# ESTATE PLANNING AND WILL DRAFTING IN NEW YORK

2012 Revision

EDITOR-IN-CHIEF
MICHAEL E. O'CONNOR, Esq.

New York State Bar Association Continuing Legal Education publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: CLE Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2012
New York State Bar Association
All rights reserved
ISBN: 1-57969-350-4
Book Product Number: 4095

2012 Supplement Product Number: 50959

# TABLE OF CONTENTS

Chapter 1	Estate Planning Overview  James N. Seeley, Esq.
Chapter 2	Federal Estate and Gift Taxation: An Overview William R. Dunlop, Esq. Karin J. Barkhorn, Esq.
Chapter 3	New York Estate and Gift Taxes Michael E. O'Connor, Esq.
Chapter 4	Fundamentals of Will Drafting Philip L. Burke, Esq.
Chapter 5	Marital Deduction/Credit Shelter Drafting  Jonathan P. McSherry, Esq., CPA
Chapter 6	Revocable Trusts Karin Sloan DeLaney, Esq.
Chapter 7	Lifetime Gifts and Trusts for Minors Susan Porter, Esq. Magdalen Gaynor, Esq.
Chapter 8	IRAs and Qualified Plans—Tax, Medicaid and Planning Issues Robert F. Baldwin, Jr., Esq.
Chapter 9	Estate Planning with Life Insurance Douglas H. Evans, Esq.
Chapter 10	<b>Dealing with Second or Troubled Marriages</b> Willard H. DaSilva, Esq.
Chapter 11	Planning for Client Incapacity Louis W. Pierro, Esq. Christopher M. Klug, J.D., LL.M. Jane-Marie Schaeffer, Esq. Philip A. Di Giorgio, Esq.
Chapter 12	Long-Term Care Insurance in New York Michael J. Amoruso, Esq. Howard S. Krooks, J.D., CELA, CAP

**Chapter 13 Practice Development and Ethical Issues** 

Ralph M. Engel, Esq.

#### **EDITOR-IN-CHIEF**

# MICHAEL E. O'CONNOR, ESQ.

Michael O'Connor is a partner in DeLaney & O'Connor LLP in Syracuse, New York. He has been an adjunct professor at the Syracuse University College of Law, teaching a course on fiduciary income tax. He is a Fellow of the American College of Trust and Estate Counsel and its past state chairman. Mr. O'Connor is past president of the Central New York Estate Planning Council and past chairman of NYSBA's Trusts and Estates and Elder Law Sections. He has authored articles for the *New York State Bar Journal* on the generation-skipping tax and Series E bonds in the estate, in addition to authoring chapters for Warren's Heaton (Matthew Bender) and statutory commentaries for LexisNexis Legal Publishing. He has lectured extensively to members of the bar and accounting profession in continuing education programs. Among his community activities, he is past board chair of Central New York Community Foundation, Inc. Mr. O'Connor received his bachelor's degree from State University of New York at Buffalo and his law degree from Syracuse University College of Law.

#### **ABOUT THE AUTHORS**

#### MICHAEL J. AMORUSO, ESQ.

Michael Amoruso is a partner in Amoruso & Amoruso LLP in Westchester County, New York, where he concentrates his practice on elder law, asset preservation, estate planning, estate administration and guardianship. He is immediate past chair of NYSBA's Elder Law Section, a member of the Executive Committee and former chair of the Legislation Committee and the Estate & Tax Planning Committee. In 2011, he received an AV Preeminent peer review rating by Martindale-Hubbell—the highest possible rating for both legal ability and ethical standards.

Mr. Amoruso was chosen as a 2010 and 2011 New York Metro Super Lawyer for Elder Law. In 2011, he was named one of the Top 25 Westchester Super Lawyers among all practice areas. He is also the 2010 recipient of the prestigious NYSBA Elder Law Section Award as a principal drafter of NYSBA's significant amendments to the 2009 power-of-attorney statute, and the 2007 recipient of the NYSBA Elder Law Section Award for his work as a principal drafter of the New York State Compact for Long Term Care—a bill that offers an alternative to Medicaid coverage for long-term care services.

Mr. Amoruso is a member of the board of directors of the National Academy of Elder Law Attorneys (NAELA) and is co-chair of the NAELA

Chapter Presidents Council, chair of NAELA's Webinar Education Committee and a member of the NAELA Public Policy Board, Program and Education Committee, and Education Task Force. He also served as president of the New York Chapter of NAELA. Mr. Amoruso received the 2010 NAELA Outstanding New York Chapter Member Award. Locally, Mr. Amoruso was a member of the Westchester County Bar Association board of directors and chair of its Elder Law Committee, as well as president of the Columbian Lawyers Association of Westchester County.

Mr. Amoruso is a nationally published author and frequent lecturer on cutting-edge topics for NYSBA, NAELA, National Association of Estate Planners and Councils, Stetson Law National Supplemental Needs Trust Conference, WealthCounsel LLC and ElderCounsel LLC, the *Westchester Business Journal* and *Generations*. He also hosts the weekly "Eldercare on the Air" radio show on WFAS AM and is a frequent source of quotes and opinions for the local and national press.

# ROBERT F. BALDWIN, JR., ESQ.

A partner in Baldwin & Sutphen, LLP, of Syracuse, New York, Robert F. Baldwin, Jr., concentrates his practice on estate planning and administration, charitable tax planning and related matters. He is formerly an adjunct professor of law at Syracuse University College of Law, where he lectured on estate planning and related issues. He is an active member of the New York State Bar Association and American Bar Association and is a Fellow of the American College of Trust and Estate Counsel, where he is a past chair of the Committee on Employee Benefits in Estate Planning. Mr. Baldwin has frequently lectured on and has authored various programs relating to estate planning, administration and employee benefit matters. He received his undergraduate degree and his law degree from Syracuse University.

#### KARIN J. BARKHORN, ESQ.

Karin Barkhorn is counsel to Bryan Cave LLP in New York City. She lectures on trusts and estates issues for the New York State Bar Association on topics such as "Litigation Involving Validity of Revocable Trusts," "Basic Will Drafting" and "Use of Trusts in Estate Planning." A graduate of Boston University Law School, Ms. Barkhorn is vice chair of NYSBA's Trusts and Estates Law Section's Committee on Estate Litigation and is a member of the New York City Bar Association's Estate and Gift Tax Committee.

#### PHILIP L. BURKE, ESQ.

Philip L. Burke is a partner in the Family Wealth and Estate Planning Department of Woods Oviatt Gilman LLP in Rochester and a member of the firm's Management Committee. He concentrates his practice in estate planning, charitable giving, estate administration, probate, estate tax law and long-term care planning. He works closely with clients and their advisers to develop appropriate estate plans for them and their families, which includes drafting of last wills and testaments, revocable and irrevocable trusts, family limited partnerships and limited liability companies, business succession documents, powers of attorney, living wills, health care proxies and related documents. Mr. Burke received his J.D. degree from Albany Law School and his B.A. degree with distinction from Boston University. He is a Fellow of both the American College of Trust and Estate Counsel and the New York State Bar Foundation.

#### WILLARD H. DASILVA, ESQ.

Willard H. DaSilva, senior member of DaSilva, Hilowitz & McEvily LLP and a veteran matrimonial law practitioner with offices in Garden City and New City, New York, is one of fewer than 100 attorneys in the United States honored as a Diplomate of the American College of Family Trial Lawyers. He is among the top 1% of attorneys in the United States recognized as a Preeminent Attorney with an AV rating in the *Martindale-Hubbell Law Directory*. His biography appears in *Who's Who in America*, and he is currently listed in *New York Magazine* as one of "The New York Area's Best Lawyers," in the *New York Times*" "Super Lawyers" and for 25 years has been listed in *The Best Lawyers in America*.

He is a past president of the American Academy of Matrimonial Lawyers, New York Chapter, and is executive editor of the ABA Family Advocate magazine and editor emeritus of the New York State Bar Journal; chairman of the board of editors of the nationally published The Matrimonial Strategist; and author of New York Matrimonial Practice, 2d Edition, published by The West Group. He is a former council member of the ABA Section of Family Law; is a Master and past president of the New York Family Law American Inn of Court; and past chair of NYSBA's General Practice Section. His lecturing schedule to judges and lawyers includes seminars sponsored by bar associations and civic organizations throughout the United States, Canada and Europe.

Mr. DaSilva, a magna cum laude graduate of New York University and member of Phi Beta Kappa, received his law degree at Columbia University Law School. He is a widely quoted commentator in the *New York Times*,

Newsday, USA Today, Newsweek, U.S. News & World Report and the New York Law Journal, which has referred to him as the "Dean of Matrimonial Lawyers." He has appeared on both network and syndicated television programs such as the Today Show, the Phil Donahue Show, Regis Philbin Show and NBC Network News, and on radio programs throughout the United States, among other news media.

# KARIN SLOAN DELANEY, ESQ.

Karin Sloan DeLaney is of counsel to the Syracuse law firm of Hancock Estabrook LLP, where she practices trusts and estates law and elder law. She received her B.A. at the State University of New York at Albany, her J.D. at Western New England College School of Law and her LL.M. in Taxation from Syracuse University College of Law. She is a member of the Central New York Estate Planning Council, the Onondaga County Bar Association and the New York State Bar Association and is a past president of the Central New York Women's Bar Association. She serves on the board of directors and the Executive and Finance Committee of Home Aides of Central New York, Inc. Ms. DeLaney is also a frequent lecturer and author on estate planning and elder law topics.

#### PHILIP A. DI GIORGIO, ESQ.

Phil Di Giorgio is a partner at the Pierro Law Group LLC and concentrates his practice in the areas of estate planning, estate and trust administration, and estate and gift taxation. Mr. Di Giorgio is a member of NYSBA's Trusts and Estates Section and previously served as vice chair of its Estate Planning Committee. Mr. Di Giorgio also helped to establish the Albany County Bar Trusts, Estates and Elder Law Committee, for which he served as co-chair from 2002 to 2003. He is a graduate of the Albany Law School of Union University, and received his B.A. from State University of New York at Albany. Mr. Di Giorgio frequently writes and lectures on estate and trust administration and estate and gift taxation.

#### WILLIAM R. DUNLOP, ESQ.

William Dunlop is counsel to Schnader, Harrison, Segal & Lewis LLP. Prior to joining that firm, he was a partner in Shea & Gould and Jackson & Nash, LLP. Mr. Dunlop received his undergraduate degree from St. John's University and his law degrees from St. John's and New York University Schools of Law. Mr. Dunlop is or has been an adjunct assistant professor and lecturer at the New York University School of Continuing Education and a lecturer at the New York University Institute on Federal Taxation, and the Practising Law Institute. He co-authored course material texts titled "Federal Estate and Gift Taxation" and "Preparation of the

Federal Estate Tax Return," used by the New York University Institute on Federal Taxation and the New York State and New York County Bar Associations. A member of the American Bar Association's and NYSBA's Tax, Trusts and Estates, and Elder Law Sections, Mr. Dunlop lectures frequently on estate administration, estate and gift tax, generation-skipping transfer tax and estate planning.

#### RALPH M. ENGEL, ESQ.

Ralph M. Engel heads the New York Trusts & Estates Practice Group at the international law firm of SNR Denton. Prior to joining the firm, he was chairman of the Trusts and Estates Department at Rosen & Reade LLP, and prior thereto, he ran the Trusts and Estates Department at Summit Rovins & Feldsman. Mr. Engel received both his undergraduate and law degrees from New York University. He was consultant on The New York Times Book of Personal Finance and The Lifetime Book of Money Management, and has authored numerous articles on estate planning, which have appeared in various publications, including The New York Law Journal, Trusts & Estates Magazine, CPA Journal and Estate Planning Magazine. A Fellow of the American College of Trust and Estate Counsel, Mr. Engel was chairman of the Trusts and Estates Committee of Lex Mundi, a worldwide association of leading law firms, and vice chairman of the Committee on Practice and Ethics of NYSBA's Trusts and Estates Law Section. He is a member and former director of the Estate Planning Council of Westchester County. Mr. Engel is also a frequent speaker on topics relating to estate planning and administration.

# DOUGLAS H. EVANS, ESQ.

Douglas Evans is special counsel to the New York City firm of Sullivan & Cromwell, where his practice centers on trusts and estates law. He earned his J.D. from Cornell Law School and is admitted to practice in New York and New Jersey. A member of NYSBA's Trusts and Estates Law Section, Mr. Evans is a former chair of that section's Committee on Continuing Legal Education. He is also on that section's Committee on Estate Litigation and Committee on Trust and Estate Administration. He is a member of the New York City Bar Association and has served on its Estate and Gift Tax Committee, Charitable Organizations Committee and Surrogate Courts Committee. In addition, Mr. Evans is a member of the American Bar Association, the New York County Lawyers Association and the New Jersey State Bar Association, and is a Fellow of the American College of Trusts and Estates Counsel. He is a frequent writer and lecturer on topics relating to trusts and estates law and is editor-in-chief and co-author of the NYSBA handbook *Probate and Administration of New York Estates*.

#### MAGDALEN GAYNOR, ESQ.

Magdalen Gaynor specializes in the area of trusts and estates and maintains offices in White Plains and Manhattan. She is a graduate of Fordham University School of Law in New York and Simmons College in Boston. She has served as chair of the Newsletter and Publications Committee of NYSBA's Trusts and Estates Law Section and was the Ninth District Representative of that section. She is a Fellow of the American College of Trust and Estate Counsel. She has lectured extensively in the area of trusts and estates and participated in many of the programs sponsored by NYSBA and the Westchester County Bar Association.

# CHRISTOPHER M. KLUG, J.D., LL.M.

Chris Klug is an associate at the Pierro Law Group LLC and concentrates his practice in the areas of tax planning, estate planning, business succession planning and elder law. Mr. Klug is an adjunct professor at Siena College in Loudonville, New York, and he is admitted to practice law in New York, Michigan, Illinois and the District of Columbia. He received his B.A. from Michigan State University, his J.D. from Michigan State University College of Law, and his LL.M. with a certificate in Estate Planning from Georgetown University Law Center.

#### HOWARD S. KROOKS, J.D., CELA, CAP

Howard Krooks is a partner of Elder Law Associates PA and of counsel to Amoruso & Amoruso LLP in Westchester County, New York. He is admitted to practice law in Florida and New York. Mr. Krooks' professional practice is devoted to elder law and trusts and estates matters, including the representation of seniors and persons with special needs and their families in connection with asset preservation planning, supplemental needs trusts, Medicaid, planning for disability, estate planning, guardianship, wills, trusts and advance directives.

As a member of the Joint Public Policy Task Force of The Florida Bar's Elder Law Section and the Academy of Florida Elder Law Attorneys, Mr. Krooks works to protect the rights of the state's most vulnerable citizens. He was invited to join a special sub-task force to review policies of the Florida Department of Children and Families (DCF) that may not comply with federal law. The special task force will also determine whether DCF policies have followed proper rule-making procedures.

Mr. Krooks is certified as an elder law attorney by the National Elder Law Foundation and is a member of the Council for Advanced Practitioners of the National Academy of Elder Law Attorneys (NAELA). He is a member of the NAELA board of directors, where he serves as vice president. He was honored with the designation of NAELA Fellow in 2009.

He serves on the Executive Council of the Elder Law Section of The Florida Bar as the NAELA liaison. He is a past chair of NYSBA's Elder Law Section and continues to serve on NYSBA's Executive Committee. Mr. Krooks was named The Florida Bar Elder Law Section Member of the Year in 2010. He was chosen as a Florida Super Lawyer from 2007 to 2011; a Metro New York Super Lawyer from 2008 to 2010; named to Florida Trend magazine's Florida Legal Elite in 2007, 2010 and 2011; recognized as a 2011 Top Attorney in Palm Beach and Martin Counties by Palm Beach Illustrated; and has an AV Preeminent peer review rating from Martindale-Hubbell—the highest rating afforded an attorney.

Mr. Krooks received the 2006 Outstanding Achievement Award from the New York Chapter of NAELA for serving as co-chair of a Special Committee on Medicaid Legislation formed by the NYSBA Elder Law Section to oppose New York Governor George Pataki's budget bills containing numerous restrictive Medicaid eligibility provisions that, if enacted, would have severely impacted the frail elderly and disabled populations. He was also recognized for serving as co-chair of the NYSBA Elder Law Section Compact Working Group, which is receiving national attention for developing alternative methods of financing long-term care. Additionally, Mr. Krooks chaired a special committee created by NYSBA's Elder Law Section to address the Statewide Commission on Fiduciary Appointments formed by Chief Justice Judith Kaye.

Mr. Krooks has written widely on elder law topics and co-authored a chapter of *Guardianship Practice in New York State*, published by NYSBA. He was an adjunct assistant professor at New York University's School of Continuing and Professional Studies and was an instructor for the New York Certified Guardian and Court Evaluator program. Mr. Krooks frequently addresses local, regional and national organizations. He has been quoted in numerous national publications and has appeared on PBS, the CBS Early Morning Show and local cable television programs focusing on elder law.

Mr. Krooks received his undergraduate degree summa cum laude from State University of New York at Albany and his law degree from the University of Pennsylvania Law School.

#### JONATHAN P. McSHERRY, J.D., CPA

Jonathan McSherry is an associate attorney and certified public accountant at DeLaney & O'Connor, LLP, in Syracuse, New York, where he practices primarily in the fields of trusts and estates law, estate planning and litigation, and tax law. Mr. McSherry is a member of the Central New York Estate Planning Council, New York State Bar Association, and Onondaga County Bar Association. He has written and lectured on retirement accounts and special needs planning. Mr. McSherry received his bachelor's degree from Syracuse University and his law degree from the University of San Diego School of Law.

# Louis W. Pierro, Esq.

Lou Pierro is the founder and principal of the Pierro Law Group LLC, where he concentrates his practice in the areas of estate planning, estate and trust administration, business succession planning, Medicaid and elder law. Mr. Pierro has chaired the Estate Planning Committee and the Committee on Taxation of NYSBA's Trusts and Estates Law Section, and has chaired its Elder Law Section. He is currently legislative liaison for the Elder Law Section and a member of its Executive Committee. Mr. Pierro has been selected to *Best Lawyers in America*, *Best Lawyers in New York* and Super Lawyers, and he has maintained an AV Preeminent attorney rating from Martindale-Hubbell. He is a graduate of Lehigh University and Albany Law School. Mr. Pierro extensively writes and lectures across the country on estate planning, estate and gift taxation and elder law.

#### SUSAN PORTER, ESO.

Susan Porter is a senior adviser with Brown Brothers Harriman Trust Company, N.A. She is an active member of the American Bar Association's Real Property, Probate and Trust Law Section, where she serves as a member of Council, the National Conference of Lawyers and Corporate Fiduciaries Committee, and is co-vice chair of Groups and Substantive Committees. She is also a member of the New York City Bar Association's Estate and Gift Tax Committee; NYSBA's Trusts & Estates Section's Estate and Trust Adminstration Committee; the Estate Planning Council of New York City; Tax Management's Advisory Board for Estates, Gifts & Trusts; and the New York, Florida and Wisconsin State Bar Associations.

Ms. Porter is a visiting adjunct professor at the University of Miami School of Law graduate LL.M. program in estate planning and a member of the advisory committee of the Philip E. Heckerling Institute on Estate Planning. Additionally, she is a lecturer on discretionary trusts for the

American Bankers Association's National Graduate Trust School. She frequently lectures about estate planning and administration and fiduciary law for professional and civic groups.

Ms. Porter has been elected a Fellow of the New York Bar Foundation, a life member of the Fellows of the American Bar Association, a member of the Academy of Women Achievers of the YWCA of the City of New York, a Distinguished Accredited Estate Planner by the National Association of Estate Planners and Councils, and was the 2005 honoree of the Trusts & Estates Group of the Lawyer's Division of the UJA-Federation of New York.

Ms. Porter received her A.B. from Vassar College, her J.D. from the University of Wisconsin Law School and her LL.M. from New York University Law School. She is a Certified Trust and Financial Advisor (CTFA) and an Accredited Estate Planner (Distinguished)<sup>®</sup>.

#### JANE-MARIE SCHAEFFER, ESQ.

Jane-Marie Schaeffer is a senior associate at the Pierro Law Group LLC and concentrates in the areas of elder law, long-term care, Medicaid, supplemental needs trusts, guardianships, estate and tax planning and charitable giving. She is a member of NYSBA's Elder Law Section and the Capital District Women's Bar Association. Ms. Schaeffer is a graduate of St. John's University School of Law and received her B.A. from New York University. She is admitted to the New York State and Massachusetts bars.

# JAMES N. SEELEY, ESQ.

James Seeley is a member of Bond, Schoeneck & King, PLLC, in Syracuse, New York, where he has practiced trust and estate law for more than 32 years. He is the past head of the firm's Trust and Estate Department. Mr. Seeley's practice includes all aspects of estate planning: estate and gift tax analysis and planning; trust, will and related document drafting; planning to assist disabled individuals and beneficiaries to manage their assets and persons; and general business and tax planning for owners of closely held businesses. Mr. Seeley also has extensive experience administering trusts and estates and representing aggrieved beneficiaries in litigation against fiduciaries. He serves as general counsel to several large family offices. Mr. Seeley is a frequent contributor to the New York State and Onondaga County Bar Associations' continuing legal education programs as a speaker and outline author, and a contributing editor to a NYSBA publication on estate planning and will drafting. In addition, he

regularly addresses lay audiences on estate planning, preretirement issues and planned giving.

Mr. Seeley is a past director of the board of the MOST Foundation, where he chaired its planned giving committee, and is a past president of the board of the Alzheimer's Association of Central New York, where he continues as a member of its Nominating Committee. He received his B.S. from Cornell University and his J.D., cum laude, from Cornell Law School. Mr. Seeley is a Fellow of the American College of Trust and Estate Counsel.