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Top Trusts and Estates **Developments, Lessons** and **Reminders** of 2023

10. Planning Remains Critical to Minimize New York Estate Tax

The 2024 New York estate exemption amount has increased to $6.94 million. Since the benefits of the exemption are phased out for estates between 100% and 105% of the exemption amount and estates that exceed 105% are taxable from dollar one (N.Y. Tax Law §952(c)(1)), planning to bring estates in that range below the exemption amount can produce significant tax savings.

Because the New York exemption is not portable between spouses, it is also important to utilize the exemption amount of the first spouse to die, for example with credit shelter or disclaimer trust planning, otherwise it will be lost.

SHARON L. KLEIN

Gifting up to the federal exemption amount ($13.61 million in 2024) to reduce the New York estate is a popular technique because, if the donor survives three years, those gifts will not be added back to the New York estate (N.Y. Tax Law §954(a)(3)).

9. Marriage Occurs When Legal Requirements Met; Not Individual Determination

In *SF v. JS,* 2023 NY Slip Op. 51033 (U), Sup. Ct. N.Y. Co, husband claimed no valid marriage existed because the wedding certificate was never filed, despite the couple having applied for a marriage license, celebrated a religious wedding ceremony before 200 guests, cohabited, held themselves out as a married couple and had a child. Husband had refused to file the wedding certificate until wife signed a prenuptial that the parties started negotiating before the wedding but never executed.

The court noted that, because marriage is an institution that involves the highest interests of society and is controlled by law based upon principles of public policy, individuals cannot determine whether or not they are lawfully married. Accordingly, husband's argument that the parties shared a clear understanding that no marriage would occur without a prenuptial agreement was misplaced.

Although there was a question as to whether New York or New Jersey law applied, since the couple was married in New Jersey but lived in New York for the entirety of their marriage, the court held

SHARON L. KLEIN *is executive vice president and president of Family Wealth for the Eastern U.S. Region at Wilmington Trust. The author wishes to thank her colleagues* JAMES BYRNE, *a senior wealth relationship manager, and* SHAQUILLE KAMPTA, *a family wealth associate, for their valuable assistance. This article includes developments through Jan. 23, 2024.*

that under the law of both states once the couple completed the statutorily mandated acts of obtaining a license and participating in a marriage ceremony, they were legally married, without filing the certificate. In the event there was a conflict of laws, the court found that the validity of the marriage would be determined by the state that has the most significant relationship to the parties.

Regarding a marriage between two New York residents whose marital domicile was New York and who had and raised a child in New York, New York had the stronger connection. In New York, every presumption lies in favor of the validity of the marriage and this marriage was absolutely valid.

8. Best Interests Is the Standard in Divorce Custody Disputes

In *Conte v. Conte*, 78 Misc. 3d 1233(A) (2023), husband was granted custody Friday at 7:30 a.m. until Tuesday at 7:30 a.m. every week, wife receiving Tuesday from 7:30 a.m. through Friday at 7:30 a.m., with all exchanges taking place at a local police station. Counsel for the parties had indicated that this was the most difficult aspect of the case to resolve and the court in fact hoped that financial aspects of the case would be resolved without further court intervention. Who was the subject of the contentious custody battle? King, the dog.

As a result of "pet custody" legislation enacted in New York in 2021 (DRL §236(B)(5)(15)), courts are required to consider the best interests of "companion animals" when awarding possession during divorce or separation proceedings. Companion animals include dogs, cats, and other domesticated animals. The "best interests" standard is the standard that is used to determine child custody issues. Although vigorously opposed by many in the matrimonial bar, New York is now one of number of states that has enacted pet custody laws, including Alaska, California, Illinois, Maine, New Hampshire and Washington D.C. (Alaska Stat. Ann. §25.24.160, Cal. Fam. Code §2605, 750 Ill. Comp. Stat. Ann. 5/502, Me. Rev. Stat. tit. 19-A, §953, N.H. Rev. Stat. Ann. §458:16-a, and D.C. Code §16-910).

Conte is a reminder that, in determining the best interests of a companion animal in divorce proceedings, a court will consider the totality of circumstances by weighing relevant factors including: the involvement, or absence, of each party in the companion animal's day-to-day life; the availability and willingness of each party to care for the companion animal; each party's involvement in health and veterinary care decisions; the quality of each party's respective home environment; the care and affection shown towards the companion animal; and each party's fitness and caretaking abilities. No single factor is dispositive.

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7. Reminder to Plan For Digital Assets

In *Matter of Moran*, 2023 NY Slip Op 32004(U), Sur. Ct. N.Y. Co, an executor sought to retrieve the decedent's personal digital data from Apple, including music, photographs, text messages, and email correspondence.

In New York, a fiduciary's access to digital assets is governed by Estates, Powers and Trusts Law (EPTL) §13-A, which is substantially identical to the Revised Uniform Fiduciary Access to Digital Assets Act, approved by the Uniform Law Commission on July 15, 2015.

EPTL §13-A-2.2 takes a three-tiered approach:

1. Directions given via an online tool that can be modified or deleted at all times prevail over any other direction in a will, trust, power of attorney or other record;

2. If the user has not utilized an online tool, or if the custodian has not provided one, a user's direction

in a will, trust, power of attorney or other record prevails; and

3. In the absence of any direction, the Terms of Service Agreement controls.

For executors, the default rule is that they cannot access the content of electronic communications, unless the decedent consented to disclosure. They can access a catalogue of electronic information (like the "to" and "from" lines of an email, without content, so accounts can be identified, for example), unless the decedent prohibited disclosure. Additionally, before disclosing a catalogue, the custodian can request an affidavit or finding by the court that the disclosure of the user's digital assets is reasonably necessary for estate administration.

In *Moran*, Apple was mandated to provide access to various digital assets, other than the content of electronic communications, including photographs, notes, and music, along with a catalog of electronic communications sent or received by the decedent. The court denied the request to release the content of the electronic communications without prejudice to the executor's amending the petition to specify the specific digital assets sought, explaining how disclosure is reasonably necessary for the administration of the decedent's estate, and stating whether the decedent had provided any direction for disclosure or consent for access as provided in EPTL §13-A-2.2.

This case is an important reminder that the ownership, transfer and disposition of digital assets present unprecedented challenges. In order to provide fiduciaries with the greatest access and flexibility, it is important to use a provider's online tool, if one is provided, and to address the disposition of and access to digital assets in estate planning documents.

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6. Need Intent To Benefit and Unambiguity For Children To Enforce Parents' Divorce Agreements

In re Estate of Panella, 2023 N.Y. Slip Op. 4009, N.Y. App. Div., tackled the question of whether children can enforce their divorced parents' agreements as third-party beneficiaries.

In *Panella*, parties signed a separation agreement pursuant to which they each agreed to execute wills naming their two children as irrevocable beneficiaries of 100% of their assets; that provision was incorporated into the divorce decree. Both parties remarried, revised their wills and neither complied with the provision. When father died leaving his entire estate to his second wife, the children claimed their father breached the agreement.

The Supreme Court noted that, for a third party to sue as a beneficiary on a contract made for the third party's benefit, an intent to benefit the third party must be shown. Absent such proof, the third-party is merely an incidental beneficiary with no right of enforcement. In ascertaining the rights of a third-party beneficiary, the court noted that the intention of the promisee to benefit the third-party is of primary importance. In this case, both the mother and decedent were promisees, and it was the decedent who was relevant promisee and who requested that the provision be inserted into the Agreement.

Consequently, the court approached the separation agreement as a contract subject to the principles of contract construction and interpretation. The court found that the provision requiring the parents to leave 100% of their estates to their children was ambiguous as to whether the obligation ceased when the children reached majority; the children failed to meet their burden of establishing that their interpretation that the provision had no expiration date

was the only construction that could fairly be made.

This case illustrates the importance of demonstrating an intent to benefit children in order for them to have standing to enforce a separation agreement and the importance of clear drafting to eliminate any potential ambiguity.

5. Notarized Affidavits No Longer Required in Civil Cases

On Oct. 25, 2023, Governor Kathy Hochul signed legislation that allows an affirmation by any person, wherever made, subscribed and affirmed by that person to be true under penalties of perjury, to be used in a civil action in New York in lieu of and with the same force and effect as an affidavit (A.5572/S.5162). Previously, only two groups were exempt from the requirement to submit affidavits (1) attorneys, physicians, osteopaths, and dentists and (2) individuals physically located outside the US. The new law amends Civil Practice Law and Rules §2106 to expand the ability to submit an affirmation to any person.

According to the Memorandum in Support of the legislation, New York now joins over 20 states in following federal practice (28 U.S.C §1746) and removing the notarization requirement, which advocates asserted disproportionately affected low-income and unrepresented individuals. The new law, which is effective Jan. 1, 2024, will significantly facilitate the ability to file papers quickly in time sensitive court proceedings, including matrimonial actions.

4. Remote Advancements

Electronic Notarization Made Permanent in New York

On Dec. 22, 2021, Governor Hochul enacted Remote Online Notarization (RON) legislation (N.Y. Exec. Law §135-c Electronic Notarization), which became effective Jan. 31, 2023. RONs require a notary to register with the New York Department of State prior to performing electronic notarizations and pay the $60 fee. Regulations (19 NYCRR §182.2-182.11) governing the performance of notarial acts, including electronic notarial acts, were made effective as of Jan. 25, 2023.

Beginning Jan. 25, 2023, *all* notaries, including electronic notaries and notaries who only provide traditional in-person services, are required to keep a journal of all notarial acts performed, including the type of identification provided, for 10 years.

For electronic notarization, the notary public must be physically located within New York at the time of the notarization. The principal need not be in New York. The notary must identify the principal through one of the following methods:

1. The notary's personal knowledge of the principal;

2. By means of communication technology that facilitates remote presentation by the principal of an official, acceptable form of ID; or

3. Through oath or affirmation of a witness who personally knows the principal, and who is either personally known to the notary or identified by the previously referenced means of communication technology.

Health Care Proxies Can Be Witnessed Remotely

On Nov. 17, 2023, Governor Hochul signed into law an amendment to NY Public Health Law (§29812-a.), which provides an alternate procedure for witnessing a health care proxy using audio-video technology, provided:

1. The principal, if not personally known to a remote witness, displays valid photo ID;

2. The audio-video conference allows for direct interaction between the principal and any remote witness;

3. Any remote witness receives a legible copy of the health care proxy, transmitted via facsimile or electronic means, within 24 hours; and

4. The remote witness signs the transmitted copy and returns it to the principal.

3. Privity Defense Has Not Offered Protection Against Legal Malpractice Claims

A string of recent malpractice cases against estate planning attorneys serves as a warning that a defense based on privity might not offer protection.

Most recently in *Betz v. Blatt,* NY Slip Op 07430, 211 A.D.3d 1004, as corrected through Feb. 8, 2023, an executor sought damages for legal malpractice against the attorney who represented a former executor of the estate who was removed for cause. The attorney admitted he knew the former executor was guilty of self-dealing and that the former executor's conduct was "shocking," yet failed to notify the court or withdraw as counsel.

According to the Appellate Division, although an attorney representing an executor generally is not liable to the beneficiaries of the estate, when fraud, collusion, malicious acts, or other special circumstances exist, an attorney may be liable to those third parties, even though not in privity with them, for harm caused by professional negligence. Here, the evidence established the existence of special circumstances subjecting the attorney to liability.

Indeed, in the context of an estate planning attorney's representation of a deceased client, New York is no longer a strict privity state, pursuant to the principles of which only a client who is in strict privity with an estate planning attorney can pursue a malpractice claim. In the estate planning context, since malpractice is usually discovered after a client's death, strict privity generally results in the cause of action dying with the client.

However, since the Court of Appeals decision in *Schneider v. Finmann*, 15 N.Y.3d 306, 933 N.E.2d 718 (2010), New York's strict privity has been relaxed and an executor can step into the shoes of a decedent and pursue a malpractice action on a decedent's behalf.

For example, in *Schmidt v. Burner*, 159 N.Y.S.3d 899 (N.Y. App. Div. 2022) a decedent specifically stated in her estate planning documents that she wished to disinherit one son and his descendants, and yet he remained a beneficiary of Totten trusts that passed by operation of law to him.

The Appellate Division denied a summary motion to dismiss a malpractice action against the estate planning attorneys for negligently failing to plan for the distribution of her assets according to her instructions. Since lay people are often oblivious to the fact that asset titling can determine disposition, and mistakenly assume that all assets will pass under their estate planning documents, it is axiomatic that estate planning attorneys verify how a client's assets are held so they can confirm asset disposition and tax apportionment preferences.

In *Alford v. Katz*, 208 A.D.3d 1587 (2022), a decedent and his second wife signed a prenuptial agreement that provided wife waived rights in the decedent's retirement accounts and husband agreed to include a $1 million marital trust in his will. Husband's will originally incorporated that bequest. He subsequently named wife as beneficiary on his retirement accounts and revised his will to bequeath $1 million outright to his wife, reduced by testamentary substitutes including retirement accounts, eliminating the marital trust.

Following husband's death, wife asserted her claim to an additional $1 million marital trust. The executor argued that decedent changed the beneficiary designation on his retirement accounts in exchange for wife's waiver of her right under the prenuptial to the marital trust, but the attorneys negligently failed to have wife execute a written amendment or waiver to the prenuptial.

Citing to *Schneider v. Finmann*, the Appellate Division held that, contrary to the attorney's contention, a personal representative may bring a claim for legal malpractice alleging that the attorneys were negligent in the estate planning for decedent. The Appellate court reversed the summary motion of the lower court that dismissed the malpractice complaint.

2. Revocable Trusts Can Help Escape Judicial Obstacles

Testamentary trusts are subject to court jurisdiction; court approval is typically necessary to effect any changes. Inter vivos trusts are not generally subject to the court's jurisdiction and changes can be effected without judicial intervention. This is one of the driving reasons practitioners advise clients to create wills with pour over revocable trusts that become irrevocable at death.

In *Matter of Constantine*, 78 Misc. 3d 1240(A), Sur. Ct. Erie County, 2023, an uncontested application by a testamentary trustee to move trust situs from New York to South Dakota was denied by the court.

Under the law of most jurisdictions, trustees can opt into a unitrust regime and pay an income beneficiary a set percentage of the trust's principal valued annually, in order to do what is fair and reasonable to all beneficiaries. New York's unitrust regime is fixed at 4% (EPTL §11-2.4); Most jurisdictions, including South Dakota, allow for a flexible unitrust distribution between 3% and 5%. The income beneficiaries in *Constantine* expressed concern that a 4% distribution would be excessive for their current needs and potentially detrimental to the remainder interests. They suggested that a 3% income distribution would be more appropriate, and the trustee petitioned to move to South Dakota to take advantage of that state's more flexible unitrust regime.

The court noted that a court has the authority to change the situs of a trust subject to its jurisdiction, if the trust situs specifically authorizes a change in situs, or does not specifically prohibit it, if the change is shown to have some beneficial effect; a court cannot change situs simply because the parties request it. In denying the application, the court held that no compelling reason for the move had been advanced; there was no family connection to the transferee state and no evidence that alleged South Dakota would permit a unitrust conversion of the testamentary trust at issue.

Had the decedent created trusts under a revocable trust with appropriate change of situs provisions, instead of under his will, the trustee likely could have moved the trust without issue and without court approval.

Interestingly, in addition to the unitrust regime, New York also affords trustees a Power to Adjust regime, allowing trustees to make adjustments between income and principal to be fair to all beneficiaries. There are no guidelines outlined in the statute as to the appropriate adjustment, so trustees are afforded the flexibility to determine a fair payout amount.

It is not clear from the case why a 3% Power to Adjust payout was not a solution; unless there were additional reasons for the move to South Dakota not disclosed in the decision.

1. New York's Corporate Transparency Act Enacted Without Public Database

Modeled on the federal Corporate Transparency Act (CTA), on Dec. 22, 2023, Governor Hochul signed the New York LLC Transparency Act (NYLTA) (S.995B/A.3484). The law provides that it is effective 365 days after enactment, but it is awaiting passage of a chapter amendment by the Legislature.

Both the CTA and NYLTA require beneficial ownership reporting information about certain entities, but while the CTA extends to a number of different entities, currently NYLTA applies only to LLCs formed or authorized to do business in New York.

Under NYLTA, which incorporates many provisions of the CTA, LLCs must provide information about each beneficial owner, which is defined as an individual who, directly or indirectly, exercises substantial control over the entity or owns or controls at least 25% of the ownership interests of the entity. This could include trust beneficiaries, trustees and settlors if the trust is a member of an LLC and meets those thresholds. The following

information must be provided about each beneficial owner:

- Full legal name
- Date of birth
- Current address
- Unique identification number from an acceptable identification document, such as a passport

A copy of the report entities file under the CTA with the Department of Treasury's Financial Crimes Enforcement Network can be filed with the New York Department of State to satisfy New York's filing requirements. Whereas the information collected under the CTA will typically be confidential, the original NYLTA contained a provision that would have created a public database of beneficial owners.

However, pursuant to a last-minute compromise, under NYLTA, like the CTA, only government agencies and law enforcement will have access to that information. According to the governor's Dec. 23, 2023 press release, she secured a compromise agreement with the Legislature that will allow members of law enforcement and regulatory authorities to uncover misconduct, while addressing legitimate privacy concerns.

As stated in the governor's approval memorandum of Dec. 22, 2023, she approved the original bill (S.995B/A.3484) on the basis of that agreement. A new bill, reflecting the privacy compromise and making other changes, including expanding the ability of the AG to investigate any LLC that fails to file its beneficial disclosure and to seek fines of up to $500 for each day late, is awaiting enactment (S.8059/A.8544, which will amend/repeal certain provisions of S.995B/A.3484).

Certain exempt companies, such as large operating companies, banks, credit unions, insurance companies, investment companies registered under the Investment Company Act of 1940 and accounting firms will be exempt from the NYLTA filing requirements.

Pursuant to the new bill awaiting enactment (S.8059/A.8544), newly formed LLCs must provide the informational filing within 30 days of their formation. All pre-existing entities must file the required information within one year of the relevant section's effective date.

In light of the CTA and NYLTA, it will be prudent for entities to consider whether they fall within an exemption and, if not, to begin gathering the required information and also establish a process to meet the obligation to keep beneficial ownership information current, including the requirement in the New York chapter amendment awaiting enactment to file an annual statement confirming or updating the information. Those considering forming new entities should review the potential impact before formation.

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Sharon L. Klein
Executive Vice President

President, Family Wealth,
Eastern U.S. Region

277 Park Avenue, 26th Floor
New York, NY 10172

sklein@wilmingtontrust.com
www.wilmingtontrust.com