

# Distribution of Property Located in New York to Foreign Fiduciaries

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# Jurisdiction

- ▶ New York's Surrogate's Courts have jurisdiction over all property located within the State. *See* NY Surrogates Court Procedure Act ("SCPA") § 206.
- ▶ Under SCPA § 206(1), the Surrogate's Court of any county has jurisdiction over the estate of any nondomiciliary decedent who leaves property in the state. Proper venue for such proceedings is the county where the nondomiciliary decedent left property or where personal property belonging to the nondomiciliary decedent has since his/her death come into and remains unadministered.
- ▶ When venue lies in more than one county, the court where a proceeding is first commenced with proper venue retains jurisdiction. SCPA § 206(2).

# Foreign Nationals

- ▶ New York Surrogate's Courts have jurisdiction over property located in New York in instances when a decedent died outside New York (or never lived in New York). This would apply to foreign nationals (*i.e.*, any person who is not a citizen or permanent resident alien of the US).

# New York Bank Accounts

- ▶ Typically, a bank account will be “located” in the county in which the account is opened.
  - *U.S. v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991)
- ▶ For remotely opened accounts, bank would need to determine which branch has most contact with or control over the account.
  - *U.S. v. Tannenbaum*, 934 F.2d 8, 13 (2d Cir. 1991)

# EPTL § 13-3.4

- ▶ New York's Estates, Powers & Trusts Law ("EPTL") § 13-3.4 permits the holder of property located in New York to distribute such property to a duly appointed foreign fiduciary in exchange for a release.
- ▶ The receipt from a foreign fiduciary is deemed a release and discharge of the person delivering such property so long as the person turning over property to a foreign fiduciary complies with EPTL § 13-3.4.

# EPTL § 13-3.4 (con't)

- ▶ Under § 13-3.4 a bank may, without a court order, turn assets of a nondomiciliary's estate over to a foreign fiduciary so long as it has not received notice of a New York fiduciary or of creditors and so long as it does not believe that the government in the other jurisdiction will confiscate the assets.
  - *See e.g., In re Estate of Cardoso*, 19 Misc. 3d 1008, 860 N.Y.S.2d 836 (Sur. Ct. 2008), in which a New York bank was deemed to have authority under the statute to transfer a decedent's investment account to a beneficiary named in the decedent's Brazilian will, which had been signed by decedent in Brazil, where the beneficiary was authorized by a Brazilian court to receive the account, no other person had been appointed administrator of the decedent's estate, the bank had not received written notice of the existence of any New York creditor, and the bank had no reason to believe that the beneficiary was not entitled to the account.
  - *See also* 41 N.Y. Jur. 2d Decedents' Estates § 1499.

# EPTL § 13-3.4 (con't)

- ▶ The statute is a permissive statute – note use of the term “*may*” – it does not require distribution in exchange for a release.
- ▶ For those who want to obtain court authorization rather than rely upon the release contemplated by EPTL § 13-3.4, § 2221 of the SCPA provides the mechanism to do so. As the Practice Commentaries to SCPA § 2221 state, if a New Yorker holding property belonging to a foreign decedent cannot pay the property or money without a court order or simply does not want to, then SCPA § 2221 “is his way to get court authorization.”

# Benefits of EPTL § 13-3.4

- ▶ Saves legal fees and the costs of court proceedings while obtaining a release.
- ▶ Efficient method of distributing property to an estate.

# Drawbacks of Distribution Under EPTL § 13-3.4

- ▶ Notwithstanding the release obtained under EPTL § 13-3.4, interested parties who were not put on notice of the foreign proceeding may nevertheless assert an adverse claim against a bank or other person who disbursed property, especially if an account or asset is of significant value. Could lead to legal fees and costs defending against such a claim.
- ▶ There is potential exposure for undetermined tax liabilities if the estate owed money to the state or IRS.
- ▶ Should a claim be asserted against a person who turned over an asset to a foreign fiduciary, it may be difficult or impractical to enforce the release against a foreign fiduciary who is not in the country.

# Ancillary Proceedings

- ▶ Ancillary proceedings permit a previously appointed foreign fiduciary to commence a domestic proceeding to seek ancillary letters testamentary/administration to acquire property located in New York
  - SCPA § 1604
- ▶ Applies to sister states and foreign nationals
  - SCPA § 1604

# Procedures for Ancillary Proceedings

- ▶ Petition is filed with the Surrogate's Court in the county in which the property is located. SCPA § 206
- ▶ Must certify that time has passed in foreign jurisdiction to contest will/administration.
- ▶ Must include exemplified/authenticated records:
  - Will (if applicable), Order of Appointment, Letters of Appointment (if applicable), death certificate
  - If in foreign language, must include translation and affidavit by translator stating qualifications
    - CPLR § 2101(b)
- ▶ Bond may be required of proposed ancillary fiduciary
  - SCPA § 801

# Procedures for Ancillary Proceedings (con't)

- ▶ Interested parties
  - In addition to all persons interested in estate, must include New York State Department of Taxation and Finance
  - New York creditors or potential creditors
- ▶ Value of real/personal property

# Ancillary Proceeding v. EPTL

- ▶ Risk avoidance is the principal benefit of requiring an appointed foreign fiduciary to bring an ancillary proceeding as opposed to proceeding under EPTL § 13-3.4 . Makes sense in certain circumstances:
  - When dealing with large sums of money or valuable assets;
  - When dealing with a foreign jurisdiction that is not considered reliable;
  - When it is unclear whether creditors exist or whether taxes/debts are owed;
  - Where it is unclear whether all interested parties have participated in the foreign proceeding;
  - When minors or incapacitated beneficiaries may be involved and/or duly appointed guardians are not appointed; and
  - In other instances when there is not a sufficient comfort level by the person or bank turning over the asset or account.
- ▶ Where none of these issues exist and there is little risk that issues will arise by turning over property to a duly appointed foreign fiduciary, EPTL § 13-3.4 makes practical sense.

# Settlement Outside of Court

- ▶ Receipt, Release, Refunding and Indemnification Agreement
  - All interested parties must sign
    - Vested and contingent interests
    - Foreign fiduciary
  - Include a consent to New York jurisdiction and waiver of service clause
    - If a claim later arises against New York property holder, the interested parties will be subject to NY jurisdiction, saving time and cost of locating and serving foreign persons
- ▶ Provides security for estates where chance of potential claims is low

# Contact Information & Biographies



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