

The Revocable Trust Revisited

By Lainie R. Fastman

Revocable trusts are frequently advertised to mass audiences as an estate planning vehicle to (a) save estate taxes, (b) avoid probate and its exorbitant cost, (c) protect assets and, sometimes, unbelievably, (d) to safeguard eligibility from the reaches of Medicaid in the event a need for long-term nursing home care arises. In reality, revocable trusts are not appropriate in all situations. Attorneys must consider all factors to determine whether a revocable trust is a good choice for a particular client. A true counselor will weigh all benefits and downsides to the revocable trust as they affect that client, the requirements for its creation, and the manners in which it can be challenged. This article contains a thoughtful review of these issues, one of which I earlier examined in an article published several years ago.¹

The Trust Agreement and the Parties

Although we may be accused of returning to the womb, a trust requires a grantor or trustor; a trustee; a trust "res," or trust property; and a trust agreement. No discussion about the parties to a trust would be complete without reference to the "merger" doctrine. At common law, it was held that where the sole income beneficiary was also the trustee, the interests of the two merged and the trust, in essence, failed. The trustee's legal interest and the beneficiary's equitable interest were merged and the trustee would hold the property free from the trust. The rule was criticized because it defeated some of the practical purposes for the creation of trusts, such as the protection of the beneficiary from creditors² or the prevention of the life beneficiary from assigning income. The rule was abolished by statute in the State of New York, which provides that "[a] trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein . . ."³ The anti-merger statute applies to inter-vivos as well as testamentary trusts.⁴ Formerly, a lifetime or inter-vivos trust could be created in writing, by deed, or as evidenced by the action of the parties, or both. New York State did not require a formal trust agreement; an oral contract between grantor and trustee that the latter was holding property for the benefit of another person, could suffice.

The Formalities of Execution

Effective December 25, 1997, N.Y. Estates, Powers & Trusts Law 7-1.17 sets forth the required formalities for a lifetime trust. It must be in writing, executed and acknowledged by the creator and, unless he or she is the sole trustee, by at least one trustee, in the manner

required by the laws of this state for the recording of a conveyance of real property, or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument. Where the grantor is also the sole trustee, not uncommon in the revocable trust, it is wise, nevertheless, to either have separate signature lines for the grantor and trustee or to properly identify them below the sole signature line, i.e., Mary Marbel, grantor and trustee. The acknowledgment may be subject to challenge if not in compliance with the requirements for the recording of a deed.⁵

Funding Issues

Unfortunately, planning often stops at the creation of the trust. No assets are ever conveyed into the trust, and, upon mom's or dad's death the stunned beneficiaries or the surviving spouse learn that the decedent's assets are still titled in his or her personal account. Counsel's task when planning with a revocable trust clearly includes transferring into the trust the assets intended to be included. To convey real estate into a revocable trust, a deed to the trustee is required. Real property located in states other than New York may be conveyed into the trust. This procedure will obviate the need for an ancillary probate or administrator in the foreign state. Obviously, any deed must be recorded. For real estate in New York State, a change of title to the trustee of a revocable trust is a mere change of identity and not a gift, not a transfer for value. Accordingly, New York State real estate transfer taxes are not applicable.

A trustee of a trust containing real estate has all the powers a title owner has with respect to the property. If the real estate consists of shares in a cooperative apartment, the stock is transferred to the trustee. A trust can be the owner of a co-op according to the Internal Revenue Service, which in Internal Revenue Code § 7701(a) provides that the term "person" includes a trust. A trust as the owner of co-op shares, like a person, is entitled to deduct real estate taxes and mortgage interests, as the owner.⁶

Co-op boards may nevertheless object to the ownership of shares by a trust. The trustee may not be the occupant. Who will be responsible for maintenance? Whose financial information is to be obtained by the board? The board may, as a condition for giving its consent, (1) require that the trust execute an Occupancy Agreement, which will provide that a change in occupancy will conform to the proprietary lease; (2) obtain a personal guarantee from the grantor; and/or (3) ask for a letter agreement whereby the trustee agrees that, notwithstanding any purported disposition in the trust

agreement, the co-op board retains the right in its sole discretion to reject any further transfers.

With respect to underwriting guidelines regarding trusts, consult a title company.

If the real property is burdened by a mortgage, the lender may impose a number of requirements. A conveyance of real property of mortgaged premises may activate a "due-on-sale provision" in the mortgage. 12 U.S.C. § 1701j-3, "Preemption of Due-on-Sale Prohibitions," provides that a lender may enforce a "due-on-sale" clause, subject to, *inter alia*, certain exemptions, to wit: "(8) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or (9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board."

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The regulations implementing the statute provide that the borrower must be and must remain the beneficiary and occupant of the property.⁸ Furthermore, the lender may require the borrower to provide reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy. This statute pre-empts state due-on-sale statutes; it applies only to mortgages and liens secured by residential and real property containing fewer than five dwelling units.

What about IRA and other deferred compensation accounts? As only individuals can be the "owner" of such accounts during their lifetime, counsel may be tempted to make the trust the beneficiary upon grantor's death. This is a temptation that should be withstood unless counsel is knowledgeable about the income tax consequences and the trust will contain the required language to insure that the IRS will "look through" the trust agreement to find the qualified beneficiaries and, further, that certain language is included in the trust requiring that minimum distributions be paid to the beneficiary.⁹

If the grantor desires that the ultimate beneficiaries named in the trust be beneficiaries of his or her IRA,

beneficiary designations must so indicate; a matter of some complexity as, presumably, the grantor desires a distribution in accordance with the trust's terms. Extensive communications with the IRA custodian always ensue. Confirmation is essential. Bank and brokerage accounts must be changed to bear the trust's title. Title is always in the trustee.

With regard to the transfer of insurance into the trust, be sure to be clear about ownership of the policy and the designated beneficiaries on the death of the insured, and get written confirmation of any changes.

Personal property can be conveyed into the revocable trust, but a deed of gift is required. A mere schedule attached to the trust agreement listing the assets the grantor intends to be included will not suffice to provide ownership by the trust.¹⁰

Revocation and Amendment

In order for the trust to be revocable, it must say so. A lifetime trust "shall be irrevocable, unless it expressly provides that it is revocable."¹¹ An amendment or revocation must be in writing and is subject to the same formalities applicable to the creation of the instrument, unless otherwise provided in the trust agreement. Revocation or amendment of the revocable trust may also be effectuated by a Last Will & Testament by an express provision in the Will which specifically refers to such lifetime trust or a particular provision thereof. Needless to say, numerous complications can result where formalities are not adhered to.¹²

In *In re Goetz*, grantor signed a trust amendment to his revocable trust shortly before his death amending the trust's provision that the residue would be divided equally among his children, and granting his wife a limited power of appointment to shift the interests of the children. The amendment was not notarized. The following day, the wife signed the amendment as her husband's agent under her husband's power of attorney. The trust agreement did not specifically authorize an agent to sign on husband's behalf. In the wife's Last Will & Testament, the son received nothing. The son sought summary judgment setting aside the limited power of appointment under which his mother disinherited him. Paragraph Eleventh of the trust agreement provided that the trust could be amended or revoked by an instrument (other than a

will or codicil thereto) executed and acknowledged by the grantor and delivered to the trustees during the grantor's lifetime. The Surrogate's Court held that this provision clearly reserved the power to amend or revoke to the grantor, but did not explicitly confer the same authority upon the grantor's agent, or upon any other person, and granted son's motion for summary judgment.¹³ The case is troublesome and has been distinguished. Nevertheless, it emphasizes the need to adhere to statutory requirements to avoid problems.

With respect to revocation or amendment by an agent under a power of attorney, the usual dichotomy between an agent's *power* under a power of attorney and his or her *right* is at play. We see this in an agent's authority concerning banking transactions, where the statute permits the agent to make withdrawals, or transfer assets to himself or herself, but he may not have the right to do so. The statute dealing with estate and trust transactions provides that an agent permitted by law to act for a principal "in . . . all matter affecting any estate of a decedent . . . or any trust . . . out of which the principal is entitled, or claims to be entitled, to some share or payment, or with respect to . . . which the principal is a fiduciary, the agent may . . . reform, release, or modify any such agreement."¹⁴

This blanket power to modify should not be confused with a right to modify, and, conceivably, act contrary to the grantor's interest or in contravention to the plan of distribution set forth in the trust. Many cases dealing with revocation or amendment pertain to irrevocable trusts, but the reasoning remains pertinent. Does the grantor have sufficient trust in his or her agent appointed in a power of attorney to amend or revoke the instrument? If so, what amendments are contemplated? If the principal is intent on not permitting an amendment or revocation by his or her agent, or wishes to limit the agent's power regarding revocation and amendment under a durable power of attorney, often executed as part of a host of planning documents, counsel should specifically so provide in the instrument. Caution is the watchword. Clearly grantor's entire estate plan can be easily destroyed. The grantor, with the guidance of his or her attorney, should include in a durable power of attorney those changes, if any, the principal's agent is authorized to make in the trust.

If the grantor of a revocable trust makes provisions for a spouse and thereafter the parties divorce or the marriage is annulled, or the parties obtained a final decree or agreement of separation recognized as valid under New York State law, the provisions for the benefit of the former spouse are deemed revoked unless the trust agreement provides otherwise. Similarly, the appointment of the former spouse as trustee or successor trustee is deemed revoked.¹⁵

Becoming Irrevocable

The attorney draftsman should keep in mind that a revocable trust becomes irrevocable upon the incompetence of the grantor. In contemplating the possibility of the revocable trust becoming irrevocable, it may be advisable to include trust powers that create flexibility. The following are mere suggestions of additional powers:

- Remove trustees.
- Change trust situs.
- Divide trusts so that assets can be invested in different way to coordinate with various beneficiaries needs.
- Combine identical trusts.
- Substitute charitable beneficiaries.
- Correct a drafting error that defeats trust purposes.
- Allow early termination of the trust.
- Invest in the stock of the grantor's family business. This may benefit both the trust and the grantor's family.
- Invest in non-income producing assets. This would allow the trustee to build equity at the expense of current income to seek higher long term gains.
- Accumulate income. This is another way of permitting a trustee to direct assets to certain heirs at the expense of others.
- Invest aggressively, using a diversified stock portfolio. This takes the more enlightened modern approach about trust investments.

Beware of tax ramifications which flow from some of these powers. It may not be a bad idea to insert a "savings clause" in which the trustee is directed not to exercise powers which contravene tax goals the grantor has set forth in the trust agreement.

Many clients value the possibility of eventually creating a Medicaid qualifying income-only trust, except they are not ready to do so at the moment of execution of the trust agreement. If this is the case, counsel should include a section dealing with the trust so qualifying upon, for example, the grantor's incompetence which may be determined by a letter from the grantor's treating physician that he or she can no longer manage her affairs. Appropriate language is required in such provision disclaiming any trust powers which would disqualify the trust as a Medicaid qualifying income-only trust. If the grantor contemplates the conversion of the revocable trust into an irrevocable Medicaid qualifying income only trust, counsel should carefully examine the trust powers to insure compliance with such a trust.

The Pour-Over Will

The revocable trust is customarily linked to a so called pour-will, a means by which the testator makes a bequest to a properly executed trust, revocable or irrevocable. New York has adhered to a minority position concerning incorporation by reference. In *In re Salmon*,¹⁶ the decedent's Will directed that his tangible personal property be divided among individuals named in a memo to be found in his safe deposit box. The Court did not permit the memo to be followed, deeming the bequest an impermissible incorporation by reference.¹⁷

Certain exceptions to the doctrine of incorporation by reference are now permitted. EPTL 3-3.7 provides that a testator or testatrix may dispose by Will of all or any part of his or her estate, the terms of which are evidenced by a written instrument executed by the testator or testatrix, the testator or testatrix and some other person, or some other person, provided that such trust is executed in the manner provided for in EPTL 7-1.17, prior to or contemporaneously with the execution of the Will, and such trust instrument is identified in such Will.

The testamentary disposition is valid even though the trust instrument is revocable¹⁸ and even though the trust instrument was not executed and attested in accordance with the formalities prescribed by EPTL 3-2.1.¹⁹ However, where the bequest of the decedent's residuary estate was made to the trustee of the decedent's revocable trust, and the trust, although apparently prepared at the same time as the Will, was not signed by the decedent until a week later, the trust was not deemed in existence at the time the Will was signed and the bequest failed.²⁰ Clearly, once the trust agreement is revoked, the disposition to the trust is no longer valid and the statute so provides.²¹ An interesting twist is found in *In re Estate of Gillespie*, where the revocable trust provided that the trust's residuary be poured over into decedent's Last Will and Testament. The court held that the trust's bequest was to be poured over in the Will actually admitted to probate, rather than to a prior Will in existence when the trust was executed, but later revoked by the testator.²²

Although the statute is precise in its requirements that the trust be executed prior to or contemporaneously with the Will, it has been held that a pour-over provision will not lapse if the trust agreement was properly acknowledged in accordance with the dictates of the statute where there were no allegations or evidence of fraud or other wrongdoing and the trust agreement, which was signed contemporaneously with the Will, was identifiable, precise and definite.²³

In *In re Estate of Pozarny*,²⁴ the decedent's living trust was marked by inconsistencies providing for the disposition of trust assets on the settlor's death. It was contained in a loose-leaf three-ring binder and

amended in contravention of the specified statutory requirement under EPTL 3-3.7(b)(1). The court held that the provisions of the Will distributing the estate's assets to the trust could not be given effect. The court's discussion of draftsmen who employ a "one size fits all" living trust without regard to the testator's particular circumstances is noteworthy.²⁵

Jurisdiction and Venue

There was a time when lifetime trust disputes were only litigated in Supreme Court. In 1966, the legislature amended the Surrogate's Court Procedure Act providing that the Surrogate's Court has the power to determine any and all matters relating to lifetime trusts.²⁶ The Act now provides that the Surrogate's court has the same jurisdiction and power as the Supreme Court over a lifetime trust and its trustee.²⁷ As the use of lifetime trusts increased, the legislature took note and added Section 207 of the Surrogate's Court Procedure Act, providing that the Surrogate's Court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the proceeding concerning the trust, or of which a trustee then acting resides in the state, or, if other than a natural person, has its principal office in the state. The proper venue for proceedings related to such lifetime trust is the county where (a) assets of the trust estate are located, or (b) the grantor was domiciled at the time of the commencement of the proceeding concerning the trust, or (c) a trustee then acting resides or, if other than a natural person, has its principal office.²⁸

If a proceeding were commenced based on the grantor's domicile and he or she then died, the court would retain jurisdiction. Once a proceeding has commenced in a proper venue, in this case based upon the residence of the trustee and the location of the assets, the court will retain jurisdiction and a motion to transfer a proceeding to compel an accounting to another jurisdiction is properly denied, as SCPA 207(2) provides that the first county of proper venue exercising jurisdiction must retain jurisdiction.²⁹ Where a dispute arose over the transfer of property pursuant to a trust agreement, venue was proper in the county where the trustee resided at the applicable time even through the property concerned was located in another county.³⁰

The Revocable Trusts and Tax Returns

A standard revocable trust is ignored for tax reasons. This is because the property is deemed to belong to the grantor, who has the ability to amend and revoke. Although the trustee is now the title owner of the property, all income and dividends payable to the grantor pursuant to the trust agreement are reported in his or her personal income tax return. Some custodians of property will insist on a tax ID number, and must be advised none is required as the trust's tax ID

number is the social security number of the grantor. If a revocable trust provides that certain income is payable to another person, that person must report the income in his or her personal income tax returns. A trust that is obligated to file an income tax return must furnish a copy of Schedule K-1 (Form 1041) to each beneficiary (1) who receives a distribution from the trust or estate for the year or (2) to whom any item with respect to the tax year is allocated.

Once the trust becomes irrevocable, the trustee must obtain a tax ID number from the IRS and file a return on Form 1041 for the trust regardless of the amount of taxable income or if any beneficiary of the trust is a nonresident alien (unless the trust is exempt under Code Sec. 501 (a)).³¹

Clearly, if the trust provides that it becomes irrevocable upon certain events, these requirements must be kept in mind. If the grantor wishes the trust to become an irrevocable Medicaid qualifying income-only trust, it may be wise to include advisory language in the trust agreement, directing the successor trustee to obtain the necessary tax ID number and to commence filing fiduciary income tax returns.

If the trust becomes irrevocable and thus must file income tax returns, with a few limited exceptions, it must adopt a calendar year. Generally, the fiduciary of a trust need not file a copy of the trust instrument with the trust income tax return unless the IRS requests it. If the IRS does request a copy of the trust agreement, the fiduciary should file it (including any amendments), accompanied by a written declaration of truth and completeness and a statement indicating the provisions of the trust instrument that determine the extent to which the income of the estate or trust is taxable to the trust, the beneficiaries, or the grantor.³²

Litigation In the Surrogate's Court

Once the legislation and the courts recognized that the revocable trust "actually functions as a Will since it is an ambulatory instrument that speaks at death to determine disposition of the Settlor's property,"³³ any dispute concerning a Last Will & Testament will be heard. So we see a determination regarding the statute of limitations;³⁴ an accounting proceeding;³⁵ a cy-pres question;³⁶ whether a surviving spouse who is not a beneficiary and thus is entitled to her elective share and a portion of the trust assets has standing to object to an accounting;³⁷ a summary judgment motion brought alleging that the trust was defective because it was contained in a loose-leaf binder, unfastened;³⁸ the court having to determine whether the grantor has the requisite mental capacity to execute the document;³⁹ a construction proceeding;⁴⁰ and a grant of limited letters to challenge the revocable trust.⁴¹

The right to a jury trial where such rights exists is provided by statute or the State Constitution.⁴² The

litigant has a right to a jury trial when objecting to a revocable trust where he or she would have a right in objecting to a Will.⁴³ Although such right is now well settled, the issue was thoroughly discussed in a number of cases.⁴⁴ Needless to say, as the comparison of its like nature with a Last Will & Testament is now firmly established, burdens of proof will follow down that well-trodden path.⁴⁵

Advantages and Disadvantages

It has been my profound conviction that the revocable trust is not a needed vehicle for every person. Its creation is costly; it takes time, effort and therefore money for most clients to have the trust properly funded, and its maintenance can be a nuisance. The mantra of our traveling minstrels, with their portable offices, that it saves the cost of probate neglects to point to the up-front costs and the downsides. The testator with a house and paid mortgage, a bank account and an IRA, and known distributees, may not need a revocable trust. However, where there is some complexity in the family tree; with, for example, an entire branch located in another country or severed from the testator by immigration or disaster, and given New York State's obsessive preoccupation with due diligence to find distributees, the revocable trust can serve very well, notwithstanding the fact that the trust may be questioned like a Last Will & Testament in the Surrogate's Court. The distributees whose lips are silenced by death may never come forward. Furthermore, if the testator or testatrix owns real property in more than one state, the revocable trust will obviate the need for ancillary probate. The testator who is essentially alone, without close kin, may find it comforting to spell out in a revocable trust a thorough plan of care in the event of illness and the frailty of old age.

Finally, where a Will contest would surely follow, the grantor of a revocable trust can show his or her active involvement with the trust; document his or her interactions with counsel, over time; consider an amendment as circumstances change; elaborate far more fully than is customarily done in a Last Will & Testament, and thus build a solid structure difficult to challenge on the basis of lack of capacity or undue influence, old war horses of the probate contest.

Endnotes

1. *Challenging the Validity of the Revocable Trust*, N.Y.L.J., May 19, 2000, p. 5, col. 1.
2. Not applicable to revocable trusts.
3. N.Y. Estates, Powers & Trusts Law 7-1.1.
4. *In re Lynn Hertzell*, 174 Misc. 2d 497 (Sur. Ct., N.Y. Co. 1997).
5. Real Property Law § 309-a.
6. Internal Revenue Code § 216.
7. 12 U.S.C. § 1701j-3(a)(3).
8. 12 C.F.R. 591.5(b) (vi).
9. See I.R.C. Treas. Reg. § 1.401(a)(9).

10. *In re Estate of Rothwell*, 189 Misc. 2d 191, 730 N.Y.S.2d 664 (Sur. Ct., Dutchess Co. 2001).
11. EPTL 7-1.16.
12. *Id.* at 7-1.17(b); cf. *Estate of Morris Abrams*, N.Y.L.J., Jan. 1, 1999, p. 27, col. 2 (Sur. Ct., N.Y. Co.) (determining a note found among the decedent's effects which purported to revoke a revocable trust was deemed insufficient because it did not comport with the requirements for revocation set forth in the instrument).
13. *In re Goetz*, 8 Misc. 3d 200, 793 N.Y.S.2d 318 (Sur. Ct., Westchester Co. 2005).
14. N.Y. General Obligations Law §5-1502G.
15. EPTL 5-1.4.
16. 46 Misc. 2d 541, 260 N.Y.S.2d 66 (Sur. Ct., N.Y. Co. 1965).
17. See Peter C. Valente et. al., *Incorporation by Reference*, N.Y.L.J., April 13, 1992 (containing a thorough treatment of the doctrine of Incorporation by Reference).
18. EPTL 3-3.7(b)(I).
19. *Id.* at 3-2.1 (setting forth the formalities required for the execution of a Last Will and Testament).
20. *In re D'Elia*, 40 Misc. 3d 355, 964 N.Y.S.2d 877 (Sur. Ct., Nassau Co. 2013).
21. EPTL 3-3.7(b)(e).
22. *In re Estate of Gillespie*, 145 Misc. 2d 542, 547 N.Y.S.2d 531 (Sur. Ct., N.Y. Co. 1989).
23. *In re Estate of O'Brien*, 233 A.D.2d. 561, 649 N.Y.S.2d 220 (3d Dep't 1996).
24. 177 Misc. 2d 752, 677 N.Y.S.2d 714 (Sur. Ct., Erie Co. 1998).
25. *Id.*
26. Surrogate's Court Procedure Act 209(6)
27. *Id.* at 1509.
28. *Id.* at 207(1).
29. *In re Meyers*, 45 A.D.3d 955, 845 N.Y.S.2d 510 (3d Dep't 2007).
30. *In re Linker*, N.Y.L.J., Dec. 17, 2004, p. 32, col. 1 (Sur. Ct., N.Y. Co.).
31. Treas. Reg. § 1.6012-3.
32. Treas. Reg. § 1.6012-3(a)(2).
33. *In re Tisdale*, 171 Misc. 2d 716, 655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997).
34. *In re Sennett*, 2008 N.Y. Misc. Lexis 144 (Sur. Ct., Suffolk Co. 2008).
35. *In re Eisenberg*, 41 Misc. 3d 1216 (A), 981 N.Y.S.2d 634 (Sur. Ct., N.Y. Co. 2013).
36. *In re Trustco Bank*, 37 Misc. 3d 1045, 954 N.Y.S.2d 411 (Sur. Ct., Schenectady Co. 2012).
37. *In re Garrasi Family Trust*, 104 A.D. 3d 990, 961 N.Y.S.2d 594 (3d Dep't 2013).
38. *In re Estate of Klosinski*, 192 Misc. 2d 714, 746 N.Y.S.2d 350 (Sur. Ct., Kings Co. 2002).
39. *In re Vultaggio*, 2015 N.Y. Misc. Lexis 4780 (Sur. Ct., Nassau Co. 2015).
40. *In re Carcanagues*, 2014-3399 N.Y.L.J. 1202766601515, 1 (Sur. Ct. N.Y. Co. 2016).
41. *In re Estate of Davidson*, 177 Misc. 2d 928, 677 N.Y.S.2d 729 (Sur. Ct., N.Y. Co. 1998).
42. CPLR 1401; SCPA 502 (1).
43. *In re Tisdale*, 171 Misc. 2d 716, 655 N.Y.S.2d 809 (Sur. Ct., N.Y. Co. 1997); SCPA 502 (1); CPLR 4101.
44. *In re Solomon*, N.Y.L.J., Sept. 9, 1997, p. 30, col. 2 (Sur. Ct., Kings Co.); *In re Tisdale*, supra; *In re Aronoff*, N.Y.L.J., Dec. 20, 1996 (Sur. Ct., N.Y. Co., 1996).
45. *Id.*

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