Current Developments: New York

Estate Planning Council of New York City, Inc.
Estate Planning Council of Putnam County
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Hudson Valley Estate Planning Council
Rockland County Estate Planning Council, Inc.

June 30, 2015

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Sharon L. Klein is Managing Director of Family Office Services & Wealth Strategies at Wilmington Trust, NA.

Sharon has over 20 years' experience in the area of trusts and estates and is a nationally recognized speaker and author on trust & estate issues. She has spoken for many professional organizations, including the Heckerling Institute on Estate Planning, the New York University Institute on Federal Taxation, the Notre Dame Estate Planning Institute, the Duke University Estate Planning Conference, and the Bloomberg BNA Tax Management Advisory Board. Sharon has been featured or quoted in publications such as The Wall Street Journal, The New York Times, The New York Law Journal and Trusts & Estates Magazine.

Sharon serves as Co-Chair of the Trusts and Estates Law Section Taxation Committee of the New York State Bar Association and Vice-Chair of the Estate & Gift Tax Committee of the American Bar Association. She is a member of The Rockefeller University Committee on Trust and Estate Gift Plans, the Estates, Gifts and Trusts Advisory Board for The Bureau of National Affairs and the Professional Advisory Council of the Anti-Defamation League. She is the immediate past Chair of the Trusts, Estates and Surrogate's Court Committee for the New York City Bar Association.

Prior to joining Wilmington Trust, Sharon was Managing Director and Head of Wealth Advisory at Lazard Wealth Management where she led the delivery of all wealth advisory services, including trusts & estates, tax and philanthropic planning. Prior to Lazard, Sharon headed the Estate Advisement department at Fiduciary Trust Company International. She provided counsel regarding all aspects of domestic and international estate planning and was responsible for overseeing the management of complex trusts and estates. Prior to joining Fiduciary Trust, Sharon was Special Counsel in the Trusts & Estates Department at Rosenman & Colin (now Katten Muchin Rosenman LLP), where she began her career in 1990. There, she advised individuals and families on the preservation, transfer, and management of wealth. Her practice included sophisticated estate and charitable planning and trust & estate administration.

Sharon earned a BA and LLB from the University of New South Wales, Australia, and an LLM from the Boalt Hall School of Law at the University of California, Berkeley.

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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2294

Date: **30-Mar-15**

From: **Steve Leimberg's Estate Planning Newsletter**

Subject: **FLASH: Sharon Klein & New York's Executive Budget for 2015-2016: What Passed, What Didn't and What's Next?**

"Late last night, Governor Cuomo and legislative leaders announced agreement on the final Executive Budget for 2015-2016. Prior to the final agreement, the Governor released his budget bill, and the Senate and Assembly release their so-called one-house budget bills, which are their versions of the Governor's budget bill. There were overlaps and differences among the Governor's budget bill, the Assembly's bill and the Senate's bill. Intensive negotiations behind closed doors among all parties continued up to the last minute, culminating in the final budget agreement. The budget is expected to pass both houses and be signed into law by the Governor for an on-time enactment by April 1."

In Estate Planning Newsletter #2293, **Sharon Klein** provided members with commentary on what was in store for New York's estate and gift tax system as a result of the 2015-2016 Executive Budget. Now that Governor Cuomo and legislative leaders have announced agreement on the final Executive Budget for 2015-2016, Sharon returns and provides members with an important update.

Sharon L. Klein is **Managing Director of Family Office Services & Wealth Strategies** at **Wilmington Trust, NA**. She has presented at the Heckerling Institute on Estate Planning, the New York University Institute on Federal Taxation, the Notre Dame Estate Planning Institute, the Duke University Estate Planning Conference, and the Bloomberg BNA Tax Management Advisory Board. She has been quoted or featured in The Wall Street Journal, The New York Times, Estate Planning Magazine and Trusts & Estates Magazine. Sharon serves as Co-Chair of the Trusts and Estates Law Section Taxation Committee of the New York State Bar Association and Vice-Chair of the Estate & Gift Tax Committee of the American Bar Association. She is a member of The Rockefeller University Committee on Trust and Estate Gift Plans, the Estates, Gifts and Trusts Advisory Board for The Bureau of National Affairs and the Professional Advisory Council of the Anti-Defamation League. She is the immediate past Chair of the Trusts, Estates and Surrogate's Court Committee for the New York City Bar Association.

Here is Sharon's commentary:

EXECUTIVE SUMMARY:

New York State has just released its final Executive Budget for 2015-2016, which includes changes to New York's estate and gift tax laws.

FACTS:

Late last night, Governor Cuomo and legislative leaders announced agreement on the final Executive Budget for 2015-2016. Prior to the final agreement, the Governor released his budget bill, and the Senate and Assembly release their so-called one-house budget bills, which are their versions of the Governor's budget bill. There were overlaps and differences among the Governor's budget bill, the Assembly's bill and the Senate's bill. Intensive negotiations behind closed doors among all parties continued up to the last minute, culminating in the final budget agreement. The budget is expected to pass both houses and be signed into law by the Governor for an on-time enactment by April 1.

Where did we end up?

COMMENT:

What were the Overlapping Proposed Changes in All Three Bills?

Prevent New York Estate Tax Lapse
Last year's Executive Budget increased the New York estate tax exclusion amount from $1 million to $2,062,500 for individuals dying on/after April 1, 2014, to $3,125,000 for individuals dying on/after April 1, 2015, to $4,187,500 for individuals dying on/after April 1, 2016, and to $5,250,000 for individuals dying on/after April 1, 2017 and before January 1, 2019. Beginning January 1, 2019, the New York exclusion amount is to be linked to the federal exclusion amount, including inflation indexing.

However, due to a drafting error, the estate tax was slated to *disappear* after March 31, 2015. The estate tax rate schedule was expressed to apply to individuals dying between April 1, 2014 and March 31, 2015. There was no rate schedule for individuals dying after March 31, 2015, and it is unclear how a tax could be imposed without a rate. Action was required to prevent the possible elimination of the estate tax for those dying outside the expressed

timeframe.

Accordingly, all three bills removed the expressed timeframe, leaving the estate tax rate table to apply generally to all decedents irrespective of the date of death.

RESULT:

Change enacted: The expressed timeframe associated with the estate tax was removed, preventing a lapse of the estate tax, which now applies generally to all decedents irrespective of the date of death.

Clarify Gift Add-Back Inapplicable to Individuals Dying After January 1, 2019

Last year's Executive Budget increased the New York gross estate of a deceased resident by the amount of any taxable gifts made within three years of death, if the decedent is a New York resident at the time the gift is made and at the time of death. The add-back provision was enacted to prevent a perceived death-bed abuse whereby individuals on their death-beds could make a gift up to the federal exclusion amount without incurring a federal gift tax, without incurring a New York gift tax (since New York does not have a gift tax), and the gift would reduce the estate for New York estate tax purposes. As enacted last year, the current statutory language provides that the gift add-back does not apply to gifts made on or after January 1, 2019 (when the New York exclusion amount will be linked to the federal amount). An amendment in all three bills provides instead that the gift add-back does not apply to estates of individuals dying on or after January 1, 2019.

RESULT:

Change enacted: The gift add-back does not apply to estates of individuals dying on or after January 1, 2019. It is unclear why the gift add-back ends on that date. It might be related to revenue projections, but in any event could presumably easily be extended.

Disallow Deductions Related to Intangible Personal Property in Computing Estate Tax for Non-Residents

Intangible personal property of a non-resident is not included in computing the non-resident's New York taxable estate. Accordingly, deductions related to that property are denied for New York purposes in an amendment included in

all three bills.

RESULT:

Change enacted: Since a non-resident's intangible personal property is not included in computing the New York estate tax liability, deductions associated with that intangible personal property are expressly disallowed.

What is Different in All Three Bills?

New York's Estate Tax Cliff is Alive and Well…
The changes effected by last year's Executive Budget resulted in a very steep estate tax "cliff": Estates that are less than or equal to the New York estate tax exclusion amount will pay no tax, but the credit for New York taxable estates that are between 100% and 105% of the basic exclusion amount is rapidly phased out and eliminated entirely if the New York taxable estate exceeds 105% of the basic exclusion amount.

Despite the opposition to the cliff submitted by numerous professional organizations, there are no changes to the cliff proposed in the Governor's budget bill or the Assembly bill.

The Senate bill contains a modest revision to the cliff by extending the runway over which the applicable credit amount is phased out to between 100% and 110% of the basic exclusion amount (instead of between 100% and 105%). However, if an estate exceeds 110% of the basic exclusion amount, the fall off the cliff is just as steep…

RESULT:

Change not enacted: There is no change to the New York estate tax cliff.

Portability
The Assembly bill contains a state-level portability proposal, increasing the credit allowed to an individual's estate by the unused exclusion amount of that individual's last deceased spouse. The Governor's bill and the Senate bill do not contain portability proposals.

RESULT:

Change not enacted: There is no state-level portability.

Gift Add-Back Parity with Estate Tax Regime

The way last year's budgetary language was drafted, there appears to be a lack of parity between the gift add-back and the estate tax regime: Gifts by a New York resident of out-of-state real property or tangible personal property are not specifically excluded from the gift add-back, but out-of-state real and tangible property are specifically excluded from the New York gross estate for estate tax purposes. In other words, if a New York resident gifted an out-of-state residence within three years of death, the value of the real property would be added back to that individual's estate, but if that same individual had died with that same out-of-state property, it would not be included in the New York gross estate. On August 25, 2014, the New York State Department of Taxation and Finance issued a Technical Memorandum (TSB) TSB-M-14(6)M to summarize and clarify the changes effected by the enactment of the 2014-2015 Executive Budget. The TSB stated that gifts are not added to a resident's gross estate if they consisted of real or tangible property having a location outside New York. While it is helpful to know that represents the Department's view, technically that is not how the statute reads.

The Assembly bill contains language that would formalize the TSB interpretation and exclude real or tangible out-of-state property from the gift add-back, but that language is not included in the Governor's bill or the Senate bill.

RESULT:

Change enacted: Real and tangible out-of-state property is expressly excluded from the gift add-back.

Separate QTIP Election When Filing Federal Return Solely to Elect Portability

For estates below the federal filing threshold, current law can preclude an executor from making both a separate New York QTIP election and electing federal portability, which requires the filing of a federal return even if an estate would not otherwise have a filing requirement. The problem stems from the fact that an executor can make a separate New York QTIP election only if a federal estate tax return is not required to be filed. If a federal return is required to be filed, a federal QTIP election must be made in order for a QTIP trust to qualify for the New York marital deduction.

In TSB-M-14(6)M and TSB-M-11(9)M, the New York State Department of

Taxation and Finance has taken the position that, even if a federal estate tax return is filed solely for the purpose of electing portability, the same QTIP election reflected on the federal return must be made for New York estate tax purposes. If a QTIP election is not made on the federal return, it may not be made for New York purposes. However, if an estate is below the federal filing threshold and a federal return is required to be filed solely for portability reasons, there would likely be no reason to make a federal QTIP election. That would force inclusion of the QTIP property in the estate of the second spouse to die – property which could otherwise have passed outside the estate.

This result can cause a dilemma for a fiduciary who may be forced to choose between a separate state QTIP election and portability. Conflicting interests among beneficiaries, particularly in acrimonious blended family situations, can intensify the dilemma.

The Assembly bill specifically provides that a separate New York QTIP election can be made when a federal estate tax return is filed solely to elect portability. The Governor's bill and the Senate bill do not contain that proposal, which curiously enough was included only in last year's Senate bill.

RESULT:

Change not enacted: There is no provision for a separate New York QTIP election when a federal estate tax return is filed.

What is Not in Any of the Three Bills?

Elimination of the Estate Tax Cliff
As noted, only the Senate bill contains a modest softening of the cliff.

RESULT:

There is no change to the New York estate tax cliff.

Lowering of the Estate Tax Rates
The Governor's bill and Senate bill last year included a proposal to reduce the top estate tax rate from 16% to 10%. None of the bills this year contemplate a rate reduction.

RESULT:

There is no change to the New York estate tax rates.

Suggestion to Limit Gift Add-Back to One Year

Although New York estate taxes are generally deductible against the federal estate tax liability, the estate tax attributable to the gift add-back does not seem to be deductible under Internal Revenue Code §2058. That section permits a deduction for state estate taxes with respect to any property included in the federal gross estate. Since lifetime gifts are not included in the federal gross estate for federal estate tax purposes, gifts added back will potentially be subject to the full maximum 16% estate tax rate, without any offsetting federal deduction. In order to blunt the scope of this result and focus on the "death-bed" nature of the perceived gifting abuse, the New York State Bar Association's Trusts and Estates Law Section and the New York City Bar Association had recommended that the add-back be limited to one year, instead of three. That recommendation was not included in any of the proposals.

RESULT:

There is no change to the three-year look-back period for gifts.

Non-Resident's New York Estate Tax Liability Dependent on Value of New York Situs Assets, Not on Apportionment between New York and non-New York Situs Assets

Although this change was made last year, it deserves mention as it has not received widespread attention, and can be good news for non-residents who die owning New York situs real or tangible property.

Before it was amended last year, New York Tax Law §960 ("Non-resident's estate tax") required the estate tax liability of a non-resident to be computed pursuant to Tax Law §952 (which imposes an estate tax on residents), as if the decedent was a resident. The calculation involved apportioning the New York tax liability by reference to the fraction that the New York situs property bore to the gross estate. Essentially, that fraction was applied to the estate tax that would have been due had the decedent been a resident.

Tax Law §960, as amended, instead of requiring an apportionment, computes the estate tax liability of a non-resident pursuant to §952 as if the decedent was a resident, but only on New York situs assets. It is no longer necessary to apportion the tax by reference to the percentage of the estate located in New

York.

RESULT:

Previously, apportioning a non-resident's estate tax liability by reference to the percentage the New York situs property bore to the gross estate often led to the imposition of New York estate taxes. It now appears that there will be no New York tax if the value of the New York situs property does not exceed the applicable New York estate tax exclusion amount in the year of death. The latest New York Estate Tax Return Form ET-706, dated 4/14, for individuals dying after April 1, 2014 and before March 31, 2015, reflects this change.

What is Next?

Ultimately, there were very few trusts & estates related changes made in the 2015-16 Executive Budget, reflected in Assembly bill 3009-B and Senate bill 2009-B, and expected to be signed into law by the Governor by April 1. Of course, this comes on the heels of the many substantial changes that were enacted as part of the 2014-15 Executive Budget, including increases in the estate tax exemption amount, which will be linked to the federal exemption amount in 2019; a resulting dramatic estate tax cliff; a gift add-back; and changes to the taxation of resident trusts. Many professional organizations had lobbied for changes to New York law, particularly an elimination or softening of the cliff, state-level portability and a reduction in the gift add-back look-back period. These lobbying efforts will likely continue.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Sharon Klein

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Developments, Lessons And Reminders Of 2014

BY SHARON L. KLEIN

From landmark legislation, to important regulatory guidance to instructive case law, 2014 saw many significant New York developments, lessons and reminders.

1. Public Access to Surrogate's Court Documents Limited: New Surrogate's Court Rule.

By Administrative Order dated Feb. 19, 2014, a new Surrogate's Court rule was adopted,[1] which limits public access to certain documents. The rule attempts to strike a balance between two competing interests: public access to judicial proceedings and privacy concerns. By their nature, filings in Surrogate's Court proceedings often contain confidential identifying and financial information. To protect privacy and enhance security given the dangers of information misuse (including identity theft), the new rule limits access to certain documents. Only interested parties (including potential beneficiaries and their counsel, public administrators and court personnel) can view: guardianship proceeding filings pursuant to Surrogate's Court Procedure Act Articles 17 and 17A, death certificates, tax returns, documents containing social security numbers, inventories of firearms and inventories of assets. Others can view these records with written permission of the Surrogate or Chief Clerk, which permission cannot be unreasonably withheld. Media groups have voiced opposition to the new rule on the basis that court documents should be presumptively open to the public.

On Nov. 6, 2014, a new redacting requirement was adopted for certain confidential personal information contained in civil filings in Supreme and County courts.[2] Compliance under the new rules will be voluntary for filings from Jan. 1 to Feb. 28, 2015, but mandatory thereafter. Those rules, which were adopted after the Surrogate's Court rule, do not apply to filings in Surrogate's Court. Given the fact that media groups have voiced opposition to the Surrogate's Court rule and the fact that the redaction rule in Supreme and County courts represents a later and different approach to address the same types of concerns, the Surrogate's Court rule is now being reviewed in light of those developments.

2. Disposition of Digital Assets: Approval of Uniform Law Leads to State-Level Momentum.

As digitization in our modern world explodes, the ownership, transfer and disposition of digital assets present unprecedented challenges. Digital assets encompass social media websites such as Facebook, email accounts such as Yahoo, personal accounts like Shutterfly and financial accounts. Family members can face many challenges in unlocking a decedent's digital information, including establishing their rights to access that information, and retrieving confidential user IDs and passwords. Terms of Service (TOS) Agreements with individual providers (which are typically entered into by clicking "I agree" when opening) usually govern what happens to an account on the death of the owner. Often, they can provide that the account is not transferable and all rights to the account cease on death. Federal and state laws that criminalize unauthorized access to computers and prohibit the release of electronic account information can prevent fiduciary access to the digital assets.

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) was approved by the Uniform Law Commission (ULC) on July 16, 2014. The goal of the UFADAA is to remove barriers to a fiduciary's access to electronic records by reinforcing the concept that the fiduciary "steps into the shoes" of the account holder. The UFADAA uses the concept of "media neutrality:" If a fiduciary would have access to a tangible asset, the fiduciary will also have access to a similar type of digital asset. "Digital asset" is very broadly defined to mean a record that is electronic. The UFADAA:

- Goes beyond the estate situation and covers four common types of fiduciaries: personal representatives, guardians, agents acting under a power of attorney and trustees;
- Maneuvers around federal and state privacy and computer fraud/abuse laws by defining fiduciaries as authorized users; and
- Supersedes any contradictory TOS agreements: Provisions in TOS agreements broadly barring fiduciary access are void.

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Upon the written request of a fiduciary with authority over digital property, a custodian must comply with the fiduciary's request for access, control or a copy of that property within 60 days. Custodians are granted immunity from taking any action in compliance with the statute.

After receiving the ULC's approval, a uniform act is officially promulgated for consideration by the states, and legislatures are urged to adopt it. A uniform law is not effective until a state legislature adopts it, sometimes with state-level massaging. Now that a final version of UFADAA has been released, it is reasonable to anticipate a flurry of state activity as individual legislatures are expected to introduce legislation based on it. Various professional organizations in New York are currently collaborating to finalize a New York version of UFADAA for introduction in the next legislative session.

3. Unitrust Regime: A Reminder About the Availability of Retroactivity.

The precepts of the Prudent Investor Rule govern the investment of trust assets. Pursuant to those precepts, a trustee is required to invest for "total return," in order to benefit both income and principal beneficiaries. However, when beneficial interests clash, the source of return becomes critical, and the tension between investing for income and investing for growth can become more pronounced. The power to adjust[3] and unitrust regimes[4] can provide trustees with the means to implement

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the mandate of total return investing, in effect, by preempting the definition of fiduciary accounting income. Under the power to adjust regime, the trustee is permitted to make adjustments between income and principal to be fair and reasonable to all beneficiaries. Under the unitrust regime, a trust can be converted to a unitrust, pursuant to which the income beneficiary will receive a fixed 4 percent payout of the trust's principal.

Matter of Kruszewski[5] is an instructive reminder that, in New York, a retroactive application of the unitrust regime is possible. In December 2011, the sole income beneficiary of a testamentary trust created by his father commenced a proceeding seeking to apply retroactively New York's unitrust provisions. In a summary judgment application, he requested that the court either not specify the effective date or, alternatively, set the effective date as Jan. 1, 2002 (the effective date of the unitrust option in New York). The Surrogate found that the income beneficiary was barred by the doctrine of res judicata[6] from seeking unitrust payments prior to the date of a final decree settling a former trustee's accounting, but that in any event a Jan. 1, 2012 effective date was appropriate. In making that determination, the Surrogate considered various factors, including the fact that the beneficiary had consented to the accounting, thereby acknowledging that the sums paid to him were proper, and that the Jan. 1, 2002 retroactive date would trigger significant tax consequences and significantly reduce the principal of the trust to the detriment of the income and remainder beneficiaries.

On appeal, the Appellate Court noted that the court determines the unitrust effective date, the selection of which is a matter committed to the sound discretion of the Surrogate's Court. Regardless of whether the Surrogate properly invoked the doctrine of res judicata, the Appellate Court held that the factors considered by the Surrogate were entirely appropriate, and that a Jan. 1, 2012 effective date struck an appropriate balance between providing the beneficiary with a reliable source of income during his retirement, while minimizing the detrimental effect of the unitrust conversion.

Although the court did not grant retroactivity, the discussion of factors it considers in making that determination is instructive. The fact that retroactivity could be appropriate is implicit in the decision. Contrast this potential for retroactivity with the statutory language regarding the power to adjust, which appears to apply prospectively only:

> [T]he prudent investor standard also authorizes the trustee to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make appropriate *present and future* distributions … Estates, Powers and Trusts Law (EPTL) §11-2.3(b)(5)(A) (emphasis added).

Accordingly, for those seeking a retroactive regime, the unitrust option in New York might be very appealing. New York is in a distinct minority in allowing retroactive application of the unitrust regime:[7] Most states allow prospective unitrust payments only. In the right circumstances, a beneficiary seeking retroactive payment might consider moving to New York a trust governed by another state's laws.

4. Revisions to How Interest on Delayed Legacies Is Computed: Legislation Finally Enacted.

After many years brewing, New York has finally enacted a new law regarding how interest is computed on delayed legacy payments.[8]

Under prior law, unless the will provided otherwise, 6 percent interest was payable on a testamentary pecuniary legacy that was unpaid seven months after letters issued. The interest charge was payable only if a legatee made a demand for the interest before initiating a judicial proceeding.

The new law makes three main changes:

1. Interest is automatically payable on a pecuniary legacy unpaid within seven months from the issuance of letters.

According to the legislative summary, the dual requirements for demand and a judicial proceeding have not been applied consistently. This caused a great amount of uncertainty, leaving fiduciaries in the difficult position of potentially paying interest on a legacy at their peril in the absence of a judicial proceeding, or forcing an unnecessary, expensive judicial proceeding.

A new Surrogate's Court rule was adopted which **limits public access to certain documents.** The rule attempts to strike a balance between two competing interests: public access to judicial proceedings and privacy concerns.

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2. The interest charge will be tied to the federal funds rate.

The former fixed statutory interest rate of 6 percent was too high based on current market rates, but might be too low in a different economic environment.

3. The interest charge is recharacterized as accounting income, so that its payment will carry out distributable net income and generate a deduction for the estate.

Although reportable as income by the legatee, the interest was not previously deductible to the estate.

The new law applies to estates of individuals who die on or after Dec. 20, 2014.

5. You Can Divorce a Spouse, But Not Necessarily the In-Laws: Lesson and Reminder.

At issue in *Matter of Lewis*[9] was EPTL §5-1.4. That section provides that divorce revokes dispositions to, and fiduciary nominations of, former spouses, but the revocatory effect of the section does not extend to the *relatives* of an ex-spouse.

In *Lewis*, the decedent executed a will in 1996, nine years prior to her divorce. The will left her entire estate to her husband, who she also appointed as executor. In the event the decedent's husband predeceased her, she named his father as the alternate executor and alternate beneficiary of all her property. While they were married and residing in Texas, the couple bought from the decedent's parents New York real property that had been in the decedent's family for generations. When the couple divorced in 2007, the property was awarded to the decedent, who relocated there permanently until her death in 2010.

No will was found by the decedent's family after her death, and her parents were awarded letters of administration. They renounced their interest in the decedent's New York property so it would pass to her brothers. After her ex-husband learned of her death, the decedent's former father-in-law offered the 1996 will for probate. The decedent's parents and brothers objected, but a divided Appellate Division affirmed the Surrogate's holding to dismiss the objections. According to the majority, the statute is clear and unambiguous in omitting the relatives of an ex-spouse, even "if we could assume that the ex-husband might someday inherit or obtain the property from [his father]."

In a strongly-worded dissent, the dissenting judge pointed out that the ex-husband's claim to be "shocked" to discover that his father was the decedent's sole beneficiary was "simply incredible"; that the evidence suggested that the ex-husband's family hid the will until they learned of the decedent's death about 8 months after her passing when her ex-husband "decided to Google [decedent's] name [to] see … what came up and her obituary came up"; and that the father-in-law was petitioner in name only, the true party in interest being the ex-husband, who was barred under EPTL §5-1.4 from taking under his former wife's will. According to the dissent, admitting the 1996 will to probate was "manifestly unjust and inequitable … [and] would defeat the purpose and spirit of EPTL §5-1.4."

Several professional organizations are currently reviewing whether EPTL §5-1.4 should be revised. Although Texas law was inapplicable in *Lewis*, that state's probate code provides that, after divorce, all will provisions (including fiduciary appointments) must be read as if the former spouse *and each relative of the former spouse who is not a relative of the testator* predeceased the testator.[10] The Uniform Probate Code revokes testamentary bequests to the former spouse, as well as bequests to the former spouse's relatives.[11] Another approach might be to have a rebuttable presumption that relatives of an ex-spouse are excluded, although that would result in uncertainty compared to a bright line rule. Any rule would of course be a default rule, subject to contrary expression.

And therein lies the reminder and the lesson: Divorced spouses must give immediate attention to their planning documents, to ensure they reflect their intent.

6. Enforceability of Charitable Pledges: A Lesson for Charities.

Despite judicial acknowledgement of the widely recognized public policy favoring enforcement of charitable pledges, the court in *Estate of Kramer*[12] refused to enforce a decedent's $1,800,000 pledge and promissory note (together, the subscription). The subscription, in furtherance of a building project at the Educational Institute Oholei Torah—Oholei Menachem, was signed in August 2006, and the decedent died in February 2008. According to the court, the rationale underpinning enforcement of a pledge is based on the theory of unilateral contract: A pledge is not a contract, but an offer to contract, which, when acted upon by incurring liability, becomes a binding obligation. Accordingly, the question before the court was whether the charity accepted the subscription by acting in reliance thereon, the burden being on the charity to demonstrate prima facie reliance. The court identified three sets of cases where charitable pledges had been enforced by the courts:

1. Those where substantive progress had

been accomplished towards the charitable purposes for which the pledges were received (such as where a building was actually built or construction was underway or a construction loan was obtained);

2. Those where partial payments in satisfaction of the pledges were made (acceptance of which created a bilateral contract); and

3. Those where facts demonstrated actions in reliance by the donees, as well as partial payment by the donors (such as where partial payment for a construction project had been paid and the building had been constructed).

In *Kramer*, the court found that the charity failed to demonstrate the required "proof of meaningful and substantive actions in reliance [of the subscription]:" The charity had not begun construction, had not engaged any building professionals and had not incurred any legal, financial or contractual obligations with respect to the building project, which the court described as "a hoped-for occurrence, an expectation of uncertain fruition."

This case should serve as an important reminder to charities that, without support to establish the requisite legal relationship, they cannot assume that a signature on a pledge card will be enforceable.

7. Recognition for Children Born After the Death of a Genetic Parent: Legislation Enacted.

As a result of scientific advances, a child can be conceived after the death of one or both of the child's genetic parents with stored genetic material. With continued technological developments and increasing demand for sophisticated storage techniques—Facebook and Apple, for example, announced that they will pay for their female employees to freeze their eggs—the number of children born after the death of their genetic parents can only be expected to rise. The law enacted on Nov. 21, 2014 clarifies the circumstances under which a child born after the death of a genetic parent will be considered a child of that parent for inheritance and succession purposes.[13]

Under the new law, a child will be considered a distributee of the genetic parent and a child of the genetic parent for purposes of class gifts in dispositive instruments, if the following four conditions are satisfied:

1. In a written instrument signed not more than seven years before death, the genetic parent must (a) expressly consent to the use of the genetic material for posthumous reproduction and (b) authorize a person to make decisions about the use of the genetic material after the genetic person's death (the statute includes a model form of written instrument, the authority under which is revoked by divorce);

2. Within seven months of the issuance of letters, the person authorized to make decisions must give notice of the existence of the stored genetic material to the personal representative of the genetic parent's estate;

3. Within seven months of the issuance of letters, the authorized person must record the writing in the Surrogate's Court; and

4. The genetic child must be in utero within 24 months or born within 33 months of the genetic parent's death.

With regard to dispositive instruments in which the genetic parent was not the creator, the provision is effective for wills of individuals dying after Sept. 1, 2014, or lifetime trusts executed after that date. For instruments created by the genetic parent, the law will apply regardless of date.

8. Statutory Residency: Landmark Court of Appeals Decision and New Nonresident Audit Guidelines.

New York generally taxes residents on their worldwide income. There are two separate and independent bases on which an individual can be taxed as a resident: (1) the individual is domiciled in New York or (2) the individual is a nondomiciliary who satisfies the statutory residency test. That test has two prongs: The nondomiciliary must (a) maintain a permanent place of abode in New York *and* (b) spend 184 days or more in the state during the taxable year.[14] There are two components of permanence that must be satisfied in order to establish that a taxpayer is "maintaining a permanent place of abode":

The law enacted on Nov. 21, 2014 clarifies the circumstances under which a child born after the death of a genetic parent will be considered a child of that parent for inheritance and succession purposes.

- Physical attributes of the dwelling; and
- Nature of the taxpayer's relationship to the dwelling.

"Physical attributes" has been interpreted to relate to the nature of the residence and whether it is *objectively* suitable for year-round living, not the taxpayer's actual use of it.[15]

Regarding the nature of the taxpayer's relationship to the dwelling, guidance is provided in the Nonresident Audit Guidelines, issued by the New York State Department of Taxation and Finance. The department issues the guidelines to ensure uniformity and consistency in the examination of nonresident returns. According to the guidelines themselves: "… they have no legal force or effect, but are generally binding on audit staff who are expected to follow the rules and procedures outlined in the guidelines when conducting an audit." The latest version of the guidelines was issued in June 2014.[16] The guidelines set out a list of seven factors to consider in evaluating the taxpayer's relationship to the dwelling: ownership, property rights, contribution to maintenance, relation to other occupants, registration for government or business purposes (such as mail, voter and car registration or phone service), dedicated separate space/personal items, and unfettered access.

The statutory residence test was the test at issue in the landmark decision of *Gaied v. Tax Appeals Tribunal*.[17]

John Gaied was a New Jersey domiciliary who worked in New York. In 1999, he purchased a three-unit apartment building in New York. His parents occupied the first floor apartment, and he rented out the basement and second floor. He paid the expenses of the apartment for his dependent parents, who had no other means of support. He had no bedroom, or even a bed in the apartment, and kept no clothing or personal belongings there. When he occasionally spent nights at the apartment at the request of his parents due to their health concerns, he slept on a couch. Gaied did spend over 183 days in New York for business, so the matter turned on whether the apartment could be considered a permanent place of abode. The Tax Appeals Tribunal determined that he did maintain a permanent place of abode, finding it significant that he maintained and owned the property, and had unfettered access to it (despite his actual infrequent use). In a 3-2 decision, the Appellate Court ruled in favor of the Tribunal. Gaied appealed to the Court of Appeals, which examined the Tax Tribunal's interpretation of "permanent place of abode" as meaning that a taxpayer need not "reside" in the dwelling, but only maintain it. The review of the Court of Appeals was limited to whether that interpretation comports with the meaning and intent of the statutes involved. The court concluded that there was no rational basis for the Tribunal's interpretation. According to the court, a permanent place of abode must relate to the taxpayer. In other words, a mere ownership interest is not sufficient – there must be some basis to conclude that the residence was utilized as the taxpayer's residence:

> The legislative history of the statute, to prevent tax evasion by New York *residents* … supports the view that in order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have a residential interest in the property.

The most significant update between the 2014 Nonresident Audit Guidelines and the previous 2012 version is to memorialize the department's reaction to the Court of Appeals decision in *Gaied*. Surprisingly, the guidelines provide that the court's finding (that there must be some basis to conclude that the residence was utilized as the taxpayer's residence) is "consistent with current Audit policy that the taxpayer must have a relationship to the dwelling for it to constitute a permanent place of abode." The 2014 guidelines make it clear that possession of property rights and the making of contributions, while important aspects to be considered in evaluating a relationship to a residence, by themselves "would not necessarily make a dwelling a [permanent place of abode] *without more*." However, the examples given to illustrate the department's views seem to belie their assertion that their interpretation is consistent with the court in *Gaied*:

Example 1 describes taxpayers who occasionally use an apartment in New York City for cultural events, rather than driving back to their home in New Jersey. The department concludes: "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 uses it*." (emphasis added)

Example 2 describes a taxpayer who moves to Florida, lists her New York home for sale and no longer resides there. Because the taxpayer has unfettered access and "*no one else is using it as residence currently*" (italics in guidelines), the department concludes that the taxpayer retains a residential interest and that the home would constitute a permanent place of abode.

In Example 3, the department posits the same facts as Example 2, except that the home contents were moved to the Florida residence and the New York home was vacant. In those circumstances, the guidelines provide that the taxpayer would not have a residential interest in the New York home because it would not be reasonable to expect her to use a vacant home despite having unfettered access.

Example 4 closely mimics the situation in *Gaied*: Instead of John who lives in New Jersey, the guidelines posit Jim, who lives in Connecticut. Like John, Jim works in Manhattan, buys an apartment for his elderly mother, is the legal owner, pays all the expenses, has a key and occasionally sleeps on the couch when visiting. According to the department, despite the presence of a number of factors that would indicate it is a permanent place of abode—ownership, maintenance, unfettered access, actual use—the property does not constitute a permanent place of abode: "… the overriding point is that the residence is used *primarily* by the mother and the taxpayer's occasional use should not change its character."

Although Example 4 should give some comfort to those who hold legal title to property that is used by others (like parents who own an apartment occupied by a child), it seems clear that the department is still focused on the *ability* to use the property, rather than actual use. Query whether that view is really consistent with the Court of Appeals holding that, given the legislative history of the statute—"to prevent tax evasion by New York *residents*" (emphasis in original)—*there must be some basis to conclude that the residence was utilized as the taxpayer's residence*. Can property be utilized as a residence without actual use? In the Department's Example 2, query how unfettered access can be sufficient if a taxpayer does not actually use the residence.

9. Dramatic Fiduciary Income Tax Changes Effected with 2014-2015 Budget.

Perhaps the most dramatic changes of this legislative session were those effected on March 31, 2014, when the New York State legislature passed the Executive Budget for 2014-2015.

Under existing New York Tax Law, an income tax is imposed on the income of a "resident trust," which includes a trust created by a New York domiciliary. However, prior law provided that a resident trust would be exempt from tax if three conditions were met: (1) there were no New York trustees, (2) there was no trust property located in New York, and (3) there was no New York source income.

The Executive Budget includes changes to the taxation of resident trusts. While it does not impose a tax at the trust level, the new law does tax distributions of accumulated trust income to New York beneficiaries of these exempt resident trusts.[18] However, with capital gains apparently not subject to the accumulation tax and a number of potential strategies to reduce or eliminate the tax on accumulated income, establishing an exempt resident trust in a jurisdiction like Delaware can still be a very effective strategy for New York residents. Note also that the foundation for trust taxation in New York is the creation of a trust by a *New York testator or grantor*.[19] Except for source income, New York will generally not tax trusts created by *nonresidents*.[20] Accordingly, for residents of other states, New York is an attractive jurisdiction in which to consider creating trusts.

10. Dramatic Changes to Trusts & Estates Laws Effected with 2014-2015 Budget, and New York State Department of Taxation and Finance Guidance.

Estate Tax Exclusion Increases, But "Cliff" Impact Can Be Dramatic. The Executive Budget increases the New York estate tax exclusion amount over the next several years.[21] The exclusion amount was increased from $1 million to $2,062,500 for individuals dying after April 1, 2014. The amount increases to $3,125,000 for individuals dying after April 1, 2015, to $4,187,500 for individuals dying after April 1, 2016, and to $5,250,000 for individuals dying after April 1, 2017 and before Jan. 1, 2019. After Jan. 1, 2019, the New York exclusion amount will be linked to federal exclusion amount, including inflation indexing (projected in 2019 to be $5.9 million). However, the New York estate tax computation contains an estate tax "cliff": Estates that are less than or equal to the New York estate tax exclusion amount will pay no tax, but the credit for New York taxable estates that are between 100 and 105 percent of the basic exclusion amount is rapidly phased out and eliminated entirely if the New York taxable estate exceeds 105 percent of the basic exclusion amount.[22]

On Aug. 25, 2014, the New York State Department of Taxation and Finance issued a Technical Memorandum[23] (TSB) to summarize and clarify the changes effected by the enactment of the Executive Budget. The TSB contains examples that illustrate the operation of the credit for an estate that is less than the basic exclusion amount (currently $2,062,500), and an estate that exceeds the basic exclusion amount by less than 5 percent, as follows:

Example 1: A taxable estate of $1,525,120 will pay no estate tax because the taxable estate is less than the basic exclusion amount. The applicable credit is equal to the amount of the tax.

Example 2: A taxable estate of $2,100,000 exceeds the basic exclusion amount by less than 5 percent, and is subject to a credit phase-out. The applicable credit is less than the estate tax due, resulting in a tax liability of $49,308.

What is not spelled out in these examples is the dramatic effect of the cliff. In the first example, a taxable estate of $2,062,500 would also have paid no tax, compared with the second example of a $2,100,000 estate, which would have a $49,308 tax liability. The tax liability ($49,308) exceeds the increase in value from $2,062,500 to $2,100,000 ($37,500).

Also dramatic but not spelled out is the tax liability if the hypothetical estate was to exceed 105 percent of the basic exclusion amount ($2,165,625): An estate of $2,165,650 would have an estate tax liability of $112,052. As per the second example, an estate of $2,100,000 would have a $49,308 tax liability. The increased tax liability of $62,744 ($112,052 - $49,308) approximates the increase in value from $2,100,000 to $2,165,650 ($65,650). The increase in the value of the estate is almost entirely eaten up by taxes.

A Disappearing Estate Tax? Note that the estate tax may *disappear* after March 31, 2015: The estate tax rate schedule is expressed to apply to individuals dying between April 1, 2014 and March 31, 2015.[24] There is no rate schedule for individuals dying after March 31, 2015. Action is required to prevent the possible elimination of the estate tax for those dying outside the expressed timeframe.

Gift Add-Back. The New York gross estate of a deceased resident will be increased by the amount of any taxable gift made within three years of death, if the decedent is a New York resident at the time the gift is made and at the time of death.[25] Although New York estate taxes are generally deductible against the federal estate tax liability, the estate tax attributable to the gift add-back does not seem to be deductible under Internal Revenue Code §2058. The result is that gifts added back will potentially be subject to the full maximum 16 percent estate tax rate, without any offsetting federal deduction. The three-year look-back applies only to gifts made on or after April 1, 2014 and before Jan. 1, 2019. The way the budgetary language was drafted, there appeared to be a lack of parity with the estate tax regime: Gifts by a New York resident of out-of-state real property or tangible personal property were not specifically excluded from the gift add-back, but out-of-state real and tangible property are specifically excluded from the New York gross estate for New York estate tax purposes.

The TSB clarifies that gifts are not added to the gross estate if they consisted of real or tangible property having a location outside New York.

1. Uniform Civil Rules of the Surrogate's Court, Rule 207.64.
2. Uniform Civil Rules of the Supreme and County Courts, §202.5(e).
3. N.Y. Estates, Powers & Trusts Law (EPTL) §11-2.3(b)(5).
4. N.Y. EPTL §11-2.4.
5. *Matter of Kruszewski*, 116 A.D.3d 1288, 984 N.Y.S.2d 232 (3d Dept. 2014).
6. The doctrine of res judicata prevents claims being asserted after a judgment has been rendered.
7. California also appears to allow the unitrust regime to be implemented retroactively. See Cal. Prob. Code §16336.4(f).
8. New York A.1185/S.4952 (2013).
9. *Matter of Lewis*, 114 A.D.3d 203, 978 N.Y.S.2d 527 (4th Dept. 2014).
10. Tex. Estates Code §123.001.
11. Uniform Probate Code §2-804 (1969, last amended 2010).
12. *Estate of Kramer*, N.Y.L.J., April 21, 2014 (Sur. Ct., Kings Co.)
13. N.Y. EPTL §4-1.3.
14. N.Y. Tax Law §605(b)(1).
15. See *In the Matter of the Petition of John J. and Laura Barker*, DTA No. 822324, 2012 N.Y. Tax Lexis 7 (N.Y. Div. Tax App. 2012).
16. 2014 Nonresident Audit Guidelines, State of New York—Department of Taxation and Finance, Income Franchise Field Audit Bureau (June 2014), available at www.tax.ny.gov/pdf/2014/misc/nonresident_audit_guidelines_2014.pdf.
17. *Gaied v. Tax Appeals Trib.*, 22 N.Y.3d 592, 983 N.Y.S.2d 757, 2014 NY Slip Op. 1101, 6 N.E.3d 1113 (N.Y. Ct. App. Feb. 18, 2014).
18. N.Y. Tax Law §612(b)(40).
19. N.Y. Tax Law §618. See 20 NYCRR §§118.1, 105.23.
20. N.Y. Tax Law §§631, 633; instructions to 2013 N.Y. Form IT-205 at 2. See N.Y. Tax Bull. TB-IT-615 (Dec. 15, 2011), available at www.tax.ny.gov/pdf/tg_bulletins/pit/b11_615i.pdf.
21. N.Y. Tax Law §952(c)(2).
22. N.Y. Tax Law §952(c)(1).
23. N.Y. TSB-M-14(6)M (May 15, 2014), available at www.tax.ny.gov/pdf/memos/estate_&_gift/m14_6m.pdf.
24. N.Y. Tax Law §952(b).
25. N.Y. Tax Law §954(a)(3).

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A06024 Text:

S T A T E O F N E W Y O R K

6024--A

2015-2016 Regular Sessions

I N A S S E M B L Y

March 10, 2015

Introduced by M. of A. WEINSTEIN -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the estates, powers and trusts law, in relation to payment of interest on delayed legacies to genetic children of the decedent

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph 3 of section 11-A-2.1 of the estates, powers and trusts law, as amended by chapter 404 of the laws of 2014, is amended to read as follows:

(3) Unless otherwise provided by the terms of the will or trust, commencing (A) seven months from either the date of death or other date a beneficiary is to receive a pecuniary amount outright if letters are not required, UNLESS THE BENEFICIARY IS A GENETIC CHILD, THEN SUCH DATE SHALL BE THE LATER OF THE AFOREMENTIONED TIME PERIODS IN THIS SUBPARAGRAPH OR THE DATE OF BIRTH OF THE GENETIC CHILD ENTITLED TO INHERIT FROM THE CHILD'S GENETIC PARENT UNDER SECTION 4-1.3 OF THIS CHAPTER, or (B) seven months from the time letters, including preliminary or temporary letters, are granted if letters are required, UNLESS THE BENEFICIARY IS A GENETIC CHILD, THEN SUCH DATE SHALL BE THE LATER OF THE AFOREMENTIONED TIME PERIOD IN THIS SUBPARAGRAPH OR THE DATE OF BIRTH OF THE GENETIC CHILD ENTITLED TO INHERIT FROM THE CHILD'S GENETIC PARENT UNDER SECTION 4-1.3 OF THIS CHAPTER, a fiduciary shall distribute income to a beneficiary who receives a pecuniary amount outright, from net income determined under paragraph (2) or from principal to the extent that net income is insufficient, of an amount equal to the pecuniary amount multiplied by an income factor, which shall be set (or reset) on the first business day of each calendar year and fixed for that calendar year at the target Federal funds rate as announced by the Federal Reserve Board (or in the event the target Federal funds rate is a range

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD07962-03-5

of rates, the high of that range) less one percent, but in no event less than one-half of one percent.

S 2. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after December 20, 2014, and the provisions of this act shall apply to estates of the decedents who shall have died on or after such date.

A06263 Text:

S T A T E O F N E W Y O R K

6263

2015-2016 Regular Sessions

I N A S S E M B L Y

March 19, 2015

Introduced by M. of A. BRAUNSTEIN, WEINSTEIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the estates, powers and trusts law, in relation to a trustee's authority to recant the invasion of a trust and the creation of a new trust

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The opening paragraph and subparagraph 6 of paragraph (j) of section 10-6.6 of the estates, powers and trusts law, the opening paragraph as added by chapter 451 of the laws of 2011 and subparagraph 6 as amended by chapter 482 of the laws of 2013, are amended and a new subparagraph 7 is added to read as follows:

The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. THE EXERCISE OF THE POWER IS IRREVOCABLE ON SUCH EFFECTIVE DATE, EITHER THIRTY DAYS FOLLOWING SERVICE OF THE NOTICE OR THE EFFECTIVE DATE AS SET FORTH IN THE WRITTEN CONSENT.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, WITHIN TWENTY DAYS OF THE EFFECTIVE DATE, the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD09957-01-5

(7) PRIOR TO THE EFFECTIVE DATE AS PROVIDED HEREIN, A TRUSTEE MAY REVOKE THE EXERCISE OF THE POWER TO INVADE TO A NEW TRUST. WHERE A TRUSTEE HAS SERVED NOTICE OF THE EXERCISE OF THE POWER PURSUANT TO SUBPARAGRAPH (2) OF THIS PARAGRAPH, THE TRUSTEE SHALL SERVE NOTICE OF THE REVOCATION OF THE EXERCISE OF THE POWER TO PERSONS INTERESTED IN THE INVADED TRUST AND THE APPOINTED TRUST BY REGISTERED OR CERTIFIED MAIL, RETURN

RECEIPT REQUESTED, OR BY PERSONAL DELIVERY OR IN ANY OTHER MANNER DIRECTED BY THE COURT HAVING JURISDICTION OVER THE INVADED TRUST. WHERE THE NOTICE OF THE EXERCISE OF THE POWER WAS FILED WITH THE COURT, THE TRUSTEE SHALL FILE THE NOTICE OF REVOCATION OF THE EXERCISE OF THE POWER WITH SUCH COURT.

S 2. This act shall take effect immediately and shall apply to all estates and living trusts.

A07869 Text:

S T A T E O F N E W Y O R K

7869

2015-2016 Regular Sessions

I N A S S E M B L Y

May 28, 2015

Introduced by M. of A. WEINSTEIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the estates, powers and trusts law, in relation to fiduciaries' powers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (b) of section 11-1.1 of the estates, powers and trusts law is amended by adding a new subparagraph 23 to read as follows:

(23) TO EXERCISES CONTROL OVER ANY AND ALL RIGHTS TO DIGITAL ASSETS, DIGITAL ACCOUNTS OR DIGITAL DEVICES WHICH ARE PROPERTY OF THE ESTATE OR TRUST, TO THE FULLEST EXTENT PERMITTED UNDER APPLICABLE LOCAL, STATE OR FEDERAL LAW, INCLUDING COPYRIGHT LAW, OR REGULATIONS NOTWITHSTANDING THE PROVISIONS OF ANY END USER AGREEMENT. FOR THE PURPOSES OF THIS SECTION:

(A) "DIGITAL ACCOUNT" MEANS AN ELECTRONIC SYSTEM FOR THE PURPOSES OF CREATING, GENERATING, SENDING, SHARING, COMMUNICATING, RECEIVING, STORING, DISPLAYING OR PROCESSING INFORMATION THAT PROVIDES ACCESS TO A DIGITAL ASSET WHICH CURRENTLY EXISTS OR MAY SUBSEQUENTLY EXIST AS TECHNOLOGY DEVELOPS, INCLUDING BUT NOT LIMITED TO, EMAIL ACCOUNTS, SOCIAL NETWORK ACCOUNTS, SOCIAL MEDIA ACCOUNTS, FILE-SHARING ACCOUNTS, HEALTH INSURANCE ACCOUNTS, HEALTH CARE ACCOUNTS, FINANCIAL MANAGEMENT ACCOUNTS, DOMAIN REGISTRATION ACCOUNTS, DOMAIN NAME SERVICE ACCOUNTS, WEB HOSTING ACCOUNTS, TAX-PREPARATION SERVICES ACCOUNTS, ONLINE STORE ACCOUNTS AND AFFILIATE PROGRAMS THERETO AND ANY OTHER ONLINE ACCOUNTS THAT CURRENTLY EXIST FOR SUCH COMPARABLE PURPOSES.

(B) "DIGITAL ASSET" MEANS DATA, TEXT, EMAILS, DOCUMENTS, AUDIO, VIDEO, IMAGES, SOUNDS, SOCIAL-MEDIA CONTENT, SOCIAL-NETWORKING CONTENT, CODES, HEALTH CARE RECORDS, HEALTH INSURANCE RECORDS, COMPUTER-SOURCE CODES, COMPUTER PROGRAMS, SOFTWARE, SOFTWARE LICENSES, DATABASES, INCLUDING THE USERNAMES AND PASSWORDS CREATED TO ACCESS SUCH ASSETS. "DIGITAL ASSET"

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD10844-01-5

DOES NOT INCLUDE AN UNDERLYING ASSET OR LIABILITY THAT IS GOVERNED UNDER OTHER PROVISIONS OF THIS CHAPTER.

(C) "DIGITAL DEVICE" MEANS AN ELECTRONIC DEVICE THAT CAN CREATE, GENERATE, SEND, SHARE, COMMUNICATE, RECEIVE, STORE, DISPLAY, OR PROCESS INFORMATION, AND SUCH ELECTRONIC DEVICES SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, DESKTOPS, LAPTOPS, TABLETS, PERIPHERALS, SERVERS, MOBILE TELEPHONES, SMARTPHONES AND ANY SIMILAR STORAGE DEVICE OR COMPARABLE

ITEM THAT CURRENTLY EXISTS OR MAY SUBSEQUENTLY EXIST AS TECHNOLOGY DEVELOPS.

(D) "ELECTRONIC" MEANS RELATING TO TECHNOLOGY, HAVING ELECTRICAL, DIGITAL, MAGNETIC, WIRELESS, OPTICAL, ELECTROMAGNETIC OR SIMILAR CAPABILITIES.

S 2. This act shall take effect immediately and shall apply to all estates, administrations, wills and trusts in existence before, on or after its effective date.

A07638 Text:

S T A T E O F N E W Y O R K

7638

2015-2016 Regular Sessions

I N A S S E M B L Y

May 20, 2015

Introduced by M. of A. SEAWRIGHT, WEINSTEIN -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary

AN ACT to amend the estates, powers and trusts law, in relation to the revocatory effect of divorce and relatives of a former spouse

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 5-1.4 of the estates, powers and trusts law is amended by adding a new paragraph (g) to read as follows:

(G) THE REVOCATORY EFFECT OF PARAGRAPH (A) SHALL BE PRESUMED TO APPLY TO A PERSON IN ANY RELATIONSHIP TO THE DIVORCED INDIVIDUAL THAT WAS BASED UPON SAID MARRIAGE, INCLUDING BUT NOT LIMITED TO STEPCHILDREN, STEPGRANDCHILDREN AND PARENTS-IN-LAW, UNLESS THERE IS SUBSTANTIAL EVIDENCE OF THE DIVORCED INDIVIDUAL'S CONTRARY INTENTION. TESTIMONY WITH REGARD TO SUCH INTENTION SHALL NOT BE DISQUALIFIED UNDER CPLR 4519 PROVIDED THAT SUCH TESTIMONY IS SUPPORTED BY OTHER EVIDENCE.

S 2. This act shall take effect immediately.