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**ESTATE PLANNING UPDATE**

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**Preface**

The “Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018” (originally entitled the “Tax Cuts and Jobs Act”, and referred to herein as the “2017 Tax Act”) was enacted on December 22, 2017.

The 2017 Tax Act doubled the existing $5,000,000 exemption (adjusted for inflation from 2010) to $10,000,000 (similarly adjusted for inflation) for estate tax, gift tax and generation-skipping transfer (“GST”) tax purposes, but only for the estates of persons dying, for gifts made, and for generation-skipping transfers occurring, in 2018 through 2025. Absent further legislation, the inflation adjusted $5,000,000 exemption that was enacted by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Tax Act”), and that was made “permanent” by The American Taxpayer Relief Act of 2012 (the “2012 Tax Act”), will apply to the estates of persons dying, and to gifts made, after 2025, and to generation-skipping transfers that occur after 2025. The 2017 Tax Act retained the existing maximum tax rate of 40% for all such purposes. In addition, the 2017 Tax Act did not modify many of the federal transfer tax changes made to the Internal Revenue Code (the “Code”) [[1]](#footnote-2)by the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) and the 2010 Tax Act, and that were made “permanent” by the 2012 Tax Act.

Further, the 2017 Tax Act made many changes to the provisions of the Code regarding the income taxation of individuals and entities, including reducing the maximum income tax rate for individuals, non-grantor trusts and estates from 39.6% to 37%, and enacting a flat income tax rate of 21% for C corporations (reduced from an existing maximum income tax rate of 35%).

Part I of this outline describes the current state of the federal transfer tax and income tax laws as a result of these Acts, and the remaining parts of this outline discuss other important federal and state tax developments, and important non-tax developments, regarding estates and trusts.

# FEDERAL TRANSFER TAXES AND INCOME TAXES

## Federal Estate Taxes, Gift Taxes and Generation-Skipping Transfer (“GST”) Taxes

The federal estate tax and gift tax exemptions, now known as the “basic exclusion amount”, are $10,000,000, indexed for inflation since 2010, for the estates of persons dying, and for gifts made, from 2018 through 2025. The basic exclusion amount after 2025 will revert to the pre-2017 Tax Act amount of $5,000,000, indexed for inflation after 2010. It is noted that as of this writing only Connecticut imposes a state gift tax.

The federal estate tax deduction (not the credit) for state death taxes paid by the estate, which was restored by the 2010 Tax Act, was made permanent by the 2012 Tax Act.

The GST tax exemption also is $10,000,000, indexed for inflation since 2010.

The inflation adjusted amount of all of these exemptions is $11,180,000 for 2018, and had previously been announced to be $5,600,000 for 2018 prior to the 2017 Tax Act.

The increases in these exemptions, like many other provisions of the 2017 Tax Act, are scheduled to sunset at the end of 2025, at which time there will be a reversion to pre-2017 Tax Act law, at least in the absence of further legislation. On account of the precise manner in which the estate tax is calculated, there exists a possibility that, if a person makes lifetime gifts in the period 2018 to 2025 to take advantage of the increased exemption, but then dies after 2025 when the increased exemption has sunset, the person’s estate could owe estate tax with respect to those lifetime gifts. The Act directs the Internal Revenue Service (the “Service”) to adopt regulations to deal with this so-called “clawback” issue.

The 2017 Act makes no changes to the following important aspects of the federal transfer tax regime:

* The 40% tax rate for gift, estate and GST taxes remains.
* The “portability” of unused exclusion at death between spouses is retained, as discussed below.
* The “stepped up basis” rules, under which the cost basis for income tax purposes of a decedent’s assets is changed to the federal estate tax values, remain the same.

As a result of the 2010 Tax Act, the 2012 Tax Act and the 2017 Tax Act, many of the other provisions of prior law continue to be effective, including, as to GST taxes, the provisions regarding the identification of the “transferor” of a transfer, modifications of exempt trusts, the automatic allocation of the GST tax exemption, the retroactive allocation of the GST tax exemption, qualified severances, and 9100 relief for GST tax purposes, and including the relaxation of the requirements for the deferral of estate tax payments under Code Section 6166.

## Portability

### General

The portability provisions of the 2010 Tax Act were made permanent by the 2012 Tax Act, and were not modified by the 2017 Tax Act.

Portability permits the unused applicable exclusion amount of the last deceased spouse of a person to be used by such a person for gift tax and/or estate tax purposes. However, these portability provisions do not apply to a person’s GST tax exemption. It is important to note that these provisions apply only if the death of the first spouse to die occurs after 2010.

For example, if a husband dies in 2018 and he and his estate have used only $6,000,000 of his $11,180,000 estate tax applicable exclusion amount, then his surviving wife will have an aggregate applicable exclusion amount of $16,360,000 (i.e., her own $11,180,000 basic exclusion amount, plus the unused $5,180,000 of her deceased husband’s applicable exclusion amount), assuming the widow does not remarry (and dies before 2026).

Importantly, these provisions of the law generally permit a person to use the unused portion of the applicable exclusion amount of only such person’s last deceased spouse. Thus, a person ordinarily cannot accumulate the unused portion of the applicable exclusion amount of more than one deceased spouse.

In addition, the unused portion of the applicable exclusion amount of the deceased spouse that can be used by the surviving spouse is not itself indexed for inflation; only the basic exclusion amount of the surviving spouse is indexed for inflation, as described above.

To apply such portability provisions, the estate of the first spouse to die must elect to do so on a timely filed federal estate tax return. Thus, the estate of the first spouse to die must file such return, even if that person’s gross estate is less than that person’s applicable exclusion amount, if the person’s estate wants to apply these portability provisions.

On June 12, 2015 the Service released final regulations (T.D. 9725) regarding the portability provisions in the 2010 Tax Act. A full discussion of these regulations is contained in an article written by the authors of this outline and published by Commerce Clearing House in Estate Planning Review – The Journal. A copy of that article is attached hereto as Exhibit “A”.

On September 29, 2011 the Service issued News Release IR-2011-97 and Notice 2011-82 providing guidance on portability for estates of decedents dying after December 31, 2010.

The Notice stated that:

* To elect portability, the executor must file a complete estate tax return (Form 706) on a timely basis, including extensions, whether or not the value of the gross estate exceeds the exclusion amount, and whether or not the executor is otherwise obligated to file an estate tax return.
* An estate will be deemed to make the portability election by timely filing a complete estate tax return without the need to make an affirmative statement, check a box, or otherwise affirmatively elect to make the election.
* Until the Service revises Form 706 to expressly contain the computation of the deceased spousal unused exclusion amount, a complete and properly prepared Form 706 will be deemed to contain the computation of the deceased spousal unused exclusion amount. Note that the estate tax return and instructions for decedents who died in 2012 includes provisions for such computation.
* To not make the portability election:

•• The executor must follow the instructions for Form 706 describing the steps to do so. The instructions for the 2011 Form 706 state that to opt out of the portability election, a statement should be attached to Form 706 indicating that the estate is not making the election under Code Section 2010(c)(5), or “No Election under Section 2010(c)(5)” should be entered across the top of the first page of Form 706.

•• Not timely filing a Form 706 effectively prevents making the election.

* As the portability election is not available to the estate of a decedent dying on or before December 31, 2010, any attempt to make a portability election on a Form 706 for such estate will be ineffective.
* The Service intends to issue regulations regarding portability and invites comments on the following issues:

•• The determination in various circumstances of the deceased spousal unused exclusion amount and the applicable exclusion amount.

•• The order in which exclusions are deemed to be used.

•• The effect of the last predeceasing spouse limitation.

•• The scope of the Service’s right to examine a return of the first spouse to die without regard to the period of the statute of limitations.

•• Any additional issues that should be considered for inclusion in the proposed regulations.

On May 11, 2013 a representative of the Service advised that it is considering granting so-called Code Section 9100 relief to estates that failed to elect portability by the required deadline. In this regard, practitioners have asked the Service to eliminate the current requirement of a private letter ruling for Code Section 9100 relief for late elections of estate tax portability.

In Rev. Proc. 2014-18, IRB 2014-7, the Service issued guidance providing a simplified procedure for estates to obtain an automatic extension of time to make a portability election. Pursuant to the Rev. Proc. if a decedent died after 2010 and before 2014 leaving a surviving spouse, the decedent was a citizen or a resident of the United States on his or her death, the decedent’s estate is not required to file an estate tax return based on the value of the estate and the amount of the decedent’s taxable gifts, and the decedent’s estate did not timely file an estate tax return to elect portability, the decedent’s estate may file an estate tax return on or before December 31, 2014, in order to elect portability, and such tax return will be deemed to be timely filed. This blanket relief permits a qualifying estate to file an estate tax return in order to elect portability without having to obtain Code Section 9100 relief to do so. In the preamble to the final regulations regarding portability, noted above, the Service stated that it is considering making this safe harbor permanent.

In Rev. Proc. 2017-34, IRB 2017-26, the Service announced a simplified method for estates that have no estate tax filing requirement under Code Section 6018(a) to elect portability, but failed to timely do so, by either filing a properly prepared Form 706 by January 2, 2018, or by the second anniversary of the decedent’s death, whichever is later, in lieu of seeking a private letter ruling from the Service allowing a late election.

In PLR 201338003 (2013), the Service ruled that a QTIP election made with respect to a credit shelter trust should be disregarded for federal transfer tax purposes because the election was not necessary to reduce the decedent’s estate tax liability to zero.

Rev. Proc. 2001-38 treats certain QTIP elections as a nullity if the election is not required to reduce the estate tax. On September 27, 2016, the Service issued Rev. Proc. 2016-49, which supersedes 2001-38. Rev. Proc. 2016-49 provides that a QTIP election will be treated as void if all three of the following conditions are met: (1) the estate’s federal estate tax liability is zero, regardless of the QTIP election, (2) no portability election is made, and (3) the estate follows the procedural requirements listed in Rev. Proc. 2016-49, which consist of filing a supplemental return (which is either a supplemental Form 706 filed for the estate of the predeceased spouse, a Form 709 filed by the surviving spouse, or a Form 706 filed for the estate of the surviving spouse) with a notation of “Filed pursuant to Rev. Proc. 2016-49” at the top of the supplemental return, and an explanation as to why the QTIP election should be treated as void.

In Estate of Sower v. Commissioner, 149 T.C. No. 11 (2017), the Court held that the Service can review the estate tax return of a predeceased spouse to determine the correct amount of the allowable deceased spousal unused exemption that is available to the estate of the surviving spouse, notwithstanding that the Service had issued an estate tax closing letter with respect to the estate of the predeceased spouse.

### Portability and the Future of Bypass Trusts[[2]](#footnote-3)

Estate planning documents for spouses having combined assets of more than the basic exclusion amount of one person traditionally would commonly contain provisions under which the estate of the first spouse to die would create a so called “bypass” trust for the benefit of the surviving spouse, in order to effectively utilize the basic exclusion amount of both spouses, rather than provisions under which the first spouse to die would leave his or her entire estate to the surviving spouse, outright and free of trust. Some proponents of portability have contended that where the combined assets of a married couple are less than $22,360,000, then the necessity of the first spouse to die to create a bypass trust for the benefit of the surviving spouse is eliminated, thereby simplifying the estate planning documents for such persons. However, significant reasons continue to exist for the use of bypass trusts, even in cases where the value of the combined assets of a married couple is less than $22,360,000.

First, as noted above, the portability provisions of the 2010 Tax Act were made “permanent” by the 2012 Tax Act and were not modified by the 2017 Tax Act. However, it is always possible that portability could be repealed by future legislation.

Second, the first spouse to die, by creating a bypass trust for the surviving spouse, can ensure that the balance in such trust remaining at the death of the surviving spouse will pass to the person or persons whom the first spouse to die wants to inherit such remaining balance, rather than giving the surviving spouse the opportunity to bequeath such assets to other persons.

Third, a bypass trust affords a degree of creditor protection for the assets in the bypass trust that the surviving spouse would not have with respect such assets if they were bequeathed to the surviving spouse, outright and free to trust.

Fourth, the appreciation in value of the assets bequeathed to a bypass trust will not be subject to estate tax in the estate of the second spouse to die, whereas the appreciation in value of assets bequeathed to a surviving spouse, outright and free of trust, will be subject to estate tax on the death of the surviving spouse.

Therefore, many sound reasons exist for the continued use of bypass trusts, even where the combined wealth of a married couple is less than $22,360,000.

However, there are other tax considerations that must be taken into account in deciding whether or not to use a bypass trust.

First, the assets in a bypass trust will not receive a so called “stepped-up” basis at the death of the surviving spouse, whereas the assets that the surviving owns at his or her death will receive a “stepped-up” basis at that time.

Second, if the state in which the decedent resided at his or her death has “decoupled” its estate tax from the federal estate tax regime, and if the state estate tax exemption is less than the federal estate tax exemption, then the use of a bypass trust could result in the payment of state estate taxes, even though no federal estate taxes would be due, whereas such state estate taxes could be avoided if the estate instead elects portability and does not use a bypass trust.[[3]](#footnote-4)

These tax considerations should be taken into account in deciding whether or not to use a bypass trust.

### Portability and Prenuptial Agreements[[4]](#footnote-5)

When negotiating and drafting a prenuptial agreement, consideration should be given to the desirability of including a section in such agreement regarding portability.

Assume, for example, that one party to the intended marriage owns assets that have a value substantially in excess of the applicable exclusion amount and that the other party owns assets having a value significantly less than such amount. In such case, the wealthier party may want a provision in the agreement that requires the executor of the estate of the less wealthy party, if the wealthier party survives the less wealthy party, to timely file a federal estate tax return for the estate of the less wealthy party and to elect on that return to permit the wealthier party, as the surviving spouse, to use the unused portion of the exclusion amount of the less wealthy party. Such a provision could provide a substantial tax benefit to the wealthier party, if he or she survives the less wealthy party.

Note, however, that in such case the executor of the estate of the less wealthy party will be required to prepare and file a federal estate tax return for such estate, even though the amount of the gross estate of the less wealthy party is less than the minimum filing requirement for such tax return, in order to make the required election.

In Estate of Vose v. Lee, Case No. 115427 (2017), where a husband and wife had executed a prenuptial agreement in 2006 under which each party to that agreement waived his or her marital rights to the other party’s property, and where the wife died intestate in 2016 survived by her husband and a son from a prior marriage, the Supreme Court of the State of Oklahoma ordered the decedent’s son, as the personal representative of the decedent’s estate, to file a federal estate tax return for the decedent’s estate and to elect portability, holding that the decedent’s surviving husband had standing to pursue such action, and finding that the decedent’s surviving husband could not have intended by the prenuptial agreement to waive his right to have the decedent’s estate elect portability, since portability did not exist when the prenuptial agreement was executed.

## Federal Income Tax Provisions

The 2017 Tax Act substantially changed many income tax provisions that are applicable to individuals, estates and trusts. However, these changes are generally only temporary. In addition, the 2017 Tax Act substantially changed many income tax provisions that are applicable to businesses, and these changes are generally permanent.

### Income Tax Provisions Applicable to Individuals

The income tax provisions in the Code that are applicable to individuals and that the 2017 Tax Act modifies include the following:

* The maximum income tax rate was reduced from 39.6% under prior law to 37%.
* The standard deduction is increased to $24,000 for married taxpayers filing jointly, $18,000 for heads of household and $12,000 for single filers.
* The personal exemption is repealed.
* The alternative minimum tax (the “AMT”) is retained with increased exemptions and higher phase out limitations.
* The aggregate amount of allowable deductions for non-business state and local income, sales and property taxes is limited to $10,000. Numerous States, including New York, New Jersey, Connecticut and California, have enacted legislation or introduced legislation to create a “workaround” to avoid the new $10,000 federal limitation on deductions for State and local taxes, by creating a mechanism under which taxpayers can make charitable contributions in lieu of paying State taxes, such as real property taxes, which otherwise would not be deductible. However, on May 23, 2018 the Service issued Notice 2018-54, providing that the Treasury Department would issue regulations addressing the federal income tax treatment of transfers to funds that taxpayers could treat as satisfying State and local tax obligations, by issuing proposed regulations that will make clear that federal law governs the tax treatment of such transfers for federal income tax purposes, including substance-over-form principles.
* The threshold for the deduction for medical expenses has been reduced from 10% of adjusted gross income (“AGI”) under prior law to 7-1/2% of AGI for tax years 2017 and 2018.
* The deduction of all miscellaneous itemized deductions that were previously subject to the 2% floor under Code Section 67 is repealed. These deductions include investment fees, tax preparation expenses and unreimbursed employee business expenses.
* The deduction for personal casualty and theft losses is repealed, except for losses resulting from federally declared disasters.
* The AGI limit on cash contributions to publicly supported charities and private operating foundations is increased from 50% to 60%. An issue may exist as to whether or not a gift of any amount of non-cash assets makes the new 60% AGI limit unavailable. However, certain commentators have stated that new Code Section 170(b)(1)(G)(iii), which coordinates the 60% limitation for cash contributions with the other limitations under Code Section 170, should be interpreted as reducing the 50% and 30% limits for the tax year in question by the aggregate cash contributions allowed under the 60% limit for such year. Thus, the cash contributions under the 60% limitation of Code Section 170(b)(1)(G) reduce the contributions taken under the other subsections of Code Section 170(b)(up to 50% of the contribution base), and as a result donors must make cash contributions in amounts that exceed their contribution basis in order to achieve a deduction that exceeds 50% of the contribution base. In other words, the cash contributions first reduce the other limits before utilizing the last 10% of the 60% limit under Code Section 170(b)(1)(G).
* The existing income tax charitable deduction under Code Section 170(l) for 80% of a payment to an institution of higher education in exchange for the right to purchase tickets or seating at an athletic event is repealed.
* Code Section 170(f)(8)(D), which provides an exception to the requirement that a taxpayer who makes a charitable contribution must receive a contemporaneous written acknowledgement of the contribution from the donee, if the donee reports such contribution to the Service, is repealed.
* The phase-out of itemized deductions (the “Pease provision”) is repealed. As a result, in certain circumstances the income tax benefit from the deduction by high income taxpayers of charitable contributions may be increased, and such increased tax benefit may incentivize charitable contributions.
* The deduction for mortgage interest has been modified as follows:

1. As to mortgages incurred after December 15, 2017, by limiting the interest deduction to the interest incurred on not more than $750,000 on such indebtedness (as opposed to $1,000,000 of such indebtedness under prior law), and by allowing such deduction only for interest paid on such mortgages that relate to a principal residence or a second residence;
2. By allowing the deduction of interest on currently existing mortgages pursuant to the law as it existed prior to the 2017 Tax Act; and
3. By making home equity interest entirely nondeductible.

* New Code Section 199A provides that an individual can deduct 20% of his or her domestic “qualified business income” from a partnership, S corporation or sole proprietorship, subject to certain limitations. For this purpose, qualified business income generally means income from any trade or business but does not include reasonable compensation of an S corporation shareholder or guaranteed payments by a partnership to a partner. However, this deduction generally is not applicable to income from a service-based business. For this purpose, a service-based business means any trade or business activity involving the performance of services in the field of health, law, accounting, actuarial sciences, performing arts, consulting, athletics, financial services, brokerage services, investment management, trading or dealing in securities, or any trade or business where the principal asset is the reputational skill of one or more owners or employees. A specified service business does not include engineering or architectural trades or businesses, and consequently qualified business income includes income from such trades or businesses. On June 8, 2018 Clifford Warren, who is a senior counsel to the Service’s Associate Chief Counsel, announced that the Service expects to issue guidance on the new pass-through deduction by mid to late July 2018.
* Effectively repealing the individual mandate under the Affordable Care Act after 2018 by eliminating the penalty for the failure to have medical insurance.
* The elimination of the deduction (and the elimination of the corresponding inclusion in income) of alimony payments pursuant to any divorce decree or separation agreement executed after 2018, or pursuant to any divorce decree or separation agreement executed prior to 2019 and modified after 2018, if the modification expressly provides that this provision of the Act shall apply to such modification. In Notice 2018-37, the Service announced that Code Section 682, which had provided that trust income payable to a spouse from certain trusts is taxable to the recipient spouse and which was repealed by the 2017 Tax Act, will continue to govern the taxation of trust income payable to former spouses under a divorce or separation instrument executed on or before December 31, 2018, unless the instrument is modified after that date to provide otherwise. The so-called “recapture rule”, which requires the payer of alimony to recapture, or report as income, previously deducted amounts when alimony paid in the third year of the first three-year period is more than $15,000 less than in the second year, or if the alimony paid in the second and third years decreases significantly from the amount paid in the first year, has not been changed by the 2017 Tax Act.
* The definition of “qualified higher education expenses” for 529 Accounts is expanded to include tuition at public, private or religious elementary or secondary schools, but capped at $10,000 per student per taxable year.
* The 2017 Tax Act simplifies the so-called “kiddie tax” which previously provided that unearned income of a child of a certain age is subject to tax at the marginal rate of the parent, if higher. Under the 2017 Tax Act, the kiddie tax now employs the tax calculation applicable to trusts and estates regardless of the parent’s marginal tax rate. The result is that the kiddie tax will no longer depend upon the parent’s tax situation, and will reach the highest marginal tax rates at very low levels of unearned income.

All of the foregoing generally will not apply after 2025, absent further legislation.

Notably, the 2017 Tax Act maintains the 20% income tax rate applicable to long term capital gains and dividends, and the 3.8% tax on net investment income.

### Income Tax Provisions Applicable to Estates and Non-Grantor Trusts

The 2017 Tax Act reduces the maximum federal income tax rate that is applicable to estates and non-grantor trusts from 39.6% to 37%, and such maximum rate is applicable to taxable income in excess of $12,500, except that the maximum capital gain tax rate of 20% applies to income above $12,700.

In addition, it appears that the 2017 Tax Act eliminates the deduction of miscellaneous itemized deductions that are subject to the 2% floor for estates and non-grantor trusts, as Code Section 641(b) provides that the taxable income of an estate or trust shall be computed in the same manner as in the case of an individual, except as otherwise provided in the portion of the Code setting forth special rules regarding the computation of such taxable income, and the 2017 Tax Act did not amend such Code Section. However, it also appears that estates and non-grantor trusts will continue to be able to deduct those expenses that would not have been incurred by them if the property to which such expenses relate had not been held in the estate or trust, as the regulations regarding the deductibility by an estate or a non-grantor trust of such expenses provide that they are not treated as miscellaneous itemized deductions. On February 10, 2018 Catherine V. Hughes, an estate tax and gift tax attorney-advisor in the Treasury Department’s Office of Tax Policy stated that, as one of the Treasury Department’s first estate and trust related tax law projects, the Treasury Department intends to issue guidance as to whether or not an estate or trust can deduct costs that would not have been incurred if the subject property were not held in an estate or trust, such as executor’s fees and trustee’s fees, after the enactment of the 2017 Tax Act.

The 20% deduction for “qualified business income” discussed above also applies to estates and non-grantor trusts.

The 2017 Tax Act did not change the AMT exemption for estates and non-grantor trusts.

The 2017 Tax Act did not change Code Section 1014, which provides that the income tax cost basis of property acquired from a decedent is the fair market value of such property at the date of the decedent’s death or, in the case of an estate that makes the alternate valuation date election under Code Section 2032, the fair market value of such property on the alternate valuation date.

### Income Tax Provisions Applicable to Charities

The 2017 Tax Act adds new Code Section 4968, which imposes an annual excise tax of 1.4% of the net investment income of certain educational institutions. The tax applies to an educational institution that has at least 500 tuition paying students, the aggregate fair market value of the assets of which (other than those assets that are used directly in carrying out the institution’s exempt purpose) is at least $500,000 per student, and more than 50% of the tuition paying students of which are located in the United States. On June 8, 2018 the Service issued Notice 2018-55, announcing that the Service intends to issue proposed regulations regarding the calculation of net investment income for purposes of Code Section 4968(c), to the effect that (1) in the case of property held by an educational institution on December 31, 2017, the basis of such property for determining gain shall be not less than its fair market value on such date, (2) institutions can offset overall net gains from asset sales in one related organization with losses from asset sales in another related organization, (3) losses will generally be allowed only to the extent of gains, and (4) there will be no loss carryovers or carrybacks.

The 2017 Tax Act adds new Code Section 4960, which imposes an excise tax on any organization that is exempt from income taxation under Code Section 501(a) equal to 21% of the sum of (a) any compensation paid to a “covered employee” in excess of $1,000,000 (other than any “excess parachute payment”), plus (b) any excess parachute payment paid to the employee. For this purpose, a covered employee includes the five highest compensated employees of the organization for the taxable year, or any employee who was a covered employee of the organization for any preceding taxable year beginning after December 31, 2016. However, this tax does not apply to compensation paid to a licensed medical professional (including a veterinarian) for the performance of medical services (or veterinary services) by that professional. In this regard, an official of the Joint Committee on Taxation has stated that this portion of the Act should be corrected to make clear that public universities, such as those that employ highly compensated sports coaches, are subject to this new excise tax on executive compensation.

The 2017 Tax Act adds new Code Section 512(a)(6), which clarifies that for an organization with more than one unrelated trade or business, the unrelated business taxable income of each business is first to be separately computed, and the organization’s unrelated business taxable income normally is the sum of the amounts computed for each separate unrelated trade or business. Thus, a deduction from one unrelated trade or business in a taxable year may not be used to offset income from a different unrelated trade or business for the same taxable year. On June 15, 2018 Jonathan Carter, an attorney in the Service’s Office of Associate Chief Counsel, announced that the Service may postpone enforcing the new Code Section that requires tax exempt organizations to report unrelated business income for each trade or business separately, due to the possible difficulty in separating one trade or business from another trade or business.

### Income Tax Provisions Applicable to Businesses

The provisions of the 2017 Tax Act that are applicable to businesses include the following:

* The federal income tax rate for C corporations is permanently set at a flat 21%. Previously, the maximum corporate income tax rate was 35%.
* The AMT is permanently repealed for C corporations.
* The existing provisions regarding the taxation of carried interests are retained, except that the 2017 Tax Act provides that a carried interest must be retained for at least three years in order to qualify for long term capital gain treatment.

### Cost of Living Adjustments

The 2017 Tax Act permanently changes the index that is to be used to compute the inflation adjustments for many provisions of the Code from the Consumer Price Index For All Urban Consumers (the “CPI-U”) to the Chained Consumer Price Index For All Urban Consumers (the “C-CPI-U”). The C-CPI-U generally rises at a slower rate than the CPI-U does. For example, in 2018 the inflation adjusted basic exclusion amount for gift tax and estate tax purposes using the CPI-U would have been $11,200,000, whereas such amount using the C-CPI-U is projected to be $11,180,000, as noted above.

### Additional Areas Impacted By The 2017 Tax Act

#### Shareholders of Electing Small Business Trusts (“ESBTs”)

The only types of trusts that are permissible shareholders of S corporations are ESBTs and Qualifying Subchapter S Trusts (“QSSTs”). Prior to the 2017 Tax Act, non-resident aliens were not allowed to own S corporation stock and were not permissible beneficiaries of ESBTs. However, the 2017 Tax Act provides that non-resident aliens may be included as a potential current beneficiary of an ESBT, although they still are not permitted shareholders of S corporation stock.

#### Charitable Contributions By ESBTs

Before the 2017 Tax Act, an ESBT was treated like any other irrevocable trust regarding the deductibility of charitable contributions by the trust. Generally, a trust was entitled to an unlimited charitable contribution deduction if the contribution was paid to a charity pursuant to the express terms of the trust. The 2017 Tax Act, however, provides that an ESBT’s charitable contributions are subject to the same rules that apply to charitable contributions by individuals. Thus, an ESBT is entitled to a carry-forward of charitable contributions that the trust makes in excess of the prescribed limits for a tax year, and can deduct the fair market value of property contributed in kind to a charity, subject to applicable percentage limitations.

#### Transfer For Value Rules

The 2017 Tax Act provides in part that the exceptions to the transfer for value rules do not apply in the case of a transfer of a life insurance contract, or any interest in a life insurance contract, in a “reportable policy sale”. A reportable policy sale means the acquisition of an interest in a life insurance contract, directly or indirectly, if the acquirer has no substantial family, business, or financial relationship with the insured (apart from the acquirer’s interest in the life insurance contract). An indirect acquisition includes the acquisition of an interest in a partnership, trust, or other entity that holds an interest in the life insurance contract. Thus, some portion of the death benefit ultimately payable under such a contract may be includable in income.

In Notice 2018-41, the Service announced that it will issue proposed regulations that would define the term “reportable policy sale”, clarify the parties that are subject to such reporting requirements, and discuss the impact of such requirements on non-United States transferors and transferees. As a transitional measure, the Notice stated that taxpayers would be given additional time to meet the reporting requirements for transactions occurring after December 31, 2007 and before final regulations are issued.

### Other Income Tax Provisions

The 2012 Tax Act extended for 2013 the ability of a person who is older than 70-1/2 to make a direct contribution to charity of up to $100,000 from the person’s Individual Retirement Account, without the contribution being included in the person’s income. This provision of the law was further extended for 2014 by the Tax Increase Prevention Act of 2014, and was again extended for 2015 and was made permanent by the Protecting Americans From Tax Hikes Act of 2015, as noted below.

The Health Care and Education Reconciliation Act of 2010 enacted new Code Section 1411, which imposes a 3.8% unearned income Medicare contribution tax, starting in 2013. As to estates and trusts, the tax is imposed on the lesser of (1) undistributed net investment income for the tax year, or (2) any excess of adjusted gross income over the dollar amount at which the highest tax bracket for estates and trusts begins for the applicable tax year, which for 2018 is projected to be $12,500, subject to inflation adjustments each year. Trusts all of the unexpired interests in which are devoted to charitable purposes are exempt from this tax. As to individuals, the tax is imposed on the lesser of (1) the taxpayer’s net investment income for the tax year, or (2) any excess of the taxpayer’s modified adjusted gross income for the tax year, over $250,000, in the case of a taxpayer filing a joint return, or over $200,000, in the case of an unmarried taxpayer.

Furthermore, the 2018 Medicare tax rate is 1.45% each for the employee and employer.

The 2017 Tax Act did not modify these other income tax provisions.

## Estate Planning After The 2017 Tax Act

### Planning Opportunities

Numerous estate planning opportunities remain even after the enactment of the 2017 Tax Act.

For example, a taxpayer who previously made lifetime gifts equal to the former basic exclusion amount may now make additional gifts without incurring the payment of gift taxes as a result of the doubling of the basic exclusion amount. In addition, a taxpayer can “leverage” the use of the increased basic exclusion amount that is now available by creating an intentionally defective grantor trust, by making a gift of 10% “seed” money to the trust, and by having the trust then purchase from the taxpayer assets that can be discounted for lack of marketability and/or lack of control in exchange for a promissory note.

Furthermore, as a result of the increased basic exclusion amount and due to the continued availability of the so-called “stepped up” basis at death for income tax purposes, a person who creates a trust may decide to give a trust beneficiary a “narrow” general testamentary power of appointment, if the beneficiary’s gross estate (including such trust’s assets) for estate tax purposes is expected to be less than the increased basic exclusion amount, in order to obtain a stepped up basis in the trust’s assets for income tax purposes at the beneficiary’s death.

Moreover, certain existing irrevocable trusts authorize the trustee to grant a trust beneficiary a general power of appointment, and the trustee should consider doing so in order to obtain a stepped up basis in the trust’s assets for income tax purposes at the beneficiary’s death. Even if such a trust does not authorize the trustee to grant a general power of appointment to a trust beneficiary, certain jurisdictions allow such a trust to be modified to permit the trustee to do so, and such a modification should be considered in appropriate cases to obtain such income tax benefit.

### Planning Pitfalls

Wills and other documents that serve as testamentary substitutes may utilize a formula clause for dividing a decedent’s estate between the portion of the estate that qualifies for the federal estate tax marital deduction and the balance of the estate, which may be bequeathed to or in trust for persons other than the decedent’s surviving spouse. The changes in the basic exclusion amount could cause an unintentional shift in beneficial interests under estate planning documents.

For example, with the advent of a $5,000,000 basic exclusion amount for estate tax purposes by the 2010 Tax Act, and the advent of the $10,000,000 basic exclusion amount for such purpose by the 2017 Tax Act, a formula clause that gives the decedent’s children the maximum amount of the estate which is exempt from the federal estate tax and leaves the remainder of the estate to the surviving spouse may result in a bequest of the first $11,180,000 for decedents dying in 2018 of the decedent’s assets to or for the benefit of persons other than the decedent’s surviving spouse, such as the decedent’s children and more remote descendants, or to a trust of which the decedent’s spouse is not the sole beneficiary. This dispositive result may be different from the disposition that the testator had intended by using such a formula clause in an instrument executed when the basic exclusion amount for estate tax purposes was substantially less than the current basic exclusion amount. Therefore, it is advisable to review estate planning documents to determine whether the dispositive plan in those documents, taking into account the provisions of the 2010 Tax Act, the 2012 Tax Act, the 2017 Tax Act, and applicable state laws, continue to reflect the testator’s estate planning goals.

As stated above, many non-tax reasons exist for the continued use of so-called credit shelter trust planning. However, in view of the increased basic exclusion amount, it may be desirable for tax purposes to avoid the use of credit shelter trust planning and elect portability in order to obtain a stepped up basis for income tax purposes at the death of the second spouse to die.

In addition, as a result of the new limitation on the deduction for federal income tax purposes of state and local taxes paid by the taxpayer, the substantial reduction of available itemized deductions, and the modification of income tax brackets for all taxpayers, a person creating a grantor trust who in the past may have decided to retain the obligation to pay the income taxes attributable to the trust’s income and expenses may now instead decide not to do so.

Furthermore, taxpayers who previously created grantor retained annuity trusts (“GRATs”), or who previously sold assets to an intentionally defective grantor trust, or who engaged in family limited partnership planning, might become less diligent about adhering to the formalities of such structures, in view of the increased basic exclusion amount, and in so doing may risk the Service treating the transaction as a sham, with the result that the Service would disregard the transaction and possibly impose a transfer tax based upon the substantially lower basic exclusion amount that was in effect at the creation of the planning mechanism.

Moreover, the increased basic exclusion amount might cause the executor of the estate of the first spouse to die to decide not to file an estate tax return for such estate and elect portability on such return, believing that the increased basic exclusion amount will adequately protect the surviving spouse from the imposition of estate taxes at his or her death, thereby avoiding the cost of preparing and filing an estate tax return for such decedent. However, since the increased basic exclusion amount “sunsets” at the end of 2025, absent further legislation, the amount of the basic exclusion amount that would be available to the estate of the surviving spouse at his or her death if he or she dies after 2025 would be based upon such amount as it existed before the enactment of the 2017 Tax Act. Thus, in such a case, the executor of the estate of the first spouse to die should prepare and file an estate tax return for such estate and elect portability.

## State Transfer Tax Considerations

EGTRRA repealed the federal estate tax credit for state death taxes paid, for estates of decedents dying after 2004, and replaced such credit with a federal estate tax deduction for state death taxes paid. However, most states and the District of Columbia previously had the “sop” or pick-up tax as their estate tax, although numerous states also have an inheritance tax. The estate tax in a majority of these states automatically conformed to changes in the federal estate tax, and therefore the economic effect of the elimination of the state death credit had an impact on revenue from the credit. As a result, many states enacted estate, inheritance and/or succession taxes to make up for the revenue loss due to the elimination of the credit; thus, they “decoupled” from the changes in the federal tax code. However, different states decoupled based upon different pre-EGTRRA applicable exclusion amounts, and different states have different exemption amounts. The elimination of the federal estate tax credit for state death taxes paid, the existing federal estate tax deduction for state death taxes paid, and the “decoupling” by many states of their estate tax from the federal estate tax regime, requires the consideration of the state estate tax planning implications of these changes.

The following states (and the District of Columbia) have a separate estate and/or inheritance tax as of June 14, 2018:

2018 State Death   
 Tax Threshold

* Connecticut (legislation enacted increase the state  
   estate tax exemption to equal the federal estate tax   
   exemption in 2020) (also separate gift tax) $2,600,000
* District of Columbia $11,180,000
* Hawaii $11,180,000
* Illinois $4,000,000
* Iowa (only separate inheritance tax)
* Kentucky (only separate inheritance tax)
* Maine $5,600,000
* Maryland (legislation enacted to increase the state  
   estate tax exemption to equal the federal estate tax   
   exemption in 2019) (also separate inheritance tax) $4,000,000
* Massachusetts $1,000,000
* Minnesota (legislation enacted to gradually increase   
   the exemption until it reaches $3,000,000 in 2020) $2,400,000
* Nebraska (only County inheritance tax)
* New Jersey (only separate inheritance tax)
* New York (legislation enacted to increase the state   
   estate tax exemption to $5,000,000 indexed for inflation   
   in 2019) $5,250,000
* Oregon $1,000,000
* Pennsylvania (only separate inheritance tax)
* Rhode Island $1,537,656 (indexed for  
   inflation at $1.5 million  
   threshold)
* Vermont $2,750,000
* Washington State $2,193,000 (indexed for   
   inflation at $2 million  
   threshold)

A discussion of actions taken by certain of these states is contained below in this Section.

### New York

In the instance where a state statute does not automatically follow changes made to the federal estate tax, such as the New York State Tax Law, its residents may find themselves with a larger estate tax burden.

As of April 1, 2014, New York increased in stages the amount of a decedent’s taxable estate that can be exempt from New York estate tax from $1,000,000 to an amount that from and after January 1, 2019 will be equal to the $5,000,000 federal basic exclusion amount pursuant to the 2012 Tax Act, adjusted for inflation, not the $10,000,000 basic exclusion amount pursuant to the 2017 Tax Act. For New York decedents dying on or after April 1, 2016 and on or before March 31, 2017, $4,187,500 may be exempt from New York estate tax. For New York decedents dying on or after April 1, 2017 and on or before December 31, 2018, $5,250,000 may be exempt from New York estate tax. For a New York decedent who dies on or after January 1, 2017 and on or before March 31, 2017 with a full federal credit shelter bequest of $5,490,000, the decedent’s estate will be required to pay New York estate taxes of $449,600, even though the estate would not have to pay any federal estate taxes. For a New York decedent who dies on or after April 1, 2017 and on or before December 31, 2017 with a full federal credit shelter bequest of $5,490,000, the decedent’s estate will be required to pay New York estate taxes of $435,832, even though the estate would not have to pay any federal estate taxes. For a New York decedent who dies on or after January 1, 2018 and on or before December 31, 2018 with a full federal credit shelter bequest of $11,180,000, the decedent’s estate will be required to pay New York estate taxes of $1,255,600, even though the estate would not have to pay any federal estate taxes. Since the New York estate tax is deductible for federal estate tax purposes, the effective combined federal and New York estate tax rate for such decedents is the sum of the federal estate tax rate of 40%, plus the effective New York estate tax rate of 9.6% (i.e., 60% of the New York estate tax rate of 16%), or 49.6%. After this change is fully phased in, a credit shelter disposition upon the death of the first spouse to die of the New York estate tax basic exclusion amount (which will be the same as the federal estate tax basic exclusion amount) will not result in any New York (or federal) estate tax, as the New York taxable estate would not be more than the New York estate tax basic exclusion amount.

Possible Planning Technique: If the New York estate tax is paid from the credit shelter disposition, the amount of the New York estate tax imposed on the estate as described in the preceding paragraph will apply. However, paying the New York estate tax from the credit shelter disposition will reduce the net after-tax amount of that disposition, and correspondingly increase the amount of the marital deduction disposition, causing an increase in the amount of the federal estate tax payable on the death of the second spouse to die. Instead, practitioners should consider having the New York estate tax payable from the marital deduction disposition (which will not cause a federal estate tax to be payable, since the New York estate tax is deductible for federal estate tax purposes), in order to maximize the amount of the credit shelter disposition and avoid such increase in the amount of the federal estate tax payable on the death of the second spouse to die. Note, however, that paying the New York estate tax from the marital deduction disposition will cause the amount of the New York estate tax to increase from $444,800 to $505,454 for decedents dying on or after April 1, 2016 and on or before December 31, 2016, from $449,600 to $510,909 for decedents dying on or after January 1, 2017 and on or before March 31, 2017, from $435,832 to $510,909 for decedents dying on or after April 1, 2017 and on or before December 31, 2017, and from $1,255,600 to $1,494,762 for decedents dying on or after January 1, 2018 and on or before December 31, 2018.

Another Possible Planning Technique: Prior to April 1, 2014, New York State allowed a credit against the amount of New York State estate taxes equal to the maximum amount of state death taxes that was allowable as a credit for federal estate tax purposes (determined pursuant to the federal estate tax regime that allowed such credit before such credit was repealed in favor of a federal estate tax deduction). As a result of the April 1, 2014 New York estate tax revision, the New York estate tax credit is allowed when a New York taxable estate is not greater than 105% of the basic exclusion amount. The amount of the credit cannot exceed the tax imposed. The New York credit is phased out as a New York taxable estate approaches 105% of the basic exclusion amount. As a result of the manner in which such credit is computed, a New York taxable estate that is more than the basic exclusion amount but not more than 105% of such amount may have a reduction in the amount of such credit that will result in an additional amount of New York estate tax payable that exceeds the amount by which the taxable estate exceeds the basic exclusion amount. For example, a New York taxable estate that exceeds the basic exclusion amount by $10,000 could result in additional New York estate taxes payable of $24,400. In such case, a charitable bequest of such excess amount (i.e., $10,000 in such example) would avoid the imposition of the additional New York estate taxes.

### Connecticut

On October 31, 2017, as part of the budget legislation, Connecticut increased the individual exemption for Connecticut estate taxes and gift taxes. The exemption for 2017 remained at $2,000,000, the exemption for 2018 is increased to $2,600,000, the exemption for 2019 is increased to $3,600,000, and the exemption after 2019 is linked to the federal basic exclusion amount. In addition, the legislation provides that the maximum amount of combined estate taxes and gift taxes that an individual and/or his or her estate may be liable to pay was reduced from $20,000,000 to $15,000,00, effective January 1, 2019. The new cap will generally apply to estates exceeding $130,000,000.

As a result, the estate of a person who dies in 2018 a resident of Connecticut with a taxable estate of $11,180,000 would be required to pay Connecticut estate taxes of $864,600, even though such estate would not be required to pay any federal estate taxes.

On June 30, 2015 Connecticut enacted a cap on probate fees for the estates of decedents who die on or after July 1, 2016. At the top bracket, for estates of $8,877,000 and more, the probate fee will be $40,000.

### New Jersey

On October 14, 2016, New Jersey repealed its estate tax. Under the new legislation, the New Jersey Estate Tax exemption increased to $2,000,000 on January 1, 2017, and the estate tax will be eliminated entirely on January 1, 2018. Prior to the repeal, the New Jersey estate tax exemption was the lowest in the country at only $675,000. Thus, the estate of a person who dies in 2017 a resident of New Jersey with a taxable estate of $5,490,000 would be required to pay New Jersey estate taxes of $312,500, even though such estate would not be required to pay any federal estate taxes. Note that the New Jersey inheritance tax was not repealed and therefore is still in effect. The New Jersey inheritance tax is based on a tiered class of beneficiaries, with a tax applying primarily to transfers to siblings, sons-in law and daughters-in-law, civil union partners before February 19, 2007 or domestic partners before July 10, 2004, friends and other distant beneficiaries. Transfers to spouses, descendants, parents, grandparents, civil union partners after February 19, 2007 or domestic partners after July 10, 2004 and charities are exempt. The maximum inheritance tax rate is 16%.

In Estate of Stevenson v. Director, 008300-07 (N.J. Tax Court, 2008), the New Jersey Tax Court held that when calculating the New Jersey estate tax where a marital disposition was burdened with estate taxes, creating an interrelated computation, the marital deduction must be reduced not only by the actual New Jersey estate tax, but also by the hypothetical federal estate tax that would have been payable if the decedent had died in 2001.

### Pennsylvania

Pennsylvania does not have an estate tax for decedents who die after December 31, 2004, due to the elimination of the credit against federal estate taxes for state death taxes paid. However, Pennsylvania still has an inheritance tax, which is independent of the federal state death tax credit and the phase-out of that credit.

### Florida

In certain states, there are additional barriers to decoupling. For example, in Florida, a constitutional provision restricting the amount of estate tax levied would likely need to be altered. Therefore, since the complete phase-out of the state death tax credit in 2005, Florida has not been able to collect any estate tax from its residents.

Attached hereto as Exhibit “B” is a chart showing a comparison of the state estate taxes after the 2017 Tax Act of New York, New Jersey, Florida and Connecticut.

### Delaware

Delaware reinstated its estate tax for decedents dying after June 30, 2009. The amount of the estate tax is equal to the credit against federal estate taxes for state death taxes paid by the estate, as such credit was in effect as of January 1, 2001. However, on July 2, 2017 Delaware enacted legislation eliminating the Delaware estate tax on the estate of any person who dies after December 31, 2017.

### Other States

Attached hereto as Exhibit “C” is a chart showing the effect as of June 14, 2018 of EGTRRA on the “pick-up” tax of each state and the status as of that date of any death tax legislation in each state.

### State QTIP Elections

In states which have decoupled and which have a separate qualified terminable interest property (“QTIP”) election for state estate tax purposes, practitioners should consider drafting testamentary documents with a separate QTIP trust for that election. As of this writing, Connecticut (only if no federal QTIP election is made), Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Maine, New Jersey (only if a federal estate tax return is not required to be filed), Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee and Washington have such an election. On July 29, 2011 the New York State Department of Taxation and Finance issued TSB-M-11(9)M stating that if a federal estate tax return is filed solely to elect portability, any QTIP election that is made on such federal tax return must also be made for New York estate tax purposes. If a QTIP election is not made on such federal return, it may not be made for New York estate tax purposes. However, a New York state only QTIP election is permitted if no federal estate tax return is filed. With regard to Connecticut, the Department of Revenue Services, by special notice, has taken the position that if the federal QTIP election is made, a state election must also be made for the same amount, although this is not in accord with the underlying statute. If no federal election is made, a state-only QTIP election may be made. With regard to New Jersey, for years prior to the repeal of the New Jersey estate tax, NJAC 26:18-3A.8(d) provides that the New Jersey estate tax return must be consistent with the federal return. Accordingly, if a federal QTIP election is made, it must also be made for New Jersey in the same amount. However, if a federal QTIP election would not reduce the federal estate tax liability, such an election will not be given effect for New Jersey estate tax purposes.

Both New York and New Jersey take the position that, even if a federal estate tax return is filed solely for the purpose of electing portability, the same QTIP election that is made on such federal return must also be made for state estate tax purposes. If a QTIP election is not made on the federal estate tax return, then it may not be made for state estate tax purposes. Thus, the executors in such states may have to choose between a state QTIP election and portability.

# OTHER IMPORTANT FEDERAL LEGISLATION

## Medicare Tax on Estates, Trusts and Individuals

The Health Care and Education Reconciliation Act of 2010 enacted new Code Section 1411, which imposes a 3.8% unearned income Medicare contribution tax, starting in 2013. As to estates and trusts, the tax is imposed on the lesser of (1) undistributed net investment income for the tax year, or (2) any excess of adjusted gross income over the dollar amount at which the highest tax bracket for estates and trusts begins for the applicable tax year, which for 2018 is $12,500, subject to inflation adjustments each year. Trusts all of the unexpired interests in which are devoted to charitable purposes are exempt from this tax. As to individuals, the tax is imposed on the lesser of (1) the taxpayer’s net investment income for the tax year, or (2) any excess of the taxpayer’s modified adjusted gross income for the tax year, over $250,000, in the case of a taxpayer filing a joint return, or over $200,000, in the case of an unmarried taxpayer.

Furthermore, the 2018 Medicare tax rate is 1.45% each for the employee and employer.

On November 30, 2012 the Service issued proposed regulations regarding such tax (REG-130507-11). The proposed regulations provide that any net investment income recognized by a charitable remainder trust before the end of 2012 is not included in such trust’s accumulated net investment income when a subsequent distribution is made after 2012. Pursuant to Proposed Reg. Section 1.1411-3, the 3.8% tax on the net investment income of an individual, estate or trust pursuant to Code Section 1411 is imposed on the lesser of (1) the taxpayer’s undistributed net income, or (2) the excess, if any, of its adjusted gross income over the threshold for the highest tax bracket under Code Section 1(e), which is $12,500 in 2018 for trusts.

On November 29, 2013 the Service issued final regulations on the net investment income tax (T.D. 9645), which generally contain many of the provisions of the proposed regulations. Under the final regulations, pooled income funds are not exempt from such tax, whereas wholly charitable trusts and wholly charitable estates are exempt from such tax. However, the regulations also state that the issue of what constitutes material participation for trusts and estates should be determined in guidance under Code Section 469, thereby leaving this issue unsettled.

On November 27, 2013 the Service updated its Questions and Answers regarding the 3.8% net investment income tax, that came into effect on January 1, 2013 and is imposed under Code Section 1411. Estates and trusts are subject to such tax if (1) they have undistributed net investment income, and (2) their adjusted gross income is greater than the dollar amount at which the highest income tax bracket for trusts and estates begins (which is $12,500 in 2017). Such tax is equal to 3.8% of the lesser of (1) the undistributed net investment income for the tax year, or (2) the excess of the gross income over the dollar amount at which the highest income tax bracket for trusts and estates begins. Such tax applies only to trusts that are subject to the fiduciary income tax under Part I of Subchapter J of Chapter 1 of Subtitle A of the Code. Trusts that are generally exempt from income tax, such as charitable trusts and qualified retirement plan trusts, are exempt from this tax. In addition, there are special rules for the calculation of the net investment income with respect to charitable remainder trusts and electing small business trusts that own interests in S corporations. Net investment income includes the various types of income and gain that are generated by investment activities, such as interest, dividends, capital gains, rental and royalty income. Individuals, estates and trusts will use Form 8960 to compute their net investment income tax and attach such form to their federal income tax returns.

At an American Law Institute Continuing Legal Education Program on February 18, 2014, an attorney with the Service’s Office of Chief Counsel stated that if a trust distributes its net investment income to a beneficiary, the income will retain its character as investment income in the beneficiary’s hands. In addition, such person stated that if there is an active business at the trust level, the business remains active for purposes of the beneficiary under the final regulations, even though there may not be a clear rule as to whether trust income retains its character in the beneficiary’s hands for purposes of Code Section 469. Further, such person stated that grantor trusts are disregarded for purposes of the net investment income tax, and the trust’s activity therefore is treated as though the grantor owned the activity directly.

In Frank Aragona Trust v. Commissioner, 142 T.C. No. 9 (2014), the Court held that the services performed by the trustees of a trust with respect to the trust’s real estate interests can be considered personal services performed by the trust, so the trust could be treated as materially participating in its real estate operations. On June 17, 2014 the Service asked the Tax Court to extend the deadline for filing computations of tax liability from June 16, 2014 to July 30, 2014.

On September 18, 2015 Catherine V. Hughes, a Treasury Department estate and gift tax attorney-advisor, stated that the Service is preparing guidance on what would constitute material participation for estates and trusts in which a fiduciary engages in a trade or business on behalf of an estate or trust, for purposes of determining whether or not such participation would be active, rather than passive, under Code Section 469.[[5]](#footnote-6)

As the tax applies with respect to tax years beginning after December 31, 2012, the estate of a decedent who died in 2012 and that selected a fiscal year ending on or before November 30, 2012 would avoid such tax on the estate’s net investment income for such fiscal year and also for the next following fiscal year.

## Patient Protection and Affordable Care Act

As stated above, the 2017 Tax Act in effect repealed the “individual mandate” requirements of the Patient Protection and Affordable Care Act, which had become effective on January 1, 2014.

## Death Master File

On December 26, 2013 the Continuing Appropriations Resolution, 2014, was enacted. The resolution includes a provision that limits public access to death records held by the Social Security Administration, known as the Death Master File, to certified entities such as life insurers and pension funds that use the data to combat fraud and administer benefits. The limits apply for three years after an individual’s death.

## Surface Transportation and Veterans Health Care Choice Improvement Act of 2015

The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (also known as the Highway Funding Bill) was enacted on July 31, 2015. This statute includes the following provisions:

* The income tax cost basis of any property acquired from a decedent within the meaning of Code Section 1014 shall not exceed the estate tax value of such property. However, this requirement only applies to property whose inclusion in the decedent’s estate increased the estate tax liability of such estate.
* The executor of an estate who is required to file a federal estate tax return, within the earlier of 30 days after the due date of such return or 30 days after such return is filed, must send a statement to the Service and to each person acquiring any interest in property that is included in the decedent’s gross estate for federal estate tax purposes identifying the value of such interest as reported on such estate tax return.
* If there is an adjustment to the value of such interest as reported on the estate tax return, the executor, within 30 days after such adjustment is made, must send a supplemental statement to the Service and to such person advising as to such adjustment.
* The penalty under Code Section 6721 for the failure to comply with a specified information reporting requirement applies to the failure to provide such statements.
* Generally, the accuracy-related penalty for an underpayment of tax pursuant to Code Section 6662 applies if the income tax cost basis of property claimed on a return exceeds the estate tax value of such property.
* The above provisions apply to property with respect to which a federal estate tax return is filed after July 31, 2015.
* The six-year statute of limitations in the case of a substantial omission under Code Section 6501 applies to an understatement of gross income by reason of an overstatement of the income tax cost basis of property. This provision is effective with respect to tax returns filed after July 31, 2015, and also with respect to tax returns filed on or before such date if the period for the assessment of taxes under Code Section 6501 has not expired as of such date.

Effective for tax returns for tax years beginning after December 31, 2015, such Act directs the Service to amend its regulations to provide that the maximum extension for the income tax returns of trusts filing Form 1041 will be a 5-1/2 month period ending on September 30th for calendar year taxpayers (currently a 5-month period) and that returns of split-interest trusts required to file Form 5227 will be an automatic 6-month period beginning on the due date for filing the return, without regard to any extensions (currently a 3-month period).

On August 21, 2015 the Service released Notice 2015-57, which provides that the due date for such statements that are required to be filed with the Service and furnished to a beneficiary before February 29, 2016 is delayed to February 29, 2016, to allow the Service to issue guidance implementing such reporting requirements. In addition, the Notice states that executors and other persons required to file or furnish such statements should not do so until the issuance of forms or further guidance by the Service addressing such requirements. This Notice is effective on August 21, 2015, and applies to executors and other persons who are required to file a federal estate tax return if such return is filed after July 31, 2015.

On August 28, 2015 the Service released a draft of the 2015 U.S. Income Tax Return for Estates and Trusts (Form 1041). The draft instructions for Schedule D of such return, which is used to report capital gains and losses, includes a reference to these new basis consistency and reporting requirements, and states that if property reported on the Schedule increases the estate tax liability, the beneficiary must use a basis that is consistent with the estate tax value of the property to determine gain or loss when the property is sold.

On December 19, 2015 the Service released a draft of Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent.

On February 11, 2016, the Service issued Notice 2016-19 stating that those required to file a statement with the Service or furnish a statement to a beneficiary need not do so until March 31, 2016.

On March 23, 2016 the Service issued Notice 2016-27 to extend the due date for executors and other persons required to file Form 8971 to June 30, 2016.

On March 2, 2016, the Service issued Proposed Regulations (Reg-127923-15) and temporary rules (T.D. 9757) to clarify that the property that must be reported to beneficiaries excludes cash, income in respect of a decedent, tangible personal property for which an appraisal is not required (personal property under $3,000), and property sold or disposed of by the estate in a transaction in which capital gain or loss is not recognized. In addition, the Proposed Regulations stated that estate tax returns filed solely to elect portability are excluded from the basis consistency requirements. On November 16, 2016, at the American Institute of CPAs Fall Tax Division Meeting, Catherine Hughes, a Treasury Department estate and gift tax attorney-advisor, said the Treasury Department is working to complete the final regulations by the end of January. Ms. Hughes also said that the Treasury is looking at the impact of whether or not a beneficiary should get an adjustment in date-of-death basis for assets that are not included in the decedent’s gross estate for tax purposes.

On December 1, 2016, the Service issued final regulations (T.D. 9797) solely to confirm Notice 2016-27, which extended the due date to file Form 8971 to June 30, 2016. The remainder of the proposed regulations, which have not yet been finalized, are on the Service’s priority guidance plan for 2016-2017. However, on March 3, 2017 at the Federal Bar Association Tax Law Conference, Theresa M. Melchiorre, attorney and acting assistant to the branch chief for Branch 5 in the Internal Revenue Service Office of Associate Chief Counsel (Passthroughs and Special Industries), said that the proposed rules will not be made final until vacancies in the Service are filled because they currently do not have the people in place to actually issue the final regulations at this point.[[6]](#footnote-7)

On October 13, 2016, the Service released revised Instructions for Form 8971. The revised Instructions now allow for the listing of bulk assets to be attached to Schedule A in lieu of a detailed description of each item that has been acquired (or is expected to be acquired) by a beneficiary.

The current Unified Agenda of Regulatory and Deregulatory Actions states that regulations on consistent basis reporting for estates under Code Sections 1014(f) and 6035 are scheduled to be released by the end of 2017. However, such regulations have not yet been issued.

On March 9, 2018 Melissa C. Liquerman of the Service announced that the Service is reviewing comments on these proposed basis consistency regulations and is considering ways to reduce some of the burdens imposed by such proposed regulations that have been identified by commentators. In particular, the Service is reviewing the “zero basis rule”, which provides that if the executor of an estate does not report an after-discovered or omitted asset on an estate tax return that is filed prior to the expiration of the statute of limitations, the income tax basis of such asset to the estate’s beneficiary is zero. In addition, the Service is reviewing the 30-day rule for reporting property to the Service, as well as the “subsequent transfer rule”, which requires that whenever an estate beneficiary disposes of an asset in a lifetime transfer, other than by a sale, to a related transferee, the transferor is required to file a supplemental statement with the Service and to provide this statement to such transferee.

## Achieving a Better Life Experience (“ABLE”) Act

On December 19, 2014 the Achieving a Better Life Experience (“ABLE”) Act was enacted. The ABLE Act added new Code Section 529A that provides rules under which states may establish and maintain a new type of tax-favored savings program through which contributions may be made to the accounts of eligible disabled individuals to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested federal programs.

On June 22, 2015 the Service issued proposed regulations for ABLE accounts under Code Section 529A. In summary, these regulations provide that:

* An ABLE account can be established only for a designated beneficiary.
* A designated beneficiary can have only one ABLE account.
* A person is an eligible individual if he or she is entitled to benefits based on blindness or disability under Title II or XVI of the Social Security Act and the blindness or disability occurred before the date on which the individual attained age 26, or a disability certification meeting specified requirements is filed with the Service. For this purpose, a disability certification must certify that the designated beneficiary (1) has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which (a) can be expected to result in death or (b) has lasted or can be expected to last for a continuous period of not less than 12 months; or (2) is blind and that such blindness or disability occurred before the date on which the individual attained age 26.
* Generally, all contributions to an ABLE account must be made in cash, and total contributions to an ABLE account for a designated beneficiary in a taxable year must not exceed the amount of the annual per-donee gift tax exclusion under Code Section 2503(b) in effect for that calendar year (currently $14,000).
* Contributions to an ABLE account may be made by any individual, trust, estate, partnership, association, company or corporation.
* Contributions to an ABLE account made by a person other than the designated beneficiary are treated as non-taxable gifts to the designated beneficiary.
* A qualified ABLE program generally is exempt from income taxation. However, such program is subject to the taxes imposed by Code Section 511 relating to the imposition of tax on unrelated business taxable income.
* Distributions from an ABLE account that do not exceed the designated beneficiary’s “qualified disability expenses” are not includable in such person’s gross income. Otherwise, the earnings portion of the distributions is includable in such person’s gross income. In addition, an additional tax of 10% on the amount so includable is imposed.
* Qualified disability expenses are expenses that relate to the designated beneficiary’s blindness or disability and are for the benefit for such person in maintaining or improving his or her health, independence or quality of life.
* Generally, a designated beneficiary’s ABLE account is disregarded for purposes of determining such person’s eligibility for an amount of any assistance or benefit provided under certain means-tested federal programs.
* The designated beneficiary is limited to no more than two opportunities in any calendar year to provide investment direction for his or her ABLE account.

On September 18, 2015 Catherine V. Hughes, a Treasury Department estate and gift tax attorney-advisor, stated that the Service is preparing guidance under the ABLE Act and that the Service expects to issue such guidance by early 2016.

On November 20, 2015 the Service issued Notice 2015-81, announcing three changes to its proposed regulations under the ABLE Act. The Notice states that ABLE programs will not need to include safeguards to determine which distributions are for qualified disability expenses, will not be required to identify distributions that will be used for housing expenses, and will not need to request the taxpayer identification number of contributors to an ABLE account, and that designated beneficiaries can open an ABLE account by certifying, under penalties of perjury, that they meet the qualification standards, including their receipt of a signed physician’s diagnosis, if necessary, and that they will retain that diagnosis and provide it to the program or the Service on request.

The 2017 Tax Act permits amounts from qualified tuition programs, commonly known as “529 accounts”, to be rolled over to an ABLE account without penalty, if the ABLE account is owned by the designated beneficiary of such 529 account, or by a member of such designated beneficiary’s family. Such rolled-over amounts count towards the overall limitation on amounts that can be contributed to an ABLE account within a taxable year and the amount rolled-over that is in excess of this limitation is includable in the distributee’s gross income in the manner provided by Code Section 72. In addition, the 2017 Tax Act temporarily increases the contribution limitation to ABLE accounts with respect to contributions made by the designated beneficiary of such account. After the overall limitation on contributions is reached, an ABLE account’s designated beneficiary may contribute an additional amount, up to the lesser of (a) the federal poverty line for a one-person household, or (b) the individual’s compensation for the tax year.

## Bipartisan Budget Act of 2015

The Bipartisan Budget Act of 2015 (“BBA”), which was enacted on November 2, 2015, includes provisions regarding the tax audits of, and the payment of tax deficiencies by, partnerships (including limited liability companies that are taxable as partnerships), which generally are not effective until 2018 (unless a partnership elects to apply such rules sooner), under which audits of a partnership are generally conducted at the partnership level, and the partnership, rather than its partners, is liable for any deficiency based on an assumed tax rate. As a result, the partners in the year in which the adjustment is made will bear the cost, rather than the persons who are partners in the year that was audited, except that a partnership that has 100 or fewer partners generally may elect out of such new rules.

In addition, Social Security benefit recipients will no longer be able to take advantage of the “file and suspend” strategy (which allowed married couples to claim benefits prior to age 70 without a reduction in future benefits), if they have not filed for Social Security benefits by April 30, 2016. The BBA also eliminated the option to file a restricted application for anyone who has not reached aged 62 by December 31, 2015. Prior to the enactment of BBA, filing for a restricted application allowed someone who applied for Social Security benefits before his or her full retirement age to claim his or her own retirement benefit or a spousal benefit, whichever is higher.

## Protecting Americans From Tax Hikes Act of 2015

The Protecting Americans from Tax Hikes Act of 2015, which was enacted December 18, 2015, includes provisions extending for 2015 and making permanent itemized income tax deductions for state and local sales taxes, and tax-free distributions from IRAs for charitable purposes. The Act also amends Code Section 2501(a) to provide that transfers to Code Sections 501(c)(4), (5), or (6) organizations that are exempt from tax under Code Section 501(a) for the use of the organization are not subject to gift tax, and amends Code Section 664(e) to clarify the valuation rule for early terminations of certain charitable remainder unitrusts.

## Consolidated Appropriations Act of 2016

The Consolidated Appropriations Act (“CAA”), which was enacted December 18, 2015, made several tax provisions permanent including: (i) the IRA charitable rollover (the IRA charitable rollover allows taxpayers to transfer up to $100,000 per year from an IRA directly to a charity); (ii) the election to deduct state and local sale taxes in lieu of state and local income taxes; (iii) the basis adjustment provision for an S corporation making a charitable contribution of property that allows shareholders to reduce the tax basis of their shares by the amount of the S corporation’s tax basis of the donated asset rather than by its fair market value; (iv) the exclusion of 100% of gain recognized from the sale of certain small business stock; and (v) the reduced five year period that an S corporation that was previously a C corporation is required to pay tax for certain dispositions of assets that appreciated in the C corporation by the time the S corporation status was effective.

# IMPORTANT IRS REGULATIONS, ANNOUNCEMENTS AND COURT DECISIONS

## 2018 Inflation Adjustments

### Adjustments Announced After the 2017 Tax Act

In Rev. Proc. 2018-18, the Service announced that the inflation-adjusted basic exclusion amount for decedents dying in 2018 is $11,180,000, increased from $5,490,000 in 2017, for determining the amount of the unified credit against the estate tax. This increased inflation-adjustment amount is also applicable for determining the amount of the unified credit against the gift tax for gifts made in 2018, and also is the amount of the GST tax exemption for 2018.

In addition, Rev. Proc. 2018-18 announced the following 2018 inflation-adjustment amounts for income tax purposes: The maximum income tax brackets starts at $600,000 for married individuals filing jointly and surviving spouses, $500,000 for heads of households, $500,000 for other unmarried individuals, $300,000 for married individuals filing separately, and $12,500 for estates and non-grantor trusts; the income tax standard deduction is $24,000 for married individuals filing jointly and surviving spouses, $18,000 for heads of households, $12,000 for other unmarried individuals, and $12,000 for married individuals filing separately; the income tax personal exemption is -0-; the alternative minimum tax exemption is $109,400 for married individuals filing jointly and surviving spouses, $70,300 for other unmarried individuals, $54,700 for married individuals filing separately, and $24,600 for estates and non-grantor trusts; and the personal exemption amount is -0-.

### Adjustments Announced Prior to the 2017 Tax Act

In Rev. Proc. 2017-58, the Service released inflation-adjusted numbers as of January 1, 2018 as follows:

The inflation-adjusted annual gift tax exclusion is $15,000, increased from $14,000 in 2017; the annual gift tax exclusion for non-citizen spouses is $152,000, increased from $149,000 in 2017; the basic exclusion amount is $5,600,000, increased from $5,490,000 in 2017, for determining the amount of the unified credit against the estate tax and gift tax; the amount used to calculate the 2% portion for purposes of Code Section 6166 is $1,520,000, increased from $1,490,000 in 2017; for executors electing to use the special use valuation method under Code Section 2032A for qualified real property, the aggregate decrease in the value of qualified real property resulting from electing to use Code Section 2032A that is taken into account for purposes of the estate tax may not exceed $1,140,000, increased from $1,120,000 in 2017.

Beginning in 2004, the GST tax exemption became tied to the applicable exclusion amount under Code Section 2010(c). Pursuant to the 2010 Tax Act, this exemption was increased to $5,000,000, starting in 2010. Starting in 2012, this exemption is indexed for inflation from 2010, and the inflation-adjusted amount of this exemption is $5,600,000 in 2018.

In addition, Rev. Proc. 2017-58 announced the following 2018 inflation-adjusted amounts for income tax purposes: the maximum income tax bracket starts at $480,050 for married individuals filing jointly and surviving spouses, $453,350 for heads of households, $426,700 for other unmarried individuals, $240,025 for married individuals filing separately, and $12,700 for estates and non-grantor trusts; the income tax standard deduction is $13,000 for married individuals filing jointly and surviving spouses, $9,550 for heads of households, $6,500 for other unmarried individuals, and $6,500 for married individuals filing separately; the income tax personal and dependency exemptions are $4,150; the alternative minimum tax exemption is $86,200 for married individuals filing jointly and surviving spouses, $55,400 for other unmarried individuals, $43,100 for married individuals filing separately, and $24,600 for estates and trusts; and the personal exemption phase-out (PEP) begins at adjusted gross income of $320,000 for married individuals filing jointly, at $293,350 for heads of households, at $266,700 for other unmarried individuals, and at $160,000 for married individuals filing separately.

The Service also issued Notice 2017-64, which announced cost-of-living adjustments affecting dollar limitations for pension plans and other retirement-related items for tax year 2018. The adjustments include the following:

* The elective deferral (contribution) limit for employees who participate in 401(k), 403(b), most 457 plans, and the federal government’s Thrift Savings Plan is $18,500.
* The catch-up contribution limit for employees aged 50 and over who participate in 401(k), 403(b), most 457 plans, and the federal government’s Thrift Savings Plan remains at $6,000.
* The limit on annual contributions to an Individual Retirement Arrangement (IRA) remains unchanged at $5,500. The additional catch-up contribution limit for individuals aged 50 and over is not subject to an annual cost-of-living adjustment and remains $1,000.
* The deduction for taxpayers making contributions to a traditional IRA is phased out for singles and heads of household who are covered by a workplace retirement plan and have modified adjusted gross incomes (AGI) between $63,000 and $73,000, increased from $62,000 and $72,000 in 2017. For married couples filing jointly, in which the spouse who makes the IRA contribution is covered by a workplace retirement plan, the income phase-out range is $101,000 to $121,000, increased from $99,000 and $119,000 in 2017. For an IRA contributor who is not covered by a workplace retirement plan and is married to someone who is covered, the deduction is phased out if the couple’s income is between $189,000 and $199,000, increased from $186,000 and $196,000 in 2017. For a married individual filing a separate return who is covered by a workplace retirement plan, the phase-out range is not subject to an annual cost-of-living adjustment and remains $0 to $10,000.
* The AGI phase-out range for taxpayers making contributions to a Roth IRA is $189,000 to $199,000 for married couples filing jointly, increased from $186,000 to $196,000 in 2017. For singles and heads of household, the income phase-out range is $120,000 to $135,000, increased from $118,000 to $133,000 in 2017. For a married individual filing a separate return, the phase-out range is not subject to an annual cost-of-living adjustment and remains $0 to $10,000.

In addition, the Social Security Administration announced that the Social Security wage base for 2018 will increase to $128,400 from $127,200 in 2017.

## Tax Returns

### Form 706-QDT

In August 2014 the Service released the final version of Form 706-QDT, United States Estate Tax Return for Qualified Domestic Trusts, and accompanying instructions. This form is used by the trustee or the designated filer of a Qualified Domestic Trust (“QDOT”) to calculate and report the estate tax due on certain distributions from the QDOT, the value of the property remaining in the QDOT on the date of the surviving spouse’s death, and the principal portion of certain annuity payments. This form is also used to notify the Service that the trust is exempt from future filing because the surviving spouse became a United States citizen and meets the requirements provided in Part II-Elections by the Trustee/Designated Filer, Line 4 Spousal Election of the instructions.

### Estate Tax Returns for Post-2016 Decedents (Form 706)

In August 2017 the Service issued Form 706 to be filed for the estates of decedents dying after December 31, 2016. The Service may issue a new Form 706 (and/or new instructions for such form) for the estates of persons dying after December 31, 2017 to comply with the changes made by the 2017 Tax Act.

The Service released statistics that show over 4,600 taxable estates filed Form 706 for decedents dying in 2013 and approximately 4,100 taxable estates filed Form 706 for decedents dying in 2011. This resulted in $16.6 billion and $10.9 billion respectively, of net estate tax collected by the Service.

### 2016 Gift Tax Returns (Form 709)

In November 2017 the Service issued the final version of Form 709 and its instructions to report gifts made in 2016. The form and instructions reflect Notice 2017-15, which provided a procedure for a decedent or donor to restore the available exclusion amount if that amount had previously been applied to a transfer to a same-sex spouse.

### Generation-Skipping Transfer Tax Forms

On October 11, 2013 the Service released a revised Form 706-GS(D) to report taxable distributions made after December 31, 2010, and a revised Form 706-GS(T) to report taxable terminations that occur after December 31, 2012.

### Instructions for Form 1040-X

On January 7, 2014 the Service issued new instructions for Form 1040-X that includes language on how taxpayers can use such form to amend a return filed before September 16, 2013 to change their filing status to a married filing status.

### Form 8690

On February 26, 2014 the Service issued Form 8960 regarding the 3.8% Medicare Contribution Tax on unearned income for individuals, estates and trusts under Code Section 1411.

### Forms 3520 and 3520-A

On August 17, 2015 the Service released draft Forms 3520 and 3520-A relating to foreign trusts that contain a new checkbox that will allow those entities to inform the Service that they are reporting foreign assets on Form 3520 or Form 3520-A instead of on Form 8938, in order to discourage duplication of reporting on Form 8938.

### Form 1041

On January 11, 2016 the Service released new instructions to Schedule D of Form 1041 for estates required to file an estate tax return after July 31, 2015 pursuant to the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015. Generally, the estate must provide a statement that includes the estate tax value of property reported on the return to both the Service and beneficiaries who receive property from an estate.

### Form 8971

On January 29, 2016, the Service released Form 8971 titled Information Regarding Beneficiaries Acquiring Property From a Decedent, and instructions to Form 8971. The form includes an attached Schedule A, which lists a description of the estate assets and its valuation, to be provided to each beneficiary to inform such beneficiary of the value of property that such beneficiary received from the estate.

### Deadlines and Extensions

Pursuant to the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015: (a) trusts filing Form 1041 will have a maximum extension period of 5-1/2 months, rather than five months, ending on September 30th, for tax years beginning after December 31, 2015; and (b) a split-interest trust can receive an automatic 6-month extension of time to file its information return (Form 5227) for tax years beginning after December 31, 2015.

On August 7, 2017 the Service issued final and temporary regulations (T.D. 9821) regarding revised filing deadlines and extensions for certain tax forms, pursuant to the Surface Transportation Act of 2015 and the Protecting Americans From Tax Hikes Act of 2015. As to corporations, the due date for filing a C corporation income tax return (Form 1120) is changed from the 15th day of the third month after the close of the tax year to the 15th day of the fourth month after the close of the tax year. The automatic extension of time to file a C corporation tax returns is six months, except that for C corporations with tax years that begin before January 1, 2026, the extension is five months if the corporation files for a calendar year, or seven months if the corporation files for a tax year that ends on June 30th. As to partnerships, the due date for filing a partnership income tax return (Form 1065) is changed from the 15th day of the fourth month after the close of the tax year to the 15th day of the third month after the close of the tax year. The automatic extension of time to file a partnership income tax return is six months. As to forms W-2, the due date for filing such forms is January 31st of the calendar year following the calendar year for which the information is being reported. These regulations are generally effective for tax returns filed on or after July 20, 2017.

In Notice 2017-47 the Service announced that it would automatically grant relief from penalties for partnerships that failed to file their tax returns or requests for extension by the March 15, 2017 deadline, but that did so by the prior April 15, 2017 filing deadline.

## Temporary Suspension of New Formal Guidance and Reevaluation of Significant Tax Regulations

On January 30, 2017 President Trump signed Executive Order 13771, which instructs the Treasury Department to reevaluate all significant tax regulations issued on or after January 1, 2016, with the purpose of revising or eliminating those that do not comply with specified policy standards regarding undue compliance costs, complexity or over reaching of the Service’s authority.

The Service announced on February 13, 2017 that it will not release any new

formal guidance, such as revenue rulings and revenue procedures, for the time being as a response to Present Donald J. Trump’s Executive Order on “Reducing Regulation and Controlling Regulatory Costs”.  However, the Service will continue to release routine guidance, such as Code Section 7520 rates.

On April 21, 2017 President Trump signed Executive Order 13789, which directs the Treasury Department to reevaluate all significant tax regulations issued after December 31, 2015, and to revise or eliminate those regulations that involve undue compliance costs, complexity, or over-reaching of the Service’s authority.

On July 7, 2017 the Service issued Notice 2017-38 identifying eight regulations as burdensome in response to such Executive Order. These eight regulatory projects are:

* Proposed regulations (REG-129067-15) under Code Section 103 on the definition of political subdivisions;
* Temporary regulations (T.D. 9770) under Code Section 337(d) on transfers of property to real estate investment trusts and regulated investment companies;
* Final regulations (T.D. 9778) under Code Section 7602 on the participation of a person described in Code Section 6103(n) in a summons interview;
* Proposed regulations (REG-163113-02) under Code Section 2704 on restrictions on the liquidation of an interest for estate, gift, and generation-skipping transfer tax purposes;
* Temporary regulations (T.D. 9788) under Code Section 752 on recourse partnership liabilities;
* Final and temporary regulations (T.D. 9790) under Code Section 385 on the treatment of certain interests in corporations as stock or indebtedness;
* Final regulations (T.D. 9794) under Code Section 987 on income and currency gain or loss with respect to a qualified business unit; and
* Final regulations (T.D. 9803) under Code Section 367 on treatment of transfers of property to foreign corporations.

In this regard, the American Institute of Certified Public Accountants recommended that the Treasury Department review the proposed regulations issued in August 2016 regarding valuation discounts under Code Sections 2701 and 2704, and the proposed regulations issued in March 2016 regarding basis consistency reporting under Code Sections 1014 and 6035.

On July 24, 2017 the Service issued Notice 2017-38, which identified the proposed regulations under Code Section 2704 as unduly burdensome or costly and slated for rescission or modification. On October 20, 2017 the Service formally withdrew such regulations.

In this regard, Treas. Reg. Section 20.2201-1, which relates to estate taxes imposed on certain members of the Armed Forces, is proposed for removal, as it has been rendered inapplicable by the Victims of Terrorism Relief Act of 2001. In addition, Treas. Reg. Section 25.2522(a)-2, which relates to certain gifts made before August 1, 1969 for both charitable and non-charitable purposes, is proposed for removal.

# ESTATE TAX CONSIDERATIONS VS. INCOME TAX CONSIDERATIONS

As noted above, the federal estate tax exclusion amount for the estates of persons dying in 2018 is $11,180,000. Thus, a married couple having combined assets of $22,360,000, with proper planning, will not be required to pay any federal estate taxes. As a result, a very small percentage of the entire population of the country is required to pay federal estate taxes. In addition, the federal estate tax exclusion amount is indexed for inflation from 2010.

Due to the continuously increasing amount of the federal estate tax exclusion, and the corresponding reduction in the number of people whose estates will be required to pay federal estate taxes, consideration must be given to not using estate planning techniques that would cause appreciated assets to be excluded from a person’s gross estate at death, in order to cause such assets to obtain a so-called “stepped up” income tax cost basis at the person’s death, thereby reducing the amount of income taxes that will be payable on the eventual sale of such assets. For example, a lifetime gift of an appreciated asset may cause such asset to be excluded from the donor’s estate tax base at the donor’s death, but the donee’s income tax cost basis for such asset will generally be the same as the donor’s income tax cost basis in that asset. On the other hand, by not making such lifetime gift, such asset will be includable in the donor’s gross estate at his or her death, but the estate and its transferees generally will have an income tax cost basis in such asset equal to the estate tax value of such asset.

Estate planning for persons whose estates will not be subject to the payment of federal estate taxes may still include the use of testamentary trusts for non-tax reasons. In the case of a testamentary trust that receives all or part of the residue of the decedent’s estate, the trust’s income tax cost basis for the assets that it receives from the estate will generally be the same as the estate’s income tax cost basis for such assets. Therefore, it may be important to consider not only the federal income tax regime, but also the state income tax regime, that would be applicable to the sale of those assets by such trusts, in order to compare the possible estate tax savings that would result from making lifetime gifts with the possible income tax savings that would result from not making such gifts. In this regard, on April 21, 2015 the California Franchise Tax Board issued an information letter stating that a trust with one California resident trustee would be required to file a California income tax return and that its income would be subject to California income tax based on the proportion of California resident trustees to California non-resident trustees (other than its California source income, which would all be subject to California income tax).

Attached hereto as Exhibit “D” is a chart entitled “Bases of State Income Taxation of Nongrantor Trusts” and dated February 15, 2018 that describes the manner in which each state in the United States and the District of Columbia would tax such trusts.

In addition, it may also be important to consider any applicable state estate tax or inheritance tax in making this analysis.

# ESTATE PLANNING WITH CHANGING ECONOMIC CONDITIONS

Numerous estate planning techniques involve dividing the ownership of an asset into a current income interest, annuity interest or unitrust interest, on the one hand, and a remainder interest, on the other hand. The Service specifies the interest rates that are used to determine the relative present values of each of these interests. Other estate planning techniques involve the use of loans. Similarly, the Service specifies the minimum interest rate that must be imposed to avoid characterizing a loan as a gift.

Pursuant to Code Section 1274(d)(1), the Service publishes federal interest rates (known as the Applicable Federal Rate, or the “AFR”) each month that are applicable to transfers or other transactions occurring in the following month. This rate is divided into four sub-rates, one for an annual payment period, a second for a semi-annual payment period, a third for a quarter-annual payment period and a fourth for a monthly payment period. For estate planning purposes, the AFR is the minimum interest rate that a lender must charge a borrower to avoid the transaction being characterized as a “gift loan” pursuant to Code Section 7872. Pursuant to Code Section 7520, the value of an annuity, a life interest, a term interest, a remainder interest or a reversionary interest gernerally is determined by using an interest rate that is 120% of the midterm AFR, rounded to the nearest two-tenths of 1%, for the month in which the valuation falls.

As a rule:

* Higher interest rates increase the value of an income interest and decrease the value of a remainder interest.
* Conversely, lower interest rates decrease the value of an income interest and increase the value of a remainder interest.
* Interest rates operate differently with respect to annuity interests than with respect to income interests. Thus, lower interest rates increase the value of an annuity, and higher interest rates decrease the value of an annuity.
* Unitrust interests are not rate-sensitive.
* Thus, the interest rate environment will determine the effectiveness of many estate planning techniques.

Certain estate planning techniques, commonly known as “estate freezes”, attempt to transfer future appreciation with respect to an asset owned by a higher generation person to a lower generation family member free of any transfer taxes, and are most effective in a low or relatively low interest rate environment. The amount of wealth that can be transferred free of transfer taxes is the difference between the AFR or the 7520 rate that is used for the transaction, on the one hand, and the anticipated higher investment performance of the asset loaned or transferred.

One of the simplest estate planning techniques is an intra-family loan in which a higher generation person, such as a parent or grandparent, makes a loan to a lower generation family member, such as a child or a grandchild. As stated above, the loan must bear interest at the AFR to avoid being characterized as a gift instead of a loan. The loan should be fully documented and all of its formalities should be respected. The loan could be structured as a term loan or a demand loan, and could be a self-amortizing term loan or could require interest-only payments with a balloon payment of principal at the end of the loan term.

For example, the mid-term annual AFR for a nine-year loan made in June 2018 was 2.86%. In view of that relatively low interest rate, the borrower should be able to easily achieve investment returns at a much higher rate, and the excess of such investment returns over that AFR would represent a transfer of wealth from the lender to the borrower free of transfer taxes.

It should be noted that the lender would have to report as income for income tax purposes the interest payments that he or she receives with respect to such loan.

A variation on this theme is a loan made by the higher generation person to a grantor trust that he or she creates for the benefit of one or more lower generation family members. Since the trust would be a grantor trust, the lender would be treated for income tax purposes as owning all of the trust’s assets and receiving all of the trust’s income, and one consequence of such grantor trust treatment is that the interest payments by the trust to the lender would not be treated as income for income tax purposes to the lender. However, another consequence of the trust being a grantor trust for income tax purposes is that the lender, rather than the trust or its beneficiaries, would be required to report and pay income tax with respect to any income earned by the trust during the lender’s life. Although at first blush, this might appear to be a negative consequence of this technique; in fact, it is a positive consequence, since the lender, by paying such income taxes, is in effect making a transfer tax-free gift to the trust.

It is noted that practitioners generally believe that in order for the Service to respect the loan to the trust as a bona fide transaction, the lender should first make a gift of “seed” money to the trust in an amount such that the amount of the seed money equals at least 10% of the sum of the seed money plus the amount of the loan. Thus, if a person intends to make a loan of $900,000 to the trust, he or she should first make a gift of $100,000 to the trust. In addition, if the trust is created for the lifetime benefit of a lower generation family member, such as a child, and directs that on the child’s death the remaining balance of the trust is distributable to the child’s then living issue, the lender can allocate a portion of his or her generation-skipping transfer (“GST”) tax exemption to the gift of the seed money, so that the entire value of the trust will be exempt from the imposition of GST taxes.

The estate planning benefits that accrue from a loan to a grantor trust can be enhanced if, instead of having the higher generation family member make a loan to the trust, he or she instead sells an asset to the trust, where the value of the asset that is sold to the trust can be discounted for valuation purposes, and the grantor receives the trust’s promissory note to evidence the purchase price. For example, if the grantor sells a fractional interest or a non-controlling interest in an asset, such as a limited partnership interest in a limited partnership, to the trust, the seller may be able to discount the value of the asset sold below the value of the asset’s pro rata share of the partnership’s underlying assets. As with any sale, the transaction should be fully documented and its formalities should be respected. As with a loan to a grantor trust, the grantor should also make a gift of seed money to the trust. Since the trust is a grantor trust, the grantor will not recognize gain or loss on the sale of the asset to the trust, and he or she will not be required to include interest payments on the promissory note that the trust gives to the grantor in his or her gross income for income tax purposes. Again, as with a loan to a grantor trust, the grantor can allocate his or her GST tax exemption to the gift of the seed money to the trust so that all of the trust’s assets are exempt from the imposition of GST taxes.

A GRAT, which is expressly approved in Code Section 2702, is a transaction in which a grantor transfers property to a grantor trust and retains an annuity interest for a fixed term or for his or her life, in order to attempt to transfer to the trust’s remainder beneficiaries any appreciation in value that exceeds the required annuity payments.

The present value of the grantor’s retained annuity is calculated using the 7520 rate, and the difference between the value of the transferred property and the present value of the annuity constitutes a gift for gift tax purposes. Ordinarily, the amount and term of the grantor’s annuity are set so that the amount of the gift is zero or nearly zero. If the GRAT’s investments outperform the 7520 rate and the grantor survives the term of the annuity, the trust’s remaining assets will pass to the remainder beneficiaries free of any transfer taxes. However, if the grantor dies before the end of the annuity term, all of the trust’s assets are includable in the grantor’s estate for estate tax purposes. It is noted that a grantor cannot allocate his GST tax exemption to a GRAT until after the expiration of his or her annuity term, as the estate tax inclusion period (“ETIP”) rules preclude such an allocation.

A sale to a grantor trust may be a more effective estate planning technique than a GRAT, as (1) the 7520 rate that is used to value the grantor’s retained annuity interest in a GRAT is 120% of the mid-term AFR charged on the promissory note that would be issued in the case of a sale to a grantor trust, (2) a grantor can allocate his GST tax exemption to the gift of seed money that he or she makes to a grantor trust immediately upon the making of such gift, whereas in the case of a GRAT such exemption cannot be allocated until the end of the annuity term, and (3) the use of valuation discounts, in the case of a sale to a grantor trust, enhance the effectiveness of that technique, whereas a valuation discount does not provide any benefit with respect to assets contributed to a GRAT since the grantor’s annuity payments constitute a fixed proportion of the value of the contributed property. On the other hand, as noted above, GRATs are statutorily sanctioned and can be structured to avoid creating a taxable gift, whereas sales to grantor trusts are not statutorily sanctioned and do require taxable gifts of seed money

# DIGITAL ASSETS

## Background

As a result of the advent of the technology age, estate planning documents should expressly provide for the marshaling, access, administration and disposition of a person’s technological assets, which are commonly referred to as “digital assets”.

Digital assets include tangible digital devices, such as a computer, an Ipod, an Ipad and a blackberry; digital information, such as email, which may be stored in a tangible digital device, on a service provider’s platform, or generally on the internet; on-line accounts, including social media accounts, such as Facebook and Twitter; and “clouds”, which generally refer to the storage of digital information on the internet. Estate planning documents, such as a Will and a Power of Attorney, should provide specific authority regarding the digital assets of the decedent or principal. In addition, consideration should be given to the appointment by Will of a “Digital Executor”, who would have the authority to deal with digital assets.

Accessing a person’s digital assets after the person becomes incompetent, or after the person dies, may require applicable passwords. Thus, clients should be encouraged to prepare and maintain a current inventory of digital assets, including applicable passwords, so that such assets can be readily identified and accessed as needed. In addition, digital service providers may have policies and contractual provisions regarding the accessibility of the digital information that they provide. Accordingly, a person’s designated agent pursuant to a Power of Attorney, or the Executor of an estate of a deceased person, may be required to review and comply with such policies and contractual provisions in order to access digital information.

The Federal Stored Communications Act creates privacy rights to protect the contents of certain electronic communications and files from disclosure by certain online user accounts service providers. If the Act applies, the service provider is prohibited from disclosing the contents and files in the online account to the fiduciary and family members of a user unless an exception to the Act applies. If an exception applies, the service provider can voluntarily disclose the contents of the electronic communications and files protected under the Act. One such exception is the consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.

In Ajemian v. Yahoo!, Inc., SJC-12237 (October 16, 2017), the Supreme Judicial Court of the State of Massachusetts held that the personal representative of a deceased individual may grant lawful consent on behalf of the deceased individual, for purposes of the Federal Stored Communications Act. However, the Court also stated that such consent by itself does not require the service provider to divulge the contents of the deceased user’s electronic communications. If state law provides a procedure for fiduciaries to follow in order to request access to or disclosure of online account contents and other digital assets, then such requirement of the Federal Stored Communications Act would be satisfied if such procedure is followed

The Uniform Law Commission (“ULC”) adopted the Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) on July 16, 2014, which gives personal representatives, guardians, agents acting under a power of attorney and trustees the right to obtain user name and password information required to access digital assets of the decedent or principal, unless the decedent or principal has expressly barred fiduciary access. This permitted broad access by fiduciaries, allowing them to “step into the shoes” of the accountholder. UFADAA also provided that Terms of Service Agreements (typically entered into between the service provider and the accountholder at the time the account was opened) that broadly banned fiduciary access were void against public policy. Many service providers lobbied against UFADAA, stating that UFADAA conflicted with federal and state laws and improperly overrode Terms of Service Agreements. In response to UFADAA, service providers (such as Google and Facebook), through a spokesperson organization called NetChoice, proposed much more restrictive legislation called the Privacy Expectation Afterlife and Choices Act (“PEAC”).

Under PEAC, only executors and administrators may access a decedent’s digital accounts with a court order. In addition, the estate must indemnify the service provider for releasing the digital contents. PEAC also stated that even if a court order was obtained, the service provider may decline to disclose the digital content under certain circumstances, including if releasing the information would cause an undue burden on the provider or if the disclosure would violate other applicable law.

After the proposal of PEAC, the ULC adopted the Revised Uniform Fiduciary Access to Digital AssetsAct (“RUFADAA”*)* on July 15, 2015 to try to bridge the gap between UFADAA and PEAC. RUFADAA creates two tiers of digital information: (1) the content, and (2) the catalog. The content of a digital asset would be the digital asset in its entirety. The catalog refers to certain identifiable information used to access a particular digital asset (i.e., the “to” and “from” lines of an email) without disclosing the content. Under RUFADAA, the accountholder must expressly consent to the disclosure of the contents of digital information to fiduciaries in order for fiduciaries to access such information. Fiduciary is defined as personal representatives, guardians, agents acting under a power of attorney, and trustees. Terms of Service Agreements are not automatically void but do not automatically control under RUFADAA. Rather, the fiduciary’s access is first controlled by the accountholder’s directions instructed through utilizing the service provider’s online tool specifically designed to direct the disposal of such digital asset, and if the service provider does not offer such a tool, then the accountholder’s Will, trust, power of attorney or other document for direction controls. RUFADAA also does not require that the estate or principal to indemnify the service provider for releasing such information.

## State Legislation

Currently 38 states have enacted legislation based on RUFADAA. These states include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. It is interesting to note that Virginia adopted legislation in 2015 based on PEAC, but it was repealed in 2017 with the enactment of legislation based on RUFADAA. In addition, the following states and the District of Columbia have introduced bills in the 2018 legislative session to enact legislation based on RUFADAA: District of Columbia, Georgia, Maine, Missouri, New Hampshire, Oklahoma, Pennsylvania and West Virginia.

Other states with digital assets legislation, which is not based on RUFADAA, are Delaware, Oklahoma and Rhode Island. Delaware adopted UFADAA in 2014 before RUFADAA was issued. Oklahoma passed a law in 2010 to allow the executor or administrator of an estate to access any social media accounts or email service accounts of a decedent. Rhode Island passed the Access to Decedents’ Electronic Mail Accounts in 2007, which allows an executor or administrator of an estate access to the email accounts of a decedent.

## Drafting for Digital Assets

Attached hereto as Exhibit “E” are sample Will provisions regarding the appointment of a Digital Executor, the definition of digital assets, and the administration and disposition of such assets in a decedent’s estate, and sample provisions for a Power of Attorney authorizing the principal’s agent to act with respect to the principal’s digital assets.

# FDIC INSURANCE INCREASES

On October 3, 2008, the Federal Deposit Insurance Corporation (“FDIC”) has increased its insurance coverage for deposits from the existing limit of $100,000. The new coverage limitation for single accounts owned by one person is $250,000 per owner; for joint accounts owned by two or more persons is $250,000 for each co-owner; for IRAs and certain other retirement accounts is $250,000 per owner; for revocable trust accounts is $250,000 per owner per beneficiary, up to five beneficiaries; for corporations, partnerships and unincorporated associations is $250,000 per entity; for irrevocable trusts is $250,000 for the non-contingent, ascertainable interest of each trust beneficiary; for employee benefit plan accounts is $250,000 for the non-contingent, ascertainable interest of each plan participant; and for government accounts is $250,000 per official custodian. On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act made permanent the standard maximum deposit insurance amount to $250,000.

# NEW YORK STATUTORY, CASE LAW AND ADMINISTRATIVE DEVELOPMENTS

## Powers of Attorney

On January 27, 2009 Chapter 644 of the New York General Obligations Law, which changes the rules regarding the statutory short form power of attorney, was enacted. The legislation provides a new statutory short form power of attorney, which includes new optional provisions for the designation of a monitor and compensation of the agent. Both the principal and the agent must sign the power of attorney. In addition, the legislation provides that if a principal wants to authorize the agent to make gifts on the principal’s behalf, a new “Statutory Major Gifts Rider” must be completed, signed, acknowledged and witnessed. The legislation is effective September 1, 2009, and powers of attorney executed before that date will continue to be valid.

On August 13, 2010 New York State enacted technical corrections legislation to its powers of attorney statute. The technical corrections legislation is effective on September 12, 2010, applicable retroactively to powers of attorney executed on or after September 1, 2009. Pursuant to the legislation, (a) a revocation of a power of attorney will be valid, even if it is delivered only to the attorney-in-fact but not to a third party, (b) a power of attorney will not automatically revoke previously executed powers of attorney, unless the new power of attorney expressly so provides, (c) an attorney-in-fact having authority to make gifts customarily made by the principal cannot make aggregate gifts of more than $500 per year, unless the power of attorney authorizes more substantial gifts, and (d) forms of powers of attorney other than the statutorily prescribed form may be used.

In 2017 a legislative bill passed the Assembly to reform New York’s Power of Attorney statute by eliminating the Statutory Gifts Rider, allowing for substantially compliant language, providing safe harbors for those who accept a power of attorney in good faith without actual knowledge that the signature is genuine, allowing sanctions against third parties who unreasonably refuse to accept a properly executed power of attorney, and expanding an agent’s power to make gifts in a calendar year that aggregate $5,000 instead of the current amount of $500. The bill was not passed by the Senate, and was reintroduced in the Assembly in the 2018 session.

In Matter of IMRE B. R., N.Y.L.J. September 17, 2013 (Sup. Ct.), the Court compelled a brokerage firm to accept a power of attorney executed on December 18, 2010, where documentation indicated that on January 19, 2011 the principal suffered from moderate to severe dementia, but where there was no medical evidence as to the principal’s state of mind when she signed the power of attorney.

In Perosi v. LiGreci, 98 A.D.3d 230 (2d Dep’t. 2012), where the grantor of a trust executed a statutory short-form power of attorney naming his daughter as his agent and granting her the authority to designate the trustee of any trust, and executed a statutory gift rider giving his daughter the authority to act as grantor and trustee, the Court held that the agent could amend such trust to remove the original trustee and appoint a successor trustee, even though the power of attorney did not specifically authorize the agent to amend the trust, since the agent had the authority to do so as the “alter ego” of the principal.

In In the Matter of the Estate of George J. Ferrara, 7 N.Y. 3d 244 (2006), the New York Court of Appeals held that attorneys-in-fact acting pursuant to a New York statutory short form power of attorney, which had been modified to provide that the attorneys-in-fact could make gifts to themselves without limitation in amount, were nonetheless bound by the requirement in New York General Obligations Law Section 5-1502M that a gift made pursuant to a short form power of attorney must be made only for purposes which an attorney-in-fact ". . . reasonably deems to be in the best interest of the principal . . .", since any additional language inserted in the power of attorney must be consistent with this constructional section of the statute.

In Matter of Mueller, 19 Misc.3d 536, 853 N.Y.S.2d 245 (Surr. Ct. Westchester County 2008), the Westchester County Surrogate rendered a decision regarding whether an exoneration clause in a power of attorney is enforceable. The decedent died intestate in 2002 at the age of 100. She was survived by her nephew as her sole distributee. Seventeen months before her death, the decedent, who was then 98 and living with an aide, executed a power of attorney prepared by her tenant. The power of attorney, given to the tenant, gave broad powers to him, including additional powers which allowed him to make gifts of the decedent's property to himself or to any of his family members, allowed him to transfer the decedent's bank accounts to other accounts in his name or to the name of any member of his family, exonerated him from accounting for his actions and exonerated him from liability to the decedent and/or her heirs. Using the power of attorney, the tenant transferred all of the decedent's bank accounts to himself and/or his mother and used the funds to pay off his credit card bills, buy a computer and, generally, to fund his lifestyle. Additionally, the tenant prepared a life tenancy agreement for himself and his mother, which he executed on behalf of the decedent, whereby he and his mother were granted the right to reside in the decedent's house for the remainder of their lives with the decedent paying all of the bills. On a motion for summary judgment, the Court held that the exoneration clause could not serve as a basis for exculpating the respondent from liability for his conduct. Applying the principles of the New York Estates, Powers & Trusts Law (“EPTL”) Section 11-1.7, and relying on Matter of Ferrara, the Court found that a clause in a power of attorney that seeks to exonerate an attorney-in-fact from any and all liability is void as against New York's public policy. The Court further ruled that fundamental to the fiduciary relationship is a duty to account and that such duty extends to an attorney-in-fact. The Court stated that "[a]bsent enforceability of the duty to account, neither a principal nor the beneficiaries of her estate would be able to protect their interests leaving an abusive attorney-in-fact in a position to act without fear of any adverse consequence."

In Matter of Francis, 2008 WL 586210 (Surr. Ct. Westchester County 2008), Surrogate Scarpino held that an exculpation clause in a power of attorney did not exonerate an attorney-in-fact from the duty to account, noting that the fundamental duty of every fiduciary to act in good faith and with undivided loyalty also applies to an attorney-in-fact.

## Same Sex Couples

### General

On June 24, 2011 New York State enacted the Marriage Equality Act, effective on July 24, 2011, legalizing same-sex marriage.

In 2017 a legislative bill passed the Assembly to conform the EPTL and SCPA to the Marriage Equality Act by removing any gender-specific references to “mothers”, “fathers”, “husbands”, and “wives”, and by inserting in their place gender-neutral references to “parents” and “spouses”. The bill was not passed by the Senate, and was reintroduced in the Assembly in the 2018 session.

In Carlos A. v. Han Ming T., 4526A, App. Div., 1st Dept., (2017), the Court held that New York state’s family law “presumption of legitimacy”, which provides that a child born during a marriage is presumed to be the child of both spouses, applies to a child born to a same-sex married couple.

In Matter of Mauricio Leyton, 4842/13A/B, N.Y.L.J., January 6, 2016, the Supreme Court, Appellate Division, First Department upheld the New York County Surrogate’s Court ruling that the 2002 “commitment ceremony” between Mauricio Leyton and David Hunter could not qualify as a marriage under the EPTL. The couple separated in 2010 but Leyton did not change his 2001 will naming Hunter as executor and 50% beneficiary before his death in 2013. The challenge came under EPTL Section 5-1.4, which provides that a former spouse will be disinherited if the divorce took place after the will was executed. The Court found that even if the couple had entered into a marriage, the EPTL required the couple to obtain a judicial decree declaring an end to their union, which they failed to do.

In Matter of Ranftle, N.Y.L.J., February 25, 2011 (App. Div. 1st Dept., February 24, 2011), the Court held that the State of New York would recognize a same-sex marriage that was performed in Canada for New York probate law purposes, as such marriages do not violate the public policy of the State of New York.

In B.S. v. F.B., 25 Misc.3d 520 (Sup. Ct., Westchester Co. 2009), the New York Supreme Court held that it lacks jurisdiction over a proceeding to “divorce” the same-sex parties to a Vermont civil union, since a civil union is not a marriage, and the Court dismissed the action without prejudice to the plaintiff’s right to file a complaint for the dissolution of the Vermont civil union addressed to the Court’s general equitable jurisdiction.

In Godfrey v. DiNapoli, 22 Misc. 3d 249, 866 NYS 2d 844 (2008), the New York Supreme Court held that the New York State Comptroller acted legally in October 2004 when that office, applying the doctrine of comity, indicated that the State Retirement System would recognize the same sex marriage of a state employee entered into in Canada.

In Will of Alan Zwerling, N.Y.L.J. Sept. 9, 2008 (Queens Co. Surr. Nahman) the Court stated that although the decedent had been legally married in Canada, the “validity of same-sex marriage had not been definitely determined”, and the Court therefore required that the decedent’s parents be cited with notice of the probate proceeding. However, in Matter of the Estate of H. Kenneth Ranftle, N.Y.L.J. Feb. 2, 2009 (N.Y. Co. Surr. Glen), where the decedent similarly had been validly married in Canada in a same-sex marriage, the Court held that the man married to the decedent is the decedent’s surviving spouse and sole distributee and, therefore, that no citation in the probate proceeding need be issued to any other person as a distributee, thereby precluding family members of the decedent from objecting to the validity of the same-sex marriage.

In Beth R. v. Donna M., 19 Misc.3d 724, Sup. Ct., New York Co. 2008, the Supreme Court, New York County held that a marriage in Canada by a lesbian couple which is valid under Canadian law is valid under New York law and the New York courts therefore can hear an action brought by one of the spouses for divorce.

### New York Taxes

On November 17, 2011 a representative of the Department of Taxation and Finance informally stated that same-sex marriages performed in jurisdictions other than New York would be recognized in New York for New York tax purposes, but that domestic partnerships would not qualify for recognition unless they take a form legally recognized as a marriage.

### New York Estate Tax

On July 18, 2013 the New York State Department of Taxation and Finance issued Technical Memorandum TSB-M-13(9)M advising that, in view of the United States Supreme Court decision in United States v. Windsor, same-sex spouses may amend previously filed estate tax returns for spouses who die prior to July 24, 2011, if the statute of limitations to apply for a refund remains open.

On July 29, 2011 the New York State Department of Taxation and Finance issued Technical Memorandum TSB-M-11(8)M advising that, as a result of the legalization of same-sex marriage in the State of New York, the term “spouse” for New York State estate tax and gift tax purposes includes same-sex spouses and different-sex spouses, for the estates of persons dying on or after July 24, 2011. Thus, the estate of a same–sex spouse may claim a marital deduction for New York State estate tax purposes and may also make a QTIP election for New York State estate tax purposes. To do so, the decedent’s estate must file with the New York estate tax return a pro forma federal estate tax return showing the computation of the federal estate tax as though the marital deduction had been allowed for federal estate tax purposes, and a copy of the actual federal estate tax return filed with the Service, if such return is required to be filed. Similar rules apply with respect to the qualified joint interests owned by same-sex spouses and gift splitting between same-sex spouses.

### New York Income Tax

On July 29, 2011 the New York State Department of Taxation and Finance issued Technical Memorandum TSB-M-11(8)C, (8)I, (7)M, (1)MCTMT, (1)R and (12)S providing guidance regarding New York State income taxes of same-sex married couples. The Memorandum provides that same-sex married couples must file New York personal income tax returns using a married filing status (e.g., married filing jointly, or married filing separately), even though they do not use a married filing status for federal income tax purposes. In order to compute their New York income tax, such persons must recompute their federal income tax as if they were married for federal tax purposes. As the legalization of same-sex marriages in the State of New York was effectively on July 24, 2011, same-sex married couples who are married as of December 31, 2011 will be considered as married for the entire year and must file their New York income tax returns using a married filing status starting in tax year 2011. Since the legalization of same-sex marriage is not retroactive, a same-sex married couple who were legally married in another state prior to July 24, 2011 is not treated as married for New York tax purposes until July 24, 2011, and may not use a married filing status prior to tax year 2011.

The Department reiterated this guidance in technical memoranda TSB-M-13(5)I, (10)M (2013), stating that taxpayers amending their returns must report and/or compute any federal information required to be shown on the state return by applying the federal rules in effect for married taxpayers for the same tax year, regardless of whether an amended federal tax return is filed.

## Other New York Estate Tax and GST Tax Changes

On March 31, 2014 New York enacted a major revision of its transfer tax system. Under the new law, the New York estate tax exclusion amount, which formerly was $1,000,000, is increased incrementally until the New York basic exclusion amount is equal to the federal estate tax exemption, as follows:

|  |  |  |
| --- | --- | --- |
| For decedents dying on or after: | And before: | The basic exclusion amount will be: |
|  |  |  |
| April 1, 2014 | April 1, 2015 | $2,062,500 |
| For decedents dying on or after: | And before: | The basic exclusion amount will be: |
| April 1, 2015 | April 1, 2016 | $3,125,000 |
| April 1, 2016 | April 1, 2017 | $4,187,500 |
| April 1, 2017 | Jan. 1, 2019 | $5,250,000 |
| Jan. 1, 2019 |  | Scheduled to equal the federal estate tax exemption as indexed for inflation pursuant to the 2012 Tax Act, not the 2017 Tax Act ($5,600,000 in 2018) |

The tax benefit of this new New York basic exclusion amount is phased out for taxable estates between 100% and 105% of the New York basic exclusion amount. Thus, taxable estates that exceed 105% of the New York exclusion amount, as shown in the following chart, will lose the benefit of the exclusion completely, so the entire taxable estate will be subject to the New York estate tax.

| Period | Basic Exclusion Amount | Full Phase-Out Amount |
| --- | --- | --- |
| 4/1/14 – 3/31/15 | $2,062,500 | $2,165,625 |
| 4/1/15 – 3/31/16 | $3,125,000 | $3,281,250 |
| 4/1/16 – 3/31/17 | $4,187,500 | $4,396,875 |
| 4/1/17 – 12/31/18 | $5,250,000 | $5,512,500 |
| After 12/31/18 | Equal to the federal exemption amount pursuant to the 2012 Tax Act, not the 2017 Tax Act (currently $5,600,000 and indexed for inflation) | 105% of the federal exemption amount |

The New York estate tax is imposed at graduated rates, with a minimum tax rate of 3.06% and a maximum tax rate of 16%, which is applicable to taxable estates of more than $10,100,000.

Attached hereto as Exhibit “F” is a chart showing the amount of New York State estate tax that is payable on various amounts of a taxable estate during the phase-in period of the new tax law.

New York does not have a gift tax, but under the new New York estate tax law, the New York taxable estate includes gifts made within three years of death. However, gifts made when the decedent was not a New York resident, gifts made by a New York resident before April 1, 2014, gifts made by a New York resident on or after January 1, 2019, and gifts that are otherwise includable in the decedent’s gross estate under another provision of the Federal estate tax law, are excluded from the operation of this rule.

The new law also repeals the New York GST tax, which prior to its repeal applied to taxable distributions and taxable terminations but not to direct skips. Prior to the enactment of the new law, the New York GST tax was equal to the maximum federal credit against the federal GST tax for state GST taxes paid. The federal GST tax rate is equal to the maximum federal estate tax rate, and for this purpose New York assumed that the maximum federal estate tax rate was the maximum rate which was in effect in 2001. Thus, since that maximum credit was 5%, and the assumed maximum federal estate tax rate was 55%, the effective New York GST tax rate was 2.75%. Furthermore, for New York purposes, the maximum GST tax exemption was $1,000,000, adjusted for inflation. For 2013, the inflation adjusted New York GST tax exemption was $1,430,000. As a result, a trust’s inclusion ratio could have been different for New York GST tax purposes than for federal GST tax purposes.

The New York State final Executive Budget for 2015-2016 included the following technical amendments to the new New York estate tax that was enacted in 2014:

* A drafting error in the 2014 legislation that would have caused the New York estate tax to disappear after March 31, 2015 was eliminated.
* The add-back of taxable gifts made within three years of death was clarified to provide that the gift add-back does not apply to estates of individuals dying on or after January 1, 2019.
* Since intangible personal property of a non-resident is not included in computing the non-resident’s New York taxable estate, deductions associated with such properties are expressly disallowed.
* Out-of-state real property and tangible personal property is expressly excluded from the three year gift add-back.
* As to the apportionment of a non-resident’s estate tax liability by reference to the percentage of New York situs property in the gross estate, there will be no New York estate tax if the value of the New York situs property does not exceed the applicable New York estate tax exclusion amount.

In addition, the 2015-2016 Executive Budget legislation did not change the New York estate tax cliff, did not include a state-only portability provision, did not include a provision for a separate New York State QTIP election when a federal estate tax return is filed, did not change the New York estate tax rates, and did not change the look-back period for gifts made within three years of death.

On August 25, 2014 the New York State Department of Taxation and Finance issued TSB-M-14(6)M regarding the new New York State estate tax law. The Technical Memorandum clarifies that a resident decedent’s New York gross estate does not include gifts made by the decedent within three years of death to the extent that the gifts consisted of real property or tangible property having a location outside of the State of New York, or if the gift was made (a) when the individual was a non-resident of New York State, or (b) before April 1, 2014, or (c) on or after January 1, 2019. The Technical Memorandum also states that the New York taxable estate for the estate of an individual who was a non-resident of the State of New York at the date of the decedent’s death does not include the value of any intangible personal property otherwise includable in the decedent’s New York gross estate, or the amount of any gift that is otherwise includable in the New York gross estate of a resident decedent, unless the gift was made while the non-resident decedent was a resident of the State of New York and the gift consisted of real property or tangible personal property having a location in New York State or intangible personal property employed in a business, trade or profession carried on in New York State. Importantly, the Technical Memorandum further states that elections made or waived on a federal estate tax return will be binding on the estate’s New York estate tax return, and that a federal estate tax return is considered “required to be filed” not only when the decedent’s gross estate exceeds the federal estate tax filing threshold, but also when the federal estate tax return is filed solely to make the federal portability election.

On October 27, 2015 the New York State Department of Taxation and Finance issued Technical Memorandum TSB-M-15(4)M regarding the treatment of deductions relating to real or tangible personal property located outside of New York State, and to intangible personal property, for New York estate tax purposes.

As to a resident estate, the Technical Memorandum states that the amount of allowable federal deductions for New York State purposes equals the total federal deductions reported on federal Form 706, less the federal deductions directly or indirectly related to real and tangible personal property that is located outside of New York State. The amount of deductions that are indirectly related to property located outside of New York State is the total amount of federal deductions not directly related to property inside or outside of New York State or to intangible personal property, multiplied by a fraction, the numerator of which is the total value of real and tangible personal property located outside of New York State, and the denominator of which is the total value of the federal gross estate. The Technical Memorandum further states that since intangible personal property is includable in the New York gross estate of a resident individual, any deductions related to intangible personal property are allowable for New York estate tax purposes.

As to a nonresident estate, the Technical Memorandum states that the amount of allowable federal deductions for New York State purposes equals the total federal deductions reported on federal Form 706 or federal Form 706-NA, minus the federal deductions directly or indirectly related to real or tangible personal property located outside of New York or to intangible personal property. The amount of deductions indirectly related to property located outside of New York State is the total federal deductions not directly related to property inside or outside of New York State, or to intangible personal property, multiplied by a fraction, the numerator of which is the total value of real and tangible personal property located outside of New York State, plus intangible personal property, and the denominator of which is the total value of the federal gross estate. Since intangible personal property is not includable in the New York gross estate of a nonresident decedent, any deductions related to intangible personal property are not allowable for New York estate tax purposes.

The Technical Memorandum further states that deductions that are directly related to real or tangible personal property include charitable deductions for the donation of land that is includable in the gross estate, mortgages secured by real property, and the amount of any real or tangible personal property that is included as part of the marital deduction; that deductions that are directly related to intangible personal property include broker fees, and the amount of any stocks, bonds or cash includable as part of the marital deduction. For this purpose, an ownership interest in a cooperative apartment corporation is considered intangible personal property for New York estate tax purposes. In addition, the Technical Memorandum states that deductions that are not directly related to real, tangible or intangible personal property include executor’s commissions, accounting fees, attorney fees, funeral expenses and unsecured debts of the decedent.

The Technical Memorandum further states that the treatment of deductions as described in the Technical Memorandum applies to the estates of persons who die on or after April 1, 2014; that as to an estate of a person who died on or after April 1, 2014 that already has filed its New York State estate tax return, where the calculation of the allowable federal deductions for New York State estate tax purposes is affected by the Technical Memorandum, such estate will have to file an amended New York estate tax return to comply with the Technical Memorandum; and that if an estate already has filed its New York State estate tax return and has overpaid its New York State estate taxes, such estate must file a claim for refund by the later of three years from the date the original return was filed (or if the original return was filed before its due date, three years from such due date), or two years from the date the tax was paid.

On December 18, 2013 Section 951 of the Tax Law was enacted, that provides that it is not necessary for a disposition to a non-United States citizen’s spouse to pass in a QDOT if no federal estate tax return is required to be filed and the disposition would otherwise qualify for the federal estate tax marital deduction. This statute “sunsets” on July 1, 2019.

On September 26, 2012 the New York State Department of Taxation and Finance issued a Technical Memorandum (TSB-M-12(4)M) advising that where a federal estate tax return is filed solely to elect portability, the decedent’s estate must file with the New York estate tax return both a copy of the federal estate tax return, as filed with the Service, and a completed pro forma Part 5-Recapitulation (form 706) and all applicable schedules that report the actual date of death value of all property the value of which was only estimated for federal estate tax purposes.

On July 29, 2011 the New York State Department of Taxation and Finance issued TSB-M-11(9)M stating that if a federal estate tax return is filed solely to elect portability, any QTIP election that is made on such tax return must also be made for New York estate tax purposes. If a QTIP election is not made on such federal return, it may not be made for New York estate tax purposes.

On October 12, 2011 the Department of Taxation and Finance issued Advisory Opinion TSB-A-11(1)M, stating that a non-resident’s revocable trust that owns an interest in a multiple member limited liability company or a partnership that owns an interest in New York real property, is an interest in an intangible asset that is not subject to New York estate tax.

On April 8, 2010 the New York State Department of Taxation and Finance, in Advisory Opinion (TSB-A-10(1)(M)), considered whether a non-resident decedent’s interest in a revocable trust, which owned interests in several multi-member New York limited liability companies that had elected to be treated as partnerships for federal income tax purposes, which in turn owned New York residential and commercial rental real property, is subject to New York estate tax. The Department concluded that the decedent’s interest in the trust was an intangible asset that was not subject to New York State estate tax.

On January 14, 2009 the Office of Counsel of the New York State Department of Taxation and Finance issued an informational statement (NYT-G-09(1)M) stating that an executor may elect to use alternate valuation for purposes of calculating the New York gross estate when no federal estate tax return is required to be filed, provided that the requirements for electing alternate valuation under Code Section 2032 (i.e., reduction of the gross estate and reduction of the estate tax and the GST tax liability) are met applying the provisions of the Code as it existed on July 22, 1998 and applying the limitations on the unified credit in Section 951(a) of the New York Tax Law. Presumably, this election will continue to apply after March 31, 2014 with respect to the new New York basic exclusion amount.

On October 24, 2008 the New York State Department of Taxation and Finance published an advisory opinion (TSB-A-08(1))M), which considered whether an interest owned by a non-New York resident in an S corporation or in a single member limited liability company that owns real property located in New York constitutes intangible personal property, rather than real property, and therefore will not be included in the non-resident decedent’s New York gross estate. The advisory opinion concluded that an interest in an S corporation owning New York real property is considered an intangible and is not included in a non-resident decedent’s New York gross estate, unless the S corporation is not entitled to recognition under the Moline Properties test (Moline Props. v. Commissioner of Internal Revenue, 319 U.S. 436 (1943)). Under the Moline Properties test, a corporation’s separate existence would be recognized for tax purposes if its purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation. The advisory opinion also concluded that an interest in a single member limited liability company owning New York real property is considered an intangible and is not included in the non-resident decedent’s New York gross estate if the limited liability company elects to be treated as a corporation under the Service’s “check-the-box” regulations (Treas. Reg. Sections 301.7701-1 through 301.7701-3). Although the advisory opinion only referenced the Moline Properties test in its discussion regarding an S corporation, it is likely that New York would also apply such test with respect to a single member limited liability company for purposes of the advisory opinion.

In Advisory Opinion TSB-A-15(1)(M) (May 29, 2015), the New York State Department of Taxation and Finance confirmed that if a single-member limited liability company owning a condominium in New York is a disregarded entity for income tax purposes, the membership interest in the entity will not be treated as intangible property for New York estate tax purposes.

## Other New York Income Tax Changes

### Modified Carryover Basis

On July 29, 2011 the New York State Department of Taxation and Finance issued TSB-M-11(9)M stating that the New York state personal income tax is based upon information reported on the taxpayer’s federal income tax return. Therefore, if the estate of a 2010 decedent elected the modified carryover basis regime, such modified carryover basis must be used to report for New York income tax purposes any gain or loss realized on the sale of the decedent’s assets after his or her death, with the result that both New York estate taxes and New York income taxes may be payable with respect to any appreciation in value with respect to such property that occurred prior to the decedent’s death.

### New York Source Income

In Matter of Carr, DTA No. 825989 (N.Y. Div. of Tax App., July 23, 2015), the New York State Division of Tax Appeals held that the State of New York could not impose its income tax on income earned by an attorney for services performed in a Florida court, where the attorney had moved his residence and his place of business from New York to Florida merely because the attorney retained his license to practice law in the State of New York.

In Burton v. New York State Department of Taxation and Finance, N.Y., No. 115 (July 1, 2015), and Caprio v. New York State Department of Taxation and Finance, N.Y., No. 116 (July 1, 2015), the New York Court of Appeals held that non-resident shareholders in S corporations that are doing business in the State of New York owed New York state income tax on their gain from the sale of the businesses in transactions where the stock purchaser elected to treat the acquisition as a deemed asset sale for federal income tax purposes.

Retroactive to tax years beginning on or after January 1, 2007, when a nonresident sells stock in an S corporation doing business in New York State and makes a Code Section 338(h)(10) election, the sale will be treated as an asset sale, and the gain that passes through to the nonresident shareholder is subject to New York State income tax.

The statutory definition of New York source income from the sale of real property located in the state has been expanded to include gain or loss on the sale or exchange of an interest in an entity that owns real property in New York. The legislation applies to the sale or exchange of an interest in partnerships, limited liability companies, S corporations and non publicly traded C corporations with 100 or fewer shareholders, if the entity owns real property in New York with a fair market value of at least 50% of the fair market value of all the entity’s assets owned for at least two years. The amount of New York source income from the sale or exchange is determined by multiplying the amount of the federal gain or loss by a fraction, the numerator of which is the fair market value of the entity’s New York real property, and the denominator of which is the fair market value of all the entity’s assets. The legislation does not affect the treatment of gain or losses passed through to the taxpayer when the entity when the entity itself sells real property located in New York, or from the sale of an interest in an entity where the interest is employed in another business carried on in New York. The legislation applies to sales of an interest in an entity that occur on or after May 7, 2009.

On April 10, 2017 the above described statutory definition of New York source income from the sale of real property located in New York was further expanded to include ownership interests in entities that own cooperative apartment shares.

### Income Tax Rates

The inflation adjusted amount of New York State income tax rates for married persons filing jointly are 6.45% for taxpayers earning between $43,000 and $161,550, 6.65% for taxpayers earning between $161,550 and $323,200, 6.85% for taxpayers earning between $323,200 and $2,155,350, and 8.82% for taxpayers earning more than $2,155,350. The inflation adjusted amount of New York State income tax rates for single individuals and married individuals filing separately are 6.45% for taxpayers earning between $21,400 and $80,650, 6.65% for taxpayers earning between $80,650 and $215,400, 6.85% for taxpayers earning between $215,400 and $1,077,550, and 8.82% for taxpayers earning more than $1,077,550.

### 2017 Omnibus Budget Bill

On April 10, 2017 New York State enacted an omnibus budget bill, which provides in part that:

**●** The so-called millionaire’s tax, which was set to expire on December 31, 2017, establishing a marginal rate of 8.82% for single filers earning more than the inflation adjusted amount of $1,077,550 and married couples earning more than the inflation adjusted amount of $2,155,350, is extended for two years.

**●** If a non-resident of New York sells an interest in a legal entity, the taxpayer is not subject to tax in New York unless more than 50% of the value of the assets of the entity are New York real property, and shares of a coop located in New York are treated as real property for this purpose.

● If a non-resident sells a partnership interest in a partnership that owns assets that would generate New York source income if the assets were sold, the non- resident would be required to treat the transaction as an asset sale subject to New York tax if the partnership makes a Section 754 election or if the purchaser acquires all of the partnership interests, and the purchaser benefits from an increase in the tax basis of the partnership’s assets.

### 2018 Omnibus Budget Bill

The New York State Omnibus Budget Bill for the fiscal year ending March 31, 2019 includes legislation that establishes two charitable contribution funds to provide funding for education and health care, to which taxpayers may make contributions and claim a new tax credit equal to 85% of their contributions to the funds, in order to circumvent the $10,000 limitation on federal deductions for state taxes. In addition, the bill includes legislation that permits school districts and local governments to create their own charitable funds. It is uncertain how the Service will respond to this type of legislation and, in this regard, it is noted that the Service’s Publication 526 provides in part that taxpayers cannot deduct as a charitable contribution any payment for which they receive a benefit in return.

### Income Tax Return Extensions

New York Department of Taxation and Finance Regulation Section 157.2 provides that the automatic extension for a New York State partnership or fiduciary income tax return is now five months, although large partnerships which are allowed an automatic six-month extension for federal purposes also will be allowed an automatic six-month extension for New York partnership returns. The new rule is effective September 30, 2009 and applies to New York income tax returns for taxable years ending on or after December 31, 2009.

### New York Residency

20 New York Codes, Rules and Regulations Section 105.20(e)(1), which applies to tax years ending on or after December 31, 2008, provides that an individual who is not domiciled in New York is considered a New York resident if he or she maintains a “permanent place of abode” in New York and spends more than 183 days of the tax year in New York, even if the person maintains the place of abode in New York only during “a temporary stay” or for a “fixed and limited period” for the accomplishment of a “particular purpose”.

20 New York Codes, Rules and Regulations Section 105.20(c) provides that “in counting the number of days spent within and without New York State, presence within New York State for any part of a calendar day constitutes a day spent within New York State, except that such presence within New York State may be disregarded if such presence is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside New York State, or while traveling through New York State to a destination outside New York State . . . .”

In the matter of the petition of Leslie Mays, N.Y. Tax App. Trib. DTA No. 826546 (December 21, 2017), the New York Tax Appeals Tribunal held that the taxpayer was a New York resident by combining the time that the taxpayer lived in an apartment in Manhattan that was provided to her through a company relocation program, as to which the taxpayer had the exclusive use, and her subsequent residency in her boyfriend’s Manhattan apartment.

In Matter of Patrick, New York Division of Tax Appeals (June 15, 2017), the Division determined that the taxpayer changed his domicile from New York City to Paris, France on March 2, 2011, the day after he retired, by moving to Paris, applying for the French equivalent of permanent residency, which he obtained in July 2011, paying French income taxes and wealth taxes as a full-time resident of France and obtaining a French driver’s license, even though he continued to own an apartment in New York and to spend time in New York after such change of domicile to obtain medical treatment and to use New York as a stopping off point when he was traveling elsewhere. In addition, the Division determined that the taxpayer was not a statutory resident of New York, even though he spent more than 183 days per year in New York, as the Division reduced the day count due to some of the days being related to the taxpayer’s medical treatment.

In In re Blatt, N.Y. App. Trib., No. 826504 (February 2, 2017), the Taxpayer won his administrative challenge to an adverse state finding in a residency audit for the tax years 2009 and 2010 even though the taxpayer retained an apartment in New York City. The New York Division of Tax Appeals was convinced that the taxpayer changed his domicile from New York to Texas after reviewing recordkeeping and other evidence, such as testimony to his state of mind that was supported by e-mail correspondence and the fact that he moved his dog to Texas.

In Matter of Ruderman, DTA No. 826242 (N.Y.S. Div. of Tax App., July 14, 2016), an administrative law judge determined that Carl Ruderman, a publisher for Elite Traveler magazine, failed to prove that he was away from New York for more than 183 days in 2007. The administrative law judge said that Ruderman gave “forthright” testimony but that Ruderman could not substantiate his claims that the charges made on his credit cards on numerous days in 2007 were actually made by his children or his employees and the flight records he offered were not conclusive. As a result, the judge held that Ruderman owed $643,337 in personal income taxes to the state and $342,843 in city income taxes.

In Matter of Sobotka (August 27, 2015), an Administrative Law Judge in the New York Division of Tax Appeals determined that although the tests for domicile and for statutory residence are not mutually exclusive, a taxpayer can only be a statutory resident of New York during any non-domiciliary period if he meets both the abode test and the day count test during the non-domiciliary period. Thus, if the non-domiciliary period covers only part of a tax year, the taxpayer must exceed the 183-day limit during the non-domiciliary part of that tax year in order to be a statutory resident.

In Matter of Zanetti, DTA No. 824337 (N.Y. Div. Tax App. 2003), affirmed, DTA No. 824337 (N.Y. Tax App. Trib. 2014), the administrative law Judge determined, and the Tribunal affirmed, that a taxpayer was a statutory resident of New York even though 26 of the 184 days required for residency were days when the taxpayer spent only part of the day in New York, regardless of the total number of hours spent out of New York on those 26 days.

In Matter of Ingle v. NYS Department of Taxation, N.Y.L.J. November 8, 2013 (App. Div., 3rd Dep’t, October 31, 2013), where the taxpayer claimed that she was a part-year New York State resident from January 1, 2004 to March 31, 2004, and sold stock on April 30, 2004, the Court upheld the tax tribunal’s determination that the taxpayer was a New York domiciliary until July 9, 2004, as the taxpayer did not show an absolute fixed intent to abandon her New York domicile prior to such date, since she extended her New York apartment lease until June 2004, vacated that apartment in July 2004, maintained duplicate household items in both her Tennessee and New York apartments, and did not alter her lifestyle or related business interests until July 2004.

In In Re Cooke, N.Y. Div. of Tax Appeals, Administrative Law Judge Unit, DTA No. 823591 (2012), where the taxpayers had residences in New York City and in Bridgehampton, New York, and divided their time approximately equally between the two residences, the tribunal determined that the taxpayers had changed their domicile from New York City to Bridgehampton, New York by the fact that the overwhelming amount of family activities and general habit of life took place in Bridgehampton, rather than in New York City.

On September 11, 2012 the New York State Department of Taxation and Finance released TSB-A-12(4)I regarding a non-New York State resident who owned a one-eighth tenancy in common interest in one of the apartments in a private, member-owned residential club in New York City. Since the club awarded the use of such residence on a first-come, first-served basis, and since the taxpayer had a priority right to use the residence for only 45 days per year, the opinion stated that the taxpayer did not have free and continuous access to the apartment and, therefore, did not maintain a permanent place of abode in New York for New York State income tax purposes solely by reason of his ownership interest in the club.

In Matter of Michaels, DTA No. 823370, N.Y.S. Div. of Tax App., ALJ Unit, April 12, 2012, where the taxpayer contracted to sell her Connecticut residence on September 14, 2004, purchased a New York City condominium on November 9, 2004 and immediately began residing in such condominium, and closed on the sale of her Connecticut residence on November 29, 2004, the Administrative Law Judge of the Division of Tax Appeals found that the decedent’s sale of her Connecticut residence occurred on November 29, 2004, at which time the taxpayer was a New York resident, and held that the gain realized on the sale was subject to New York income tax.

On November 28, 2011 the Department of Taxation and Finance issued an advisory opinion regarding taxpayers who changed their domicile during 2010 from New York to Connecticut and had restricted access to their New York City residence prior to its sale. The opinion stated that the taxpayers should not be taxed as “resident” taxpayers for 2010, as they did not maintain a permanent place of abode in New York for substantially all of 2010, even though they spent more than 183 days in New York during 2010.

In Matter of Gaied, DTA No. 821727, State of New York-Tax Tribunal, 2011 N.Y. Tax LEXIS 136 (June 16, 2011), the New York State Tax Appeals Tribunal held that a New Jersey resident who worked in Staten Island and who purchased a residence in New York State for use by his parents was a New York State resident for New York State income tax purposes, even though the taxpayer stayed at the New York residence only when he visited his parents, as the taxpayer had not established that the property was maintained exclusively for his parents and had not established that the New York residence was solely an investment property, since the taxpayer did not collect rent from his parents. In Gaied v. New York, NY Slip Op. 09108 (App. Div., 3d Dept., 2012), the Appellate Division upheld the decision of the Tax Tribunal. The Court of Appeals (No. 26, February 18, 2014) reversed the Appellate Division decision, and held that in order for a non-New York domiciliary to be a “statutory resident” of New York for New York income tax purposes, the person not only has to have a permanent place of abode in New York, but the person must actually utilize such abode as his or her residence. In June 2014 the New York State Department of Taxation and Finance issued new non-resident audit guidelines which, contrary to the Court’s holding in Gaied, states that a residence that is owned and maintained by a taxpayer with unfettered access will generally be deemed to be a permanent place of abode regardless of how often the taxpayer actually uses it, and that a taxpayer who moves out of state and lists her apartment for sale and no longer resides in it, will still be treated as having a permanent place of abode in New York if the taxpayer continues to have unfettered access to the apartment and no one else is using it.

In In re Robertson, No. 822004 (September 23, 2010), the New York Tax Appeals Tribunal held that during 2000 the taxpayer was not physically present in New York City for more than 183 days, the number necessary for finding him a city resident, and that the taxpayer therefore did not owe New York City income taxes for such year, even though the taxpayer owned an apartment in New York City during such year.

In In re David Leiman, the New York Division of Tax Appeals, Nos. 822385, 822386 and 822387 (Feb. 4, 2010), held that the taxpayer’s ownership of a life estate in New York property that was owned by his daughter constitutes a permanent place of abode in New York for purposes of residency and, since the taxpayer failed to present any evidence as to his whereabouts during the tax year, the taxpayer was liable for New York personal income tax on his income from all sources.

### New York Resident Trusts

#### Background

States use a variety of criteria to determine whether or not a trust is a resident trust and, therefore, subject to income taxation by the state. These criteria are:

* Using the state’s law as the governing law of the trust.
* Administering the trust in the state.
* Having a grantor that is domiciled in or a resident of the state.
* Having a trustee that is domiciled in or a resident of the state.
* Having a beneficiary that is domiciled in or a resident of the state.
* Owning assets located in the state.

In addition, approximately 33 states follow the federal grantor trust rules, and approximately 26 states do not tax revocable trusts at the entity level.

#### New York and Other Authorities

A New York “resident trust” had been defined as a testamentary trust under the will of a decedent who is domiciled in the State of New York at his or her death, a trust (whether revocable or irrevocable) established by a person who is domiciled in New York at the time of the trust’s creation, or a revocable trust that later became irrevocable while the settlor was domiciled in New York. Although a New York resident trust would not be subject to any New York income taxes if all of the trustees are domiciled in a state other than New York, the entire corpus of the trust is located outside of New York, and the trust has no New York source income, legislation was enacted on March 31, 2014 that would subject the income of such a trust to New York income tax at the beneficiary or grantor level, in the circumstances noted below.

Such March 31, 2014 legislation would impose New York income tax on the accumulated income of such a resident trust (other than ING trusts, discussed below) once that income is distributed to New York resident beneficiaries, but only to the extent that such income was earned on or after January 1, 2014 and distributed on or after June 1, 2014. This new tax does not apply to grantor trusts or to non-resident trusts.

Such March 31, 2014 also would tax incomplete gift non-grantor (“ING”) resident trusts as if they were grantor trusts on all income earned after January 1, 2014. As a result, all of the income of such trusts would be subject to income tax in New York on the personal tax return of the New York resident grantor.

On May 16, 2014 the New York Department of Taxation and Finance issued memorandum TSB-M-14(3)I, which stated that:

* Accumulation distributions made to New York resident beneficiaries by exempt resident trusts (other than ING Trusts) will not be required to be included in the beneficiaries’ New York adjusted gross income, if the distributions are made before June 1, 2014.
* The income of an ING Trust will not be required to be included in the grantor’s or beneficiaries’ New York adjusted gross income if the trust is terminated and all assets are distributed before June 1, 2014.

Although an Ohio court decision involving an Ohio trust, in T. Ryan Legg Irrevocable Trust v. Testa, 2016 WL 7449356 (Ohio 2016), where an Ohio resident created an Irrevocable Trust and transferred stock of an S Corporation to the trust, and where a substantial portion of the corporation’s business was conducted in Ohio, the Court upheld the imposition of Ohio’s income tax on the capital gain realized by the trust from the sale from such stock, even though the trust was a non-resident trust under the Ohio statute at the time of the sale, against the taxpayer’s equal protection and due process challenges to the constitutionality of such imposition, on the grounds that the grantor’s residency in Ohio and the fact that the grantor through the corporation conducted significant business in Ohio constituted sufficient contacts with the State of Ohio to justify the imposition of the tax.

Although a North Carolina court decision involving a North Carolina trust, in The Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Department of Revenue, 2015 WL 1880607 (April 23, 2015), aff’d, 789 S.E.2d 645 (N.C. Ct. App 2016), the Court held that a North Carolina statute taxing the income of a trust where the trust’s beneficiaries were North Carolina residents, but where there were no other connections to North Carolina, was unconstitutional under both the federal and state constitutions, as the beneficiaries’ residency, alone, was not sufficient to subject the trust to taxation.

Although a Pennsylvania court decision involving Pennsylvania trusts, the Court in McNeil Trust v. Commonwealth, Nos. 651 F.R. 2010 and 173 F.R. 2011 (Pa. Commw. Ct. May 24, 2013), held that the imposition of the Pennsylvania personal income tax on two inter vivos trusts that were located in, administered in and governed by the laws of Delaware violated the commerce clause of the United States Constitution, even though discretionary trust beneficiaries were Pennsylvania residents and the settlor was a Pennsylvania resident when the trusts were established.

On June 8, 2010, the New York Department of Taxation and Finance issued Advisory Opinion No. TSB-10(4)I, which clarified that a New York resident trust will become non-taxable for New York income tax purposes immediately upon satisfying the three conditions described above. Thus, in the year in which the trust changes its taxable status for New York income tax purposes, New York will only tax the trust income that accrued prior to the trust becoming non-taxable by New York State.

On July 23, 2010 the New York Technical Service Bureau issued memorandum TSB-M-10(5)I, requiring a New York resident trust that is exempt from paying New York fiduciary income tax because the Trust has no New York trustee and no New York source income, and all of its assets are located outside of New York, to nonetheless file both a New York fiduciary income tax return, but not pay New York income tax, and a Declaration confirming why the Trust is exempt from paying New York income tax. The policy stated in the Memorandum is effective for tax years beginning on or after January 1, 2010.

In 2010, New York released Form IT-205-C, the New York State Resident Trust Nontaxable Certification, which must be filed every year by a New York resident trust that meets the requirements described above so as not to be subject to New York State income tax.

In Matter of William Rockefeller, N.Y.L.J., January 5, 2004, the New York County Surrogate’s Court considered an application to change the situs of a testamentary trust from New York to Delaware, where the New York corporate trustee was resigning in favor of a Delaware corporate trustee affiliated with a financial institution having its principal place of business in New York to enable the trust to avoid the application to it of New York income taxes. The trust was created under the will of a New York domiciliary which was probated in New York. The Court noted that the New York corporate trustee’s resignation would result in the trust no longer being taxable for New York income tax purposes, but denied the application to change the trust’s situs, noting that the change in the trust’s New York tax status was not inconsistent with the continuing supervision of the trust by the New York courts.

## Unitrust Conversions

In a case of first impression involving the then newly effective New York unitrust legislation, the Court was asked to permit the conversion to a unitrust under EPTL Section 11-2.4(e)(2) of a testamentary trust for the benefit of the testator’s widow. Considering the factors enumerated in EPTL Section 11-2.4(e)(5)(A) for unitrust conversion, the Court found that the original trust, which provided a power of invasion for the petitioner’s support and maintenance, had been intended by the testator to benefit his wife. The Court further determined that EPTL Section 11-2.4(b)(2)’s “smoothing” rule did not apply to trusts established prior to its January 1, 2002 effective date. Therefore, the Court treated the trust as a new trust opting into unitrust as of January 1, 2002 and applied a three-year average to the smoothing rule with the average to be determined from the net fair market values of the trust assets on the first business days of 2002, 2003 and 2004, to apply in 2004. In Re Estate of Edward J. Ives, N.Y.L.J. July 29, 2002, p. 28, col. 3, Broome County, Surrogate Peckham.

In In re Estate of Jacob Heller, N.Y.L.J., January 23, 2004, the Westchester County Surrogate's Court held that whether a trustee abuses his discretion by electing unitrust status pursuant to Section 11-2.4 of the EPTL is an issue of fact, rather than an issue of law, to be decided based on the factors enumerated in that statute, and that a trustee could only elect unitrust status prospectively, no retroactively. On May 4, 2006 the Court of Appeals issued its opinion in Heller, (2006 WL 1193191, 2006 N.Y. Slip Op. 03469), holding that a trustee’s status as a remainder beneficiary by itself does not invalidate a unitrust election made by that trustee, and that a trustee may elect unitrust status retroactive to January 1, 2002, which was the effective date of EPTL Section 11-2.4.

In In Re Smithers, N.Y.L.J., September 23, 2013 at p. 32 (Sur. Ct. Nassau County), the Court approved an unopposed application by the income beneficiary of a testamentary trust to retroactively convert the trust to a unitrust pursuant to Section 11-2.4 of the EPTL, as income distributions from the trust had decreased steadily over the years, and in view of the petitioners advanced age, the increase in the cost of her health care and her living expenses made it difficult for her to maintain herself. The Court directed that the effective date of the conversion was January 1, 2013.

In Matter of Moore, 41 Misc.3d 687 (Sur. Ct., Nassau County 2013), the Court granted the unopposed petition of the trust’s income beneficiary to convert the trust to a unitrust regime, as the trust was created to provide the petitioner with the trust’s income, which had become insufficient to meet her needs, and in view of the petitioner’s advanced age, payment of the unitrust amount to her would not exhaust the trust prior to her death.

In Matter of Kruszewski, 116 A.D.3d 1288 (3d Dept., 2014), where the income beneficiary of a testamentary trust commenced a proceeding in December 2011 seeking to apply New York’s unitrust provisions retroactively to January 1, 2002, and where the Surrogate’s Court found that the income beneficiary was barred by the doctrine of res judicata from seeking unitrust payments prior to the date of a final decree settling a former trustee’s accounting, and that a January 1, 2012 effective date was appropriate, the Appellate Division affirmed the January 1, 2012 effective date, regardless of whether the Surrogate properly invoked the doctrine of res judicata.

In Matter of Miller, N.Y.L.J., January 12, 2016, the Broome County Surrogate’s Court approved the conversion of a perpetual charitable trust created in 1977 to a unitrust. The trustee petitioned the court to, retroactively as of January 1, 2015, apply the provisions of EPTL Section 11-2.4 to the trust for purposes of determining the annual distribution to which the beneficiary church is entitled. The New York Attorney General did not object to the petition. The Court approved the unitrust conversion for an amount of 4% of the net fair market value of the trust assets, effective January 1, 2015.

## Attorney Engagement Letters

The New York Appellate Divisions of the Supreme Court adopted a new rule entitled “Written Letters of Engagement,” which appears in Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations, effective on March 4, 2002.

The rule (§1215.1) requires an attorney who undertakes to represent a client and enters an arrangement for, charges or collects any fee from a client, to provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter if otherwise impracticable, or if the scope of services cannot be determined at the time of the commencement of the representation. The letter of engagement must address the following matters: (1) the scope of the legal services to be provided; (2) an explanation of the attorney’s fees to be charged, as well as expenses and billing practices of counsel; and (3) where applicable, notice of the client’s rights to arbitration of fee disputes pursuant to Part 137 of the Rules of the Chief Administrator. In lieu of a written letter of engagement, a signed written retainer agreement addressing the matters to be contained in the written letter of engagement may be utilized.

Part 137 of the Rules of the Chief Administrator was issued in 2002 and mandates fee-dispute arbitration initiated by the client where the fees in issue are between $1,000 and $50,000. Arbitration is not mandated, but permitted at the attorney’s request, if the client agrees. If an attorney refuses to participate in mandatory arbitration, a referral will be made to the grievance committee.

Excluded from the rule are (1) representation of a client where the fee to be charged is expected to be less than $3,000; (2) representation where the attorney’s services are of the same general kind as previously rendered to and paid for by the client; or (3) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR).

In Feder, Goldstein, Tanenbaum & D’Errico v. Ronan, N.Y.L.J. May 6, 2003, p. 21, col. 5 (Nassau Co. Dist. Ct. J. Pardes), a law firm’s failure to provide an engagement letter or retainer agreement precluded the recovery of attorney fees.

In Matter of Feroleto, 6 Misc. 3d 680, 2004 N.Y. Slip Op. 24495, Bronx County Surrogate Holzman allowed compensation to an attorney determined on a quantum meruit basis where the client had not signed a letter of engagement, but where the Court determined that the failure to comply with Rule §1215.1 was not willful and that the client knew that counsel was to be compensated for service rendered.

Similarly, in Seth Rubinstein, P.C. v. Ganea, 2007 NY Slip Op. 02923 (2d Dept. April 3, 2007), the Appellate Division allowed compensation to an attorney determined on a quantum meruit basis even though the lawyer failed the furnish the client with a written engagement letter, where the client had conceded that he did not believe that the legal services would be rendered without charge and where the lawyer’s failure to comply with Rule §1215.1 was found to be unintentional.

Amendments to CPLR Section 4503 (Ch. 430, Laws of 2002) providing that for the purposes of the attorney-client privilege, if the client is a “personal representative”, as defined therein, and the attorney represents the personal representative in that capacity, then in the absence of an agreement to the contrary, no beneficiary of the estate shall be treated as a client of the attorney solely by reason of status as beneficiary, and the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not constitute a waiver of the privilege.

On August 19, 2016, CPLR Section 4503(b) was amended to extend the attorney-client privilege guaranteed for probate proceedings to revocable trusts.

In Lawrence v. Graubard Miller, 11 N.Y.3d 588 (2008), the law firm that represented the decedent's widow in a decades-long legal proceeding regarding the accounting of the administration of the decedent’s estate had been billing the widow on a straight time basis for legal services rendered, but changed the billing arrangement to a contingency fee shortly before the accounting proceeding was settled by the payment of the executor of the decedent’s estate of approximately $100,000,000 to the decedent’s widow and her children. In addition, the widow made gifts of approximately $5,000,000 to three members of the law firm which represented her in that accounting proceeding and paid approximately $2,700,000 in gift taxes with respect to such gifts. The Court held that more information was required to determine whether the contingency fee arrangement was unconscionable. On August 27, 2010, Hon. Howard A. Levine, a former New York Court of Appeals judge who had served as the referee in the contested accounting proceeding, issued a report to the New York County Surrogate’s Court recommending that the claimed fees of approximately $44,000,000 should be reduced to $15,840,000, which he determined by applying 40% to the first $10,000,000 of recovery, 30% to the next $10,000,000 of recovery and 10% to the remainder of the recovery. As to the gifts by the widow to her lawyers, Judge Levine found that the widow understood the implications of making the gifts, including her awareness that taxes would result from large gifts, and that she was not under any undue influence regarding the gifts, although he also found that the attorneys to whom the widow had made gifts had violated an ethical consideration contained in New York’s Disciplinary Rules which was in place at the time of the gifts by failing to advise the widow to seek independent counsel about making the gifts to her attorneys. In Estate of Sylvan Lawrence, N.Y.L.J. (Surr. Ct., N.Y. Co., September 8, 2010), the Court ordered counsel to return such gifts to their client and approved the portion of the referee’s report that preserved the contingent nature of the modified fee arrangement but resulted in a modified fee of approximately $16,000,000, rather than the $44,000,000 contingent fee sought by such counsel.

In Matter of Talbot, 84 A.D.3d 967 (2d Dep’t 2011), where a party executed an attorney retainer agreement under which the attorney would receive a $5,000 retainer and a contingent fee of $585,000 regarding a contested probate proceeding, the Court held that the Surrogate must consider not only whether a contingency fee retainer agreement was wrongfully procured, but also the reasonableness of the fee and the agreement itself.

In Matter of Benware, 86 A.D.3d 687 (3d Dep’t 2011), the Court held that , although the Surrogate was not bound by the attorney retainer agreement in setting the attorney’s fee, the Surrogate could not award fees in excess of the amount agreed to in a valid retainer agreement.

## Disclosure Requirements of Attorney-Fiduciaries

The Surrogate of Bronx County held that an SCPA Section 2307-a disclosure statement contained in the will, itself, rather than in a separate writing, was still valid and the designated executor, who also was the attorney who drafted the will, was entitled to a full executor’s commission. The testatrix designated her executor in the following language: “I hereby appoint Philip L. McGrory to be the executor of this my Last Will and Testament; I realize he is my attorney and would be entitled to a fee both as the executor and as the attorney for the estate but I wish him to serve as the executor because my sister has refused.” Surrogate Holzman declined to follow Surrogate Roth’s holdings in In re Pacanofsky and In re Hinkson, 186 Misc.2d 15, 714 N.Y.S.2d 433 (N.Y. County 2000). Those cases held that a disclosure statement, consisting of the general language of the statutory model and contained in the will, failed the requirements for a disclosure statement under SCPA Section 2307-a. Surrogate Holzman reasoned that even though the statute envisions the disclosure statement set forth as a separate writing, the statute does not contain an absolute prohibition against the disclosure being set forth in the will, itself. Addressing the language of the testatrix’s will, Surrogate Holzman thought the disclosure set forth in the will reflected a more meaningful discussion between the decedent and her attorney than could have been presumed to have occurred from the general language of a statutory model. Finally, the Court distinguished In re Pacanofsky and In re Hinkson on the grounds that in those cases, the disclosure statement contained within the will was the boilerplate language of the statutory model. In contrast, the language of the testatrix’s will reflected a meaningful conversation between the testatrix and her attorney. Estate of Winston, 186 Misc.2d 332, 714 N.Y.S.2d 879 (Bronx County Surr. Holzman, December 5, 2000).

Surrogate Riordan of Nassau County decided that an attorney/fiduciary was entitled to only one-half a statutory commission because a disclosure statement contained in a will did not meet the requirements of SCPA Section 2307-a. After reviewing the legislative history of SCPA Section 2307-a, Surrogate Riordan held that an acknowledgment in a Will stating that “I hereby appoint my friend and attorney . . . to be Executor of this, my Will. . . . I direct that my Executor shall receive a full commission in addition to a legal fee notwithstanding any rules or laws which prohibit a full commission” was not sufficient to comply with Section 2307-a and the fiduciary/attorney was only entitled to one-half a statutory commission. See In re Estate of Bruder, N.Y. L.J. Mar. 15, 2001, p. 25, col. 3 (Nassau County Surr. Riordan). Accord In Re Estate of Katz, N.Y.L.J. March 26, 2001, p. 30, col. 2 (Kings Co. Surr. Feinberg); In Re Estate of McGarry, N.Y.L.J. June 10, 2002, p. 31 (Suffolk Co. Surr. Czygier).

Surrogate Radigan decided that a waiver of the SCPA 2307-a disclosure requirement was proper where a woman acknowledged her understanding that her attorney/fiduciary was entitled to both commissions and attorney’s fees and reaffirmed her will without signing a disclosure statement. The attorney/fiduciary named in the 1981 will had retired. In 1999, the attorney for the attorney/fiduciary visited the testatrix in the hospital to review her estate plan. At that time, the attorney for the attorney/fiduciary informed the testatrix that her attorney/fiduciary was entitled to both attorney’s fees and commissions which she acknowledged. There appearing to be no immediate threat to the testatrix’s health, the disclosure statement was not obtained at that time. The testatrix suddenly died five days later without having signed a disclosure statement. Surrogate Radigan decided on these facts that waiver of the SCPA 2307-a disclosure requirements was proper. See In re Smith, N.Y. L.J., Nov. 28, 2000 p. 29, col. 3 (Nassau County Surr. Radigan).

Surrogate Czygier found good cause existed for waiver of the SCPA 2307-a disclosure provisions and allowed full statutory commissions. A Connecticut attorney drafted a Will in 1981 while the testator was domiciled in Connecticut where there was no comparable statute with such requirements and the attorney was not admitted to practice in New York. At the time of the preparation of the Will there was no anticipation that the decedent would reside in New York. The Court held that the requirements of SCPA 2307-a must be adhered to only if, at the time the Will was prepared, it was foreseeable that the Will would be probated in New York State. Matter of Newell, N.Y.L.J. June 6, 2002, p. 27, col. 4 (Suffolk Co. Surr. Czygier).

In Matter of Lustig, N.Y.L.J., February 7, 2005, p. 32 (App. Div. 1st Dept.), the Appellate Division confirmed the Order of Surrogate Roth, New York County Surrogate’s Court, directing that the executor’s commissions payable to the attorney-executor be limited to one-half of the statutory commissions to which he otherwise would have been entitled, since the testator failed to acknowledge in a writing separate from his will that the disclosure required by SCPA § 2307-a had been provided.

In Matter of Wagoner, 7 Misc. 3d 445 (Surr. Ct., Albany Co., Surr. Doyle, January 10, 2005), the Court considered a statutory disclosure statement under SCPA 2307-a, which was witnessed only by the testator’s attorney, where the testator designated the attorney’s paralegal as the testator’s executor. The paralegal informed the Court by affidavit that she was not a close friend of the decedent and that she became acquainted with the decedent as a result of her employment with the decedent’s attorney. The Court determined that the paralegal’s relationship with the attorney, combined with her lack of an independent relationship with the decedent, was such that a statutory disclosure statement was required, and held that the statement in question should not be treated as having been signed in the presence of "one witness other than the executor-designee." As a result, the Court held that the statement was null and void and limited the executor’s commissions to one-half of the statutory commissions. However, the Appellate Division (30 A.D. 3d 805, 3rd Dept., June 2006), reversed the Surrogate’s Court decision, holding that the statute is inapplicable to the instant case, since it only applies to attorneys who are named as executors and the nominated executrix is not an attorney.

In Matter of Karlan, N.Y.L.J., April 11, 2006, p. 19 (Surr. Ct., Nassau Co., Surr. Riordan), the Court held that the attorney who prepared the decedent’s will and who was named in the will as one of the decedent’s three executors could not receive more than one-half of one full executor’s commission, since the decedent did not execute a written acknowledgment of disclosure in the form set forth in SCPA 2307-a, even though the same attorney had prepared numerous prior wills for the decedent who had executed such disclosure statements in connection with those prior wills.

In In re Estate of Brokken, N.Y.L.J., March 28, 2006, p. 24 (New York Co., Surr. Roth), the Court held that the attorney-fiduciary could receive a full commission, even though the testator did not execute the disclosure statement required by SCPA Section 2307-a, where the estate’s beneficiaries were fully informed of the statutory disclosure requirement and waived it.

In In re Estate of Tackley, N.Y.L.J., October 10, 2006, p. 33, (Surr. Ct., New York Co., Surr. Roth), the Court held that the disclosure statement in question failed to comply with the statutory requirements, since it did not state that the testator acknowledges that, absent disclosure, an attorney who serves as an executor shall be entitled to one-half the commissions which the executor otherwise would be entitled to receive.

In In re Estate of Wrobleski, N.Y.L.J., June 4, 2008, p. 41, an uncontested probate proceeding, the Kings County Surrogate's Court was presented with the issue of whether the acknowledgment of disclosure submitted by the nominated attorney-fiduciary was in compliance with the dictates of SCPA Section 2307-a. The petitioner submitted an acknowledgment executed by the decedent that did not comply with the current requirements of SCPA Section 2307-a but appeared to comply with those required by the statute at the time the acknowledgment was executed. However, the Court noted that the acknowledgment was missing the signature of the witness to the instrument. In an effort to cure this defect, the petitioner submitted an affidavit of the attorney who supervised the execution of the will and an affidavit of one of the attesting witnesses, both of which alleged that they witnessed the execution of the acknowledgment of disclosure with the other two attesting witnesses. The Court found that while substantial compliance with the model disclosure provided by the statute will entitle an attorney to full commissions, omission of any of the material requirements of the acknowledgment will deprive the attorney-fiduciary of the full statutory commission. The Court found further that the signature of a witness on the acknowledgment was a substantial component of the statutory requirement that could not be overlooked and could not be cured post-mortem by the affidavits of witnesses. Accordingly, the attorney-fiduciary's commissions would be reduced to one-half of the statutory rate.

In Estate of Falgiano, N.Y.L.J. January 19, 2016 (Albany Co. Surr. Pettit), the Court considered SCPA Section 2307-a(5), which directs that the failure to comply with statutory disclosure requirements results an in attorney-fiduciary being limited to one-half of the statutory executor’s commissions, and SCPA Section 2307-a(7), which directs that the determination of compliance is to be made in the probate proceeding. The Court found that SCPA Sections 2307-a(5) and (7) together resulted in two absolute directives in conflict. Surrogate Pettit ruled that despite the mandatory language of SCPA Section 2307-a(7), the determination of an attorney-executor’s commission during an accounting proceeding seemed common practice in Surrogate’s Courts and upheld its prior decision. The Court previously found that it could not ignore the attorney-executor’s noncompliance by awarding him full executor’s commission on the ground that the issue was not fully determined in the probate proceeding because that would circumvent the intent of the Legislature. The attorney-executor was limited to one-half of the statutory commissions.

**IMPORTANT:**

SCPA Section 2307-a was amended, effective November 16, 2004, to provide that the disclosure must be acknowledged in a document separate from the will, but which may be attached to the will, and to provide that the disclosure must state that the testator acknowledges or was informed that, absent the execution of the disclosure, an attorney who serves as an executor shall be entitled to one-half of the commissions which the attorney otherwise would be entitled to receive. The amendment did not address the issue of whether a disclosure statement executed before November 16, 2004, containing all the elements of disclosure required by the statute in effect at the time the statement was executed, but not containing the new disclosure provision describing the effect of the failure to execute a disclosure statement, will satisfy the new statutory requirement. However, In Matter of Griffen, 16 Misc. 3d 295 (Surr. Ct., Nassau Co., Surr. Radigan 5/2/07), the Court ruled that a disclosure statement executed prior to the effective date of an amendment (which added an additional requirement to the form of disclosure) but which conformed to the statute in effect on the date the disclosure statement was executed was in compliance with the statute and the attorney-executor was entitled to full statutory commissions.

In Matter of Gurnee, 16 Misc.3d 1113(A), 2007 N.Y. Slip. Op. 51408(U), (Surr. Ct. So. June 28, 2007), Surrogate Czygier of Suffolk County held that the attorney-executors were limited to one-half commissions pursuant to SCPA Section 2307-a, where the disclosure form failed to contain additional language required by the 2004 amendment to the statute. In addition, the Court stated that a valid disclosure form executed in connection with an earlier will of a testator cannot be utilized as proof of compliance with the statute with respect to a later will which does not contain the necessary disclosure statement.

In Matter of Moss, N.Y.L.J. Sept. 24, 2008, p. 40, col. 3 (Surr. Ct. New York Co. Surr. Roth), the Court held that where the testatrix signed a disclosure statement which complied with the then applicable requirements, her subsequent execution of a codicil after the 2004 amendment to SCPA Section 2307-a did not require the execution of a new disclosure statement, where the codicil did not involve a fiduciary appointment.

SCPA Section 2307-a was further amended, effective on August 31, 2007 and applicable to all wills executed on or after that date, to extend the disclosure provisions to include a nominated executor who is an employee of the attorney draftsperson or of a then affiliated attorney. In addition, the amendment provides that the testator must be informed that any person, including “the testator’s spouse, child, friend or associate, or an attorney” is eligible to serve as an executor. Furthermore, the amendment provides that in the absence of an executed disclosure acknowledgment by the testator, the attorney draftsperson, a then affiliated attorney, or an employee of the draftsperson or of a then affiliated attorney, who serves as an executor will be entitled to one-half of the commissions he or she otherwise would be entitled to receive. The amendment also modifies the statutory model disclosure forms to incorporate these changes.

In Matter of Hess, N.Y.L.J. Sept. 24, 2008, p. 40, col. 3 (Surr. Ct. New York Co. Surr. Roth), the Court held that a partner of the attorney-drafter is “affiliated” with the attorney-drafter within the meaning of the statute and, therefore, is ineligible to act as a witness to the disclosure statement.

In In Re Estate of Deener, 2008 N.Y. Slip. Op. 28470 (Surr. Ct. New York Co. Surr. Roth), the Court held that SCPA Section 2307-a applies even to an out-of-state attorney named as an executor in the will of a New York domiciliary.

In Matter of Winters, 25 Misc.3d 631 (Surr. Ct., Broome Co. 2009), the Court held that the 2007 amendment to SCPA Section 2307-a, to the effect that the disclosure provisions also apply to the employees of the attorney draftsperson, should not be applied retroactively to a will which was executed in 1994 and in which the decedent nominated as the executrix a legal secretary in the office of the attorney who prepared the will.

In Matter of Riley, 29 Misc.3d 1059 (Surr. Ct., Oneida Co., September 17, 2010), the Court held that the an attorney-executor was entitled to full commissions because the SCPA §2307-a disclosure statement executed by the decedent at the time the will was executed complied with the mandatory provisions then in effect even though it did not comply with the model disclosure statement.

In Estate of Carl Beybom, N.Y.L.J. (Surr. Ct., Suffolk Co., September 28, 2011), the Court held that the attorney disclosure form in question satisfied the statutory requirements, even though it did not bear the signature of a “witness” but instead bore signature and stamp of a notary who in effect acted as an attesting witness, and where the notary was an attorney affiliated with the draftsperson designated in the Will as the nominated executor.

In In re Estate of Mayer, N.Y.L.J., August 11, 2011, p. 27 (Surr. Ct., Bronx Co.), where the testator executed a disclosure statement containing only three of the four statutorily required disclosures but omitting the disclosure that absent execution of such statement the attorney-executor shall be entitled to only one-half of the commissions that he or she would otherwise be entitled to receive, the Court held that the disclosure statement failed to comply with the required statutory language and that the commissions of the attorney-executor were limited to one-half of the statutory commissions.

In Matter of Rafailovich, 2012 N.Y. Slip Op. 50522(U) (Surr. Ct., Bronx Co., March 23, 2012), where the decedent executed her will and an attorney disclosure statement in 2002, and such statement complied with the then existing requirements for such statements, but did not include the additional requirements that were added by the 2004 and 2007 amendments to SCPA Section 2307-a, the Court held that such additional requirements would not be applied retroactively and, therefore, that the attorney co-executor would be entitled to full statutory commissions.

In Matter of Restuccio, NY Slip Op. 22390 (Surr. Ct., Richmond Co., December 31, 2012) the Court held that disclosure requirements in SCPA 2307-a are not applicable to a will that was prepared for a non-New York domiciliary by a non-New York attorney who is named in the will as the executor, where the decedent died a New York domiciliary.

In Estate of King, N.Y.L.J. January 27, 2014, p. 28 (Surr. Ct. Bronx Co., 2013), where the decedent executed a will and a statutory notice of disclosure on June 5, 2007, which was after the 2004 amendment to the models of acknowledgement of disclosure, but before the 2007 statutory amendment to SCPA 2307-(a)(1), and where the acknowledgement of disclosure contained only three of the four disclosures required by the model of disclosure, the Court held that the attorney-executor is limited to one-half of the statutory commissions to which he otherwise would be entitled.

In Estate of Goodman, N.Y.L.J., 1202727785614, at 1, June 1, 2015, where the written disclosure signed by the decedent contained only three of the four statements required pursuant to SCPA Section 2307-a, and where the charitable beneficiaries and the New York State Attorney General were not given notice and an opportunity to be heard on the issue of executor’s commissions in the probate proceeding, the New York County Surrogate’s Court held that they properly raised their objections to the commissions in the executor’s accounting proceeding, that the disclosure did not “substantially conform” to the requirements of such statute, and therefore that the attorney-executor was limited to one-half of the statutory commissions.

## Relaxation of Strict Privity Doctrine

In Estate of Saul Schneider v. Finmann, No. 104 (June 17, 2010), the New York Court of Appeals relaxed the application of the strict privity doctrine to estate planning malpractice suits commenced by the personal representative of the decedent’s estate against the decedent’s attorney and held that “privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney”, thereby allowing the personal representative to maintain the malpractice claim. However, the Court also stated that strict privity remains a bar against estate planning malpractice claims of beneficiaries of the estate or of third-party individuals against the estate planning attorney, in the absence of fraud or other circumstances.

In Leff v. Fulbright & Jaworski, L.L.P., 2010 NY Slip Op 08443 (App. Div. 1st Dep’t., November 18, 2010), the Court held that the decedent’s wife was not in privity with the attorneys who represented her deceased husband in connection with his estate planning and, therefore, that she could not maintain a legal malpractice proceeding against such attorneys, as the surviving spouse was never involved in the planning of the decedent’s estate and did not rely on any advice relating to that planning, notwithstanding that such attorneys also represented the surviving spouse in connection with her estate planning.

In Will of Seymour Schuman (April 12, 2011) the New York County Surrogate’s Court, in a contested accounting proceeding regarding the accounting of the decedent’s surviving spouse as the executor of the decedent’s estate, where the objectants also asserted a legal malpractice claim against the attorneys who performed legal services for the executor, the Court held that there was no privity between such attorneys and such beneficiaries, and the Court therefore dismissed such claim.

On May 10, 2011 the New York State Bar Association Committee on Professional Ethics issued Opinion 865, stating that a lawyer who prepared an estate plan for a client can agree to act as counsel to the executor of the client’s estate if, before or during the representation of the executor, the lawyer does not perceive a “colorable claim” for legal malpractice arising out of the lawyer’s representation of the client in relation to doing the estate planning; and that if the lawyer does perceive such a claim, then the conflict is not consentable and the lawyer must decline or withdraw from the representation and must inform the executor of the facts giving rise to the claim.

In Allmen v. Fox Rothschild LLP, 2012 NY Slip Op. 30244(U) (NY Co. Sup. Ct., January 31, 2012), in which the executor of a decedent’s estate sued the law firm that drafted the decedent’s will for legal malpractice, the Court held that the “continuous representation” doctrine does not apply after the decedent’s death to toll the applicable statute of limitations.

In Rhodes v. Honigman, 131 A.D.3d 1151, 16 N.Y.S.3d 324 (2d Dept 2015), the decedent created an inter vivos trust with himself and his spouse as co-trustees. After his death, the trust continued for the benefit of his spouse with his spouse as sole trustee. After the spouse’s death, the trust was to terminate and be distributed to the decedent’s children from a prior marriage and to charities. The decedent’s children brought a claim against the attorney draftsman alleging malpractice for providing that the spouse would be trustee and giving the spouse the power to distribute trust property to herself to the detriment of the daughter’s interest. The Court dismissed the action on the grounds that the children lacked privity.

## No Fault Divorce

On August 15, 2010 New York enacted no-fault divorce (Domestic Relations Law Section 170.7), permitting a divorce where either spouse states under oath that the marital relationship has irretrievably broken down for at least six months, and all financial, child custody and visitation issues have been resolved. The statute is effective on October 14, 2010.

In A.C. v. D.R., No. 10-202115, and D.R.C. v. A.C., No. 10-203033 (April 2011), the New York State Supreme Court held that a spouse’s self-serving declaration about his or her state of mind, even though not based on any objective fact, is sufficient to meet the requirements of the no-fault divorce law that the relationship has irretrievably broken for the period of at least six months.

## Decanting

On August 7, 2011 EPTL Section 10-6.6 was amended, effective immediately and applicable to all trusts created before and after the statute’s effective date, to broaden New York’s “decanting” statute. Under the new statute, if a trustee has unlimited discretion to distribute principal, the current and remainder beneficiaries of the new trust to which the appointed trust is decanted may be any one or more of the beneficiaries of the invaded trust, to the exclusion of other beneficiaries. In addition, a trustee may grant a discretionary power of appointment to any one or more of the beneficiaries of the appointed trust if such beneficiary could receive principal distributions outright from the invaded trust. If a trustee’s discretion is not unlimited, the trustee may appoint the principal of the invaded trust to a new trust only if the current and remainder beneficiaries of the appointed trust are the same as in the invaded trust. However, a trustee’s power to distribute cannot be used to limit, reduce or modify any beneficiary’s current right to receive mandatory distributions of income or principal, unless the newly created trust is a supplemental needs trust. Further, a trustee is not entitled to receive paying commissions for exercising the “decanting” power, and the “decanting” power cannot be exercised in a manner that violates the Rule Against Perpetuities.

On October 23, 2013, and on November 13, 2013, legislation was enacted to amend Section 10-6.6 of the EPTL to provide that:

* A trustee with unlimited discretion to invade trust principal can exercise the decanting power to exclude all successor and remainder beneficiaries.
* Whether or not the exercise of the decanting power begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all of the facts and circumstances of the situation.
* The decanting instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations.
* If a decanting converts a non-grantor trust to a grantor trust, the grantor will not be considered to be a “beneficiary” of either trust by reason of the trustee’s authority to distribute trust principal to the grantor to reimburse the grantor for income taxes on trust income.
* If a trust has multiple trustees, the exercise of the decanting power requires only a majority decision of the trustees.

EPTL Section 10-6.6 was amended in relation to a trustee’s powers to invade the principal of a trust in further trust so as not to trigger the GST tax.

On November 20, 2015, EPTL Section 10-6.6(j) was amended to allow a decanting to be recanted before it becomes effective. A decanting is effective 30 days after service is given.

Although not a New York case, the decanting that was the subject of Ferri v. Powell-Ferri, 326 Conn. 438 (2017), had unanticipated consequences. In that case, a beneficiary of a trust, whose wife was suing him for divorce, had the right to withdraw 100% of the trust property. The trustees of such trust, during the divorce action, decanted the trust to a new spendthrift trust under which the beneficiary’s interest was completely subject to the trustees’ discretion. In this action, the trustees sought a declaratory judgment to the effect that the decanting was valid, and the wife contended that it was invalid, but that even if the decanting were valid, she nonetheless could reach the trust property because the new trust was a self-settled trust. The Court held that the decanting was valid, but in the related divorce action, Powell-Ferri v. Ferri, 326 Conn. 457 (2017), the Court held that although the assets of the new trust were not subject to division as marital property, since such assets lost their status as marital property as a result of the decanting, the trial court could properly consider the new trust and the husband’s interest in it for purposes of determining the amount of alimony to be paid by the husband to his wife. The trial court then ordered that the husband pay annual alimony of $300,000 to his wife, even though his annual earnings totaled only $200,000, and even though he might never receive any distributions from the new trust.

In Hodges v. Johnson, 2017 N.H. LEXIS 232 (N.H. 2017), also a non-New York case, where a trustee of two trusts decanted them, resulting in the elimination of four of the six original current beneficiaries, and the elimination of three of the five first-line contingent remainder beneficiaries, the Court held that the decantings were improper and void because the trustee violated his duty of impartiality by failing to give any consideration to the beneficial interests of the beneficiaries who were eliminated, even though under applicable state law a trustee is allowed to decant from one trust to another for the benefit of one or more of the beneficiaries of the first trust. The Court apparently believed that the settlor of the trusts had influenced the trustee’s decisions regarding the decanting and the settlor’s vitriol motivated him, and that the decanting trustee never considered the financial interests of the excluded beneficiaries.

## In Terrorem Clauses

In Matter of Egerer, 30 Misc.3d 1229A (2006), the Suffolk County Surrogate’s Court held that an in terrorem clause, to the extent that it could be interpreted as preventing the estate’s beneficiaries from objecting to the fiduciaries’ conduct, is void as against public policy.

In Hallman v. Bosswick, N.Y.L.J. March 11, 2009, p. 32, col. 5, the New York County Surrogate's Court construed a broadly worded in terrorem clause and held that a proceeding to set aside the fiduciary nominations in the decedent's Will of certain of the co-executors and co-trustees, based upon their alleged actions and inactions prior to the decedent's death, would trigger the in terrorem clause, but that neither a petition to reduce the executor's commissions of one of the co-executors by one-half for his alleged failure to comply with the SCPA 2307-a, nor a petition to revoke the letters testamentary and the letters of trusteeship issued to two of the co-executors, based on their alleged actions and omissions after the decedent's death, would trigger that clause. The New York Supreme Court, Appellate Division, First Department, 72 A.D.3d 616 (2010), affirmed the Surrogate Court's determination that a proceeding to set aside the fiduciary nominations based upon alleged actions and inactions prior to the decedent's death would trigger the in terrorem clause.

In Matter of Baugher, N.Y.L.J. July 2, 2010, p. 25, c. 1 (Surr. Ct., Nassau Co.), where the decedent's will had not yet been admitted to probate, the Court granted a motion permitting the decedent's children, and the children of a predeceased child of the decedent, to depose the person nominated as the successor executor in the propounded will, and to depose the attorney draftsman of a prior instrument, prior to filing objections, the Court further held that it could not determine prior to the admission of the will to probate whether conducting those depositions violated the in terrorem clause in the will, and the Court warned such children and grandchildren that conducting such depositions might trigger the in terrorem clause.

EPTL Section 3-3.5(b)(3)(D), which provides that preliminary examination under SCPA Section 1404 of the witnesses to a Will, the person who prepared the Will, the nominated executors and the proponents in a probate proceeding, will not trigger an in terrorem clause in a Will, has been amended, effective as of August 3, 2011, to expand such classes of persons to include, upon the application to the Court based upon special circumstances, any person whose examination the Court determines may provide information with respect to the validity of the Will that is of substantial importance or relevance to a decision to file objections to the Will.

In In re Estate of Spiegel, N.Y.L.J. Oct. 31, 2011, p. 30 (Surr. Ct., Nassau Co.), where the Court allowed the pre-action deposition of the attorney-draftsman of the decedents’ wills for use in a construction proceeding regarding the instruments, the Court held that the deposition would not trigger the in terrorem clause in the wills, due to the safe harbor provisions of EPTL Section 3-3.5, as the deposition was relevant discovery for the construction proceeding.

In Estate of Weintraub, N.Y.L.J., July 19, 2013 (Surr. Ct., Nassau Co.), the Court held that an in terrorem clause would not be violated by a deposition of an associate of the attorney who drafted and supervised the execution of the decedent’s will as part of a SCPA Section 1404 examination, as special circumstances permitting such deposition without triggering the in terrorem clause existed where the decedent was diagnosed with Alzheimer’s disease before the execution of the will, and the hospital records indicated that the decedent was “confused” and “disoriented”.

In In re Peters, 132 A.D.3d 1250, 17 N.Y.S.3d 305 (4th Dept 2015), the decedent’s will included an in terrorem clause and specific disposition of certain businesses to the decedent’s children if they owned and operated them at his death. The decedent’s surviving spouse claimed that she owned the businesses disposed of in the will. The Surrogate determined that the businesses were assets of the estate and that the surviving spouse violated the in terrorem clause. On appeal, the Court ruled that if the surviving spouse is the owner of the businesses, then the will does not dispose of them and her actions cannot violate the in terroem clause.

## Single-Member LLCs

In Advisory Opinion TSB-A-16(3)M, the Department of Taxation and Finance determined that a membership interest in a single-member LLC owning a New York condominium should be treated as real property for New York estate tax purposes if it’s been disregarded for federal income tax purposes. The opinion goes on to state that if a single-member LLC makes an election to be treated as a corporation under Treasury Regulations Section 301.7701-3(c), the membership interest would be treated as intangible personal property.

## Other Significant Legislation

### Significant 2008 Legislation

#### Small Estates

SCPA Section 1301 has been amended, effective January 1, 2009, to increase from $20,000 to $30,000 the maximum value of a small estate which can be settled without the formality of court administration.

#### Revocation of Incompetent’s Will

Mental Hygiene Law Section 81.29(d) has been amended, effective July 7, 2008, to provide that an Article 81 proceeding for the appointment of a guardian for an incapacitated person shall not invalidate or revoke a will or codicil of that person during his or her lifetime.

#### Revocatory Effect of Divorce

EPTL Section 5-1.4 dealing with the revocatory effect of a divorce was repealed and a new EPTL Section 5-1.4 was enacted in its place. Pursuant to the new statute, except as provided as by the express terms of a governing instrument, a divorce (including a judicial separation), or an annulment of a marriage, revokes any revocable disposition or appointment of property made by a divorced individual to or for the benefit of the former spouse, including a disposition or appointment by will, by a transfer on death security registration, by a beneficiary designation in a life insurance policy or in a pension or retirement benefits plan, or by a revocable trust, including a bank account in trust form. The new statute also provides that a divorce revokes a provision conferring a power of appointment or a power of disposition on the former spouse and the nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent or attorney-in-fact. This new statute is effective July 7, 2008 and applies if the divorce or death occurs after that date.

In Matter of Lewis, 114 A.D.3d 203 (4th Dept., 2014), the Court held that Section 5-1.4 of the EPTL, which provides that a divorce revokes dispositions to and fiduciary nominations of former spouses, does not extend to the relatives of a former spouse.

### Significant 2009 Legislation

#### Loss of Health Insurance Coverage in Divorce

Sections 236(B)(5) and 236(B)(6) of the Domestic Relations Law have been amended, effective September 21, 2009, to include the loss of health insurance coverage and the cost of obtaining such coverage as a factor to be considered by the New York Courts in divorce proceedings when determining the equitable distribution of marital property and the award of maintenance.

#### Simultaneous Deaths

EPTL Section 2-1.6 has been repealed and replaced by a new Section 2-1.6, which provides that an individual who does not survive a decedent or an event by 120 hours is deemed to have predeceased the decedent, or died before the event, unless the governing instrument expressly provides otherwise.

#### Sale of Life Insurance

On November 19, 2009 New York enacted the Life Settlements Act establishing a comprehensive statutory framework to regulate the sale of life insurance policies by their owners. The Act requires the licensing of life settlement brokers, contains privacy protections for individual policyholders, requires disclosure to a policyholder of a full and complete description to all offers, counter-offers, acceptances and rejections related to a proposed life settlement, establishes standards of conduct which impose a fiduciary duty on a life settlement broker to the policyholder, and contains criminal provisions regarding fraudulent acts in violation of the insurance law. The Act also prohibits life settlement providers and life settlement brokers from facilitating the issuance of a policy for the intended benefit of a person who has no insurable interest in the insured’s life. The legislative history of the Act makes clear that, in the case of a sale of a life insurance policy, where there was a prior plan or arrangement for the individual to purchase the policy for the purpose of selling it to a third party, it may be determined that there was no insurable interest at the inception of the policy. In addition, the Act prohibits a person from entering into a valid life settlement contract for two years after the issuance of a policy, with certain exceptions.

### Significant 2010 Legislation

#### Formula Bequests

On August 13, 2010 New York amended the EPTL by adding a new Section 2-1.13 to provide that a formula in a dispositive instrument executed prior to January 1, 2010 containing a bequest of the maximum amount that can pass free of federal estate taxes shall be construed under the Code as in effect for decedents dying on December 31, 2009, if the decedent dies after December 31, 2009, the decedent dies at a time when there is no federal estate tax in effect, and the decedent is survived by a spouse. The Section also provides that the federal estate tax is deemed to be in effect if it is legally restored retroactively to the date of the decedent’s death. In addition, the Section provides that a formula in a dispositive instrument executed prior to January 1, 2010 providing for a bequest of the decedent’s unused GST tax exemption shall be construed under the Code as in effect on December 31, 2009, if the decedent dies after that date and at a time when there is no federal GST tax in effect. The Section states that the federal GST tax is deemed to be in effect if it is legally restored to the date of the decedent’s death.

#### Life Sustaining Measures

On March 16, 2010 New York enacted the Family Health Care Decisions Act ("FHCDA"), which expands the authority of family members and others close to a patient to withdraw or withhold life-sustaining measures in the absence of a health care proxy or living will. If there is no health care proxy, the FHCDA sets a priority list of individuals who can make such decisions for an incapacitated patient, as follows: a guardian authorized to make health care decisions pursuant to Article 81 of the Mental Hygiene Law, the spouse (if not legally separated) or the domestic partner, a child 18 years of age or older, a parent, a sibling 18 years of age or older or a close friend. Under the FHCDA, the patient is presumed capable to make health care decisions unless determined otherwise by procedures established in the FHCDA. The Act is effective June 1, 2010.

NOTE: In 2015 New York enacted legislation permitting patients in New York to also execute a Medical Orders for Life-Sustaining Treatment (MOLST), an advance directive created to facilitate and improve end-of-life medical decisions beyond the health care proxy. A MOLST form becomes part of the patient’s medical records (much like a Do Not Resuscitate Order) and does not require the same execution formalities as a health care proxy.

#### Renunciations

On March 30, 2010 EPTL Section 2-1.11 was amended to provide that certain renunciations shall not necessarily constitute a qualified disclaimer for federal estate tax and gift tax purpose, unless the renunciation also satisfies the federal gift tax and estate tax requirements for a qualified disclaimer. The law also allows a beneficiary to renounce his or her survivorship interest in joint property or property held as a tenancy by the entirety to the extent that he or she could make a "qualified disclaimer" under Code Section 2518. The law is effective on January 1, 2011.

#### Proof of Paternity

On April 28, 2010 EPTL Section 4-1.2(a)(2)(D) was repealed and EPTL Section 4-1.2(a)(2)(C) was amended, to add that proof of paternity by clear and convincing evidence may include evidence derived from a genetic marker test, or evidence that the father openly and notoriously acknowledged the child as his own. The amendment is effective on April 28, 2010, applying to the estates of decedents dying on or after that date.

#### Pet Trusts

EPTL Section 7-8.1 was amended to eliminate the 21 year limitation on the length of trusts for the benefit of pets. The amendment is effective on May 5, 2010.

In Matter of Rosenthal, File No. 2007/2968/A (Surr. Ct. N.Y. Cty., April 15, 2011), the New York County Surrogate's Court denied a motion filed by a number of animal welfare groups to intervene in a terminated proceeding involving the interpretation of a charitable trust established under a lifetime trust by Leona Helmsley. The movants sought a ruling that the trust be required to give “special emphasis” to dog welfare charities and claimed standing as potential beneficiaries with a “special interest” in the trust funds. The Court rejected the groups' theory of standing noting that “in more than 25 years since the Alco (referring to Alco Gravure Inc. v. Knapp Foundation, 64 N.Y.2d 458) decision, no New York court has found standing under the 'special interest' exception.”

#### Uniform Prudent Management of Institutional Funds Act

On September 17, 2010 New York enacted its version of the Uniform Prudent Management of Institutional Funds Act. In general, the Act imposes standards regarding the investment of institutional funds, standards regarding the appropriation of endowment funds and standards for modifying restrictions imposed by the donor on the investment and use of institutional funds. Specifically, the Act, among other things, authorizes a donor of a restricted charitable transfer to designate an individual or an entity in the document making the transfer who or which will have the authority to enforce the terms of the transfer. Thus, absent such a designation, the transferor’s executors, heirs, successors, assigns, transferees or distributees will not have any such authority. The Act also requires that directors and officers make “a reasonable effort to verify facts relevant to the management and investment” of a fund in which the institutional fund invests its assets and creates a rebuttable presumption of imprudence for appropriations made from an endowment that is greater than 7% of the endowment’s market value, calculated over a five year period. In addition the Act creates a good faith prudent person care standard for the delegation of management or investment functions to an independent investment advisor or manager. Moreover, the Act provides that an investment delegee submits to the jurisdiction of the State of New York and that its contract can be terminated at any time without penalty on 60 days’ notice.

#### Family Exemption

On August 30, 2010 EPTL Section 5-3.1 was amended, effective as of January 1, 2011, to modify the statute that enumerates certain items of a decedent’s property that vest in a surviving spouse (or in children under the age of 21 years, if there is no surviving spouse) and that are exempt from the claims of creditors. The amendment increases the monetary value of such property from $56,000 to $92,500; increases the amount of cash that the spouse or children are entitled to retain from $15,000 to $25,000; increases the exempt value of the automobile that the spouse or children are entitled to retain from $15,000 to $25,000; increases the value of furniture, clothing, computers and other household items that the spouse or children are entitled to retain from $10,000 to $20,000; increases the value of books, family pictures, DVDs, CDs, discs and software that the spouse or children are entitled to retain from $1,000 to $2,500; increases the value of farm animals and tractors that the spouse or children are entitled to retain from $15,000 to $20,000; and includes jewelry (unless specifically bequeathed in the decedent’s will) as household items.

### Significant 2011 Legislation

#### Formula Bequests

On September 23, 2011 New York amended EPTL Section 2-1.13 to provide that a formula bequest in a testamentary instrument of a person who died in 2010 is deemed to refer to the federal estate tax law as it applied with respect to persons dying in 2010, regardless of whether the decedent’s estate is subject to the federal estate tax regime or elects out of the federal estate tax regime and into the modified carryover basis regime; that its formula construction provisions also apply to all generation-skipping formula transfers; that its formula construction provisions apply to wills, trusts and beneficiary designations; and that the time to bring a construction proceeding regarding such matters is extended until the later of 24 months after the decedent’s death or six months after the date of enactment of such legislation.

### Proposed Significant 2012 Legislation

#### Uniform Trust Code

The New York Advisory Committee to the Legislature on the EPTL and the SCPA is issuing its Sixth Report, recommending that the Legislature consider enactment of a New York Uniform Trust Code, which would be incorporated within Article 7 of the EPTL as a new Article 7A. The new Article, which would be a default statute, would address jurisdictional and venue issues; virtual representation, trust validity, modification, reformation, termination, cy pres, decanting and combining trusts; under what circumstances lifetime trusts are irrevocable; the statute of limitations regarding a claim concerning the validity of an irrevocable trust; duties and powers of trustees, including the duty to maintain adequate records and keep trust property separate; trustees’ liability and computation of damages; and issues of exoneration of a trustee from liability. The concerned professional organizations are still working on draft legislation that they hope will be introduced in the legislation at a later date.

### Significant 2013 Legislation

#### Not-For-Profit Corporations

The Non-Profit Revitalization Act of 2013 was enacted on December 18, 2013.

* The Act divides all not-for-profit corporations between charitable corporations and non-charitable corporations, rather than dividing not-for-profit corporations into four categories as existed under prior law.
* The Act permits a charitable corporation to change, eliminate or add a purpose or power by a certificate of amendment to its certificate of incorporation with the approval of either the New York State Supreme Court or the New York State Attorney General, rather than only with the approval of such court as existed under prior law.
* The Act raises the gross revenue thresholds that trigger certain filing requirements from $100,000 to $250,000 for an independent accountant's review, and from $250,000 to $500,000 (increasing to $750,000 on July 1, 2017 and $1,000,000 on July 1, 2021) for an independent accountant's audit.
* The Act creates new audit oversight responsibilities for the boards of charitable corporations.
* The Act permits non-substantial real estate transactions by a majority vote of the board or of a committee of the board, instead of by a vote of two-thirds of the entire board, as was required under prior law. In addition, a charitable corporation can sell all or substantially all of its assets with the approval of the New York State Attorney General, rather than with the approval of the New York State Supreme Court as was required under prior law.
* The Act prohibits a member, director or officer from participating in any decision as to such person's compensation.
* The Act replaces prior provisions regarding transactions between a not-for-profit corporation and interested directors and officers with new provisions regarding "related party transactions".
* The Act requires every not-for-profit corporation to adopt a conflict of interest policy.
* The Act requires every not-for-profit corporation that has 20 or more employees and that had annual revenue in the prior fiscal year in excess of $1,000,000 to adopt a whistleblower policy.
* The Act adds a new Section 8-1.9 to the EPTL that causes such oversight responsibilities, such related party transaction provisions, such conflict of interest policy provisions and such whistleblower policy provisions to apply to trusts created solely for charitable purposes, and to trusts that continue solely for charitable purposes after all non-charitable interests have terminated.
* In general, the Act is effective on July 1, 2014.

On June 30, 2014 the Act was amended to extend from January 1, 2015 to January 1, 2016 the effective date of the provision in the Act prohibiting an employee of a corporation from serving as chair of the board or holding any other title with similar responsibilities, and to extend from July 1, 2014 to January 1, 2015 the effective date of the enhanced audit process requirements for any corporation or charitable trust with annual revenues below $10,000,000.

On July 31, 2015 the office of the New York State Attorney General released Guidance Document 2015-4, V. 1.0, providing guidance regarding the Act’s requirement that not-for-profit corporations must maintain a conflict of interest policy. Notably, the guidance appears to exempt compensation arrangements with officers and executive employees from the “related party transactions” provisions of the Act, and appears to exempt de minimis transactions, transactions that are activities undertaken in the ordinary course of business by the organization’s staff, benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission, and transactions related to compensation of employees or directors, or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation, from the record-keeping requirements of the conflict of interest provisions of the Act, at least where such transactions do not require board action or approval.

Also on April 13, 2015, the office of the New York State Attorney General issued Guidance Document 2015-5, V. 1.0, providing guidance regarding the Act’s requirement that certain non-for-profit corporations maintain whistleblower policies. The guidance provides that the policies as to which a not-for-profit corporation must provide whistleblower protection include, without limitation, policies that are formally adopted by the corporation’s governing body and that are designed to prevent financial wrongdoing, conflict of interest policies, policies addressing unethical conduct, and harassment and discrimination policies. The guidance also notes that a report made in “good faith” is one which the whistleblower reasonably believes to be true, and reasonably believes to constitute illegal conduct, fraud or a violation of an organization’s policy.

#### Anti-Lapse Statute

On September 27, 2013 amendments to Section 3-3.3 of the EPTL were enacted that clarify the application of the anti-lapse statute in relation to multi-generational gifts and the issue of a testator’s siblings, and clarifying that the anti-lapse statute also applies to bequests of future interests.

#### Real Estate Tax Abatements

On July 3, 2013 Section 467-a of the Real Property Tax Law (the “RPTL”)was amended to permit a partial tax abatements for certain residential real property held in trust.

The Association of the Bar of the City of New York has recommended further amending the RPTL to clarify that such abatement should be allowed where such property is held in trust solely for the benefit of the current beneficiary of the trust, regardless of the identity of the remainder beneficiaries of the trust, and to also allow such abatement for such property owned as a legal life estate, in a single member limited liability company, or a multiple member limited liability company the ownership of which is held solely by spouses.

#### Informal Settlement of Fiduciary Accounts

On November 13, 2013 Section 715 of the SCPA was amended to allow the court to approve an informal settlement of a resigning fiduciary’s account.

#### Interest on After-Discovered Assets

On July 31, 2013 new Section 991 of the Tax Law, was enacted, providing for a reduced rate of interest applicable to certain additions to tax resulting from the discovery after the filing of an estate tax return of certain assets belonging to the decedent and held by the State Comptroller as abandoned property.

#### Adult Guardianships

New York amended the Mental Hygiene Law (Section 83.01 et seq.) in 2013 addressing the issue of jurisdiction over adult guardianships and other protective proceedings. The Act becomes effective on April 21, 2014.

### Significant 2014 Legislation and Court Rules

#### Posthumous Renunciations

On August 11, 2014 Section 2-1.11 of the EPTL was amended to permit a personal representative of a decedent, without prior court approval, to renounce an interest to which the decedent became entitled but did not receive prior to death.

#### Availability of Sensitive Documents

An Administrative Order dated February 19, 2014 adopted a new Surrogate’s Court rule (22 NYCRR Section 207.64) under which only persons interested in the decedent’s estate or their counsel, the Public Administrator or its counsel, counsel for any federal, state or local governmental agency, or court personnel, can view guardianship proceeding filings pursuant to Articles 17 and 17A of the SCPA, death certificates, tax returns, documents containing social security numbers, inventories of firearms and inventories of assets.

An amendment to this rule was proposed by the Office of Court Administration on April 21, 2015 to expand the Administrative Order to include in the prohibition of public access documents containing information protected from disclosure under other provisions of federal or State law, for example HIPPA medical information and job protected services reports, and to remove inventory of assets and social security numbers from the protected documents list. In addition, the proposed amendment requires parties to omit or redact social security numbers and financial account numbers (except in proceedings under Article 13 of the SCPA), unless the person submitting the papers believes that the inclusion of this information is material and necessary to the adjudication of the proceeding. In that case, he or she may apply to the court for leave to serve and file.

#### Interest on Bequests

Section 11-A-2.1 of the EPTL was amended to provide that interest on legacies would be mandatory and would be payable from the residuary estate, accruing from seven months after preliminary or permanent letters are issued, that such interest paid in any calendar year would be set on the first business day of the year at the federal funds rate less 1%, but no lower than 0.5%, and that such interest would be treated as accounting income so the estate could deduct it for income tax purposes.

#### Posthumous Reproduction

On November 21, 2014 a new section 4-1.3 of the EPTL was enacted, and Section 11-1.5 of the EPTL was amended, to provide that a child will be treated as a distributee of the genetic parent and as a child of the genetic parent for purposes of class gifts in dispositive instruments, if (a) in a written instrument signed not more than seven years before death, the genetic parent expressly consents to the use of his or her genetic material for posthumous reproduction, and authorizes a person to make decisions about the use of the genetic material after the genetic parent’s death, (b) within seven months after the issuance of letters, the authorized person gives notice about the existence of the stored genetic material to the personal representative of the genetic parent’s estate, (c) within seven months after the issuance of letters, the authorized person records the writing in the Surrogate’s Court, and (d) the genetic child is in utero within 24 months, or born within 33 months, of the genetic parent’s death. This statute applies (a) to all instruments created by the genetic parent, regardless of date, and (b) to dispositive instruments in which the genetic parent is not the creator, for wills of individuals dying after September 1, 2014 and for lifetime trusts executed after that date.

### Significant 2015 Legislation

#### Temporary Maintenance Guidelines

Legislation was enacted to amend Section 236B(5-a) of the New York Domestic Relations Law, regarding temporary maintenance guidelines, to address the potential in the existing temporary maintenance guidelines of shifting income and transforming the monied spouse into the less monied spouse.

### Significant 2016 Legislation

#### Digital Assets

On September 29, 2016 Article 13-A of the EPTL was enacted to give either the executor or administrator of a decedent’s estate, a guardian or ward of a protected person, an agent acting pursuant to a power of attorney, or a trustee the same access to digital assets as assets held in traditional brick-and-mortar buildings. This law was effective immediately. The legislation provides a hierarchy for the instruments by which the user may express his or her intent regarding disclosure to others. A user may direct, by means of an “online tool”, that the custodian of such information disclose or not disclose some or all of the user’s digital assets, including the “content of electronic communications” to designated recipients. Any such directive set forth in an online tool overrides any communication to the contrary in a will or an inter vivos instrument. Absent any such online directive, the user may direct disclosure by means of a will or inter vivos instrument. Any such directive overrides any contrary provisions that may be set forth in a terms-of-service-agreement that does not require the user to act affirmatively and distinctly from the user’s consent to the terms of service. In addition, the legislation distinguishes between the disclosure of digital assets and the disclosure of the content of electronic communications.

In Matter of Serrano, 56 Misc.3d 497 (Surr. Ct., New York County, 2017), where the Court’s opinion does not state if the decedent directed disclosure of digital content to his estate’s fiduciary, and where the decedent apparently died intestate, the Court held that the estate’s fiduciary was entitled to disclosure of the contacts and calendar information associated with the decedent’s email account, but was not entitled to the content of the emails attached to that account, as there was no affirmative directive by the decedent requiring the custodian of the account to make such disclosure.

### Significant 2016 Court Rule Changes

#### Inventories

Effective as of March 1, 2016, Section 207.20 of the N.Y. State Court Rules has been amended to provide new rules for filing an Inventory of Assets in Surrogate’s Court. The Rules provide that an Inventory of Assets must be filed with the court within nine months of the date letters are issued to the fiduciary or as the court otherwise directs.

### Significant 2017 Legislation

#### Power to Adjust Regime

On September 12, 2017 Section 11-2.3(b)(5) of the EPTL was amended to treat an adjustment under the power to adjust regime as a recharacterization of the adjusted amount from income to principal or principal to income, as the case may be, in order to calculate trustee’s commissions, effective January 1, 2018.

### Significant Proposed 2017 Legislation

#### Aid in Dying Act

A legislative bill was introduced in the Assembly and Senate to allow terminally

ill people in New York State to ask for life-ending drugs. The bill requires a mental health professional to deem the terminally ill person to be mentally competent to make such a decision. The Assembly, but not the Senate, passed the bill. The bill was reintroduced in the Assembly and Senate during the 2018 session.

#### Revocatory Effect of Divorce

A legislative bill was introduced in both houses of the legislature to continue the current provisions of Section 5-1.4 of the EPTL disqualifying a decedent’s former spouse from inheriting under the decedent’s will or acting as executor under the decedent’s will, and to extend this concept to provide that there would be a rebuttable presumption revoking dispositions to family members of a decedent’s former spouse. The bill is pending.

#### Power of Withdrawal

A legislative bill was introduced in the Assembly to revise Section 7-3.1(a) of the EPTL and Section 5205(c) of the CPLR to clarify that no individual will be treated as having made a disposition in trust for his or her own use by reason of a lapse of a power of withdrawal from the trust.

#### Attorney Client Privilege and Trustees

A legislative bill passed the Assembly to amend Section 4503(a)(2) of the New York Civil Practice Law and Rules (the “CPLR”) to extend the attorney-client privilege to lifetime trustees. The Senate did not pass the bill, and it was reintroduced in the Assembly during the 2018 session.

## Other Case Law Developments

### Fiduciary Investments-Diversification and Self-Dealing

In Matter of JPMorgan Chase Bank, N.A., 2013 N.Y. Slip Op. 32305(U) (Sur. Ct. Monroe County, September 30, 2013), where trust beneficiaries objected to the trustee investing in its own managed funds, the Court held that the beneficiaries are barred by laches from now raising such objection, as the objected conduct began in 2000 and continued for a period of 12 years, with the objectant’s knowledge, and without the objectant’s commencing any legal action against the trustee until 2012.

In Matter of the Accounting of Tydings, N.Y.L.J., July 7, 2011, p. 26 (Surr. Ct., Bronx Co.), where the grantor of an inter vivos trust transferred to the trust an interest-free loan previously made to the person who would be the trustee of the trust, where the trust authorized the trustee to retain an original investment for any length of time without liability, and where the trust authorized the trustee to act on behalf of the trust with regard to any transaction in which the trustee had an interest and exonerated the trustee from liability for any loss to the trust absent bad faith or fraud, the Court held that the trustee would not be liable for retaining such interest-free loan, but that the trustee would be liable for interest-free loans subsequently made by the trust to the trustee. The Court surcharged the trustee at the rate of 5% per year for the lost income on such loans made by the trust to the trustee. The Court also held that the exoneration clause in the trust did not bar the objectant from recovering lost profits attributable to the trustee’s use of trust funds, without consideration, to benefit an entity in which the trustee was personally interested. Further, the Court concluded that the trustee had exhibited indifference to the trustee’s duties and, therefore, sufficient malfeasance to warrant a denial of trustee’s commissions. Moreover, the Court held that the trustee and the objectant beneficiary should each, individually, pay such person’s own legal fees and expenses.

Although not a New York case, in In re Wachovia Corp. ERISA Litigation, W.D.N.C., No. 3:09-cv-00262-MR (October 24, 2011), the Court approved a settlement of $12,350,000, plus attorney’s fees, in an action by Code Section 401(k) plan participants against Wachovia Corp., where Wachovia allegedly breached its fiduciary duties by permitting substantial investment of the plan assets in Wachovia’s common stock when it was not prudent to do so.

In Matter of Knox, 2010 N.Y. Misc. LEXIS 6110 (Surr. Ct., Erie Co.), where the trust was initially funded with stock of Woolworth and Marine Midland Bank, N.A., the Court held that the trustee was liable for its failure to diversify the trust’s investments and that the proper method of calculating damages for the negligent retention of trust assets is the value of the lost capital to the trust, which is the value of the stock on the date on which it should have been sold, less the actually sale proceeds of the stock or, if the stock is still retained, less the value of the stock at the time of the accounting. However, the Appellate Division sub nom, Matter of HSBC Bank, USA, N.A., 98 A.D.3d 300 (4th Dept., 2012), reversed the Surrogate’s Court, holding that the trustee erred only in retaining the Woolworth stock beyond the date of the company’s final dividend payment, that the trustee had not negligently failed to diversify, that the lower court wrongly applied at 9% interest rate to damages prior to June 1981 when the statutory rate was 6%, and that there was no basis to award fees and expenses to the guardian and the attorney for the adult objectants, and the Court remanded the case for a re-accounting and a calculation of damages.

Although not a New York case, Merrill Lynch Trust Company, FSB v. Mary C. Campbell, et al., (Del Ch. Case # C.A. 1803-VCN 9/2/2009), the Delaware Chancery Court ruled that where a trust instrument placed sole discretion for investment decisions on the trustee, the trustee’s exercise of discretion is not subject to the control of the court except where necessary to prevent an abuse of discretion.

In In re Carpenter, File No. 159626 (Surr. Ct. Nassau Co. 2009), the corporate co-trustee of a testamentary trust requested the Court’s advice and direction as to the need to diversify the trust’s assets. The trust directed the trustees to distribute the trust’s income to the individual co-trustee/income beneficiary for his life, required that the trustees act unanimously and contained no provisions authorizing the retention of specific assets. The Court directed that the trust assets be diversified, unless all the interested parties to the trust agree in writing to waive the co-trustees’ obligation to diversify, assent in writing and ratify the past and future retention of trust assets until the trustees agree to their disposition, and indemnify and absolve the corporate co-trustee from any and all liability for retaining the trust assets.

In Matter of the Final Accounting of Michael Duffy, 25 Misc.3d 901 (2009), the Monroe County Surrogate’s Court held that the executor’s failure to convert the estate’s stock portfolio to cash immediately after the September 11, 2001 terrorist attacks was not negligent and therefore did not violate EPTL Section 11-2.3, even though the stocks lost 40% in value between the time the executor was appointed and the date when the stock was transferred to the estate’s beneficiary, where the executor demonstrated that the decedent wanted to protect the long-term financial needs of the beneficiary by maintaining a diversified investment portfolio.

In Matter of Bloomingdale, 48 A.D.3d 559, 853 N.Y.S.2d 92 (2d Dept. 2008), the Appellate Division modified a decision of the Surrogate's Court, Westchester County, which denied the petitioner's motion for summary judgment dismissing certain objections again him insofar as they related to the failure to diversify investments. The record revealed that the act complained of, in part, occurred during a period in time when the petitioner served as co-trustee with the two remaindermen (the objectants) of the trust. The Court held that "[w]here a fiduciary has the means to know of a cofiduciary's act, and has assented or acquiesced in them, the fiduciary is bound by those acts and jointly liable for them." Accordingly, as to the period of time during which the remaindermen were co-trustees with the petitioner, their objection was dismissed.

In Matter of Manufacturers and Traders Trust Co., N.Y.L.J. June 10, 2008, p. 25 (Onondaga Co. Surr. Wells), the Court held that the objectants failed to satisfy their burden of proof that any purchase or sale of any of the trust’s investments was unreasonable or outside the scope of the powers granted by the trust instrument to the trustee, where the trust instrument gave the trustee broad investment powers.

Although not a New York case, in Nelson v. First National Bank and Trust Co. of Williston, 543 F.3d 432 (October 1, 2008), the Court of Appeals for the 8th Circuit held that the trustee did not breach its fiduciary duty by failing to liquidate the trust’s stock within two months after the settlor’s death, where 90% of the trust’s marketable assets consisted of the stock of a single company and the terms of the trust expressly provided for retention of that stock despite any resulting lack of diversification.

In the case of In re Hyde, 845 N.Y.S. 2d 833 (N.Y. App. Div. 2007), the Court affirmed the dismissal of the beneficiaries objections to the trustee’s account that the trustee’s lack of diversification violated the prudent investor rule. The Court found that the trustee’s retention of the common stock of a closely held business did not violate New York’s version of the prudent investor rule because the stock was particularly unmarketable given the capital structure of the corporation, the high dividend payout served the beneficiaries’ needs, the settlors used the trust as a device for insuring that ownership of the corporation remained in the family and the corporate co-trustee regularly explored selling the stock and kept well informed of the corporation’s financial situation.

In Estate of Charles Dumont, (Surrogate’s Court of Monroe County, New York, July 13, 2004), the Court held that the trustee of a testamentary trust violated its fiduciary duty to the trust and was liable to the trust, where the trust consisted overwhelmingly of the stock of one company, where the will expressly exonerated the trustee from losses caused by failure to diversify the trust’s assets and in fact barred the trustee from selling trust assets solely for the purpose of diversification, but where the trustee was authorized to sell the stock for a “compelling reason”, and where the trustee did not sell the stock, which declined significantly in value. In addition, the Court ruled that the trustee must return to the trust its commissions received since the stock declined in value. However, on February 3, 2006 the Appellate Division, Fourth Department (809 N.Y.S. 2d 360), reversed the Monroe County Surrogate’s Court judgment, holding that the Surrogate’s decision was impermissibly based on nothing more than hindsight and that there was no evidence that the trustee acted imprudently in failing to sell the stock in question. On April 28, 2006 the New York Court of Appeals denied a petition for appeal of the Appellate Division’s decision.

In two cases, the Appellate Division, Third Department decided matters relating to trustee’s investments. See N.Y.L.J. August 11, 2000. In In re Estate of Saxton, 274 A.D.2d 110 (2000) aff’d 179 Misc. 2d 681 (Broome Co. Surr. Thomas 1998), the Court held that the bank - trustee was liable for its failure to diversify investments held in the trust. The testamentary trust was established in 1958 and funded entirely with IBM stock worth $569,853. In 1959, the beneficiaries signed an “Investment Direction Agreement” which attempted to immunize the bank from liability. In 1986, the stock was valued at more than $7 million. The beneficiaries urged diversification but the trust officer resisted it. When the trust ended in 1993, the stock was worth only $2.9 million. The critical issue in the case was whether the trustee was shielded by the fact that the beneficiaries signed the “Investment Direction Agreement” stating that the investment would consist almost entirely of IBM stock, and that the bank would be held harmless in the event of a decrease in value. The Court unanimously held that the bank could not rely on the waiver to insulate it from liability where the waiver was not the result of an informed consent by the beneficiaries. The Court also held that in assessing damages the capital gains taxes that would have been paid had the stock been sold at the appropriate time must be deducted from the award and interest must be frontloaded and awarded based on the value of the trust had the stock been sold when it should have been sold. Surrogate Thomas had assessed a surcharge of $6,681,038 plus interest and return of all commissions; the surcharge being based on the difference between the amount that would have been in the trust if 90% of the IBM stock had been sold on September 10, 1987 (the date the market crashed) and the amount that was in the trust when the stock was actually distributed in July, 1993, minus dividends and other income. The Appellate Court ordered a recalculation of damages, holding that the damages should be reduced by the federal tax that the beneficiary would have had to pay if the stock had been sold and that interest should have been based on the full value of the stock at the time when it should have been sold less the value at the time of distribution and dividends based on the methodology established in In re Janes, 90 N.Y. 2d 41 (1997). Finally, the Court held that absent a showing of self-dealing or fraud, there was no basis for a denial of commissions since the beneficiary was simply entitled to be put in the position she would have occupied if no breach of duty occurred.

In a second case, In re Estate of Rowe, 274 A.D.2d 87 (3d Dep’t Aug. 10, 2000) aff’d N.Y. L.J. Mar. 16, 1998 at 25 (Otsego Co. Surr. Ct. Judicial Hearing Officer Farley), the Third Department upheld the removal of a bank trustee for its negligent conduct in failing to diversify a charitable trust funded solely by 30,000 shares of IBM stock. The trust was funded with 30,000 shares of IBM, which was trading at about $117 per share when the trust was funded in September 1989. The charitable lead interest of the trust was payable for 15 years. Although the trustee/bank had sold approximately 8,000 shares of stock during the period of account, the record revealed that by the close of the accounting period it held 19,398 shares of stock valued at $74 per share. The market value of the trust assets over the course of the accounting period had dropped by $1.7 million. The Surrogate determined that from September 1989 to the end date of the accounting period, the trustee/bank was negligent, that it had violated its own policy manual and that, in January 1990, it should have diversified most of the trust’s holdings in IBM. The Third Department affirmed the removal, denial of commissions and surcharge, finding that the Surrogate’s Court properly followed the methodology established in In re Janes, 90 N.Y. 2d 41 (1997), and did not erroneously compute damages by adding compound interest to the value of the stock at the time it was sold or, if unsold, at the time of the accounting, rather than computing interest on the difference between the two values. Among the factors which the Appellate Division relied upon was the failure of the trustee/bank to adhere to its own internal protocol or to conduct more than routine reviews of the IBM stock.

The Southern District of New York, applying New York law, in Williams v. J.P.Morgan & Co., Inc., 199 F.2d 189 (S.D.N.Y. 2002), was faced with a situation where the remainderman of the trust and the trustee-bank respectively moved for summary judgment on the issue of the calculation of damages. The Bank had liquidated the trust’s stock portfolio in 1971 and reinvested the proceeds in cash and tax-exempt bonds, with the ratification of the income beneficiary and not the remaindermen, nor did it alter the 1970 trust investments at any time thereafter. Plaintiff did not claim that the trustee engaged in any fraud or self-dealing or misconduct apart from the negligent and imprudent failure to invest and/or diversify the trust assets. The Court held that under New York law as construed by the state Court of Appeals, the measure of damages for negligent and imprudent failure to invest and diversify is the value of the capital lost. See, Matter of Janes, 90 NYS2d 41. The methodology established by the Court of Appeals for establishing lost capital requires a determination of the value of the asset on the date on which it should have been sold and, then, subtracting either (a) the value of the asset at the time of the accounting or (b) the value of the asset at the time of the Court’s decision. The Court has the discretion to award interest, but must subtract therefrom any dividends or income attributable to the asset during the time the asset was retained. Finding that it was bound to apply the rule of law as enunciated by the highest court of the state, the Court concluded that the methodology established by Janes governed the calculation of damages should plaintiff prevail on liability. The Court rejected plaintiff’s arguments that a distinction should be drawn between investments in securities, as in Janes, as compared to investments in tax-exempt bonds, holding that it was a distinction without a difference, because both claims concerned inattentiveness and inaction on the part of the trustee. Further, the Court rejected plaintiff’s application for lost profits, concluding that, an award of appreciation damages or lost profits was inapplicable unless the fiduciary’s conduct consisted of deliberate self-dealing and faithless transfers of trust property.

In a non-New York case, the Court of Appeals for the First Appellate District of Ohio in Fifth Third Bank v. Firstar Bank, N.A., No. C-050518 (2006), issued its opinion reviewing the Trial Court’s decision in an action seeking to surcharge the trustee of a charitable remainder unitrust for failing to properly diversify the trust‛s assets, where the trust was funded entirely with the stock of one company and the trust lost one-half of its value during its first year. The Court of Appeals affirmed the Trial Court’s determination that the Ohio Attorney General was a necessary party to the action, that authority in the trust document to retain assets transferred by the grantor to the trust did not abrogate the trustee’s duty to diversify the trust assets and that the trustee should be surcharged for the loss sustained by the trust.

### Qualification and Removal of Fiduciaries

In In re Mercer, 119 A.D.3d 990 (2d Dept., 2014), the court affirmed the Surrogate’s decision, which had denied an application by the objectants in a contested probate and accounting proceeding to immediately suspend the petitioners’ letters testamentary and letters of trusteeship pending the conclusion of the trial in the accounting proceeding.

In Matter of Stewart, N.Y.L.J. December 23, 2011 (Surr. Ct. N.Y. Co.), the Court accepted the Referee’s findings that the trustee of a trust was unfit to continue to serve, due to her documented hostility to her co-trustee and to the trust’s beneficiaries which was of such severity that it interfered with the administration of the trust, and the Court confirmed the Referee’s report that the trustee should be removed.

In In re Marsloe, 88 A.D.3d 1003 (2d Dept. 2011), where the nominated executor of the decedent’s will was one of two witnesses to the will, the Court determined that the executorial appointment was not a beneficial disposition or an appointment of property for purposes of EPTL Section 3-3.2, which voids a disposition to a beneficiary who serves as a witness if there are not two other available witnesses who are not beneficiaries, and the Court held that the nominated executor therefore could serve as such executor.

### Right of Election

In In Re Berk, 20 Misc. 3d 691, 864 NYS 2d 710 (Surr. Ct., Kings Co. 2008), the Court held that a decedent’s surviving spouse could claim her elective share of the decedent’s estate under EPTL Section 5-1.1-A, even if the marriage had been voidable due to the decedent’s alleged lack of competency to marry, or due to the marriage resulting from fraud, duress or force.

In In Re Oestrich, 21 Misc. 3d 499, 863 NYS 2d 531 (Surr. Ct., Broome Co. 2008), where the decedent’s surviving spouse had filed her right of election and then petitioned to withdraw it, and where the decedent’s executor had distributed the residue of the estate to the residuary beneficiaries, including the surviving spouse, the Court denied the surviving spouse’s petition to withdraw her election, since allowing the withdrawal of the election would prejudice the residuary beneficiaries, other than the surviving spouse, who would have to refund a portion of their distributions if the election was withdrawn. In addition, the Court held that the executor improperly distributed a portion of the residuary estate to the surviving spouse before the Court ruled on her request to revoke her election and surcharged the executor in the amount of the improper distribution, less any repayment by the surviving spouse.

In Campbell v. Thomas, NY Slip Op 02082 (2d Dept. 2010), the Appellate Division held that a right of election could not be exercised by the decedent’s surviving spouse, where the surviving spouse married the decedent shortly before his death when the decedent suffered from severe dementia and the marriage has been declared null and void, as such exercise would enable that spouse to profit from her own wrongdoing.

### Jurisdiction and Charitable Trusts

In In re Fleet National Bank, 20 Misc. 3d 879, 864 NYS 2d 706 (Sup. Ct., Albany Co. 2008), the Court held that the Surrogate’s Court has jurisdiction over charitable inter vivos trusts, notwithstanding EPTL Section 8-1.1(c)(1), which appears to provide that only the Supreme Court has jurisdiction over such trusts.

### Presumption Against Suicide

In Matter of Green v. William Penn Life Insurance Co. of N.Y., 2009 NY Slip Op. 3586 (May 9, 2009), the Court of Appeals held that the question of whether a person has committed suicide is a factual issue to be decided by a fact finder and that the Appellate Division had erred when it found, as a matter of law, that the insurer failed to rebut the presumption against suicide.

In Matter of Infante v. Dignan, 2009 NY Slip Op. 3587 (May 5, 2009), the Court of Appeals refused to allow the presumption against suicide to overrule a medical examiner’s determination that the decedent had committed suicide.

### Forced Heirship and New York Property

In Matter of Meyer, 876 NYS 2d 7, N.Y. App. Div. (1st Dept. 2009), the Court considered whether forced heirship under French law applied to inter vivos gifts of New York property made by a person who was a French citizen, domiciled in Bermuda, who died in her New York residence and who had executed a New York will and two codicils directing that New York law should govern the testamentary disposition of her New York situs property. The Court held that inter vivos transfers of property are governed by the law of the state where the property was situated at the time of the transfer, regardless of the transferor’s domicile, even though neither the decedent’s New York will and codicils nor the EPTL governs inter vivos transfers, thereby denying the claim of the decedent’s son to such property based on forced heirship.

### Executor’s Commissions and Trustee's Commissions

In In re Ostrer, 23 Misc. 3d 246, 869 NYS 2d 894 (Surr. Ct., Nassau Co. 2008), the Court held that the executor of the estate was entitled to receive commissions, even though the testator’s will directed that no executor shall receive commissions, where all the beneficiaries consented to the payment of the commissions.

In Matter of Ralph P. Manny, 1992-1319/B, (Surr. Ct. Westchester Co., May 20, 2010), the Court held that the trustees of an inter vivos trust who received annual commissions from the trust, but who did not provide annual statements to the trust’s beneficiaries required by SCPA Sections 2309(4) and 2312(6), could retain the commissions they received, but would be required to pay the trust statutory interest at the rate of 9% per annum on such commissions, as they were improperly taken by the trustees.

### Prenuptial and Postnuptial Agreements

In Freed v. Kapla, 313336/13, N.Y.L.J. July 1, 2015, the Appellate Division, First Department held that a prenuptial agreement requiring the husband to vacate the wife’s apartment, if the marriage terminated, was valid, notwithstanding an alleged oral promise by the wife to take care of the husband, and notwithstanding the husband’s claim that he did not understand the agreement when he signed it, because Hebrew is his first language and he had a poor command of English.

In Karg v. Kern, 309367/12, N.Y.L.J. July 1, 2015, the Appellate Division, First Department affirmed the nullification of a prenuptial agreement that was written in German on the grounds that the wife was duped into signing the document because she did not understand German.

In Galetta v. Galetta, 21 NY3d 186 (2013), the Court of Appeals held that the parties’ prenuptial agreement was invalid because the notarial acknowledgement failed to include the phrase “to me known and known to me” as required by the applicable statute, and because the notary’s affidavit intended to cure the error failed to describe a specific protocol that the notary repeatedly and invariably used to identify the signers of the document.

In Matter of Koegel, N.Y.L.J. February 23, 2018, p.21, c.2 (2nd Dept. 2018), where the decedent and his fiancée had executed a prenuptial agreement in which each of them agreed to make no claims against the estate of the other, and where the parties’ signatures were acknowledged by their respective attorneys, but neither acknowledgment attested to whether or not the decedent or his fiancée was known to their respective notaries, and where the attorneys who took such acknowledgements actually recalled acknowledging the signatures at issue, the Court held that the confirmation of the identity of the signers, by means of an affidavit, was sufficient to cure the defect in the language of the acknowledgements without having to explain how the identity was confirmed.

In Petracca v. Petracca, 101 AD3d 695 (2d Dept. 2012), the Court set aside a post nuptial agreement, in which the wife waived any rights to her husband’s business interests, the marital residence and her rights of inheritance. on the grounds that the husband’s assets as stated in the agreement were undervalued by at least $11,000,000 and that the terms of the agreement were manifestly unfair to the wife when the agreement was executed.

In Cioffi Petrakis v. Petrakis, 103 AD3d 766 (2d Dept. 2013), the Court sustained the wife’s claim that she was fraudulently induced to sign a prenuptial agreement and set aside the agreement, noting that the wife’s claim rested largely on the creditability of the parties and that the lower Court resolved the credibility issues in the wife’s favor, even though the agreement expressly stated that there were no oral representatives other than those set forth in the agreement, that the agreement set forth the “entire understanding” of the parties, and that neither party was relying on any promises that were not set forth in the agreement.

In Strong v. Dubin, NY Slip Op 04121 (May 13, 2010), the Appellate Division, First Department, held that a prenuptial waiver of equitable distribution rights to retirement assets is valid, distinguishing the requirement under ERISA that a waiver of survivorship rights to retirement assets can only be validly accomplished by a spouse.

### Payment of Fiduciary's and Beneficiary’s Attorney's Fees

In Matter of Hyde, 15 NY3d 179 (June 29, 2010), the New York Court of Appeals held that Surrogates have the discretion to order the payment of a fiduciary’s attorney’s fees from shares of individual estate beneficiaries, and not just from the estate as a whole. The Court stated that the factors which Surrogates may consider in exercising such discretion, none of which is determinative, include whether the beneficiaries who are objecting to the disposition of an estate are acting solely on their own behalf, or on behalf of the common interest of the estate; the possible benefits to individual beneficiaries from the outcome of the proceeding; the extent of an individual beneficiary’s participation in the proceeding; the good faith or bad faith of the objecting beneficiary; whether or not there was justifiable doubt regarding the fiduciary’s conduct; the portions of interest in the estate held by the non-objecting beneficiaries relative to those of the objecting beneficiaries; and the future interests that could be affected by charging the counsel fees against the shares of individual beneficiaries rather than against the estate as a whole. On remand, the Court, 32 Misc.3d 661 (Surr. Ct., Warren Co. 2011), applied the Court of Appeals’ decision to the intermediate accountings of two trusts, each of which was for the benefit two families, both of whom had objected to both accountings. One of the families withdrew their objections to the accountings after discovery was completed and before trial. After trial, the Surrogate’s Court dismissed all of the objections. As to one of the two trusts, the Surrogate’s Court held that all litigation expenses that were incurred prior to the withdrawal by one of the families of its objections to the accounting should be paid from the trust, as until that point in time, both families were participating in the objections to the accounting of such trust. However, as to the litigation expenses that were incurred after the withdrawal of such objections by one of the families, the Surrogate’s Court held that one-half of such litigation expenses should be paid from the share of the trust attributable to the family that continued the litigation after discovery, and that the other half of such litigation expenses should be paid from the trust corpus. As to the other trust, the Surrogate’s Court assessed all of the litigation expenses relating to the objections to the accounting of such trust against that trust’s corpus, as only one member of one of the two families, who was the income beneficiary of the trust, had filed objections to such accounting.

In Matter of Lasdon, No. 703/93 (Surr. Ct. New York Co., November 19, 2010), where the trustee delayed the final distribution of trusts that had formally terminated, the Court held that the trustee should not be barred from having the trusts pay his attorneys’ fees and that the trustee should not be required to pay the legal expenses incurred by the objectants, even though the trustee was surcharged for losses occurring after the formal termination of the trusts. This portion of the holding in Lasdon was affirmed by the Appellate Division, First Department, 2013 NY Slip Op 02467 (2013).

In Matter of Benware, 86 A.D.3d 687 (3d Dep’t 2011), the Court held that the Surrogate properly assessed a portion of the fees paid by the estate to the executor’s attorney against the share of the residue of the estate distributable to one of the co-executors, as beneficiary, finding that such person’s behavior was responsible for some of the acrimony that characterized the administration of the estate, and the Court further held that, although the Surrogate was not bound by the retainer agreement in setting the fee, the Surrogate could not award fees in excess of the amount agreed to in a valid retainer agreement.

In In Re Frey, N.Y.L.J., July 25, 2013, p. 25, col. 5, (Sur. Ct., N.Y. Co.), the Court, relying on Matter of Hyde, held that the counsel fees incurred by an estate’s beneficiary should be charged against such beneficiary’s share of the estate, as the Court determined that the beneficiary was not seeking to benefit or to enlarge the estate, but only to secure her own bequest.

In In re Heimo, N.Y.L.J. January 28, 2014 (Surr. Ct., Kings Co.), involving a contested accounting proceeding and the legal fees incurred by three fiduciaries, the court recognized that an exception to the “single fee” rule has been made when the adversarial position taken by the co-fiduciaries requires separate counsel and additional fees, and the court awarded reduced counsel fees aggregating 31% of the gross estate.

### Loans vs. Gifts

In Bosswick v. Hallman, N.Y.L.J. May 6, 2009, p. 36, col. 2, a turnover proceeding seeking collection of promissory notes given by the decedent's daughter to the decedent, the New York County Surrogate’s Court granted petitioners' motion for summary judgment and denied respondent's motion for summary judgment, holding that the cash transfers from the decedent to his daughter which were evidenced by those promissory notes were loans, rather than gifts, where the decedent's daughter, as a co-executor of the decedent's estate, included such transfers as assets of the estate on the estate's inventory filed with the Surrogate's Court, and on the federal estate tax return and the amended federal estate tax return filed by the estate with the Service, and did not include such transfers as gifts on gift tax returns of the decedent which the executors filed with the Internal Revenue Service. The New York Supreme Court, Appellate Division, First Department, 72 A.D.3d 617 (2010), affirmed the Surrogate Court's decision.

### Statute of Limitations

In Williamson v. PricewaterhouseCoopers LLP, 9 N.Y.3d 1 (2007), the Court held that the “continuous representation” doctrine, which if applicable would toll the statute of limitations for accounting malpractice claims until the accountant-client relationship terminated, does not apply where an audit client entered into annual engagements with the accounting firm to provide separate and discrete audit services for each audit year.

### Rule Against Perpetuities

In Bleecker Street Tenants Corp. v. Bleecker Jones LLC, 16 N.Y.3d 272 (2011), the Court held that the Rule against Perpetuities in EPTL Section 9-1.1(b) does not apply to options to renew a lease.

In TDNI Properties LLC v. Saratoga Glen Builders, LLC, 80 A.D.3d 852 (3d Dept. 2011), the Court held that options granted by a landowner to a builder to purchase lots in a subdivision are subject to the Rule against Perpetuities.

### Surcharge Computations

Although not a New York case, in Hopper v. JPMorgan Chase Bank, N. A., No. PR-11-3238-1, a jury trial in the Probate Court of Dallas County, Texas, the Court ordered the bank, which was hired to independently administer the decedent’s estate, to pay $4,700,000 in actual damages, $4,000,000,000 in punitive damages and $5,000,000 in attorney’s fees, finding that the bank breached its fiduciary duties and contractual obligations by unreasonably delaying the release of the decedent’s interests in various assets, by failing to meet certain financial deadlines regarding assets (i.e., allowing stock options to expire) and by ignoring the widow’s wishes to sell certain stock.

In Matter of Lasdon, 2011 N.Y. Misc. LEXIS 4433 (Surr. Ct., N.Y. Co., August 22, 2011), where a trustee failed to timely distribute the trust assets to the remainder beneficiaries and the value of the trust declined between the time when such assets should have been distributed and when they were actually distributed, the Court, in computing the amount of the surcharge against the trustee, declined to impute a gains tax as a factor in the surcharge and declined to award 9% interest on the surcharge, instead awarding 6% interest, compounded annually, on the surcharge. In a subsequent opinion, N.Y.L.J. June 18, 2012, the Court held that interest should be imposed not on the lost capital, but instead should be imposed on the full value of the assets at that time they should have been sold, and then deducted the value of such assets when they were distributed to the beneficiaries, as well as the dividends and other income attributable to the improper retention by the trustee of such assets. In addition, the Court held that interest should be imposed to the date of the Court’s decision, on August 22, 2011, rather than to the earlier date on which the trustee distributed the assets to the beneficiaries. The Appellate Division, First Department, 2013 NY Slip Op 02467 (2013), reversed the Surrogate Court’s imposition of a surcharge, stating that the petitioners did not demonstrate that the measure of damages is the difference in the value of the stock on the date such stock should have been distributed and the date such stock was actually distributed.

### Exoneration of Fiduciaries

In JPMorgan Chase Bank v. Loutit, N.Y.L.J. February 21, 2013, involving trusts containing a choice of law provision requiring the application of Massachusetts law, the Supreme Court, Nassau County, held that Massachusetts law would apply, rather than New York law, that the exculpatory provisions in the trusts were valid under Massachusetts law, even though they would be invalid under New York law, and that the language of the guidelines for the trusts exonerate the trustee from any claim that the trustee violated such guideline terms by failing to sell a large concentration of stock sufficiently early in time.

In Matter of HSBC Bank, USA, N.A., 2012 NY Slip Op 4954 (App. Div. 4th Dept., June 19, 2012), where an inter vivos trust authorized the trustee to seek and rely without liability on the advice of “counsel”, the Court held that such provision was not the type of absolute exoneration from liability that is prohibited by Section 11-1.7 of the EPTL, which voids as contrary to public policy any attempt at exoneration from liability of an executor or a testamentary trustee for the failure to exercise reasonable care, diligence and prudence.

### Slayer Inheritance

In Matter of Gleason, 36 Misc.3d 486 (Sur. Ct., Suffolk Co. 2012), where a husband had pleaded guilty to first-degree manslaughter for causing the death of his mother-in-law, the slayer’s wife was the sole beneficiary of her mother’s will, the slayer’s wife committed suicide 13 months after her mother’s death, and the slayer was the sole distributee of his wife’s estate, the Court held the slayer was disqualified from inheriting his wife’s estate, as her assets have been inherited by her from the victim.

### Delaware Trusts

In In Re Ethel F. Peierls Charitable Lead Unitrust, C.M. No. 16811-N-VCL (2012), In Re The Peierls Family Inter Vivos Trusts, consolidated C.M. No. 16812-N-VCL (2012) and In Re the Peierls Family Testamentary Trusts, consolidated C.M. No. 16810-N-VCL (2012), the Delaware Court of Chancery refused to approve the resignations of individual trustees and the confirmation of the appointment of a Delaware trust company as successor corporate trustee, on the grounds that such resignations and appointment can be accomplished pursuant to the terms of the trust agreements, refused to hold that Delaware law would govern the administration of the trusts upon the appointment of a Delaware trustee, as such an order would be contrary to the choice of law provisions in the trust agreements, declined to confirm that Delaware was the situs of the trusts, as New York or New Jersey law applied to the administration of the trusts and must be followed in order to change the trust situs, denied a requested reformation of the trusts, since the question of whether or not the trusts could be reformed was a matter of New York law or New Jersey law which the parties had not briefed, and denied the request that the Court accept jurisdiction over the trusts.

### Equitable Deviation

In Matter of Muir, N.Y.L.J. June 6, 2013, the New York County Surrogate’s Court held that the doctrine of equitable deviation should apply to modify a requirement in the testator’s will that the assets of a testamentary trust should be invested solely in United States obligations, where the income from such obligations decreased to the point where it was no longer in the best interests of the trust’s beneficiaries to follow that investment restriction, and the court reformed the terms of the trust to permit the trustees to invest in a manner consistent with the Prudent Investor Act as set forth in EPTL Section 11-2.3.

### Discretionary Trust Distributions

In Matter of Gleason Jr., N.Y.L.J. November 25, 2013 (Surr. Ct. N.Y. Co.), where the decedent’s granddaughter objected to an accounting of the trustee of a testamentary trust created under the decedent’s will on the grounds that the trustee wrongfully exercised its power to make discretionary distributions of trust principal, the Court refused to grant cross-motions for summary judgment, stating that a trustee’s decision regarding discretionary distributions of trust principal will not be interferred with by a court except in cases of abuse of discretion, bad faith or fraud.

### Incorporation By Reference

In Matter of D’Elia, 40 Misc.3d 355 (Surr. Ct., Nassau Co. 2013), where the decedent’s will bequeathed the residue of his estate to a so-called “pour-over trust”, and where the will further provided that if such trust was inoperative or invalid for any reason, the terms of the trust were incorporated by reference into the will, and where such trust was invalid as it was not executed prior to contemporaneously with the execution of the will, the Court held that the residuary bequest failed, resulting in intestacy.

### Bequests of Tangibles

In In re Rothchild, N.Y.L.J. October 28, 2014 (Surr. Ct., Bronx County), the court held that the decedent’s stamps and coin collections passed pursuant to the residuary clause of the decedent’s will, rather than as part of a bequest of tangible personal property.

### Charitable Pledges

In Estate of Kramer, N.Y.L.J. April 21, 2014 (Surrogate’s Court, Kings Co.), the court refused to enforce a decedent’s charitable pledge and promissory note, where the charity had not taken any meaningful and substantive actions in reliance on the pledge and note.

### Inference of Due Execution

In In re Sanger, N.Y.L.J. July 21, 2014 (Surr. Ct., Nassau Co.), involving a contested probate proceeding, where the execution of the propounded will was supervised by an attorney, an attestation clause preceded the signatures of the witnesses, and a self-proving affidavit was attached at the end of the will, the court held that the petitioner was entitled to an inference of due execution, even though the attorney who supervised the execution of the propounded will was not admitted to practice law in New York at the time the will was signed.

### Social Security Benefits

In MacNeil v. Berryhill , 16-2189-cv (Ct. App. 2nd Cir. 2017), the Court held that New York State law precludes a child who is born to a deceased parent after that parent’s death by means of in vitro fertilization from qualifying for Social Security Administration benefits, as EPTL Section 4-1.1(c), which deems children conceived before a decedent’s death but born alive thereafter as having “survived” the decedent, treats other potential distributees born after the decedent’s death, by omission from such statute, as children who did not “survive” the decedent.

### Assisted Suicide

In Myers v. Schneiderman, NY Slip Op 0642 (2017), the New York Court of Appeals held that Section 120.30 of the New York Penal Law, which provides that a person is guilty of assisting a suicide if he intentionally causes or aids another person to attempt suicide, and that Section 125.15 of such law, which provides that conduct that intentionally aids another in committing suicide constitutes manslaughter in the second degree, are constitutional, and that a physician who assists a suicide by prescribing lethal doses of drugs to a terminally ill competent person is subject to criminal prosecution for second degree manslaughter.

## Other Administrative Developments

### Bitcoins

On July 17, 2014 the New York State Department of Financial Services proposed establishing rules for firms involved in receiving, transmitting and storing virtual currency, as well as retail conversions. The proposed rules would establish a so-called “BitLicense”, and merchants who buy and sell virtual currency as a business would require such a license. However, merchants and consumers who use virtual currency solely to buy and sell goods and services would not need such a license.

### New York City Partnerships and Multi-member LLCs

As of May 18, 2015, partnerships or multi-member limited liability companies that acquire real estate in New York City must disclose the name and tax identification number of each general partner or limited liability company member to the New York City Department of Finance, to improve tax reporting and assessment, and to make it more difficult for criminals to hide purchases through shell companies.

# CONNECTICUT GIFT TAX, ESTATE TAX AND OTHER PERTINENT LEGISLATION

## Connecticut Estate Taxes and Gift Taxes

On October 31, 2017, as part of the budget legislation, Connecticut increased the individual exemption for Connecticut estate taxes and gift taxes. The exemption for 2017 remains at $2,000,000, the exemption for 2018 is increased to $2,600,000, the exemption for 2019 is increased to $3,600,000, and the exemption after 2019 is linked to the federal basic exclusion amount. In addition, the legislation provides that the maximum amount of combined estate taxes and gift taxes that an individual and/or his or her estate may be liable to pay was reduced from $20,000,000 to $15,000,000.

The Connecticut estate tax laws have been amended, effective for the estates of decedents dying on or after January 1, 2015, to modify the definition of “Connecticut taxable estate” to exclude Connecticut taxable gifts that are otherwise included in the gross estate for federal estate tax purposes, and to provide a Connecticut estate tax credit for the Connecticut gift tax paid by the taxpayer or the taxpayer’s spouse for Connecticut taxable gifts when such gift tax is otherwise included in the decedent’s gross estate.

The Connecticut estate tax and gift tax statute was amended to treat parties to a same sex marriage in the same manner as parties to a heterosexual marriage for estate tax and gift tax purposes, effective April 23, 2009.

## Connecticut Probate Fees

On June 30, 2015 Connecticut enacted a cap on probate fees for the estates of decedents who die on or after July 1, 2016. At the top bracket, for estates of $8,877,000 and over, the probate fee will be $40,000.

## Substitute Decision-Making Documents

Connecticut enacted an act adopting the Connecticut Uniform Recognition of Substitute Decision-Making Documents Act and revising the Connecticut Uniform Power of Attorney Act. The portion of the Act relating to substitute decision-making documents, which is effective on October 1, 2017, applies to any substitute decision-making document, whenever created. Pursuant to the Act, a substitute decision-making document is a record created by an individual to authorize a decision maker to act for the individual with respect to property, health or personal care. The portion of the Act relating to powers of attorney, which is effective July 1, 2017, revises Connecticut’s Uniform Power of Attorney Act by allowing the use of forms substantially similar to the statutory forms, broadening the list of activities that require a power of attorney’s specific grant of authority, and revising the statutory forms, including adding provisions for digital devices, digital assets, user accounts, electronically stored information and intellectual property.

## Tax on Endorsement Income

Connecticut is considering a proposal to tax endowment income for schools with funds of $10,000,000,000 or more. Yale University, with an endowment that earned $2,600,000,000 in investment gains in 2015, is the only school in the state that would be subject to the proposed bill.

## Posthumously Conceived on Born Children

On October 1, 2013 legislation was enacted that provides certain inheritance rights to a child conceived or born after the date of the death of one of the child’s married parents, if both parents sign and date a written document specifically authorizing the surviving spouse to use the genetic material of the deceased spouse to posthumously conceive a child, who must be in utero within one year of death.

## Digital Assets

In 2012 Connecticut enacted legislation (Conn. Gen. Stat. Section 45a-334a) requiring an electronic mail service provider to provide to the personal representative of a decedent’s estate who was domiciled in Connecticut at the time of his or her death access to or copies of the contents of the electronic mail account of the decedent.

## Same-Sex Marriage

On April 23, 2009 legislation was enacted in Connecticut approving same-sex marriage.

## Pet Trusts

Connecticut enacted legislation (Conn. Legis. Serv. 09-169), effective October 1, 2009, which authorizes, either by a will or by an inter vivos trust, the creation of a trust which provides for the care of one or more specified animals which is or are alive during the testator’s or settlor’s life. Any such trust must terminate at the death of the last surviving animal or animals designated in the trust.

EXHIBIT “A”

**FINAL REGULATIONS**

**REGARDING PORTABILITY**

By Sanford J. Schlesinger, Esq. and Martin R. Goodman, Esq.

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On June 12, 2015, the Internal Revenue Service (the IRS) released final regulations (T.D. 9725) (the final regulations) regarding the portability provisions in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (P.L. 111-312)(the 2010 Act), which provisions were amended and made permanent by the American Taxpayer Relief Act of 2012 (P.L. 112-240)(the 2012 Act). The final regulations also removed the proposed temporary regulations (the proposed regulations) regarding portability that were issued on June 15, 2012 (after the enactment of the 2010 Act, but before the enactment of the 2012 Act), and that would have expired on June 15, 2015. This analysis will review and discuss the final regulations and the IRS’s supplementary information (the supplementary information) provided in the preamble that accompanied the final regulations, and, where applicable, will compare the final regulations to the proposed regulations.

Preliminarily, it is important to note that portability applies for estate and gift tax purposes, but it does not apply for generation-skipping transfer tax purposes.

The final regulations consist of estate tax regulations and gift tax regulations, which are largely the same as the proposed regulations, with certain important differences that are discussed below. The estate tax regulations are contained in Reg. §20.2001-2, which states that the final regulations provide additional rules regarding the IRS’s authority to examine tax returns, even if the time in which the tax may be assessed has expired, for the purpose of determining the deceased spousal unused exclusion (DSUE, described below) amount, Reg. §20.2010-1, which sets forth definitions and general rules regarding the unified credit against the estate tax, Reg. §20.2010-2, which contains portability provisions that are applicable to the estate of a decedent who is survived by a spouse, and Reg. §20.2010-3, which contains portability provisions that are applicable to the estate of the surviving spouse. The gift tax regulations consist of Reg. §25.2505-1, which sets forth general rules regarding the unified credit against the gift tax, and Reg. §25.2505-2, which contains provisions regarding lifetime gifts made by a surviving spouse who has a DSUE amount available.

In general, the final regulations are effective on June 12, 2015.

**Estate Tax Regulations**

Reg. §20.2001-2 states that Reg. §§20.2001-1(b), 20.2010-2(d) and 20.2010-3(d), all of which are discussed below, provide additional rules regarding the IRS’s authority to examine any gift tax return or other tax returns, even if the statute of limitations for assessments has expired, for the purpose of determining the DSUE amount that is available to the surviving spouse.

Reg. §20.2010-1 defines certain relevant terms and sets forth general rules regarding the unified credit against the estate tax.

This regulation begins by stating that the estate of every decedent is allowed a credit under Code Sec. 2010(a) of the Internal Revenue Code of 1986, as amended (the Code), of the “applicable credit amount” (which sometimes is referred to as the “unified credit”). The applicable credit amount is the amount of the tentative tax that would be determined under Code Sec. 2001(c) if the amount on which the tentative tax is computed were equal to the “applicable exclusion amount” (which credit is determined by applying the tax rate schedule to the applicable exclusion amount). The regulation then defines the term applicable exclusion amount to be equal to the sum of the “basic exclusion amount” (defined below) and, with respect to the estate of a surviving spouse, the DSUE amount (also defined below). The basic exclusion amount (which is commonly referred to as the estate tax exemption) is defined as $5,000,000 for the estate of a decedent dying in 2011, and $5,000,000, adjusted for inflation from 2010, for the estate of a decedent dying after 2011. The inflation adjusted basic exclusion amount is $5,430,000 for the estate of a person who dies in 2015. Thus, the amount of this credit for the estate of a decedent who dies in 2015 without any DSUE amount is $2,117,800, as determined from a basic exclusion amount of $5,430,000. The amount of this credit for the estate of a decedent who dies after 2015 is determined based on the applicable exclusion amount, consisting of the sum of the decedent’s basic exclusion amount of $5,000,000, as adjusted for inflation from 2010, and the decedent’s DSUE amount, if any. This credit is reduced by 20 percent of the portion of the gift tax exemption of $30,000 that was allowable prior to 1977 and that the decedent used with respect to gifts made after September 8, 1976, and before January 1, 1977, but in any case the amount of this credit is not more than the amount of the tentative estate tax determined under Code Sec. 2001(c).

The regulation states that the DSUE amount generally is the unused portion of a decedent’s applicable exclusion amount to the extent that such amount does not exceed the basic exclusion amount in effect in the year of the decedent’s death.

Finally, the regulation defines the term “last deceased spouse” as the most recently deceased individual who, at that individual’s death after December 31, 2010, was married to the surviving spouse.

**Portability Election Requirements**

Reg. §20.2010-2(a) sets forth the requirements for a valid portability election.

The regulation states that the executor of a decedent’s estate must elect portability of the DSUE amount on a timely filed federal estate tax return (Form 706) to allow the decedent’s surviving spouse to take into account the decedent’s DSUE amount. The regulation provides that an estate that elects portability will be treated as an estate that is required to file an estate tax return under Code Sec. 6018(a), even if the estate otherwise would not be required to do so. Therefore, the due date of an estate tax return that is filed to elect portability is nine months after the date of the decedent’s (not the surviving spouse’s) death, subject to any allowed extension of time to file such tax return, even if an estate tax return is not otherwise required to be filed for the estate.

Importantly, this regulation (unlike the temporary regulations) clarifies circumstances under which an extension of time to elect portability will or will not be granted under Reg. §301.9100-3. The regulation states that such an extension to elect portability is not available to estates that are required to file an estate tax return based on the applicable exclusion amount, since in such case the due date for the portability election is prescribed by statute and Reg. §301.9100-3 applies only to an election whose due date is prescribed by regulation. However, an extension of time under Reg. §301.9100-3 to elect portability may be available to an estate that is under the value threshold for being required to file an estate tax return, as in such case the due date for the portability election is prescribed by regulation, rather than by statute.

In this regard, note that Rev. Proc. 2014-18, IRB 2014-7, 513, provided that if a United States citizen or resident died after December 31, 2010, and on or before December 31, 2013, and had a surviving spouse, and if the decedent’s estate was below the threshold for filing an estate tax return, and if such estate did not timely file an estate tax return, then such estate will be deemed to meet the requirements for relief under Reg. §301.9100-3, and is granted relief under such regulation to extend the time to elect portability, if such estate files a complete and properly prepared estate tax return on or before December 31, 2014. It is important to note that the IRS’s supplementary information stated that the IRS is continuing to consider permanently extending the type of relief granted in such revenue procedure, although such relief is not included in the final regulations.

The regulation further states that if an estate tax return is complete and properly prepared (as discussed below) and is timely filed, the executor of the estate of a decedent who is survived by a spouse will be treated as having elected portability of the decedent’s DSUE amount, unless the executor affirmatively chooses *not* to elect portability. An executor will not be considered to have elected portability if the executor states on a timely filed estate tax return, or in an attachment to that return, that the executor is not electing portability under Code Sec. 2010(c)(5), or if the executor does not timely file an estate tax return. The regulation states that the manner in which the executor may make the above-described affirmative statement on the estate tax return is as set forth in the instructions issued for that tax return.

The regulation then states that the portability election, once made, becomes irrevocable after the due date of the estate tax return, including extensions actually granted. However, before a portability election, or an election to not have portability apply, becomes irrevocable, an executor may make a portability election or may supersede a portability election previously made by timely filing another estate tax return making a portability election or reporting the decision not to make a previously made portability election. The regulation provides that an executor of the estate of a decedent who is survived by a spouse may elect portability on behalf of the estate if the decedent dies on or after January 1, 2011. However, the regulation also provides that the executor of the estate of a nonresident decedent who was not a citizen of the United States at the time of his or her death may not elect portability on behalf of that decedent, and that the timely filing of an estate tax return for such decedent will not be deemed to make the portability election.

The regulation states that a duly appointed executor or administrator of the estate of a decedent, who is appointed, qualified and acting within the United States, can file the estate tax return for the decedent’s estate and elect portability, or elect not to have portability apply. Such regulation also provides that if no executor or administrator has been appointed for a decedent’s estate, then any person in actual or constructive possession of any property of the decedent (a non-appointed executor) can file the estate tax return for the decedent’s estate and elect portability, or can elect not to have portability apply. Such regulation further provides that an election to allow portability made by a non-appointed executor cannot be superseded by a contrary election to have portability not apply made by another non-appointed executor of that estate, unless such other non-appointed executor is the successor of the non-appointed executor who made the portability election. However, the regulation also states that a portability election made by a non-appointed executor when there is no appointed executor for that decedent’s estate can be superseded by a subsequent contrary election made by an appointed executor of such estate on an estate tax return that is timely filed.

In this regard, it is noted that circumstances may exist which cause the executor to be unwilling to elect portability. For example, the executor may be a child of the decedent from a former marriage who, due to animus, may not want to confer a tax benefit on the decedent’s surviving spouse by electing portability. However, the state in which the decedent’s Will is probated may authorize the appointment of an executor for a limited purpose. For example, the State of New York provides such pursuant to the Section 702 of the New York Surrogate’s Court Procedure Act. In such a case, it may be possible for the surviving spouse to be appointed as the executor of the estate for the limited purpose of filing the estate tax return and making the portability election.

The IRS, in the supplementary information, stated that several persons who submitted comments with regard to the proposed regulations requested that the final regulations allow a surviving spouse who is not an executor of the deceased spouse’s estate to file an estate tax return and make the portability election in various circumstances, including where the surviving spouse is given the right to file the estate tax return in a premarital agreement, or the surviving spouse has petitioned the appropriate local court for his or her appointment as an executor solely for the limited purpose of filing the estate tax return in order to make the portability election. However, the IRS concluded that any consideration of what, if any, state law action might bring the surviving spouse within the definition of executor under Code Sec. 2203 is outside of the scope of these regulations, and the final regulations do not include any of such changes requested by those commentators.

The regulation then sets forth the requirements for a complete and properly prepared estate tax return pursuant to which the executor may elect portability. The regulation provides that, in general, an estate tax return will be considered complete and properly prepared if it is prepared in accordance with the instructions issued by the IRS for the preparation of an estate tax return and if the requirements of Reg. §20.6018-2 (which, in general, contains additional provisions as to the person or persons required to file an estate tax return), Reg. §20.6018-3 (which sets forth the requirements for the contents of an estate tax return) and Reg. §20.6018-4 (which sets forth certain requirements as to documents that must be filed with an estate tax return) are satisfied.

The IRS in its supplementary information stated that a person who submitted comments after the publication of the proposed regulations suggested that the final regulations elaborate on the circumstances under which a timely filed estate tax return may be considered insufficient as to render the estate tax return incomplete for purposes of electing portability. However, the IRS considered the issue of whether or not an estate tax return is complete and properly prepared to be an issue that must be determined on a case-by-case basis by applying standards as prescribed in current law. Therefore, the final regulations did not adopt this suggestion.

The regulation also sets forth a special rule regarding the reporting of the value of certain property of estates as to which the executor is not required to file an estate tax return other than for the purpose of making the portability election (i.e., an estate of a decedent whose gross estate and adjusted taxable gifts do not exceed the filing requirement threshold for the year of the decedent’s death). Pursuant to this special rule, an executor is not required to report a value for property that is includible in the decedent’s gross estate and that qualifies for either the estate tax marital deduction or the estate tax charitable deduction. Instead, the executor will only be required to report the description, ownership and/or beneficiary of such property, and all other information necessary to establish the right of the estate to the estate tax marital deduction or the estate tax charitable deduction for such property.

However, this special rule does not apply if:

(a) the value of such property relates to, affects or is needed to determine the value passing from the decedent to another recipient;

(b) the value of such property is needed to determine the estate’s eligibility for the provisions of Code Sec. 2032 (regarding the alternate valuation date election), Code Sec. 2032A (regarding the valuation of qualified real property), or another estate tax or generation-skipping transfer tax provision of the Code for which the value of such property or the value of the gross estate or the adjusted gross estate must be known (not including Code Sec. 1014, which sets forth the rules for determining the income tax cost basis of property acquired from a decedent), such as Code Sec. 6166 (regarding the election to pay the portion of the estate tax that is attributable to an interest in a closely held business in installments);

(c) less than the entire value of an interest in property that is includible in the decedent’s gross estate qualifies for the estate tax marital deduction or the estate tax charitable deduction; or

(d) a partial disclaimer or a partial qualified terminable interest property (QTIP) election is made with respect to property that is includible in the decedent’s gross estate, part of which qualifies for the estate tax marital deduction or the estate tax charitable deduction. Thus, in any of these instances, an estate tax return that is filed solely to make the portability election, and that would not otherwise be required to be filed, will require all of the information and related documentation that would be required for an estate tax return for the estate of a decedent whose gross estate and adjusted taxable gifts exceeds the filing threshold, in order to be considered a complete and properly prepared estate tax return.

This special rule reducing the requirements for reporting the value of certain property that is includible in the decedent’s gross estate will apply only if the executor exercises due diligence to estimate the fair market value of the decedent’s gross estate, including the property that is includible in the decedent’s gross estate and that qualifies for the estate tax marital deduction or the estate tax charitable deduction. The regulation states that the executor, using his, her or its best estimate of the value of the properties that qualify for the estate tax marital deduction or the estate tax charitable deduction must report on the estate tax return, under penalties of perjury, the amount corresponding to the particular range within which the executor’s best estimate of the total gross estate falls, in accordance with the instructions for Form 706. In this regard, it is noted that such instructions contain a Table of Estimated Values for such assets, in increments of $250,000, and state that the amount reported on Form 706 for such assets should correspond to the applicable range of dollar values for such assets.

This regulation contains examples illustrating the operation of this special rule.

In Example 1, the gross estate of the first spouse to die consisted solely of assets owned jointly with the decedent’s surviving spouse, with right of survivorship, a life insurance policy payable to the surviving spouse, and a survivor annuity payable to the surviving spouse for her life. The decedent made no taxable gifts during his lifetime. The example states that an estate tax return that identifies these assets on the proper schedules, but provides no information with regard to the date of death value of such assets, that includes evidence verifying the title of each jointly held asset, confirming that the surviving spouse is the sole beneficiary of both the life insurance policy and the survivor annuity, and verifying that the annuity is exclusively for the surviving spouse’s life, and that reports the executor’s best estimate, determined by exercising due diligence, of the fair market value of the decedent’s gross estate, is considered a complete and properly prepared estate tax return in which the executor has elected portability.

In Example 2, the decedent died testate, leaving a will in which he bequeaths his entire estate to his surviving wife, outright and free of trust. The decedent also had non-probate assets that are includible in his gross estate, consisting of a life insurance policy payable to his children and an individual retirement account (IRA) payable to his wife. The decedent made no taxable gifts during his lifetime. The executor of the decedent’s estate filed an estate tax return in which all of the assets that are includible in the decedent’s gross estate are identified on the proper schedule. As to the decedent’s probate assets and the IRA, no information is provided regarding the date of death value of such assets. The executor attaches a copy of the decedent’s will, and describes each such asset and its ownership to establish the estate’s entitlement to the estate tax marital deduction for such assets. With respect to the life insurance policy payable to the decedent’s children, all of the regular estate tax return requirements apply, including reporting and establishing the fair market value of such asset. The executor also reports the executor’s best estimate, determined by exercising due diligence, of the fair market value of the decedent’s gross estate. This example states that the estate tax return is considered to be complete and properly prepared, and that the executor has elected portability.

In Example 3, the decedent died testate, and his will bequeathed 50 percent of his probate assets to a marital trust for the benefit of the decedent’s wife and the other 50 percent thereof to a trust for the benefit of the decedent’s wife and their descendants. This example states that, as the amount passing to the non-marital trust cannot be verified without knowledge of the full value of the property passing under the decedent’s will, the value of the property of the marital trust relates to or affects the value of the property passing to the non-marital trust, so that the general return requirements apply to all of the property includible in the decedent’s gross estate. Thus, in this example, the special rule described above waiving such requirements does *not* apply.

The IRS in its supplementary information stated that a person who submitted comments after the proposed regulations were issued suggested that the IRS prepare a shorter version of the estate tax return to be used by estates that are not otherwise required to file an estate tax return, but do so only to elect portability. The IRS concluded that a timely filed, complete and properly prepared estate tax return affords the most efficient and administrable method of obtaining the information necessary to compute and verify the DSUE amount, and that the alleged benefits to taxpayers from an abbreviated form is far outweighed by the anticipated administrative difficulties in administering the estate tax that would occur from the use of a short version of such tax return. Thus, the IRS did not adopt this suggestion.

In this regard, it should be noted that Rev. Proc. 2001-38, IRB 2001-24, 1335, states that the IRS will disregard for federal estate tax, gift tax, and generation-skipping transfer tax purposes, a QTIP election that is made under Code Sec. 2056(b)(7) where the election was not necessary to reduce the estate tax liability to zero. The IRS, in the supplementary information, stated that multiple commentators have requested guidance on the application of such revenue procedure when an estate that is below the filing threshold files an estate tax return and makes the portability election and a QTIP election on such tax return. The commentators have noted that, with the introduction of portability, an executor may purposefully file an estate tax return in such a case in order to elect both portability and QTIP treatment, and that the rationale for the rule voiding the QTIP election (that such election was of no benefit to the taxpayer) is no longer applicable. However, the IRS declined to provide such guidance in the final regulations, and stated that it intends to provide such guidance by publication in the Internal Revenue Bulletin to clarify whether a QTIP election that is made for estate tax purposes may be disregarded when the executor has elected portability.

It also is noted that the IRS recently announced on its website that it will not automatically issue closing letters for estate tax returns filed on or after June 1, 2015, and that a taxpayer who wants a closing letter should request it in a separate letter submitted to the IRS at least four months after the estate tax return is filed. This departure from the IRS’s long-standing practice of issuing estate tax closing letters may be due to the IRS’s belief that if it issues an estate tax closing letter for an estate that elects portability, then the IRS could be “prejudiced” in any effort that it may make to subsequently review such estate tax return in order to determine the amount of the decedent’s DSUE amount, even though Code Sec. 2010(c)(5)(B) grants the IRS such examination authority whether or not the statute of limitation for assessments has expired with respect to such tax return. In addition, it is possible that with the advent of portability, the number of estate tax returns that are being filed and will be filed may far exceed the number of estate tax returns that were filed before portability was enacted, and the IRS may believe that it would be overly burdensome to issue estate tax closing letters as a matter of course for each such tax return. However, if the IRS’s new policy regarding the issuance of estate tax closing letters is based on this administrative concern, the IRS could simply limit the application of this new policy to the estates of decedents that are below the filing threshold. Regardless of the rationale for this change in policy, it may be desirable for executors to routinely request estate tax closing letters approximately four months after filing estate tax returns, especially with respect to estates that have a low risk or no risk of adjustments on audit.

**DSUE Computation**

Reg. §20.2010-2(b) provides that the executor of a decedent’s estate must include a computation of the DSUE amount on the decedent’s estate tax return to elect portability, and that this requirement is satisfied by the timely filing of a complete and properly prepared estate tax return, as long as the executor has not elected out of portability.

Reg. §20.2010-2(c) contains provisions regarding the computation of the DSUE amount. This regulation provides that such amount generally is the lesser of the basic exclusion amount in effect for the year of the decedent’s death (i.e., $5,000,000, adjusted for inflation, as noted above), or the excess of the decedent’s applicable exclusion amount over the sum of the decedent’s taxable estate and the amount of the decedent’s adjusted taxable gifts as to which gift taxes were not paid.

In this regard, it is noted that the 2010 Act defined the DSUE amount as the lesser of (a) the basic exclusion amount, or (b) the excess of the basic exclusion amount (rather than the applicable exclusion amount) of the last deceased spouse of the surviving spouse over the amount with respect to which the tentative tax is determined under Code Sec. 2001(b)(1) on the estate of such deceased spouse. However, the proposed regulations, which as noted above, were issued after the enactment of the 2010 Act but before the enactment of the 2012 Act, defined the DSUE amount as the lesser of (a) the basic exclusion amount, or (b) the excess of the applicable exclusion amount (rather than the basic exclusion amount) of the last deceased spouse of the surviving spouse over the amount with respect to which the tentative tax on the estate of such deceased spouse is so determined.

The effect of such statutory formulation in the 2010 Act, and the effect of the regulatory interpretation of it in the proposed regulations, can be illustrated by the following example:

Assume that H-1 dies in 2011, having made taxable gifts during his life of $3,000,000 and having no taxable estate, that the executor of H-1’s estate files an estate tax return electing portability, that H-1’s surviving spouse, W, makes no taxable gifts during her life, and that W remarries H-2 and W predeceases H-2. Pursuant to the statutory formulation in the 2010 Act, after H-1’s death, W’s applicable exclusion amount is $7,000,000 (i.e., her $5,000,000 basic exclusion amount, plus the DSUE amount of $2,000,000 from H-1). W has a taxable estate of $3,000,000 at her death, and the executor of W’s estate files an estate tax return electing portability. Pursuant to the statutory formulation, W’s DSUE amount is the lesser of (a) W’s basic exclusion amount of $5,000,000, or (b) the excess of W’s basic exclusion amount of $5,000,000, over her taxable estate of $3,000,000, or $2,000,000. Thus, W’s DSUE amount is $2,000,000. Therefore, H- 2’s applicable exclusion amount would be the sum of his own basic exclusion amount of $5,000,000, plus W’s DSUE amount of $2,000,000, or $7,000,000.

However, pursuant to the proposed regulation, W’s DSUE amount is the lesser of (a) W’s basic exclusion amount (i.e., $5,000,000), or the (b) excess of W’s applicable exclusion amount, which is $7,000,000 (i.e., W’s $5,000,000 basic exclusion amount, plus the $2,000,000 DSUE amount from H-1), over the amount of W’s taxable estate of $3,000,000, for an excess amount of $4,000,000. Thus, pursuant to the proposed regulations, W’s DSUE amount is $4,000,000, and the applicable exclusion amount of H-2 is $9,000,000 (i.e., H-2’s basic exclusion amount of $5,000,000, plus W’s DSUE amount of $4,000,000).

Consequently, such regulatory interpretation of the statute increased the applicable exclusion amount of H-2 by $2,000,000.

Interestingly, the technical explanation of the 2010 Act prepared by the Joint Congressional Committee on Taxation (JCX-55-10, December 10, 2010, Footnote 57), in its discussion regarding the portability provisions of the 2010 Act, included an example (Example 3), which in effect adopted the view regarding the computation of the DSUE amount that is set forth in the proposed regulations. In addition, on March 23, 2011, the same Committee issued an errata to its general explanation of the 2010 Act (JCX-20-11) stating that the intent of the 2010 Act was to compute the DSUE amount of the wife in the above example in the same manner as it is computed pursuant to the proposed regulations, and further stating that a technical correction of the 2010 Act may be necessary to replace the statutory reference to the “basic exclusion amount of the last such deceased spouse of such surviving spouse” with a statutory reference to the “applicable exclusion amount of the last such deceased spouse of such surviving spouse” to reflect this intent. In fact, the 2012 Act included such technical correction of the 2010 Act. As a result, there was no need for a reference to this issue in the final regulations, and there was none.

The regulation also states that the amount of the adjusted taxable gifts of a decedent is reduced by the amount on which gift taxes were paid, in order to compute the decedent’s DSUE amount.

It should be noted that the temporary regulations did not provide guidance, and reserved a section thereof for future provision, on the impact of the estate tax credits under Code Secs. 2012 through 2015 (the credit for gift taxes, the credit for tax on prior transfers, the credit for foreign death taxes, and the credit for death taxes on remainders, respectively). The IRS, in the supplementary information, stated that it concluded that the amount of such allowable credits can be determined only after subtracting the applicable credit amount determined under Code Sec. 2010 from the tax imposed by Code Sec. 2001. Thus, to the extent that the applicable credit amount is applied to reduce the tax imposed by Code Sec. 2001 to zero, the credits allowable in Code Secs. 2012 through 2015 are not available. In addition, the IRS stated that the computation of the DSUE amount does not take into account any unused credits arising under Code Secs. 2012 through 2015. For these reasons, the IRS concluded that no adjustment to the computation of the DSUE amount to account for any such unused credits is warranted, and the final regulations so state.

The regulation also sets forth a special rule regarding portability in the case of property passing to a qualified domestic trust (QDOT). Pursuant to Code Sec. 2056(d), the estate of a decedent is not allowed an estate tax marital deduction for property passing from the decedent to a surviving spouse who is not a United States citizen, unless the property passes to a QDOT. Pursuant to Code Sec. 2056A, in general, a QDOT is a trust that requires that at least one trustee shall be an individual who is a United States citizen or a domestic corporation, who or which will pay the estate tax with respect to such trust from any principal distribution of the trust before the death of the surviving spouse, and from the value of the trust that is remaining on the death of the surviving spouse. The regulation provides that in such case the DSUE amount of the decedent is computed on the decedent’s estate tax return for the purpose of electing portability in the same manner as such amount would otherwise be computed, but the decedent’s DSUE amount is subject to subsequent adjustments. The regulation states that the DSUE amount of the decedent must be redetermined upon the occurrence of the final distribution or other event (generally, the death of the surviving spouse or the earlier termination of all QDOTs for that surviving spouse) on which the estate tax is imposed. Thus, a surviving spouse generally cannot use any of the DSUE amount received from the deceased spouse while a QDOT for the benefit of the surviving spouse remains in effect. As a result of this rule, a non-citizen surviving spouse will generally not be able to use the deceased spouse’s DSUE amount to make lifetime gifts.

In this regard, it is noted that the proposed regulations provided that in the case of a decedent’s estate claiming a marital deduction for property received through a QDOT, the earliest date on which a decedent’s DSUE amount could be included in determining the applicable exclusion amount available to the surviving spouse or the surviving spouse’s estate is the date of the event that triggers the final estate tax liability of the first spouse to die under Code Sec. 2056A. However, the IRS stated in the supplementary information that a person who submitted comments regarding such regulations challenged this delay in the surviving spouse’s ability to use the decedent’s DSUE amount if the surviving spouse becomes a United States citizen after the decedent’s estate tax return is filed and after the property passes to a QDOT for the benefit of such surviving spouse. The IRS stated that it concluded that in such a case the tax imposed by Code Sec. 2056A(b)(1) would no longer apply, and the decedent’s DSUE amount would no longer be subject to adjustment and would become available for transfers by the surviving spouse as of the day the surviving spouse becomes a United States citizen. Accordingly, the final regulations included this change, by providing that if the surviving spouse becomes a United States citizen after the death of the first spouse to die, in general no estate tax will be imposed under Code Sec. 2056(a) either on subsequent QDOT distributions or on the property remaining in the QDOT on the surviving spouse’s death, and the decedent’s DSUE amount is no longer subject to adjustment.

The regulation contains four examples illustrating its application:

In Example 1, H and W are United States citizens. H makes a taxable gift of $1,000,000 in 2002, pays no gift tax due to the applicable exclusion amount available to H of $1,000,000 in 2002, and dies in 2015 survived by W. H’s taxable estate is $1,000,000, and the executor of H’s estate timely files an estate tax return electing portability. The example states that H’s DSUE amount is $3,430,000 (the lesser of (a) the $5,430,000 basic exclusion amount in 2015, or (b) the excess of H’s $5,430,000 applicable exclusion amount over the sum of H’s $1,000,000 taxable estate and the $1,000,000 amount of adjusted taxable gifts that H made).

In Example 2, the facts are the same as in Example 1, except that the value of H’s taxable gift in 2002 is $2,000,000, as to which H paid a gift tax on $1,000,000. This example states that H’s DSUE amount is $3,430,000 (the lesser of (a) the $5,430,000 basic exclusion amount in 2015, or (b) the excess of H’s $5,430,000 applicable exclusion amount over the sum of the $1,000,000 taxable estate of H and the $1,000,000 of adjusted taxable gift made by H as to which gift taxes were not paid).

In Example 3, H, a United States citizen, made a taxable gift of $1,000,000 in 2002 as to which no gift taxes were due. H dies in 2015 with a gross estate of $2,000,000 survived by W, who is a United States resident but not a United States citizen. H bequeathed the sum of $1,500,000 to a QDOT for the benefit of W. H’s executor timely filed an estate tax return making the QDOT election and electing portability. H’s taxable estate, after the marital deduction of $1,500,000, is $500,000. The preliminary DSUE amount of H is $3,930,000 (the lesser of (a) the $5,430,000 basic exclusion amount in 2015, or (b) the excess of H’s $5,430,000 applicable exclusion amount over the sum of H’s $500,000 taxable estate and the $1,000,000 adjusted taxable gift made by H). At W’s death in 2017, the value of the assets of the QDOT is $1,800,000. The example states that the DSUE amount is redetermined to be $2,130,000 (the lesser of (a) the $5,430,000 basic exclusion amount in 2015, or (b) the excess of H’s $5,430,000 applicable exclusion amount over $3,300,000 (the sum of the $500,000 taxable estate of H augmented by the $1,800,000 of QDOT assets and the $1,000,000 of adjusted taxable gifts)).

In Example 4, the facts are the same as in Example 3, except that W becomes a United States citizen in 2016 and dies in 2018. The example states that pursuant to Code Sec. 2056A(b)(12), the estate tax under Code Sec. 2056A no longer applies to the QDOT property. The example further states that because H’s DSUE amount is no longer subject to adjustment once W becomes a United States citizen, H’s DSUE amount is $3,930,000, as it was preliminarily determined as of H’s death, and that on W’s death in 2018, the value of the QDOT property is includible in W’s gross estate.

The regulation also states that the IRS may examine the tax returns of a decedent to determine the decedent’s DSUE amount, regardless of whether or not the period of limitations on the assessment of additional taxes has expired for such tax return. However, as noted below regarding the gift tax regulations, the IRS cannot assess any additional taxes with respect to any such tax return after the expiration of the statute of limitations for such assessment.

In this regard, the IRS in the supplementary information stated that a person who submitted comments concerning the proposed regulations requested that such examination authority of the IRS be limited to issues of the reporting and valuation of assets, and not extend to other legal issues that may impact on the availability of the DSUE amount to the surviving spouse. The IRS stated that such limited authority would be inconsistent with the statute, which grants broad authority to the IRS to examine the correctness of any return, without regard to the statute of limitations on assessments, to make determinations with respect to the allowable DSUE amount. In addition, another commentator requested confirmation that, in the examination of a tax return for the purpose of determining the allowable DSUE amount that takes place after the expiration of the statute of limitations, the valuation of assets may be increased or decreased, with a possible result that the allowable DSUE amount may decrease or increase. The IRS stated that no clarification or change in the regulations was required for this purpose. Further, another commentator suggested that the final regulations consider whether, in the case of such an examination, an adjustment to the value of an asset reported on the estate tax return affects the income tax cost basis of such asset under Code Sec. 1014. The IRS stated that the basis of property acquired from a decedent is determined in accordance with the existing principles of Code Sec. 1014, and that the scope of such examination authority is sufficiently clear and therefore no change need be made in this regard in the final regulations. Moreover, another commentator suggested that the final regulations clarify the deductibility of administration expenses associated with such an examination. The IRS stated that any such expenses should be treated as any other expense associated with preparation of the surviving spouse’s tax returns, that the standards for deducting such expenses for estate tax and gift tax purposes are sufficiently clear, and that no change to the temporary regulation in this regard is necessary. Finally, another commentator suggested clarifying who may participate in such an examination. The IRS stated that each taxpayer has the authority to participate in the resolution of issues raised in the audit of his or her tax return, and that addressing this issue is outside the scope of the final regulations.

**Portability Provisions Applicable to the Surviving Spouse’s Estate**

Reg. §20.2010-3 provides that the DSUE amount of a decedent is included in determining the applicable exclusion amount of the decedent’s surviving spouse for estate tax purposes only if such decedent is the last deceased spouse of such surviving spouse on the date of the death of such surviving spouse, and only if the executor of the estate of such last deceased spouse elected portability. This regulation further states that the surviving spouse’s estate has no DSUE amount available if the last deceased spouse of such surviving spouse had no DSUE amount, or if the executor of the last deceased spouse’s estate did not make a portability election, even if the surviving spouse previously had a DSUE amount available from another decedent who, prior to the death of the last deceased spouse, was the last deceased spouse of such surviving spouse. For example, if H-1 and W are married, and if H-1 dies having a DSUE amount and the executor of his estate makes the portability election, but thereafter W marries H-2 who then dies having no DSUE amount, then on W’s death the DSUE amount from H-1 would not be available to the estate of W.

In addition, this regulation states that a decedent is the last deceased spouse of a surviving spouse even if, on the date of the death of such surviving spouse, the surviving spouse is married to another then living individual. Further, the regulation states that if a surviving spouse remarries and that marriage ends in a divorce or an annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse. Since the divorced spouse, at his or her death, is not married to the surviving spouse, such divorced spouse is not the last deceased spouse of the surviving spouse.

The regulation provides a special rule to compute the DSUE amount of a surviving spouse for estate tax purposes where the surviving spouse previously applied the DSUE amount of one or more deceased spouses to lifetime taxable gifts. This rule states that if a surviving spouse has applied the DSUE amount of one or more last deceased spouses to the surviving spouse’s lifetime gifts, and if any of those last deceased spouses is not the surviving spouse’s last deceased spouse at the death of the surviving spouse, then the DSUE amount to be included in determining the applicable exclusion amount of the surviving spouse at the time of the surviving spouse’s death is the sum of the DSUE amount of the surviving spouse’s last deceased spouse, and the DSUE amount of each other deceased spouse of the surviving spouse, to the extent that such DSUE amount was applied to one or more taxable gifts of the surviving spouse.

This regulation contains the following example to illustrate the operation of this provision:

H-1 dies in 2011, survived by W, and neither of them has made any taxable gifts during H-1’s life. H-1’s executor elects portability of H-1’s DSUE amount, which is $5,000,000. In 2012 W makes taxable gifts of $2,000,000, and W is considered to have applied $2,000,000 of H-1’s DSUE amount to the taxable gifts. Thereafter, W has a remaining applicable exclusion amount of $8,120,000, consisting of H-1’s $3,000,000 remaining DSUE amount, plus W’s own $5,120,000 basic exclusion amount. After H-1’s death, W marries H-2 in 2013. H-2 dies in 2014. H-2’s executor elects portability of H-2’s DSUE amount, which is $2,000,000. W dies in 2015. The example states that the DSUE amount to be included in determining the applicable exclusion amount available to W’s estate is $4,000,000, which is determined by adding the $2,000,000 DSUE amount of H-2 and the $2,000,000 DSUE amount of H-1 that was applied by W to W’s 2012 taxable gifts. Thus, W’s applicable exclusion amount is the sum of her own basic exclusion amount of $5,430,000, plus such DSUE amount of $4,000,000, for a total of $9,430,000.

Therefore, this special rule effectively permits a wealthy person to make a very large aggregate amount of lifetime gifts on a tax-free basis, as long as portability remains in effect, by having serial marriages to individuals, each of whom predeceases such person and has a DSUE amount, and whose executors elect portability, and by such person making a lifetime gift equal to such DSUE amount of each such deceased individual before such person remarries.

The regulation provides rules regarding the date as of which a decedent’s DSUE amount is to be taken into consideration by the surviving spouse. This regulation states that in general a portability election applies as of the date of the death of the person with respect to whom such election is made. Therefore, a decedent’s DSUE amount is included in the applicable exclusion amount of the decedent’s surviving spouse and will be applicable to transfers made by the surviving spouse after the death of the decedent. However, this regulation also states that even if the surviving spouse made a transfer in reliance on the availability or computation of the decedent’s DSUE amount, such DSUE amount will not be included in the applicable exclusion amount of the surviving spouse (a) if the executor of the decedent’s estate supersedes the portability election by timely filing a subsequent estate tax return in which no such election is made, or (b) to the extent that the DSUE amount is subsequently reduced by a valuation adjustment or a correction of an error in the computation of such amount, or (c) to the extent that the surviving spouse cannot substantiate the DSUE amount that is claimed on the surviving spouse’s tax return.

This regulation also provides a special rule when property passes from a decedent for the benefit of a surviving spouse in one or more QDOTs and the decedent’s executor elects portability. The regulation states that in such case the DSUE amount that is available to be included in the applicable exclusion amount of the surviving spouse is the DSUE amount of the decedent as redetermined (see earlier description). Thus, the earliest date on which the decedent’s DSUE amount can be included in the applicable exclusion amount of the surviving spouse is the date of the occurrence of the final QDOT distribution or other final event (generally, the death of the surviving spouse or the earlier termination of all QDOTs for that surviving spouse) on which the estate tax is imposed. Thereafter, however, the decedent’s DSUE amount as so redetermined may be applied to taxable gifts of the surviving spouse.

The regulation provides that for the purpose of determining the DSUE amount that is included in the applicable exclusion amount of the surviving spouse, the IRS may examine the tax returns of each of the surviving spouse’s deceased spouses whose DSUE amount is claimed to be included in the surviving spouse’s applicable exclusion amount, whether or not the statute of limitations for the assessment of additional taxes has expired for any such tax return. In this regard, the regulation also states that IRS’s authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. This regulation further states that the IRS, upon such examination, may adjust or even eliminate the DSUE amount reported on such a return, but that the IRS can assess additional taxes on that return only if that tax is assessed within the applicable period of limitations regarding assessments.

The regulation provides that the estate of a nonresident surviving spouse who is not a United States citizen at the time of his or her death cannot take into account the DSUE amount of any deceased spouse of such surviving spouse, except to the extent allowed under any applicable treaty obligation of the United States.

**Gift Tax Regulations**

Reg. §25.2505-1 provides general rules regarding the application of the unified credit against the gift tax. First, these provisions refer to the general rules and definitions in the estate tax regulations described above regarding such rules and definitions concerning the application of the unified credit against the estate tax. Second, as in the estate tax regulations, this regulation also provides that the applicable credit must be reduced by 20 percent of the amount allowed as a specific exemption for gifts made by the decedent after September 8, 1976 and before January 1, 1977. Third, similar to the estate tax regulations, this regulation provides that the applicable credit shall not exceed the amount of the gift tax that is otherwise imposed.

Reg. §25.2505-2 sets forth rules regarding lifetime gifts made by a surviving spouse who has a DSUE amount available.

This regulation provides that a DSUE amount of a decedent is included in determining the surviving spouse’s applicable exclusion amount if (a) such decedent is the last deceased spouse of the surviving spouse at the time of the surviving spouse’s taxable gift, and (b) the executor of the decedent’s estate elected portability. In addition, this regulation provides that if, on the date that the surviving spouse makes a taxable gift, the last deceased spouse of the surviving spouse had no DSUE amount, or if the executor of the estate of such last deceased spouse did not elect portability, then the surviving spouse has no DSUE amount available to determine his or her applicable exclusion amount, even if the surviving spouse previously had a DSUE amount available from another decedent who, prior to the death of the last deceased spouse, was the last deceased spouse of such surviving spouse (except as provided below).

Further, this regulation provides that a decedent is the last deceased spouse of a surviving spouse even if, on the date of the surviving spouse’s taxable gift, the surviving spouse is married to another individual who is then living. Moreover, if a surviving spouse remarries and that marriage ends in divorce or an annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse, as the divorced spouse, at his or her death, was not married to the surviving spouse.

As in the proposed regulations, this regulation contains a much needed ordering rule that provides that if a surviving spouse makes a taxable gift and has a DSUE amount that is included in determining the surviving spouse’s applicable exclusion amount, then the surviving spouse will be treated as applying such DSUE amount to the taxable gift before applying the surviving spouse’s own basic exclusion amount to such gift.

Very importantly, also as provided in the proposed regulations, this regulation contains a special rule regarding multiple deceased spouses and a previously used DSUE amount that is available to a surviving spouse. This rule states, in general, that if a surviving spouse applied the DSUE amount of one or more last deceased spouses to the surviving spouse’s prior lifetime gifts, and, if any of those last deceased spouses is different from the surviving spouse’s last deceased spouse at the time of the surviving spouse’s current taxable gift, then the DSUE amount to be included in determining the applicable exclusion amount of the surviving spouse that will apply at the time of the current taxable gift is the sum of (a) the DSUE amount of the surviving spouse’s last deceased spouse, and (b) the DSUE amount of each of the other deceased spouses of the surviving spouse to the extent that such amount was applied to one or more previous taxable gifts of the surviving spouse.

This regulation contains the following example to illustrate the operation of this special rule: H-1 dies in 2011, survived by W, and neither of them made any taxable gifts during H-1’s life. H-1’s executor elects portability, and the DSUE amount of H-1 is $5,000,000. In 2012 W makes taxable gifts of $2,000,000. W is treated as having applied $2,000,000 of H-1’s DSUE amount to such gifts. Thereafter, W is considered to have a remaining applicable exclusion amount of $8,120,000, consisting of H-1’s $3,000,000 remaining DSUE amount, plus W’s own $5,120,000 basic exclusion amount. In 2013 W marries H-2, and H-2 dies on June 30, 2015.   
H-2’s executor elects portability, and H-2’s DSUE amount is $2,000,000. The DSUE amount to be included in determining the applicable exclusion amount available to W for gifts that she makes from July 1, 2015 through December 31, 2015 is $4,000,000, determined by adding the $2,000,000 DSUE amount of H-2 and the $2,000,000 DSUE amount of H-1 that was applied by W to W’s 2012 taxable gifts. Thus, W’s applicable exclusion amount for the second half of 2015 is $9,430,000, consisting of the sum of the two $2,000,000 DSUE amounts described above, plus W’s own basic exclusion amount of $5,430,000 for 2015. Since the gift tax on any gifts that W makes during the second half of 2015 will be computed on both the amount of such gifts and the $2,000,000 of taxable gifts that W made in 2015, W in effect can make additional gifts of $7,430,000 during the second half of 2015 without having to pay any gift tax on account of such gifts.

As in the estate tax regulations, this regulation also provides that a portability election that is made by an executor of a decedent’s estate generally applies as of the date of such decedent’s death. Thus, a decedent’s DSUE amount will be included in the applicable exclusion amount of the decedent’s surviving spouse and will be applicable to transfers made by the surviving spouse after the decedent’s death. However, this regulation also provides that such decedent’s DSUE amount will not be included in the applicable exclusion amount of the surviving spouse, even if the surviving spouse has made a taxable gift in reliance on the availability or computation of the decedent’s DSUE amount, (a) if the executor of the decedent’s estate supersedes the portability election by timely filing a subsequent estate tax return negating such election, (b) to the extent that the DSUE amount is subsequently reduced by a valuation adjustment or the correction of an error in calculation, or (c) to the extent that the DSUE amount claimed on the decedent’s return cannot be determined.

As in the estate tax regulations, this regulation also states that if a surviving spouse for whom property has passed from a decedent to a QDOT becomes a United States citizen, then the date on which such decedent’s DSUE amount will be included in the surviving spouse’s applicable exclusion amount is the date on which the surviving spouse becomes a United States citizen.

This regulation contains a special rule regarding the computation and redetermination of the DSUE amount for property passing to a QDOT for the benefit of a surviving spouse where the decedent’s executor elects portability that is similar to the comparable rule in the estate tax regulations discussed above. However, this regulation further states that the decedent’s DSUE amount as so redetermined may be applied to the surviving spouse’s taxable gifts that are made in the year of the surviving spouse’s death, or if the terminating event occurs prior to the surviving spouse’s death, then in the year of that terminating event and/or in any subsequent year of the surviving spouse’s life.

This regulation also contains provisions regarding the authority of the IRS to examine the tax returns of each of the surviving spouse’s deceased spouses whose DSUE amount is claimed to be included in the surviving spouse’s applicable exclusion amount, that are similar to the comparable rules in the estate tax regulations discussed above.

Finally, this regulation also contains rules that are similar to the comparable rules in the estate tax regulations discussed above regarding the inability of a non-resident surviving spouse who was not a citizen of the United States at the time he or she makes a gift that is subject to gift taxes to take into account the DSUE amount of any deceased spouse.

**Conclusion**

These final regulations provide comprehensive guidance regarding the complex portability provisions set forth in the 2010 Act and that were made permanent by the 2012 Act. As noted above, in certain important respects these regulations are very favorable to the taxpayer and clarify areas of uncertainty that were in the proposed regulations, but there still remain areas that need clarification.

EXHIBIT “B”

**STATE ESTATE TAX AFTER THE 2017 TAX ACT ON**

**A TAXABLE ESTATE EQUAL TO THE FEDERAL BASIC EXCLUSION AMOUNT**

Taxable Federal/State New York New Jersey\* Florida Connecticut\*\*

Year of Death Estate Death Tax Credit Estate Tax Estate Tax Estate Tax Estate Tax

2002-2003 $1,000,000 0 0 $ 33,200 0 0

2004 $1,500,000 0 $ 64,400 $ 64,400 0 0

2005 $1,500,000 0 $ 64,400 $ 64,400 0 0

2006-2008 $2,000,000 0 $ 99,600 $ 99,600 0 0

2009 $3,500,000 0 $229,200 $229,200 0 $229,200

2010 $5,000,000 0 $391,600 $391,600 0 $121,800

2011 $5,000,000 0 $391,600 $391,600 0 $229,800

2012 $5,120,000 0 $405,200 $405,200 0 $240,000

2013 $5,250,000 0 $420,800 $420,800 0 $251,700

2014 $5,340,000 0 $431,600 $431,600 0 $259,800

2015 $5,430,000 0 $442,400 $442,400 0 $267,900

2016 $5,450,000 0 $444,800 $444,800 0 $269,700

2017 $5,490,000 0 $312,500 0 $273,300

- 1/1/17 to 3/31/17 $449,600  
 - 4/1/17 to 12/31/17 $435,832

2018 $11,180,000 0 $1,255,600 0 0 $864,600

\* New Jersey also imposes an inheritance tax. Transfers to surviving spouses, fathers, mothers, grandparents, children (both natural and

adopted) and issue of children are exempt from such tax.

\*\* Prior to January 1, 2005, Connecticut also imposed an inheritance tax on property passing to beneficiaries other than spouse or descendants.

EXHIBIT “C”

**STATE DEATH TAX LEGISLATION**

**AS OF JUNE 14, 2018**

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**The American College of Trust and Estate Counsel**

| **State** | **Type of Tax** | **Effect of EGTRRA on Pick-up Tax and Size of Gross Estate** | **Legislation Affecting State Death Tax** | **2018 State Death Tax Threshold** |
| --- | --- | --- | --- | --- |
| Alabama | None | Tax is tied to federal state death tax credit.  AL ST § 40-15-2. |  |  |
| Alaska | None | Tax is tied to federal state death tax credit.  AK ST § 43.31.011. |  |  |
| Arizona | None | Tax was tied to federal state death tax credit.  AZ ST §§ 42-4051; 42-4001(2), (12).  On May 8, 2006, Governor Napolitano signed  SB 1170 which permanently repealed Arizona’s state estate tax. |  |  |
| Arkansas | None | Tax is tied to federal state death tax credit.  AR ST § 26-59-103; 26-59-106; 26-59-109, as amended March, 2003. |  |  |
| California | None | Tax is tied to federal state death tax credit.  CA REV & TAX §§ 13302; 13411. |  |  |
| Colorado | None | Tax is tied to federal state death tax credit.  CO ST §§ 39-23.5-103; 39-23.5-102. |  |  |
| Connecticut | Separate Estate Tax | As part of the two year budget which became law on September 8, 2009, the exemption for the separate estate and gift taxes was increased to $3.5 million, effective January 1, 2010, the tax rates were reduced to a spread of 7.2% to 12%, and effective for decedents dying on or after January 1, 2010, the Connecticut tax is due six months after the date of death.  CT ST § 12-391.  In May 2011, the threshold was lowered to $2 million retroactive to January 1, 2011 | On October 31, 2017, the Connecticut Governor signed the 2018-2019 budget which increased the exemption for the Connecticut state estate and gift tax to $2,600,000 in 2018, to $3,600,000 in 2019, and to the federal estate and gift tax exemption in 2020.  Beginning in 2019, the cap on the Connecticut state estate and gift tax is reduced from $20 million to $15 million (which represents the tax due on a Connecticut estate of approximately $129 million). | $2,600,000 |
| Delaware | None | Tax sunsetted on January 1, 2018. |  |  |
| District of Columbia | Pick-up Only | As a result of 2015 legislation as modified in 2017, the threshold will match federal exemption as it is indexed for inflation beginning in 2018.  DC CODE §§ 47-3701(14)  No separate state QTIP election. | DC Bill B22-0685 was introduced in the DC City Council on February 8, 2018. This proposal would cut the DC threshold to $5.6 million retroactive to January 1, 2018. The threshold would be indexed for inflation. While a majority of the members of the DC City Council support the proposal, the chair of the Council’s Finance Committee does not and the proposal is currently held up in committee. | $11,180,000 |
| Florida | None | Tax is tied to federal state death tax credit.  FL ST § 198.02; FL CONST. Art. VII, Sec. 5 |  |  |
| Georgia | None | Tax is tied to federal state death tax credit.    GA ST § 48-12-2. |  |  |
| Hawaii | Modified Pick-up Tax | Tax was tied to federal state death tax credit.  HI ST §§ 236D-3; 236D-2; 236D-B.  The Hawaii Legislature on April 30, 2010 overrode the Governor’s veto of HB 2866 to impose a Hawaii estate tax on residents and also on the Hawaii assets of a non-resident or a non US citizen. | On May 2, 2012, the Hawaii legislature passed HB 2328 which conforms the Hawaii estate tax exemption to the federal estate tax exemption for decedents dying after January 25, 2012. | $11,180,000 |
| Idaho | None | Tax is tied to federal state death tax credit.  ID ST §§ 14-403; 14-402; 63-3004 (as amended Mar. 2002). |  |  |
| Illinois | Modified Pick-up  Only | On January 13, 2011, Governor Quinn signed Public Act 096-1496 which increased Illinois’ individual and corporate income tax rates. Included in the Act was the reinstatement of Illinois’ estate tax as of January 1, 2011 with a $2 million exemption.  Senate Bill 397 passed both the Illinois House and Senate as part of the tax package for Sears and CME on December 13, 2011. It increased the exemption to $3.5 million for 2012 and $4 million for 2013 and beyond. Governor Quinn signed the legislation on December 16, 2011.  Illinois permits a separate state QTIP election, effective September 8, 2009. 35 ILCS 405/2(b-1). |  | $4,000,000 |
| Indiana | None | Pick-up tax is tied to federal state death tax credit.  IN ST §§ 6-4.1-11-2; 6-4.1-1-4. | On May 11, 2013, Governor Pence signed HB 1001 which repealed Indiana’s inheritance tax retroactively to January 1, 2013. This replaced Indiana’s prior law enacted in 2012 which phased out Indiana’s inheritance tax over nine years beginning in 2013 and ending on December 31, 2021 and increased the inheritance tax exemption amounts retroactive to January 1, 2012. |  |
| Iowa | Inheritance Tax | Pick-up tax tied to federal state death tax credit. IA ST § 451.2; 451.13.  Effective July 1, 2010, Iowa specifically reenacted it pick-up estate tax for decedents dying after December 31, 2010. Iowa Senate File 2380, reenacting IA ST §451.2.  Iowa has separate inheritance tax on transfers to remote relatives and third parties. |  |  |
| Kansas | None. | For decedents dying on or after January 1, 2007 and through December 31, 2009, Kansas had enacted a separate stand alone estate tax. KS ST § 79-15, 203 |  |  |
| Kentucky | Inheritance  Tax | Pick-up tax is tied to federal state death tax credit.  KT ST § 140.130.  Kentucky has not decoupled but has a separate inheritance tax and recognizes by administrative pronouncement a separate state QTIP election. |  |  |
| Louisiana | None | Pick-up tax is tied to federal state death tax credit.  LA R.S. §§ 47:2431; 47:2432; 47:2434. |  |  |
| Maine | Pick-up Only | For decedents dying after December 31, 2002, pick-up tax is frozen at pre-EGTRRA federal state death tax credit, and imposed on estates exceeding applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law) (L.D. 1319; March 27, 2003).  On June 20, 2011, Maine’s governor signed Public Law Chapter 380 into law, which will increase the Maine estate tax exemption to $2 million in 2013 and beyond. The rates were also changed, effective January 1, 2013, to 0% for Maine estates up to $2 million, 8% for Maine estates between $2 million and $5 million, 10% between $5 million and $8 million and 12% for the excess over $8 million.  On June 30, 2015, the Maine legislature overrode the Governor’s veto of LD 1019, the budget bill for fiscal years 2016 and 2017. As part of the new law, the Maine Exemption is tagged to the federal exemption for decedents dying on or after January 1, 2016.  The tax rates will be: 8% on the first $3 million above the Maine Exemption; 10% on the next $3 million above the Maine Exemption; and 12% on all amounts above $6 million above the Maine Exemption.  The new legislation did not include portability as part of the Maine Estate Tax.  For estates of decedents dying after December 31, 2002, Sec. 2058 deduction is ignored in computing Maine tax and a separate state QTIP election is permitted. M.R.S. Title 36, Sec. 4062.  Maine also subjects real or tangible property located in Maine that is transferred to a trust, limited liability company or other pass-through entity to tax in a non-resident’s estate. M.R.S. Title 36, Sec. 4064. | Maine does not appear to have picked up the amendments made in the 2017 federal tax reform act. For estates of decedents dying on or after January 1, 2016, the “Maine exclusion amount” means the basic exclusion amount determined for the calender year in accordance with Section 2010(c)(3) of the “Code.” 36 M.R.S. § 4102(5). However, Maine’s tax law defines “Code” as the United States Internal Revenue Code of 1986 and any amendments to that Code as of December 31, 2016. | $5,600,000 |
| Maryland | Pick-up Tax  Inheritance  Tax | On May 15, 2014, Governor O’Malley signed HB 739 which repealed and reenacted MD TAX GENERAL §§ 7-305, 7-309(a), and 7-309(b) to do the following:  1. Increase the threshold for the Maryland estate tax to $1.5 million in 2015, $2 million in 2016, $3 million in 2017, and $4 million in 2018. For 2019 and beyond, the Maryland threshold will equal the federal applicable exclusion amount.  2. Continues to limit the amount of the federal credit used to calculate the Maryland estate tax to 16% of the amount by which the decedent’s taxable estate exceeds the Maryland threshold unless the Section 2011 federal state tax credit is then in effect.  3. Continues to ignore the federal deduction for state death taxes under Sec. 2058 in computing Maryland estate tax, thus eliminating a circular computation.  4. Permits a state QTIP election. | On April 5, 2018, HB 0308 became law. The new law provides that for 2019 and thereafter, the Maryland threshold will be capped at the fixed amount of $5 million rather than being equal to the inflation-adjusted federal exemption as provided under prior law.  The new law also provides for the portability of the unused predeceased spouse’s Maryland exemption amount to the surviving spouse beginning in 2019. | $4,000,000 |
| Massachusetts | Pick-up Only | For decedents dying in 2002, pick-up tax is tied to federal state death tax credit.  MA ST 65C §§ 2A.  For decedents dying on or after January 1, 2003, pick-up tax is frozen at federal state death tax credit in effect on December 31, 2000. MA ST 65C §§ 2A(a), as amended July 2002.  Tax imposed on estates exceeding applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law), even if that amount is below EGTRRA applicable exclusion amount.  See, Taxpayer Advisory Bulletin (Dec. 2002), DOR Directive 03-02, Mass. Guide to Estate Taxes (2003) and TIR 02-18 published by Mass. Dept. of Rev.  Massachusetts Department of Revenue has issued directive, pursuant to which separate Massachusetts QTIP election can be made when applying state’s new estate tax based upon pre-EGTRRA federal state death tax credit. |  | $1,000,000 |
| Michigan | None | Tax was tied to federal state death tax credit.  MI ST §§ 205.232; 205.256 |  |  |
| Minnesota | Pick-up Only | Tax frozen at federal state death tax credit in effect on December 31, 2000, clarifying statute passed May 2002.  Tax imposed on estates exceeding federal applicable exclusion amount in effect on December 31, 2000 (including scheduled increases under pre-EGTRRA law), even if that amount is below EGTRRA applicable exclusion amount.  MN ST §§ 291.005; 291.03; instructions for MN Estate Tax Return; MN Revenue Notice 02-16.  Separate state QTIP election permitted. | On May 30, 2017, the governor signed the budget bill H.F. No. 1 which increased the Minnesota estate tax exemption for 2017 from $1,800,000 to $2,100,000 retroactively, and increases the exemption to $2,400,000 in 2018, $2,700,000 in 2019, and $3,000,000 for 2020 and thereafter,  On March 21, 2014, the Minnesota Governor signed HF 1777 which retroactively repealed Minnesota’s gift tax (which was enacted in 2013).  The provision enacted in 2013 to impose an estate tax on non-residents who own an interest in a pass-through entity which in turn owned real or personal property in Minnesota has been amended to exclude certain publicly traded entities. It still applies to entities taxed as partnerships or S Corporations that own closely held businesses, farms, and cabins. | $2,400,000 |
| Mississippi | None | Tax is tied to federal state death tax credit.  MS ST § 27-9-5. |  |  |
| Missouri | None | Tax is tied to federal state death tax credit.  MO ST §§ 145.011; 145.091. |  |  |
| Montana | None | Tax is tied to federal state death tax credit.  MT St § 72-16-904; 72-16-905. |  |  |
| Nebraska | County Inheritance Tax | Nebraska through 2006 imposed a pick-up tax at the state level. Counties impose and collect a separate inheritance tax.  NEB REV ST. § 77-2101.01(1). |  |  |
| Nevada | None | Tax is tied to federal state death tax credit.    NV ST Title 32 §§ 375A.025; 375A.100. |  |  |
| New Hampshire | None | Tax is tied to federal state death tax credit.  NH ST §§ 87:1; 87:7. |  |  |
| New Jersey | Pick-up Tax  Inheritance Tax | For decedents dying after December 31, 2002, pick-up tax frozen at federal state death tax credit in effect on December 31, 2001.  NJ ST §§ 54:38-1  Pick-up tax imposed on estates exceeding federal applicable exclusion amount in effect December 31, 2001 ($675,000), not including scheduled increases under pre-EGTRRA law, even though that amount is below the lowest EGTRRA applicable exclusion amount.  The executor has the option of paying the above pick-up tax or a similar tax prescribed by the NJ Dir. Of Div. of Taxn. NJ St §§ 54:38-1; approved on July 1, 2002.  In Oberhand v. Director, Div. of Tax, 193 N.J. 558 (2008), the retroactive application of New Jersey's decoupled estate tax to the estate of a decedent dying prior to the enactment of the tax was declared "manifestly unjust", where the will included marital formula provisions.  In Estate of Stevenson v. Director, 008300-07 (N.J.Tax 2-19-2008) the NJ Tax Court held that in calculating the New Jersey estate tax where a marital disposition was burdened with estate tax, creating an interrelated computation, the marital deduction must be reduced not only by the actual NJ estate tax, but also by the hypothetical federal estate tax that would have been payable if the decedent had died in 2001.  New Jersey allows a separate state QTIP election when a federal estate tax return is not filed and is not required to be filed.  The New Jersey Administration Code also requires that if the federal and state QTIP election is made, they must be consistent.  NJAC 18:26-3A.8(d) | On October 14, Governor Christie signed Assembly Bill A-12 which was the tax bill accompanying the Assembly Bill A-10 which revised the funding for the state’s Transportation Fund.  Under this new law, the Pick-Up Tax will have a $2 million exemption in 2017 and will be eliminated as of January 1, 2018.  The new law also eliminates the tax on New Jersey real and tangible property of a non-resident decedent.  The repeal of the pick-up tax does not apply to the separate New Jersey inheritance tax. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| New Mexico | None | Tax is tied to federal state death tax credit.  NM ST §§ 7-7-2; 7-7-3. |  |  |
| New York | Pick-up Only | Tax frozen at federal state death tax credit in effect on July 22, 1998. NY TAX § 951.  Governor signed S. 6060 in 2004 which applies New York Estate Tax on a *pro rata* basis to non-resident decedents with property subject to New York Estate Tax.  On March 16, 2010, the New York Office of Tax Policy Analysis, Taxpayer Guidance Division issued a notice permitting a separate state QTIP election when no federal estate tax return is required to be filed such as in 2010 when there is no estate tax or when the value of the gross estate is too low to require the filing of a federal return. See TSB-M-10(1)M.  Advisory Opinion (TSB-A-08(1)M (October 24, 2008) provides that an interest in an S  Corporation owned by a non-resident and containing a condominium in New York is an intangible asset as long as the S Corporation has a real business purpose. If the S Corporation has no business purpose, it appears that New York would look through the S Corporation and subject the condominium to New York estate tax in the estate of the non-resident. There would likely be no business purpose if the sole reason for forming the S Corporation was to own assets. | The Executive Budget of 2014-2015 which was signed by Governor Cuomo on March 31, 2014 made substantial changes to New York’s estate tax.  The New York estate tax exemption which was $1,000,000 through March 31, 2014 has been increased as follows:  April 1, 2014 to March 31, 2015 -- $2,062,500  April 1, 2015 to March 31, 2016 -- $3,125,000  April 1, 2016 to March 31, 2017 -- $4,187,500  April 1, 2017 to December 31, 2018 -- $5,250,000  As of January 1, 2019 the New York estate tax exemption amount will be the same as the federal estate tax applicable exclusion amount.  The maximum rate of tax will continue to be 16%.  Taxable gifts within three years of death between April 1, 2014 and December 31, 2018 will be added back to a decedent’s estate for purposes of calculating the New York tax.  The New York estate tax will be a cliff tax. If the value of the estate is more than 105% of the then current exemption, the exemption will not be available.  On April 1, 2015, as part of 2015-2016 Executive Budget, New York enacted changes to the New York Estate Tax. New York first clarified that the new rate schedule enacted in 2014 applies to all decedents dying after April 1, 2014. Previously, the rate schedule only applied through March 31, 2015. New York then modified the there year gift add-back provision to make it clear that the gift add-back does not apply to any individuals dying on or after January 1, 2019. Previously, the gift add-back provision did not apply to gifts made on or after January 1, 2019.  New York continues to not permit portability for New York estates and no QTIP election is allowed. | $5,250,000 (April 1, 2017 through  December 31, 2018) |
| North Carolina | None |  | On July 23, 2013, the Governor signed HB 998 which repealed the North Carolina estate tax retroactively to January 1, 2013 |  |
| North Dakota | None | Tax is tied to federal state death tax credit.  ND ST § 57-37.1-04 |  |  |
| Ohio | None | Governor Taft signed the budget bill, 2005 HB 66, repealing the Ohio estate (sponge) tax prospectively and granting credit for it retroactively. This was effective June 30, 2005 and killed the sponge tax.  On June 30, 2011, Governor Kasich signed HB 153, the biannual budget bill, which contains a repeal of the Ohio state estate tax effective January 1, 2013. |  |  |
| Oklahoma | None | Tax is tied to federal state death tax credit.  OK ST Title 68 § 804  The separate estate tax was phased out as of January 1, 2010. |  |  |
| Oregon | Separate Estate Tax | On June 28, 2011, Oregon’s governor signed HB 2541 which replaces Oregon’s pick-up tax with a stand-alone estate tax effective January 1, 2012. The new tax has a $1 million threshold with rates increasing from ten percent to sixteen percent between $1 million and $9.5 million.  Determination of the estate for Oregon estate tax purposes is based upon the federal taxable estate with adjustments. |  | $1,000,000 |
| Pennsylvania | Inheritance  Tax | Tax is tied to the federal state death tax credit to the extent that the available federal state death tax credit exceeds the state inheritance tax.  PA ST T. 72 P.S. § 9117 amended December 23, 2003.  Pennsylvania had decoupled its pick-up tax in 2002, but has now recoupled retroactively. The recoupling does not affect the Pennsylvania inheritance tax which is independent of the federal state death tax credit.  Pennsylvania recognizes a state QTIP election. |  |  |
| Rhode Island | Pick-up Only | Tax frozen at federal state death tax credit in effect on January 1, 2001, with certain adjustments (see below).  RI ST § 44-22-1.  Rhode Island recognized a separate state QTIP election in the State’s Tax Division Ruling Request No. 2003-03.  Rhode Island’s Governor signed in to law HB 5983 on June 30, 2009, effective for deaths occurring on or after January 1, 2010, an increase in the amount exempt from Rhode Island estate tax from $675,000, to $850,000, with annual adjustments beginning for deaths occurring on or after January 1, 2011 based on “the percentage of increase in the Consumer Price Index for all Urban Consumers (CPI-U)…. rounded up to the nearest five dollar ($5.00) increment.”  RI ST § 44-22-1.1. | On June 19, 2014, the Rhode Island Governor approved changes to the Rhode Island Estate Tax by increasing the exemption to $1,500,000 indexed for inflation in 2015 and eliminating the cliff tax. | $1,537,656 |
| South Carolina | None | Tax is tied to federal state death tax credit.  SC ST §§ 12-16-510; 12-16-20 and 12-6-40, amended in 2002. |  |  |
| South Dakota | None | Tax is tied to federal state death tax credit.  SD ST §§ 10-40A-3; 10-40A-1 (as amended Feb. 2002). |  |  |
| Tennessee | None | Pick-up tax is tied to federal state death tax credit.  TN ST §§ 67-8-202; 67-8-203.  Tennessee had a separate inheritance tax which was phased out as of January 1, 2016. | On May 2, 2012, the Tennessee legislature passed HB 3760/SB 3762 which phases out the Tennessee inheritance Tax as of January 1, 2016. The Tennessee inheritance Tax Exemption is increased to $1.25 million in 2013, $2 million in 2014, and $5 million in 2015.  On May 2, 2012, the Tennessee legislature also passed HB 2840/SB 2777 which repeals the Tennessee state gift tax retroactive to January 1, 2012. |  |
| Texas | None | Tax was permanently repealed effective as of September 15, 2015 when Chapter 211 of the Texas Tax Code was repealed. Prior to September 15, 2015, the tax was tied to the federal state death tax credit. |  |  |
| Utah | None | Tax is tied to federal state death tax credit.  UT ST § 59-11-102; 59-11-103. |  |  |
| Vermont | Modified Pick-up | In 2010, Vermont increased the estate tax exemption threshold from $2,000,000 to $2,750,000 for decedents dying January 1, 2011. As of January 1, 2012 the exclusion is scheduled to equal the federal estate tax applicable exclusion, so long as the FET exclusion is not less than $2,000,000 and not more than $3,500,000. VT ST T. 32 § 7442a.  Previously the estate tax was frozen at federal state death tax credit in effect on January 1, 2001.  VT ST T. 32 §§ 7402(8), 7442a, 7475, amended on June 21, 2002.  No separate state QTIP election permitted |  | $2,750,000 |
| Virginia | None | Tax is tied to federal state death tax credit.  VA ST §§ 58.1-901; 58.1-902.  The Virginia tax was temporarily repealed effective July 1, 2007. Previously, the tax was frozen at federal state death tax credit in effect on January 1, 1978. Tax was imposed only on estates exceeding EGTRRA federal applicable exclusion amount.  VA ST §§ 58.1-901; 58.1-902. |  |  |
| Washington | Separate Estate Tax | On February 3, 2005, Washington State Supreme Court unanimously held that Washington’s state death tax was unconstitutional. The tax was tied to the current federal state death tax credit, thus reducing the tax for the years 2002 - 2004 and eliminating it for the years 2005 - 2010. Hemphill v. State Department of Revenue 2005 WL 240940 (Wash. 2005).  In response to Hemphill, the Washington State Senate on April 19 and the Washington House on April 22, 2005, by narrow majorities, passed a stand-alone state estate tax with rates ranging from 10% to 19%, a $1.5 million exemption in 2005 and $2 million thereafter, and a deduction for farms for which a Sec. 2032A election could have been taken (regardless of whether the election is made). The Governor signed the legislation.  WA ST §§ 83.100.040; 83.100.020.  Washington voters defeated a referendum to repeal the Washington estate tax in the November 2006 elections.  Washington permits a separate state QTIP election. WA ST §83.100.047. | On June 14, 2013, Governor Inslee signed HB 2075 which closed an exemption for marital trusts retroactive immediately prior to when the Department of Revenue was about to start issuing refund checks, created a deduction for up to $2.5 million for certain family owned businesses and indexes the $2 million Washington state death tax threshold for inflation. | $2,193,000 |
| West Virginia | None | Tax is tied to federal state death tax credit.  WV § 11-11-3. |  |  |
| Wisconsin | None | Tax is tied to federal state death tax credit.  WI ST § 72.01(11m).  For deaths occurring after September 30, 2002, and before January 1, 2008, tax was frozen at federal state death tax credit in effect on December 31, 2000 and was imposed on estates exceeding federal applicable exclusion amount in effect on December 31, 2000 ($675,000), not including scheduled increases under pre-EGTRRA law, even though that amount is below the lowest EGTRRA applicable exclusion amount. Thereafter, tax imposed only on estates exceeding EGTRRA federal applicable exclusion amount.  WI ST §§ 72.01; 72.02, amended in 2001; WI Dept. of Revenue website.  On April 15, 2004, the Wisconsin governor signed 2003 Wis. Act 258, which provided that Wisconsin will not impose an estate tax with respect to the intangible personal property of a non-resident decedent that has a taxable situs in Wisconsin even if the non-resident’s state of domicile does not impose a death tax. Previously, Wisconsin would impose an estate tax with respect to the intangible personal property of a non-resident decedent that had a taxable situs in Wisconsin if the state of domicile of the non-resident had no state death tax. |  |  |
| Wyoming | None | Tax is tied to federal state death tax credit.  WY ST §§ 39-19-103; 39-19-104. |  |  |

EXHIBIT “D”

**Bases of State Income Taxation of Nongrantor Trusts (Revised 2/15/18)**

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| **State** | **Citations** | **Top 2017 Rate** | | | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | | **Trust Administered in State** | | **Trust With Resident Trustee** | | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Alabama | Ala. Code §§ 40-18-1(33), 40-18-5(l)(c); instructions to 2017 Ala. Form 41 at 1, 2. | 5.0% on inc. over $3,000 | | | **🗸**1 | **🗸**1 | |  | |  | |  | **revenue.alabama.gov** |
| Alaska | No income tax imposed on trusts. | | | | | | | | | | | | **www.dor.alaska.gov** |
| Arizona | Ariz. Rev. Stat.  §§ 43-1011(5)(a), 43-1301(5), 43-1311(B); instructions to 2017 Ariz. Form 141AZ at 1, 20. | | 4.54% on inc. over $155,159 |  | |  |  | | **🗸** | |  | | **www.azdor.gov** |
| Arkansas | Ark. Code Ann. §§ 26-51-201(a)(9), (10), 26-51-203(a); instructions to 2017 Ark. AR1002 at 1; 2017 Ark. Indexed Tax Brackets Chart. | | 6.9% on inc. on or over $82,601 | **🗸**2 | | **🗸**2 |  | |  | |  | | **www.dfa.arkansas.gov** |
| California | Cal. Rev. & Tax. Code §§ 17041(a)(1), 17043(a), 17742(a); Cal. Const. Art. XIII, § 36(f)(2); instructions to 2017 Cal. Form 541 at 4, 9, 10. | | 13.3% on inc. over $1 million |  | |  |  | | **🗸** | | **🗸** | | **www.ftb.ca.gov** |
| Colorado | Colo. Rev. Stat.  §§ 39-22-103(10), 39-22-104(1.7); instructions to 2017 Colo. Form 105 at 3, 4; 2017 Colo. Form 105 at 1. | | 4.63% |  | |  | **🗸** | |  | |  | | **www.colorado.gov/revenue** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Connecticut | Conn. Gen. Stat.  §§ 12-700(a)(9),  12-701(a)(4)(C)–(D); Conn. Agencies Regs. § 12-701(a)(4)-1; instructions to 2017 Form CT-1041 at 6; 2017 Form CT-1041 at 3. | 6.99% | **🗸** | **🗸3** |  |  |  | **www.ct.gov/drs** |
| Delaware | 30 Del. C. §§ 1102(a)(14), 1601(8); 2017 Del. Form 400-I at 1, 2; 2017 Del. Form 400 at 2. | 6.6% on inc. over $60,000 | **🗸**4 | **🗸**4 |  | **🗸**4 |  | **www.revenue.delaware.gov** |
| District of Columbia | D.C. Code §§ 47-1806.03(a)(10), 47-1809.01, 47-1809.02; instructions to 2017 D.C. Form D-41 at 6, 7. | 8.95% on inc. over $1,000,000 | **🗸** | **🗸** |  |  |  | **otr.cfo.dc.gov** |
| Florida | No income tax imposed on trusts; Florida intangible personal property tax repealed for 2007 and later years. | | | | | | | **floridarevenue.com** |
| Georgia | O.C.G.A. §§ 48-7-20(b)(1), (d), 48-7-22; Ga. Comp. R. & Regs. r. 560-7-3-.07(1); instructions to 2017 Ga. Form 501 at 6. | 6.0% on inc. over $7,000 |  |  |  |  | **🗸**5 | **dor.georgia.gov** |
| Hawaii | Haw. Rev. Stat.  §§ 235-1, 235-4.5, 235-51(d); Haw. Admin. Rules § 18-235-1.17; instructions to 2017 Haw. Form N-40 at 1, 13. | 8.25% on inc. over $40,000 |  |  | **🗸**4 | **🗸**4 |  | **tax.hawaii.gov** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Idaho | Idaho Code §§ 63-3015(2), 63-3024(a); Idaho Admin. Code Regs. 35.01.01.035.01, 35.01.01.075.03(e); instructions to 2017 Idaho Form 66 at 1, 10. | 7.4% on inc. over $11,043 | **🗸**6 | **🗸**6 | **🗸**6 | **🗸**6 |  | **www.tax.idaho.gov** |
| Illinois | 35 Ill. Comp. Stat.  5/201(a), (b)(5.3), (c), (d), 5/1501(a)(20)(C)–(D);  Ill. Admin. Code tit. 86,  § 100.3020(a)(3)–(4); instructions to 2017 Form IL-1041 at 4, 10; 2017 Form IL-1041 at 2, 3. | 5.85% | **🗸** | **🗸** |  |  |  | **www.tax.illinois.gov** |
| Indiana | Ind. Code  §§ 6-3-1-12(d), 6-3-1-14, 6-3-2-1(a)(3); Ind. Admin. Code tit. 45, r. 3.1-1-21(d); instructions to 2017 Ind. Form IT-41 at 1, 3; 2017 Ind. Form IT-41 at 1. | 3.23% |  |  | **🗸** |  |  | **www.in.gov/dor** |
| Iowa | Iowa Code § 422.5(1)(i), (6); Iowa Admin. Code r. 701-89.3(1)–(2); instructions to 2017 Iowa Form IA 1041 at 1; 2017 Iowa Form IA 1041 at 2. | 8.98% on inc. over $70,785 | **🗸**6 | **🗸**6 | **🗸**6 | **🗸**6 |  | **tax.iowa.gov** |
| Kansas | Kan. Stat. Ann.  §§ 79-32,109(d), 79-32,110(a)(2)(E), (d); instructions to 2017 Kan. Form K-41 at 2; 2017 Kan. Form K-41 at 4. | 5.2% on inc. over $30,000 |  |  | **🗸** |  |  | **www.ksrevenue.org** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Kentucky | Ky. Rev. Stat. Ann.  §§ 141.020(2)(b)(6), 141.030(1); 103 Ky. Admin. Regs. 19:010; instructions to 2017 Ky. Form 741 at 1, 2. | 6.0% on inc. over $75,000 |  |  |  | **🗸** |  | **revenue.ky.gov** |
| Louisiana | La. Rev. Stat. Ann.  §§ 47:300.1(3), 47:300.10(3); instructions to 2017 La. Form IT-541 at 1. | 6.0% on inc. over $50,000 | **🗸** |  | **🗸**7 |  |  | **www.revenue.louisiana. gov** |
| Maine | Me. Rev. Stat. Ann. tit. 36, §§ 5102(4)(B)–(C), 5111(1-E), 5403; instructions to 2017 Form 1041ME at 1, 2. | 7.15% on inc. over $50,000 | **🗸** | **🗸** |  |  |  | **www.maine.gov/revenue** |
| Maryland | Md. Code Ann., Tax–Gen. §§ 10-101(k)(1)(iii), 10-105(a)(1), 10-106(a)(1)(iii); instructions to 2017 Md. Form 504 at 1, 5, 6. | 5.75% (plus county tax between 1.25% and 3.20%) on inc. over $250,000 | **🗸** | **🗸** | **🗸** |  |  | **www.marylandtaxes.com** |
| Massachu-setts | Mass. Gen. Laws ch. 62,  §§ 4, 10(c); Mass Regs. Code tit. 830, § 62.10.1(1); instructions to 2017 Mass. Form 2 at 1, 3, 22; 2017 Mass. Form 2 at 2. | 5.1% (12.0% for short-term gains and gains on sales of collectibles) | **🗸**4 | **🗸**4, 8 |  |  |  | **www.mass.gov/dor** |
| Michigan | Mich. Comp. Laws  §§ 206.16, 206.18(1)(c), 206.51(1)(b); instructions to 2017 MI-1041 at 2; 2017 MI-1041 at 1. | 4.25% | 🗸 | 🗸9 |  |  |  | **www.michigan.gov/taxes** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Minnesota | Minn. Stat. §§ 290.01 Subd. 7b, 290.06 Subd. 2c, Subd. 2d; instructions to 2017 Minn. Form M2 at 1, 14. | 9.85% on inc. over $130,760 | 🗸10 | 🗸10 | 🗸11 |  |  | **www.revenue.state.**  **mn.us** |
| Mississippi | Miss. Code Ann. § 27-7-5(1)(b); instructions to 2017 Miss. Form 81-110 at 3, 11. | 5.0% on inc. over $10,000 |  |  | 🗸 |  |  | **www.dor.ms.gov** |
| Missouri | RSMo §§ 143.011, 143.061; 143.331(2)–(3); instructions to 2017 Form MO-1041 at 4, 10. | 6.0% on inc. over $9,072 | 🗸12 | 🗸12 |  |  |  | **dor.mo.gov** |
| Montana | Mont. Code Ann. §§ 72-38-103(14), 15-30-2103; instructions to 2017 Mont. Form FID-3 at 2, 12, 15‒16; 2017 Mont. Form FID-3 at 2. | 6.9% on inc. over $17,600 | 🗸12 | 🗸12 | 🗸 | 🗸 | 🗸 | **revenue.mt.gov** |
| Nebraska | Neb. Rev. Stat.  §§ 77-2714.01(6)(b)–(c), 77-2715.03(2), (3), 77-2717(1)(a); Neb. Admin. Code tit. 316, Ch. 23, REG-23-001; instructions to 2017 Neb. Form 1041N at 7, 8. | 6.84% on inc. over $15,580 | **🗸** | **🗸** |  |  |  | **www.revenue.nebraska.**  **gov** |
| Nevada | **N**o income tax imposed on trusts. | | | | | | | **tax.nv.gov** |
| New Hampshire | **N**o income tax imposed on trusts. | | | | | | | **www.revenue.nh.gov** |

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| **State** | **Citations** | **Top 2017 Rate** | | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** | |
| New Jersey | NJSA §§ 54A:1-2(o)(2)–(3), 54A:2-1(b)(5); instructions to 2017 Form NJ-1041 at 1, 24. | 8.97% on inc. over $500,000 | | **🗸**13 | **🗸**13 | |  |  |  | **www.state.nj.us/treasury/taxation** | |
| New Mexico | N.M. Stat. Ann. §§ 7-2-2(I), (S), 7-2-7(C); instructions to 2017 N.M. Form F1D-1 at 2, 5. | 4.9% on inc. over $16,000 | |  |  | | **🗸** | **🗸** |  | **www.tax.newmexico.gov** | |
| New York State | N.Y. Tax Law  §§ 601(c)(1)(A), 605(b)(3); 20 NYCRR § 105.23; instructions to 2017 N.Y. Form IT-205 at 2, 10. | 8.82% on inc. over $1,077,550 | | **🗸**13 | **🗸**13 | |  |  |  | **www.tax.ny.gov** | |
| New York City | N.Y. Tax Law §§ 1304(a)(3), 1304-B, 1305; Admin. Code City of N.Y. §§ 11-1701, 11-1704.1, 11-1705; instructions to 2017 N.Y. Form IT-205 at 16, 17. | 3.876% on inc. over $50,000 | **🗸**13 | | **🗸**13 |  | |  |  | **www.tax.ny.gov** |
| North Carolina | N.C. Gen. Stat. §§ 105-153.7(a), 105-160.2; instructions to 2017 N.C. Form D-407 at 1; 2017 N.C. Form D-407 at 1. | 5.499% |  | |  |  | |  | **🗸** | **www.ncdor.gov** |
| North Dakota | N.D. Cent. Code §§ 57-38-07, 57-38-30.3(1)(e), (g); N.D. Admin. Code § 81-03-02.1-04(2); instructions to 2017 N.D. Form 38 at 2; 2017 N.D. Form 38 at 2. | 2.9% on inc. over $12,500 | |  |  | | **🗸** | **🗸** | **🗸** | **www.nd.gov/tax** | |
| Ohio | Ohio Rev. Code Ann. §§ 5747.01(I)(3), 5747.02(A)(3), (D); instructions to 2017 Ohio Form IT 1041 at 4, 12. | 4.997% on inc. over $213,350 | | **🗸** | **🗸**4 | |  |  |  | **www.tax.ohio.gov** | |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Oklahoma | Okla. Stat. tit. 68, §§ 2353(6) 2355(C)(1)(f), (G), 2355.1A; Okla. Admin. Code § 710:50-23-1(c); instructions to 2017 Okla. Form 513 at 2, 14. | 5.0% on inc. over $8,700 | **🗸** | **🗸** |  |  |  | **www.tax.ok.gov** |
| Oregon | Or. Rev. Stat. §§ 316.037, 316.282(1)(d); Or. Admin. R. 150-316.0400(3); instructions to 2017 Or. Form 41 at 3; 2017 Or. Form 41 at 3. | 9.9% on inc. over $125,000 |  |  | **🗸** | **🗸** |  | **www.oregon.gov/dor** |
| Pennsylvan-ia | 72 P.S. §§ 7301(s), 7302; 61 Pa. Code § 101.1; instructions to 2017 Form PA-41 at 4; 2017 Form PA-41 at 1. | 3.07% | **🗸1**4 | **🗸14** |  |  |  | **www.revenue.pa.gov** |
| Rhode Island | R.I. Gen. Laws §§ 44-30-2.6(c)(3)(A)(II), (E), 44-30-5(c)(2)–(4); R.I. Admin. Code 60-1-154:1; instructions to 2017 Form RI-1041 at 1-1; 2017 RI-1041 Tax Rate Schedules at 1. | 5.99% on inc. over $7,800 | **🗸**4 | **🗸**4 |  |  |  | **www.tax.ri.gov** |
| South Carolina | S.C. Code Ann. §§ 12-6-30(5), 12-6-510(A), 12-6-520; instructions to 2017 Form SC1041 at 1, 3. | 7.0% on inc. over $14,670 |  |  | **🗸** |  |  | **dor.sc.gov** |
| South Dakota | No income tax imposed on trusts. | **dor.sd.gov** |  |  |  |  |  |  |
| Tennessee | Tenn. Code Ann. §§ 67-2-102, 67-2-110(a); instructions to 2017 Tenn. Form INC. 250 at 1, 3, 4. | 4.0% (interest and dividends only) |  |  |  |  | **🗸** | **www.tn.gov/revenue** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** |
| Texas | No income tax imposed on trusts. | | | | | | | **www.comptroller.texas.gov/taxes** |
| Utah | Utah Code Ann. §§ 59-10-104(2)(b), 59-10-201(1), 75-7-103(1)(i)(ii)–(iii); instructions to 2017 UT Form TC-41 at 3, 6; 2017 UT Form TC-41 at 1. | 5.0% | **🗸**15 |  | **🗸**15, 16 |  |  | **www.tax.utah.gov** |
| Vermont | 32 V.S.A. §§ 5811(11)(B), 5822(a)(5), (6), (b)(2); instructions to 2017 Vt. Form FIT-161 at 2; 2017 Vt. Form FIT-161 at 2. | 8.95% on inc. over $12,450 | **🗸** | **🗸** |  |  |  | **www.tax.vt.gov** |
| Virginia | Va. Code Ann. §§ 58.1-302, 58.1-320, 58.1-360; 23 Va. Admin. Code § 10-115-10; instructions to 2017 Va. Form 770 at 1, 8. | 5.75% on inc. over $17,000 | **🗸** | **🗸** | **🗸** | **🗸** |  | **www.tax.virginia.gov.** |
| Washington | No income tax imposed on trusts. | **dor.wa.gov** |  |  |  |  |  |  |
| West Virginia | W. Va. Code §§ 11-21-4e(a), 11-21-7(c); W. Va. Code St. Rs. § 110-21-4, 110-21-7.3; instructions to 2017 W. Va. Form IT-141 at 1, 5. | 6.5% on inc. over $60,000 | **🗸** | **🗸** |  |  |  | **www.tax.wv.gov** |
| Wisconsin | Wis. Stat. §§ 71.06(1q), (2e)(b), 71.125(1), 71.14(2), (3), (3m); instructions to 2017 Wis. Form 2 at 1, 19. | 7.65% on inc. over $247,350 | **🗸** | **🗸**17 | **🗸**18 |  |  | **www.revenue.wi.gov** |

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| **State** | **Citations** | **Top 2017 Rate** | **Trust Created by Will of Resident** | **Inter Vivos Trust Created by Resident** | **Trust Administered in State** | **Trust With Resident Trustee** | **Trust With Resident Beneficiary** | **Tax Dept. Website** | |
| Wyoming | No income tax imposed on trusts. | | | | | | | **revenue.wyo.gov** |

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1 Provided that trust has resident fiduciary or current beneficiary.

2.Provided that trust has resident trustee.

3 Provided that trust has resident noncontingent beneficiary.

4 Provided that trust has resident beneficiary.

5 Tax also applies if trustee receives income from business done in state or manages funds or property located in state.

6 Provided that other requirements are met.

7 Unless trust designates governing law other than Louisiana.

8 Provided that trust has Massachusetts trustee.

9 Unless trustees, beneficiaries, and administration are outside Michigan.

10 Post-1995 trust only.

11 Pre-1996 trust only.

12 Provided that trust has resident income beneficiary during or on last day of year.

13 Unless trustees and trust assets are outside state and no source income; trustee should file informational return.

14 Unless settlor is no longer resident or is deceased and trust lacks sufficient contact with Pennsylvania to establish nexus.

15 Post-2003 irrevocable resident nongrantor trust having Utah corporate trustee may deduct all nonsource income but must file Utah return if must file federal return.

16 Testamentary trust created by non-Utah resident; inter vivos trust created by Utah or non-Utah resident.

17 Trust created or first administered in Wisconsin after October 28, 1999, only.

18 Irrevocable inter vivos trust administered in Wisconsin before October 29, 1999, only.

EXHIBIT “E”

**DIGITAL PROPERTY**

**WILL CLAUSES**

1) Tangible Personal Property and Definition of Digital Property

I give and bequeath all of my jewelry, clothing, books, silverware, glassware, works of art, antiques, all other personal and household effects, furniture, furnishings, automobiles, digital devices of every nature and kind, including, but not limited to, computers, laptops, notebooks, and smartphones and similar devices that now exist or may exist in the future, and "digital assets", hereinafter defined, of every nature and kind (except for any digital financial accounts or digital business accounts such as on-line banking or brokerage accounts, which digital financial accounts and digital business accounts shall be disposed of as a part of my "Residuary Estate", as hereinafter defined, to the extent that such accounts are testamentary assets) to my wife, \_\_\_\_\_\_\_\_\_\_\_\_\_\_, if she shall survive me. For all purposes of this my Last Will and Testament, the term "digital assets" shall include, but not be limited to, all of my files stored on my digital devices and backup systems, including but not limited to, files stored on desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops, and all emails received by me, my email accounts such as any and all Gmail, Yahoo, America on Line (AOL) accounts, my digital music, digital photographs, digital videos, and digital games, my software licenses, my social network accounts such as any Facebook, Twitter, LinkedIn, Flickr, Shutterfly and YouTube accounts, my file sharing accounts, my domain registrations and domain name system (DNS) service accounts, my web hosting accounts, my tax preparation service accounts, and my online stores, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops or such comparable items as technology develops regardless of the ownership of the physical device upon which the digital item is stored.

2) Digital Executor - (A) I hereby nominate, constitute and appoint \_\_\_\_\_\_\_\_\_\_\_\_\_as the Digital Executor of this my Last Will and Testament in connection with the administration of all of my "digital assets", as hereinbefore defined. If \_\_\_\_\_\_\_\_\_\_shall die or shall be or become unwilling or unable to qualify and/or act or continue to act as Digital Executor, I hereby nominate, constitute and appoint \_\_\_\_\_\_\_\_\_\_to be Digital Executor in his/her place and stead.

(B) I hereby nominate, constitute and appoint \_\_\_\_\_\_\_\_\_\_\_\_\_as the Executor of this my Last Will and Testament in connection with the administration of all of my assets, except for my "digital assets". If \_\_\_\_\_\_\_\_\_\_shall die or shall be or become unwilling or unable to qualify and/or act or continue to act as Executor, I hereby nominate, constitute and appoint \_\_\_\_\_\_\_\_\_\_to be Executor in his/her place and stead.

3) Powers Clause re Digital Assets - My Executors (or my Digital Executors) shall have full authority granted to them under applicable law to administer all of my "digital assets", as hereinbefore defined, including, but not limited to: (i) the power to access, use, control, transfer and dispose of my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, using, modifying, deleting, controlling, transferring or disposing of my "digital assets", as hereinbefore defined, and (ii) the power to access, use, modify, delete, control, transfer and dispose of all of my "digital assets", as hereinbefore defined.

B. POWER OF ATTORNEY

My agent, to the extent permissible under applicable law, shall have the same powers and rights that I possess over all of my "digital assets", as hereinafter defined, including, but not limited to: (i) the power to access, use, control, transfer and dispose of my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, using, modifying, deleting, controlling, transferring or disposing of my digital assets, as hereafter defined, and (ii) the power to access, use, modify, delete, control, transfer and dispose of my "digital assets" as hereafter defined. For all purposes of this Power of Attorney, the term "digital assets" shall include, but not be limited to, all of my files stored on my digital devices and backup systems, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops, and all emails received by me, my email accounts such as any and all Gmail, Yahoo, America on Line (AOL) accounts, my digital music, digital photographs, digital videos, and digital games, my software licenses, my social network accounts such as any Facebook, Twitter, LinkedIn, Flickr, Shutterfly and YouTube accounts, my file sharing accounts, my domain registrations and domain name system (DNS) service accounts, my web hosting accounts, my tax preparation service accounts, and my online stores, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops or such comparable items as technology develops regardless of the ownership of the physical device upon which the digital item is stored.

EXHIBIT “F”

**Computation of New York State Estate Tax**

(on various amounts of Taxable Estate)

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Taxable Estate of: | 4/1 to 12/31/14 | 1/1 to 3/31/15 | 4/1 to 12/31/15 | 1/1 to 3/31/16 | 4/1 to 12/31/16 | 1/1 to 3/31/17 | 4/1 to 12/31/17 | 2018 |
| NYS Basic Exclusion Amount | 2,062,500.00 | 2,062,500.00 | 3,125,000.00 | 3,125,000.00 | 4,187,500.00 | 4,187,500.00 | 5,250,000.00 | 5,250,000.00 |
| Resulting NYS Estate Tax | - | - | - | - | - | - | - | - |
| 102.5% of Basic Exclusion Amount | 2,114,062.50 | 2,114,062.50 | 3,203,125.00 | 3,203,125.00 | 4,292,187.50 | 4,292,187.50 | 5,381,250.00 | 5,381,250.00 |
| Resulting NYS Estate Tax\* | 65,906.25 | 65,906.25 | 128,837.50 | 128,837.50 | 205,931.25 | 205,931.25 | 287,550.00 | 287,550.00 |
| 105% of Basic Exclusion Amount | 2,165,625.00 | 2,165,625.00 | 3,281,250.00 | 3,281,250.00 | 4,396,875.00 | 4,396,875.00 | 5,512,500.00 | 5,512,500.00 |
| Resulting NYS Estate Tax\* | 112,050.00 | 112,050.00 | 208,200.00 | 208,200.00 | 324,050.00 | 324,050.00 | 452,300.00 | 452,300.00 |
| Resulting NYS Estate Tax\*\* | 121,793.00 | 121,793.00 | 230,310.00 | 230,310.00 | 364,921.00 | 364,921.00 | 513,977.00 | 513,977.00 |
| Federal Basic Exclusion Amount  Resulting NYS Estate Tax\*  Resulting NYS Estate Tax \*\* | 5,340,000.00  431,600.00  490,454.00 | 5,430,000.00  442,400.00  502,727.00 | 5,430,000.00  442,400.00  502,727.00 | 5,450,000.00  444,800.00  505,454.00 | 5,450,000.00  444,800.00  505,454.00 | 5,490,000.00  449,600.00  510,909.00 | 5,490,000.00  435,832.00  510,909.00 | 11,180,000.00  1,255,600.00  1,494,762.00 |

\* These calculations apply either (a) in the case of an unmarried decedent, or (b) in the case of a married decedent (whose will divides such decedent's residuary estate into a  
 credit shelter trust and a QTIP trust) assuming that the NYS Estate Tax is paid out of the credit shelter trust.

\*\* These calculations assume that the NYS Estate Tax is paid out of the QTIP trust (in order to maximize the amount of the credit shelter trust). Payment of the NYS Estate  
 Tax out of the QTIP trust will cause an interrelated calculation for NYS Estate Tax purposes because it reduces the marital deduction.

1. All references to the Code are to the Internal Revenue Code of 1986, as amended. [↑](#footnote-ref-2)
2. This subsection of the Outline is adapted from a portion of an article that the authors of this Outline wrote and that was published in Estate Planning Review – The Journal, a Wolters Kluwer Business. [↑](#footnote-ref-3)
3. See Part I, Section E, of this Outline for a fuller discussion of “decoupling”. [↑](#footnote-ref-4)
4. This subsection of the Outline is adapted from a portion of an article that the authors of this Outline wrote and that was published in Estate Planning Review – The Journal, a Wolters Kluwer Business. [↑](#footnote-ref-5)
5. See Part III, Section C, of this Outline for information regarding the Service’s temporary suspension of new formal guidance. [↑](#footnote-ref-6)
6. See Part III, Section C, of this Outline for information regarding the Service’s temporary suspension of new formal guidance. [↑](#footnote-ref-7)