January 2022

**ESTATE PLANNING UPDATE**

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**TABLE OF CONTENTS**

**Page**

I. FEDERAL TRANSFER TAXES AND INCOME TAXES ..... 2
A. Federal Estate Taxes, Gift Taxes and Generation-Skipping Transfer ("GST") Taxes ..... 2
B. Portability ..... 3
1. General ..... 3
2. Portability and the Future of Bypass Trusts ..... 6
3. Portability and Prenuptial Agreements ..... 7
C. Federal Income Tax Provisions ..... 7
1. Income Tax Provisions Applicable to Individuals ..... 8
2. Income Tax Provisions Applicable to Estates and Non-Grantor Trusts ..... 11
3. Income Tax Provisions Applicable to Charities ..... 13
4. Income Tax Provisions Applicable to Businesses ..... 14
5. Cost of Living Adjustments ..... 14
6. Additional Areas Impacted By The 2017 Tax Act ..... 14
(a) Shareholders of Electing Small Business Trusts ("ESBTs") ..... 14
(b) Charitable Contributions By ESBTs ..... 15
(c) Transfer For Value Rules ..... 15
7. Other Income Tax Provisions ..... 15
D. Estate Planning After The 2017 Tax Act ..... 16
1. Planning Opportunities ..... 16
2. Planning Pitfalls ..... 17
E. State Transfer Tax Considerations ..... 18
1. New York ..... 21
2. Connecticut ..... 23
3. New Jersey ..... 23
4. Pennsylvania ..... 24
5. Florida ..... 24
6. Delaware ..... 24
7. Other States ..... 24
8. State QTIP Elections ..... 25
9. Estate Tax Proposals ..... 26

II. OTHER IMPORTANT FEDERAL LEGISLATION ..... 27
A. Medicare Tax on Estates, Trusts and Individuals ..... 27
B. Patient Protection and Affordable Care Act ..... 28
C. Death Master File ..... 28

D. Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 ....29
E. Achieving a Better Life Experience ("ABLE") Act ....31
F. Bipartisan Budget Act of 2015 ....33
G. Protecting Americans From Tax Hikes Act of 2015 ....33
H. Consolidated Appropriations Act of 2016 ....34

III. IMPORTANT IRS REGULATIONS, ANNOUNCEMENTS AND COURT DECISIONS ....34
A. Inflation Adjustments ....34
1. Adjustments Announced After the 2017 Tax Act ....34
2. Adjustments Announced Prior to the 2017 Tax Act ....35
B. Tax Returns ....36
1. Form 8971 ....36
2. Deadlines and Extensions ....36
C. Release of Estate Tax Lien in Sale of Realty ....36
D. Estate Tax Closing Letters ....38
E. Other Matters Regarding Estate Tax, Gift Tax and Fiduciary Income Tax Audits and Collections ....39
F. Request for Discharge From Personal Liability – Form 5495 ....42
G. Qualified Personal Residence Trusts ....42
H. Private Trust Companies and Family Offices ....42
I. Restricted Management Accounts ....43
J. Estate Tax Deductions for Claims and Expenses - Section 2053 ....43
K. Section 6166 Court Decisions and Announcements ....46
L. 2% Floor for Miscellaneous Itemized Deductions ....50
M. Alternate Valuation Date Election ....52
N. Generation-Skipping Transfer Taxes ....54
1. Exercise or Lapse of Power of Appointment ....54
2. Qualified Severances ....55
3. Allocation of GST Tax Exemption ....56
4. PLRs and GST Tax Trusts ....56
O. Intentionally Defective Grantor Trusts ....57
P. GRATs and GRITs ....60
Q. Gifts, Gift Tax, and Estate Tax Includibility of Gift Tax ....63
R. Same-Sex Marriages ....66
S. Special Procedures for Same-Sex Couples to Recapture Exemption Amounts ....68
T. IRAs and Qualified Retirement Plans ....68
U. Special Valuation Rules – Chapter 14 ....74
V. No Ruling Areas ....75
W. Priority Guidance Plan ....77
X. Basis Reporting Requirements ....77
Y. Change of Address Notification ....77
Z. Foreign Financial Assets ....77
AA. Trust Income Taxation (Kaestner, Fielding et al.) ....78
BB. Divorce ....80
CC. SECURE Act ....81

DD. CARES Act .....82
EE. American Rescue Plan Act of 2021 .....82
FF. Infrastructure Plan .....83
GG. Build Back Better Bill .....83

IV. ESTATE TAX CONSIDERATIONS VS. INCOME TAX CONSIDERATIONS .....83

V. ESTATE PLANNING WITH CHANGING ECONOMIC CONDITIONS .....84

VI. DIGITAL ASSETS, ELECTRONIC WILLS AND REMOTE EXECUTION .....87
A. Background .....87
B. State Legislation .....90
C. Drafting for Digital Assets .....90
D. Cryptocurrency .....90
E. Electronic Wills .....91
F. Remote Execution, Witnessing and Notarization of Documents .....92

VII. FDIC INSURANCE INCREASES .....92

VIII. SIGNIFICANT FLORIDA LEGISLATION AND CASE LAW DEVELOPMENTS .....93
A. Creation of Dynasty Trusts .....93
B. Intestate Shares .....93
C. Separate Writings .....94
D. UTMA Transfers .....94
E. Uniform Disclaimer of Property Interests Act .....94
F. Anatomical Gift Law .....94
G. Fiduciary Responsibility for Life Insurance .....94
H. Creditors' Claims .....95
I. Homestead Law .....96
J. Attorney-Client Privilege .....97
K. Privity .....97
L. Reformation and Construction of Wills .....97
M. Powers of Attorney .....98
N. Personal Representatives, Administrators, Trustees and Guardians .....98
O. Standing to Contest Will or Challenge Trust Distributions .....99
P. Waiver of Spousal Rights .....99
Q. Ademption of Bequests .....100
R. Former Spouses .....100
S. Gifts and Bequests to Clients' Attorneys .....100
T. Disposition of Decedents' Wills .....100
U. Florida Trusts .....100
V. In Terrorem Clauses .....102
W. Undue Influence .....102
X. Exercise of Powers of Appointment .....102
Y. Foreign Wills .....102
Z. Doctrine of Renunciation .....103
AA. Attorneys' Fees .....103

BB. Comity Principles ..... 103
CC. Disposition of Decedent's Remains ..... 103
DD. Anti-Lapse Statute ..... 103
EE. Family Trust Companies ..... 103
FF. Electronic Wills ..... 104
GG. Precious Metals ..... 104
HH. Grantor Trust Reimbursement ..... 104
II. Small Estates ..... 104
JJ. Attorney Serving as Fiduciary ..... 104
KK. Conflict of Interest – Personal Representative ..... 104

IX. SIGNIFICANT NEW JERSEY LEGISLATION, REGULATIONS AND CASE LAW DEVELOPMENTS ..... 104
A. Same-Sex Marriage and Civil Unions ..... 104
B. Uniform Prudent Management of Institutional Funds Act ..... 105
C. New Jersey Estate Tax and Inheritance Tax ..... 106
D. New Jersey Gross Income Tax ..... 106
E. New Jersey Resident Trusts ..... 106
F. Support Trusts and Alimony ..... 107
G. Prenuptial Agreements ..... 107
H. Digital Assets ..... 107
I. Small Estate Administration ..... 107
J. Uniform Trust Code Accounts ..... 108
K. Gestational Surrogacy Contracts ..... 108
L. Assisted Suicide ..... 108

X. NEW YORK STATUTORY, CASE LAW AND ADMINISTRATIVE DEVELOPMENTS ..... 109
A. Same Sex Couples ..... 109
1. General ..... 109
2. New York Taxes ..... 110
3. New York Estate Tax ..... 110
B. Other New York Estate Tax and GST Tax Changes ..... 111
C. Other New York Income Tax Changes ..... 117
1. New York Source Income ..... 117
2. Income Tax Rates ..... 118
3. 2017 Omnibus Budget Bill ..... 118
4. 2018 Omnibus Budget Bill ..... 118
5. 2019 – 2020 Budget ..... 119
6. 2020 – 2021 Budget ..... 119
7. 2021 – 2022 Budget ..... 119
8. Income Tax Return Extensions ..... 120
9. New York Residency ..... 120
10. New York Resident Trusts ..... 125
(a) Background ..... 125
(b) New York and Other Authorities ..... 126
11. Decoupling from Federal Income Tax Changes ..... 127

D. Unitrust Conversions ....127
E. Attorney Engagement Letters ....129
F. Disclosure Requirements of Attorney-Fiduciaries....131
G. Relaxation of Strict Privity Doctrine ....136
H. No Fault Divorce....137
I. Decanting ....137
J. In Terrorem Clauses....139
K. Single-Member LLCs ....140
L. Other Significant Legislation....140
1. Significant 2016 Legislation....140
(a) Digital Assets ....140
2. Significant 2016 Court Rule Changes....141
(a) Inventories....141
3. Significant 2017 Legislation....141
(a) Power to Adjust Regime ....141
4. Significant 2019 Proposed Legislation....141
5. Significant 2020 Legislation....141
M. Other Case Law Developments ....142
1. Fiduciary Investments-Diversification and Self-Dealing ....142
2. Qualification and Removal of Fiduciaries ....146
3. Right of Election....147
4. Executor’s Commissions and Trustee's Commissions....147
5. Prenuptial and Postnuptial Agreements....148
6. Payment of Fiduciary's and Beneficiary’s Attorney's Fees ....149
7. Loans vs. Gifts ....150
8. Surcharge Computations....151
9. Exoneration of Fiduciaries....152
10. Slayer Inheritance ....152
11. Delaware Trusts ....152
12. Equitable Deviation ....153
13. Discretionary Trust Distributions ....153
14. Incorporation By Reference....153
15. Bequests of Tangibles....153
16. Charitable Pledges ....154
17. Inference of Due Execution ....154
18. Social Security Benefits....154
19. Assisted Suicide....154
N. Other Administrative Developments ....154
1. Bitcoins ....154
2. New York City Partnerships and Multi-member LLCs....155

XI. CONNECTICUT GIFT TAX, ESTATE TAX AND OTHER PERTINENT LEGISLATION ....156
A. Connecticut Estate Taxes and Gift Taxes ....156
B. Connecticut Probate Fees....156
C. Substitute Decision-Making Documents ....156
D. Tax on Endorsement Income ....157

E. Posthumously Conceived or Born Children ....................................................157
F. Digital Assets ....................................................157
G. Same-Sex Marriage ....................................................157
H. Pet Trusts ....................................................157
I. Changes to Trust Laws ....................................................158

EXHIBIT "A" ....................................................159

EXHIBIT "B" ....................................................160

EXHIBIT "C" ....................................................179

EXHIBIT "D" ....................................................188

EXHIBIT "E" ....................................................190

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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]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

[1] All references to the Code are to the Internal Revenue Code of 1986, as amended.

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury Department regulations, we inform you that any U.S. federal tax advice contained in this outline (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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federal and state tax developments, and important non-tax developments, regarding estates and trusts.

# I. FEDERAL TRANSFER TAXES AND INCOME TAXES

## A. 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 $12,060,000 for 2022.

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 directed the Internal Revenue Service (the "Service") to adopt regulations to deal with this so-called "clawback" issue. Proposed regulations (Prop. Reg. §20.2010-1(c)) were issued on November 20, 2018 and address this concern, providing that individuals who take advantage of the increased exemption by making lifetime gifts between 2018 and 2025 will not lose the benefit of the increased exemption even if the sunset occurs in 2026. Final regulations were issued on November 22, 2019, applicable to estates of decedents dying on and after November 26, 2019 (Treas. Reg. §20.2010-1(c)). The final regulations confirm that individuals making lifetime gifts before 2025 will not be adversely impacted by a 2026 sunset. In order to accomplish this, the regulations provide a special rule for post-2025 decedents that allows the estate to compute its estate tax credit using the higher of the basic exclusion amount applicable to the lifetime gifts or that applicable at the date of death.

The 2017 Act made 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.

## B. Portability

### 1. 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 2022 and he and his estate have used only $6,000,000 of his $12,060,000 estate tax applicable exclusion amount, then his surviving wife will have an aggregate applicable exclusion amount of $18,120,000 (i.e., her own $12,060,000 basic exclusion amount, plus the unused $6,060,000 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 Sanford J. Schlesinger, Esq. and Martin R. Goodman, Esq. and published by Commerce Clearing House in Estate Planning Review – The Journal.

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.

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.

## 2. Portability and the Future of Bypass Trusts[2]

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 $24,120,000, 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 $24,120,000.

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 $24,120,000.

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

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[2] This subsection of the Outline is adapted from a portion of an article that Sanford J. Schlesinger, Esq. and Martin R. Goodman, Esq. wrote and that was published in Estate Planning Review – The Journal, a Wolters Kluwer Business.

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]

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

3. Portability and Prenuptial Agreements[4]

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.

C. 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

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[3] See Part I, Section E of this Outline for a fuller discussion of "decoupling".

[4] This subsection of the Outline is adapted from a portion of an article that Sanford J. Schlesinger, Esq. and Martin R. Goodman, Esq. wrote and that was published in Estate Planning Review – The Journal, a Wolters Kluwer Business.

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

1. 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, indexed for inflation.

- 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 ("SALT") 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. The New York Employee Compensation Expense Program permits employers to elect to pay a payroll tax of 1.5 percent in 2019, 3 percent in 2020 and 5 percent in 2021 and thereafter, on employee compensation over $40,000, and to deduct such payroll tax without limitation. Although an employee's gross pay would be reduced, the law provides a mechanism to maintain the same net pay for the employee. On July 3, 2018 New York State issued a memorandum providing guidance as to its new optional employer payroll tax, which is designed to partially replace the personal income tax with a payroll tax that is deductible for employers, to mitigate the impact of the 2017 Tax Act's $10,000 limitation on the deduction for State and local taxes.

New York, New Jersey, Connecticut, and Maryland even commenced judicial actions to invalidate the $10,000 cap, which they lost. On October 5, 2021, the Second Circuit U.S. Court of Appeals unanimously held that the federal government had the authority to impose the cap, and that it was constitutional and proper. The states had argued that the cap was coercive and specifically meant to target them - an argument that was rejected by the Court.

In August 2018, the Service issued proposed regulations (which were "clarified" in September 2018) addressing the federal income tax treatment of transfers to funds that taxpayers could treat as satisfying State and local tax obligations, making it clear that federal law governs the tax treatment of such transfers for federal income tax purposes, including substance-over-form principles. The proposed regulations adopt a "quid pro quo" theory, providing that the amount of the charitable deduction must be reduced by any state tax credit received in exchange.

There is a de minimis exception for instances where the tax credit would be 15% or less of the charitable gift. The regulations make it clear that they only apply in instances where the individual receives a tax credit, but NOT a tax deduction. The proposed regulations do not affect the business expense deduction, which means that businesses can generally deduct business-related charitable contributions in full.

The Service issued new proposed regulations on December 13, 2019 that deal with charitable contributions which are intended to circumvent the $10,000 SALT limitation. The regulations incorporate earlier guidance, including the "quid pro quo" theory (which the Service has clarified) and the full deduction allowed to businesses. The Service also issued Rev. Proc. 2019-12, which confirms that to the extent a business taxpayer expects to receive a state or local tax credit, there is a direct benefit to its business. In that case, the payment is deemed an ordinary and necessary business expense. The result is that the business can deduct the portion of the charitable contribution for which a return benefit / tax credit is anticipated as a business expense, and the balance as a charitable donation.

The Service also announced in November of 2020 that state and local taxes imposed at the entity level on pass-through entities are permitted as a federal deduction. The Service intends to issue proposed regulations that will clarify that such payments are not subject to the $10,000 SALT limitation.

- 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 to 2020.

- 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:

(a) 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;

(b) By allowing the deduction of interest on currently existing mortgages pursuant to the law as it existed prior to the 2017 Tax Act; and

(c) By making home equity interest generally nondeductible (in 2018, the Service issued an advisory memo creating a "loophole" that allows such interest to be deducted if the home equity loan is for a use approved by the IRS, i.e., to "buy, build, or substantially improve the taxpayer's home that secures the loan."

- 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. In August 2018, the Service issued proposed regulations on the new pass-through deduction, which would apply to taxable years ending after the date of publication of the final regulations in the Federal Register (except for the included anti-abuse rules, which would apply to taxable years ending after December 22, 2017). The regulations also include provisions that allow the government to treat multiple trusts as a

single trust in situations in which a tax-avoidance purpose is shown or presumed to exist (including Section 199A), if certain conditions are met.

- 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. Note that the spending bill that was signed into law in December 2019 repealed the "kiddie tax" change, permitting taxpayers to treat the 2017 Tax Act change as repealed for 2018 and 2019. Effectively, this means that the "kiddie tax" reverts back to what it was before the 2017 Tax Act.

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.

2. <u>Income Tax Provisions Applicable to Estates and Non-Grantor Trusts</u>

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 $13,450 for 2022, except that the maximum capital gain tax rate of 20% applies to income above $13,700.

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 July 13, 2018 the Service released Notice 2018-61, advising that the Service intended to issue regulations that would provide that estates and non-grantor trusts can continue to deduct administration expenses that would not have been incurred if the property were not held in the estate or trust, including the appropriate portion of a bundled fee, in determining the adjusted gross income of the estate or trust, and that the Service was studying whether or not such deductions should be treated as miscellaneous itemized deductions in the hands of a beneficiary of the estate or trust when they are passed out to such beneficiary as excess deductions on the termination of the entity.[5] In the interim, it appeared that the Service was taking the position that such excess deductions were not currently deductible by the beneficiaries.

The Service issued proposed regulations on May 11, 2020. Such regulations confirmed that estates and non-grantor trusts could continue to deduct administration expenses that would not have been incurred if the property were not held in the estate or trust, and that such expenses are not miscellaneous itemized deductions. Such regulations also provided that excess deductions received by beneficiaries on the termination of an estate or trust under Section 642(h) retained their character while they were in the estate or trust even after they were in the hands of the beneficiaries (i.e., as non-miscellaneous itemized deductions or as miscellaneous itemized deductions). The fiduciary is required to identify the character of the excess deductions. The proposed regulations amended Regulations §§ 1.67-4, 1.642(h)-2 and 1.642(h)-5. Final regulations were issued on September 21, 2020 (effective on October 19, 2020), which generally adopt the proposed regulations with very few changes.

The 20% deduction for "qualified business income" discussed above also applies to estates and non-grantor trusts. A trust that files form 990-T and has unrelated business income may also have qualified business income. In that case, the trust would be allowed a deduction under Code Section 199A.

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

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[5] See Part III, Section M, of this Outline for a discussion of the law regarding this issue prior to the 2017 Tax Act.

election under Code Section 2032, the fair market value of such property on the alternate valuation date.

3. 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 Service issued proposed regulations on July 3, 2019, which provide guidance to help colleges and universities determine whether they are subject to the tax and how to compute same. The regulations define key terms such as student and tuition, and clarify which assets are deemed to be used in carrying out the institution's exempt purpose. Final regulations were issued effective October 14, 2020, which adopt more generous rules than those contained in the proposed regulations. For example, the final regulations expand the definition of "student," allowing schools to include not only students enrolled in degree programs, but also those taking courses for academic credit.

This provision will affect the wealthiest universities for their 2019 fiscal year. Harvard, with an endowment fund of approximately $40 billion, and Stanford, with an endowment of approximately $28 billion, will face roughly $38 million and $43 million, respectively, on their net investment income, including tax on unrealized gains that will be paid in future years.

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 IRS issued guidance for Section 4960 in the form of a Q&A, and issued proposed regulations on June 11, 2020, incorporating such interim guidance. Final regulations

were issued on January 19, 2021, generally preserving the concepts included in the interim guidance and proposed regulations, with minor changes.

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. In August 2018, the Service issued guidance for identifying separate trades or businesses, treatment of certain income and various other associated concepts (Notice 2018-67).

4. 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.

5. 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 was $11,180,000, as noted above. The 2019 exemption using the C-CPI-U was $11,400,000, the 2020 exemption was $11,580,000, the 2021 exemption was $11,700,000, and the 2022 exemption is $12,060,000.

6. Additional Areas Impacted By The 2017 Tax Act

(a) ........................................................................................................................ S hareholders 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. The Service issued proposed regulations in April of 2019 that modified the allocation rules under Treas. Reg. Section 1.641(c)-1 to make certain that such non-resident aliens do not escape United States income taxation. Final regulations were issued effective on June 18, 2019, adopting the proposed regulations in their entirety.

(b) ........................................................................................................................ C
haritable 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.

(c) ........................................................................................................................ T
ransfer 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 would 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. Proposed regulations were issued in January of 2019, responding to comments to Notice 2018-41 and providing certain definitions and guidance for determining the amount of excludable death benefits.

7. 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. Note that the SECURE Act increased the age at which required minimum

distributions must begin from 70 ½ to 72 years. See discussion on the SECURE Act in Part III, Section DD of this Outline.

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 2022 is $13,450, subject to inflation adjustments each year. For trusts, all of the unexpired interests 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 2022 Medicare tax rate is 1.45% each for the employee and employer.

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

## D. Estate Planning After The 2017 Tax Act

### 1. 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.

2. 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 $12,060,000 for decedents dying in 2022 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.

E. 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 January 1, 2022:

| State | 2022 State Death Tax Threshold | Notes |
|---|---|---|
| Connecticut | $9,100,000 | • In 2018, CT changed its estate tax law to extend the phase-in of the exemption to 2023 to reflect the increase in the federal exemption to $10 million indexed for inflation in the 2017 Tax Act.<br>• Beginning in 2019, the cap on CT estate and gift tax is reduced from $20 million to $15 million – which represents the tax due on a CT estate of approximately $129 million. |

| | | |
|---|---|---|
| | | • In 2022, the CT death tax threshold increased to $9.1 million and will match the federal exemption amount in 2023. |
| District of Columbia | $4,000,000<br>(as of 2021) | • The Estate Tax Adjustment Emergency Amendment Act of 2020 was passed in August 2020 which reduced the exemption to $4,000,000 starting on 1/1/2021.<br>• The estate tax threshold will be indexed for inflation beginning in 2022. |
| Hawaii | $5,490,000 | • Portability available for DOD after 1/25/12.<br>• HI state death tax threshold is indexed for inflation at the $5 million threshold. The HI Dept. of Taxation did not adjust for inflation in 2019 and 2020 and has not yet done so for 2021.<br>• Effective 1/1/2019, HI increased the rate of its state estate tax on estates valued at over $10,000,000 to 20%.<br>• For decedents dying on or after 1/1/2020, the Hawaii Estate Tax Return must be filed electronically unless a waiver is obtained. The penalty for failure to file electronically is two percent of the tax due. |
| Illinois | $4,000,000 | |
| Iowa | *separate inheritance tax only* | • On 6/16/2021, the governor signed FS 619 which, among other tax law changes, reduces the inheritance tax rates by twenty percent each year beginning on 1/1/2021 through 12/31/2024 and results in the repeal of the inheritance tax as of 1/1/2025. |
| Kentucky | *separate inheritance tax only* | |
| Maine | $6,010,000 | • State death tax threshold adjusted for inflation at the $5.6 million threshold. |

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|---|---|---|
| Maryland | $5,000,000 | • Legislation enacted to increase the state estate tax exemption to the fixed amount of $5,000,000 for 2019 as well as allow portability of DSUE beginning in 2019 (retroactive for spouses dying between 2011 and 2018).<br>• Also has separate inheritance tax. |
| Massachusetts | $1,000,000 | |
| Minnesota | $3,000,000 | • Legislation enacted to gradually increase the exemption until it reached $3,000,000 in 2020. |
| Nebraska | *County inheritance tax only* | |
| New Jersey | *separate inheritance tax only* | |
| New York | $6,110,000 | • As of 1/1/19, NYS exemption amount will be the same as the federal exemption amount **prior** to the 2017 Tax Act, which is $5,000,000 indexed for inflation from 2010. |
| Oregon | $1,000,000 | • For estates of decedent's dying on or after 1/1/2022, the time for filing an Oregon estate tax return and paying the tax has been extended to 12 months following the decedent's date of death for **all estates**. |
| Pennsylvania | *separate inheritance tax only* | |
| Rhode Island | $1,648,111 | • RI state death tax threshold is indexed for inflation at $1.5 million threshold. |
| Vermont | $5,000,000 | • On 6/18/19, VT enacted H. 541 which increased the VT estate tax exemption to $4,250,000 in 2020 and $5,000,000 in 2021 and thereafter. |

| | | |
|---|---|---|
| Washington State | $2,193,000 | • WA state death tax threshold is indexed for inflation at $2 million but WA did not adjust for inflation in 2019 and 2020 and has not yet done so for 2021. |

It is also worth noting that a California bill was introduced on March 26, 2019 that would have let voters decide on the November 2020 ballot if they wanted a state-level estate, gift and GST tax commencing with deaths (or transfers) on or after January 1, 2021. The bill proposed a 40% tax with a basic exclusion amount of $3,500,000, not indexed for inflation. The bill failed to receive a floor vote and did not appear on the 2020 ballot.

In addition, Governor Ned Lamont of Connecticut proposed a budget for 2020 and 2021 (announced on February 20, 2019), which would have eliminated the Connecticut gift tax and reaffirmed the current estate tax structure (i.e., gradually increasing the estate tax exemption to equal the federal estate tax exemption in 2023). Neither provision made the final bill.

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

1. 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 New York decedents dying on or after January 1, 2019 and on or before December 31, 2019, $5,740,000 may be exempt from New York estate tax. For New York decedents dying on or after January 1, 2020 and on or before December 31, 2020, $5,850,000 may be exempt from New York estate tax. For New York decedents dying on or after January 1, 2021 and on or before December 31, 2021, $5,930,000 may be exempt from New York estate tax. For New York decedents dying on or after January 1, 2022 and on or before December 31, 2022, $6,110,000 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. For a New York decedent who dies on or after January 1, 2019 and on or before December 31, 2019 with a full federal credit shelter bequest of $11,400,000, the decedent's estate will be required to pay New York estate taxes of $1,290,800, 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, 2020 and on or before December 31, 2020 with a full federal credit shelter bequest of $11,580,000, the decedent's estate will be required to pay New York estate taxes of $1,319,600, 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, 2021 and on or before December 31, 2021 with a full federal credit shelter bequest of $11,700,000, the decedent's estate will be required to pay New York estate taxes of $1,338,800, 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 and assuming the increased federal basic exclusion amount under the 2017 Tax Act sunsets, 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, from $1,255,600 to $1,494,762 for decedents dying on or after January 1, 2018 and on or before December 31, 2018, and from $1,290,800 to $1,536,667 for decedents dying on or after January 1, 2019 and on or before December 31, 2019, and from $1,319,600 to $1,570,952 for decedents dying on or after January 1, 2020 and on or before December 31, 2020, and from $1,338,800 to $1,593,809 for decedents dying on or after January 1, 2021 and on or before December 31, 2021.

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.

2. Connecticut

On May 31, 2018 Connecticut passed legislation that extended the phase-in of the 2017 Tax Act federal exemption amount until 2023. The exemption for 2019 was increased to $3.6 million, for 2020 to $5.1 million, for 2021 to $7.1 million, for 2022 to $9.1 million, and for 2023 and thereafter the exemption amount will be the same as the federal 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, effective January 1, 2019. The new cap will generally apply to estates exceeding $130,000,000.

Governor Ned Lamont of Connecticut proposed a budget for 2020 and 2021 (announced on February 20, 2019), which would have eliminated the Connecticut gift tax and reaffirmed the current estate tax structure (i.e., gradually increasing the estate tax exemption to equal the federal estate tax exemption in 2023). Neither provision made the final bill.

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

It is noteworthy that Connecticut recently lost roughly the equivalent of 1.6% of its annual adjusted gross income due to high wage earners moving out of the State, versus the lower wage earners who move into Connecticut.

3. 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 was eliminated entirely as of 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 died

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.

4. 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.

5. 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 "A" is a chart showing a comparison of the state estate taxes after the 2017 Tax Act of New York, New Jersey, Florida and Connecticut.

6. 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.

7. Other States

Attached hereto as Exhibit "B" is a chart showing the effect as of January 1, 2022 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.

8. 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.

In Matter of Seiden, 2018 NY Slip Op 32541 (U) (Surrogate's Court, New York County, October 9, 2018), the Court vacated and set aside a Notice of Estate Tax Deficiency imposing nearly half a million dollars of tax attributable to a QTIP trust from the decedent's pre-deceased husband's estate. The decedent's husband had died in 2010, during the federal estate tax repeal, and his estate elected not to file a federal estate tax return. The estate did, however, file a New York State tax return on which it reported the trust and elected QTIP treatment. The State issued a closing letter. When the surviving spouse died in 2014, her estate filed a federal estate tax return correctly omitting the QTIP trust based on Section 2044, which requires the inclusion of trust property for which a marital deduction was allowed - this wasn't the case since no federal return had been filed by the husband's estate. The surviving spouse's estate also omitted the QTIP trust for New York estate tax purposes, contending that the trust property was not includible in the New York gross estate, which is defined by reference to the federal gross estate, in which the trust is clearly not includible. The Court agreed with the estate, stating that this is the correct result based on the plain language of the statute. The 2020 Budget includes a provision that prevents this result for all estate of individuals dying on or after April 1, 2019. The new law requires QTIP property to be included in the estate of a surviving spouse if a New York marital deduction had been allowed for the property.

9. <u>Estate Tax Proposals</u>

There were several proposals being considered which would have overhauled the current estate tax regime. Most notably, on September 13, 2021, the House Ways & Means Committee released proposed legislation containing sweeping tax law changes. Its provisions included:

- A top marginal tax rate of 39.6% would apply to married couples earning annually more than $450,000 and individuals earning more than $400,000, effective for tax years after December 31, 2021. This increase would also apply to trusts and estates in the highest income tax bracket.

- Increase the long-term capital gains rate from 20% to 25% for taxpayers in the highest ordinary income tax bracket, effective as of September 14, 2021.

- Modifications to the child and dependent care tax credit would be made permanent.

- Reduce the federal estate and gift tax exemption to $5 million (as it existed before the 2017 Tax Act), adjusted for inflation, for deaths and lifetime gifts after December 31, 2021 (advancing the current sunset of December 31, 2025). Notably, the proposed legislation retains the basis step-up and portability rules and does not change the estate and gift tax rates.

- Significantly overhaul the current grantor trust rules in ways that would significantly reduce the use of such trusts created or funded after the date of enactment. E.g., assets of a grantor trust would be includible in the grantor's estate, sales between a grantor and a grantor trust would no longer be disregarded for income tax purposes, "toggling off" grantor trust status would be treated as a gift, etc.

- New retirement plan limitations would be imposed for high earning taxpayers, which would be effective for tax years after December 31, 2021.

The current version of the Build Back Better bill that is being discussed has dropped many of the provisions included in the original House version (particularly the estate/gift tax provisions and the grantor trust provisions); however, it remains to be seen what the legislature will do in this regard.

The Treasury Department also released the "Green Book" for the first time in almost five years in June 2021. The Green Book contains explanations of the President's revenue proposals for fiscal year 2022. While the proposals in the Green Book do not include lowering the federal gift and estate tax exclusion amounts, they do include the elimination of the basis "step-up" at death. The proposals also include the treatment of certain gifts as realization events for capital gain purposes, as well as an increase to the capital gains tax rate (and to the top marginal income tax rates). The proposed effective date for the majority of the proposals is January 1, 2022. It is important to note that the proposals included in the Green Book are not legislation, and it is unknown which, if any, of the proposals will be passed into law.

## II. OTHER IMPORTANT FEDERAL LEGISLATION

### A. 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 2022 is $13,450, 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 2022 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 $13,450 in 2022 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 $13,450 in 2022). 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 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.[6]

B. 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.

C. 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.

[6] See Part III, Section C, of this Outline for information regarding the Service's temporary suspension of new formal guidance.

D. 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.[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.

Proposed regulations on consistent basis reporting for estates under Code Sections 1014(f) and 6035 were released on March 4, 2016.

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.

E. 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

[7] See Part III, Section C, of this Outline for information regarding the Service's temporary suspension of new formal guidance.

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 $15,000).

- 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 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.

On July 30, 2018 the Service released Notice 2018-58, announcing that the Service intends to issue regulations regarding contributions of refunded qualified higher education expenses to a qualified tuition program, a rollover from a qualified tuition program to an ABLE account, and treating certain elementary or secondary school expenses as qualified higher education expenses. The Notice stated that the anticipated regulations will provide that rollovers from Code Section 529 college savings plans, together with contributions made to tax-favored disability savings accounts, cannot exceed the annual contribution limit to such accounts. In 2021, the annual ABLE contribution limit is $15,000. In addition, the Notice provides for qualified higher education expenses to include tuition at elementary or secondary schools up to $10,000 per beneficiary. Proposed regulations were issued in October 2019 and final regulations were issued on October 2, 2020.

F. 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 were not effective until 2018 (unless a partnership elected 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.

G. 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.

### H. 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.

## III. IMPORTANT IRS REGULATIONS, ANNOUNCEMENTS AND COURT DECISIONS

### A. Inflation Adjustments

#### 1. 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 was $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 was the amount of the GST tax exemption for 2018. For 2021, the amount was $11,700,000 and for 2022, the amount is $12,060,000.

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 ($628,301 for 2021 and $647,851 for 2022), $500,000 for heads of households and other unmarried individuals ($523,601 for 2021 and $539,901 for 2022), $300,000 for married individuals filing separately ($314,151 for 2021 and $323,926 for 2022), and $12,500 for estates and non-grantor trusts ($13,050 for 2021 and $13,450 for 2022); the income tax standard deduction is $24,000 for married individuals filing jointly and surviving spouses ($25,100 for 2021 and $25,900 for 2022), $18,000 for heads of households ($18,800 for 2021 and $19,400 for 2022), $12,000 for other unmarried individuals and for married individuals filing separately ($12,550 for 2021 and $12,950 for 2022); the income tax personal exemption is -0-; the alternative minimum tax exemption is $109,400 for married individuals filing jointly and surviving spouses ($114,600 for 2021 and $118,100 for 2022), $70,300 for other unmarried individuals ($73,600 for 2021 and $75,900 for 2022), $54,700 for married individuals filing separately ($57,300 for 2021 and $59,050 for 2022), and $24,600 for estates and non-grantor trusts ($25,700 for 2021 and $26,500 for 2022); and the personal exemption amount is -0-.

## 2. Adjustments Announced Prior to the 2017 Tax Act

In Rev. Proc. 2017-58, the Service had announced the following 2018 inflation-adjusted amounts for income tax purposes: The maximum income tax bracket started 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 was $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 were $4,150; the alternative minimum tax exemption was $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) began 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 was $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 remained at $6,000.

- The limit on annual contributions to an Individual Retirement Arrangement (IRA) remained unchanged at $5,500. The additional catch-up contribution limit for individuals aged 50 and over was not subject to an annual cost-of-living adjustment and remained $1,000.

- The deduction for taxpayers making contributions to a traditional IRA was phased out for singles and heads of household who were covered by a workplace retirement plan and had 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 made the IRA contribution was covered by a workplace retirement plan, the income phase-out range was $101,000 to $121,000, increased from $99,000 and $119,000 in 2017. For an IRA contributor who was not covered by a workplace retirement plan and was married to someone who was covered, the deduction was phased out if the couple's income was between $189,000 and $199,000, increased from $186,000 and $196,000 in 2017. For a married individual filing a separate return who was covered by a workplace retirement plan, the phase-out range was not subject to an annual cost-of-living adjustment and remained $0 to $10,000.

- The AGI phase-out range for taxpayers making contributions to a Roth IRA was $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 was $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 was not subject to an annual cost-of-living adjustment and remained $0 to $10,000.

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

## B. Tax Returns

### 1. 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.

### 2. 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.

## C. Release of Estate Tax Lien in Sale of Realty

Under Code Section 6324(a), an automatic estate tax lien is placed on a

decedent's property at death. In the past, when an executor or administrator sold real property of a decedent's estate before an estate tax closing letter is issued, the executor must obtain a Certificate of Discharge from Federal Tax Lien (more colloquially known as a Release of Lien) from the Service to provide to the purchaser at closing. Before the summer of 2016, obtaining a Release of Lien was relatively simple. The executor or administrator would File Form 4422 - Application for Certificate Discharging Property Subject to Estate Tax Lien with the Service and after the Service's agent would review the application, the Service would usually issue the Release of Lien to the applicant. However, a new procedure went into effect on or about June 1, 2016. Under this new procedure, in order to receive a Release of Lien using Form 4422, the entire net sales proceeds must be paid to the Service for the Service to hold as an estate tax payment until the estate return is filed and a closing letter is issued, or the net sale proceeds must be held in escrow. This procedure requires the estate to file Form 4422 with the Service, and the Service will then issue a "conditional commitment to discharge certain property from federal estate tax lien." This document will permit the closing to take place. If the Service holds the proceeds (rather than the proceeds being put in escrow), the Service will accrue interest at the underpayment rate commencing 45 days after the estate tax return is filed.

On April 5, 2017 the Service's Director of Collection Policy issued a memorandum providing interim guidance to the Service's personnel regarding the issuance of a discharge of an estate tax lien. The memorandum provides in part that:

- If it is determined that the estate was not required to file an estate tax return, then the Service should not issue a discharge certificate, but instead should issue a Letter 1352, Request for Discharge of Estate Tax Lien, selecting the applicable paragraph for no estate tax return filing requirement.

- If Form 4422 indicates that the estate will be non-taxable, based on the estimated gross estate and estimated deductions, then a discharge without an escrow may be appropriate.

- If Form 4422 shows an estimated estate tax greater than the net sale of proceeds, and no estimated tax payment having been made, then the net sale proceeds should be paid to the Service or held in escrow before granting the discharge of lien.

- If Form 4422 shows an estimated estate tax liability, and the estate has filed an extension of time to file the estate tax return and paid the full estimated estate tax, then a discharge without an escrow may be appropriate.

- If Form 706 is filed and the reported tax is paid, then a discharge without an escrow may be appropriate.

- A certificate of discharge may be issued if it is determined that the remaining property of the estate that is subject to the estate tax lien has a value that is at least double the amount of the unsatisfied tax liability secured by such lien and the amount of all other liens on such property which have a priority over the estate tax lien.

- A certificate of discharge may be issued if it is determined that the Service's interest in the property subject to the lien has no value.

- A certificate of discharge may be issued if the property subject to the estate tax lien is sold, and the Service determines that the sale proceeds should be held in escrow as a fund subject to the estate tax lien.

- An estate has a right under Code Section 6325(b)(4) to receive a certificate of discharge on any property subject to an estate tax lien if the estate deposits an amount equal to the value of the Service's interest in the property or furnishes an acceptable bond in the like amount sufficient to cover the Service's interest in the property.

D. Estate Tax Closing Letters

The Service has 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 an estate tax closing letter should request it in a separate letter submitted to the Service at least four months after the estate tax return is filed.

On September 18, 2015 at an American Bar Association Section of Taxation meeting in Chicago, Catherine V. Hughes, a Treasury Department estate and gift tax attorney-advisor, stated that the Service's Frequently Asked Questions on Estate Taxes website would soon be updated to advise practitioners that they can ask for a transcript of an estate tax return that includes a code (i.e., Code 421) indicating that the Service has accepted an estate tax return as filed or that the Service has completed its estate tax examination, and that the transcript with such code number would constitute the equivalent of an estate tax closing letter. Ms. Hughes also stated that discontinuing the automatic issuance of estate tax closing letters was entirely a cost-cutting decision, and not one based on policy.

In Notice 2017-12 (January 6, 2017), the Service reiterated its policy of only issuing estate tax closing letters on request, and stated that an estate or its authorized representative could obtain an account transcript which, if it contains Code "421" indicating a closed examination of an estate tax return, will serve as a functional equivalent of an estate tax closing letter. Tax professionals can obtain an account transcript from the Service's Transcript Delivery System, which will reflect transactions including the acceptance of Form 706 and/or the completion of an estate tax examination, using Form 4506-T, Request for Transcript of Tax Return. A tax professional requesting such a transcript must file a power of attorney with the Service.

On May 12, 2018 Catherine Hughes, an estate and gift tax attorney-advisor in the Treasury Department's Office of Tax Policy, announced that as of May 10, 2018 practitioners could access the transcripts online by going to IRS.gov, typing "estate tax closing letters" in the search box on the upper right hand side of the homepage, and then selecting "Transcripts in Lieu of Estate Tax Closing Letters", which will provide instructions for obtaining an account transcript.

Proposed regulations were issued on December 31, 2020 establishing a user fee of $67 for persons requesting a closing letter. The regulations were adopted without any significant changes by final regulations issued on September 27, 2021. The new fee will apply to requests for estate tax closing letters received by the Service on or after October 28, 2021. An estate tax closing letter (Letter 627) can be requested and the fee can be paid on *www.pay.gov*.

## E. Other Matters Regarding Estate Tax, Gift Tax and Fiduciary Income Tax Audits and Collections

On July 25, 2017 the Commissioner of the Service announced that, in order to protect taxpayer information in business-related tax returns that criminals use to file fraudulent claims, the Service may request tax payment history, parent company information, tax filing history, the names and social security numbers of the individuals who sign tax documents, and possibly other information, when practitioners file business, trust or estate tax returns for the 2018 tax season.

In CCA 201643020 the Service advised that Code Section 6501(c)(9) only extends the usual three-year assessment period for gifts not reported on a gift tax return, and even if failure to include prior-year gifts in the calculation of tax results in a lower tax on the reported gift, the extended assessment period does not apply. Only two rules in Code Section 6501(c)(9) limit its application: (1) it applies to gifts not reported on a gift tax return, and (2) it does not apply to an item adequately disclosed on the return or on an attachment to the return.

In FAA 20152201F (August 21, 2015), the Service stated that the three year statute of limitations under Code Section 6501 for the assessment of gift taxes does not apply to a gift tax return filed by a limited partnership where the company failed to adequately disclose the donor's transfers of interests to the partnership and failed to adequately describe the method used to determine the value of the interest involved. As a result, the Service stated that it could assess a gift tax based on the transfer in question at any time.

In Estate of Schaefer, 145 T.C. No. 4 (July 28, 2015), where the taxpayer had established two NIMCRUTs providing for payments to the income beneficiaries of the lesser of the net trust accounting income for the taxable year or a fixed percentage of the value of the trust assets, the Tax Court held that the value of the charitable remainder interest in each trust for estate tax purposes should be based upon the maximum fixed percentage provided in the trusts for payments to the income beneficiaries, rather than using the Code Section 7520 rate to determine the amount of the payments to the income beneficiaries, if such rate is above 5%.

In Estate of Davidson v. Commissioner, T.C. No. 13748-13 (2015), where the Service had asserted estate tax and GST tax deficiencies totaling $2,800,000,000 in connection with transfers by the taxpayer to trusts for his grandchildren of self-cancelling installment notes in reliance on an allegedly unrealistic life expectancy, and where the taxpayer had asserted that the medical consultants retained by the parties stated that the taxpayer had a greater than 50% probability of living at least one year, but the taxpayer died only two months after the transfers, the Service stipulated to estate taxes and GST taxes totaling approximately $321,000,000. In September 2015, Davidson's estate filed a lawsuit against Deloitte Tax LLP for $500,000,000 to recover taxes, fees and penalties. The estate claims that Deloitte never disclosed to Davidson the risks associated with using self-canceling installment notes.

In Kress v. United States, 2019-1 USTC ¶ 60,711 (U.S. Dist. Ct. Wis. 2019), the Court determined its own discount for lack of marketability in a case where minority shares of closely held stock were gifted by donors to their children and grandchildren. The company's bylaws included transfer restrictions for the family members. The Court stated that the government's expert's report failed to take into account comparable companies, the impact of the recession, and, among other errors, overvalued the minority shares. The donor's expert's report, on the other hand, which used the market approach and included more accurate projections, was widely accepted by the Court. However, the Court stated that the transfer restrictions should not have been taken into account by the donor's expert because the donors could not establish that similar restrictions were commonplace for other companies. Therefore, the Court applied its own discount.

In Estate of Kollsman v. Commissioner of Internal Revenue Service (No. 18-70565, June 21, 2019), the US Circuit Court of Appeals for the Ninth Circuit upheld the Tax Court's finding that there was an undervaluation of two Old Master paintings by Sotheby's. Sotheby's had appraised the paintings at $500,000 and $100,000, respectively, as of decedent's date of death, which values were reported for estate tax purposes. The first painting subsequently sold for $2.4 million, after being cleaned and re-framed; the second painting did not sell. The sale triggered the IRS deficiency, whose expert valued the paintings as of date of death at $2.1 million and $500,000, respectively. The Court held that Sotheby's, as the estate's appraiser, exaggerated the impact of the paintings' dirtiness, stating that a hypothetical buyer of the level of sophistication required to buy such art work would know that the painting(s) could easily be cleaned. The Court also stated that the estate's expert was not able to explain the significant discrepancy between his valuation and the ultimate sale price of the first painting, and he did not consider comparable sales in his valuation.

In Estate of Streightoff v. Commissioner (T.C. Memo 2018-178), the Tax Court agreed with the Service's rejection of a 37.2% discount for lack of marketability, control and liquidity. More than two years before death, decedent had transferred liquid assets to a limited partnership in which he obtained an 88.99% interest in the partnership in exchange. On that same day, he created a revocable trust to which he transferred his partnership interest. The Tax Court, holding for the Service stated that the estate was valuing an assignee interest, and not a limited partnership interest, which decedent's interest really was in substance. Therefore, the estate was not entitled to the discount that would have applied to an actual assignee interest.

In Estate of Aaron U. Jones v. Commissioner (T.C. Memo 2019-101), the Tax Court addressed several valuation issues regarding the gifting of minority interests in two related companies involved in the timber industry – Seneca Sawmill Company (SSC), an Oregon corporation that manufactured lumber, and Seneca Jones Timber Co. (SJTC), an Oregon limited partnership that purchased, managed and held the land and then sold its lumber to SSC. SSC owned 10% of SSC and the two entities shared a management team. Taxpayer Aaron had gifted voting and nonvoting interests in both entities to his daughters and to trusts for his daughters' benefit in 2009. The gifts were appraised for gift tax purposes as having a value of approximately $21 million by taxpayer's appraiser. The Service asserted that the actual value exceeded $120 million.

Among the issues presented to Court, the most notable were whether an income or asset-based approach was proper for valuing the interests in SJTC and whether the value of such interests should be discounted because of tax-affecting. The Service argued for an asset-based approach, claiming that SJTC was a natural resource holding company. The Court, agreeing with the taxpayer's approach, held that the income-based approach was proper to value SJTC as it was an operating company and because the minority interests that were gifted were not in a position to direct the company's liquidation. The Court also agreed with the estate's expert, who tax-affected the earnings of the company and reduced their value to take into account the income tax that the partners would ultimately have to pay, arguing that any hypothetical buyer would take the tax burden into account. This resulted in a significantly lower valuation of a pass-through entity than the previously favored assumption of the company paying a zero percent entity level rate.

On June 10, 2020, the Tax Court in Mary P. Nelson v. Comm'r (T.C. Memo 2020-81) narrowly construed the language of transfer instruments causing a taxpayer to be deemed to have made a gift on the redetermination of value of a partnership interest. Mary Nelson owned an interest in a company named Longspar. In December 2008, Ms. Nelson gifted interests in Longspar to a family trust. The language in the gift assignment provided that the gifted interests had a value of $2.096 million "as determined by a qualified appraiser within 90 days of the effective date of this Assignment."

A few days later, Ms. Nelson sold additional interests in Longspar to the same family trust. The sale instrument provided that the sold interests had a value of $20 million "as determined by a qualified appraiser within 180 days of the effective date of this Assignment."

Neither the gift nor the sale instruments defined fair market value or provided for a reallocation after the valuation date.

Ms. Nelson's appraiser subsequently concluded that 1% interest in Longspar was worth $341,000, which resulted in the gift being of a 6.14% interest and the sale of a 58.65% interest. Ms. Nelson and her husband elected to split the gift and reported same on a Form 709.

The IRS later determined that the Longspar interests were significantly undervalued, and that the gift should have been valued at $1,761,009 and the sale at $26,803,519. As a result, the sale was treated as a part sale (i.e., of $20 million) and an additional gift of $6,803,519 to account for the excess of the sales price above $20 million.

In reviewing the transfer documents, the Tax Court determined that the transfer of interests was dependent in each case on the appraiser's valuation, not on the value as finally determined for gift or estate tax purposes. Acknowledging that Ms. Nelson may have intended that to be the case, the Court noted that the language "as determined for federal gift and estate tax purposes" was omitted from the gift and sale instruments and, therefore, the percentage transferred could not be adjusted based on the redetermination of value. The U.S. Court of Appeals for the Fifth Circuit upheld the Tax Court's ruling (5th Cir. No. 20-61068, Nov. 3, 2021).

In August of 2020, in response to difficulties posed by the coronavirus pandemic, the Service announced that gift and estate tax returns may be digitally signed, but they still need to

be filed by mail. The Service did not specify which digital signature products may be used. This rule has been extended to October 31, 2023.

F. Request for Discharge From Personal Liability – Form 5495

An executor of a decedent's estate may file Form 5495, Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905, with the Service to be discharged from personal liability for the estate taxes payable with respect to the decedent's estate (Code Section 2204) and for income taxes and gift taxes payable by the decedent (Code Section 6905). The Service recently requested comments regarding such Form as part of the Service's continuing efforts to reduce paperwork.

G. Qualified Personal Residence Trusts

In Riese v. Commissioner, T.C. Memo 2011-60 (March 15 2011), where the decedent had transferred her residence to a qualified personal residence trust ("QPRT") and continued to reside in the residence for approximately six months after the end of the term of the QPRT until her death without paying any rent, the Tax Court found that there was an agreement among the parties that the decedent would pay rent after the end of the QPRT term, even though there was no written lease and she had not paid any rent prior to her death, and the Court therefore held that the residence was not includible in the decedent's gross estate for estate tax purposes under Code Section 2036. The Court also held that the estate was entitled to an estate tax deduction under Code Section 2053(a)(3) for the rent due for the period from the end of the QPRT to the date of the decedent's death as a claim against the estate.

In PLR 200920033 (February 3, 2009), the Service ruled that a "Reverse QPRT", under which the taxpayer transferred a residence to a QPRT which gave his parents the right to use the residence for a term of years, with the son retaining the reversion interest, qualified as a QPRT under Code Section 2702. Since the taxpayer had received the residence at the expiration of a QPRT created by his father with the same residence, the ruling noted that the Service was not expressing any opinion as to whether the residence would be included in his father's gross estate under Code Section 2036, reserving the right to claim that the parties had an express or implied agreement that, after the first QPRT term ended, the son would retransfer the home to the reverse QPRT so that his father could continue to use it for his life.

On May 9, 2003, the Service in Rev. Proc. 2003-42 issued a sample declaration of trust that meets the requirements of the Code for a qualified personal residence trust with one term holder and provides samples of certain alternative provisions concerning additions to the trust to purchase a personal residence and disposition of trust assets on cessation of its qualification as a QPRT.

H. Private Trust Companies and Family Offices

In Notice 2008-63, IRB 2008-31 (August 4, 2008), the Service issued a proposed revenue ruling concerning the income, estate, gift and GST tax consequences of creating a private trust company to serve as the trustee of trusts having family members as grantors and beneficiaries. The private trust companies' governing documents create a committee having exclusive authority regarding discretionary distributions from each trust. No member of the

committee can participate in matters concerning any trust of which that member or his or her spouse is a grantor or a beneficiary or having a beneficiary to whom the member or his or her spouse who is a support obligation. Furthermore, no family member can have any express or implied reciprocal agreement with another family member regarding distributions. The Service ruled that a trust would not be includible in the grantor's gross estate under Code Section 2036(a) or Code Section 2038(a) by reason of the trust company service as trustee, the grantor's interest in the trust company, or the grantor's service as an officer, director, manager, employee or member of the distribution committee of the trust company. The Service also ruled that the service by a grantor on the distribution committee would not cause the grantor to be liable for gift taxes on discretionary distributions from the trust of which such person is the grantor, since the grantor cannot participate in distribution decisions. Furthermore, the Service ruled that the trust company serving as trustee, by itself, would not cause any grantor or beneficiary of that trust to be treated as the trust's owner for income tax purposes.

On June 22, 2011 the Securities and Exchange Commission issued its final Rule 202(a)(11)(G)-1 exempting family offices from registration requirements under the Investment Advisers Act of 1940. The Rule stated that in order to qualify for the exemption, a family office adviser must only advise "family clients" with respect to securities, be wholly-owned by "family clients" and exclusively controlled by "family members", and not hold itself out to the public as an investment adviser.

## I. Restricted Management Accounts

On October 9, 2009 the Service determined in Chief Counsel Advice 200941016 that a restricted management account creates a principal/agent relationship and, therefore, that the only discount allowable for purposes of estate tax and gift tax valuation would be a discount for potential damages for breach of contract, which ordinarily would be significantly less than discounts for lack of control and lack of marketability.

In Rev. Rul. 2008-35, IRB 2008-29 (July 21, 2008), the Service ruled that for estate and gift tax purposes, the fair market value of a restricted management account is the actual value of the cash and marketable securities in the account without any restrictions or discounts, where the account was managed by a bank which had complete discretion regarding the investments, all dividends, interest and other earned income during the five-year term of the account would be reinvested, and no distribution would be made until the end of the term, except as permitted in the agreement. After one year and pursuant to the terms of the agreement, the decedent assigned the appreciation of the account assets to a child. The Service ruled that the assets remaining in the account were includible in the decedent's gross estate under Code Section 2036(a), finding that the decedent had always retained a property interest in the account's assets. Moreover, the Service ruled that the account restrictions did not reduce the fair market value of the account's assets for estate tax or gift tax purposes under Code Sections 2031 and 2512.

## J. Estate Tax Deductions for Claims and Expenses - Section 2053

On October 16, 2009 the Service finalized previously proposed regulations regarding the determination of the amount deductible from a decedent's gross estate for claims under Code Section 2053(a)(3). The final regulations generally provide that a deduction for any claim or

expense described in Code Section 2053 is limited to the amount actually paid in settlement or satisfaction of the claim or expense. The final regulations provide exceptions for claims against an estate as to which there is a claim or asset includible in the gross estate that is substantially related to the claim against the estate, and for claims against the estate which in the aggregate do not exceed $500,000. These regulations generally apply to the estates of decedents dying on or after October 20, 2009.

The Service also issued Notice 2009-84, IRB 2009-44 (November 2, 2009), which provides that if an estate timely files a protective claim for refund based on a Code Section 2053 deduction, the Service will limit its review of the estate tax return to such deduction if the claim becomes ready for consideration after the expiration of the period of limitations for the assessment of additional estate taxes against the estate, rather than examining the entire estate tax return. However, this exception does not apply when the Service is considering a protective refund claim based on a Code Section 2053 deduction and, in the same estate, is considering a refund claim that is not based on a protective claim regarding a Code Section 2053 deduction. This Notice applies to protective refund claims filed on behalf of estates of decedents dying on or after October 20, 2009.

On October 17, 2011 the Service issued Rev. Proc. 2011-48, IRB 2011-42, providing guidance regarding protective estate tax refund claims under Code Section 2053, applicable with respect to protective refund claims filed on behalf of estates of decedents dying on or after October 20, 2009. The Revenue Procedure provides in part that the claim may be filed at any time before the expiration of the statute of limitations, must describe the reasons and contingencies delaying the actual payment of the claim or expense, must set forth each ground upon which the claimed refund is based and facts sufficient to apprise the Service of the exact basis of the claim, and may be filed using Form 843 (Claim for Refund and Request for Abatement). The Revenue Procedure states that filing such a claim will not cause the Service to reopen issues on the estate tax return other than those that pertain to the claimed refund.

In J. Smith Exr., 2008-2 USTC ¶ 60,566, the Court of Appeals for the Fifth Circuit held that the Service was entitled to deduct the remaining obligation of an estate for unpaid underpayment interest against an overpayment of the estate tax and refund the balance of the overpayment to the estate.

In Estate of Malkin v. Commissioner, T.C. Memo 2009-212 (2009), the Tax Court held that the deductions claimed by the decedent's estate under Code Section 2053 could not exceed the value of the estate property which was subject to claims.

In Estate of Black v. Commissioner, 133 T.C. No. 15 (December 14, 2009), the Tax Court held that a loan from a family limited partnership to the decedent's estate, which the estate used to pay its tax liabilities and expenses, was not necessarily incurred by the estate and, therefore, that the interest paid by the estate in connection with the loan was not a deductible administration expense under Code Section 2053(a)(2).

In Stick v. Commissioner, T.C. Memo 2010-192 (September 1, 2010), the Tax Court held that the decedent's estate could not deduct interest for estate tax purposes as an administration expense under Code Section 2053, where the interest was incurred on a loan made

by the trust which was the residuary beneficiary of the estate, and the loan was used to pay the decedent's estate taxes, where the estate failed to establish that the loan was required to enable the estate to pay such taxes.

In Keller v. United States, S.D. Tex., No.V-02-62 (September 15, 2010), the United States District Court for the Southern District of Texas held that the decedent's estate could deduct for estate tax purposes interest on a loan from an investment partnership established by the decedent's financial advisors to two trusts which the decedent controlled, disallowed the estate tax deduction of a contingency fee paid to a law firm as not necessary to the administration of the estate, and allowed the estate to deduct for estate tax purposes fees paid to only one of the four executors (but not the fees paid to the three other executors), finding that only such one person actually performed the role of the executor of the estate.

In Duncan v. Commissioner, T.C. Memo 2011-255 (October 31, 2011), where the decedent's estate borrowed funds from a trust that was the residuary beneficiary of the estate and the assets of which were includible in the decedent's gross estate, in order to pay federal estate taxes, the Court held that the interest payable by the estate with respect to such loan was deductible for federal estate tax purposes as an administration expense under Code Section 2053, as the Court found that the loan at issue was a bona fide debt, the interest expense was actually and necessarily incurred in the administration of the estate, and the amount of interest was ascertainable with reasonable certainty.

In Naify v. United States, No. 3:09-cv-01604 (September 8, 2010), aff'd, 9th Cir. No. 10-17358 (2012) the District Court for the Northern District of California held that the decedent's estate, which had claimed an estate tax deduction of $62,000,000 for income taxes owed by the decedent to the State of California, could only deduct $26,000,000, which is the amount for which the estate settled that claim after the decedent's death.

In Saunders v. Commissioner, 136 T.C. No. 18 (2011) aff'd, No. 12-70323 (9th Cir. 2014), the Tax Court held that the decedent's estate could claim an estate tax deduction under Code Section 2053 for the amount of a claim against the decedent that was actually paid during the administration of the estate, but not for the more substantial amount for which such claim was appraised as of the date of the decedent's death because the value was not ascertainable with reasonable certainty.

In Gill v. Commissioner, T.C. Memo, 2012-7 (January 9, 2012), the Court held that an amount paid by an estate as legal fees under a settlement agreement to reimburse the decedent's children for legal fees they incurred in an undue influence litigation regarding the decedent's will are a deductible administration expense of the estate for federal estate tax purposes.

In Estate of Perdue v. Commissioner, TC Memo 2015-249 (December 28, 2015), where the decedent and her husband formed a family limited partnership to hold marketable securities and their interest in a commercial building, and a family trust, the beneficiaries of which were their descendants and their descendants' spouses, and to which the decedent and her husband made gifts of interests in the FLP, the Court held that the estate could deduct interest on loans from the beneficiaries of the estate used to pay the estate tax, even though the FLP could have been liquidated by a unanimous vote of the children (thereby providing the estate with the funds

needed to pay the estate tax) and was only prevented from doing so by the refusal of one child to vote for such liquidation.

In Estate of Koons III v. Commissioner, T.C. Memo 2013-94 (2013), aff'd, 2017 BL 139095 11th Cir., No. 16-10646 (2017), where the decedent's revocable trust owned a majority interest in a limited liability company having assets consisting largely of liquid securities, the Court denied an estate tax deduction for interest with respect to a loan from the limited liability company to such trust, noting that the loan was not necessary to the administration of the estate, as the trust could have caused the company to make a distribution of the required funds, rather than a loan.

K. Section 6166 Court Decisions and Announcements

On September 18, 2015 Catherine V. Hughes, a Treasury Department estate and gift tax attorney-advisor, stated that the Service is preparing comprehensive proposed regulations under Code Section 6166.[8]

In United States v. Spoor, 838 F.3d 1197 (11th Cir. 2016), where the decedent's estate elected to pay estate taxes in installments under Code Section 6166, and where the estate subsequently agreed to the creation of a special deferred estate tax lien on the closely held business interest under Code Section 6324A, and where the government filed an action to foreclose both the estate tax lien and an income tax lien for the estate's unpaid income taxes, the Court held that the lien under Code Section 6324A has a priority over the executor's claim for administration expenses, even though such expenses arose before the recordation of the special estate tax lien, in contrast to the general estate tax lien provision in Code Section 6324.

In Adell v. Commissioner, T.C. Memo 2014-89 (2014), the Court held that an estate's claimed overpayment of the non-deferrable portion of its estate tax liability could not be applied to a later assessed gift tax liability because the estate did not pay more than the full amount of the estate tax due and, therefore, did not leave the Service with an available overpayment to credit against the gift tax.

In Adell v. Commissioner, T.C. Memo 2013-228 (2013), the Court held that the Service appropriately terminated the estate's Code Section 6166 deferral election where probate litigation caused the estate to miss required interest payments.

On January 25, 2013 the Service issued CCA 201304006, advising that where an estate makes a Code Section 6166 election for part of a closely held business interest, and a deficiency is subsequently assessed, the portion of the deficiency that is attributable to the business will be prorated to the installments payable pursuant to the original election, but that a deficiency that is unrelated to the value of the portion of such interest as to which the estate originally made the election cannot be used to expand such election.

In United States v. Johnson, 2012 U.S. Dist. LEXIS 72194 (D. Ct. Utah 2012), the executors of the decedent's estate elected to pay estate taxes in installments pursuant to Code

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[8] See Part III, Section C, of this Outline for information regarding the Service's temporary suspension of new formal guidance.

Section 6166, the decedent bequeathed the residue of her estate to an existing trust, the executors distributed such residue to that trust, and such trust distributed those assets to the trust's beneficiaries pursuant to an agreement under which the beneficiaries agreed to pay the remaining estate tax due. The Court held that the trust's beneficiaries were not liable for the remaining estate tax as transferees, as such beneficiaries did not receive assets directly from the decedent's gross estate. However, the Court also held that such beneficiaries were liable for the estate tax as beneficiaries of life insurance policies insuring the decedent's life, to the extent of the benefit that they received from such policies. Further, the Court held that the trustees of the trust were transferees of the estate, and that the trustees, as well as the estate's executors, were personally liable for the estate tax.

In PLR 201403012, the Service ruled that a post-death reorganization that converted the ownership of interests in real estate from a general partnership to a limited liability company would not terminate the estate's deferral of the payment of estate taxes under Code Section 6166.

On October 21, 2011 the Service issued CCA 201142024, advising that a change in the form of the business that holds the property for which the Code Section 6166 election was made would not constitute a divestment of the interest in that property for purposes of Code Section 6166(g).

On October 21, 2011 the Service issued CCA 201142025, which advised that a distribution by gift of 51% of the Code Section 6166 property to other family members was an accelerating event for purposes of Code Section 6166(g), thereby causing the Code Section 6166 election to cease to apply.

In CCA 201144027, dealing with an election to pay estate taxes in installments pursuant to Code Section 6166, and the holding company election under Code Section 6166(b)(8), the Service advised that an estate may not make a bifurcated Code Section 6166(b)(8) election with respect to the holding company stock, but that the estate may either apply Code Section 6166(b)(8) and forgo the deferral option under Code Section 6166(a)(3), or not make the Code Section 6166(b)(8) election.

In United States v. Kulhanek, 2010 U.S. Dist. LEXIS 130039 (W.D. PA., December 8, 2010), where there was an election to defer the payment of estate taxes under Code Section 6166, the Court held that the 10 year statute of limitations for the collection of unpaid estate taxes under Code Section 6324(a)(1) is suspended and does not begin to run until the disposition of the closely held stock.

In PLR 200939003 (June 23, 2009), the Service ruled that the GST tax payable on a taxable termination is not eligible to be paid in installments under Code Section 6166. Note, however, that the installment payment election is applicable to the GST tax imposed on direct skips occurring on the death of the transferor.

In Carroll v. United States, 2009-2 USTC ¶ 60,577 (N.D. Ala. July 29, 2009), the Court held that where executors are personally liable for the payment of estate taxes as a result of electing to pay such taxes in installments under Code Section 6166 and then distributing the estate assets to themselves as beneficiaries of the estate before paying all such installments, a co-

executor could not discharge such liability in a bankruptcy proceeding, holding that the tax debt was excepted from discharge since the co-executor before the Court willfully evaded the payment of the estate tax debt, even though tax debts generally are dischargeable through bankruptcy.

In Chief Counsel Memorandum POSTS – 113182-07 (February 25, 2009), the Service advised that, in connection with an election to pay estate taxes in installments under Code Section 6166, the Service may require the estate to provide a bond or a lien in an amount including not only the deferred estate tax but also the aggregate amount of interest to be paid over the deferral period, provided that the amount of interest does not exceed the amount of the deferred tax; that the Service may accept a bond or a lien in a lesser amount on a case-by-case basis after examining all the relevant facts and circumstances; that the value of the property offered by the estate for the lien may or may not be the same as its value as reported on the federal estate tax return; that if an interest in a family limited partnership is being pledged as security, the federal estate tax discount used to value that interest should also be used in valuing it for purposes of the lien; and that if mortgaged property is used for purposes of the lien, such property should be valued based on its net equity.

On June 12, 2009 the Service issued a memorandum (SB/SE-05-0609-010) stating that, effective immediately, the Estate Tax Advisory Group of the Service will determine on a case by case basis whether a bond or the special estate tax lien under Code Section 6324A is required in all cases in which estates elect to pay estate taxes in installments pursuant to Code Section 6166 and will negotiate the bond or special lien, after the Service's Estate and Gift Tax Section has determined that the estate qualifies for the election. The memorandum states that prior to making a determination as to whether to require a bond or a special estate tax lien, the Advisory Estate Tax Group will first request the estate to voluntarily provide a bond or special estate tax lien. If the estate declines to do so, the Advisory Estate Tax Group will make its determination based on a list of non-exclusive factors, which are the duration and stability of the business, the perceived ability to pay the installments of tax and interest on a timely basis, and the tax compliance history of the business, the estate and the decedent. After such determination, the estate will be given the right to appeal.

In CCA 200848004 (2008), the Service's Office of Chief Counsel stated that a Code Section 6166 election can only be made by attaching a notice of election to a timely filed federal estate tax return.

In PLR 200842012, the Service ruled that the closely held company in which the decedent had an interest carried on an "active trade or business" for purposes of Code Section 6166, where the corporation owned, developed, managed and leased commercial property, the employees of the corporation were involved in all aspects of the business, and a separate facilities team was responsible for day-to-day repairs, maintenance and other tasks in connection with the properties.

In Roski v. Commissioner, 128 T.C. No. 10 (April 12, 2007), the Tax Court held that the Service does not have the authority to require a bond or a special lien for every estate that elects to defer the payment of estate taxes under Code Section 6166. Moreover, the Court stated that the Service must exercise its discretion as to whether or not to require a bond or a special

lien in each case by reviewing the applicable facts and cannot arbitrarily rely on a standard which in effect precludes that exercise of discretion.

The Chief Counsel's office of the Service in C.C.A. 200645027 has advised that when an estate elects to pay estate taxes in installments pursuant to Code Section 6166 and gives the Service the special estate tax lien provided for in Code Section 6324A with respect to the Code Section 6166 assets of the estate, that special lien does not divest the balance of the assets of the gross estate from the estate tax lien provided for in Code Section 6324.

The Chief Counsel's office of the Service addressed questions regarding the acceptance of stock in a closely held corporation as collateral for a lien under Section 6324A for estate tax deferred under Section 6166 (C.C.A. 200747019). The Service said that stock in a closely held corporation qualifies as "other property" acceptable as collateral for such a lien if three statutory requirements are met: (1) the stock must first be expected to survive the deferral period and retain its value, based on the Service's valuation; (2) the stock must be identified in the written agreement described under Section 6324A(b)(1)(B) which must show all persons having an interest in the stock agree to the creation of the special lien; and (3) the value of the stock as of the agreement date must be sufficient to pay the deferred taxes plus required interest. The Service noted that the principles in the C.C.A. are equally applicable to interests in a limited liability company or a partnership. In order to secure the Service's interest in the stock, a Notice of Federal Tax Lien should be filed and the Service may hold the stock certificates to prevent their sale to third parties.

In addition, the Chief Counsel's office in C.C.A. 200803016 has provided advice on whether the Service is required to accept an interest in a limited liability company as collateral under Section 6324A. As with the sufficiency of stock in a closely held corporation, the Chief Counsel explained that if the three requirements [i.e., (1) the interest has to be expected to survive the deferral period; (2) the interest has to be identified in the written agreement described under Section 6324A(b)(1)(B); and (3) the value of the interest has to be sufficient to pay the deferred taxes plus required interest] under Section 6324A are met, the special lien arises and the collateral offered by the estate has to be accepted by the Service. In the case of an LLC, the Chief Counsel observed that the Service was required to file a Notice of Federal Tax Lien for the special estate tax lien against the LLC.

In Rev. Rul. 2006-34, 2006-1 Cum. Bull. 1171, the Service set forth a non-exclusive list of factors which the Service would use to determine whether a decedent's real estate activities were sufficiently active to qualify the real estate interest as a closely held business interest for purposes of allowing the decedent's estate to defer the payment of estate taxes under Code Section 6166. The Service stated that, to determine whether the decedent's interest is an asset used in the active conduct of a trade or business, the Service will consider the amount of time the decedent devoted to the trade or business, whether an office was maintained from which the decedent's activities were conducted or coordinated and whether the decedent maintained regular business hours for that purpose, the extent to which the decedent was actively involved in finding new tenants and negotiating and executing leases, the extent to which the decedent provided landscaping, grounds care or other services beyond the mere furnishing of leased premises, the extent to which the decedent personally made, arranged for, performed or supervised repairs and maintenance to the property, and the extent to which the decedent handled

tenant repair requests and complaints. The Ruling further stated that no single factor would be determinative.

In PLR 200939003 (June 23, 2009), the Service ruled that the GST tax payable on a taxable termination is not eligible to be paid in installments under Code Section 6166. Note, however, that the installment payment election is applicable to the GST tax imposed on direct skips occurring on the death of the transferor.

L. 2% Floor for Miscellaneous Itemized Deductions

As mentioned in Part I, Section C.2 of this Outline, the 2017 Tax Act eliminated 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 July 13, 2018 the Service released Notice 2018-61, advising that the Service intended to issue regulations that would provide that estates and non-grantor trusts can continue to deduct administration expenses that would not have been incurred if the property were not held in the estate or trust, including the appropriate portion of a bundled fee, in determining the adjusted gross income of the estate or trust, and that the Service was studying whether or not such deductions should be treated as miscellaneous itemized deductions in the hands of a beneficiary of the estate or trust when they are passed out to such beneficiary as excess deductions on the termination of the entity. In the interim, it appeared that the Service was taking the position that such excess deductions were not currently deductible by the beneficiaries.

The Service issued proposed regulations on May 11, 2020. Such regulations confirm that estates and non-grantor trusts can continue to deduct administration expenses that would not have been incurred if the property were not held in the estate or trust, and that such expenses are not miscellaneous itemized deductions. Such regulations also provide that excess deductions received by beneficiaries on the termination of an estate or trust under Section 642(h) retain their character while they were in the estate or trust even after they are in the hands of the beneficiaries (i.e., as non-miscellaneous itemized deductions or as miscellaneous itemized deductions). The fiduciary is required to identify the character of the excess deductions. The proposed regulations amend Regulations §§ 1.67-4, 1.642(h)-2 and 1.642(h)-5. Final regulations were issued on September 21, 2020 (effective on October 19, 2020), which generally adopt the proposed regulations with very few changes.

Following is a discussion of the law as it existed prior to the 2017 Tax Act.

In Rudkin v. Commissioner, sub nom, Knight v. Commissioner, 552 U.S. 181 (2008), the Court unanimously held that deductions for investment advisory fees paid by a trust are subject to the 2% floor on miscellaneous itemized deductions under Code §67(a). The Court

rejected the approach which asked whether the cost at issue "could" have been incurred by an individual. Instead, the Court adopted the test which asked whether the costs incurred would not "commonly" or "customarily" be incurred by individuals, holding that Code §67(e)(1) excepts from the 2% floor only those fees that would be uncommon, unusual or unlikely for such a hypothetical individual to incur.

On February 27, 2008, and in light of the U.S. Supreme Court's decision in Knight, id., the Service issued Notice 2008-32 to provide interim guidance on the treatment under Code Section 67 of investment advisory costs and other costs subject to the 2% floor. Taxpayers will not be required to determine the portion of a bundled fiduciary fee that is subject to the 2% floor for any tax year prior to January 1, 2008. The proposed regulations from July, 2007 were based on reasoning that was specifically rejected by the Supreme Court in Knight. Accordingly, the Notice indicates that the Service will issue final regulations that conform to Knight and anticipates that final regulations under §1.67-4 will be published after the extended comment period which ends May 27, 2008. On December 11, 2008 the Service issued Notice 2008-116 extending the application of Notice 2008-32 to tax years beginning before January 1, 2009. On April 1, 2010 the Service issued Notice 2010-32, 2010-16 IRB 594, further extending the application of Notice 2008-32 to tax years beginning before January 1, 2010. On April 13, 2011 the Service issued Notice 2011-37 extending the application of Notice 2008-32 to tax years that begin before the date that final regulations regarding this issue are published in the Federal Register.

On May 9, 2014 the Service issued final regulations (Treas. Reg. Section 1.67-4) as to which expenses that are incurred by estates and trusts other than grantor trusts are subject to the 2% floor for miscellaneous itemized deductions under Code Section 67(a). These regulations provide that:

- In general, an administration expense is subject to the 2% floor if the expense would be "commonly" or "customarily" incurred by a hypothetical individual owning the same property as the property owned by the estate or the non-grantor trust.

- In determining whether an expense is "commonly" or "customarily" incurred by a hypothetical individual owning the same property, the determining factor is the type of product or service that the estate or the non-grantor trust purchases, rather than the description of the cost of that product or service. Expenses incurred in the defense of a claim against the estate, the decedent or a non-grantor trust that are not related to the existence, validity or administration of such estate or trust are subject to such 2% floor.

- Ownership costs that are chargeable to or incurred by an owner of property merely by reason of owning such property are subject to the 2% floor. Such costs include condominium fees, insurance premiums, maintenance and lawn services, automobile registration and insurance costs, and partnership costs that are passed through to and reportable by the estate or the trust as a partner, if these costs are defined as miscellaneous itemized deductions pursuant to Code Section 67(b).

- The cost of preparing estate tax returns, GST tax returns, fiduciary income tax returns and a decedent's final individual income tax returns are not subject to the 2% floor. However, the cost of preparing other tax returns are subject to the 2% floor.

- Investment advisory fees generally are subject to the 2% floor. However, a special, additional charge that is added solely because the investment advice is rendered to an estate or a trust rather than to an individual, or is attributable to a unusual investment objective or the need for a specialized balancing of the interests or various parties (beyond the usual balancing of the varying interests of current beneficiaries and remaindermen), such that a reasonable comparison with individual investors would be improper, is not subject to the 2% floor.

- Appraisal fees to determine the fair market value of assets as of the decedent's date of death or the alternate valuation date, to determine value for purposes of making estate or trust distributions, or otherwise required to properly prepare the estate's or trust's tax returns, or a GST tax return, are not subject to the two-percent floor. The cost of other appraisals for other purposes (for example, for insurance purpose) is subject to the 2% floor.

- Certain other fiduciary expenses, including but not limited to probate court fees and costs, fiduciary bond premiums, legal publication costs of notices to creditors or heirs, the cost of certified copies of the decedent's death certificate, and costs related to fiduciary accounts, are not subject to the 2% floor.

- Generally, "bundled" fees must be allocated between costs that are subject to the 2% floor and costs that are not subject to such floor. However, if a "bundled fee" is not computed on an hourly rate basis, then only the portion of such fee that is attributable to investment advice is subject to the 2% floor, except that payments from a "bundled" fee to third parties that would have been subject to the 2% floor if they had been paid directly by the estate or the trust are subject to such floor, and except that any fees or expenses that are separately assessed by the fiduciary or other payee, that are in addition to the usual or basic "bundled" fee and that are "commonly" or "customarily" incurred by an individual, are subject to the 2% floor.

- The allocation of the portion of the "bundled" fee that is subject to the 2% floor may be made by any "reasonable" method.

The regulations are effective for tax years beginning on or after January 1, 2015.

## M. Alternate Valuation Date Election

In PLR 201109014 (March 4, 2011), rescinding PLR 201033023 (August 20, 2010), the Service granted an estate additional time to make the alternate valuation date election for federal estate tax purposes, where the estate had timely filed a federal estate tax return valuing the decedent's assets on the date of the decedent's death and, more than 18 months after the due date of that return, the executors asked the Service to grant additional time to make such election.

On November 18, 2011 the Service released new proposed regulations under Code Section 2032 (REG-112196-07) regarding the alternate valuation date election and withdrew previously proposed regulations regarding that election that were released in April 2008.[9] The new proposed regulations provide that:

[9] See Part III, Section C, of this Outline for information regarding the Service's temporary suspension of new formal guidance.

- If an interest in a corporation, a partnership or any other entity that is includible in a decedent's gross estate is exchanged for one or more different interests in the same entity, or in an acquiring or resulting entity, the transaction will not constitute a "disposition" for purposes of such election, if, on the date of the exchange, the value of the interest surrendered equals the value of the acquired interest.

- In determining whether or not the exchanged properties have the same fair market value, a difference in value that is equal to or less than 5% of the value of the surrendered property as of the transaction date will be ignored.

- If the decedent's estate receives a distribution or a disbursement from a partnership, a corporation, a trust (including an Individual Retirement Account, a Roth IRA, or other deferred compensation plans), the distribution or disbursement will not constitute a "distribution" of the asset for purposes of such election, if on the date of the distribution or disbursement the value of the decedent's interest in such property before the distribution or disbursement equals the sum of the value of the distribution or disbursement received and the value of such property after that distribution or disbursement.

- If the estate disposes of only a portion of the decedent's interest in an asset and retains the other portion on the six-month date, or if an estate disposes of a decedent's entire interest in an asset in two or more transactions prior to the end of the six-month date, the value of each portion of the asset is determined by multiplying the value of the decedent's entire interest by a fraction, the numerator of which is the portion of the interest in the asset that is disposed of, and the denominator of which is the decedent's entire interest in the asset.

- An asset owned by the decedent at his death is not considered to be "distributed" merely because it passes directly to another person at the decedent's death as a result of a beneficiary designation, or other contractual arrangement, or by operation of law.

- Factors such as economic or market conditions, occurrences described in Section 2054 of the Code (i.e., losses arising from fires, storms, shipwrecks, other casualties, or theft, that are not compensated for by insurance or otherwise) can be taken into account in determining the value of an asset for purposes of such election.

- Management decisions made in the ordinary course of operating a business generally are taken into account as occurrences relating to economic or market conditions.

- Changes in value due to the mere lapse of time generally are not taken into account in determining the value of an asset for purposes of such election.

- As to the value of a life estate, remainder interest or term interest for purposes of such election, the value of the interest as of the alternate valuation date is determined by applying the age, at the decedent's death, of each person whose life expectancy may affect the value of that interest, and the value of the property and the applicable interest rate under Section 7520 of the Code shall be determined using values that apply on the alternate valuation date.

N. Generation-Skipping Transfer Taxes

1. Exercise or Lapse of Power of Appointment

Conflict continues among the Courts in regard to the "grandfather" exception to GST taxes for trusts that were irrevocable before September 25, 1985 where a general power of appointment is not exercised. The issue is whether the lapse of the general power of appointment is an "addition" to the corpus of a trust which thereby subjects the trust to the GST tax even though it would otherwise not be subject to the GST tax because of the "grandfather" exception.

In Peterson Marital Trust v. Commissioner, 78 F.3d 795 (2d Cir. 1996), the Court held that (1) the lapse of the surviving spouse's general power of appointment was a "constructive addition" to the marital trust under Temporary Regulation Section 26.2601-1(b), and (2) since the lapse occurred after 1985, the entire trust, which was payable to the settlor's grandchildren, was subject to the GST tax.

However, in Simpson v. United States, 183 F.3d 812 (8th Cir. 1999), the Court held that the 1993 transfer of trust corpus to the settlor's widow's grandchildren, pursuant to the widow's failure to exercise a general power of appointment under the settlor's testamentary trust, which became irrevocable upon his death in 1966, came within the "grandfather" provision, making the GST tax inapplicable to any generation skipping transfer under the trust.

In the Estate of Gerson, 2007-2 USTC ¶ 60,551 (6th Cir. 2007), the Sixth Circuit Court of Appeals affirmed the Tax Court finding that a decedent's exercise of her testamentary general power of appointment in favor of her grandchildren with respect to an irrevocable trust created by her deceased husband prior to September 25, 1985, was subject to the GST tax under Reg. Section 26.2601-1(b)(1)(i). The Court of Appeals found that the regulation was a valid interpretation of language in the effective date rule of Section 1433(b)(2)(A) of the Tax Reform Act of 1986 (which provided a grandfather exception for trusts that were irrevocable before September 25, 1985 but only to the extent that such transfer is not made out of corpus added to the trust after that date). The Tax Court's opinion agreed with the Second Circuit's ruling in Peterson Marital Trust v. Commissioner, supra., that the words of TRA '86 Section 1433(b)(2)(A) can only be given meaning in a particular context. The Tax Court's ruling was at odds with decisions from the Eighth and Ninth Circuits (see, Simpson, supra., and R. Belcher, 281 F.3d 1078 (9th Cir. 2002)), which have allowed such transfers. On May 27, 2008 the United States Supreme Court denied certiorari in Gerson (*sub nom* Kleinman v. Commissioner, No. 07-1064).

In Estate of Timken v. United States, 630 F. Supp. 2d 823 (U.S. Dist. Ct., N.D. Ohio 2009), the Court held that a lapse of a general power of appointment under a trust is a constructive addition to the trust for GST tax purposes, finding that Treas. Reg. Section 26.2601-1(b)(1)(v)(A) which, so provides, is valid as a permissible construction of the effective date provisions of the GST tax. The Court of Appeals for the Sixth Circuit (Case No. 09-3650, April 2, 2010) affirmed the District Court decision. On January 10, 2011, the United States Supreme Court (U.S. No. 10-363) denied a petition for certiorari.

2. Qualified Severances

Final regulations (NPRM-REG-128843-05) with regard to a qualified severance for GST tax purposes were effective on August 2, 2007. For severances made after December 31, 2000 and before August 2, 2007, taxpayers may rely on any reasonable interpretation of Sec. 2642(a)(3), provided that reasonable notice of the severance has been given to the Service. Although the proposed regulations posited that the severance rules of Reg. Section 26.2654-1(b) were superseded by Sec. 2642(a)(3), the final regulations note that the provisions address different circumstances. Therefore, Reg. Section 26.2654-1(b) is not superseded by the final regulations. While the non pro rata funding of trusts resulting from a qualified severance is still permitted, the final regulations provide that such funding must be achieved by applying the appropriate fraction or percentage to the total value of the trust assets as of the "date of severance". The "date of severance" is defined as the date selected for determining the value of trust assets, either on a discretionary basis or by court order, so long as funding is begun immediately and occurs within a reasonable time (not more than 90 days) after the selected date of severance.

In addition, the final regulations also address the qualified severance of a trust that was irrevocable prior to September 25, 1985, but to which an addition was made after that date. The regulations explain that, while the reporting provision of the regulations is not a requirement for qualified severance status, a severance should be reported to the Service to ensure the proper application of the GST tax. Notification of a qualified severance must be made by marking "Qualified Severance" at the top of Form 706-GS(T) and attaching a "Notice of Qualified Severance" to the return.

Proposed amendments to Reg. Sections 26.2642-6 and 26.2654-1 were issued contemporaneously with the final regulations (T.D. 9348 (FEGT ¶43,113)) and address the situation where the trusts resulting from a severance do not meet the requirements of a qualified severance. In such case, the new trusts will be treated as separate trusts for GST tax purposes as long as the resulting trusts are recognized under applicable state law. However, each trust will have the same inclusion ratio immediately after the severance as the original trust had prior to the severance. In addition, an additional type of qualified severance is proposed (as authorized by Section 2642(a)(3)(B)(ii)): the severance of a trust with an inclusion ratio between zero and one into two or more new trusts. The proposed regulations clarify Reg. Section 26.2642-6(d)(4) by providing that no discount or reduction from value of an asset owned by the original trust arising as a result of the division of the original trust's interest in the assets between the resulting trusts is allowed in funding the new trusts. This clarification is proposed to be effective with respect to severances occurring on or after August 2, 2007.

Effective July 31, 2008, the Service published final rules (T.D. 9421) regarding qualified severances of trusts for GST tax purposes. The final rules rejected a recommendation of an alternative funding rule for qualified severances of trusts in relation to the GST tax and clarified that, for the requirements of a qualified severance, regardless of whether the funding is done on a pro rata basis, the cumulative value of the resulting trusts equals the value of the original trust. The Service stated that "this funding rule produces a bright line test, the same result whether or not the trust assets are divided on a pro rata basis, and recognizes that in many circumstances, where a trust is severed for tax purposes into two identical trusts with the same or

related beneficiaries, any closely held stock or partnership units divided between the two resulting trusts are likely to be sold as a unit without any actual reduction in value that may be reflected in the claimed discounts." In addition, the final rules added cautionary language to Example 3 of Reg. Section 26.2642-6(j) to the effect that a GST taxable event will result as a consequence of a nonqualified severance and added a new example to confirm that a trust resulting from a nonqualified severance may subsequently be severed in a qualified severance.

On January 31, 2014 the Treasury Department published a notice in the Federal Register asking the Office of Management and Budget to review the Service's regulations requiring taxpayers to report a qualified severance by filing a Generation-Skipping Transfer Tax Return for Terminations (Form 706-GS (T)) to report qualified severances.

3. Allocation of GST Tax Exemption

On April 16, 2008, the Service issued proposed regulations (REG-147775-06) that describe the circumstances and procedures under which an extension of time will be granted to make a late allocation of a GST tax exemption to a transfer, to make a late election out of an automatic allocation of that exemption to a transfer, and to elect to have the deemed allocation of a GST exemption apply to a direct skip. The proposed regulations would replace Treas. Regs. Section 301.9100-3 regarding relief under Code Section 2642(g)(1).

Requests for relief under Code Section 2642 will be granted when the taxpayer establishes to the Service's satisfaction that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government. Factors such as the intent of the transferor to timely allocate the GST tax exemption or to timely make an election under Code Section 2632 will be used to determine whether the taxpayer acted reasonably and in good faith.

In the event an extension of time to allocate a GST tax exemption is granted under Code Section 2642, the allocation will be considered effective as of the date of the transfer and the value of the property transferred will determine the amount of the GST tax exemption allocated. If an extension of time to elect out of the automatic allocation of the GST tax exemption is granted under Code Section 2632, the election will be considered effective as of the date of the transfer. In the event an extension of time to treat any trust as a GST trust under Code Section 2632 is granted, the election will be considered effective as of the first (or each) transfer covered by the election. If an extension is granted under Code Section 2642, the amount of the exemption is limited to the amount of the transferor's unused GST tax exemption under Code Section 2631. If an amount of the GST tax exemption has increased since the date of the transfer, no portion of the increased amount can be applied because the grant of relief is to a transfer taking place in an earlier year and prior to the effective date of that increase. The proposed regulations apply to requests for relief filed on or after the date of publication of the Treasury decision adopting these rules as final regulations.

4. PLRs and GST Tax Trusts

On March 3, 2017 a representative of the Service announced that the Service is suspending work on private letter rulings regarding modifications to GST tax trusts, such as

dynasty trusts, under Code Section 2601, and is temporarily halting pre-submission conferences on estate tax, gift tax and GST tax issues regarding such trusts, due to a lack of resources.

## O. Intentionally Defective Grantor Trusts

In Schinazi v. Eden, 338 Ga. App. 793 (2016), where a settlor created an intentionally defective grantor trust, retaining the right to reacquire trust property by substituting property of equivalent value, and where the settlor transferred a limited partnership interest to the trust and six years later exercised his right to reacquire such interest by substituting property of equivalent value, but the trustee of the trust refused to sign an acknowledgment of the transaction as required by the partnership agreement, and did not execute an assignment of the limited partnership interest owned by the trust, the Court held that the trust was still the owner of such interest, as the transaction failed to conform to the requirements of the partnership agreement.

In Securities and Exchange Commission v. Wyly, 56 F. Supp. 3d 394 (S.D.N.Y. 2014), where the taxpayer's created and funded 17 offshore trusts having as beneficiaries persons including the grantors, their spouses, their children and charitable organizations, and where the trust protectors had the power to add or substitute a charitable organization as a beneficiary and remove and replace the trustees, and where the trusts were designed to be non-grantor trusts for federal income tax purposes so that as foreign trusts, none of the income earned by and retained in the trusts would be subject to federal income taxes, the Court concluded that the trusts were grantor trusts and that the exception in Code Section 674(c) for independent trustees was inapplicable, as the trustees invariably followed the directions of the trust protectors, the trust protectors invariably followed the instructions of the grantors, the trust protectors were expressly empowered to remove and replace the trustees, and the grantors had close relationships with the trust protectors.

In PLR 201729009 (2017), where a grantor created an irrevocable trust and retained a limited testamentary power of appointment over the trust's assets, and where distributions may be made from the trust to designated beneficiaries at the direction of the grantor or a distribution committee, the Service ruled that the trust is not a grantor trust as to the grantor or as to any member of the distribution committee under Code Section 671, that the determination of whether or not the grantor would be treated as a substantial owner under Code Section 675 regarding the exercise of administrative controls must be deferred until the federal income tax returns of the involved parties have been examined, and that the contribution of property to the trust by the grantor is not a completed gift subject to federal gift taxes, but that any distribution of property from the trust to any beneficiary other than the grantor would be a completed gift by the grantor and not by any member of the distribution committee.

In Woelbing v. Commissioner, T.C. No. 30260-13, petitioned filed December 26, 2013, and Woelbing v. Commissioner, T.C. No. 30261-13, petitioned filed December 26, 2013, where the decedent sold stock to an insurance trust pursuant to an installment sale agreement, and the trust owned life insurance policies insuring the lives of the decedent and his wife, and the trust and the wife were parties to a split-dollar insurance agreement that required the wife to pay a portion of the premiums and the trust to reimburse her for such premiums following the death of the survivor of the husband and wife, the taxpayers claimed that the Service erroneously determined that the value of the stock should be treated as a taxable gift notwithstanding that the

stock was sold for a promissory note bearing interest at the applicable federal rate with a principal amount equal to the appraised fair market value of the stock sold, and that the Service erroneously determined that the stock sold should be includable in the husband's estate under Code Sections 2036 and 2038, instead of including the promissory note as an asset owned by the husband at his death. On March 25, 2016 the parties agreed to settle all issues. According to the decision, the taxpayer owed no deficiencies in gift tax or penalties from 2006, 2008 or 2009, and the Service owed no overpayments to the estate.

In Adams v. Commissioner, T.C. Memo 2010-72 (April 13, 2010), the Tax Court held that a beneficiary of a grantor trust that owned real property was entitled to claim a mortgage interest deduction on the trust property where the beneficiary had the duty to maintain and repair the property, the beneficiary paid the taxes attributable to the property and the beneficiary had a right of first refusal to purchase the property.

In Rev. Rul. 2011-28, IRB 2011-49 (Dec. 5, 2011), the Service ruled that the retention by a trust's grantor of a non-fiduciary power to acquire an insurance policy held in the trust by substituting other assets of equivalent value will not, by itself, cause the value of the policy to be includible in the grantor's gross estate under Code Section 2042 if the trustee has a fiduciary obligation (either under applicable local law or in the trust instrument) to ensure that the substitute property is of equivalent value and the substitution power cannot be exercised in a manner that shifts benefits among trust beneficiaries.

In Rev. Rul. 2008-22, 2008-16 IRB 796 (April 21, 2008), the Service ruled that an inter vivos trust will not be included in a grantor's taxable estate under Code Sections 2036 or 2038 solely because the grantor retains a nonfiduciary power to substitute property of equivalent value "provided that the power is not exercised in a manner that can shift benefits if (a) the trustee has both the power (under local law or the trust instrument) to reinvest the trust corpus and a duty of impartiality with respect to trust beneficiaries or (b) the nature of the trust investments or the level of income produced by any or all of the trust's investments does not impact the respective interests of the beneficiaries, such as when the trust is administered as a unitrust …or when distributions from the trust are limited to discretionary distributions of principal and income."

In PLR 200944002 the Service ruled that the retention by the grantor of an irrevocable trust of the power to substitute trust assets with other property of equal value did not cause the trust property to be included in the grantor's gross estate for estate tax purposes, where the trustee was prohibited from distributing trust funds to the grantor or the grantor's estate to satisfy the grantor's income tax liabilities.

In PLR 200848006, PLR 200848015, PLR 200848016 and PLR 200848017, the Service refused to rule as to whether a plan to modify a trust to give the grantor the power, exercisable solely in a non-fiduciary, to reacquire trust property by substituting other property of equivalent value would cause the trust to be treated as a grantor trust for income tax purposes, advising that this is a fact question to be determined after the federal income tax returns for the relevant parties have been filed and examined.

In Karmazin v. Commissioner, Tax Court Docket No. 2127-03 (2003), in a gift tax audit resulting in the taxpayer filing a petition in Tax Court, the Service issued an unagreed

report and a 90-day tax deficiency letter in which the Service viewed an installment note, issued by an intentionally defective grantor trust in exchange for the assets, as equity rather than debt. If this characterization was sustained, it would result in the note having a value of zero (pursuant to the rules of Code Chapter 14) and the taxpayer being burdened with a sizable gift tax obligation. The Service claimed that the notes, as equity, constitute an "applicable retained interest" and must be valued at zero for gift tax purposes. The Service's conclusion that the notes constitute equity was based on a number of factors, including a low equity-to-debt ratio (which nevertheless was in excess of the 10% equity requirement often cited as sufficient), the fact that the only assets supporting the "debt" were the FLP interests transferred to the family trusts and the fact that the debt was non-recourse as to the trust beneficiaries. In the alternative, the Service also took the position that the FLP should be disregarded for transfer tax purposes because it lacked economic substance and had no valid business purposes, or Code Section 2703(a)(2) applies to disregard the FLP for transfer tax purposes, since the limited partnership form itself constitutes a restriction on the right to sell or use the underlying assets. The Service stated that although no discount was applicable, if one was determined to apply it should be limited to 3% and no annual exclusions may be claimed, citing Hackl v. Commr. The Service is reported to have withdrawn its position that the sale of limited partnership interests to an intentionally defective grantor trust in exchange for a note was not a bona fide transaction under Code Sections 2701 and 2702.

In Rev. Rul. 2004-64, 2004-2 Cum. Bull. 7, the Service addressed the gift and estate tax issues involved in a grantor trust where neither applicable state law nor the trust instrument contains any provision requiring or permitting the trustee to reimburse the grantor for income taxes payable by the grantor with respect to trust income, or where applicable state law or the governing instrument requires the trustee to do so, or where applicable state law or the governing instrument merely gives the trustee discretion to do so. As to the gift tax consequences, the Service held that the grantor's payment of those income taxes does not constitute a gift by the grantor to the trust beneficiaries in any of those situations because the grantor, rather than the trust, is liable for the payment of the taxes. In addition, the Service held that the trust's reimbursement of the grantor for the payment of those taxes, whether that reimbursement is permitted or required, is not a gift by the trust beneficiaries to the grantor.

As to the estate tax consequences, the Service held that no portion of the trust is includible in grantor's gross estate under Code Section 2036 where neither applicable state law nor the trust instrument contains any provision requiring or permitting the trustee to reimburse the grantor, since the grantor did not retain the right to have the trust property used to discharge his legal obligation to pay the income tax. However, where the trust instrument requires the trustee to reimburse the grantor, or where state law requires the trustee to reimburse the grantor (unless the trust instrument provides otherwise), the full value of the trust's assets will be includible in the grantor's gross estate under Code Section 2036(a)(1), but the Service will not adversely apply this estate tax holding to a grantor's estate with respect to any trust that was created prior to October 4, 2004. As to a trust instrument which gives the trustee discretion to reimburse the grantor, the Service held that this discretionary reimbursement power (whether granted in the trust instrument or under state law), by itself, will not cause the trust assets to be includible in the grantor's gross estate, whether or not the trustee actually reimburses the grantor. However, the Service noted that the trustee's discretion combined with other facts such as an expressed or implied understanding between the grantor and the trustee regarding the trustee's

exercise of that discretion could cause inclusion of the trust assets in the grantor's gross estate tax purposes.

P. GRATs and GRITs

On November 7, 2011 the Service issued final regulations under Code Section 2036 regarding the value of property transferred in trust that is includable in the transferor's gross estate for estate tax purposes where the transferor retained an interest in such property. The regulations provide that: If the decedent and another individual were joint income beneficiaries of the trust, the decedent's estate includes (a) one-half of the value of the trust property, plus (b) the value of the other half of the trust property reduced by the value, as of the decedent's death, of the present value of the survivor's interest. Where the grantor's beneficial interest succeeds another individual's interest, the includable amount is the value of the trust property necessary to produce the grantor's annuity or unitrust payment had he survived the current recipient, less the present value of the current recipient's remaining interest, except that the includable amount cannot be less than the amount of the trust property required to produce the annuity or unitrust payment to which the decedent was entitled in the year of his death. Where the decedent is entitled to increasing payments, the includable amount is (a) the value of the trust property necessary to produce the decedent's annuity or unitrust payment for the year of death, plus the value of the trust necessary to produce the incremental amount resulting from the increased annuity in each of the future years, discounted to reflect the delay in the decedent receiving this additional amount. The regulations also provide that if Code Section 2036 applies to include the value of trust property in the decedent's estate, any payments payable to such estate after the decedent's death will not also be includable under Code Section 2033.

On July 14, 2008, the Service adopted amendments and revisions to Treas. Reg. Sections 20.2036-1 and 20.2039-1 relating to a grantor's retained interest in a trust. The final regulations incorporate guidance provided in Rev. Rul. 82-105, 1982-1 C.B. 133 and Rev. Rul. 76-273, 1976-2 C.B. 268 regarding the portion of a trust which is includible in a grantor's gross estate under Code Section 2036 if the grantor retained the right to use trust property or the right to receive an annuity, unitrust, or other income payment for the grantor's life, for any period not ascertainable without reference to the grantor's death or for any period that does not end before the grantor's death. The covered trusts include grantor retained annuity trusts, charitable remainder trusts and qualified personal residence trusts, among others. Pursuant to amended Treas. Reg. Section 20.2036-1, if a grantor retained the right to use the trust property, the portion of the trust corpus includible in the grantor's gross estate is that portion of corpus, valued as of the grantor's date of death or alternate valuation date, necessary to yield the annual payment using the then applicable Code Section 7520 rate. In addition, as to pooled income funds, the retained interest is the right to all the income. Thus, the entire share of the fund's corpus attributable to the transferor is includible in the transferor's gross estate. The amendments clarify that although Code Section 2039 may also have implications on the issue of includibility in the grantor's gross estate, only Code Section 2036 will apply to an annuity, unitrust or other payment retained by a deceased grantor in a CRT or GRAT. The amended regulations are effective with respect of decedents for which the valuation date of the gross estate is on or after July 14, 2008.

In Walton v. Commissioner, 115 T.C. No. 41 (Dec. 22, 2000), the grantor funded two substantially identical GRATs with common stock worth approximately $100 million. Each

GRAT had a term of two years and, in the event of the grantor's death, the annuity amounts were to be paid to her estate. At the end of the two year term, the remaining value of each trust was to be distributed to the grantor's daughters. The Tax Court determined that for purposes of valuing the gift to the grantor's daughters upon the creation of the GRATs under Code Section 2702, the retained qualified annuity should have been valued as an annuity for a specified term of years, rather than as an annuity for the shorter of a term certain or the period ending upon the grantor's death. The Court also determined that the grantor retained all interests in the annuities set forth in the GRATs because she could not, as a matter of law, make a gift of the property to herself or her estate. Finally, the Court reviewed Example (5) of Treasury Regulation Section 25.2702-3(e) which the Service relied upon in arguing that the value of the annuity payable for the shorter of two years or the period ending upon the grantor's death could be subtracted from the fair market value of the gifted stock. The Court rejected the Service's argument and held that Example 5 was an invalid interpretation of Code Section 2702 because it was inconsistent with the statutory text, the policy objectives which motivated the statute's enactment, and the approach taken in the comparable context of valuing split-interest gifts to charities. The Service in Notice 2003-72 announced its acquiescence in the Court's decision. In that Notice, the Service also announced that it would change the regulations to allow treatment of a retained unitrust interest payable to a donor or his or her estate as a qualified interest. On July 23, 2004, the Service issued those Proposed Regulations (Reg-163679-02) which clarify that a unitrust amount or annuity payable to a grantor, or the grantor's estate if the grantor dies prior to the expiration of the term, is a qualified interest for the specified term. On February 24, 2005, the Service adopted the proposed regulations.

In Cook v. Commissioner, 269 F.3d 854 (7th Cir. Oct. 22, 2001), the Seventh Circuit affirmed the Tax Court's holding that a husband and wife who each created two GRATs must determine the value of the remainder interest in the GRATs using the factor for single-life annuities not a dual-life annuity, because the spousal interests in each trust were not fixed and ascertainable and because the retained interests in each GRAT may extend beyond the shorter of a term of years or the period ending upon the death of the grantor. The couple were co-trustees for each GRAT and funded them with shares of stock in their closely-held family company. The grantors each transferred the shares into a retained annuity for a fixed number of years or until the grantor's death; if the grantor died prior to the expiration of the annuity, the annuity would be paid to the surviving grantor until the earliest of the death of the surviving grantor or an additional specified term and each grantor retained the right to revoke the other grantor's interest.

In Schott v. Commissioner, T.C. Memo 2001-110 (2001), a case with nearly identical facts as Cook v. Commissioner, the Tax Court held that a successor annuity interest of a spouse in a retained two-life annuity is not a qualified interest that is subject to valuation under Code Section 2702. Under the terms of the GRAT, the grantor retained an annuity interest for 15 years or, if sooner, until the grantor's death. If the grantor died prior to the expiration of the annuity term, the annuity was to be paid to the spouse. If the spouse did not survive the grantor or the grantor revoked the interest, the annuity payments ceased. The Court held that this contingent spousal interest was distinguishable from the fixed, noncontingent spousal interest for a fixed term of years in both Example (6) and Example (7) of Treasury Regulation Section 25.2702-2(d)(1). Finally, the Court noted that the legislative intent to conform qualified interests in valuing GRATs with charitable split interest trusts did not include dual-life annuities. Accord:

Tech. Adv. Mem. 200230003 (July 26, 2002), where the spousal interests were nearly the same as those in Cook and Schott, as the spousal interests were contingent, rather than fixed and ascertainable, because it was possible that they would never vest. The Service concluded that the spousal interests were not qualified interests and were valued at zero in determining the value of the grantors' gifts to the GRATs. The Service rejected the grantors' argument that the GRATs were of the "fixed" term variety considered in A. Walton, supra. The Service further determined that the fact that the spousal interests were payable to the spouse's estate if the spouse died before the end of the annuity term did not alter the contingent nature of the spousal interests. The Ninth Circuit reversed the Tax Court's judgment in Schott v. Commissioner, 81 TCM (CCH) 600, rev'd 319 F.3d 1203 (9th Cir. 2003) and distinguished the Seventh Circuit Cook decision (Cook v. Commissioner, 269 F.3d 854 (7th Cir. 2001). The Ninth Circuit held that the two-life annuity retained by the Schotts in their GRATs is an interest which is qualified under Code Section 2702 and therefore is to be subtracted from the value of the gift. The Court stated that the Commissioner's interpretation of Example 7 in 20 CFR Sec. 25.2702-2(d) to exclude the contingency of the spouse being alive at the time her annuity begins is unreasonable and invalid; the annuity created by each Schott trust for the lives of the grantor and spouse or 15 years is as qualified as the annuity in Example 7 paying a fixed amount for 10 years to the grantor, then to the spouse if living. The Court held that a two-life annuity, based on the lives of the grantor and spouse with a limit of 15 years, falls within the class of easily valued rights that Congress meant to qualify under Code Section 2702. The Ninth Circuit distinguished Cook on the basis of the requirement in Cook that the parties be married at the date the survivor annuity begins.

In response to the decision in Schott, on July 23, 2004 the Service issued Proposed Regulations (REG -163679-02) that clarify when a revocable spousal interest is a qualified interest. The Proposed Regulations provide that the qualified interest must be for a fixed term and payment cannot be contingent on an event other than survival of the term holder (subject to the transferor's retained right of revocation). A revocable spousal interest is contingent, and therefore not a qualified interest, if the spouse will not receive any payments if the transferor survives the fixed term during which the transferor is the holder. These regulations clarify that the revocable spousal interest is a qualified interest only if the spouse's interest, standing alone, would constitute a qualified interest but for the grantor's revocation power. On February 24, 2005 the Service adopted the proposed regulations and added new Example 8 in Reg. §25.2702-3(e) to clarify that the grantor makes a completed gift to the spouse when the revocation right lapses on the expiration of the grantor's retained term.

The final regulations amending Reg. §2702-2 and Reg. §2702-3 apply to trusts created on after July 26, 2004, but the Service will not challenge any prior application of the changes to Example 5 and Example 6 in Reg. §25.2702-3(e).

In J. Badgley, DC CA., 2018-1 USTC ¶ 60,705, where the decedent had created a GRAT and died before the expiration of the GRAT term, the Court held that the GRAT's assets were includable in the decedent's gross estate for estate tax purposes under Code Section 2036(a)(1), as the decedent reserved the right to the income from the transferred property for purposes of such Code Section by reserving the right to annual annuity payments. The District Court's decision was affirmed by the Ninth Circuit on April 28, 2020 (Badgley v. United States, No. 18-16053 (9th Cir. Apr. 28, 2020)).

Q. Gifts, Gift Tax, and Estate Tax Includibility of Gift Tax

In CCA 201745012, where the taxpayer had created irrevocable trusts that included an annuity payable to him for the trusts' term, with the remainder payable to the taxpayer's children, and where before the annuities expired the donor purchased the remainder interests in the trusts in exchange for unsecured promissory notes, and the taxpayer thereafter died, the Service advised that the promissory notes constituted completed gifts from the donor to the trusts, since the donor's purchase of the remainder interests did not constitute adequate and full consideration, as they did not replenish or augment the donor's taxable estate since the trusts were includable in the donor's estate under Code Section 2036(a)(1) even in the absence of the transaction, and the Service further advised that the donor's estate could not deduct the amount of the promissory notes as claims against the estate, since the notes were not given to the trusts for adequate and full consideration due to the failure of the decedent's purchase of the remainder interests to replenish or augment his taxable estate.

In Morrissette v. Commissioner, 146 T.C. No. 11 (Apr. 13, 2016), the Tax Court held that a properly structured intergenerational split-dollar life insurance transaction is not a gift, and that the value of the life insurance protection is determined using the economic benefit regime set forth under Treasury Regulations Section 1.61-22. Ms. Morrissette had advanced $30 million for her revocable trust to finance the purchase of $58,000,000 of life insurance on the lives of her sons. When Ms. Morrissette died, her federal estate tax return included the split-dollar receivable at an appraised value of $7,500,000, even though the cash-surrender value of the policies was $30 million.

The decision was appealed to the U.S. Tax Court (Morrissette v. Commissioner, T.C. No. 4415-14, 5/13/21), which ruled in May of 2021 that neither the amount of premiums paid toward the policies nor the cash-surrender value of the polices should have been included in Ms. Morrissette's estate; however, the value of rights related to the split-dollar arrangement should have been included and was grossly undervalued by the estate, resulting in a 40% understatement penalty.

In Estate of Levine v. Commissioner, T.C., No. 9345-15 (July 13, 2016), the estate won its motion for summary judgment after it contested the Service's determination that $6,500,000 paid in insurance premiums constituted a gift. During oral arguments, the estate argued that Morrissette controls and the Service agreed. However, the Service noted that it disagrees with the ruling in Morrissette, thereby reserving its right to appeal. The case went to trial in November 2017 and is still pending (Estate of Marion Levine, US Tax Court Docket No. 13370-13.)

In Estate of Cahill v. Commissioner, T.C. Memo 2018-84, the Court denied the estate's summary judgment motion, in which the estate contended that Code Sections 2036(a)(2), 2038(a) and 2703(a) do not apply to generational split-dollar arrangements, holding that, with regard to Code Sections 2036(a)(2) and 2038(a), the decedent should be treated as holding a unilateral right to terminate the arrangement and recover the greater of the cash surrender value or premiums paid because the parties' right to terminate the arrangement by mutual agreement was a right held by the decedent in conjunction with another person, and, with respect to Code Section 2703(a), that the requirement that another party consent to a termination should be treated as a restriction on the decedent's right to terminate the arrangement for purposes of such

Code Section. The Court further held that although Treas. Reg. Section 1.61-22, applying the economic benefit regime to split-dollar agreements, does not apply for estate tax purposes, it would be impermissibly inconsistent with the treatment of the decedent as the owner for gift tax purposes to not also treat him as the owner for estate tax purposes.

On September 10, 2015 the Service issued proposed regulations under Code Section 2801 (REG-112997-10) relating to the tax under Code Section 2801 on United States citizens and residents who received gifts or bequests from certain individuals who relinquished United States citizenship or ceased to be lawful permanent residents of the United States on or after June 17, 2008. The Service will publish Form 708 to report such gifts and bequests after final regulations under Code Section 2801 are issued.

In PLR 201523003, where the taxpayer had created trusts for the benefit of his wife and their descendants, and the taxpayer and his wife filed gift tax returns electing to split the gifts to the trusts, the Service ruled that the gift-splitting applies only as to the part of each trust passing to the descendants if such interest is ascertainable at the time of the gift and is severable from the interest transferred to the donor's wife.

In Cavallaro v. Commissioner, T.C. Memo 2014-189, where a company which was owned by the senior generation and which manufactured certain equipment, and a company owned by the junior generation which sold that equipment, merged, the Court held that the allocation of value between the two generations' ownership of the post-merger company was inconsistent with the pre-merger value of each company, and that the senior generation therefore made a $30,000,000 gift to the junior generation as a result of the merger.

In V. Kite Estate, TCM 2013-43, the decedent appointed her children as trustees of certain trusts, including QTIP trusts. The children then terminated such trusts, with the assets passing to the decedent's revocable trust. The assets consisted entirely of interests in a family limited partnership, and the decedent's revocable trust then sold its interest in the partnership to the decedent's children in exchange for deferred private annuities. The Tax Court held that the sale was for full and adequate consideration and, therefore, not subject to gift tax. However, the Court also held that the termination of the QTIP trusts and the sale of the decedent's interest in the partnership disregarded the Code Section 2519 QTIP rules and, therefore, was subject to gift tax, noting that the disposition of the QTIP trusts was part of a prearranged and simultaneous transfer. In addition, the Court held that where the income beneficiary of a QTIP trust is deemed to have made a gift of the remainder interest in the trust pursuant to Code Section 2519, any consideration that such beneficiary receives in the transaction cannot reduce the amount of the gift for gift tax purposes, since the trust's income beneficiary did not own such remainder interest and, therefore, cannot technically receive any consideration in exchange for it.

In Sommers v Commissioner, T.C. No. 9305-07, T.C. Memo 2013-8 (January 10, 2013), where the decedent transferred his art collection during his life to a limited liability company and made gifts of units in the company to his nieces, and where state court cases held that such gifts were valid and complete, the Tax Court held that the estate was collaterally estopped by such state court decisions from arguing that the gifts were not gifts for federal gift tax purposes, and from arguing that the decedent retained a power to alter, amend, revoke or terminate the gifts.

In PLR 201310002 (2013) and PLR 201310006 (2013) the Service ruled with respect to Delaware incomplete non-grantor trusts (i.e., so-called "DING" trusts), where there was a corporate trustee that was required to distribute income or principal to the grantor or his issue at the direction of a distribution committee consisting of the grantor and his four children, or must make distributions of principal to the grantor's issue at the grantor's direction pursuant to an ascertainable standard, the Service ruled that the trusts are not grantor trusts, that the grantor did not make completed gifts on the creation of the trusts, and that the distribution committee members did not make completed gifts upon making distributions to the grantor or to persons other than the grantor.

In CCA 201208026 dated September 28, 2011 the Service advised that a transfer to an irrevocable trust as to which the donor retains a testamentary limited power of appointment is a completed gift of the term interest in the trust, and the value of the term interest for gift tax purposes is 100% of the amount transferred to the trust due to the application of Chapter 14 of the Code. On August 21, 2012 officials of Bessemer Trust Company advised the Real Property, Trust and Estate Law Section of the American Bar Association that using a retained testamentary limited power of appointment is no longer an absolute way of avoiding having a transfer to a trust treated as a completed gift if the grantor is not the sole beneficiary of the trust.

In PLR 201825003, the Service ruled that a transfer of a donor's remainder interest in works of art and an agreement to transfer the remaining interest at the donor's death was not a completed gift for gift tax purposes, since it was subject to a condition precedent of the donor's receipt of a favorable letter ruling from the Service regarding the gift tax treatment of the gift.

On June 18, 2010 the Service issued a Chief Counsel Advice Memorandum (CCA 201024059) advising that the gift tax imposed on the transfer of closely held stock could be assessed at any time where the donor failed to disclose on the gift tax return the method used to value the stock and a description of the discounts taken in valuing the stocks, thereby failing to comply with the requirement that the transfer must be "adequately disclosed" for the statute of limitations to begin to run.

On May 21, 2010 the Service issued a Chief Counsel Advice Memorandum (CCA 201020009), advising that Code Section 2035(b), which includes in the gross estate of a decedent the amount of any gift tax paid on gifts made within three years of death, does not apply to the payment of gift tax made by a non-resident non-U.S. citizen.

In Steinberg v. Commissioner, 145 T.C. No. 7 (September 16, 2015), the Tax Court held that a gift by the taxpayer to her four daughters, who assumed the obligation to pay the portion of the donor's estate taxes attributable to the inclusion in the donor's gross estate of the gift taxes imposed with respect to such gifts, if the donor died within three years of the date of such gifts, were net gifts, and that the amount of such liability should reduce the value of the gifts. The Court further held that such reduction in value should be based on the Service's actuarial tables.

In Estate of Morgens v. Commissioner, 133 T.C. No. 17 (December 21, 2009), where the income beneficiary of QTIP trusts, within three years of her death, made a gift of her income interests in the trusts to the remainder beneficiaries of the trusts, thereby causing a gift of the

trusts' remainder interests under Code Section 2519, the Tax Court held that the income beneficiary was liable for the payment of the gift tax, resulting in the includibility of that gift tax in the income beneficiary's gross estate for estate tax purposes pursuant to Code Section 2035(b), even though the remainder beneficiaries had agreed to indemnify the income beneficiary for any gift tax payable by reason of the gift. On May 3, 2012 the Court of Appeals affirmed the Tax Court decision (109 AFTR2d 2006, 9th Cir. 2012), and held that the gift taxes paid must be included in the transferor's gross estate under Code Section 2035(b).

In E. Barnett, Admr., 2009-2 USTC ¶ 60,576, the District Court in Pennsylvania held that checks issued by the decedent's agent to make gifts pursuant to a power of attorney which did not specifically authorize the agent to make gifts were not valid gifts and were includible in the decedent's gross estate for estate tax purposes.

On September 9, 2009 the Service issued final regulations under Code Section 7477 (Treas. Reg. §301.7477-1) as to when a donor may file a Tax Court petition seeking a declaratory judgment as to the gift tax value of a gift. The regulations provide that a donor may file such a petition if (1) the transfer is shown or disclosed on a gift tax return, (2) the Service has made a determination regarding the gift tax treatment of the transfer that results in an "actual controversy", (3) the donor has exhausted all available administrative remedies, and (4) the donor files the Tax Court petition requesting a declaratory judgment under Code Section 7477 within 91 days of the Service's notice of proposed adjustment. The final regulations apply to civil proceedings described in Code Section 7477 which are filed in the Tax Court on or after September 9, 2009.

In CCA 201330033 (February 24, 2012) the Service advised as to the gift tax and estate tax consequences of transfers of stock to grantor trusts in exchange for self-cancelling notes that provided only for the payment of interest during their term, with a balloon payment of principal at the end of the term, where the transferor died in the year after the transfer and before the notes matured. The Service stated that the fair market value of the notes is to be determined pursuant to the willing buyer, willing seller standard in Treas. Reg. Section 25.2512-8, rather than based on the Code Section 7520 mortality tables, and that if the value of the notes is less than the value of the stock, measured at the time of the transfer, then there is a deemed gift by the transferor of the difference. The Service stated that in the instant case the notes lacked the indicia of genuine debt, which requires a reasonable expectation of payment, since it was unclear as to whether or not the trusts were adequately funded to be able to pay the notes. As a result, the Service concluded that notes were worth significantly less than the value of the stock and that the difference was a gift. The Service also advised that there were no estate tax consequences as a result of the cancellation of the notes at the transferor's death.

R. Same-Sex Marriages

In Obergefell v. Hodges, U.S. No. 14-556 (June 26, 2015), the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits states from banning same-sex marriages.

On October 21, 2015 the Service issued proposed regulations (REG-148998-13)

to amend the current regulations under Code Section 7701 to provide that for federal tax purposes the terms "spouse", "husband" and "wife" mean an individual who is lawfully married to another individual, and the term "husband and wife" means two individuals who are lawfully married to each other. These definitions apply regardless of sex. In addition, these proposed regulations provide that a marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by any state, possession or territory of the United States. Thus, whether or not a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes depends on whether or not that marriage would be recognized in at least one State, possession or territory of the United States. On September 2, 2016, the Service issued final regulations (T.D. 9785; RIN:1545-BM10) regarding same-sex marriages, which largely mirror the proposed regulations.

As a result of the United States Supreme Court's decision in Obergefell, tax officials in states that did not provide marriage related tax benefits to same-sex married couples before such decision have begun the process of adjusting their tax benefits to provide equal tax treatment.

In United States v. Windsor, 570 U.S. 744 (2013), 133 S. Ct. 2675, the United States Supreme Court held that Section 3 of the Defense of Marriage Act was unconstitutional and that the estate of a same-sex spouse was entitled to a federal estate tax marital deduction for the bequest to the surviving same-sex spouse.

In Hollingsworth v. Perry, 570 U.S. 693 (2013), 133 S. Ct. 2652, the United States Supreme Court also held that the proponents of Proposition 8, which was California's ban of same-sex marriage, lacked standing to appeal a Federal District Judge's ruling that Proposition 8 violated the Constitution.

In Cozen O'Connor, P.C. v. Tobits, E.D. Pa., No. 2:11-cv-00045-CDJ (2013), the Court held that the same-sex spouse of a deceased participant in a profit sharing plan, which provided that death benefits would be paid to the participant's surviving spouse, was entitled to the spousal death benefits under the plan and under the Employee Retirement Income Security Act ("ERISA").

In Rev. Rul. 2013-17, IRB 2013-38, the Service ruled that a same-sex couple that is legally married in a jurisdiction that recognizes such marriages will be treated as married for federal tax purposes, whether or not the couple resides in a jurisdiction that recognizes same-sex marriages.

On August 29, 2013 the Service issued a FAQs on same-sex marriage. For tax year 2013 and thereafter, same-sex spouses generally must file using a married filing separately or jointly filing status. For tax years 2012 and earlier, same-sex spouses who file an original tax return on or after September 16, 2013 generally must file using a married filing separately or jointly filing status. Same-sex spouses who file their 2012 tax year return before September 16, 2013 may choose, but are not required, to amend their federal tax returns to file using a married filing status.

On November 26, 2013 the Service issued new draft 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.

The Service in its FAQs on registered domestic partnerships stated that such partners are not considered as married or spouses for federal tax purposes, as such partners are not married under state law. Thus, domestic partners cannot file federal returns using a married filing status, and a taxpayer cannot file as head of household if the taxpayer's only dependent is his or her registered domestic partner. In addition, for applicable years, a registered domestic partner can itemize his or her deductions whether or not his or her partner itemizes or claims the standard deduction.

S. Special Procedures for Same-Sex Couples to Recapture Exemption Amounts

Notice 2017-15 provides procedures for recalculating the applicable exclusion amount and the remaining GST tax exemption for transfers made during marriage between same-sex spouses. This is available even to couples who did not qualify at the time of the transfer for the marital deduction for federal estate or gift tax purposes because of the Defense of Marriage Act, even if the applicable limitations period has expired. The taxpayer can file an amended gift tax return or a supplemental estate tax return. However, Notice 2017-15 does not extend the applicable time limits on the election to split gifts made by a spouse.

T. IRAs and Qualified Retirement Plans

In Rev. Proc. 2016-47, the Service developed a "self-certification" procedure by which a taxpayer can complete a rollover of an IRA if the taxpayer missed the 60 day deadline under Sections 402(c)(3) or 408(d)(3). A taxpayer can "self-certify" to plan administrators that they would be eligible for a waiver of the 60 day deadline if three conditions are met: the taxpayer has not previously been denied a waiver for this rollover, the taxpayer was unable to complete the rollover within the 60 days because of certain circumstances (i.e., error by a financial institution, death or illness in the taxpayer's family), and the rollover must be completed as soon as practicable after the reason that prevent the taxpayer from timely rolling over the IRA has been resolved.

In In re Lerbakken, B.A.P. 8th Cir., No. 18-6018 (October 16, 2018), the Court held that the bankruptcy exemption for retirement accounts is limited to individuals who create and contribute to the accounts, and not to their ex-spouses who receive a retirement interest as part of a divorce settlement.

In Kellerman v. Rice, E.D. Ark., No. 4:15-cv-00347 (September 14, 2015), the Court held that, pursuant to Code Section 408(a)(2), an IRA loses its tax exempt status if it engages in any transaction prohibited by Code Section 4975, and that in such case the account holder cannot claim that the IRA is an exempt asset in the account holder's bankruptcy case.

In Running v. Miller, 778 F.3d 711 (Ct. App. 8th Cir., 2015), the Court held that an annuity purchased through a direct rollover from a tax-exempt IRA is exempt from the debtor's Chapter 7 estate.

On July 2, 2014 the Service published final regulations (T.D. 9673) under Code Sections 401, 403 408, 408A and 6047 regarding qualifying longevity annuity contracts ("QLACs"), which allow a participant in a retirement plan or a person who has an IRA to use a

portion of his or her plan or IRA account balance to purchase an annuity that will begin to pay benefits at an advanced age (up to a maximum of age 85), and that will continue to pay benefits for the life of the plan participant or IRA owner. The regulations provide that the maximum permitted investment that individuals can use to purchase qualifying longevity annuity contracts regardless of non-compliance with the age 70-1/2 minimum distribution requirements is 25% of their account balance or $125,000, whichever is less. The $125,000 limitation will be inflation adjusted. The regulations also allow the plan participant or IRA owner to deduct the cost of the QLAC from the account balance for purposes of determining the required minimum distribution that must be paid from the plan to the participant or from the IRA to its owner. In addition, the regulations require that a company that issues a QLAC must send a report to the plan participant or IRA owner annually regarding that contract, and the Service has issued Form 1098-Q for that purpose. Note that the SECURE Act increased the age at which required minimum distributions must begin from 70 ½ to 72 years. See discussion on the SECURE Act in Part III, Section DD of this Outline.

In Bobrow v. Commissioner, T.C. Memo 2014-21, the Court held that a taxpayer who maintained multiple individual retirement accounts could not make a rollover contribution for more than one IRA in a one-year period. As a result of this decision, on July 10, 2014 the Service stated that it would withdraw its proposed changes to Treas. Reg. Section 1.408-4(b)(4)(ii) and IRS Publication 590, providing that this limitation is applied on an IRA-by-IRA basis, and would issue revised guidance to clarify that rules limiting IRA rollovers to one per year apply on an aggregate basis. On November 24, 2014 the Service published Announcement 2014-32, clarifying that a 2014 transfer of a distribution from one IRA to another IRA will not have an impact on the new rule only allowing one IRA-to-IRA transfer per year beginning in 2015.

In Notice 2014-19, the Service stated that qualified retirement plans must reflect the outcome of United States v. Windsor as of June 26, 2013, the date of the United States Supreme Court's decision in that case, but need not reflect that outcome prior to such date in order to continue to be qualified.

On December 9, 2015 the Service issued Notice 2015-86, advising that Obergefell, which legalized same-sex marriage, did not require changes for tax-qualified retirement plans, as such plans already were required to recognize same-sex marriage under Windsor.

On April 4, 2005, the United States Supreme Court in Rousey v. Jacoway, 544 U.S. 320, held that an IRA is exempt from the reach of creditors in bankruptcy pursuant to §522(d)(10)(E) of the Bankruptcy Code, which exempts certain assets from the debtor's bankruptcy estate. The Court stated that the 10% penalty imposed on withdrawals from an IRA before the accountholder is 59-1/2 years old, and the elimination of this penalty for withdrawals after the accountholder attains that age, indicates that the accountholder's right to receive payments from the IRA is a right to payment "on account of age" for purposes of that section of the Bankruptcy Code, which exempts payments under certain types of plans on account of age, as well as on account of other specified factors.

In Clark v. Rameker, the United States Supreme Court (No. 13-299, June 12, 2014), held that an inherited IRA does not represent "retirement funds" and is therefore not an exempt asset in connection with a debtor's bankruptcy filing.

In In re Todd, 121 A.F.T.R.2d 2018-1474 (2018), the Bankruptcy Court for the Northern District of New York held that a debtor's inherited IRA was not exempt under New York law from the debtor's creditors as a trust created by a third party for the benefit of the debtor, since the debtor beneficiary could access the funds without restriction. Therefore, the Court held that the IRA was part of the bankruptcy estate and subject to the claims of the debtor's creditors.

In PLR 201125009 (June 24, 2011), the Service ruled that the executor of the estate of a surviving spouse could disclaim the undistributed portion in a retirement account, even though required minimum distributions had already been made from such account to the estate's account.

In Rev. Rul. 2005-36, 2005-1 Cum. Bull. 1368, the Service ruled that a beneficiary's receipt from a decedent's individual retirement account of the required minimum distribution for the year of the decedent's death does not prevent the beneficiary from making a qualified disclaimer of her beneficial interest in the IRA.

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.

ROTH IRA CONVERSIONS: For tax years beginning after 2009, an individual can convert a traditional IRA into a Roth IRA without regard to the amount of the individual's adjusted gross income, thereby avoiding income tax on all future income and appreciation in the IRA, whereas prior to 2010 an individual could do so only if his or her modified adjusted gross income was not more than $100,000. A taxpayer who made such a conversion in 2010 can elect to recognize the conversion ratably in 2011 and 2012.

On September 18, 2014 the Service issued proposed regulations (REG-105739-11) and Notice 2014-54, clarifying that plan participants who receive a distribution from a retirement account can roll over the after-tax funds to a Roth IRA.

In Notice 2009-75, IRB 2009-39 (September 28, 2009), the Service stated that a Roth IRA conversion made directly from a non-IRA account will be treated as though it first passed through a traditional IRA, so that special tax rules, such as those applicable to net unrealized depreciation on employer securities, which otherwise would require the payment of current income tax only on the amount of the stock's cost basis until the participant later sells the stock, would not be applicable, with the result that the participant will be required to pay income tax on the entire amount.

In Paschall v. Commissioner, 137 T.C. No. 2 (2011), and Swanson v. Commissioner, T.C. Memo 2011-156 (2011), the Tax Court held that taxpayers who utilized a Roth IRA

conversion tax shelter were liable for excise taxes due to excess contributions to the Roth IRA and were liable failure to file penalties for relying on the tax advice of the tax shelter promoter.

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.

In Hess v. Wojcik-Hess, 1:08-cv-789 (January 26, 2010), the District Court for the Northern District of New York held that the decedent's employee benefit plans were governed by ERISA, which required that the Court must apply the terms of the plans in determining the eligible beneficiary, thereby entitling the decedent's separated spouse to the benefits under those plans, notwithstanding a separation agreement between the decedent and his spouse in which the spouse waived any claim which she may have in those plans.

In Kesinger v. URL Pharma Inc., No. 09-cv-06510 (D. Ct. New Jersey, March 20, 2012), where the decedent's wife waived her right to the proceeds of the decedent's 401(k) plan as part of their divorce decree, but the decedent failed to change the designated beneficiary of his plan benefits prior to his death, the Court held that the plan administrator is obligated to pay the plan proceeds to the decedent's former wife, as the designated beneficiary, but that the decedent's estate could sue the decedent's former wife to enforce her waiver of her right to receive the plan proceeds and to recover such proceeds for the decedent's estate.

In Charles Schwab & Co. v. Debickero, 593 F.3d 916 (January 22, 2010), the Ninth Circuit Court of Appeals affirmed a District Court decision that automatic protections provided by ERISA for a surviving spouse which are applicable to pension plans do not apply to IRAs, even though some of the funds in the IRA originated in an ERISA-protected pension plan before being rolled over to the IRA.

In Prudential Insurance Co. of America v. Glacobbe, No. 3:07-cv-04113-AET-TJB (October 30, 2009), the District Court in New Jersey, in an unpublished decision, held that, where the decedent attempted to change the beneficiary designation of a life insurance policy held in a welfare benefit plan which was governed by ERISA, but omitted the Social Security numbers of the new beneficiaries, the plan was required to be administered in accordance with the plan documents and that the decedent had failed to "substantially comply" with the plan's requirements by not including those Social Security numbers on the beneficiary designation form.

In PLR 200944059 (August 3, 2009), the Service ruled that where the decedent named a trust as the beneficiary of his IRA and the lifetime beneficiary of the trust was the decedent's wife and the remainderman was his son, the wife was not treated as the payee of the IRA and, therefore, she could not roll the decedent's IRA into an IRA in her own name.

In PLR 201011036 (December 14, 2009), the Service ruled that a taxpayer who suffered from multiple sclerosis and was unable to engage in any substantial gainful employment by reason of his illness was disabled and, therefore, was not subject to the 10% early distribution penalty for early distributions from his IRA.

The Department of Labor in Advisory Opinion 2009-02A (September 28, 2009) stated that benefit distributions from an IRA to a trust, when the IRA's owner's grandson is the sole beneficiary, the IRA owner is the trustee and the owner's son is the designated successor trustee, would not constitute a prohibited transaction for purposes of Code Section 4975, even though the trust is a "disqualified person" under Code Section 4975, since ordinary benefit distributions are not prohibited transactions if the benefit is computed and paid on a basis consistent with the terms of the plan and is applied to all other participants and beneficiaries.

In Hallingby v. Hallingby, No. 08-1866-cv (2009), the United States Court of Appeals for the Second Circuit held that commercial annuities purchased for retirement plan participants in connection with the termination of such plan are not subject to ERISA, since ERISA allows an employee benefit plan to be terminated under stated conditions, including by the purchase of commercial annuities for the plan participants, notwithstanding that ERISA requires a pension plan to prohibit the assignment of plan benefits. The Court of Appeals remanded the case to the District Court for the Southern District of New York to decide in accordance with state law whether the decedent's final wife is entitled to the survivor benefit payments under the annuity contract, or whether a prior wife of the decedent who had waived all rights to any retirement benefits in her divorce settlement with the decedent was entitled to such survivor benefit payments.

In McCauley v New York State and Local Employees' Retirement System, 2012 N.Y. Slip Op 22283 (Sup. Ct. August 13, 2012), the Court held that the dissolution of the plan participant's marriage revoked his beneficiary designation that he executed prior to his death.

In In re Estate of Sauers, 971 A.2d 1265 (Pa. Super. Ct. 2009), the Superior Court of Pennsylvania held that the decedent's ex-wife, who received the death benefit payable under a life insurance policy insuring the decedent's life as the policy's beneficiary, where the policy was part of an employee benefit plan subject to ERISA and the insured did not change the policy beneficiary after his divorce, was required to transfer the policy proceeds to the contingent beneficiary under the policy, on the grounds that the Pennsylvania revocation-on-divorce statute did not affect the administration of the Plan and, therefore, ERISA did not preempt such Pennsylvania statute.

In Kennedy v. Plan Administrator for Dupont Savings and Investment Plan, 129 S. Ct. 865 (2009), the United States Supreme Court held that the Plan Administrator properly paid the death benefit payable under the company's savings and investment plan to the decedent's former wife, whom the decedent had properly designated as the beneficiary of that benefit when the decedent was married to her, even though the decree divorcing the decedent and his former wife divested her of her rights under that plan, since the decedent had not executed another beneficiary designation form after his divorce, where the plan required that beneficiary designations must be made as required by the Plan Administrator using the specific forms the Administrator had created for that purpose. However, the Court expressly refused to decide whether the decedent's estate (to whom the plan benefit would have been payable in the absence of a valid beneficiary designation) would have a valid federal or state contract claim against the decedent's former spouse and whether federal law would preempt any such state law claim.

In Egelhoff v. Egelhoff, 532 U.S. 141, 121 S. Ct. 1322 (2001) the United States Supreme Court held that ERISA preempts state laws that automatically revoke group-term life insurance and pension plan beneficiary designations upon the participant's divorce because such state laws directly relate to the administration of ERISA plans. A decedent's children sought to have the decedent's group-term life insurance proceeds and pension benefits paid to them under Washington state law rather than the decedent's ex-wife who was still the named beneficiary for the plans. Under Washington law, and many other state laws, beneficiary designations for nonprobate assets are automatically revoked upon divorce as a matter of law. The Court reasoned that ERISA's broad preemption clause was intended to ensure uniform administration of employee benefit plans. The Supreme Court decision does not, however, preclude plan sponsors from choosing to include automatic beneficiary designation revocation as part of the plan design to the extent permitted under the Code and ERISA.

In McGowan v. NJR Service Corp., 423 F.3d 241 (3d Cir. 2005), a divided panel of the United States Court of Appeals for the Third Circuit held that, in the absence of a qualified domestic relations order, an Employee Retirement Income Security Act benefits plan administrator is not required to recognize a non-participant beneficiary's waiver of benefits. The Court stated that the explicit prohibition against alienation or assignment of benefits in ERISA Section 206(d) applies to invalidate the waiver by the participant's former spouse in a divorce settlement.

In Silber v. Silber, 99 N.Y.2d 395 (Ct. App. 2003), the New York Court of Appeals held that a qualified domestic relations order ("QDRO") may serve as a qualified deferred compensation plan document that changes the beneficiary designation of a plan governed by ERISA in the absence of the filing of a plan beneficiary designation form, even though the QDRO in question only constituted a waiver of the claimant's rights to the plan benefit and did not specifically designate a beneficiary of that benefit.

In a PLR 200826008 (June 30, 2008), the Service considered the income tax consequences of a sale of an IRA to a trust created for the benefit of the IRA's beneficiary. A decedent left his IRA to his two children, one of whom was a minor. The minor child's conservator proposed to create a trust for the sole benefit of the child, from which the child could withdraw increasing portions as he attained certain ages, eventually having the power to withdraw the trust's entire balance. At the child's death, any remaining property would pass as he designates under a general power of appointment. Code Section 691(a)(1) generally provides that when a person inherits a right to income in respect of a decedent (such as an IRA) and then transfer this right, that person must include in gross income the fair market value of this right at the time of transfer, plus any amount by which any consideration for the transfer exceeds the fair market value. Citing Rev. Rul. 85-13, 1985-1 C.B. 184, the Service concluded that, because the proposed trust would be a grantor trust to the beneficiary, a sale of the IRA would be disregarded for income tax purposes, and assuming the transfer would not constitute a completed gift by the beneficiary, the transfer of the IRA would not be a sale or disposition of the IRA for federal income tax purposes or a transfer for purposes of Code Section 691(a)(2).

In Tech. Adv. Memo 2002-47-001, the National Office ruled that the value of decedent's IRAs holding marketable securities should not be discounted for estate tax purposes to reflect income taxes that will be payable by the beneficiaries upon receipt of distributions

from the IRAs, or for lack of marketability. The ruling follows the rationale in Estate of Robinson v. Commissioner, 69 T.C. 222 (1977), which held that the fact that the assets are subject to income tax on distribution should not impact on the application of the "willing buyer - willing seller" standard because the IRA distributee can sell the underlying assets at market price without any discount. With respect to the lack of marketability, the ruling stated that "while § 408(e) imposes penalties on the transfer or assignment of the IRA there are no restrictions preventing the distribution of assets to the beneficiaries after the decedent's death and short administrative delays in processing the beneficiaries' request for distribution should not warrant a discount." The Service declined to treat an IRA as a separate entity like a corporation, viewing it as merely a custodial arrangement with the assets held in the IRA as being no different from securities held in a brokerage account. The Service also noted that the Code provides for an income tax deduction for the estate tax attributable to the income tax inherent in the IRA and that this deduction is intended to operate in lieu of a valuation discount for estate tax purposes.

In L. Smith Est., 300 F. Supp. 2d 474 (D. Ct. Texas 2004), the Court held that the value of a decedent's retirement accounts for estate tax purposes could not be discounted to reflect the income tax liability to be incurred by the accounts' beneficiaries when the accounts are distributed and noted that Congress alleviated the impact of the double taxation of income in respect of a decedent by allowing the recipient of that income to deduct the estate tax attributable to it pursuant to Code Section 691(c) . On November 15, 2004, the Court of Appeals for the Fifth Circuit (391 F.3d 621) affirmed the District Court decision.

Furthermore, on June 21, 2004 the National Office ruled in Tech. Adv. Memo 2004-44-021 that income taxes paid by a decedent's estate on distributions from IRAs were not deductible for federal estate tax purposes under Code Sec. 2053 as administration expenses or as claims against the estate.

In Estate of Kahn v. Commissioner, 125 T.C. No.11 (2005), the Tax Court held that the decedent's estate could not reduce the value of the decedent's individual retirement accounts owned at her death by the anticipated amount of federal income taxes which the beneficiaries of the accounts would pay when they received distributions from the accounts. Instead, the Court held that the estate had to report the accounts for estate tax purposes at the net aggregate value of the assets in the accounts.

## U. Special Valuation Rules – Chapter 14

On August 2, 2016 the Service released proposed regulations (REG-163113-02) regarding the valuation of interests in corporations and partnerships for estate tax, gift tax and generation-skipping transfer tax purposes under Code Section 2704. However, in light of President Trump's election and his proposal to repeal the estate tax, many transfer tax professionals speculated that these proposed regulations may never be finalized.[10]

As noted above, on October 20, 2017 the Service formally withdrew such regulations.

[10] See Part III, Section C, of this Outline for information regarding the Service's temporary suspension of new formal guidance.

In St. Laurent v. Commissioner, T.C. Nos. 24963-13 through 24970-13 (2013), the petitioners challenged the Service's assessment of gift tax deficiencies regarding gifts of membership interest in limited liability companies, claiming that the Service erroneously valued the gifts under Code Section 2703 without regard to any options, agreements, rights to acquire or use such property, or restrictions on the right to sell or use such property, and without regard to Code Section 2704 by determining the value without consideration of any lapse in voting or liquidation rights.

In Rankin v. Smith, 109 A.F.T.R.2d 987 (Fed. Ct. Cl. 2012), where the decedent owned stock that was required to be converted at his death into another class of stock that would have fewer voting rights than the original stock, the Court held that Code Section 2704 required the lapsed voting rights of the pre-converted stock to be disregarded in determining the estate tax value of such stock, as the decedent and his family controlled the corporation both before and after the conversion.

## V. No Ruling Areas

The Service released Rev. Proc. 2018-3 on January 2, 2018, which states that the Service will not issue letter rulings or determination letters as to the following issues until the Service resolves the issues through the publication of a revenue ruling, a revenue procedure, regulations or otherwise:

- Whether the corpus of a trust will be included in a grantor's estate under any of Code Sections 2036, 2038 or 2041 when the trustee of the trust is a private trust company owned partially or entirely by members of the grantor's family.
- Certain income tax, gift tax and GST tax aspects of the distribution from one irrevocable trust to another irrevocable trust (i.e., "decanting").
- Basis adjustments pursuant to Code Section 1014 with respect to assets in grantor trusts where such assets are not includable in the gross estate of the deemed owner of such assets for estate tax purposes.

On January 2, 2020, the Service released Rev. Proc. 2020-3, which added the following two new items to the no-ruling list:

- The application of the grantor trust rules to DING, NINGs, etc., unless:
  - distributions require unanimous or majority consent of the distribution committee,
  - there are at least two members of the distribution committee other than the grantor and the grantor's spouse, and
  - all of the members of the distribution committee are trust beneficiaries or their guardians.
- The application of the private foundation rules to a split-interest trust where no income, gift, estate, etc. deduction has been claimed.

On January 4, 2021, the Service released Rev. Proc. 2021-3, which provides, among others, the following trusts and estates areas on which the IRS will not issue rulings:

- Whether the period of administration or settlement of an estate or trust is reasonable or unduly prolonged;
- Allowance of an unlimited deduction for amounts set aside for charitable purposes where there's a possibility that the corpus of the trust or estate may be invaded;
- Whether the settlement of a charitable remainder trust upon the termination of the noncharitable interest is made within a reasonable period of time;
- Whether a contribution of an interest in a limited partnership or a limited liability company to a charitable organization is eligible for a charitable contribution deduction under Code Sections 2055 or 2522;
- Whether a trust that is "grandfathered" for generation-skipping transfer tax purposes retains its exempt status after certain modifications;
- Whether the beneficiaries of a trust will be considered owners of any portion of the trust when two or more of them have the power to make distributions to themselves by unanimous consent;
- Whether the beneficiaries of a trust hold general powers of appointment over any portion of a transfer to a trust when:
    - Two or more of them have the power to make distributions to themselves by unanimous consent and without the donor's consent, and
    - Either such beneficiaries must be replaced on the lapse of their powers as the result of death (or otherwise), or all of such beneficiaries' powers described above lapse on the death of any of the beneficiaries;
- Whether the grantor will be considered the owner of any portion of a trust when:
    - substantially all of the trust corpus consists or will consist of insurance policies on the life of the grantor or the grantor's spouse,
    - the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse,
    - the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, and
    - there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under Code Sections 673 to 677.

W. Priority Guidance Plan

On November 17, 2020 the Service issued its 2020-2021 Priority Guidance Plan. The Plan contains 191 guidance projects, which include:

- Regulations clarifying the deductibility of certain expenses that are incurred by estates and non-grantor trusts.
- Regulations regarding the limited deductibility of more than $10,000 in state and local taxes, and work-arounds involving charitable gifts and taxes paid by flow-through entities.
- Final regulations regarding basis consistency between estate and person acquiring property from decedent.
- Final regulations describing the circumstances and procedures under which an extension of time will be granted to allocate generation-skipping transfer tax exemption.

X. Basis Reporting Requirements

On February 1, 2010 the Service issued proposed regulations (REG-101896-09) requiring brokers, mutual funds and others to report the basis of stock and to classify capital gains and losses as long-term or short-term, explaining how to compute average stock basis, and requiring stock issuers to report corporate actions that affect stock basis. Brokers reporting gross proceeds from the sale of a security will be required to report the adjusted basis and type of gain for most stock acquired on or after January 1, 2011, for stock in a mutual fund or a dividend reinvestment plan acquired on or after January 1, 2010, and for other securities and options acquired on or after January 1, 2013. Final regulations were adopted in 2015 expanding the scope of the proposed regulations.

Y. Change of Address Notification

In Rev. Proc. 2010-16, IRB 2010-19 (May 10, 2010), the Service updated its procedures for taxpayers to notify the Service of a change of address. Generally, the Service uses the address on a taxpayer's most recently filed and properly processed return as the taxpayer's address of record. In addition, a taxpayer can file Form 8822, Change of Address, to properly notify the Service of the taxpayer's change of address. The Revenue Procedure noted that a taxpayer's new address listed on an application (Form 4868) for an automatic extension of time to file the taxpayer's income tax return, or a power of attorney and declaration of representative (Form 2848), will not be used by the Service to automatically update a taxpayer's address.

Z. Foreign Financial Assets

The Service issued final regulations under Code Section 6038D that require specific domestic entities to report their interests in specified foreign assets under Foreign Account Tax Compliance Act (FACTA) beginning after January 1, 2016. A U.S. citizen, resident alien or a domestic corporation, partnership or trust that is formed or used to hold (directly or indirectly) specified foreign assets, with an interest in foreign assets having an aggregate value exceeding

$50,000 on the last day of the year or $75,000 at any time during the year, must annually report its interest in the assets on Form 8938, Statement of Foreign Financial Assets.

AA. Trust Income Taxation (Kaestner, Fielding et al.)

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. The North Carolina Department of Revenue (DOR) filed a petition for certiorari in the United States Supreme Court, which was granted on January 11, 2019. The DOR asked the Court to determine whether the federal due process clause prohibits North Carolina from taxing trusts because their beneficiaries are North Carolina residents. On June 21, 2019, the Supreme Court ruled, by unanimous opinion, that a trust beneficiary's residence in a particular state does not constitute a sufficient nexus so as to allow the state to tax the trust. The court stated that income that has not yet been distributed cannot be taxed when it is uncertain whether a beneficiary will receive it.

North Carolina residents had until December 21, 2019 to apply for refunds based on the Court's ruling in Kaestner. The North Carolina Department of Revenue (DOR) issued guidance on January 2, 2020 for taxpayers seeking such refunds. The DOR explained that it would send such taxpayers an informational document request for information not ordinarily required to be filed (e.g., copy of the trust instrument, copies of trust tax returns, etc.). Taxpayers had 30 days to respond.

In a similar case, the Minnesota Supreme Court decided in Fielding v. Comm'r of Revenue, N.W.2d, 2018 WL 3447690 (Minn., July 18, 2018) that the grantor's domicile at the time the trust was created is not a sufficient basis on which Minnesota can tax the trust's worldwide income. The Court called "unconstitutional" that part of the Minnesota statute's definition of a resident trust which included a lifetime trust whose grantor was domiciled in Minnesota at the time the trust was created, as it did not satisfy due process requirements. The trustee was not domiciled in Minnesota and all administration took place outside of Minnesota. The Court noted that even the trust agreement's provision that Minnesota law would govern was not sufficient to provide the requisite contacts. The United States Supreme Court denied review on June 28, 2019, one week after Kaestner was decided.

Compare Estate of Evans v. Dept. of Rev., 368 Or. 430 (Or. 2021), in which the Oregon Supreme Court *en banc* affirmed the Oregon Tax Court's holding that QTIP property was properly taxable by Oregon in the estate of a surviving spouse who had moved to Oregon from Montana, where her husband had predeceased and where the QTIP trust for her benefit had been established.

Helene Evans died a resident Oregon, to which she moved after the death of her husband, Donald Gillam, who had died a resident of Montana in 2012. Gillam's Will created a trust for Evans' benefit, for which a QTIP election was made. After Evans moved to Oregon, a

dispute arose between Evans and the trustee (who was a Montana resident) regarding the trustee's exercise of the power to make principal distributions to Evans. Evans and the trustee eventually reached a settlement agreement pursuant to which Evans released her right under Montana law to require the trustee to make the QTIP productive of income in exchange for a lump sum principal payment and a fixed monthly payment for her lifetime.

In 2015, after Evans' death, her estate filed an estate tax return including the QTIP trust and then requested a refund. The estate argued that Oregon's taxing of the QTIP based solely on the residency of Evans, who was just an income beneficiary, violated the Fourteenth Amendment's Due Process Clause. The Oregon Department of Revenue denied the refund request, rejecting the due process argument. The estate appealed to the Oregon Tax Court, where both parties filed motions for summary judgment. The Tax Court granted the Department's motion and the estate appealed to the Oregon Supreme Court. The Supreme Court affirmed the Tax Court, resting its holding on the Kaestner reasoning. The Court stated that, under Kaestner, the "minimum contacts" requirement for the resident is satisfied if the person has some "possession, control or enjoyment" of the trust property. In this case, the Court concluded that Evans, who was the sole lifetime beneficiary of the QTIP trust, had sufficient enjoyment of the trust principal (as well as the income) to warrant taxation in her estate of the QTIP trust. Pursuant to the settlement agreement, even after receiving the lump sum payment, Evans could still receive principal distributions if the trust income was not sufficient to satisfy the lifetime monthly payment requirement. The Court stated that "Evans could and did access the trust principal in a way that no other person could during her lifetime" and that she had sufficient "enjoyment of the trust principal" so as to warrant taxation that was not in violation of the due process requirement.

In 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. This was in spite of 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.

A recent case, Steuer v. Franchise Tax Board (No. A154691, 2020 BL 240383, Cal. Ct. App. 6/29/20) establishes that a trust is properly taxed in California based on its California sourced income. Raymond Syufy (founder of Century Theaters, Inc.) established a trust for the sole benefit of his daughter, who was a California resident. The trust had two trustees, one of whom was a California resident and the other of whom was a Maryland resident. The trust held a limited partnership interest in Syufy Enterprises LP, which sold stock to Century Theatres, Inc. and Cinemark USA Inc. The trust took the position that only half of the income was taxable in California, since only one of the two trustees was a resident of California, and filed returns accordingly. The California Board of Equalization rejected the argument and the case was brought before the trial court, who granted the trust's motion for summary judgment. Upon

appeal, the Court of Appeal overturned the trial court, holding that the trust must pay income tax on all California income regardless of the residency of the trustees.

In 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.

In Comptroller of the Treasury of Maryland v. Wynne, No. 13-485 (May 18, 2015), the United States Supreme Court held that Maryland's income tax structure was unconstitutional, as it violated the so-called "dormant Commerce Clause", which is a doctrine that allows courts to invalidate laws having the effect of hindering interstate commerce, since Maryland's tax structure subjected earnings that were already taxed outside of Maryland to a second layer of taxation within Maryland. The Court found that by both taxing non-residents on income earned in Maryland and denying a credit to Maryland residents for tax on income earned in other states, Maryland exhibited a preference for in-state income, in violation of the Commerce Clause.

Connecticut lawmakers approved a bill in February 2021 that protects telecommuters from state double taxation. Governor Ted Lamont signed the bill into law on March 4, 2021. The new law is only applicable for 2020; questions have been raised whether or not it will be extended to 2021. Essentially, the new law extends a credit that had already been law in Connecticut to cover Connecticut residents with out-of-state jobs who were forced to work from home during the pandemic. Such residents get a tax credit on their 2020 Connecticut income tax returns for income taxes paid to the other state. The bill was requested by Gov. Lamont after New York announced in October 2020 that it would require telecommuting workers who live outside of New York State to pay New York income taxes.

New Hampshire has asked the United States Supreme Court to weigh in in the case of New Hampshire v. Massachusetts, filed on October 19, 2020. Like New York, Massachusetts decided to start taxing nonresident telecommuters, 84,000 of whom reside in New Hampshire, which does not impose a state income tax. New Hampshire filed suit, calling Massachusetts' "tax grab" unconstitutional. Connecticut, New Jersey and at least ten other states have filed amicus briefs siding with New Hampshire, while New York is aligning itself with Massachusetts. The U.S. Solicitor General filed a brief in May 2021, advising the Court not to hear the case.

## BB. Divorce

The Tax Act significantly changed the tax impact of maintenance payments. Under the new law, maintenance payments are no longer deductible by the payor and taxable to the recipient. The law is generally effective for all divorce judgments entered after December 31, 2018.

A significant impact of this provision pertains to grantor trusts created during marriage. Under prior law, if a grantor trust was created during marriage and remained so after the parties' divorce, the grantor would have been liable for taxes on any income distributed to the

grantor's now ex-spouse, and the ex-spouse would receive the income tax free. That is no longer the case under the Tax Act.

## CC. SECURE Act

In December 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which significantly affects retirement planning. Most notably and with limited exceptions, the SECURE Act eliminates a non-spouse beneficiary's life expectancy distribution option for inherited retirement benefits. It does, however, increase the general time limit within which the benefits must be distributed from five to 10 years. This change will generally accelerate (and potentially increase) the tax due on the benefits. Beneficiaries have the option to take the distributions over the 10 years in any manner they choose, i.e., the distributions do not have to be taken in installments over the 10 year period. This provides some planning opportunities (i.e., front or back loading the distributions depending on other income sources) and potentially makes Roth conversions more attractive for taxpayers who want to leave beneficiaries tax-free benefits. It is noted that the rules for a surviving spouse remain the same under the SECURE Act as under prior law. There are also exceptions to the 10 year rule for minor, disabled and chronically ill beneficiaries.

Individuals who have implemented conduit trusts into their estate plans should revisit the operative terms and consider whether such trusts continue to make sense in the first place. On the other hand, the limitation could result in charitably inclined individuals naming a charitable remainder trust as the beneficiary of their retirement assets, which would effectively recreate the lifetime payout.

The SECURE Act may result in an increase in the use of CRTs to extend the stretch payout beyond ten years for younger beneficiaries who could benefit from such a structure. However, the pros and cons of using a CRT must be carefully considered, because CRTs are less flexible than other mechanisms. For example, since the payments from a CRT do not vary greatly from year to year, a CRT may not work if the beneficiary does not have other funds available. On the other hand, younger beneficiaries may end up receiving more money through a CRT than outright from an IRA because of how long they are expected to live.

The SECURE Act also increases the age at which required minimum distributions must begin from 70 ½ years to 72 years for individuals who turn 70 ½ after December 31, 2019, and repeals the maximum age at which a wage earner can contribute to a traditional IRA beginning in 2020 (the prior maximum age was 70 ½ years). Taxpayers should beware, however, as any deductible IRA contribution made during or after the year in which the taxpayer turns 70 ½ years of age reduces the taxpayer's charitable gift exclusion amount dollar for dollar each year until the entire deducted amount is captured.

The Service has provided guidance to financial institutions on reporting RMDs for 2020. Due to the changes in the SECURE Act, RMD statements were not supposed to be sent in 2020 to IRA owners who attained age 70 ½ in 2020. However, some financial institutions may still erroneously have sent them to such individuals. In this instance, the Service provided that it would not consider the statement to have been provided incorrectly if the institution notified the IRA owner no later than April 15, 2020 that no RMD was required for 2020.

There was one significant change in the final version that passed Congress from the original House version. Like the final version, the House version permitted life expectancy payouts for disabled and chronically ill beneficiaries. The final version added a new concept, an "applicable multi-beneficiary trust", which enables trusts for disabled or chronically ill beneficiaries to use life expectancy payouts, and permits healthy beneficiaries of such trusts (such as siblings) to receive benefits after the death of the disabled or chronically ill beneficiary. This is a significant planning tool for families which include disabled or chronically ill beneficiaries.

DD. CARES Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was an economic emergency relief bill signed into law due to the coronavirus pandemic. The CARES Act contained various provisions intended to provide financial assistance to many Americans.

Among other benefits, the CARES Act includes the following charitable giving incentives:

- An above-the-line charitable deduction for cash contributions to charity of up to $300. Americans can benefit from this deduction for their 2020 income tax return in addition to the standard deduction (i.e., there is no need to itemize deductions in order to benefit from this $300 deduction). Although the provision is only intended for 2020, it is important to note that the bill states it is for taxable years "beginning in 2020" and does not have a sunset date.
- Suspension of the 60% adjusted gross income limitation for individuals' charitable contributions for 2020. The new deduction only applies to cash gifts that go to public charities. The limitation still applies to non-cash donations and to donations to private foundations and donor advised funds. Deductions in excess of 2020 income can be used in 2021.
- Increase of the cap on how much corporations can deduct for charitable gifts in 2020 from 10% of taxable income (or 15% in the case of food donations) to 25%.
- Required minimum distributions (RMDs) for 2020 were suspended until 2021. Taxpayers who chose to take their 2020 RMDs in 2020 were still able to do so; however, those who preferred not to had the option of deferring their 2020 RMDs until 2021.

EE. American Rescue Plan Act of 2021

On March 11, 2021, President Biden signed into law the $1.9 trillion American Rescue Plan Act of 2021 intended to provide coronavirus relief. Among other provisions, the Rescue Plan includes over $50 billion in aid for small businesses and $360 billion in state and local government funding. Other notable provisions include:

- An additional $7.25 billion for the Paycheck Protection Program;
- $28.6 billion for restaurant relief;
- $1.25 billion for live venue operators;

- $10 billion to the State Small Business Credit Initiative;
- $1,400 direct payments to individuals;
- Extension of unemployment benefits through September 6, 2021;
- Certain tax provisions for individuals;
- Rental and homeowner assistance;
- An additional $15 billion to extend the airline Payroll Support Program and $8 billion for airports; and
- $30.5 billion to transit agencies.

### FF. Infrastructure Plan

On November 15, 2021, President Biden signed into law the more than $1 trillion infrastructure plan, which includes, among other provisions, the following:

- $550 billion for transportation, broadband and other utilities;
- $110 billion for roads, bridges and other similar projects;
- $66 billion for freight and passenger rail systems; and
- $39 billion for public transportation.

### GG. Build Back Better Bill

Currently pending before Congress is the Build Back Better bill, which has seen various iterations since its initial release. Many provisions have been dropped from the version passed by the House Ways and Means Committee, and it remains to be determined which of the numerous provisions, if any, will be passed, if any.

## IV. ESTATE TAX CONSIDERATIONS VS. INCOME TAX CONSIDERATIONS

As noted above, the federal estate tax exclusion amount for the estates of persons dying in 2022 is $12,060,000. Thus, a married couple having combined assets of $24,120,000, 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 the case of Steuer v. Franchise Tax Board (2020 Cal. App. LEXIS 592, June 29, 2020), a trust had been established for the sole benefit of a California resident. The trust had two co-trustees - a California resident and a Maryland resident. The trust held a limited partnership interest in an entity which sold stock in 2007. Some of the capital gain income from the stock sale was allocated to the trust, which reported same on its 2007 tax return and paid the corresponding amount of California income tax. The trust later filed an amended 2007 California income tax return, requesting a refund. The trustees argued that the capital gain was incorrectly reported as California-sourced income. The trustees argued that they were "required to apportion the stock gain as California source and non-California-source income . . . according to the number of trustees resident in California" based on Rev. & Tax. Code 17743, which provides: "Where the taxability of income under this chapter depends on the residence of the fiduciary and there are two or more fiduciaries for the trust, the income taxable . . . shall be apportioned according to the number of fiduciaries resident in this state." Accordingly, the trustees argued that the one half of the capital gain apportioned to the Maryland trustee was not taxable. The trial court agreed, ordering a refund to the trust.

The Court of Appeal reversed the trial court, holding that California's Revenue and Taxation Code imposes taxes on the entire amount of trust income derived from California sources, regardless of the residency of the trust's fiduciaries.

Attached hereto as Exhibit "C" is a chart entitled "Bases of State Income Taxation of Nongrantor Trusts" (as of February 22, 2021) 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.

## V. 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 generally 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 January 2022 is 1.3%. 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.

It is noted that the Service has not published any new actuarial factors since 2009 because the mortality table from the 2010 census had not been available. A new mortality table was published by the CDC in August 2020 from the 2010 census, so new regulations are anticipated that will include new actuarial factors. Since the new mortality tables show longer life expectancies, it is anticipated that life estates will increase in value whereas remainder interests will decrease in value.

## VI. DIGITAL ASSETS, ELECTRONIC WILLS AND REMOTE EXECUTION

### A. 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 Assets Act ("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.

On January 14, 2019, the New York County Surrogate's Court held that Apple is required to turn over to decedent's Executor photos stored in decedent's Apple account, even though the decedent did not specifically designate a "Digital Executor." (Matter of Estate of Swezey, 2019 NYLJ LEXIS 135 (Surr. Ct., New York County, 2019). The Court stated that in this age of electronics, a decedent's assets must include digital assets, to which the Executor is entitled to have access. The court also distinguished between assets (decedent's photos, etc.) and electronic communications, which would require the account holder's consent.

On March 11, 2019, the New York Westchester County Surrogate's Court denied access to the parents of a 24-year old decedent who died in his sleep, intestate, to the content of their son's digital assets, as they failed to show that such access was necessary for the administration of his estate or otherwise. The Court did, however, find that the parents were entitled to access the non-content information (calendar, contacts, etc.). (Matter of Coleman, 96 N.Y.S.3d 515 (2019)). A similar holding was issued in Estate of Murray on September 30, 2019 by the Surrogate's Court of Suffolk County.

The pandemic sparked a necessity for remote execution, witnessing and notarization of documents. Governors all over the country issued executive orders authorizing same, catapulting into the online world the execution of wills and other estate planning documents, which was always a very formalized, traditional process. New York and most other states continued to extend such executive orders through the summer of 2021, allowing individuals to execute their wills, trusts and other documents remotely and to have same remotely notarized or witnessed, as the case may be. In light of the ongoing pandemic, Governor Hochul signed a new law on December 22, 2021 permanently legalizing remote notarization in New York effective June 20, 2022. Forty states in total allow remote online notarization. It remains to be determined whether remote witnessing will be reinstated, either on a temporary or permanent basis, in light of the Omicron surge.

B. State Legislation

Currently, all 50 states have enacted legislation based on RUFADAA, or its predecessor, UFADAA. 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.

C. Drafting for Digital Assets

Attached hereto as Exhibit "D" 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.

D. Cryptocurrency

Cryptocurrency (i.e., digital currency) is becoming more widely used by both individuals and businesses. The market capitalization of cryptocurrency as of December 2021 surged above $2 trillion, as Bitcoin jumped more than 1000% to over $50,000 as of the middle of the month from $3,850 in March 2020 (having jumped even higher to over $60,000 in October 2021).

A detailed explanation is beyond the scope of this outline, but in general terms, while there are several benefits to cryptocurrency, such as security and privacy, there are also significant risks. Such risks include the highly volatile fluctuation in value, the lack of centralized regulation and the limited ability for the owner of cryptocurrency to access his account if he loses the passcode. From a fiduciary perspective, there are significant concerns regarding the prudency of investing in cryptocurrency versus more traditional investments. While there is the potential for greater returns, there is also a significant risk of loss due to the volatile nature of cryptocurrency. Bitcoin, arguably the most well-known of the cryptocurrencies, has seen huge shifts in its value. For example, on January 1, 2017 one Bitcoin was worth $1,000. The value increased to $20,000 by the end of 2017, only to drop to approximately $3,800 in 2019. As mentioned above, the value then skyrocketed to over $60,000 in the end of 2021.

Fiduciaries should not retain or invest in cryptocurrency without appropriate authorization from either beneficiaries, testators, settlors, or courts. It is very important to note in that regard that if cryptocurrency is being held in a "wallet," the fiduciary will not be able to gain access without the complicated passcode. The passcode, however, theoretically makes trust funding, for example, much easier in that, conceptually, all that would be required in order to fund a trust with cryptocurrency would be for the settlor to provide the trustee with the passcode. Planners must be very careful, however, so as not to run afoul of the estate inclusion rules – for example, if the settlor is not to retain any control over the cryptocurrency (i.e., to avoid inclusion by virtue of IRC Section 2038), he must not continue to have access to the passcode.

From a tax perspective, it is important to note that the Service considers cryptocurrency property, rather than currency, applying capital gains rules to its taxation (IRS Notice 2014-21). One consequence of this is the impact such tax status has on estate planning. For example, if a donor makes a gift of cryptocurrency, the donee receives it subject to the donor's basis, unlike a

cash gift. On the other hand, if a donor makes a charitable contribution of appreciated cryptocurrency, he is entitled to receive a charitable deduction and avoid paying capital gains taxes on the appreciation.

One of the most appealing aspects of cryptocurrency is its secretive nature. However, the Service recently began paying more attention and monitoring cryptocurrency, due to its increase in popularity. In 2018, the Service ordered Coinbase, a popular cryptocurrency exchange, to release transaction information on its users.

On October 9, 2019 the Service released Revenue Ruling 2019-24 and a Q&A document, which provide information on how the agency expects income from cryptocurrency to be reported. Taxpayers are required to track their cryptocurrency transactions and to determine how much tax is owed on sales. The guidance applies standard tax principles, including taxing assets held less than a year at short-term capital gains rates.

The IRS has added a new line to a draft version of Schedule 1 of Form 1040 for 2019 that requires the taxpayer to check "yes" or "no" to a questions that asks, "At any time during 2019, did you receive, sell, send, exchange, or otherwise acquire any financial interest in any virtual currency?" The purpose of this question seems to be to give the Service a better idea of the prevalence of cryptocurrency transactions. Note, however, that it appears that cryptocurrency transactions are not "reportable transactions" that have to be accounted for in FBAR reporting. The Service has not yet issued formal guidance on this matter.

Many charities have begun taking advantage of the transparency offered by donations of cryptocurrency. The blockchain technology utilized for cryptocurrency transactions allows for secure payments without the need for a bank or intermediary. However, the lack of regulation in this area can cause significant problems, particularly for charities who are not technologically sophisticated enough to process and/or understand these types of transactions.

One major issue arises due to the volatility of cryptocurrency values. Some experts recommend that charities receiving donations of cryptocurrency should immediately convert to cash in order to maintain the donation's value. Failure to do so could have significant financial and tax consequences for both donors and charities. This is not feasible unless charities have the proper infrastructure in place.

Another concern is whether or not a qualified appraisal is required for donations in excess of $5,000. If so, identifying a qualified appraiser may prove difficult, as this is still a fairly new field.

Privacy concerns pose another major problem. One of the most attractive features of blockchain technology is the immutability of its ledger, i.e., the data contained therein cannot be changed. That may be difficult to reconcile with donors who prefer anonymity.

E. Electronic Wills

A new uniform act authorizing electronic wills (E-Wills Act) was approved by the Uniform Law Commission at its summer 2019 meeting. Courts have started validating electronic

wills that do not meet traditional execution requirements, in order to honor the intent of the testator. There are currently three types of electronic wills: 1) offline wills, which are stored on a local hard drive; 2) online wills, which are created or stored using a neutral third-party provider; and 3) qualified custodian electronic wills, which are created, executed and stored by companies subject to state regulations. Offline and online wills are the modern equivalent of holographic wills, in that they are typically "handwritten" and merely signed by the testator, whereas qualified custodians sometimes provide remote witnessing and notarization.

The E-Wills Act retains the witness requirement but allows each state to determine whether the witnesses must be physically present or whether they can be "present" remotely, by video and audio means. The Act also requires that a self-proving affidavit be executed simultaneously with an electronic will. Revocation may be accomplished either by physical act or by the execution of a subsequent will or codicil.

F. Remote Execution, Witnessing and Notarization of Documents

The pandemic sparked a necessity for remote execution, witnessing and notarization of documents. Governors all over the country issued executive orders authorizing same, catapulting into the online world the execution of wills and other estate planning documents, which was always a very formalized, traditional process. New York and most other states continued to extend such executive orders throughout the pandemic, allowing individuals to execute their wills, trusts and other documents remotely and to have same remotely notarized or witnessed, as the case may be. Former Governor Cuomo ended the COVID 19 State Disaster Emergency after June 24, 2021. As such, the executive order permitting remote witnessing and notarization of documents ordered under the state of emergency expired. In light of the ongoing pandemic, Governor Hochul signed a new law on December 22, 2021 permanently legalizing remote notarization in New York effective June 20, 2022. Forty states in total allow remote online notarization. It remains to be determined whether remote witnessing will be reinstated, either on a temporary or permanent basis, in light of the Omicron surge.

Matter of Ryan, 2021 NY Slip Op 21010 (N.Y. Sur. Ct. Broome County Jan. 25, 2021), is the first reported case in New York in which a will that was remotely executed was admitted to probate. Prior to the will's execution, the draftsman had discussed the terms of the will with the testator and the execution otherwise satisfied all of the requirements of New York's will execution statute and former Governor Cuomo's Executive Order regarding remote execution, interestingly, without the scrivener even knowing about said Order.

## VII. 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.

## VIII. SIGNIFICANT FLORIDA LEGISLATION AND CASE LAW DEVELOPMENTS

In recent years, the Florida Legislature has enacted significant new legislation regarding Florida taxes, estates and trusts. The following are the highlights of some aspects of this new legislation, as well as certain case law developments:

### A. Creation of Dynasty Trusts

The length of time that a trust can exist before being terminated by law has been extended in Florida to a term of 360 years. This changes the prior rule against perpetuities, which normally forced a trust to terminate after approximately 90 years.

Accordingly, it is now possible to establish "dynasty" trusts in Florida. These trusts, when funded with not more than an amount equal to the GST tax exemption available to an individual, can continue for up to 360 years without the payment of any GST tax.

### B. Intestate Shares

In Estate of Maher v. Iglikova, 2014 WL 1386660 (Fla. 3d DCA Apr. 9, 2014) the Court held that for purposes of the Florida pretermitted child statute, a child is not deemed to be born after the making of a will even though the adjudication of the testator's paternity occurred after the execution of the will, reasoning that such adjudication is merely an acknowledgment of an existing relationship.

In Aldrich v. Basile, 136 So.3d 530 (Fla. 2014) the Florida Supreme Court held that assets acquired by the decedent after the execution of a will, which did not contain a residuary disposition, passed pursuant to Florida's intestacy statute and not to the named beneficiaries of the specific bequests in the will.

In Astrue v. Capato, 132 S.Ct. 2021 (2012), the United States Supreme Court held that twins conceived through in vitro fertilization after their father's death in Florida did not qualify for Social Security Survivors' benefits as Florida intestacy law permits children who are born posthumously to inherit only if conceived during the decedent's lifetime.

In 2011 Florida enacted legislation, Fla. Stat. Section 732.102, effective October 1, 2011, changing the intestate share of a surviving spouse to the entire intestate estate of the deceased spouse if all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. If the decedent has one or more surviving descendants who are not descendants of the surviving spouse, the intestate share of the surviving spouse is one-half of the decedent's intestate estate. If there are one or more surviving descendants of the decedent, all of whom are also descendants of the surviving spouse, and if the

surviving spouse also has one or more descendants who are not descendants of the decedent, the surviving spouse receives one-half of the decedent's intestate estate.

C. Separate Writings

Effective January 1, 2002, even though a testator may still refer to a separate writing in his will for purposes of disposing of tangible personal property, a testator may not dispose of property used in a trade or business. If there are conflicts, the provisions of the most recent writing shall control.

D. UTMA Transfers

In 2005, the Florida legislature enacted a statute that allows a custodian under the Uniform Transfers to Minors Act to transfer custodial assets to a trustee of a Code Section 2503(c) trust.

E. Uniform Disclaimer of Property Interests Act

In 2005, Florida enacted The Florida Uniform Disclaimer of Property Interests Act. The Act contains broad powers to disclaim, including the right to disclaim a survivorship interest in jointly held property, the right to disclaim property held as a tenancy by the entirety, the right to disclaim a power of appointment, the right to disclaim by an appointee, object or taker in default of the exercise of a power of appointment, and the right of a fiduciary to disclaim a power held in a fiduciary capacity. In addition, the Act authorizes a fiduciary to disclaim any interest in or power over property, without court approval, if and to the extent that the instrument creating the fiduciary relationship expressly gives the fiduciary the right to do so. In the absence of that grant of authority in the governing instrument, a fiduciary can disclaim an interest in or power over property with court approval.

F. Anatomical Gift Law

Florida adopted revisions to its anatomical gift law (Fla. Statutes Sections 765.511, et seq.), effective July 1, 2009, to incorporate certain provisions from the Revised Uniform Anatomical Gift Act of 2006 (Fla. Sess. Law Serv. Ch. 2009-218). The Act limits the authorized donee of an anatomical gift to (1) any procurement organization (which is defined as an entity that is designated as an organ procurement organization by the Secretary of the United States Department of Health and Human Services and that engages in the retrieval, screening, testing, processing, storage or distribution of human organs), (2) any accredited medical or dental school, college or university for education, research, therapy or transplantation, or (3) any individual specified by name for therapy or transplantation needed by such individual.

G. Fiduciary Responsibility for Life Insurance

In 2009 Florida enacted legislation (Title XXXIII, Section 518.112) permitting a trustee of a life insurance trust, after written notice to the beneficiaries, to delegate investment management of life insurance to others, including the grantor of the trust or the trust beneficiary, thereby eliminating trustee responsibility for the investment decisions or actions or omissions of the selected agent, if all the requirements of the legislation are satisfied.

In 2010 Florida enacted legislation (Title XLII, Section 736.0902), effective July 1, 2010, under which a trustee of a trust will have no duty to ensure that the trust has an insurable interest in a life insurance policy if:

(1) The trust owns insurance on the life of a person who is the insured, a proposed insured, or such person's spouse, and any such person has furnished the trustee with the funds used to acquire or pay premiums on the policy insuring the life of any such person;

(2) The trust agreement does not opt out of the statute's application;

(3) The insurance policy is not purchased from a trustee affiliate, and neither the trustee nor any trustee affiliate receives commissions regarding the policy's purchase unless the trustee's investment duties were delegated to another person;

(4) The trustee did not know that the beneficiaries lacked an insurable interest when the policy was purchased; and

(5) The trustee did not have knowledge of a stranger-owned life insurance arrangement.

The statute also provides that a trustee has no duty to determine whether the life insurance policy is a proper trust investment, to diversify with respect to any such policy, to investigate the financial strength of the issuing company, to decide whether to exercise any policy options, or to examine the financial and physical health of the insured, if the statements in clauses (1), (2) and (3) in the preceding sentence apply, and if either:

(a) The trust agreement affirmatively opts into the application of the statute; or

(b) The trustee gives notice to the trust beneficiaries of the trustee's intention to opt into the statute and no beneficiary objects within 30 days of receipt of that notice or any written objections are withdrawn.

H. Creditors' Claims

In Miller v. Kresser, 34 So.3d 172 (Fla. 4th DCA, May 5, 2010), the Court held that a creditor cannot invalidate the spendthrift provision of a trust, even where the trustee had completely turned over management of the trust to the beneficiary, provided that the language of the trust meets certain statutory requirements.

In Olmstead v. Fed. Trade Commission, No. SC08-1009 (June 24, 2010), the Florida Supreme Court held that a Court may require an owner of a single member Florida limited liability company to surrender his ownership interest in the company to satisfy an outstanding judgment against the member.

In 2011 Florida enacted legislation which amended Florida Statutes Section 608.433 to clarify the decision in Olmstead by expressly providing that a charging order is the "sole and exclusive remedy" against limited liability company membership interests, except that a charging order is not the sole and exclusive remedy in the context of a single member limited liability company if the judgment creditor can establish that distributions under a charging order will not satisfy the judgment within a reasonable amount of time.

In 2011 Florida enacted legislation to amend Florida Statutes Section 222.21(c) to provide that inherited IRAs are exempt from the claims of creditors of the owner, beneficiary or participant of the inherited IRA. The statute applies retroactively to all inherited IRA accounts regardless of the date on which the account was created.

In Staum v. Rubano, 2013 WL 4081055 (Fla. 4th DCA, August 14, 2013), where a nursing home that was owed payment from a decedent filed a complaint against the personal representative of the decedent's estate in New York before the estate was opened, the nursing home subsequently filed a claim against the New York domiciliary estate after the estate was opened, and the nursing home filed a claim against the decedent's ancillary estate in Florida and petitioned for an accounting of the ancillary estate and for the transfer of the ancillary estate's assets to the New York domiciliary estate, the Court held that the claim against the ancillary estate was time barred, but the Florida courts should not determine whether or not the claim was time barred against the domiciliary estate in New York, and the ancillary estate's assets should be transferred to the New York domiciliary estate for the New York courts to adjudicate such claim.

In Golden v. Jones, 2013 WL 5810360 (Fla. 4th DCA 2013), the Court held that if a known or reasonably ascertainable creditor of a decedent is never served with a copy of the notice to creditors, the statute of limitations set forth in FS Section 733.201(1) never begins to run, and the creditor's claim is timely if it is filed within two years of the decedent's death.

In Souder v. Malone, 143 So. 3d 486 (Fla. 5th DCA 2014), the court held that a creditor's claims that were filed after the expiration of the three-month creditors' claims period were not timely filed, even though the creditor was a reasonably ascertainable creditor of the decedent but did not receive the required notice to creditors.

Florida amended its statutes (Fla. Stat. Section 733.808) to provide that general language in a will or a trust directing the fiduciary to pay the decedent's debts does not undo the creditor-exempt status of death benefits payable to a trust unless such language expressly refers to this statute and directs that it shall not apply.

## I. Homestead Law

The Florida Constitution and related statutes restrict the ability of a homestead owner to devise the homestead if survived by a spouse or minor children and also impose certain restrictions on the lifetime transfer of such property. A series of Florida statutes, effective on October 1, 2010, permit greater flexibility with respect to the transfer of such property.

In addition, as to the estates of decedents dying after October 1, 2010, if homestead property is invalidly devised, FS 732.401(2) gives the surviving spouse an election to take a one-

half interest as a tenant in common in the devised property, instead of a life estate in such property, as would have applied prior to such statute.

In Habeeb v. Linder, 3D 10-1532 (FL. 3d DCA 2011), the Court held that a husband and wife had waived their post-death homestead rights by signing a joint warranty deed transferring the homestead property to the wife. However, the Court subsequently withdrew its decision, leaving open the possibility of future litigation regarding this issue.

In Grisolia v. Pfeffer, 2011 WL 5864806 (Fla. 3d DCA 2011), where the decedent and his wife were registered aliens and the decedent had purchased an apartment for his family in Florida, the Court held that, despite the decedent's immigration status at the time of his death, his intention to make the condominium his family's permanent residence caused the condominium to be homestead property, which could not be subject to a forced sale to pay the decedent's debts.

J. Attorney-Client Privilege

In 2011 Florida enacted legislation, Fla. Stat. Section 90.5021, providing that the attorney-client privilege applies between a fiduciary and an attorney employed by the fiduciary. For this purpose, the term "fiduciary" includes without limitation personal representatives, trustees, guardians and attorneys-in-fact. The legislation requires a personal representative in a probate proceeding to include in the Notice of Administration a statement that the attorney-client privilege applies with respect to the personal representative and any attorney employed by the personal representative, and requires a trustee to include in the initial notice to qualified beneficiaries a statement that the attorney-client privilege applies with respect to the trustee and any attorney employed by the trustee.

K. Privity

In Hodge v. Cichon, Fla. Ct. App., No. 5D10-1852 (February 6, 2012), a case in which beneficiaries of a decedent's estate sued the attorneys who prepared the decedent's estate planning documents for legal malpractice, the Court held that the issue of whether or not the estate's beneficiaries had standing to sue the attorneys raised an issue of material fact, as there may have been a conflict among the parties as to the identity of the estate's beneficiaries.

L. Reformation and Construction of Wills

In 2011 Florida enacted legislation, Fla. Stat. Sections 733.615, 733.616 and 733.1061, effective July 1, 2011, permitting a Court to reform a will, even if the will is not ambiguous, to conform its terms to the testator's intent if it is proven by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake. In addition, the legislation permits a Court to modify a will, with or without retroactive effect, to accomplish a testator's tax objectives, if the modification is not contrary to the testator's probable intent.

In Basil v. Aldrich, 2011 WL 3696309 (Fla. 1st DCA 2011), where the decedent's will did not have a residuary clause the Court held that property acquired by the decedent after the

execution of the will should pass subject to Florida's intestate succession rules, rather than to the beneficiary of specific bequests named in the will.

M. Powers of Attorney

Florida amended its statute (FS Sections 709.2101-709.2402) regarding powers of attorney, effective on October 1, 2011, to provide that a power of attorney must be signed by the principal and by two subscribing witnesses and must be acknowledged by the principal before a notary public, effective for powers of attorney executed after September 30, 2011; that a power of attorney executed in another state which does not comply with such execution requirements is nonetheless valid if it complied with the execution requirements of the state in which it was executed at the time it was executed; that a third party who is asked to accept such a power of attorney may in good faith request, and rely upon without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney; and that a power of attorney signed after September 30, 2011 cannot be contingent upon some future event, such as the principal's incapacity. A power of attorney that is executed prior to October 1, 2011 that is contingent on a future event is only exercisable upon delivery of an affidavit of a physician that must state that the physician is licensed to practice medicine under Florida law, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the principal lacks the capacity to manage his or her property. The statute does not create a "statutory" form of power of attorney. The statute also provides that a power of attorney containing only a blanket grant of authority, or a power of attorney that contains incorporations by reference, executed after the amendment to the statute, are generally ineffective.

N. Personal Representatives, Administrators, Trustees and Guardians

In Bookman v. Davidson, 136 So.3d 1276 (Fla. 1st DCA 2014) the Court held that a successor personal representative had standing to sue the prior personal representative's attorney for malpractice in connection with the administration of the decedent' s estate, since under Florida law the lawyer's client was the prior personal representative, rather than the estate itself or the estate's beneficiaries, and the powers and duties granted to the original personal representative flow to the successor.

In Leyva v. Daniels, 530 Fed. Appx. 933 (11th Cir. 2013), the Court held that for purposes of federal diversity jurisdiction, the personal representative of a decedent's estate is deemed to be a citizen only of the state of the decedent, regardless of the state in which the personal representative actually resides.

In Roughton v. R.J. Reynolds Tobacco Co., 129 So. 3d 1145 (Fla. 1st DCA 2013), the Court held that the only party that has standing to bring a wrongful death action in Florida is the personal representative of the decedent's estate, even with respect to acts that occurred prior to the personal representative's appointment.

In Hill v. Davis, 2011 WL 3847252 (Fla. 2011), the Florida Supreme Court held that the statutory time limit for objecting to the qualifications of a personal representative of a decedent's estate bars an untimely objection, even when the personal representative was never

qualified to serve as such person failed to meet the qualifications required for a nonresident, absent fraud, misrepresentation or misconduct.

In Naftel v. Pappas, 2011 WL 3678004 (Fla. 1st DCA 2011), where the Order appointing a personal representative of the decedent's estate was entered before the issuance of Letters of Administration, the Court held that the time within which an objectant could appeal such appointment commenced on the date of such Order, rather than on the later date of the issuance of the Letters of Administration.

In Long v. Willis, 2011 WL 3587411 (Fla. 2d, DCA 2011), where an unmarried decedent died intestate survived by three minor children, and where Florida law provides that the Administrator of the intestate estate, in the absence of a spouse, is to be selected by a majority in interest of the decedent's heirs, the votes of minor heirs are cast not by their surviving parent (i.e., the decedent's former wife) or natural guardian, but instead by the guardian of the property of such minor heirs, and that a guardian of the property of the decedent's minor children should be appointed so such children's vote, by such guardian, could be counted.

O. Standing to Contest Will or Challenge Trust Distributions

In Agee v. Brown, 2011 WL 5554833 (Fla. 4th DCA 2011), the Court held that an attorney who prepared the decedent’s prior will is an “interested person” under Fla. Stat. Section 733.109(1) who can seek to revoke the decedent’s last will, as such attorney was a beneficiary under the decedent’s prior will, even though the bequest to such attorney under the decedent’s prior will might be found to be improper and void.

In Siegel v. JP Morgan Chase Bank, 71 So. 3d 935 (Fla. 4th DCA 2011), the Court held that beneficiaries of the decedent’s inter vivos trust had standing to challenge distributions that the trustee of such trust made before the grantor’s death.

In Gordon v. Kleinman, 2013 WL 4081027 (Fla. 4th DCA, August 14, 2013), the Court held that the petitioner, who was named as a beneficiary in the decedent’s 1983 will but not as a beneficiary in the decedent’s subsequently executed wills, had standing to challenge the probate of the decedent’s 2009 will, even though the petitioner was not named as a beneficiary in the decedent’s most recent will executed prior to 2009, as the petitioner sufficiently alleged that all of the wills executed after the 1983 will (in which the petitioner was named as a beneficiary) were invalid.

P. Waiver of Spousal Rights

In Steffens v. Evans, 70 So. 3d 758 (Fla. 4th DCA 2011), where the decedent had executed a will naming his wife as a beneficiary but thereafter entered into a post-nuptial agreement waiving all rights as to certain property of each other, the Court held that the post-nuptial agreement waived any benefits that would have passed to the decedent’s wife under his will, as the language of the agreement tracked the language of Fla. Stat. Section 732.702(1), regarding a waiver of rights of a surviving spouse, even though the agreement also provided that either party could transfer to the other party any property or interest, as the Court held that such provision referred to transfers of property after the execution of the agreement and would not preserve the rights of the decedent’s wife under the previously executed will.

Q. Ademption of Bequests

In Melican v. Parker, 289 Ga. 420 (2011), where the decedent had devised his Florida condominium to the plaintiff but executed a contract to sell the condominium before he died and the closing of such sale occurred after the decedent's death, the Court held that under Florida's nonademption statute, Fla. Stat. Section 732.606(2)(a), which provides that a "specific devisee has the right to the remaining specifically devised property and …[a]ny balance of the purchase price owing from a purchaser to a testator at death because of the sale of the property", the plaintiff was entitled to the sale proceeds as a specific devisee of the condominium.

R. Former Spouses

Pursuant to Fla. Stat. Sections 732.507(2) and 736.1105, designations of a former spouse as the beneficiary of a non-probate asset that would otherwise be transferred or paid to the spouse pursuant to such designation upon the death of a decedent are void. The statute applies to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

In Passamondi v. Passamondi**,** 130 So. 3d 736 (Fla. 2d DCA 2014). where one of the parties to a divorce proceeding died before the completion of that proceeding, but after the entry of a final judgment in such proceeding dissolving the marriage, the court held that the Florida matrimonial court, rather than the Florida probate court, has jurisdiction over the remaining equitable distribution issues relating to the divorce.

S. Gifts and Bequests to Clients' Attorneys

In 2013 Florida enacted a statute (Section 732.806) that voids any part of a written instrument, including a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract, that makes a gift to a lawyer or a person related to the lawyer, if the lawyer prepared or supervised the execution of the instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

T. Disposition of Decedents' Wills

Pursuant to Fla. Stat. Section 732.901, a custodian of a will must deposit it with the clerk of the court within 10 days after receiving information that the testator died.

U. Florida Trusts

Pursuant to Fla. Stat. Section 732.0202, any beneficiary of a trust is subject to the jurisdiction of the Florida courts to the extent of the beneficiary's interest in the trust; and any trustee, trust beneficiary or other person, whether or not a citizen or resident of Florida who personally or through an agent does any of the following acts related to a trust, submits to the jurisdiction of the Florida courts involving that trust:

- Accepts trusteeship of a trust with its principal place of administration in Florida at the time of acceptance.

- Moves the principal place of administration of a trust to Florida.

- Serves as trustee of a trust: (i) created by a settlor who was a resident of Florida at the time of creation; or (ii) having its principal place of administration in Florida.

- Accepts a delegation of powers/duties from the trustee of a trust with its principal place of administration in Florida.

- Commits a breach of trust in Florida or with respect to a trust with its principal place of administration in Florida at the time of the breach.

- Accepts compensation from a trust with its principal place of administration in Florida.

- Performs any act or service for a trust with its principal place of administration in Florida.

- Accepts a distribution from a trust with its principal place of administration in Florida with respect to any matter involving the distribution.

Section 736.0813 of the Florida Statutes was amended to clarify that a trustee who provides accountings more frequently than annually, such as on a monthly or quarterly basis, need not provide a second accounting covering the same period at the end of the annual period.

Sections 717.112 and 717.101 (24) of the Florida Statutes have been revised, and Section 717.1125 of the Florida Statutes has been enacted, to shorten the time period that a trustee must hold unclaimed property before seeking to deliver such property to the state, from a period of five years to a period of two years.

In Peck v. Peck, 2014 WL 768827 (Fla. 2d DCA 2014), the Court held that the Florida courts have the authority to modify or terminate an irrevocable trust on the consent of the settlor and the beneficiaries, even if doing so would defeat the purpose of the trust.

Florida has updated its decanting statute to provide that trustees may, with certain limitations, decant a trust as long as they possess the power to make distributions, even if such power is not an absolute power of invasion (as was previously required), i.e., if they are limited by an ascertainable standard.

Florida has amended its directed trust statute (Fla. Stat. Section 736.0703(9)) to provide that where the terms of a trust appoint more than one trustee but confer on one or more of the trustees, to the exclusion of the other trustees, the power to direct or prevent specified actions of the trustees, the excluded trustees shall not be liable for any consequences resulting from compliance with the direction, except where the excluded trustees engage in willful misconduct.

Florida amended its trust code (Fla. Stat. Section 736.0207) to provide that a party contesting the validity or revocation of all or part of a trust has the burden of proof in such proceeding, to make the trust code in this regard consistent with the Florida probate code, which specifies that the party contesting the probate of a will has the burden of proof in that proceeding.

Although not a Florida case, in In re Stanley A. Seneker Trust, Nos. 317003, 317096, 2015 WL 847129 (Mich. Ct. App., Feb. 26, 2015), where a settlor had created a revocable trust while a resident of Michigan and then moved to Florida where he died, and where the trustee was a Florida resident, and Florida was the principal place of administration of the trust under both Florida and Michigan law, the Michigan court held that it lacked subject matter jurisdiction in a proceeding to remove the trustee and appoint a successor trustee, since the trustee had not changed the place of administration of the trust from Florida to Michigan.

V. In Terrorem Clauses

In Dinkins v. Dinkins, 2013 WL 3834371 (Fla. 5th DCA, July 26, 2013), the Court held that a trust provision which would give the decedent's surviving spouse $5,000,000, outright and free of trust, if such spouse validly disclaims all of her interest in a QTIP trust created under such trust agreement and also validly waives her right to take an elective share in the decedent's estate, does not constitute an invalid in terrorem clause, as such provision only provides an optional alternative devise to the beneficiary.

W. Undue Influence

Under Florida law, a presumption of undue influence arises with respect to a transaction if the contestant can demonstrate that a person in a confidential or fiduciary relationship actively procured the transaction from which he or she substantially benefits, and that presumption shifts the burden of proof from the contestant to the proponent of the transaction. Florida amended its statutes (Fla. Stat. Section 733.107) to clarify that this policy is not limited to will contests but applies to other transactions as well, such as trust contests and challenges to inter vivos gifts.

In Estate of Kester v. Rocco, 117 So. 3d 1196 (Fla. 1st DCA 2013), where one of the decedent's three daughters assisted the decedent during her life in changing financial accounts from the decedent's name alone to "pay on death" accounts or joint accounts with right of survivorship, the Court held that there was no demonstration that the child who assisted her mother was active in procuring such changes, noting that the mere evidence that a parent and an adult child had a close relationship and that the younger person often assisted the parent with tasks is not enough to show undue influence by the child.

X. Exercise of Powers of Appointment

In Cessac v. Stevens, 2013 WL 6097315 (Fla. 1st DCA 2013), the Court held that a residuary disposition in a will that did not make specific reference to the testator's powers of appointment under certain trusts, as required by such trusts, did not operate to exercise such powers of appointment.

Y. Foreign Wills

In Lee v. Estate of Payne, 2013 WL 5225200 (Fla. 2d DCA 2013), the Court held that a foreign will that devises Florida real property may be admitted to probate in Florida if the will is valid in the state in which it was executed, unless it is a holographic will that was not signed and witnessed in accordance with FS Section 732.502.

Z. Doctrine of Renunciation

In Fintak v. Fintak, 120 So. 3rd 177 (Fla. 2d DCA 2013), the Court held that the common law rule, that one who contests a will or trust must renounce his or her beneficial interest in that document, is not applicable where the settlor of a trust seeks to invalidate such trust on the grounds of the lack of necessary capacity to create the trust and undue influence, as the settlor was legally entitled to receive the benefits of the assets in the trust even if the trust had never existed.

AA. Attorneys' Fees

On May 15, 2015, Florida enacted legislation (Fla. Stat. Section 733.106(4)) that provides a broad, non-exclusive list of factors that the courts may consider in directing that attorneys' fees and costs may be assessed against a particular beneficiary's share of an estate or trust.

BB. Comity Principles

In Perelman v. Estate of Perelman, 124 So. 3d 983 (Fla. 4th DCA 2013), where the decedent's son had commenced a proceeding to probate a 2010 will of the decedent in Pennsylvania, and the decedent's husband thereafter commenced a proceeding to probate a 1991 will of the decedent in Florida, contending that the decedent was domiciled in Florida and that her 2010 will was invalid, the Florida court stayed the Florida proceeding, holding that the Florida court should adhere to the principles of priority and comity when a court of another state was the first to exercise jurisdiction over a matter.

CC. Disposition of Decedent's Remains

In Wilson v. Wilson, 2014 WL 2101226 (Fla. 4th DCA May 21, 2014) the Court held that the decedent's ashes were not property of the decedent's estate and, therefore, were not subject to partition.

DD. Anti-Lapse Statute

Florida amended its anti-lapse statute in the Florida trust code to provide that an outright devise to a deceased beneficiary in a revocable trust or a testamentary trust lapses unless the beneficiary was a grandparent or the lineal descendant of a grandparent of the trust's settlor, unless the trust otherwise provides.

EE. Family Trust Companies

Florida enacted a comprehensive Florida Family Trust Company Act, effective October 1, 2015 (Ch. 622, Fla. Stat.), to establish requirements for licensing a family trust company, to provide regulation of those persons who provide fiduciary services as a family trust company to family members of no more than two families and their related interests, and to establish the degree of regulatory oversight of family trust companies required by the Florida Office of Financial Regulation.

FF. Electronic Wills

Florida enacted legislation to authorize electronic wills effective January 1, 2020 (2019 Fla. H.B. 409).

GG. Precious Metals

Florida enacted legislation effective January 1, 2020 that treats "precious metals in any tangible form, such as bullion or coins…[as] tangible personal property" (Section 731.1065 of the Florida Probate Code). Accordingly, unless such items are specifically addressed in a decedent's will or revocable trust, the metals would pass (generally, outright) to the beneficiary of the decedent's tangible personal property, rather than pursuant to the residuary/remainder disposition.

HH. Grantor Trust Reimbursement

Effective July 1, 2020, Florida allows, but does not require, an independent trustee of a grantor trust to reimburse the grantor for all or part of the income tax paid by the grantor and attributable to trust income (Fla. Stat. Section 736.08145).

II. Small Estates

Effective July 1, 2020, Florida has enacted and amended a myriad of statutes intended to ease the burden of administering small estates (e.g., Fla. Stat. Sections 655.059, 753.303 and 735.304).

JJ. Attorney Serving as Fiduciary

Effective October 1, 2020, an attorney, or related person, is prohibited from receiving compensation for serving as fiduciary if the attorney prepared or supervised the execution of the will or trust, unless the attorney makes certain disclosures to the client in writing before the will or trust is executed (Fla. Stat. Sections 733.617 and 736.0708).

KK. Conflict of Interest – Personal Representative

Effective July 1, 2020, new language in the Florida statutes extends conflicts of interest for a personal representative to a sale or encumbrance to a corporation, trust, or other entity in which the representative (or his agent) has a substantial interest (Fla. Stat. Section 733.610).

## IX. SIGNIFICANT NEW JERSEY LEGISLATION, REGULATIONS AND CASE LAW DEVELOPMENTS

A. Same-Sex Marriage and Civil Unions

Same-sex marriages became legal in New Jersey on October 21, 2013.

A Bill allowing civil unions was signed into law on December 21, 2006.

To enter into a civil union, the persons must not be a party to another civil union, domestic partnership or marriage in New Jersey, must be of the same sex, and must be at least 18 years of age, unless they obtained the consent of their parents or guardian or, if under the age of 16, they obtain a consent of a family court judge. Since New Jersey does not have a residency requirement for marriage, a nonresident same-sex couple can enter into a civil union in New Jersey.

This legislation provides that no new domestic partnerships will be registered in New Jersey, except for same-sex and opposite-sex couples in which both partners are at least 62 years of age. Currently registered domestic partnerships will continue to be recognized with at least the rights, benefits and obligations provided under the Domestic Partnership Act.

Under the new legislation, the inheritance treatment, including intestacy rights, of a surviving spouse in a civil union are now equal to those of a similarly situated married couple under New Jersey law. In addition, for parties to a civil union, as in a marriage, the default form of joint property ownership is tenancy by the entirety. Moreover, a surviving partner of a civil union will be considered as a Class A beneficiary for New Jersey inheritance tax purposes and, therefore, can inherit from his or her partner free from New Jersey inheritance taxes.

NJSA Section 37:2-38 and NJSA Section 37:2-32 have been amended, effective June 27, 2013, to remove provisions that invalidate a pre-civil union agreement if it is unconscionable at that time its enforcement is sought. As a result, whether or not such an agreement is unconscionable is to be determined at the time of its execution.

In Jiwungkul v. Director, Divison of Taxation, N.J. Super Ct. App. Div., No. A-4089-1572 (2016), a New Jersey taxpayer appealed a ruling that he is not entitled to an estate tax deduction because his same-sex partner died six days before the couple's wedding day. The couple had registered as same-sex domestic partners but had refused to enter a civil union because they believed it to be inferior to marriage. Under New Jersey law, same-sex couples registered as domestic partners are treated as a couple for purposes of inheritance taxes but not for estate tax. The appeal was dismissed.

B. Uniform Prudent Management of Institutional Funds Act

Effective on June 10, 2009, New Jersey adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") (NJ P.L. 2009, c. 64), replacing the 1975 Uniform Management of Institutional Funds Act ("UMIFA"). The UMIFA contained a general obligation to invest prudently using ordinary business care, and the UPMIFA updates that prudence standard to adopt more modern investment practices and provide greater guidance to boards.

The UPMIFA also contains provisions permitting the release and modification of donor restrictions on funds held by a charitable institution. Under both the UPMIFA and the UMIFA, a donor can release a restriction. Under the UPMIFA, if a board cannot obtain the donor's consent (e.g., the donor is deceased), an institution can petition a court to modify or release a restriction that has become impracticable, wasteful, impairs the management or investment of the fund, or, if because of circumstances unanticipated by the donor, the modification will further the

purposes of the fund. The UPMIFA also applies cy pres and allows a change in a restriction if consistent with the charitable purpose of the institution or charitable intent of the donor.

The UPMIFA adds a new provision which enables an institution to modify restrictions without judicial approval on funds that are under $250,000 and have been established for at least 20 years, provided that the institution must continue to use the property in a manner consistent with the donor's charitable purpose expressed in the gift instrument. In such case, the institution must give 60 days' notice of the proposed modification to the New Jersey Attorney General.

C. New Jersey Estate Tax and Inheritance Tax

On October 14, 2016, New Jersey repealed its estate tax. Under the legislation, the New Jersey Estate Tax exemption increased to $2,000,000 on January 1, 2017 and was 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. The New Jersey inheritance tax is still effective.

On April 30, 2019, the Court in Shedlock v. Dir., Div of Taxation (No. 008644-2018), held that a transfer made by a decedent more than three years prior to death, in which the decedent retained no interest, is not deemed as having been made in contemplation of death and is not subject to inheritance tax.

D. New Jersey Gross Income Tax

On May 9, 2013 legislation was enacted providing that a trustee's discretion to reimburse the trust's grantor for income taxes that the grantor pays with respect to the trust's income is not a right that would subject the trust's assets to the claims of the grantor's creditors.

On June 17, 2013 legislation (S. 2532) was enacted that bars the New Jersey Division of Taxation from considering a person's charitable contributions when determining whether or not the donor is a New Jersey resident for New Jersey gross income tax purposes.

On June 7, 2005 the New Jersey Division of Taxation issued a notice setting forth its policies for determining residency and changes in domicile for purposes of the New Jersey gross income tax. NJS §54A:1-2(m) defines a New Jersey resident as any individual domiciled in New Jersey, unless the individual does all of the following for entire year: maintains no permanent place of abode in New Jersey; maintains a permanent place of abode elsewhere; and spends no more than 30 days of the taxable year in New Jersey. The notice stated that domicile is regarded as "any place an individual regards as his or her permanent home" and that an individual's domicile continues until he or she moves with the intent to establish a permanent home elsewhere. The notice also stated that it is the taxpayer's burden to prove a change of domicile and that the Division of Taxation will no longer consider charitable contributions in determining an individual's domicile.

E. New Jersey Resident Trusts

In Residuary Trust Under the Will of Fred E. Kassner v. Division of Taxation, State of New Jersey, N.J. Super. Ct., App. Div., No. A-3636-12T1 (May 28, 2015), a New Jersey resident created a testamentary trust that had a New York resident as its trustee. The trust owned no

assets in New Jersey, but the trust's assets included S corporation stock, and the trust paid New Jersey income tax on the portion of the S corporations' income that was allocated to New Jersey. The state sought to impose its tax on all of the trusts' retained income, since in 2011 the state changed its prior position, which had been that it would not assert income tax on trust income if the trustees and the trust's assets were outside of New Jersey, by issuing new guidance stating that if a trust had any New Jersey income, all of its retained income would be subject to New Jersey taxes. The court, without addressing the constitutional issues, determined that it was not fair to retroactively apply the 2011 changed position to income tax returns of the trust for years prior to 2011, and held that the state could not do so.

F. Support Trusts and Alimony

In Tannen v. Tannen, 416 N.J. Super. 248 (App. Div. 2010), aff'd per curiam, 208 N.J. 409 (2011), a divorce proceeding in which the wife was a beneficiary of a discretionary support trust created by her parents for her benefit, of which the wife and her parents were the trustees, the Court held that the trust was not an asset of the wife for purposes of the alimony statute and, therefore, that trust income should not be imputed to the wife for purposes of determining the amount of alimony payable by the husband to the wife, even though the Restatement (Third) of Trusts provides that the wife has an enforceable interest in the trust's income, since no reported New Jersey appellate or New Jersey Supreme Court opinion has adopted such statement of the law as is contained the Restatement.

G. Prenuptial Agreements

NJSA Section 37:2-38 and NJSA Section 37:2-32 have been amended, effective June 27, 2013, to remove provisions that invalidate a prenuptial agreement if it is unconscionable at that time its enforcement is sought. As a result, whether or not such an agreement is unconscionable is to be determined at the time of its execution.

H. Digital Assets

On September 13, 2017 New Jersey enacted the Uniform Fiduciary Access to Digital Assets Act. The Act, which is effective on December 12, 2017, allows executors or administrators of deceased persons' estates, court-appointed guardians of incapacitated persons, agents appointed under powers of attorney, and trustees, to manage digital property, but restricts access to electronic communications unless the original user consented in a will, trust, power of attorney or other record.

I. Small Estate Administration

On January 19, 2016, New Jersey enacted amendments to statutes (N.J. Sections 3B:10-3 and 3B:10-4) to increase the threshold for transferring an intestate estate without administration. If the heir is a surviving spouse or partner the threshold increased to $50,000 from $20,000, and if the heir is not a surviving spouse or partner the threshold increased to $20,000 from $10,000.

J. Uniform Trust Code Accounts

Effective July 17, 2016, New Jersey enacted its version of the Uniform Trust Code, which will apply to most existing trusts.

K. Gestational Surrogacy Contracts

The New Jersey Gestational Carrier Agreement Act was enacted on May 30, 2018, effective immediately, permitting gestational carriers and intended parents to execute legally enforceable gestational surrogacy contracts, where the pregnant woman is not biologically related to the child. Surrogacy contracts where the pregnant woman is the natural mother of the child remain unenforceable in New Jersey.

L. Assisted Suicide

In 2019, New Jersey (and Maine) recently enacted legislation allowing assisted suicide. Like other states that have enacted similar legislation, there are safeguards in place to prevent abuse. For example, among other requirements, the person must be mentally capable of making health care decisions and be in the terminal stage of an irreversible disease.

## X. NEW YORK STATUTORY, CASE LAW AND ADMINISTRATIVE DEVELOPMENTS

### A. Same Sex Couples

#### 1. 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.

2. 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.

3. 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.

B. 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 |
| 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 | Jan. 1, 2020 | $5,740,000 |
| Jan. 1, 2020 | Jan. 1, 2021 | $5,850,000 |
| Jan. 1, 2021 | Jan. 1, 2022 | $5,930,000 |
| Jan. 1, 2022 | Jan. 1, 2023 | $6,110,000 |

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 |
| 1/1/19 – 12/31/19 | $5,740,000 | $6,027,000 |
| 1/1/20 – 12/31/20 | $5,850,000 | $6,142,500 |
| 1/1/21 – 12/31/21 | $5,930,000 | $6,226,500 |

| Period | Basic Exclusion Amount | Full Phase-Out Amount |
|---|---|---|
| 1/1/22 – 12/31/22 | $6,110,000 | $6,415,500 |

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 "E" 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.

To highlight the impact of the New York estate tax "cliff," the following table shows the taxable estate, the increment above the basic exclusion amount ("BEA"), the resulting tax, and the effective tax bracket applied to increment above the basic exclusion amount at various taxable estate tax values for 2021:

| Taxable Estate | Increment above BEA | Tax | Bracket on increment |
|---|---|---|---|
| 5,930,000 | 0 | 0 | 0 |
| 6,030,000 | 100,000 | 241,300 | 241% |
| 6,130,000 | 200,000 | 430,876 | 215% |
| 6,226,500 | 296,500 | 538,992 | 182% |
| 6,400,000 | 470,000 | 561,200 | 119% |
| 6,504,587 | 574,587 | 574,587 | 100% |
| 6,600,000 | 670,000 | 586,800 | 88% |

This table illustrates that the incremental tax bracket on the excess of the taxable estate above the BEA decreases as the taxable estate increases. The “break even” point, at which the estate tax exactly equals the excess of the taxable estate above the BEA, is a taxable estate of $6,504,587. For taxable estates above that value, a “Santa Clause” bequest to charity will cost the estate beneficiaries more than the tax saving and is therefore no longer beneficial purely as a tax saving device. However, a gift to charity is still relatively inexpensive for taxable estate values modestly above the break-even point. For example, at a taxable estate of $6,600,000, a charitable bequest of $670,000 costs the beneficiaries only $83,200, which might be attractive to clients with charitable intent.

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 who dies between January 1, 2019 and January 16, 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. This three year add-back provision was slated to expire for individuals dying on or after January 1, 2019. However, the 2020 Budget includes a provision that was passed into law that retains the add-

back until January 1, 2026 and applies to decedents dying on or after January 16, 2019. There is, however, an exception for gifts made between January 1, 2019 and January 15, 2019.

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 (originally, the statute applied to gifts made before January 1, 2019, regardless of when the decedent died). Note that the 2020 Budget includes a provision that was passed into law that retains the add-back until January 1, 2026 and applies to decedents dying on or after January 16, 2019. There is, however, an exception for gifts made between January 1, 2019 and January 15, 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.

On July 3, 2019, New York extended the expiration date of provisions relating to the estate tax treatment of dispositions to non-citizen spouses. The provisions were originally to expire on July 1, 2019, and were extended to July 1, 2022.

## C. Other New York Income Tax Changes

### 1. 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.

2. Income Tax Rates

The 2022 inflation adjusted amount of New York State income tax rates for married persons filing jointly are 5.97% for taxpayers earning between $43,001 and $161,550, 6.33% for taxpayers earning between $161,551 and $323,200, 6.85% for taxpayers earning between $323,201 and $2,155,350, 9.65% for taxpayers earning between $2,155,350 and $5,000,000, 10.3% for taxpayers earning between $5,000,001 and $25,000,000, and 10.9% for taxpayers earning in excess of $25,000,000. The inflation adjusted amount of New York State income tax rates for single individuals and married individuals filing separately are 5.97% for taxpayers earning between $21,401 and $80,650, 6.33% for taxpayers earning between $80,651 and $215,400, 6.85% for taxpayers earning between $215,401 and $1,077,550, 9.65% for taxpayers earning between $1,077,550 and $5,000,000, 10.3% for taxpayers earning between $5,000,001 and $25,000,000, and 10.9% for taxpayers earning in excess of $25,000,000.

3. 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.

4. 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.

5. 2019 – 2020 Budget

On March 31, 2019, New York lawmakers reached a budget deal for the fiscal year beginning on April 1, 2019. The budget continues the middle-class tax cut, and keeps spending to two percent. It also made permanent the limitation to two percent of increases in property taxes. The Budget also includes various provisions to fund the Metropolitan Transit Authority, including a "mansion tax" for New York City residents that rises incrementally (above the current 1% mansion tax) for purchase prices of $2 million or more and caps out at 3.9% for properties sold at $25 million or more. The budget also plans, among other provisions, to codify the New York State of Health program, essentially reviving the Affordable Care Act. The budget also extended the charitable contributions itemized deduction through 2024. If a taxpayer's New York adjusted gross income (AGI) is between $1 million and $10 million, the New York charitable contributions itemized deduction is limited to 50% of the federal deduction. For those whose New York AGI exceeds $10 million, the deduction is limited to 25% of the federal deduction. The top personal income tax bracket, tax rate, and tax table benefit recapture provisions were also extended through 2024.

6. 2020 – 2021 Budget

In the end of March 2020, Governor Cuomo and the New York Legislature agreed upon the 2020 – 2021 budget. As this was during the height of the coronavirus pandemic, the budget authorized a reduction in spending of $10 billion in order to account for the economic downturn caused by the pandemic. The budget also included $3 billion of short-term borrowing to compensate for the initial shortfall caused by the pandemic. There was also a provision allowing the Director of Budget to monitor the State's finances and review same periodically throughout the year and implement necessary changes, due to the various uncertainties caused by the pandemic.

7. 2021 – 2022 Budget

In April 2021, New York's fiscal year 2022 Budget was passed, totaling $212 billion. Among other provisions, former Governor Cuomo conceded to state lawmakers' demands to raise taxes on the ultra-wealthy, including an increase in the top personal income tax rate to 9.65% (from 8.82%) for individual filers earning in excess of $1,077,550 million and joint filers earning in excess of $2,155,351. The Budget also established two new brackets at a rate of 10.3% for those earning between $5 million and $25 million, and 10.9% for those exceeding $25 million. The increased rates are slated to be in effect for the 2021 – 2027 tax years. The tax hikes result in New York City millionaires being the most taxed in the nation, with rates between 13.5% and 14.8%, exceeding even California, whose highest taxed residents pay a top rate of 13.3%.

Former Governor Cuomo was optimistic that the tax increases would be offset by a federal SALT repeal; however, that does not seem likely. In the meantime, the Budget also

enacted a new pass-through entity tax, designed to offset the SALT limitation. Pass-through entities can elect on an annual basis to pay an entity level tax determined using a sliding scale of rates from 6.85% to 10.9%, depending on income. Partners, members or shareholders of the entity can then claim a tax credit on their New York State personal income tax return equal to their direct share of the entity's tax. Effectively, this allows the business owner to avoid the SALT cap at a federal level, since the entity level tax substitutes for their individual state tax, avoiding the SALT limitation.

8. 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.

9. 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 a Letter Ruling (TSB-A-18, August 29, 2018), the New York Department of Taxation and Finance determined that a taxpayer's Long Island office was not a permanent place of abode, for statutory purposes, since taxpayer did not have unfettered access to the office, and it offered no bathing or kitchen facilities.

In In the Matter of the Petition of Wiesen, N.Y. App. Trib., No. 826284 (September 13, 2018), the taxpayer failed to establish that he relinquished his New York domicile in favor of Florida. Taxpayer continued to maintain a rent-controlled apartment in New York, and the Tribunal noted that the only evidence he provided was unpersuasive and self-serving (declaration letters, filing NY nonresident returns, applying for a Florida homestead exemption), instead of more informal, credible indicators such as pay stubs, bills, memberships.

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. On March 28, 2019, the Appellate Division affirmed the Tax Appeals Tribunal's decision.

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.

This favorable determination was overturned by the April 12, 2018 Budget. Beginning in 2019, all of the days during which a taxpayer is present in New York will be counted toward the determination of whether or not he is a statutory resident (i.e., the 183-day test), regardless of whether he was also a domiciliary for any of those days.

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.

In Grant G. Biggar, DTA No. 827817 (N.Y. Div. Tax App., Jan. 10, 2019), the New York State Tax Department argued (and the administrative law judge agreed) that a taxpayer adopted New York as his domicile in 2010, when he accepted a contract-based position as president of "Creditex," purchased an apartment in the West Village and undertook major renovations. For tax year 2010, taxpayer filed a nonresident and part-year resident return, together with Form IT-360.1, which reports a taxpayer's change in domicile, either into or out of New York. For 2012, 2013 and 2015, taxpayer filed returns claiming that he was a statutory resident, but not a domiciliary. Taxpayer would travel frequently out of the United States, and left his position with Creditex in 2012.

The taxpayer spent a significant amount of time in New Zealand in 2014 due to his mother's failing health. For 2014, taxpayer filed as a nonresident. The Department claimed that he was in fact a domiciliary in 2014, having acquired domicile in 2010 and never having

relinquished it. Arguing that a taxpayer acquired domicile is very different from the typical case in which the Department argues that a taxpayer never relinquished it. Adding intrigue to this case, the Department relied on the fact that the taxpayer filed Form IT-360.1, when it generally rejects similar documentation from taxpayers asserting their domicile elsewhere.

On August 22, 2019, the New York Tax Appeals Tribunal sustained an income tax deficiency notice against taxpayers who were domiciled in New Jersey and filed non-resident New York returns. Taxpayer worked in New York City and taxpayers owned a home in New York. The deficiency notice was based on the finding that taxpayers were present in New York for more than 183 days. Taxpayers argued for redetermination, claiming that their New York home was only a vacation home, but the Tribunal held that the home was a permanent place of abode and was used year-round, and their petition was denied (In re Coulson, N.Y. Div. Tax App., No. 827736, 08/22/19).

In October 2019, the U.S. Supreme Court rejected two appeals in which taxpayers argued that New York is in violation of the U.S. Constitution by denying income tax credits for taxes paid in other states by dual residents. Dual residents who pay taxes in another jurisdiction on intangible income receive a credit for New York State income tax purposes if the money is derived from economic activity in the other state. Each case involved the sale of a business by a couple who lived primarily in Connecticut but also owned a home and worked in New York City. Even though each couple paid taxes on the respective sales to Connecticut, New York also assessed taxes on the sales, claiming that the couples were residents because they spent more than 183 days in New York. New York State courts upheld the assessments and the U.S. Supreme Court denied the couples' requests for appeal. (Chamberlain v. New York State Department of Taxation and Finance, 18-1569, and Edelman v. New York State Department of Taxation and Finance, 18-1570).

The income tax implications of telecommuting have now come to the forefront as a result of the pandemic. Generally, an employee is responsible for paying income taxes in the jurisdiction where such employee physically performs services. Even prior to the pandemic, various states, including New York, adopted the "convenience" rule, which states that if an employee works from home because of the employer's necessity, such employee is taxed in the employee's telecommuting location, i.e., home. If an employee works from home for his or her own convenience, the employee is taxed as though he or she were working from the employer's physical office. Considering the number of employees telecommuting as a result of the pandemic, the question is raised, for whose convenience are employees working from home – the employee's or the employer's?

New York is one of three states to issue guidance on this topic during the pandemic. The Department of Taxation and Finance posted FAQs that address this question, stating that if a nonresident employee's primary office is in New York State, even if that employee is working from their home located in a different state, the employee's telecommuting days are considered worked in New York, unless the employer established a proper office in the employee's home state.

New York State has also indicated its intention to audit individuals who change their filing status for 2020 or 2021, whether as a result of change in domicile or reallocation of days

worked in New York State. The Department of Taxation and Finance has already begun sending letters to individuals questioning such changes.

The difficulties such individuals will face are highlighted in the recent Boniface decision (DTA 829018 (N.Y. Div. Tax pp., April 29, 2021)). The Bonifaces filed a non-resident return with New York claiming a change of domicile to Florida as of 2013. The Bonifaces maintained a residence in New York but were very careful not to spend more than 183 days per year in New York so that they could not be deemed to be statutory residents. Thus, they only had to show that they, in fact, changed their domicile from New York to Florida.

The Bonifaces chose not to have an in-person hearing before the administrative law judge (ALJ), instead opting to offer written evidence. They submitted proof of the steps they had taken to change their domicile, including obtaining Florida driver's licenses, switching to Florida doctors and dentists, etc. They also offered evidence that their Florida home was larger than their New York residence. However, New York State submitted evidence of credit card usage, cell phone records, etc., which established that they spent more than five months of the year in New York. In addition, all of their children and grandchildren lived in New York. The ALJ held that, in large part due to the lack of sworn testimony, the Bonifaces did not overcome the fact that they maintained a permanent place of abode in New York and spent significant time in New York each year; i.e., they did not meet the burden of proving that they established a new domicile in Florida.

10. New York Resident Trusts

(a) ........................................................................................................................ B ackground

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.

(b) ............................................................................................................................ N
ew 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 legislation 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.

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 following three conditions:

- all the trustees are domiciled in a state other than New York;
- the entire corpus of the trust, including real and tangible property, is located outside the state of New York; and
- all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

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.

11. Decoupling from Federal Income Tax Changes

For individual taxpayers, New York decoupled from certain federal income tax changes for tax years beginning in 2018 (e.g., New Yorkers may claim a deduction for state and local taxes in excess of the federal $10,000 limitation). However, the New York State Department of Taxation and Finance initially took the position that such decoupling was not available to non-grantor trusts and estates. The 2020 New York Executive Budget, enacted on April 12, 2019, reversed the Department's position, extending the benefits of decoupling to trusts and estates (but disallowing the Section 199A deduction, among other changes).

D. 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.

E. 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, as well as $400,000 to the firm, itself, 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, 2011), 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. The Appellate Division modified the Surrogate's Order (106 A.D.3d 607 (1st Dep't 2013)), stating that appropriate remedy would be to revert to the original hourly fee arrangement. The case made its way to the New York Court of Appeals, who held that the contingent retainer agreement was not unconscionable, despite the large fee, and that the widow's estate's claim for a refund of the gifts was time barred (Matter of Lawrence, 24 N.Y.3d 320 (October 28, 2014)).

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.

F. 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.

G. 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.

H. 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.

I. 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.

J. 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.

K. 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.

L. Other Significant Legislation

1. Significant 2016 Legislation

(a) ........................................................................................................................ 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.

2. Significant 2016 Court Rule Changes

(a) 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.

3. Significant 2017 Legislation

(a) 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.

4. Significant 2019 Proposed Legislation

The New York Medical Aid in Dying Act, which would allow terminally ill people in New York to receive life ending drugs, is under consideration in the Senate and in the Assembly. It was introduced in the Assembly on January 28, 2019 and in the Senate on February 21, 2019.

5. Significant 2020 Legislation

On July 21, 2020, the New York State Senate passed a bill to amend Article 5 of the General Obligations Law which overhauls the New York State Power of Attorney Short Form. Governor Cuomo signed the bill into law on December 15, 2020, to become effective 180 days thereafter.

The general purpose of the new legislation is as follows:(i) to simplify the current power of attorney form; (ii) to permit substantially conforming language (because the "exact" wording requirement in the current law is unduly burdensome and becomes a trap for the unwary); (iii) to provide safe-harbor provisions for third parties that, in good faith, accept an acknowledged power of attorney without actual knowledge that the signature is not genuine; (iv) to allow for damages to be recovered against third parties who refuse to accept a valid power of attorney; and (v) to make certain technical amendments.

The technical amendments provide that a person can sign at the direction of a principal who is unable to sign and expands an agent's power to make gifts in the aggregate in a calendar year from the current $500 limit to $5,000 without requiring a modification to the form. As a result, the Statutory Gifts Rider is eliminated and any powers to make gifts in excess of $5,000 must be added to the "Modifications" section of the Power of Attorney Short Form. Finally, the changes to Article 5 of the General Obligations Law clarify an agent's obligation to keep records and receipts and further clarify the agent's authority with regard to financial matters related to health care.

The new form must be used for all Powers of Attorney executed after June 13, 2021.

In 2020, New York passed the Child-Parent Security Act (CPSA), effective on February 15, 2021, revolutionizing and amending various other statutes as they pertain to the legal parentage of children conceived through assisted reproduction (including in the context of inheritance, family law, divorce, insurance law). The CPSA makes broad-sweeping changes, too numerous for the scope of this outline, which essentially modernize the definition of "parent" and "child."

M. Other Case Law Developments

1. 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.

2. 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.

3. 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.

4. 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.

On August 15, 2019, in Matter of Panzirer (2019 NY Slip Op 032428(U)), the New York County Surrogate's Court awarded $100 million in compensation to the four remaining Executors of Leona Helmsley's estate, to be divided equally among them, and an additional $6.25 million to the estate of her late brother, Alvin Rosenthal, for executorial services that he rendered prior to his death. The Court rejected the Attorney General's objections that the amount is excessive and that their compensation should be strictly based on a mathematical formula of time spent multiplied by an appropriate hourly rate.

The Court instead agreed with the Executors' position that a multifactor approach should be utilized, based on the "magnitude and complexity" of the estate.

It is important to note that under Ms. Helmsley's Will, the Executors were entitled to "reasonable compensation" rather than to the statutory amounts pursuant to SCPA Section 2307 (which would have resulted in statutory commissions in excess of $215 million). Ms. Helmsley's estate was in excess of $5 billion.

5. 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 (2$^{nd}$ 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.

6. 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.

7. 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.

Although not a New York Case, the Tax Court reviewed the gift versus loan question in Estate of Bolles v. Commissioner (T.C. Memo 2020-71). Decedent, Mary Bolles, had made

certain loans to her son, Peter, who failed to repay the loans following his business failure. Ms. Bolles had five children, whom she had always treated equally in her estate planning documents. However, over the course of 22 years, beginning in 1985, Ms. Bolles made loans to Peter having a total value of $1,063,333. Similar loans were not made to any of her other children. The loans were intended to support Peter's architecture practice, which eventually failed.

Ms. Bolles executed a revocable trust agreement in 1989, from which she specifically excluded Peter. She subsequently executed an amendment thereto, in which Peter was included, but which provided that each child's share would be reduced by the value of any loans to such child outstanding as of the date of her death, plus interest. Peter simultaneously signed an instrument acknowledging that he owed his mother $771,628 which he could not repay and that such sum would reduce his inheritance.

Upon Ms. Bolles' death, the Service assessed an estate tax deficiency, ultimately arguing that the loans to Peter should be treated as gifts and should be accounted for accordingly in the calculation of Ms. Bolles' estate tax liability.

The Court applied the usual factors in determining whether the transfers to Peter were loans or gifts (i.e., whether or not: a promissory note was executed, interest was charged, there was collateral, Peter had the ability to repay, records were maintained, etc.).

The Tax Court emphasized that in the family loan context, "expectation of repayment" and "intent to enforce" are critical factors in determining whether a transfer should be characterized as a gift or a loan. In this case, the Court held that Ms. Bolles could not have possibly expected repayment once it became obvious that Peter's business was a failure. As such, the Court stated that while the transfers may initially have started out as loans, they were converted into gifts in 1989 when she accepted that they would not be repaid, as evidenced by the 1989 trust agreement.

8. Surcharge Computations

Although not a New York case, in September of 2017 in Hopper v. JPMorgan Chase Bank, N. A., No. PR-11-3238-1, in a jury trial in the Probate Court of Dallas County, Texas, the jury decided that 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. Almost a year later, in August of 2018, the judge decided that a final judgment was warranted, and awarded $781,432 in actual damages, in excess of $5 million in attorney's fees, almost $1 million in "exemplary" damages, and more than $255,000 of interest on the actual damages.

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.

9. 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.

10. 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.

11. 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.

In June 2019, Delaware enacted Sections 3343 and 3344 of Title 12 of the Delaware Code, which grant new trust powers to help trustees and beneficiaries effectuate a trust's purpose and make trust administration more efficacious.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

N. Other Administrative Developments

1. 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.

## 2. 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.

## XI. CONNECTICUT GIFT TAX, ESTATE TAX AND OTHER PERTINENT LEGISLATION

### A. Connecticut Estate Taxes and Gift Taxes

On May 31, 2018 Connecticut passed legislation that extended the phase-in of the 2017 Tax Act federal exemption amount until 2023. The exemption for 2019 was increased to $3.6 million, for 2020 to $5.1 million, for 2021 to $7.1 million, for 2022 to $9.1 million, and for 2023 and thereafter the exemption amount will be the same as the federal 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.

In addition, Governor Ned Lamont of Connecticut proposed a budget for 2020 and 2021 (announced on February 20, 2019), which would have eliminated the Connecticut gift tax and reaffirmed the current estate tax structure (i.e., gradually increasing the estate tax exemption to equal the federal estate tax exemption in 2023). Neither provision made the final bill.

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.

On August 9, 2018, the IRS Chief Counsel's Office issued a memorandum on what is included in the Connecticut estate tax base. The Chief Counsel's Office determined that post-2004 gifts are not included in the estate tax base, but for Connecticut gift taxes paid on gifts made within three years of death are included. However, the Chief Counsel's Office advised that the federal deduction for Connecticut estate tax must be reduced by the Connecticut estate tax attributable to such gift taxes, since they are not includible in the federal 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.

### B. 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.

### C. 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.

D. 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.

E. Posthumously Conceived or 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.

In February of 2020, Connecticut introduced the Connecticut Parentage Act, updating the existing statute by removing the requirement that only the decedent's spouse may use the genetic material. The decedent can authorize any individual to use same.

F. 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.

G. Same-Sex Marriage

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

H. 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.

## I. Changes to Trust Laws

On June 24, 2019, Connecticut adopted its own version of the Uniform Trust Code (which will take effect on January 1, 2020) that includes major changes to trust law, including the following:

1. Dynasty Trusts - trusts may now continue for 800 years, creating generation-skipping transfer tax planning opportunities.

2. Asset Protection Trusts – Connecticut residents may now establish irrevocable "self-settled" trusts of which they can be the beneficiary, while having the trust property protected from creditors. They can do so without having to use an out-of-state corporate trustee from states like Delaware or Nevada.

3. Directed Trusts – Trust settlors may now appoint trust directors to hold specialized and limited powers traditionally held by Trustees.

4. Uniform Trust Code Provisions – The new law allows individuals to receive notice on behalf of minor or disabled beneficiaries; trustees and beneficiaries can obtain court approval to modify or terminate trusts with obsolete provisions; probate courts will have greater jurisdiction over trust matters.

**EXHIBIT "A"**
**STATE ESTATE TAX AFTER THE 2017 TAX ACT ON**
**A TAXABLE ESTATE EQUAL TO THE FEDERAL BASIC EXCLUSION AMOUNT**

| Year of Death | Taxable Estate | Federal/State Death Tax Credit | New York Estate Tax | New Jersey* Estate Tax | Florida Estate Tax | Connecticut** Estate Tax |
|---|---|---|---|---|---|---|
| 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 |
| 2019 | $11,400,000 | 0 | $1,290,800 | 0 | 0 | $819,000 |
| 2020 | $11,580,000 | 0 | $1,319,600 | 0 | 0 | $717,600 |
| 2021 | $11,700,000 | 0 | $1,338,800 | 0 | 0 | $528,000 |

2022 computations are not available yet

* 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 "B"**

**STATE DEATH TAX LEGISLATION**

**AS OF January 1, 2022**

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

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| Alabama | None | Tax is tied to federal state death tax credit.<br><br>AL ST § 40-15-2. | | |
| Alaska | None | Tax is tied to federal state death tax credit.<br><br>AK ST § 43.31.011. | | |
| Arizona | None | Tax was tied to federal state death tax credit.<br><br>AZ ST §§ 42-4051; 42-4001(2), (12).<br><br>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.<br><br>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.<br>CA REV & TAX §§ 13302; 13411. | | |
| Colorado | None | Tax is tied to federal state death tax credit.<br>CO ST §§ 39-23.5-103; 39-23.5-102. | | |
| Connecticut | Separate Estate Tax | On October 31, 2017, the Connecticut Governor signed the 2018-2019 budget which increased | | $9,100,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | 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.<br><br>On May 31, 2018, Connecticut changed its estate tax law to extend the phase-in of the exemption to 2023 to reflect the increase in the federal exemption to $10 million indexed for inflation in the 2017 Tax Act. The exemption will be phased in as follows:<br><br>2019: $3.6 million<br>2020: $5.1 million<br>2021: $7.1 million<br>2022: $9.1 million<br>2023: federal exemption for deaths after January 1, 2023<br><br>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). | | |
| Delaware | None | Tax sunsetted on January 1, 2018. | | |
| District of Columbia | Pick-up Only | In August 2020, the DC City Council enacted the "Estate Tax Adjustment Amendment Act of 2020," which reduces the DC threshold to $4 million in 2021 and which will be adjusted for inflation beginning in 2022.<br><br>No separate state QTIP election. | | $4,000,000 (as of 2021) |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| Florida | None | Tax is tied to federal state death tax credit.<br><br>FL ST § 198.02; FL CONST. Art. VII, Sec. 5 | | |
| Georgia | None | Effective July 1, 2014, the Georgia estate tax was repealed.<br><br>GA ST § 48-12-1. | | |
| Hawaii | Modified Pick-up Tax | On June 7, 2018, the governor signed SB 2821, which amended HI ST § 236E-6 to reduce the Hawaiian exemption, effective January 1, 2018, to $5,000,000 indexed for inflation.<br><br>The Hawaii Department of Taxation released Announcement 2018-13 on September 4, 2018 in which it announced that the exemption will remain at the amount available to decedents dying during 2017.<br><br>In response to calls from practitioners, the Hawaii Department of Taxation indicated that it was not going to adjust the exemption for inflation in 2019 and 2020. | On April 4, 2019, Governor Ige signed into law an increase in the tax for Hawaii net taxable estates valued at over $10,000.000. The tax is $1,385,000 plus 20% of the amount over $10,000,000. The law applies to decedents dying after December 31, 2019. | $5,490,000 |
| Idaho | None | Tax is tied to federal state death tax credit.<br><br>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. | | $4,000,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | 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.<br><br>Illinois permits a separate state QTIP election, effective September 8, 2009. 35 ILCS 405/2(b-1). | | |
| Indiana | None | Pick-up tax is tied to federal state death tax credit.<br><br>IN ST §§ 6-4.1-11-2; 6-4.1-1-4.<br><br>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.<br><br>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. | | |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | Iowa has separate inheritance tax on transfers to others than lineal ascendants and descendants.<br><br>On June 16, 2021, the governor signed SF 619 which, among other tax law changes, reduces the inheritance tax rates by twenty percent each year beginning January 1, 2021 through December 31, 2024 and results in the repeal of the inheritance tax as of January 1, 2025. | | |
| 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.<br><br>KS ST § 79-15, 203 | | |
| Kentucky | Inheritance Tax | Pick-up tax is tied to federal state death tax credit.<br>KT ST § 140.130.<br><br>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.<br><br>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 | | $6,010,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | increases under pre-EGTRRA law) (L.D. 1319; March 27, 2003).<br><br>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.<br><br>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.<br><br>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.<br><br>The new legislation did not include portability as part of the Maine Estate Tax.<br><br>On September 12, 2018, LP1655 became law without the Governor's signature. The new law amends M.R.S. Title 36, Section 4102 and Section 4119 to make the Maine exemption | | |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | $5,600,000 adjusted for inflation for decedents dying on or after January 1, 2018.<br><br>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.<br><br>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. | | |
| Maryland | Pick-up Tax<br><br>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:<br><br>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.<br><br>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. | | $5,000,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | 3. Continues to ignore the federal deduction for state death taxes under Sec. 2058 in computing Maryland estate tax, thus eliminating a circular computation.<br><br>4. Permits a state QTIP election.<br><br>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.<br><br>The new law also provides for the portability of the unused predeceased spouse's Maryland exemption amount to the surviving spouse beginning in 2019. | | |
| Massachusetts | Pick-up Only | For decedents dying in 2002, pick-up tax is tied to federal state death tax credit.<br>MA ST 65C §§ 2A.<br><br>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.<br><br>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. | | $1,000,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | 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.<br><br>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. | | |
| Michigan | None | Tax is tied to federal state death tax credit.<br><br>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.<br><br>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.<br><br>MN ST §§ 291.005; 291.03; instructions for MN Estate Tax Return; MN Revenue Notice 02-16.<br><br>Separate state QTIP election permitted.<br><br>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 | | $3,000,000 |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | increases the exemption to $2,400,000 in 2018, $2,700,000 in 2019, and $3,000,000 for 2020 and thereafter,<br><br>On March 21, 2014, the Minnesota Governor signed HF 1777 which retroactively repealed Minnesota's gift tax (which was enacted in 2013).<br><br>A 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 was amended in 2014 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. | | |
| Mississippi | None | Tax is tied to federal state death tax credit.<br>MS ST § 27-9-5. | | |
| Missouri | None | Tax is tied to federal state death tax credit.<br><br>MO ST §§ 145.011; 145.091. | | |
| Montana | None | Tax is tied to federal state death tax credit.<br><br>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.<br><br>NEB REV ST. § 77-2101.01(1). | | |
| Nevada | None | Tax is tied to federal state death tax credit. | | |

| State | Type of Tax | Current Law | Legislation Affecting State Death Tax | 2022 State Death Tax Threshold |
|---|---|---|---|---|
| | | NV ST Title 32 §§ 375A.025; 375A.100. | | |
| New Hampshire | None | Tax is tied to federal state death tax credit.<br><br>NH ST §§ 87:1; 87:7. | | |
| New Jersey | Inheritance Tax | On October 14, 2016 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 was 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.<br><br>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.<br><br>NM ST §§ 7-7-2; 7-7-3. | | |
| New York | Pick-up Only | 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.<br><br>The New York estate tax exemption which was $1,000,000 through March 31, 2014 was increased as follows:<br><br>April 1, 2014 to March 31, 2015 -- $2,062,500 | | $6,110,000 |

| | | | | |
|---|---|---|---|---|
| | | April 1, 2015 to March 31, 2016 -- $3,125,000<br><br>April 1, 2016 to March 31, 2017 -- $4,187,500<br><br>April 1, 2017 to December 31, 2018 -- $5,250,000<br><br>As of January 1, 2019 the New York estate tax exemption amount will be the same as the federal estate tax applicable exclusion amount, before the 2017 Tax Act (i.e., $5,000,000 adjusted for inflation).<br><br>The maximum rate of tax will continue to be 16%.<br><br>Taxable gifts within three years of death will be added back to a decedent's estate for purposes of calculating the New York tax (except for gifts made between January 1, 2019 and January 15, 2019). This applies to decedents dying after January 16, 2019.<br><br>The New York estate tax is a cliff tax. If the value of the estate is more than 105% of the then current exemption, the exemption will not be available.<br><br>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 three-year gift add-back provision | | |

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|---|---|---|---|---|
| | | 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. The 2020 Budget then modified this again by extending the add-back until January 1, 2026. It applies to decedents dying on or after January 16, 2019. There is, however, an exception for gifts made between January 1, 2019 and January 15, 2019.<br><br>New York continues to not permit portability for New York estates and no separate state QTIP election is allowed when portability is elected on a federal return. | | |
| 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.<br><br>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.<br><br>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.<br>OK ST Title 68 § 804 | | |

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|---|---|---|---|---|
| | | 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.<br><br>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.<br>PA ST T. 72 P.S. § 9117 amended December 23, 2003.<br><br>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.<br><br>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).<br>RI ST § 44-22-1.<br><br>Rhode Island recognized a separate state QTIP election in the State's Tax Division Ruling Request No. 2003-03.<br><br>Rhode Island's Governor signed in to law HB 5983 on June 30, 2009, effective for deaths | | $1,648,111 |

| | | | | |
|---|---|---|---|---|
| | | 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."<br>RI ST § 44-22-1.1.<br><br>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. | | |
| South Carolina | None | Tax is tied to federal state death tax credit.<br><br>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.<br><br>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.<br>TN ST §§ 67-8-202; 67-8-203.<br><br>Tennessee had a separate inheritance tax which was phased out as of January 1, 2016. | | |
| 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.<br><br>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.<br><br>On June 18, 2019, Vermont enacted H. 541 which increased the Vermont estate tax exemption to $4,250,000 in 2020 and $5,000,000 in 2021 and thereafter.<br><br>No separate state QTIP election permitted.<br><br>Vermont does not permit portability of its estate tax exemption. | | $5,000,000 |
| Virginia | None | Tax is tied to federal state death tax credit.<br>VA ST §§ 58.1-901; 58.1-902.<br><br>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.<br>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 | | $2,193,000 |

| | | 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).<br><br>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.<br>WA ST §§ 83.100.040; 83.100.020.<br><br>Washington voters defeated a referendum to repeal the Washington estate tax in the November 2006 elections.<br><br>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.<br><br>Washington permits a separate state QTIP election. WA ST §83.100.047. | | |
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|---|---|---|---|---|
|  |  | The definition of "consumer price index" in the Revised Code of Washington (§83.100.020(1)(b)) does not match with the current CPI measure calculated by the US Bureau of Labor and Statistics. Washington is using the last CPI figure for the Seattle CPI. This resulted in no increase in the applicable exclusion amount for 2019 and 2020. |  |  |
| West Virginia | None | Tax is tied to federal state death tax credit.<br>WV § 11-11-3. |  |  |
| Wisconsin | None | Tax is tied to federal state death tax credit.<br>WI ST § 72.01(11m).<br><br>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.<br>WI ST §§ 72.01; 72.02, amended in 2001; WI Dept. of Revenue website.<br><br>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 |  |  |

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|---|---|---|---|---|
| | | 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.<br><br>WY ST §§ 39-19-103; 39-19-104. | | |

## EXHIBIT "C"
## Bases of State Income Taxation of Nongrantor Trusts (Revised 2/22/21)

| State | Citations | Top 2020 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); Ala. Admin. Code r. 810-3-29-.07(2)(b)-(c); instructions to 2020 Ala. Form 41 at 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. §§ 43-1013, 43-1011(A), 43-1301(5), 43-1311(B); instructions to 2020 Ariz. Form 141AZ at 1, 20. | 4.5% on inc. over $163,632 | | | | ✓ | | **www.azdor.gov** |
| Arkansas | Ark. Code Ann. §§ 26-51-201(a)(9), (10), (d), 26-51-203(a); 2020 Ark. Regular Tax Table at 28; 2020 Ark. Indexed Tax Brackets | 6.6% on inc. on or over $82,000 | ✓[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 2020 Cal. Form 541 at 9, 11. | 13.3% on inc. over $1 million | | | | ✓ | ✓[3] | **www.ftb.ca.gov** |
| Colorado | Colo. Rev. Stat. §§ 39-22-103(10), 39-22-104(1.7); instructions to 2020 Colo. Form 105 at 3, 4; 2020 Colo. Form 105 at 1. | 4.55% | | | ✓ | | | **www.colorado/gov/pacific/tax.com** |

| State | Citations | Top 2020 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)(E), 12-701(a)(4)(C)–(D); Conn. Agencies Regs. § 12-701(a)(4)-1; instructions to 2020 Form CT-1041 at 5, 16; 2020 Form CT-1041 at 2. | 6.99% | ✓ | ✓[4] | | | | **portal.ct.gov/drs** |
| Delaware | 30 Del. C. §§ 1102(a)(14), 1601(9); instructions to 2020 Del. Form 400-I at 1-2; 2020 Del. Form 400 at 2. | 6.6% on inc. over $60,000 | ✓[5] | ✓[5] | | ✓[5] | | **www.revenue.delaware.gov** |
| District of Columbia | D.C. Code §§ 47-1806.03(a)(10), 47-1809.01, 47-1809.02; instructions to 2020 D.C. Form D-41 at 7, 8. | 8.95% on inc. over $1,000,000 | ✓ | ✓ | | | | **otr.cfo.dc.gov** |
| Florida | No income tax imposed. | | | | | | | **floridarevenue.com** |
| Georgia | O.C.G.A. §§ 48-7-20(b)(1), (d), 48-7-22; instructions to 2020 Ga. Form 501 at 7. | 5.75% on inc. over $7,000 | | | | | ✓[2] | **dor.georgia.gov** |
| Hawaii | Haw. Rev. Stat. §§ 235-1, 235-51(d); Haw. Admin. Rules § 18-235-1.17; instructions to 2020 Haw. Form N-40 at 1, 11. | 8.25% on inc. over $40,000 | | | ✓[5] | ✓[5] | | **tax.hawaii.gov** |

| State | Citations | Top 2020 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 2020 Idaho Form 66 at 8. | 6.925% on inc. over $11,760 | ✓[6] | ✓[6] | ✓[6] | ✓[6] | | **www.tax.idaho.gov** |
| Illinois | 35 ILCS 5/201(a), (b)(5.4), (c), (d), 5/1501(a)(20)(C)–(D); Ill. Admin. Code tit. 86, § 100.3020(a)(3)–(4); instructions to 2020 Form IL-1041 at 5-6, 13; 2020 Form IL-1041 at 3. | 6.45% | ✓ | ✓ | | | | **www2.illinois.gov** |
| Indiana | Ind. Code §§ 6-3-1-12(d), 6-3-2-1(a)(3); Ind. Admin. Code tit. 45, r. 3.1-1-21(d); instructions to 2020 Ind. Form IT-41 at 1, 4; 2020 Ind. Form IT-41 at 1. | 3.23% | | | ✓ | | | **www.in.gov/dor** |
| Iowa | Iowa Code § 422.5(1); 422 5A(9); Iowa Admin. Code r. 701-89.3(1)–(2); 2020 Iowa Form IA 1041 at 4. | 8.53% on inc. over $74,970 | | | ✓[6] | ✓[6] | | **tax.iowa.gov** |
| Kansas | Kan. Stat. Ann. §§ 79-32,109(d), 79-32,110(a)(2)(F), (d); instructions to 2020 Kan. Form K-41 at 2; 2020 Kan. Form K-41 at 4. | 5.7% on inc. over $30,000 | | | ✓ | | | **www.ksrevenue.org** |

| State | Citations | Top 2020 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)(a), 141.030(1); 103 Ky. Admin. Regs. 19:010; instructions to 2020 Ky. Form 741 at 2; 2020 Ky. Form 741 at 2. | 5.0% | | | | ✓[5] | | **revenue.ky.gov** |
| Louisiana | La. Rev. Stat. Ann. §§ 47:300.1(3), 47:300.10(3); instructions to 2020 La. Form IT-541 at 1. | 6.0% on inc. over $50,000 | ✓ | | ✓[7, 8] | | | **www.revenue.louisiana.gov** |
| Maine | Me. Rev. Stat. Ann. tit. 36, §§ 5102(4)(B)–(C), 5111(1-F), 5403; instructions to 2020 Form 1041ME at 1, 2. | 7.15% on inc. over $52,600 | ✓ | ✓ | | | | **www.maine.gov/revenue** |
| Maryland | Md. Code Ann., Tax–Gen. §§ 10-101(k)(1)(iii), 10-105(a)(1)(viii), 10-106(a)(1)(iii); instructions to 2020 Md. Form 504 at 1, 5, 6. | 5.75% (plus county tax between 2.25% and 3.20%) on inc. over $250,000 | ✓[5] | ✓[5] | ✓[5] | | | **www.marylandtaxes.com** |
| Massachu-setts | Mass. Gen. Laws ch. 62, §§ 4, 10(a), (c); Mass Regs. Code tit. 830, § 62.10.1(1); instructions to 2020 Mass. Form 2 at 4, 23; 2020 Mass. Form 2 at 2. | 5% (12.0% for short-term gains and gains on sales of collectibles ) | ✓[5] | ✓[2,5] | | | | **www.mass.gov/orgs/massachusetts-department-of-revenue** |
| Michigan | Mich. Comp. Laws §§ 206.16, 206.18(1)(c), 206.51(1)(b); instructions to 2020 MI-1041 at 2; 2020 MI-1041 at 1. | 4.25% | ✓ | ✓[9] | | | | **www.michigan.gov/taxes** |

| State | Citations | Top 2020 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 2020 Minn. Form M2 at 1, 13, 18. | 9.85% on inc. over $136,735 | ✓[10] | ✓[10] | ✓[11] | | | **www.revenue.state.mn.us** |
| Mississippi | Miss. Code Ann. § 27-7-5(1)(c); instructions to 2020 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 2020 Form MO-1041 at 4, 11. | 5.4% on inc. over $8,584 | ✓[12] | ✓[12] | | | | **dor.mo.gov** |
| Montana | Mont. Code Ann. § 15-30-2103; instructions to 2020 Mont. Form FID-3 at 3, 18-19; 2020 Mont. Form FID-3 at 2. | 6.9% on inc. over $18,700 | ✓[6] | ✓[6] | ✓[6] | ✓[6] | ✓[6] | **mtrevenue.gov** |
| Nebraska | Neb. Rev. Stat. §§ 77-2714.01(6)(b)–(c), 77-2715.03(3), 77-2717(1)(a)(ii); Neb. Admin. Code § 23-001; instructions to 2020 Neb. Form 1041N at 7, 8. | 6.84% on inc. over $16,580 | ✓ | ✓ | | | | **www.revenue.nebraska.gov** |
| Nevada | No income tax imposed. | | | | | | | **tax.nv.gov** |
| New Hampshire | No income tax imposed on nongrantor trusts. | | | | | | | **www.revenue.nh.gov** |

| State | Citations | Top 2020 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)(7); instructions to 2020 Form NJ-1041 at 3, 30. | 10.75% on inc. over $1,000,000 | ✓[13] | ✓[13] | | | | **www.state.nj.us/treasury /taxation** |
| New Mexico | N.M. Stat. Ann. § 7-2-7(C); instructions to 2020 N.M. Form F1D-1 at 3, 9. | 4.9% on inc. over $16,000 | | | ✓ | ✓ | | **www.tax.newmexico.gov** |
| New York State | N.Y. Tax Law §§ 601(c)(1)(B)(iii), 605(b)(3); 20 NYCRR § 105.23; instructions to 2020 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)(A), 1304-B(a)(1)(ii), 1305(c); Admin. Code City of N.Y. §§ 11-1701, 11-1704.1, 11-1705; instructions to 2020 N.Y. Form IT-205 at 16, 18. | 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; 2020 N.C. Form D-407 at 1, 2; 2020 N.C. Form D-407 at 1. | 5.25% | | | | | ✓[14] | **www.ncdor.gov** |
| North Dakota | N.D. Cent. Code § 57-38-30.3(1)(e), (g); N.D. Admin. Code § 81-03-02.1-04(2); instructions to 2020 N.D. Form 38 at 2; 2020 N.D Form 38 at 2. | 2.9% on inc. over $13,175 | | | ✓[6] | ✓[6] | ✓[6] | **www.nd.gov/tax** |
| Ohio | Ohio Rev. Code Ann. §§ 5747.01(I)(3), 5747.02(A)(3), (D); instructions to 2020 Ohio Form IT 1041 at 8, 9. | 4.797% on inc. over $221,300 | ✓ | ✓[5] | | | | **www.tax.ohio.gov** |

| State | Citations | Top 2020 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 2020 Okla. Form 513 at 3, 17. | 5.0% on inc. over $7,200 | ✓ | ✓ | | | | **www.ok.gov/tax** |
| Oregon | Or. Rev. Stat. §§ 316.037, 316.282(1)(d); Or. Admin. R. 150-316.0400(3); instructions to 2020 Or. Form 41 at 3; 2020 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 2020 Form PA-41 at 5; 2020 Form PA-41 at 1. | 3.07% | ✓[15] | ✓[15] | | | | **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); 280-RICR-20-55-7.7; instructions to 2020 Form RI-1041 at 1-1; 2020 RI-1041 Tax Rate Schedules at 1. | 5.99% on inc. over $8,300 | ✓[5] | ✓[5] | | | | **www.tax.ri.gov** |
| South Carolina | S.C. Code Ann. §§ 12-6-30(5), 12-6-510(A), 12-6-520; instructions to 2020 Form SC1041 at 1, 3. | 7.0% on inc. over $15,400 | | | ✓ | | | **dor.sc.gov** |
| South Dakota | No income tax imposed. | | | | | | | **dor.sd.gov** |
| Tennessee | Tenn. Code Ann. §§ 67-2-102(4), 67-2-110(a); instructions to 2020 Tenn. Form INC. 250 at 1, 2. | 1.0% (interest and dividends only) | | | | | ✓ | **www.tn.gov/revenue** |

| State | Citations | Top 2020 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. | | | | | | | **www.comptroller.texas.gov/taxes** |
| Utah | Utah Code Ann. §§ 59-10-104(2)(b), 59-10-202(2)(b), 75-7-103(1)(i)(ii)–(iii); instructions to 2020 UT Form TC-41 at 3, 6, 12-13; 2020 UT Form TC-41 at 1. | 4.95% | ✓[16] | | ✓[16, 8] | | | **www.tax.utah.gov** |
| Vermont | 32 V.S.A. §§ 5811(11), 5822(a)(5), (6), (b)(2); instructions to 2020 Vt. Form FIT-161 at 2; 2020 Vt. Form FIT-161 at 2. | 8.75% on inc. over $9,750 | ✓ | ✓ | | | | **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 2020 Va. Form 770 at 1, 9. | 5.75% on inc. over $17,000 | ✓ | ✓ | ✓[17] | | | **www.tax.virginia.gov.** |
| Washington | No income tax imposed. | | | | | | | **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 2020 W. Va. Form IT-141 at 2, 8. | 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 2020 Wis. Form 2 at 1, 19. | 7.65% on inc. over $263,480 | ✓ | ✓[18] | ✓[19] | | | **www.revenue.wi.gov** |

| State | Citations | Top 2020 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. | | | | | | | **revenue.wyo.gov** |

[1] Provided that trust has domiciliary or resident fiduciary or current beneficiary for more than seven months during taxable year.
[2] Provided that trust has resident fiduciary.
[3] Other than beneficiary whose interest is contingent.
[4] Provided that trust has resident noncontingent beneficiary.
[5] Provided that trust has resident beneficiary.
[6] Provided that other requirements are met.
[7] Unless trust designates governing law other than Louisiana.
[8] Testamentary trust created by nonresident; inter vivos trust created by resident or nonresident.
[9] Unless trustee, assets, administration, and beneficiaries 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 taxable year.
[13] Unless trust has no trustee, asset, or source income in state and trustee files informational return.
[14] Unless trust does not have resident trustee and resident beneficiaries have not received income, have no right to demand it, and are uncertain ever to receive it (Kaestner, 2019 WL 2552488 (U.S. June 21, 2019)). Tax might be eliminated in other situations.
[15] Unless settlor is no longer resident or is deceased and trust lacks sufficient contact with Pennsylvania to establish nexus.
[16] 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.
[17] Until July 1, 2019.
[18] Trust created or first administered in Wisconsin after October 28, 1999, only.
[19] Irrevocable inter vivos trust administered in Wisconsin before October 29, 1999, only.

**EXHIBIT "D"**

**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 "E"
## Computation of New York State Estate Tax

(on various amounts of Taxable Estate – note that the 2022 computations are not available yet)

| Taxable Estate of: | 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 | 2019 | 2020 | 2021 |
|---|---|---|---|---|---|---|---|---|---|
| NYS Basic Exclusion Amount | 3,125,000.00 | 3,125,000.00 | 4,187,500.00 | 4,187,500.00 | 5,250,000.00 | 5,250,000.00 | 5,740,000.00 | 5,850,000.00 | 5,930,000.00 |
| Resulting NYS Estate Tax | - | - | - | - | - | - | - | - | - |
| 102.5% of Basic Exclusion Amount | 3,203,125.00 | 3,203,125.00 | 4,292,187.50 | 4,292,187.50 | 5,381,250.00 | 5,381,250.00 | 5,883,500.00 | 5,996,250.00 | 6,078,250.00 |
| Resulting NYS Estate Tax* | 128,837.50 | 128,837.50 | 205,931.25 | 205,931.25 | 287,550.00 | 287,550.00 | 326,260.00 | 334,950.00 | 341,270.00 |
| 105% of Basic Exclusion Amount | 3,281,250.00 | 3,281,250.00 | 4,396,875.00 | 4,396,875.00 | 5,512,500.00 | 5,512,500.00 | 6,027,000.00 | 6,142,500.00 | 6,226,500.00 |
| Resulting NYS Estate Tax* | 208,200.00 | 208,200.00 | 324,050.00 | 324,050.00 | 452,300.00 | 452,300.00 | 514,040.00 | 528,240.00 | 538,992.00 |
| Resulting NYS Estate Tax** | 230,310.00 | 230,310.00 | 364,921.00 | 364,921.00 | 513,977.00 | 513,977.00 | 588,826.00 | 605,780.00 | 618,110.00 |
| Federal Basic Exclusion Amount | 5,430,000.00 | 5,450,000.00 | 5,450,000.00 | 5,490,000.00 | 5,490,000.00 | 11,180,000.00 | 11,400,000.00 | 11,580,000.00 | 11,700,000.00 |
| Resulting NYS Estate Tax* | 442,400.00 | 444,800.00 | 444,800.00 | 449,600.00 | 435,832.00 | 1,255,600.00 | 1,290,800.00 | 1,319,600.00 | 1,338,800.00 |
| Resulting NYS Estate Tax ** | 502,727.00 | 505,454.00 | 505,454.00 | 510,909.00 | 510,909.00 | 1,494,762.00 | 1,536,667.00 | 1,570,952.00 | 1,593,809.00 |

* 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.