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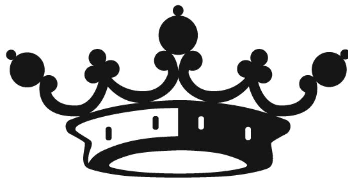

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Changes in Laws Affecting Estate Planning

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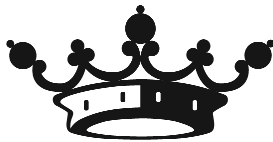

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General Discussion of Tax Law Changes

Every new year brings with it changes and opportunities. This is especially true in the estate tax planning realm of 2009. Changes to the federal estate tax laws in 2009 included, for example, the largest ever increase in the estate tax exemption. Effective January 1, 2009, the applicable exclusion amount (AEA), which is the amount excluded from federal estate tax, jumped from $2 million to $3.5 million. With this welcomed change, however, comes a significant state estate tax cost that requires revisiting one's estate plan to ensure that both federal and state estate taxes are reduced in an effective manner consistent with the client's objectives.

Because of the increased AEA, the single client will be able to pass to his family or other beneficiaries $3.5 million without paying any federal estate tax. Furthermore, with proper estate planning, a husband and wife can shelter up to $7 million. However, flexibility in estate planning and the use of various wealth transfer techniques are of paramount importance due to the uncertainty of the future of the federal tax law, the marked volatility in asset values and interest rates, and, of course, possible changes in the client's personal life. The federal estate tax, for example, is scheduled to be repealed on January 1, 2010, only to return to an AEA of only $1 million in 2011. Despite the scheduled decrease in the AEA from $3.5 million to merely $1 million in only two years, most estate planning experts are of the opinion that the only certainty amid the uncertainty is that more changes are likely to come in 2009 for a number of reasons. One such change is preserving the $3.5 million AEA beyond 2009 and the current top tax rate of 45 percent, which the new administration supports. Regardless of the changes that will come about, we are confident that they will come this year, and estate planning attorneys must plan against unwanted or unexpected consequences.

Although avoiding federal estate tax will be easier starting in 2009[1] because of the increased AEA, the same is not true with state estate tax. In fact, the

[1] As noted above, the federal estate tax is scheduled to be repealed on January 1, 2010, only to return to an AEA of only $1 million in 2011. However, the law has a "sunset" provision, which means that if Congress passes no additional law, the estate tax laws in effect prior to the Tax Relief Act of 2001 would be reinstated in 2011. Gift tax rates will be reduced on the same schedule as the estate tax rate. However, when the estate tax is repealed in 2010, taxpayers will still be subject to a lifetime gift tax, with a maximum gift tax rate of 35 percent, which is the same as the maximum income tax rate. Gift tax rates are reduced on the same schedule as the estate tax rate. The generation-skipping transfer tax will also be repealed for all transfers after December 31, 2009. For purposes of this discussion, we will assume that the AEA will remain at $3.5 million.

increase in the federal AEA means that estates in 2009 (and beyond, if the anticipated federal changes become law by year's end) will be subject to a far greater state estate tax. While the higher AEA will result in lower federal estate taxes on the death of the surviving spouse, for example, it can also cause unanticipated state estate tax to be due at the death of the first spouse if your client's estate plan has not been updated to account for the possibility of differing federal and state estate tax exemptions. For residents of New York,[2] where the exclusion amount is only $1 million, if the estate plan is designed to minimize federal estate taxes only, there may be state estate tax liability of as much as $229,200 at the death of the first spouse. Consider this example: an estate of $2 million in 2008 paid no federal estate tax, while paying $99,600 in New York state estate tax (a similar estate tax would have been due in New Jersey and Massachusetts—there was no estate tax in Connecticut because its exemption was $2 million); in 2009, an estate of $3.5 million will still not pay federal estate tax, but will incur as much as $229,200 in state estate taxes.

Therefore, it is more important than ever for residents of a state with a state estate tax (or a resident of any state who owns real property in such a state, in some cases) to determine whether one's will and/or revocable trust should be updated, considering the likelihood that the federal and applicable state estate tax exemptions are different at the time of the death of the first spouse. Most traditional estate plans maximize the use of the federal AEA, resulting in no federal tax due at the death of the first spouse. However, as is evident from the example above, there could be a considerable state estate tax due. In some cases, but certainly not all, it may make sense in the long run to pay the relatively small amount of state estate tax at the first death to avoid possibly paying substantially more federal tax at the death of the surviving spouse.

Since a federal and state estate tax will, in all likelihood, continue to be a reality for a long time, estate tax considerations will continue to be important for many clients. Flexibility in dealing with changes to the federal and state tax codes, and not predictability, is the key to an effective estate plan. At our firm, we urged our clients to contact us for a review of their estate plan to discuss the impact of the federal AEA increase and the various techniques available to maximize their objectives by minimizing their estate tax. Such a review is also important to ensure that the AEA increase does not result in an unintended *decrease* in the amount going to the surviving spouse and *increase* in

[2] The same is true of residents of Connecticut, Massachusetts, and New Jersey, whose exemptions are $2 million, $1 million, and $675,000, respectively.

the amount going to children, by way of a classic credit shelter formula, which would require the funding thereof with an amount equal to the deceased spouse's available AEA. For instance, if the deceased spouse's will left the AEA equally to children and the balance to the surviving spouse, the amount available to the surviving spouse would decrease as the AEA increased. For example, if the deceased spouse had a $5 million estate, the surviving spouse would have received $4 million when the AEA was $1 million and only $1.5 million when the AEA increased to $3.5 million.

Additional changes that may affect your client's estate plan that are worth mentioning, but are beyond the scope of this chapter, include the increase in annual gift tax exclusion, increase in non-citizen spouse gift tax annual exclusion, and increase in the generation-skipping transfer exemption. As you may know, each year individuals are entitled to make gifts of the annual gift tax exclusion amount without incurring gift tax or using up any of their lifetime applicable exemption amount (which remains unchanged at $1 million) against estate and gift tax. Having been adjusted for inflation, the annual exclusion per donee in 2009 is increased from $12,000 to $13,000. With respect to gifts made to a non-citizen spouse, that annual exclusion amount has been increased to $133,000 in 2009. As for the generation-skipping transfer exemption, the amount of the exemption, just like the estate tax exemption, has been increased from $2 million to $3.5 million in 2009. Therefore, since both a husband and wife can use a separate $3.5 million exemption, up to $7 million will be exempt from the generation-skipping transfer tax for transfers from, for example, grandparents directly to grandchildren, or grandparents to qualified trusts created for the grandchildren's benefit. This permits skipping over a generation for estate tax purposes. Clearly, this provides a significant benefit, but an effective estate plan should consider all relevant issues, including federal and state estate tax issues, to ensure that the increase in generation-skipping transfer exemption will provide a substantial benefit to your client's descendants over time. As with the federal AEA, the generation-skipping transfer exemption is scheduled to be repealed as of January 1, 2010, and to return to $1 million in 2011. However, since the two exemptions are linked both in the amount and applicable tax rate, it is likely that the generation-skipping transfer tax exemption, like the estate tax exemption, will also remain at $3.5 million and at the current flat tax rate of 45 percent[3] under the anticipated changes expected under the new administration.

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[3] The generation-skipping transfer tax is not graduated, and the 45 percent applies to the first dollar subject to the tax.

Impact of the Economic Crisis

Since we are on the topic of predicting the unpredictable, as a result of comments made by the current administration and members of Congress, it is also worth noting that there has been a great deal of speculation on what the future may hold for federal estate tax legislation. In no specific order of significance, examples include: allowing the portability of the AEA so married couples may make full use of their current combined AEA ($7 million) without the necessity of a credit shelter trust, and even if the first spouse to die does not have enough assets to fully utilize his or her estate tax exemption, or the executor underfunds the credit shelter disposition, the unused portion of the AEA would not be lost and would be available to the surviving spouse;[4] eliminating the deduction for state death taxes; curtailing, if not eliminating, certain discounts for lifetime gifts and/or bequests of family limited partnerships; allowing flexibility in Crummey powers[5] such that gifts to trusts would qualify for the annual exclusion amount; increasing the AEA for gifts from the current $1 million to $3.5 million; and requiring a minimum of 10 percent of the value of the remainder interest for grantor-retained annuity trusts, as is presently required for charitable remainder trusts.

In addition to the foregoing, there were significant changes affecting our clients' IRAs and 401ks, resulting from October 2008's Emergency Economic Stabilization Act and December 2008's Worker, Retiree, and

[4] For example, if when the first spouse dies, that spouse only has $2 million of assets that can be covered by $2 million of the AEA, the $1.5 million of unused estate tax exemption would be carried forward to the surviving spouse to be utilized on such spouse's death.

[5] Gifts to an irrevocable trust do not automatically qualify for the federal annual gift tax exclusion. A Crummey power is an estate planning tool utilized to allow gifts to an irrevocable trust to qualify for the federal annual gift tax exclusion. A Crummey power (which derives its name from *Crummey v. Commissioner of Internal Revenue*, 397 F.2d 82 (9th Cir. 1968)) is a provision contained in certain irrevocable trusts (the most common of which is an irrevocable life insurance trust) that permits specified trust beneficiaries to withdraw gifts that a grantor makes to the trust. This withdrawal power permits a gift to the trust to qualify as a present interest gift, which in turn qualifies it for the annual exclusion. Generally, the annual exclusion effectively exempts annual gifts up to the applicable exclusion amount per trust beneficiary from the federal gift tax. Over time, regular gifting to the trust will reduce the size of the grantor's gross estate. Without the Crummey power, all gifts made to the irrevocable trust (which, for example, if they are not withdrawn by the beneficiary, are often used by the trustee to pay for annual life insurance premiums) would otherwise be subject to gift tax.

Employer Recovery Act. While the rules affected by the changes are too complex for, and beyond the scope of, this chapter, the major benefits are as follows. The Emergency Economic Stabilization Act allows individual taxpayers who are at least seventy and a half years old to exclude up to $100,000 annually of otherwise taxable IRA distributions that are paid directly to qualifying charitable organizations. The Worker, Retiree, and Employer Recovery Act suspends the application of the minimum distribution rules for 2009 as they apply to IRAs and "defined contribution plans" such as 401k and profit-sharing plans. This means that in most cases, owners of such accounts and the beneficiaries of deceased account owners will not be required to take a minimum distribution in 2009.

Lastly, while the economic downturn in 2008 created an unsettling volatile market and interest rates reached historic lows, it also presents unique estate planning opportunities for 2009 and beyond. Simply put, the lower interest rates fall and the more stock prices decrease, the better the environment to transfer assets with reduced or no gift or estate tax consequences. This is true because many techniques rely on assets outperforming the Internal Revenue Service's rates of return. While there are a number of options available to our clients, two of the more common techniques that become significantly more valuable as the prices of securities and interest rates fall are sales to "defective" grantor trusts, and the use of grantor-retained annuity trusts. In addition to these, the Internal Revenue Service's low rates present real opportunities to allow clients to assist their families while shifting wealth between generations with reduced or no gift tax implications. Intra-family loans, for example, can provide a significant benefit to a junior generation family member with relatively modest tax implications to the senior generation family member. Not only can intra-family loans be made at rates lower than those that are commercially available, but also the payment terms can be designed to fit the specific needs and resources of the borrower.

The changes in 2009 and the educated speculation of future estate tax legislation present both the need to revisit one's estate plan and an unexpected opportunity to utilize techniques that will allow the practitioner to better structure his client's objectives while maximizing estate and gift tax savings. As a service to our clients, our trusts and estates practice group provides our clients with periodic updates to keep them abreast of

significant developments and opportunities that affect their existing estate plans, or that they should consider in developing their future estate plans. It is a practice that more estate planning attorneys should engage in. Not only is it good practice, but it is good for client development.

Tax and Other Law Changes Affecting New York Estate Planning

Increase in Federal Applicable Exclusion Amount[6]

The most significant recent development affecting New York estate tax actually did not come about through the New York legislature. As briefly set forth above, in 2009, the AEA for the federal estate tax and generation-skipping transfer tax increased from $2 million to $3.5 million. In 2010, the current law provides that there will be a repeal of the estate tax and the generation-skipping transfer tax. In 2011, the AEA and the generation-skipping transfer tax exemption will revert back to $1 million, which was the amount prior to the current law. Although one can never accurately predict the future when it comes to Tax Code legislation, it is highly unlikely that the current administration and Congress, as it is constituted today, will allow the AEA to be repealed. It is also highly unlikely that the $3.5 million AEA will be reduced by future federal tax legislation. As unpredictable as Tax Code legislation may be, one thing is for certain: the New York Estate Tax Law will remain unchanged for the foreseeable future. In fact, the reason the 2009 federal change is so significant to New York state estates stems from the last major change affecting New York estate tax law, which was in 2005, as further discussed below. For residents of New York,[7] if the estate plan is designed to minimize federal estate taxes only, there may be state estate tax liability of as much as $229,200 at the death of the first spouse. Consider this example: An estate of $2 million in 2008 paid no federal estate tax, while paying $99,600 in New York state estate tax (a similar estate tax would have been due in New Jersey and Massachusetts—there was no estate tax in Connecticut because its exemption was $2 million). In 2009, an estate of $3.5 million will still not

[6] The following discussion also applies to other states that have decoupled their state estate tax provisions from the federal estate tax, and do not allow a state-only qualified terminable interest property.

[7] The same is true of residents of Connecticut, Massachusetts, and New Jersey, whose exemptions are $2 million, $1,million, and $675,000, respectively.

pay federal estate tax, but will incur as much as $229,200 in state estate taxes. In some cases, but certainly not all, it will make sense in the long run to pay some state estate tax at the first death to avoid possibly paying substantially more federal tax at the death of the surviving spouse. A New York resident[8] surviving spouse, for example, with her own taxable estate of $3.5 million, would save more than $900,000 in federal taxes in her estate by paying $229,200 in her husband's estate.[9]

The relationship between the New York estate tax and the federal estate tax system changed dramatically in 2005 when New York became a decoupled state for federal estate tax purposes. As a result of this decoupling, assuming a taxable estate of at least $3.5 million, the death of a grantor or testator with a New York estate in 2009 and beyond may result in exposing at least $2.5 million (the difference between the federal AEA of $3.5 million and the New York AEA of $1 million) to New York estate tax. Therefore, there could be a significant New York estate tax even though there would be no federal estate tax due on a $3.5 million estate. The significance of January 1, 2005, is that it is the date that the pick-up tax was officially phased out under the provisions of the Economic Growth and Tax Relief Reconciliation Act. For dates of death on or after January 1, 2005, the Internal Revenue Code allows a deduction for state estate taxes (or inheritances taxes[10] paid to a state in computing the federal taxable estate). Prior to 2005, an estate was allowed a credit against the federal estate tax for such taxes. This change affects the New York state estate tax because New York state estate tax does not conform to the federal change. As a result, the deduction for state death taxes is not allowable in computing the taxable estate for New York State.

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[8] The example would also apply to residents of Connecticut, Massachusetts, and New Jersey, the difference being the proportionate state estate tax relative to the particular state's exemption.

[9] For purposes of simplifying calculations, this example assumes that the predeceased spouse died in 2009 and the current federal and state AEA will remain the same.

[10] For those not familiar with the difference, the distinction between an inheritance tax and an estate tax is that an inheritance tax is based on who inherits the decedent's property, as opposed to the total value of the estate. In other words, the tax is assessed only against the property the beneficiary receives, not the total value of the decedent's estate. For example, in a state that imposes an inheritance tax, a transfer to a spouse or to a charity is not taxed, a transfer to a child or other descendant is taxed at a rate different from that which would be applied to a transfer to a sibling, and yet another rate is applied to transfers made to anyone else. In New York, which does not vary the rate based on who inherits the property, full deductions are allowed for property passing to a surviving spouse who is a U.S. citizen or to a charity.

Since New York state tax law incorporated the increases in the unified credit up to the amount of tax on $1 million, the filing requirements for New York State were identical to the federal requirements through 2003. The additional increases in the federal filing threshold after 2003 were not incorporated in New York state tax law, so the filing threshold for New York State remains at $1 million. As such, some estates with dates of death after 2003 would have to file a New York state estate tax return, even if they are not required to file a federal estate tax return. So how does one know if a New York estate tax return is required to be filed? The answer[11] is as follows:

If the date of death is on or after January 1, 2004:

> The estate must file Form ET-706, New York State Estate Tax Return, if any of the following conditions are true:
>
> - The decedent was domiciled in New York State at the time of death, and the total of the federal gross estate, federal taxable gifts, and specific exemption (see federal instructions for Form 706) exceeds $1 million.
> - The decedent was not domiciled in New York State at the time of death, and the estate includes real or tangible personal property with a situs in New York State, and the total of the federal gross estate, federal taxable gifts, and specific exemption exceeds $1 million.
> - The decedent was neither a resident nor a citizen of the United States, the estate includes real or tangible personal property with a situs in New York State, and the estate is required to file a federal estate tax return (Form 706-NA).

If the date of death was on or after February 1, 2000, but before January 1, 2004:

> The estate had to file Form ET-706, New York State Estate Tax Return, if both of the following were true:

[11] See instructions for Form ET-706.

- The estate is required to file a federal estate tax return (either Form 706 or Form 706-NA).
- The decedent was domiciled in New York State (that is, a resident) at the time of death, or was a non-resident who owned real property or tangible personal property in New York state.

Implications

So, what does this change mean, and how does it affect a New York estate plan in 2009 and beyond? In the simplest of terms, there is a gap between the federal AEA ($3.5 million) and the New York AEA ($1 million) of $2.5 million. For married clients, this gap can result in a New York estate tax due on the first spouse's death, although no federal estate tax would be due until the death of the surviving spouse. The problem facing married clients in New York, therefore, is that your typical implementation of the marital deduction and the credit shelter trusts (commonly referred to as "AB" trusts) does nothing for minimizing New York estate taxes (or any other state's death estate taxes, for that matter).[12]

Even more unfortunate for New York residents is the fact that although New York imposes its own estate tax and allows only a $1 million AEA, New York does not allow state-only qualified terminable interest property (QTIP) elections. Such an election would allow for a full federal estate tax exemption of $3.5 million for each spouse, while deferring all New York estate taxes until the surviving spouse's death. Since state-only QTIPs are not allowed in New York, New York residents are generally limited to either fully funding the federal estate tax exemption ($3.5 million) and paying New York estate taxes on the amount exceeding New York's AEA ($2.5 million) on the first spouse's death, or funding the credit shelter disposition with $1 million (New York AEA) and wasting $2.5 million of the federal estate tax exemption by overfunding the marital deduction disposition. As a result, the New York estate tax will be about $229,000 on

[12] There are some states that allow for planning such that both the federal and state death taxes are deferred until the death of the surviving spouse through the use of what are commonly referred to as "ABC" trusts. New York is not one of those states. Therefore, New York residents without proper estate or post-mortem planning are faced with the choice of paying a state estate tax on the first spouse's death or under-funding the credit shelter trust so that both state and federal estate taxes are deferred until the death of the surviving spouse.

the $2.5 million of federal estate tax exemption exceeding the $1 million New York estate tax exemption. However, incurring some estate taxes upon the first spouse's death in exchange for fully utilizing the federal exemption may provide overall estate tax savings when considering the aggregate taxes payable for both spouses' estates. Therefore, it would be a good idea to keep options open for your clients so that the executor can make the proper choice as to which estate assets would be used to fund state death taxes.

But is there an even better alternative? Yes, there is. Here, too, however, we must rely on federal authority and not so much on New York authority. The issue is whether the estate of the surviving spouse will be afforded an exception to the Internal Revenue Code (I.R.C.) § 2044 (West 2009) requirement that her estate include property for which a deduction was previously allowed with respect to the transfer of such property to the surviving spouse under I.R.C. § 2056(b)(7) (1997).

This summarizes the "exception" to I.R.C. § 2044 as provided in Rev. Proc. 2001-38, 2001-24 I.R.B. 1335 (2001), and provides further observations and comments based on our review of private letter rulings and court decisions that have applied Rev. Proc. 2001-38 and the pertinent sections of the Internal Revenue Code, generally.

Background

I.R.C. § 2056(a), in pertinent part, provides that the value of a taxable estate is determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse. I.R.C. § 2056(b)(7)(A) provides an exception to the terminable interest rule in I.R.C. § 2056(b)(1) that denies a marital deduction for an interest passing to the surviving spouse that is a "terminable interest." A QTIP, under I.R.C. § 2056(b)(7)(A), is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under I.R.C. § 2056(b)(7)(B)(i), a QTIP is property that passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under I.R.C. § 2056(b)(7)(B)(v) applies. Under I.R.C. § 2056(b)(7)(B)(v), that election to treat property as QTIP under I.R.C. §

2056(b)(7) is made by the executor on the return of tax imposed by I.R.C. § 2001 (2003).[13] Of course, this election, once made, is irrevocable.

It goes without saying that a QTIP election has transfer tax consequences for the surviving spouse. Under I.R.C. § 2044(a) and (b), the value of the surviving spouse's gross estate includes the value of any property in which the decedent has a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under I.R.C. § 2056(b)(7).[14]

Therefore, in situations where an estate made an unnecessary QTIP election, the property subject to the election would unnecessarily enlarge the surviving spouse's gross estate under I.R.C. § 2044(a), or if that spouse disposes of the income interest, would be subject to gift tax under I.R.C. § 2519 (West 2009). Further, the surviving spouse would, in the absence of a "reverse QTIP" election under I.R.C. § 2652(a)(3) (1998), be treated as the transferor of the property for generation-skipping transfer tax purposes under I.R.C. § 2652(a).

The purpose of Rev. Proc. 2001-38 is to provide relief for surviving spouses and their estates in situations where a predeceased spouse's estate made an unnecessary QTIP election under I.R.C. § 2056(b)(7) that did not reduce the estate tax liability of the estate. Under certain narrow circumstances specified in the revenue procedure, the QTIP election will be treated as a nullity for federal estate, gift, and generation-skipping transfer tax purposes, so that the property will not be subject to transfer tax with respect to the surviving spouse.

<u>Applicability of Rev. Proc. 2001-38</u>

Certain QTIP elections will be disregarded for estate tax purposes. Specifically, the revenue procedure provides that QTIP elections that were

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[13] The term "return of tax imposed by 2001" means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed after the due date.

[14] Under I.R.C. § 2519(a) and (b), any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under I.R.C. § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Further, the surviving spouse will, in the absence of a "reverse QTIP" election under I.R.C. § 2652(a)(3), be treated as the transferor of the property for generation-skipping transfer tax purposes under I.R.C. § 2652(a).

not necessary to eliminate federal estate tax on the first spouse's death will be ignored in determining the amount included in the surviving spouse's estate under I.R.C. § 2044. One example of an unnecessary QTIP election described in the revenue procedure is one that is made for both a credit shelter trust and a marital trust. The QTIP election for the credit shelter trust is not necessary, because no estate tax is imposed on a credit shelter trust funded with an amount that does not exceed the AEA under I.R.C. § 2010(c) (2002) (i.e., $3.5 million). The unnecessary election will cause inclusion of both the credit shelter trust and the QTIP trust in the surviving spouse's estate on his or her subsequent death, potentially increasing the estate tax on his or her estate. In effect, by making the election, the executor has wasted the predeceased spouse's estate tax exemption. Rev. Proc. 2001-38 provides that on the surviving spouse's subsequent death, the Internal Revenue Service will disregard the unnecessary election and will not insist on inclusion of the credit shelter trust assets in the surviving spouse's estate. Another example where, as a consequence of an unnecessary QTIP election, the property subject to the election would be included in the surviving spouse's estate under I.R.C. § 2044, but for the protection of Rev. Proc. 2001-38, is where the election was made when the taxable estate (before allowances of the marital deduction) was less than the applicable exclusion amount under I.R.C. § 2010(c). Obviously, the QTIP election was not necessary, because no estate tax would have been imposed regardless of whether the QTIP election was made.

However, Rev. Proc. 2001-38 states that it does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability in the predeceased spouse's estate and the executor made the election with respect to more property than was necessary to reduce the estate tax liability to zero. Nor does it apply to elections that are stated in terms of a formula designed to reduce the estate tax to zero.

<u>Observations and Suggestions</u>

It appears that the revenue procedure allows for an opportunity to obtain the benefit of a marital deduction in the first spouse's estate without the accompanying tax burden in the surviving spouse's estate. Let us take a closer look.

The revenue procedure sets forth the procedure by which the estate of the surviving spouse may avail itself of the revenue procedure's "protection." In addition, although some may opine that it is automatic *ab initio*, the application of Rev. Proc. 2001-38 is not automatic and applies only if the surviving spouse or the surviving spouse's estate applies for relief. Since an application for relief is required, it is possible to leave the difference between the federal AEA and the New York AEA in a separate QTIP Trust and make a QTIP election for that trust. When the surviving spouse dies, her estate would then decide whether to invoke Rev. Proc. 2001-38. In that case, it is very likely to be impossible or impractical for New York State to collect the estate tax in the first spouse's estate. However, if New York State takes the position that the unnecessary QTIP election is void *ab initio*, it might seek to impose the tax on the predeceased spouse's estate despite the QTIP election. But, as discussed below, we do not believe this to be a likely scenario.

So, by using Rev. Proc. 2001-38, is the family able to "have its cake and eat it too"? Does the revenue procedure mean the QTIP election can be used to avoid state estate tax on the first death, while the unnecessary QTIP trust is still excluded from the surviving spouse's estate? The answer would be "probably so."

When a taxpayer obtains relief under the revenue procedure, the QTIP election is disregarded, including for purposes of the marital deduction in the first spouse's estate. The ultimate reversal or "undoing" of the marital deduction may not incur any federal estate tax in the first estate. But without that deduction, New York state estate taxes would have been imposed on the first spouse's estate. It would appear, therefore, that the New York State Department of Taxation and Finance, upon learning of an application for relief under the revenue procedure, may assert a claim for tax in the first spouse's estate, along with interest and any other additions to tax. And, one could reasonably conclude, that as interesting an idea as it might be, the "risk and reward" would need to be considered because the taxing authority could decide to not allow the revenue procedure to maximize the federal estate tax savings and avoid the New York state estate tax in both the first and second estates.

Here is an example of a scenario in which the risk and reward would need to be contemplated: spouse dies and his revocable trust provides for a marital trust. We will assume that he did not make any lifetime taxable gifts. Therefore, his full estate tax exemption is available to the executor. He is survived by his wife and children, with a taxable estate of $4.5 million. Since the marital trust is of a kind that can qualify for the QTIP marital deduction (if the executor so elects), it will be exempt from estate tax to the extent that the executor elects. However, the tradeoff would be that the portion of the marital trust (or what remains of it at the surviving spouse's death) to which the election is made will be fully includible and taxable in the surviving spouse's eventual estate. The incremental estate taxes then attributable to the marital trust would be payable out of the assets of the marital trust, not out of the surviving spouse's general estate. In other words, the taxes on the death of the surviving spouse would be borne by the children, since they are the ultimate beneficiaries of the marital trust.

The first option, in a scenario in which we do nothing until the death of the first spouse, which would involve no "risk" at all, would be for the executor to elect QTIP treatment for only $1 million of the marital trust, leaving $3.5 million uncovered by the marital deduction. The result would be that no federal estate tax is due because $3.5 million (the federal AEA) would be utilized for the credit shelter disposition and the balance will be covered by the marital deduction. However, $2.5 million (the difference between the federal and New York state AEA) would be exposed to New York estate tax, resulting in $229,000 in New York estate taxes.

In the second option,[15] the trustee could exercise their power under the revocable trust agreement to divide the marital trust into three trusts—we will refer to them as credit shelter trust, QTIP trust #1, and QTIP trust #2. The credit shelter trust would contain $1 million in assets. QTIP trust #1 would contain $2.5 million, and QTIP trust #2 would contain the balance of the marital trust assets, or $1 million. The executor could elect QTIP treatment for both QTIP trust #1 and QTIP trust #2, and leave the credit

[15] The strategy discussed in this second option can be structured by creating multiple separate "QTIP-able" trusts for both spouses in their respective wills or revocable trusts so as to avoid having to wait for the first spouse to die, then having the trustee exercise their power to create separate trusts, thereby eliminating the alleged "risk" of the Internal Revenue Service determining that the post-mortem planning is akin to a partial election.

shelter trust uncovered by the marital deduction. This option would result in no federal or New York estate tax because the credit shelter trust does not exceed the New York AEA and the QTIP trusts are covered by the marital deduction.

The second option, therefore, leaves open the possibility under the revenue procedure that the surviving spouse's executor might be able to exclude QTIP trust #1 from her gross estate. If this works, the "reward" is that incremental estate taxes that would be charged against the marital trust would only be based on QTIP trust #2 (i.e., $1 million), and not both QTIP trusts.

The second option would result in no federal or New York estate tax because, as mentioned above, Rev. Proc. 2001-38 provides that where the estate of the first spouse to die has made a QTIP election with respect to a trust that was not necessary to reduce the federal estate tax to zero in that estate, the QTIP election with respect to that trust will be disregarded upon the surviving spouse's death and the value of that trust will not be included in the surviving spouse's gross estate. This would apply to our example because election of QTIP treatment for QTIP trust #1 would not be necessary to keep the federal estate tax in the estate at zero (this is so because had the QTIP election not been made, the $2.5 million, combined with the $1 million in the credit shelter trust, would not have exceeded the $3.5 million AEA). One might question whether the revenue procedure would work to keep our QTIP trust #1 from being included in the surviving spouse's estate since the revenue procedure states that it is inapplicable where a "partial" QTIP election was made with respect to a trust in the first spouse's estate. While there are no published rulings to indicate whether the Internal Revenue Service might regard the division of our marital trust into separate trusts, and the election of QTIP treatment for only two of the resulting three trusts, as a partial election, it is unlikely that the Internal Revenue Service, in a scenario where there would not have been any federal estate tax due, as in our example, would not allow the relief afforded under Rev. Proc. 2001-38.

What, then, of New York? Is there a "risk"? Here, too, there is no published ruling. However, we believe this is an opportunity in which the taxpayer would be permitted to "have his cake and eat it too." The relief

afforded under the revenue procedure in the federal estate clearly results in excluding QTIP trust #1 from the surviving spouse's estate. But what of the fact that the first estate saved in New York estate taxes because of the very QTIP election that the executor of the second spouse's estate is now seeking to undo so that the corpus of QTIP trust #1 (or what is left of it) is not included in the surviving spouse's estate? What chance does New York have in recovering estate taxes against the first spouse's estate if the Internal Revenue Service allows the executor in the second spouse's estate to undo the election? The answer lies in N.Y. TAX LAW § 961 (West 2009), "Effect of Federal Determination." Specifically, said N.Y. TAX LAW § 961(a)(3) states: a final federal determination "as to the value or amount of any such item, shall also determine the same issue for purposes of the tax under this article unless such final federal determination is shown by a preponderance of the evidence to be *erroneous*" (emphasis added). In other words, it would seem clear that the only way New York would be able to impose an estate tax on the first spouse's estate (assuming the statute of limitations on the first estate has run[16]) upon the death of the second spouse is if the Internal Revenue Service's determination to allow the undoing of the QTIP election in the first spouse's estate was "erroneous" as a matter of law. It is difficult to imagine, if not impossible, a scenario in which the Internal Revenue Service erroneously determines the validity of a QTIP election. Therefore, once the Internal Revenue Service made its determination to allow the marital deduction in the first spouse's estate, New York would be bound by that determination. As a result, New York would not be able to impose its estate tax on the first spouse's estate, because to do so would necessarily involve retroactively imposing such a tax, which would be contrary to N.Y. TAX LAW § 961.

Significant Changes to Durable Power of Attorney

A power of attorney is routinely recommended as part of an estate plan. It is very easily created and confers upon another a great deal of power over someone else's affairs. A general durable power of attorney, for example, is the only document one can use to effectively substitute the decision-making of the agent (attorney-in-fact) for that of the principal in virtually all types

[16] There is a three-year statute of limitations (generally after the return is filed) on the Tax Department's right to assert additional tax due.

of financial transactions.[17] Of course, with the broad power to act on another's behalf comes the fiduciary responsibility of exercising that power in the best interest of the principal. Unfortunately, there have been a number of attorneys-in-fact over the years that have failed to abide by their fiduciary duties and engaged in all sorts of impermissible acts of self-dealing. Effective September 1, 2009, however, 2008 N.Y. Sess. Laws ch. 644 (signed into law as Chapter 4 of the Laws of 2009) amends New York's General Obligations Law. N.Y. GEN. OBLIG. LAW § 5-1501 (2009), which contained the previous statutory short form power of attorney, has been repealed in its entirety. New N.Y. GEN. OBLIG. LAW §§ 5-1501, 5-1501A, and 5-1501B have been added in its place. This amendment provides significant changes to the use and exercise of powers of attorney in the hopes of providing additional protections against some of the major abuses.

Because of its easy creation and significant effect on the financial management of the principal, the legislature intended for the new power of attorney to remain flexible enough to allow the agent to carry out the principal's reasonable intentions while also containing clear and consistent direction for its effective use. Many had opined, for example, that the former power of attorney made it difficult for a principal to make an informed decision about what type of authority and how much authority to give an agent with respect to the management of the principal's daily financial affairs and the reorganization or distribution of the principal's assets in connection with financial and estate planning, obviously two very different and potentially conflicting purposes. The prior power of attorney, for example, did not indicate that the agent could engage in self-gifting or self-designation as the beneficiary of the principal's insurance policies and retirement benefits. In addition, some argued that gifting and transfer provisions were "scattered" among more routine provisions, and that clear and precise instructions as to gifting were nowhere to be found in the former power of attorney. Considering that the power of attorney could also be employed in matters involving the principal's medical bills, concerns were also raised with regard to the interaction of the prior law with federal privacy rules under the Health Insurance Portability and Accountability Act.

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[17] A general durable power of attorney is also an attractive method by which to avoid having to commence a N.Y. MENTAL HYG. LAW §§ 81.01 et seq. (West 2009) proceeding for the purpose of having a guardian of the person or property appointed for an incapacitated person.

Specific Changes

1. Validity of the New Form

The new law provides ample definitions for the terms used within Title 15. See N.Y. GEN. OBLIG. LAW § 5-1501. And to prevent miscommunication and possible fraud, it also provides that a valid power of attorney must be (i) legibly typed in no less than twelve-point font, (ii) signed and dated by a principal, (iii) with capacity (as defined within the statute), (iv) in the manner prescribed for the acknowledgement of a conveyance of real property. See N.Y. GEN. OBLIG. LAW § 5-1501B.

Moreover, the new form is not valid until it is signed by *both* the principal and agent, whereas the prior form merely required the duly acknowledged signature of the principal. Both signatures are required to be duly acknowledged. If there is one agent appointed, the effective date of the power of attorney is the date on which the agent's signature is acknowledged. If there are two or more agents, each of whom may act separately from the other, the effective date of the power of attorney as to a particular agent is the date on which that agent's signature was acknowledged. If two or more agents are designated to act together, the power of attorney takes effect when all the agents have signed and their signatures have been acknowledged. In addition, unless the principal expressly provides otherwise, co-agents must act together. However, even in the absence of an authorization for the agents to separately act, in certain emergency situations, as defined in the statute, one co-agent may serve alone. See N.Y. GEN. OBLIG. LAW § 5-1508 (2009).

To sign a power of attorney, the principal must have capacity, which is defined by the statute as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending, or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney." See N.Y. GEN. OBLIG. LAW § 5-1501. All powers of attorney are considered durable[18] unless the document expressly states otherwise. Accordingly, the

[18] A durable power of attorney is one in which the power of attorney will continue to be effective even if the principal becomes incapacitated.

non-durable power of attorney form has likewise been repealed. However, the new statutory form can be modified to indicate that the power of attorney should not survive the principal's incapacity.

2. Fiduciary Duties

In addition to the statutory explanation of the agent's fiduciary duties, in essence codifying the common law recognition of an agent as a fiduciary, a notice is added to the statutory short form explaining the agent's role, fiduciary obligations, and legal limitations on authority. The agent's duly acknowledged signature serves as an acknowledgment of the agent's fiduciary obligations and evidences the agent's intent to accept the appointment and abide by those obligations. As had been the case previously, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed. The principal may also provide that the agent receive reasonable compensation for carrying out those transactions. An agent under power of attorney, however, is not entitled to compensation unless it is expressly provided for within the document. The statutory form provides a box to be initialed if the agent is to receive "reasonable compensation." Reimbursements of the agent's expenses are permitted without an affirmative provision.

3. Gifting Generally

The new law increases the amount of the gifting provision to match the amount under the Internal Revenue Code and adds a provision allowing gifting to a "529" account up to the annual gift tax exclusion. Gift-splitting provisions have also been amended to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse. The default statutory provisions regarding annual exclusions on gifting will remain consistent with federal law.

4. Major Gifts and Rider

The most significant change to the law is the establishment of the "statutory major gifts rider" (SMGR), a supplemental document in which the principal may "authorize major gift transactions and other transfers" as

detailed in the new N.Y. GEN. OBLIG. LAW § 5-1514 (2009). Therefore gifting powers may no longer be granted to an agent within the context of a durable power of attorney, and instead the principal must sign an SMGR to accomplish this.

Clearly, this change was set out to curtail the abuses of gifting powers that previously took place under the exercise of the former power of attorney. It also addresses the concern that gifting and transfer provisions were previously "scattered" among more routine provisions by allowing for clear and precise instructions to be specified by the principal. It is entirely new and is intended to make a significant difference in how an attorney-in-fact exercises the power to make gifts. A grant of authority to make major gifts and other asset transfers must now be set out in a separate rider that contains the principal's signature, duly notarized and witnessed by two people not named in the instrument as permissible recipients of gifts or other transfers, in the same manner as a will. As an alternative, the principal may grant such authority to the agent in a non-statutory power of attorney executed in the same manner as a major gifts rider. An agent acting pursuant to the authority granted by this rider or non-statutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests. The major gifts rider is also necessary for an agent to, among other things, open, modify, or terminate a deposit account in the name of the principal and other joint tenants; open, modify, or terminate any other joint account in the name of the principal and other joint tenants; and open, modify, or terminate certain bank accounts in trust form, such as Totten trust accounts, "payable on death" accounts, or "in trust for" accounts.

As aforementioned, the statutory form of SMGR or a non-statutory form may be used. However, if the principal wishes to use any SMGR, he or she must so authorize by initialing the appropriate box on the new durable power of attorney form. Attorneys should be mindful that the SMGR will only be valid if it is executed simultaneously with the power of attorney form, and is both acknowledged and witnessed by two disinterested witnesses.

In the absence of an SMGR, the only gifts an attorney-in-fact will be permitted to make on behalf of the principal are gifts the principal had

customarily made to individuals and charities, not to exceed $500 per beneficiary, per calendar year. See N.Y. GEN. OBLIG. LAW § 5-1502I (2009). It is axiomatic that without an SMGR, the power of attorney will not serve to accomplish many significant estate planning objectives.

5. Health Insurance Portability and Accountability Act Concerns

The law forbidding the agent from making health care decisions was not changed, and the statutory structure continues to permit the division of responsibilities for health care decisions and bill paying between two representatives, the health care agent and the attorney-in-fact, respectively. However, by the legislature adding the terms "health care billing and payment matters" to the terms "records, reports, and statements," the attorney-in-fact is now able to examine, question, and pay medical bills without fear of the Health Insurance Portability and Accountability Act Privacy Rule that would otherwise prevent the agent's access to the records. Of course, the principal must grant the agent power with respect to records, reports, and statements in the first place.

6. Third Parties

Under the new law, third parties may not, without reasonable cause, refuse to accept powers of attorney. The basis for a reasonable refusal includes, but is not limited to: the agent's refusal to provide an original or certified copy of the power of attorney; the third party's actual knowledge of a report to the local adult protective services unit by another person; questions about the validity of the power of attorney based on the third party's good-faith referral of the principal and the agent to the local adult protective services unit; actual knowledge of the principal's death or reasonable basis for believing he is dead; or actual knowledge of the principal's incapacity upon execution of the document or when acceptance of a non-durable power of attorney is sought on the principal's behalf. The new statute authorizes the agent to seek a court order compelling acceptance of the power of attorney when a third party unreasonably refuses to accept it. A "financial institution," which is now defined as including securities brokers, securities dealers, securities firms, and insurance companies, must now accept a validly executed power of attorney without requiring completion of the institution's own form. Finally, third parties do not now incur any liability in acting on a power of attorney unless the

third party has actual notice that the power has been revoked or terminated.

7. Miscellaneous

The statutory form provides a section that provides the principal with the opportunity to appoint a "monitor" who will have the authority to request that the agent provide a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal and to produce records, receipts, and so on for a going-forward basis. See N.Y. GEN. OBLIG. LAW § 5-1509 (2009). If the agent fails to produce records as required, or other questions arise with respect to a power of attorney, a new special proceeding established under N.Y. GEN. OBLIG. LAW § 5-1510 (2009) of the new law may be commenced by specific interested parties. In addition, investigative agencies and law enforcement officials may now request a copy of the power of attorney and the records of the agent, and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.

A number of other provisions have been added. For example, an attorney can now certify a copy of a power of attorney instead of having to first record it in order to then obtain certified copies from the clerk.

Lastly, a power of attorney executed in another state or jurisdiction, in compliance with the laws of that state, is valid and enforceable in New York. See N.Y. GEN. OBLIG. LAW § 5-1512 (2009).

Impact of Power of Attorney Changes

Notwithstanding the significant changes to the power of attorney, it is important nonetheless to emphasize to our client, who is the principal, that in choosing an agent, congeniality and convenience should give way to trustworthiness and honesty. Appointing an agent, in other words, is not something to take lightly, and the client should be made aware of both the duties of the agent as well as the perils of choosing the wrong one. To ensure a pseudo checks and balances arrangement, it might also be prudent to appoint co-attorneys-in-fact and require them to act jointly. The client should also consider limiting the powers granted to the agent as opposed to the more general power to act in "all other matters." After all, the narrower the powers, the less chance there is for the agent to take advantage of the

principal. Depending upon the facts and circumstances surrounding your particular client's needs, a suggestion that he exercise his right to appoint a "monitor," who will have the authority to request that the agent provide a copy of the documents that record the transactions the agent has carried out for the principal, might be in order.

As you can see from the forgoing, the new law provides for a number of safeguards the principal may set forth in the statutory short form power of attorney. It is therefore all the more relevant and necessary that we, as the principal's counsel, advise the client not only as to the significance of those safeguards, but that we continue to stress the importance of choosing the proper fiduciary.

Additional Note

During June/July of 2009, the turbulent atmosphere in Albany had caused many to believe that no proposed modifications to the new law would be forthcoming from the legislature, and that no new legislation relating to the new power of attorney would be passed. All that was expected was perhaps a postponement of the September 1, 2009, effective date of the new law and power of attorney. However, the New York State Senate adjourned without any such postponement. As such, the new law as passed in 2008 went into effect on September 1, 2009, without revision.

However, a bill has been introduced that, if it is signed into law, would amend the new form and may postpone the effective date of the new power of attorney form. One of the proposed changes provides that the execution of the power of attorney would no longer automatically revoke previously executed powers of attorney. For the time being, however, consideration should be given to whether a clause should be inserted regarding the revocation of prior powers of attorney in order to avoid unintentionally revoking powers of attorney made for a specific purpose. It goes without saying that other modifications should also be made if doing so would be in the best interest of your client.

Significant Changes in the Revocatory Effect of Divorce

More often than not, people do not consider creating an estate plan or, more importantly, amending an existing estate plan until after the

occurrence of a significant event, such as the birth of a child, the death of a family member, a marriage in the family (whether the client herself or her child is getting married), or the purchase of a significant asset such as a new home. Unfortunately a divorce or pending divorce is often not considered a reason for someone to amend an existing estate plan, yet it is an event that should most definitely motivate people to revisit their estate plans in order to be certain that their intentions as to the disposition of their estates are set forth accordingly.

The amended N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (2008) effective July 7, 2008, is an example of the New York legislature taking an active approach in dealing with an issue that, if left unattended by the estate planning client, could have caused serious, unintended consequences. The new statute provides for the revocation upon divorce, legal separation by judicial decree, or annulment of marriage (hereinafter collectively referred to as "divorce") of dispositions to or for the benefit of the former spouse by last will and testament or revocable trust (including a bank account in trust form); beneficiary designations in a life insurance policy; security registration in beneficiary form; and beneficiary designations in a pension or retirement plan to the extent permitted by law. In addition, any provision conferring a power of appointment or power of disposition on the former spouse, naming the former spouse as executor, trustee, conservator, guardian, agent, or attorney-in-fact, will also be revoked upon divorce.[19] Lastly, under the former law, divorce severed the interests of the former spouse in property held as tenants by the entirety and transformed them into tenancies in common. The new N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 extends the effect of divorce to include transforming interests previously held as joint tenants with rights of survivorship to tenancies in common. It is important to note that, in the event that a client may wish to "opt out" of the expanded revocatory effect of the new N.Y. EST. POWERS & TRUSTS LAW § 5-1.4, he or she may do so by simply expressly providing that divorce shall not revoke the disposition or

[19] While these are welcomed changes, the new statute does not go nearly as far as some other states where the revocable disposition of property or appointment as fiduciary is not limited to the former spouse, but extends to relatives of the former spouse as well. N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 does not extend to relatives of the former spouse.

nomination (or joint tenancies) in the "governing instrument" as defined by the statute.[20]

Notwithstanding the significant default rules resulting from the new N.Y. EST. POWERS & TRUSTS LAW § 5-1.4, clients should be discouraged from relying on it as the source for determining how their estates will pass. At the outset, N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 is only effective upon a final divorce judgment, annulment of marriage, or when the separation decree is entered. A divorce or separation proceeding certainly can, and very often does, take a significant amount of time to complete. N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 is not applicable during the pendency of the action. For example, if a spouse were to die prior to obtaining a judgment of divorce or the entering of a separation decree, the disposition to the ex-spouse as the beneficiary and the designation as fiduciary would not be revoked, resulting in an obvious undesired and unintended consequence. It is imperative, therefore, that clients review and consider revising their estate plans during the pendency of the divorce proceeding, or even prior to the commencement of such an action in some cases.

Yet another example of an unintended consequence is one where the wife's will sets forth that if she is not survived by her husband, the disposition that would have gone to the surviving spouse would pass to a class of people or group of beneficiaries that includes the former spouse's family. Also, one or more of the former spouse's family members might be named as a successor fiduciary, or as a successor guardian for minor children. One could certainly imagine a scenario where such appointments would be inappropriate in the event of a divorce or judicial separation. Under N.Y. EST. POWERS & TRUSTS LAW § 5-1.4, these appointments would not be revoked, nor would the dispositions to the former spouse's family. Therefore, while N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 revokes the designation of the spouse as fiduciary as well as dispositions for the spouse's benefit, it does not revoke other designations that would no longer be appropriate. Thus, the will or revocable trust must be reviewed to ensure that the testator's intentions are clearly set forth.

[20] See N.Y. EST. POWERS & TRUSTS LAW § 5-1.4.

The forgoing examples also apply to powers of attorney and health care proxies. N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 does not revoke the appointments of a former spouse's relatives as an attorney-in-fact or health care agent (whether as primary agents or successors). It would be in the best interest of the client to make the necessary changes to these documents long before obtaining the divorce.

As stated earlier, the beneficiary designations of non-probate assets are covered by N.Y. EST. POWERS & TRUSTS LAW § 5-1.4, but not as to relatives of the former spouse. Here, too, the client anticipating a divorce judgment would be wise not to wait until the proceeding is finalized to make necessary changes to beneficiary designations.

It is clear that although New York's legislature expanded the revocatory effect of divorce under N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 to reflect the plausible intent of clients in most scenarios, the new law does not produce the desired outcome in all cases. As such, clients anticipating a divorce should avoid unintended consequences by reviewing their estate plans and making the necessary changes. Failure to do so, or the attorney's mere reliance on the new law, could prove to be contrary to the client's intentions and best interests.

Changes to Simultaneous Death Statute

Simultaneous death is an issue that arises when two people die at the same time, at least one of whom is entitled to part or all of the other's estate (whether by last will and testament or revocable trust—hereinafter collectively referred to as "will"—intestacy, joint property, or other disposition) on his or her death. Generally, if there was any evidence whatsoever that one party survived the other, even by a few moments, at common law, the estates would be distributed in that order. Of course, a testator could include a clause in his will that would change the presumption under the statute.

The disposition of property when people die simultaneously has changed significantly in New York. Effective July 11, 2009, the N.Y. EST. POWERS & TRUSTS LAW § 2-1.6 (2009) provides that absent clear and convincing evidence that one individual survived the other by 120 hours, that individual is treated as if he or she predeceased. In effect, the new statute repealed the former N.Y. EST. POWERS & TRUSTS LAW § 2-1.6, which was based on

actual simultaneous death, and replaces it with language that treats the death of a relevant person within 120 hours of the decedent as predeceasing the decedent.

Under former N.Y. EST. POWERS & TRUSTS LAW § 2-1.6, if it appeared that people died simultaneously, the property of each person was disposed of as if he had survived, with certain exceptions. For instance, when a provision in a will depended on the time of death of two or more beneficiaries, and there was no evidence that they died otherwise than simultaneously, the property was divided into equal portions for each of them. When two joint tenants or tenants by the entirety died simultaneously, the property was distributed one-half to each of their heirs.

To alleviate the problem of proving simultaneous death, the New York legislature has adopted pertinent provisions of the 1993 version of the Uniform Simultaneous Death Act, which provided that each person is to be treated as though he or she predeceased the other if they die within 120 hours of one another. In other words, unless it is established by clear and convincing evidence that an individual survived the death of another individual by 120 hours, that individual is deemed to have predeceased the other individual.

Under the former N.Y. EST. POWERS & TRUSTS LAW § 2-1.6, absent a clause in the decedents' wills stating otherwise, the statute presumed that each individual predeceased the other. Thus, property was generally distributed as if each individual survived the other, with some exceptions. The point of N.Y. EST. POWERS & TRUSTS LAW § 2-1.6, whether the former version or the new, is most evident in an example where either or both the wife and husband had children from a previous marriage. In that case, their wills would very often not be similar and have different beneficiaries. This would be so, for example, because each spouse probably came into the marriage with his or her own separate property. And while each spouse may want the current spouse to enjoy the use of the separate property either outright or in trust if the current spouse survives, if the current spouse is already dead, each spouse would likely want to leave his or her separate property to his or her own children. But what if the wills are silent or if there are no wills? The new N.Y. EST. POWERS & TRUSTS

LAW § 2-1.6, which applies when the wills say nothing about who survived whom, or when there are no wills, states that unless it is established by clear and convincing evidence (more than merely by a preponderance of the evidence) that one spouse survived the other by 120 hours, that spouse is determined to have predeceased the other. Therefore, since the other spouse is presumed to be predeceased, nothing would go from one spouse to the other, and the respective estates would be divided accordingly and pass to their successor beneficiaries or their respective next of kin.
The new N.Y. EST. POWERS & TRUSTS LAW § 2-1.6 also adds a new Paragraph (f) and provides that "unless otherwise provided in the [payable on death account] documents" when the owner and a beneficiary of a payable on death account "die and there is no sufficient evidence that they have died otherwise than simultaneously, the [payable on death account] shall be treated as if the owner had survived the beneficiary."

Conclusion

Keeping abreast of current changes while keeping an eye (and ear) toward future developments and proposals in the areas of federal and state tax and other laws affecting trusts and estates is of paramount importance to an attorney engaged in estate planning and those engaged in estate administration or estate litigation. All three facets of trusts and estates practice require that the attorney keep track of changes as they happen, and even planned changes that are being considered or discussed. The motivation for keeping up to date is that such changes or proposed changes provide for client development opportunities and the development of strategies. Most importantly, it is our duty as attorneys to provide our clients with representation based on the most informed and knowledgeable advice possible.

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Mr. Amlicke is a frequent speaker and author for many business and professional organizations on various topics related to estate planning, estate and trust administration, and taxation. He is on the faculty of the National Business Institute, and he teaches the institute's all-day program titled "The Probate Process from Start to Finish in New York." Mr. Amlicke has been on the faculty of the Pace University Law Center for Continuing Legal Education, where he taught basic will drafting. He also wrote an article on the marital deduction for the Pace University Law Center. He has lectured on estate planning for Merrill Lynch, Schwab, and other financial organizations. He has written tax articles for Estate Planning*, a national estate planning magazine.*

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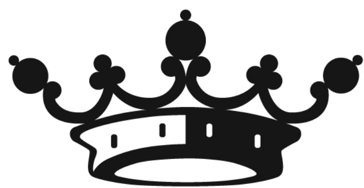

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