2d 216 (Sur. Ct. N.Y. Co. 1972) (stating that legacy was forfeited where one of two attesting witnesses was not a distributee); *In re Flynn's Will*, 68 Misc. 2d 1087, 329 N.Y.S.2d 249 (Sur. Ct., Westchester Co. 1972) (holding that where testator devised real estate to his half-brother and half-brother's wife who was a subscribing witness to the will,

voiding of devise to the wife resulted in vesting of the entire interest in the husband).

16. *Morea*, 169 Misc. 2d at 416, 645 N.Y.S.2d at 1023, *citing In re Walter's Estate*, 285 N.Y. 158, 33 N.E.2d 72 (1941); *Fracht*, 94 Misc. 2d at 664, 405 N.Y.S.2d at 222.
17. *Wu*, 24 Misc. 3d 668, 669, 877 N.Y.S.2d 886, 887 (Sur. Ct., N.Y. Co. 2009).
18. Affirmation of Jerry M. Iannece, dated January 9, 2008 (attorney for Harry Wu).
19. *Wu*, 24 Misc. 3d at 669.
20. *Id.* (emphasis in original).
21. *Id.* at 670.
22. *Id.* (emphasis added).
23. *See* EPTL 1-2.4.
24. *See* EPTL 1-2.15.
25. *See supra*.
26. *See, e.g.*, Lee A. Snow, "Bequests to Will Witnesses—A Trap for the Unwary?," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 43, No. 3. (Fall 2010).
27. Currently, California, Washington and Wisconsin each have an interested witness statute with a rebuttable presumption.

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