**A Generation of Change in the law of Wills and Trusts**

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1. Introduction: areas of major change
   1. Family composition
   2. Wills and Trusts formalities
   3. The changing nature of the trust
   4. Wealth transfer taxes
2. Family composition
   1. Marriage
      1. Marriage Equality Act (“MEA”) (L. 2011 cs. 95, 96) became effective July 24, 2011. The act added a new section 10-a to the Domestic Relations Law which states that an otherwise valid marriage is “shall be valid regardless of whether the parties to the marriage are of the same or different sex.” Note: the Second Department has held the MEA retroactively validates to the time the parties had a religious ceremony in 2005 followed by a civil ceremony valid under the MEA in 2011, four days after the MEA’s effective date. *Mackoff v. Bluemke-Mackoff*, \_\_\_ A.D.3d \_\_\_, \_\_\_ N.Y.S.3d \_\_\_, 2023 WL 7561813 (2d Dep’t).
      2. The extension of marriage to same-sex couples is a milestone in legal recognition of family relationships that go beyond tradition. But in many ways the Marriage Equality Act is a conservative reform. The only change it makes to the legal framework of marriage is to allow two persons of the same sex to enter into a contractual relationship defined by law. In the last 40 years, however, the legal consequences of that contract have changed in important ways.
      3. First, in 1980 the legislature enacted Domestic Relations Law § 236B mandating equitable distribution on divorce. While it took about a decade for the courts to make equal division of property the norm (*see,* B. Grossman, *The Evolution of Equitable Distribution in New York*, 62 NYU Annual Survey of American Law 607), this change in the law became an important step to recognizing marriage as an equal economic partnership, a view of the institution that probably made it more understandable to same-sex couples whose lives did not conform to ideas of marriage rooted in coverture.
      4. Second, in 1997 EPTL 5-1.1-A was enacted, requiring that the surviving spouse’s elective share be held outright, rather than in trust.
         1. The elective share trust was a feature of the first elective statute which became effective on September 1, 1930 (former Decedent Estate Law § 18). Recommended by the Foley Commission, the legislation abolished dower and curtesy and the distinctions between the descent of real property and the distribution of personal property in intestacy. (Under prior law, the real property of a married decedent did not descend to the surviving spouse.)
         2. The Bennett Commission was the next source of changes to the elective share statute. The legislation recommended by the Commission expanded the pool of property subject to the right of election to certain “testamentary substitutes” in addition to the deceased spouse’s probate estate, effective September 1, 1967.
         3. In 1992 legislation recommended by the EPTL Advisory Committee enacted EPTL 5-1.1-A. (L. 1992 c. 595, § 10) The new statute expanded the list of testamentary substitutes (although not as much as the Committee advised—the legislature removed life insurance policies from the list), and made the elective share a pecuniary amount equal to one-third of the “net estate” whether the decedent was survived by issue or not (under prior law, the fraction was one-third if the decedent was survived by issue and one-half if not). The legislation also abolished the elective share trust and required that the surviving spouse own the elective share outright.
         4. The 1992 changes were a compromise. On the one hand, the requirement that the elective share be owned outright by the surviving spouse is related to the idea of marriage as an equal economic partnership, but if that policy were to be fully reflected in the statute, the elective share amount presumably would be one-half.
         5. The requirement that the elective share be owned outright, of course, means that a QTIP trust, no matter how large its corpus, cannot satisfy the elective share. The QTIP trust was created in 1981, at least in part, to allow the estate of the first spouse to die to take advantage of the unlimited marital deduction enacted the same year (P.L. 97-34, “The Economic Recovery Tax Act”) without giving the surviving spouse control over enjoyment of the property after the surviving spouse’s death.
         6. This disjunct made pre- and post-nuptial agreements even more important, especially in second and subsequent marriages. In 1998, the Court of Appeals decision in *Matter of Greiff*, 92 N.Y.2d 341, 680 N.Y.S.2d 894, 703 N.E.2d 752 (1998) made it possible for a surviving spouse to put the burden of persuasion of the legality and enforceability of a pre-nuptial agreement on the estate of the deceased spouse by showing by a preponderance of the evidence “that the premarital relationship between the contracting individuals manifested ‘probable’ undue and unfair advantage.” While the decision in *Greiff* caused a good deal of consternation at first, it seems to have shaped practice in ways that try to negate that “undue and unfair advantage” the opinion mentions. For example, leaving sufficient time before the date of marriage to allow the parties to truly examine the agreement, ensuring that both parties have counsel of their own choosing, and that if one party has much more wealth than the other, that the wealthier party pay attorney for the other party.
   2. Parentage
      1. Non-marital children
         1. Since 1987, EPTL 4-1.2 has recognized the use of genetic testing to prove parentage and since 2010 the results of “a genetic marker test” alone are sufficient to prove parentage (EPTL 4-1.2(a)(2)(C)(i) as amended by L. 2010, c. 64).
         2. Forty years ago, the maternal genetic lineage of a child was certain—the child was conceived through fertilization of an ovum of the female who gave birth, although as early as the mid-1970s it appears that surrogacy contracts providing that the child would be the child of someone other than the female who gave birth and who was the genetic parent of the child did exist.
         3. According to the website of Worldwide Surrogacy (<https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline>) the first successful gestational surrogacy took place in 1985. Today there is no certainty that the female who gives birth is genetically related to the child.
         4. This observation leads to a discussion of assisted reproduction.
      2. Assisted reproduction.
         1. Assisted reproduction is now defined in the Child-Parent Security Act (L. 2020, c.56 pt. L) (“CPSA”) as a method of causing pregnancy other than sexual intercourse (Family Ct. Act § 581-102(a))
         2. The CPSA generally makes the parentage of a child of assisted reproduction a matter of intent. While status as a donor, that is someone who contributes genetic material without the intent to be a parent of the child conceived from that genetic material, or status as an intended parent, that is someone who intends to be the parent of a child of assisted reproduction can be shown by written consent, the statute allows a court to find requisite intent by “clear and convincing evidence.” (Family Ct. Act § 581-202(d) (donor); § 581-304(c) (intended parent)
         3. Parentage now can be completely decoupled from reproduction in a way that adoption does not make possible. Adoption changes existing parentage; the rules governing assisted reproduction make intent, or perhaps choice, the determining factor from the child’s birth.
         4. The CPSA also amended Dom. Rel. Law § 122 to prohibit only “genetic surrogate parenting agreements,” defined in Dom. Rel. Law § 121 to be an oral or written agreement in which a “genetic surrogate,” in turn defined as a “person who gives birth to a child who is the person’s genetic child pursuant to a genetic surrogate parenting agreement,” agrees either to be inseminated with the sperm “of a person who is not their spouse or to be impregnated with an embryo that is the product of the genetic surrogate’s ovum fertilized with the sperm of a person who is not their spouse” and by which the genetic surrogate agrees to surrender or consent to the adoption of the child born as a result of the insemination or impregnation. The prohibition on surrogate parenting contracts, therefore, now applies only to contracts in which the party who is giving birth is also genetically related to the child.
         5. In 2014, EPTL 4-1.3 was enacted (L. 2014 c. 439 §1) to provide rules for inheritance by children conceived after the death of an intended parent. The statute requires written consent to the use of a person’s genetic material after that person’s death if a child born from that material is to be child of that person. This requirement is in tension with the intent-based approach of the CPSA. That approach has been followed in at least one posthumous reproduction case decided before the enactment of the CPSA, *Matter of Zhu*, 64 Misc.3d 280, 103 N.Y.S.3d 775 (Sup. Ct. Westchester County 2019).

The decedent was involved in a skiing accident which left him in a vegetative state without brain activity. Life was sustained by artificial means pending the donation of the decedent’s organs. On the morning of the day on which the decedent’s organs were to be donated, the decedent’s parents sought an order directing the hospital to collect the decedent’s sperm for future use in what the opinion describes as “third-party reproduction.” The court decided that absent a clear statutory direction governing the collection of genetic material in this situation, the authority of the decedent’s parents to donate the decedent’s organ under Public Health Law § 4301, the showing that the decedent had a strong attachment to family life and evidence of the decedent’s statements that he wished to be the father of “several children,” the court granted the order. Assuming that the decedent’s sperm was successfully collected and proves viable, use of the sperm for posthumous reproduction is not possible under EPTL 4-1.3(j):

The use of a genetic material after the death of the person providing such material is subject exclusively to the provisions of this section and to any valid and binding contractual agreement between such person and the facility providing storage of the genetic material and may not be the subject of a disposition in an instrument created by the person providing such material or by any other person.

* + 1. Beyond adoption
       1. Adoption has long been part of New York law and in 1986 and 1987 Dom. Rel. Law § 117 was amended to allow persons adopted by their grandparents or the descendants of their grandparents to inherit and to take under governing instruments in their family relationships as they existed before the adoption. The provision reflects an assumption that adoption by a relative is not meant to sever the child from the previous family relationships.
       2. Just as there is now under the CPSA the possibility of parentage by intent in the context of children of assisted reproduction, New York decisional law now recognizes the possibility of parentage by intent for some purposes.
       3. Until 2016, the law of New York set out in the decision by the Court of Appeals in *Alison D. v. Virginia M*., 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) was clear: there are only way two ways to become a parent: birth and adoption. The majority opinion made it clear that acting like a parent did not make one a parent. While other jurisdictions began to recognize equitable or de fact parentage, New York courts adamantly refused to recognize parentage based on conduct (and the legislature had no appetite for dealing with the issue).
       4. In 2016 the court overruled *Alison D.* in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 39 N.Y.S.3d 89, 61 N.E.3d 488 (2016) and held that where there is clear and convincing proof of “a pre-conception agreement to conceive and raise a child as co-parents” the partner of the biological parent does have standing to seek visitation and custody under Dom. Rel. Law § 70 (and presumably has an obligation to support the child).
       5. This is not the same as “de facto parentage” which the law of a handful states, a number that is growing with the increasing adoption of the new version of the Uniform Parentage Act (2017) (“UPA”). Under UPA § 609, an individual may be adjudicated the de facto parent of a child if the court finds that there is proof by clear and convincing evidence of seven factors all related to acting like a parent, including undertaking full responsibility for the child, establishing “a bonded and dependent relationship” with the child, and that continuing the relationship is in the child’s best interest. *See, e.g.,* Rev. Code Wash. 26.26A.440; *Matter of J.L.,* 23 Wash.App.2d 1029 (2022); *Matter of L.J.M.,* 15 Wash.App.2d 588, 476 P.3d 636 (2020). Once a judgment of de facto parentage is entered, the parent-child relationship arguably exists for all purposes, presumably including under UPA § 203 inheritance and inclusion in class gifts in donative instruments.

1. Wills and Trusts formalities
   1. The rise of the harmless error rule and intent in general
      1. One of the most important developments in the law of donative transfers at the end of the last century was an increasing focus on the intent of the donor as validating the transfer even in the absence of compliance with otherwise required formalities.
      2. This approach is exemplified by the Restatement of Property (Third) (Wills and Donative Transfers) § 3.3 and codified in Uniform Probate Code § 2-503 which treats a document or writing not executed in compliance with the provisions of § 2-502 as if it had been so executed “if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute” the decedent’s will, a partial or complete revocation of the will, an addition to or an alteration of the will, or a partial or complete revival of the decedent’s formerly revoked will or of a formerly revoked portion of the will.
      3. The provision is the law in nine states, including New Jersey (N.J. Stat. Ann § 3B:3-3; effective February 27, 2005).
         1. New Jersey cases have held that there is no requirement that the document or writing be signed, but there must be evidence that the testator reviewed the document or writing and gave “final assent” to it, *In re Will of Macool*, 416 N.J. Super. 298, 3 A.3d 12589 (App.Div. 2010).
         2. And that because the statute is remedial in nature it must be liberally construed, *In re Estate of Ehrlich*, 427 N.J. Super. 64, 47 A.3d 12 (App. Div. 2012).
      4. Restatement of Property (Third) § 6.2 *cmt. yy* states that an intervivos gift of personal property “can be perfected on the basis of donative intent alone.”
   2. New York’s position as both ahead of the times and behind them.
      1. New York codified its rules for the execution of wills in the Revised Statutes of 1830 (2 R.S. 63, § 40). Those provisions are still at the heart of EPTL 3-2.1. Under the 1830 provision the testator must
         1. Sign at the end of the will,
         2. Sign in the presence of the witnesses or acknowledge the signature to each of them,
         3. Declare to the witnesses that the document is the testator’s will,
         4. And request at least two persons to sign as witnesses, and they must sign at the end of the will.
      2. The 1830 enactment spared New York the influence of the English Wills Act of 1837 (7 Will 4 & 1 Vict. c. 26) with its requirement that the testator sign or acknowledge the testator’s signature in the presence of two or more witnesses “present at the same time” and that the witnesses sign in the presence of the testator. Widely adopted by United States jurisdictions, it has led to much litigation over the meaning of “presence,” litigation which New York has avoided. (For an example notorious because included in many casebooks *see, Stevens v. Casdorph*, 508 S.E.2d 610 (W.Va. 1998)).
      3. In addition, the long-standing the rule that a will execution supervised by an attorney presumptively complies with the statutory formalities probably has reduced litigation.
      4. New York, however, is one of the very few United States jurisdictions to retain the interested witness rule, invalidating a disposition in the will to a witness (at least to the extent it exceeds the witness’s intestate share as a distributee of the testator), EPTL 3-3.2. (For a skillful construction of the statute to avoid an inequitable disqualification, *see, Matter of Morea*, 169 Misc.2d 415, 645 N.Y.S.2d 1022 (Sur. Ct. Bronx Co. 1996)(per Holtzman, S.))
2. The changing nature of the trust
   1. Investments
      1. For many decades, investments by trustees were governed by the New York “legal list” concept born in the Court of Appeals decision in *King v. Talbot*, 40 N.Y. 76 (1869) which made all stocks and bonds of industrial enterprises imprudent investments.
      2. Another view was put forward by the Massachusetts Supreme Judicial Court in *Harvard College v. Amory*, 26 Mass. 446 (1830) which made no particular investment imprudent per se, although the rule was sometimes applied in restrictive ways.
      3. In 1992 the first sections of Restatement (Third) of Trusts ushered in a new world of fiduciary investing by adopting modern portfolio theory which counsels investing based on an assessment of the level of risk appropriate in light of the purposes for the creation of the trust and needs of the beneficiaries, among other factors.
         1. The Restatement provision was followed by the Uniform Prudent Investor Act (UPIA) (1994) which was substantially adopted in New York in 1995, EPTL 11-2.3.
         2. In addition to the enacting the prudent investor rule, the UPIA § 9 and EPTL 11-2.3(c) include a provision allowing a trustee to formally delegate investment or management functions so long as the trustee exercises “care, skill, and caution” (UPIA § 9 modifies these nouns with the adjective “reasonable”) in selecting and monitoring the delegee as well as in establishing the scope and terms of the delegation and in New York, controlling the “overall cost by reason of the delegation.”
         3. This dramatic change in existing law that pretty much forbade delegation of the trustee’s duties and has given rise to an entire industry of investment advising for fiduciaries. To a great degree it seems that corporate trustees market their investment expertise to individual trustees rather than necessarily becoming “the trustee.”
      4. The adoption of the prudent investor standard drove changes in the law governing the allocation of trust receipts between the principal and income accounts and the very meaning of “income.”
         1. Put most simply, investing the trust corpus as a whole to treat current beneficiaries and future beneficiaries impartially as the statute expressly requires (UPIA § 6; EPTL 11-2.3(b)(3), (4)(B)) put trustees in a difficult position when stocks appreciated greatly but paid relatively small dividends. Generating sufficient income in trusts that require current beneficiaries receive “income”—whether as a mandate or in the trustee’s discretion—can be difficult when at the same the trustee is trying to make sure that the value of the corpus will be maintained for future beneficiaries.
         2. The legislature responded in 2001 first by adding subparagraph (b)(5) (L. 2001 c. 243, § 1) creating the “power to adjust” which allows trustees to adjust between the principal and income accounts if the trustee determines that “such an adjustment would be fair and reasonable to all of the beneficiaries.” (EPTL 11-2.3-A was enacted at the same time to provide rules for judicial control of the exercise of the power to adjust.)
         3. The legislature also enacted a second approach to the problem with new EPTL 11-2.4 (L. 2001 c. 243, § 4) creating the statutory unitrust. Under the section, the default meaning of income of a trust means an amount equal to 4% of the value of the trust property at the beginning of “the first business day of the current valuation year.” The section includes rules for opting into and out of unitrust treatment and for calculating the unitrust amount.
      5. The changing law of trust investment also contributed to the rise of the “directed trustee” or what is sometimes called “divided trusteeship.”
         1. This now familiar concept allows the creator of a trust to give a person other than the trustee the authority to tell the trustee what to do, for example, to direct the trustee’s investment decisions or distribution decisions.
         2. The duties of the “trustee” are often limited to record keeping and preparing and filing income tax returns.
         3. A more advanced development is the excluded co-trustee which dispenses with the trust director and allows the creator to give one-trustee the authority to make investment decisions while excluding the other trustees from having any responsibility for those decisions. The first statutory provision is 21 Del. C. § 3133A, enacted in 2017.
         4. The New York Trust Code includes directed trustee provisions modelled on the Uniform Directed Trustee Act and an excluded trustee provision modelled on the Delaware statute.
   2. The revocable trust as the perfect will substitute—among others.
      1. In 1997 the legislature enacted most of the recommendations of the EPTL Advisory Committee relating to lifetime trusts (L. 1997 c. 139).
      2. By modifying the merger rule of EPTL 7-1.1 the legislation made it possible for the creator of revocable lifetime trust to be the sole trustee, removing one of the major obstacles to the use of a funded revocable lifetime trust as a will substitute—the preservation of the creator’s privacy.
      3. The other sine qua non for using the revocable trust as a will substitute is the inability of the remainder beneficiaries to question the actions of the trustee while the creator has the power to revoke. New York has no statute to that effect (the proposed New York Code does), but case law so holds. The seminal case is *Matter of Central Hanover Bk & Tr.(Momand),* 176 Misc. 183 (Sur. Ct. New York Co. 1941), aff’d. 263 App.Div. 801, 32 N.Y.S.2d 128 (1st Dep’t 1941), aff’d. 288 N.Y. 608, 42 N.E.2d 610 (1942). *See also, Matter of Johnson*, 166 A.D.3d 1435, 89 N.Y.S.3d 377 (3d Dep’t 2018); *Matter of Malasky*, 290 A.D.2d 631, 736 N.Y.S.2d 151 (3d Dep’t 2002); *Matter of Andrews*, 289 A.D.2d 910, 753 N.Y.S.2d 640 (3d Dep’t 2001).
      4. The 1997 legislation also enacted rules governing.
         1. The formalities of creating a lifetime trust, EPTL 7-1.17(a) (signatures of creator and trustee acknowledged before a notary, or witnessed by two witnesses) (therefore it is no longer possible to have an oral trust of personal property);
         2. Amendment or revocation of a lifetime trust, EPTL 7-1.17(b) (in writing and executed by the person authorized to amend or revoke and unless the trust terms provide otherwise, witnesses or acknowledged like the trust instrument);
         3. Funding, EPTL 7-1.18 (assets with written title must have that title changed, otherwise assignment with particularity).
      5. The legislature did not adopt the Commission’s suggestions for statutes governing the procedures for challenging the validity of lifetime trusts or creating rules for no-contest clauses in lifetime trusts. The former provision has been incorporated into the New York Trust Code.
      6. And the rise of the revocable trust illustrates the more general growth of non-probate property arrangements.
         1. These are “perfect” will substitutes because the by creating the owner of the property retains all the economic benefits of the property, has complete freedom to undue the arrangement, and the beneficiary has no rights in the property until the death of the owner.
         2. Compare to the right to partition a joint tenancy with right of survivorship.
         3. The Uniform Transfer on Death Security Registration Act (1989/1998) was enacted by the legislature in 2005 (L.2005, c.325 § 2) effective January 1, 2006. The enactment allows a TOD designation not only for individual securities, but for brokerage accounts. (Adopted in all the states except Louisiana and Texas and incorporated into the UPC)
         4. Although not adopted in New York, the Uniform Real Property Transfer on Death Act (2009) validates the classic invalid will substitute—a deed intended to take effect only at the death of the grantor. (Adopted in 18 states and the Virgin Islands and incorporated into the UPC)
      7. Does the will have a future? Not so long ago, the answer was “no”—non-probate property arrangements were expected to take over the world. But just as that idea become a truism, the rise of the internet made possible “every testator their own lawyer.” And who knows what coming years will bring as generative AI becomes a regular part of life.
   3. Modification, reformation, decanting—grantor control
      1. Irrevocable trusts are irrevocable--unless they’re not. Over the last decades U.S. law has changed to allow more ways to change if not terminate otherwise revocable trusts.
      2. Modification
         1. The only statutory provision for modification of an irrevocable trust is EPTL 7-1.6 which since 1966 has allowed the court to make application of principal to the income beneficiary of a trust trustee under certain circumstances after a hearing on notice to those beneficially interested.
         2. New York has also codified what some at least believe is an aspect of the general law of trusts, the ability of the creator of a revocable to amend or revoke with trust with the consent of the beneficiaries, EPTL 7-1.9.
         3. Traditionally, modification of the administrative terms of an irrevocable trust— “equitable deviation”—has been limited to dire situations in which a failure to do so will lead to the destruction of the trust. The classic case is *Matter of Pulitzer*, 139 Misc. 575, 249 N.Y.S. 87 (Sur. Ct. New York Co. 1931, *aff’d* 237 A.D. 808, 260 N.Y.S. 975 (1ST Dep’t 1932); *cf Matter of Smathers,* 19 Misc. 3d 337, 852 N.Y.S.2d 718 (Sur. Ct. Westchester Co. 2008).
         4. And reformation, that is changing the words of a trust (or a will) has been limited to repairing ambiguous language.
         5. Once again, Restatements (Third) of Property and of Trusts have taken more advanced views which have been incorporated into the Uniform Probate Code and the Uniform Trust Code.
         6. UTC § 411(b) allows termination of an irrevocable trust on the consent of all the beneficiaries if the court decides continuation of the trust is not necessary “to achieve any material purpose of the trust” and modification if the modification is not inconsistent with a material purpose.
         7. UTC § 412(a) allows modification of administrative *or* dispositive trust terms if because of circumstances unanticipated by the settlor if such action will further the purposes of the trust.
         8. UTC § 412(b) allows modification of administrative terms “if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.”
      3. Reformation
         1. UTC § 415 allows reformation of the terms of a trust, even if unambiguous “to conform the terms to the settlor’s intention if it is proved by clear and convincing evidence what the settlor’s intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.” UPC § 2-805 is the same rule for wills.
         2. The California Supreme Court appears to be the first state high court to hold that an unambiguous will may be reformed in the absence of a statute, *Estate of Duke*, 61 Cal.4th 871, 190 Cal.Rptr.3d 295, 352 P.3d 863 (2015).
      4. Decanting
         1. “Decanting” is the short-hand term for exercise of discretion by the trustee of a discretionary trust to distribute trust property to a new trust created by the trustee; the trustee is sometimes described as exercising a power of appointment to appoint in further trust. That is how the New York statute characterizes the trustee’s action, EPTL 10-6.6(d).
         2. The New York statute, which was probably the first in the nation, was enacted in 1992 (L. 1992 c. 591) and extensively revised in 2011 (L. 2011 c. 451). The statute, which is considered to codify and elaborate existing law, was originally driven by the desire to prolong the term of existing trusts that predated the enactment of the Generation Skipping Transfer Tax.
         3. It is difficult to know how decanting is being used in New York; there does not seem to be a great of litigation. One example is *Kroll v. New York State Dep’t. of Health*, 143 A.D.3d 716, 39 N.Y.S.3d 183 (2d Dep’t 2016) where the court approved a decanting to create a supplemental needs trust.
         4. Perhaps the most well know example of a decanting held to violate the decanting trustees’ fiduciary duties is *Hodges v. Johnson*, 170 N.H, 470, 177 A.3d 86 (2017) where a series of decantings that eliminated beneficiaries who had fallen out of favor with the creator of trusts holding non-voting interests in the family businesses (one trust GST tax exempt, the other not), were found to violate the trustees’ duty of impartiality. While the behavior of the disfavored beneficiaries described in the trustees’ filings is outrageous, the attempt to retain control by the creator of the trusts is certainly in tension with the irrevocability of the trusts.
         5. This is not a new issue, of course. Consider *McNeil v. McNeil*, 798 A.2d 503 (Del. 2002). The McNeil trusts were created by Henry McNeil, Sr. Fully discretionary, they were administered by the individual trustees who as they admitted, deferred to the wishes of the creator and his spouse. Irrevocable, yes, but still under control?
   4. Rule against perpetuities
      1. The Rule is going the way of the dodo. By one count 34 states have repealed the Rule, usually by requiring vesting at the end of a long period of time, sometimes as long as 1000 years, *e.g.,* Fla. Stat. § 689.225(g). (although sometimes a much shorter period, perhaps based on the traditional Rule is retained for interests in real property, *see,* 25 Del. C. § 503(b)(110 years))
      2. New York has two rules against perpetuities.
         1. The rule against the undue suspension of the power of alienation, now EPTL 9-1.1(a), which preserves almost verbatim the language of the Revised Statutes of 1830
         2. The rule against too remote vesting, EPTL 9-1.1(b), enacted in the late 1950s.
         3. The original period was two lives in being at the creation of the interest which in 1960 finally became the traditional lives in being plus 21 years and a period of gestation. L. 1960 c. 448.
      3. Why the Rule is near extinction is a question with several possible answers. Just to suggest:
         1. It has long been presented as inanely complicated and taught, I sometimes fear, as a sort of hazing exercise with the not so subliminal message that “most of you will never understand this.”
         2. A lack of emphasis on the best solution: a saving clause
         3. A lack of emphasis on the most common ways to violate the Rule, especially by the exercise of special and all testamentary powers of appointment that don’t pay attention to the Rule.
         4. Inconsistent legislative and academic approaches: “wait and see” is sometimes as difficult to apply as the Rule; the USRAP ran into difficulties with its interaction with the generation skipping transfer tax; the Restatements went from wait and see, to the USRAP, to a fixed period.
         5. But whether a symptom or a driving force—the next topic
   5. Dynasty trusts
      1. The end of the Rule Against Perpetuities makes possible perpetual private trusts.
      2. Again, whether cause or effect, the use of the GST tax exemption amount to exempt a trust from GST tax for as long as the trust exists naturally creates the desire to make such trusts last as long as possible, IRC § 2642.
      3. Couple that desire with the apparent attraction of creating a perpetual endowment of one’s family line and we get the dynasty trust.
      4. There are difficulties inherent in the perpetual private trust.
         1. Trustee succession (perhaps the private trust company is part of the answer)
         2. Obsolescence of terms as society changes
            1. Trustees given discretion to pay for a beneficiary’s education through the bachelor’s degree. Will that make sense forever?
            2. Changes in family structure and advances in reproductive biology make the very idea of a “family line” more problematic.
      5. Modification is likely to become an even more important topic as these trusts age.
3. Wealth transfer taxes
   1. The enactment of ERTA in 1981 was probably the beginning of the end for the federal wealth transfer taxes.
      1. The increase in the exemption amount probably made it easier to imagine a world in which the taxes do not exist at all—all one must do is raise the exempt amount to “unlimited.” Subsequent increases in the exemption amount to levels that make the taxes apply only those with the resources to minimize its effects only makes the effect stronger. In 2024, the applicable exclusion amount is $13,610,000, Rev. Proc. 2023-24.
      2. In retrospect, the enactment of the current Generation Skipping Transfer Tax in the Tax Reform Act of 1986 (Pub. L. No. 99-514, §§ 1431-1433) seems like an anomaly. The tax is a strong affirmation of the policy that the transfer of wealth should be taxed in each generation.
      3. Anomaly or not, the wealth transfer tax system remains under unrelenting political attack, even though it effects only a miniscule percentage of the U.S. population.
   2. New York estate taxes
      1. Until February 1, 2000, New York had its own estate tax which generally exceeded the federal estate tax credit of former IRC § 2011.
      2. L. 1997 c. 389 enacted a new estate tax applicable to the estate of decedents dying on or after February 1, 2000, equal to the federal credit; a so-called “sop tax.” The legislation also repealed the gift tax but left the state GST tax in place.
      3. The repeal of federal estate tax credit in EGTRRA in 2001 (Pub. L. No. 107-16) ended the all too brief coordination of the New York and federal estate taxes.
      4. The system based on the federal estate tax credit endured until April 1, 2014, when L. 2014 c. 59, part x came into effect. The legislation raised the exclusion amount; provided a very controversial phase out of the exemption amount (the “cliff”) and repealed the GST tax.
      5. While the new exclusion as adjusted for inflation approximated the federal amount, the doubling of the federal exclusion amount from $5,000,000 to $10,000,000 in the Tax Cut and Jobs Act of 2017 (Pub. L. No. 115-97) once again opened a large gap between the state and federal amounts, complicating planning (which is also complicated for married couples because New York law does not allow provide portability of the unused exclusion amount of the first spouse to die).
      6. The federal amount is supposed to revert to $5,000,000 adjusted for inflation at midnight December 31, 2025. Should that occur, the New York and federal systems will be much more closely aligned—don’t count on it.