

TRUSTS & ESTATES

The  WealthManagement.com journal for
estate-planning professionals

By **Sharon L. Klein** & **James J.C. Byrne**

The State of the States: 2023

An update on key planning developments

State legislatures have been very busy on several trust and estate-related fronts. Here's an update on key planning developments across the country, through Nov. 30, 2023.

Holographic Wills

Holographic wills came front and center as a result of the well-publicized bitter and prolonged family battles over Aretha Franklin's two competing wills. The controlling handwritten will of the iconic singer, complete with messy handwriting, crossed-out words and scribbles, was found in a spiral notebook under a couch cushion in her home.

While state law varies, a will generally must be: (1) in writing; (2) signed by the testator or at the testator's direction; and (3) signed by at least two individuals who attest to witnessing the testator's execution of the instrument. A handwritten will that's witnessed and notarized validly under the applicable state's law can be probated as a regular will.¹ Additionally, certain states recognize the validity of handwritten or holographic wills that aren't witnessed. Aretha Franklin died in Michigan, which allows holographic wills. A holographic will is typically valid if the signature and material provisions of the will are exclusively in the testator's handwriting, regardless of whether it's witnessed.

There are currently 27 states that recognize the validity of holographic wills: Alaska,² Arizona,³

Arkansas,⁴ California,⁵ Colorado,⁶ Hawaii,⁷ Idaho,⁸ Kentucky,⁹ Louisiana,¹⁰ Maine,¹¹ Michigan,¹² Mississippi,¹³ Montana,¹⁴ Nebraska,¹⁵ Nevada,¹⁶ New Jersey,¹⁷ North Carolina,¹⁸ North Dakota,¹⁹ Oklahoma,²⁰ Pennsylvania,²¹ South Dakota,²² Tennessee,²³ Texas,²⁴ Utah,²⁵ Virginia,²⁶ West Virginia²⁷ and Wyoming.²⁸

While the following 10 states don't recognize holographic wills under their own laws, they can admit holographic wills into probate, provided they were validly executed in accordance with the laws of the aforementioned 27 states: Alabama,²⁹ Connecticut,³⁰ Delaware,³¹ Iowa,³² Kansas,³³ Minnesota,³⁴ Rhode Island,³⁵ South Carolina,³⁶ Washington³⁷ and Wisconsin.³⁸

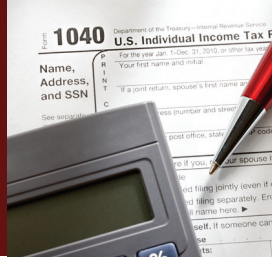
Maryland and New York only recognize holographic wills that are executed by their residents under very narrow circumstances. Maryland recognizes holographic wills if: (1) the instrument is entirely in the handwriting of the testator; (2) the testator is serving in the U.S. armed services at the time of execution; and (3) the document is signed by the testator while outside of a U.S. state, the District of Columbia or a U.S. territory.³⁹ Additionally, Maryland deems a holographic will void one year after the testator's discharge from the armed services, unless the testator dies within one year of execution or loses testamentary capacity within such year.⁴⁰ In New York, holographic wills are only valid if made by: (1) a member of the U.S. armed forces while in actual military or naval service during a war or other armed conflict; (2) an individual who serves with or accompanies an armed force engaged in actual military or naval service during such war or other armed conflict; or (3) a mariner while at sea.⁴¹ A holographic will becomes invalid: (1) one year after the testator's discharge from the armed forces;

Sharon L. Klein is executive vice president and **James**



J.C. Byrne is a senior wealth relationship manager, both at Wilmington Trust, N.A. in New York City

COMMITTEE REPORT: ESTATE PLANNING & TAXATION



(2) one year after the testator ceases serving with or accompanying such armed force; or (3) three years after a mariner testator executes a holographic will while at sea.⁴² If the testator lacks testamentary capacity on expiration of the aforementioned periods of time, the holographic will remains valid until such individual regains testamentary capacity.⁴³ In addition to allowing holographic wills to be admitted into probate if validly executed in accordance with the laws of a state that recognizes them, Rhode Island recognizes holographic wills executed by any soldier or airman in actual military service or any mariner at sea.⁴⁴

Modernized UFIPA

In 2023, California⁴⁵ became the latest state to adopt the Uniform Fiduciary Income and Principal Act (UFIPA), promulgated by the Uniform Law Commission (ULC) in 2018. The UFIPA is an update of the Uniform Principal and Income Act (UPIA) that the ULC most recently revised in 1997, which has been adopted in some version by virtually every jurisdiction.

Among UFIPA's most important changes from UPIA are:

Power to adjust significantly expanded. To fulfill UPIA's mandate for trustees to invest not just for income or growth but also for total return, the UPIA authorizes trustees to make adjustments from income to principal or from principal to income, provided three conditions are satisfied:

1. The trustee invests and manages trust assets pursuant to prudent investor principles;
2. The terms of the trust describe the amount that may or must be distributed to a beneficiary by reference to the trust's income; and
3. The trustee determines that it's unable to comply with the duty to administer a trust impartially, based on what's fair and reasonable to all of the trust beneficiaries, without making an adjustment.

UFIPA replaces the three-pronged test with the sole requirement that a fiduciary (which is defined to include trustees and personal representatives)

determine that the exercise of the power to adjust will assist the fiduciary to administer a trust or estate impartially.

Unitrust provisions included. As described by the ULC, the 1997 UPIA didn't include provisions for converting a traditional trust into a unitrust to allow for total return investing because the tax treatment of unitrusts was then uncertain. Instead, the drafters added a section allowing a trustee to adjust between income and principal as necessary. In 2003, the Internal Revenue Service published regulations respecting unitrust conversions if a state statute provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust for the year. The regulations specifically provide that a unitrust amount of 3% to 5% of the fair market value of the trust assets, whether determined annually or on a rolling multi-year average, is a reasonable apportionment of the total return of the trust. Following the release of the IRS regulations, the ULC notes that over 30 states amended their UPIA statutes to allow unitrust conversions, but according to the ULC, these statutes aren't uniform and are often overly restrictive.

If the trust qualifies for a special tax benefit, the unitrust rate must be between 3% to 5%, and the period must be a calendar year.

The UFIPA includes a flexible set of unitrust provisions aimed at providing uniformity in this area. Under UFIPA, for example, the unitrust amount can be a fixed rate or a rate determined for the applicable period using a market index or a mathematical blend of market indices and can have a floor and/or a ceiling on annual distribution amounts or on the amount of fluctuation of the unitrust amount from period to period. The period is flexible and can include, for example, a calendar year, different 12-month stretch or calendar quarter, to name a few. However, if the trust qualifies for



FEATURE: ESTATE PLANNING & TAXATION

a special tax benefit (for example, the marital deduction), the unitrust rate must be between 3% to 5% (patterned on the IRS regulations), and the period must be a calendar year. Like the standard for using the power to adjust, a fiduciary can make decisions with regard to the unitrust if the fiduciary determines that the action will assist the fiduciary to administer a trust or estate impartially.

New default rule on governing law. UFIPA provides a new default rule on governing law. The law of the situs of the trust (as opposed to the law of the state of the trust's creation) will apply, unless the terms of the trust specify a different jurisdiction.

In addition to California, six states have adopted UFIPA: Arkansas⁴⁶ Colorado,⁴⁷ Kansas,⁴⁸ Utah,⁴⁹ Virginia⁵⁰ and Washington.⁵¹ Missouri⁵² proposed legislation in 2023, but it has since died.

In 2014, New York was the first state to end the viability of ING trusts by characterizing them as grantor trusts for state purposes.

California Ends Use of INGs

Many wealthy individuals looking to reduce exposure to income taxes turned to a planning strategy that can remove income from taxation at the state level. The essence of the strategy is for a grantor in a high tax state to create a trust that's a separate taxpayer (non-grantor trust) in a state that won't tax the trust. This type of trust is known as an incomplete gift non-grantor trust (ING). The trust is structured so that transfers to it are incomplete for gift tax purposes, so no gift tax is due. Typically, this is effected by allowing the grantor to receive trust distributions only with the approval of adverse parties (beneficiaries other than the grantor or grantor's spouse) and by retaining a limited power to appoint trust principal to other beneficiaries. As a non-grantor trust, the trust's income won't be taxable to the grantor, but rather on a separate fiduciary income tax return for the ING. Assuming there's no source income attributable to the ING that's taxable by the

grantor's home state, the grantor can shift what would otherwise have been their tax burden from the ING assets, possibly even avoiding state income taxation altogether if the ING is established in a jurisdiction that doesn't impose an income tax on the trust.

In 2014, New York was the first state to end the viability of ING trusts by characterizing them as grantor trusts for state purposes. Although the ING is considered a non-grantor trust for federal purposes and New York generally follows federal law, New York law does provide for a number of decoupling modifications. New York added the treatment of ING trusts as a decoupling modification⁵³ thereby subjecting the income of an ING to New York income taxation as if the trust were a grantor trust (while the ING remains a non-grantor trust for federal income tax purposes).

On July 20, 2023, California enacted similar legislation to address the same issue by adding Section 17082 to the California Revenue and Taxation Code.⁵⁴ Retroactive to Jan. 1, 2023, the new law includes the income of an ING in the gross income of the grantor, to the extent the trust's income would be included in the grantor's income if the trust was a grantor trust. The law carves out an exception that allows a fiduciary of a trust to make an irrevocable election to be treated as a resident non-grantor trust, provided that at least 90% of the trust's income is distributable to charitable organizations.

While the income tax play of ING's has been eliminated in California and New York, the technique is still available in other states. Of course, if the grantor moved to a state that doesn't have an income tax, that could also eliminate state-level income tax liability. Another option to consider for avoiding state-level income taxation is to gift the heightened federal exemption amount before it's slated to be slashed to a completed non-grantor trust in a jurisdiction that won't tax the trust.

Telecommuting Tax Battles

Employees working remotely or on a hybrid schedule have become the new normal. If someone lives in one state and telecommutes to another, what are the personal income tax implications?

Generally, an employee pays taxes in the jurisdiction in which the employee physically performs



COMMITTEE REPORT: ESTATE PLANNING & TAXATION

services. Even prior to the pandemic, however, six states—Arkansas,⁵⁵ Connecticut,⁵⁶ Delaware,⁵⁷ Nebraska,⁵⁸ New York⁵⁹ and Pennsylvania⁶⁰—imposed a “convenience of employer rule.” Pursuant to this rule, if employees work from home through the employer’s necessity, the employee will be taxed in the employee’s telecommuting location. If, however, the employee telecommutes for their own convenience, the employee’s wages for those workdays will be classified as if the employee was working from the employer’s physical office.

At least 14 states⁶¹—ranging from New Jersey to Utah—issued briefs siding with New Hampshire when that state filed a motion for leave to file a bill of complaint against Massachusetts in the Supreme Court,⁶² challenging a state’s constitutional authority to tax a nonresident who’s telecommuting from their home state and neither lives nor physically works in the taxing state. On June 28, 2021, the Supreme Court denied New Hampshire’s motion. Accordingly, the convenience of employer rule remains intact for now, making it prudent for taxpayers to keep careful track of days worked remotely, particularly because tax credits may not eliminate double taxation.

Moreover, if a state’s telecommuting residents are subject to tax as if physically working in the state of their employer’s office, despite never setting foot in that location, the convenience of employer rule can have a deleterious impact on the coffers of the employee’s state of residence.

Consider New Jersey, for example, which offers its residents a tax credit for taxes paid to other states in order for its residents to avoid double taxation. According to New Jersey’s amicus brief in support of New Hampshire’s motion,⁶³ New Jersey may have credited up to \$1.2 billion to its residents for taxes paid to New York while working at home in New Jersey just for the 12-month period beginning March 2020.

On July 21, 2023, Governor Phil Murphy signed into law legislation⁶⁴ that contains three components. The first is to adopt New Jersey’s own convenience of employer rule to permit the state to tax employees of New Jersey employers if they reside in another state and work from home for their own convenience (instead of the employer’s need). A stated objective is to create parity with New York (a/k/a retaliation).

Second, the new law incentivizes New Jersey residents with tax credits to challenge other states that collect taxes for services the employees performed while physically located in New Jersey. Third, it creates a pilot program to incentivize job growth and capital investments by providing grants to businesses that assign their employees to New Jersey locations.

The new law is retroactive to Jan. 1, 2023.

State and local income taxes assessed at the entity level should be fully deductible for federal tax purposes without regard to the individual SALT cap.

Pass-Through Entity Tax

The Tax Cuts and Jobs Act of 2017 has limited the deduction for state and local taxes (SALT) to \$10,000 since 2018. After a failed constitutional challenge,⁶⁵ the \$10,000 SALT deduction limit will be in effect until it’s slated to sunset after 2025.

In Notice 2020-75, the IRS issued guidance permitting a workaround to the cap: Partnerships and S corporations (S corps) can elect annually to pay state and local taxes through the entity at the state level in exchange for partners or shareholders receiving a personal income tax credit equivalent to the pass-through entity (PTE) tax. In essence, because the SALT cap applies only to individuals, state and local income taxes assessed at the entity level should be fully deductible for federal tax purposes without regard to the individual SALT cap.

Following waves of PTE legislation across the country, 36 states (Alabama,⁶⁶ Arizona,⁶⁷ Arkansas,⁶⁸ California,⁶⁹ Colorado,⁷⁰ Connecticut,⁷¹ Georgia,⁷² Hawaii,⁷³ Idaho,⁷⁴ Illinois,⁷⁵ Indiana,⁷⁶ Iowa,⁷⁷ Kansas,⁷⁸ Kentucky,⁷⁹ Louisiana,⁸⁰ Maryland,⁸¹ Massachusetts,⁸² Michigan,⁸³ Minnesota,⁸⁴ Mississippi,⁸⁵ Missouri,⁸⁶ Montana,⁸⁷ Nebraska,⁸⁸ New Jersey,⁸⁹ New Mexico,⁹⁰ New York,⁹¹ North Carolina,⁹² Ohio,⁹³ Oklahoma,⁹⁴ Oregon,⁹⁵ Rhode



FEATURE: ESTATE PLANNING & TAXATION

Island,⁹⁶ South Carolina,⁹⁷ Utah,⁹⁸ Virginia,⁹⁹ West Virginia¹⁰⁰ and Wisconsin¹⁰¹) have enacted PTE workaround legislation, and three states have legislation pending (Maine,¹⁰² Pennsylvania¹⁰³ and Vermont¹⁰⁴). New York City was the first city to enact a PTE tax.¹⁰⁵

These jurisdictions have recently enacted or amended PTE legislation:

Connecticut. The state's PTE tax was the only mandatory one in the country. Among other changes, for tax years beginning on or after Jan. 1, 2024, Connecticut's PTE legislation will be optional, allowing partnerships and S corps to elect into the tax. The election can be made on a year-by-year basis and must be made no later than the due date for filing the return (including extensions).¹⁰⁶

There are 13 jurisdictions that impose an estate tax and six with an inheritance tax, including one that imposes both.

Hawaii. Effective Jan. 1, 2024, partnerships and S corps may annually elect to pay Hawaii income taxes at the entity level for tax years beginning after Dec. 31, 2022. An electing PTE will be liable for Hawaii income tax on the sum of all eligible members' distributive shares and guaranteed payments of Hawaii taxable income, multiplied by the highest rate of tax applicable to the individual (ranging from 1.4% to 11%). Eligible members of an electing PTE may claim a nonrefundable income tax credit for their pro rata share of PTE taxes paid by the entity. Additionally, residents and part-year residents are entitled to a nonrefundable credit for their share of taxes paid to another state or the District of Columbia on income of any partnership or S corp, so long as the taxes paid to the other state are found to be substantially similar.¹⁰⁷

Indiana. For taxable years beginning on or after Jan. 1, 2022, certain PTEs may voluntarily elect to

pay tax at the entity level based on each owner's total share of adjusted gross income.¹⁰⁸ For 2023 and 2024, the applicable tax rate is 3.15%.¹⁰⁹ A refundable tax credit is available equal to the amount of taxes paid by the electing entity with regard to the owner's share.¹¹⁰ Another credit is available for PTE taxes that are imposed by and paid to another state.¹¹¹

Iowa. For tax years beginning on or after Jan. 1, 2022, partnerships or S corps may elect to be subject to Iowa income tax at the entity level. When the PTE pays the PTE tax, its owners receive a percentage of the PTE tax as a refundable tax credit. The applicable PTE tax rate is the highest individual income tax rate in effect for that year (8.53% for 2022, 6% for 2023 and 5.7% for 2024).¹¹²

Kentucky. For taxable years beginning on or after Jan. 1, 2022, a PTE may elect to have Kentucky income tax levied at the entity level. The entity's owners would be entitled to a nonrefundable credit in the amount of the pro rata share of the PTE tax paid. The applicable PTE tax rate is the individual income tax rate in effect for that year (4.5% for 2023 and 4% for 2024¹¹³). Another credit is available for PTE taxes that are imposed by and paid to another state, limited in amount to the lesser of the tax actually paid or the amount that would be paid if the income was subject to Kentucky income taxation.¹¹⁴

Montana. For tax years beginning after Dec. 31, 2022, a partnership or S corp may, via a representative delegated by the entity, elect to be subject to Montana income taxation at the entity level.¹¹⁵ The PTE tax rate will be equal to the highest marginal tax rate in effect for a given year (6.75% for 2023 and 5.9% for 2024).¹¹⁶ When the PTE elects and pays the tax, its owners receive a percentage of the tax as a refundable tax credit.¹¹⁷ The election applies to the distributive share income of owners that are individuals, estates, trusts and PTEs (not C corporations or tax-exempt entities).¹¹⁸ The PTE tax is calculated on each owner's distributive share of income apportioned or allocated to Montana; however, an entity may elect to tax a Montana-resident owner's distributive share of income, regardless of its source.¹¹⁹

Nebraska. For tax years beginning on or after Jan. 1, 2018, an eligible partnership or S corp may elect to be subject to Nebraska income tax at the entity level. For tax years prior to Jan. 1, 2023, the

COMMITTEE REPORT: ESTATE PLANNING & TAXATION



election must be made no later than Dec. 31, 2024. When the PTE elects and pays PTE tax, its owners receive a percentage of the tax as a refundable tax credit. The applicable PTE tax rate is the highest individual income tax rate in effect for that year (6.84% for 2018-2022, 6.64% for 2023 and 5.84% for 2024).¹²⁰

New York City. Effective for tax years beginning on or after Jan. 1, 2022, an eligible city partnership or city resident S corp may make the annual irrevocable New York City (NYC) PTE tax election.¹²¹ Any eligible city partnership or city resident S corp that makes the New York State PTE tax election may make the NYC PTE election for the same taxable year.¹²² The NYC PTE tax is imposed at a flat rate of 3.876% (the highest NYC personal income tax rate) of city PTE tax income.¹²³ Resident partners, members or shareholders receive a credit against their personal income tax equal to their direct share of the NYC PTE tax.¹²⁴ Previously, in calculating PTE taxable income, an entity was required to deduct the PTE tax itself, resulting in a circular calculation. An amendment passed in 2023¹²⁵ resolves the issue with a technical correction that requires entities to include any PTE taxes, or substantially similar taxes paid to other jurisdictions, in the computation of New York and NYC PTE taxable income. The 2023 amendments also correct what the memorandum in support describes as an unintentional omission of city resident trusts and estates from participating in NYC PTE tax. Specifically, the budget amends the definition of “city taxpayer” to include city resident trusts and estates so that S corps and partnerships with city resident trusts and estates owners may elect to participate in NYC PTE tax.¹²⁶

West Virginia. For tax years beginning on or after Jan. 1, 2022, partnerships or other business entities not subject to West Virginia corporate income tax may elect to be subject to West Virginia income tax at the entity level. When the PTE elects and pays the PTE tax, its owners receive a percentage of the tax as a nonrefundable tax credit. Any excess credit may be carried forward for a period of five years.¹²⁷ The applicable PTE tax rate is the highest individual income tax rate in effect for that year (currently 5.12% for 2023 and beyond).¹²⁸ Another credit is available for PTE taxes that are imposed by and paid

to another state that are substantially similar to those imposed by West Virginia. The amount of the credit is limited to the amount of tax paid to other states as if the income had been taxed by West Virginia.¹²⁹

Estate and Gift Tax

The indexed federal exemption amount, \$12.92 million in 2023 and rising to \$13.61 million in 2024, is presently slated to remain in place until Jan. 1, 2026, when it will revert to \$5 million, inflation-indexed.¹³⁰ There are 13 jurisdictions (Connecticut,¹³¹ District of Columbia,¹³² Hawaii,¹³³ Illinois,¹³⁴ Maine,¹³⁵ Maryland,¹³⁶ Massachusetts,¹³⁷ Minnesota,¹³⁸ New York,¹³⁹ Oregon,¹⁴⁰ Rhode Island,¹⁴¹ Vermont¹⁴² and Washington¹⁴³) that impose an estate tax and six (Iowa,¹⁴⁴ Kentucky,¹⁴⁵ Maryland,¹⁴⁶ Nebraska,¹⁴⁷ New Jersey¹⁴⁸ and Pennsylvania¹⁴⁹) with an inheritance tax, including one (Maryland) that imposes both.

Connecticut remains the
only jurisdiction in the
country with a true gift tax.

Here’s the latest state-level activity:

Connecticut. Connecticut’s estate and gift tax exemption is equal to the federal exemption amount for individuals dying after Jan. 1, 2023.¹⁵⁰ There’s a \$15 million cap on an individual’s estate and gift tax liability, meaning no further estate or gift tax will be owed once the cap is reached, which equates to a \$137.92 million estate.

Connecticut remains the only jurisdiction in the country with a true gift tax. Importantly for planning purposes, Connecticut doesn’t impose a tax on gifts of tangible or real property located outside the state, so it’s possible to make gifts with that type of out-of-state property without triggering a Connecticut gift tax.¹⁵¹

District of Columbia. In response to the financial impact of the pandemic, the District adopted the Estate Tax Adjustment Amendment Act of 2020.¹⁵² This law reduced the District’s estate



FEATURE: ESTATE PLANNING & TAXATION

tax exemption to \$4 million for individuals dying on or after Jan. 1, 2021.¹⁵³ Beginning Jan. 1, 2022, that exemption amount increases annually by cost-of-living adjustments. The 2023 exemption amount was \$4,528,800.

Iowa. In June 2021, Iowa enacted legislation¹⁵⁴ to repeal its inheritance tax, which ranges from 0% to 15% depending on the relationship of the decedent to a beneficiary. The tax will be reduced by 20% per year beginning with individuals dying in 2021, culminating in full repeal for individuals dying on or after Jan. 1, 2025.

The New York estate tax regime maintains its built-in “cliff.”

Maine. Maine’s exclusion amount is \$5.6 million, indexed for inflation, for individuals dying after Jan. 1, 2018.¹⁵⁵ The estate tax exemption increased from \$6.01 million in 2022 to \$6.41 million in 2023.

Massachusetts. On Oct. 4, 2023, Governor Maura Healy signed an act which doubled the state’s estate tax exemption from \$1 million to \$2 million for individuals dying on or after Jan. 1, 2023.¹⁵⁶

Nebraska. On Feb. 17, 2022, this state enacted legislation¹⁵⁷ to reduce the inheritance tax for individuals dying on or after Jan. 1, 2023. As a result, individual beneficiaries under age 22 aren’t subject to the tax; for unrelated individuals, the exemption increased to \$25,000 per beneficiary and the rate decreased from 18% to 15%; for non-immediate relatives, the exemption increased to \$40,000 per beneficiary and the rate decreased from 13% to 11%; for immediate relatives, the exemption increased to \$100,000 per beneficiary and the rate remains at 1%. Spouses will continue to be exempt from inheritance taxes.

New York. Effective for those dying on or after Jan. 1, 2019, New York’s exemption amount is linked to the 2010 federal exemption amount of \$5 million, indexed for inflation.¹⁵⁸ In 2023, New York’s exemption amount was \$6.58 million, up from \$6.11 million in 2022. However, the New York estate tax regime maintains its built-in “cliff.”¹⁵⁹ Only estates that are less than or equal to the

exemption amount on the date of death will pay no tax; for those estates that are between 100% and 105% of the exemption amount, there’s a rapid phase-out of the exemption; and those estates that exceed 105% of the exemption amount will lose the benefit of the exemption amount entirely and be subject to tax from dollar one.

While New York doesn’t impose a current gift tax, the New York gross estate of a deceased resident is increased by the amount of any taxable gift made within three years of death, if the decedent was a New York resident at the time the gift was made and at the time of death.

Out-of-state real and tangible property won’t trigger a New York estate tax for New York residents. Nonresidents who own real or tangible property located in New York won’t owe any New York estate tax if the value of their New York situs property is below the New York exemption amount at the date of death.

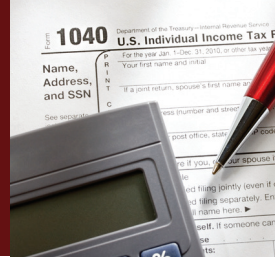
Rhode Island. Pursuant to a law signed in June 2014, this state increased its estate tax exemption amount to \$1.5 million in 2015, indexed for inflation.¹⁶⁰ For 2023, the estate tax exemption amount increased to \$1,733,264.

Washington. The current exemption amount is \$2 million, indexed for inflation, but there was no inflation adjustment for 2023, so this state’s estate tax exemption remained at \$2.193 million.¹⁶¹

Electronic Execution

Wills. Courts have increasingly been called on to adjudicate the validity of electronic writings purporting to be wills.¹⁶² While a controversial topic, even before the pandemic, jurisdictions had begun to advance their laws to permit electronic wills as our technological capabilities continue to expand.

Nevada was the first state to enact legislation allowing electronic wills in 2001, which was amended in 2017.¹⁶³ Indiana passed legislation permitting electronic wills in 2018.¹⁶⁴ Arizona enacted legislation permitting electronic wills in 2019.¹⁶⁵ Florida enacted an Electronic Documents Act in June 2019, which became effective Jan. 1, 2020 and includes electronic wills.¹⁶⁶ Illinois enacted the Electronic Wills and Remote Witnesses Act, effective July 26, 2021.¹⁶⁷ In 2022, Maryland amended its law regarding the



COMMITTEE REPORT: ESTATE PLANNING & TAXATION

requirements to execute a valid will to include electronic wills and remote witnessing of wills.¹⁶⁸

In July 2019, the ULC promulgated the Uniform Electronic Wills Act (UEWA), which gives a testator the ability to electronically execute a will provided the will must exist in the electronic equivalent of text (no audio or video wills), and the requisite number of witnesses must be physically or, in states that allow it, virtually present for the signing of the electronic will. Electronic wills can be revoked the same way as traditional ones, including by a subsequent will or codicil or a revocatory act. Additionally, the UEWA requires that the self-proving affidavit be executed at the same time as an electronic will so the affidavit is part of the electronic will. An electronic will should be recognized as valid if it's valid under the law of the jurisdiction where the testator was physically located at the time of signing. The UEWA doesn't include requirements regarding the storage of electronic wills, although individual states can add requirements in their statutes.

Utah was the first state to enact the UEWA in August 2020.¹⁶⁹ Colorado,¹⁷⁰ North Dakota¹⁷¹ and Washington¹⁷² enacted the UEWA in 2021. Missouri,¹⁷³ New Jersey¹⁷⁴ and Texas¹⁷⁵ have proposed UEWA legislation pending.

Here are the jurisdictions that enacted electronic will legislation in 2023:

District of Columbia. The District adopted the UEWA and now allows individuals to execute, witness and attest wills in electronic format.¹⁷⁶ The District also recognizes wills that were validly executed electronically in other jurisdictions but that may not be in compliance with its own requirements of due execution.¹⁷⁷ These new laws apply to wills created on or after March 10, 2023.

Idaho. This state adopted the UEWA, allowing individuals to execute, witness and attest wills in electronic format.¹⁷⁸ Under the Act, Idaho will also recognize wills that were validly executed electronically in other jurisdictions, but which may not be in compliance with its own requirements of due execution.¹⁷⁹ While the Act was enacted in 2023, its provisions apply retroactively to Jan. 1, 2020.

Minnesota. While Minnesota didn't directly adopt the UEWA, it relied on the uniform provisions


to amend its probate laws to allow for electronic execution, witnessing, attesting and notarization of wills.¹⁸⁰ Minnesota amended its probate laws to recognize electronic wills validly executed in other jurisdictions.¹⁸¹ These new laws apply to wills created on or after Aug. 1, 2023.

Trusts and other estate-planning documents. Because UEWA only addresses electronic will executions, the electronic execution of other estate-planning documents, such as trusts and powers of attorney, fell into an ambiguous area of the law that lacked formal guidance. In 2021, Delaware was the first state to pass legislation recognizing the electronic execution of various trust-related instruments, including governing instruments (other than wills and codicils), non-judicial settlement agreements, modifications and documents related to the appointment or removal of trustees, advisors or protectors.¹⁸² The Delaware legislation is an extension of the Uniform Electronic Transactions Act (UETA), which the ULC approved in 1999. The UETA prescribed the methods by which two parties could provide electronic signatures when conducting business electronically under bilateral agreements. Rather than recreate the requirements of what constitutes a valid electronic signature, the Delaware legislation allows for electronic execution of the specifically enumerated trust-related documents in accordance with the terms of the UETA.¹⁸³

In 2022, the ULC promulgated the Uniform Electronic Estate Planning Documents Act (UEEPDA). The UEEPDA applies only to non-testamentary documents. Testamentary documents, such as an individual's will, are subject to special rules covered in the UEWA. As described by the ULC, the UEEPDA was drafted to complement the UEWA, which can be inserted as an Article of the UEEPDA to provide states with a comprehensive set of rules for both testamentary and non-testamentary electronic estate-planning documents. Illinois adopted the UEEPDA, amending and adding to its Electronic Wills and Remote Witnesses Act to create the Electronic Wills, Electronic Estate Planning Documents, and Remote Witnesses Act, effective Jan. 1, 2024.¹⁸⁴ Missouri,¹⁸⁵ Oklahoma¹⁸⁶ and Texas¹⁸⁷ have introduced legislation to adopt the UEEPDA.



FEATURE: ESTATE PLANNING & TAXATION

Notarization. During the pandemic, many jurisdictions issued executive orders temporarily authorizing remote notarization.¹⁸⁸ A slew of legislation followed to enact remote notarization permanently. In 2021, many states, including Alabama,¹⁸⁹ Arkansas,¹⁹⁰ Illinois,¹⁹¹ Kansas,¹⁹² Maine,¹⁹³ New Hampshire,¹⁹⁴ New Jersey,¹⁹⁵ New Mexico,¹⁹⁶ Oregon¹⁹⁷ and Wyoming,¹⁹⁸ enacted legislation that permanently allows remote notarization. In 2022, the District of Columbia,¹⁹⁹ Delaware,²⁰⁰ Maine,²⁰¹ North Carolina,²⁰² New York,²⁰³ Rhode Island²⁰⁴ and Vermont²⁰⁵ enacted permanent legislation to permit remote notarization. Massachusetts previously provided repeated extensions to its temporary COVID-19 remote notarization and witnessing legislation. However, recently enacted legislation in this state both repeals these temporary measures and provides a permanent framework for both in-person electronic and remote online notarization.²⁰⁶ This legislation isn't effective until Jan. 1, 2024, which left a gap in 2023 when Massachusetts didn't recognize electronic notarization: Between March 31, 2023 and Dec. 31, 2023, notarial acts must have been performed in the physical presence of the notary public. As of July 1, 2023, Maine has also enacted permanent legislation permitting remote notarization.²⁰⁷ On Sept. 30, 2023, Governor Gavin Newsom signed legislation to establish a remote online notarization system in California that's set to go into effect once the Secretary of State certifies that it's completed its technology project required to implement the service, or by Jan. 1, 2030, whichever is earlier.²⁰⁸ As of Oct. 1, 2023, Connecticut permanently recognizes remote online notarization, codifying temporary measures that were put in place during the pandemic.²⁰⁹ As of 2023, the National Association of Secretaries of State reports that 46 jurisdictions have legislation authorizing remote notarization.²¹⁰ 

— *The authors wish to thank their colleague Shaquille Kampta, a family wealth associate, for his valuable assistance.*

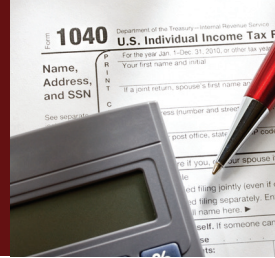
— *This article is for general information only and is not intended as an offer or solicitation for the sale of any financial product, service or other professional advice. Wilmington Trust does not provide tax, legal*

or accounting advice. Professional advice always requires consideration of individual circumstances. Wilmington Trust is a registered service mark used in connection with various fiduciary and non-fiduciary services offered by certain subsidiaries of M&T Bank Corporation.

Endnotes

1. *Morrow v. Morrow*, 354 So. 3d 642 (Fla. Dist. Ct. App. 2023).
2. Alaska Stat. Ann. Section 13.12.502.
3. Ariz. Rev. Stat. Ann. Section 14-2503.
4. Ark. Code Ann. Section 28-25-104.
5. Cal. Prob. Code Section 6111.
6. Colo. Rev. Stat. Ann. Section 15-11-502.
7. Haw. Rev. Stat. Ann. Section 560:2-502.
8. Idaho Code Ann. Section 15-2-503.
9. Ky. Rev. Stat. Ann. Section 394.040.
10. La. Civ. Code Ann. Art. 1575.
11. Me. Rev. Stat. tit. 18-C, Section 2-502.
12. Mich. Comp. Laws Ann. Section 700.2502.
13. Miss. Code Ann. Section 91-5-1.
14. Mont. Code Ann. Section 72-2-522.
15. Neb. Rev. Stat. Ann. Section 30-2328.
16. Nev. Rev. Stat. Ann. Section 133.090.
17. N.J. Stat. Ann. Section 3B:3-2.
18. N.C. Gen. Stat. Ann. Section 31-3.4.
19. N.D. Cent. Code Ann. Section 30.1-08-02.
20. Okla. Stat. Ann. tit. 84, Section 54.
21. 20 Pa. Stat. and Cons. Stat. Ann. Section 2502.
22. S.D. Codified Laws Section 29A-2-502.
23. Tenn. Code Ann. Section 32-1-105.
24. Tex. Est. Code Ann. Section 251.052.
25. Utah Code Ann. Section 75-2-502.
26. Va. Code Ann. Section 64.2-403.
27. W. Va. Code Ann. Section 41-1-3.
28. Wyo. Stat. Ann. Section 2-6-113.
29. Ala. Code Section 43-8-135.
30. Conn. Gen. Stat. Ann. Section 45a-251.
31. Del. Code Ann. tit. 12, Section 1306.
32. Iowa Code Ann. Section 633.283.
33. Kan. Stat. Ann. Section 59-609.
34. Minn. Stat. Ann. Section 524.2-506.
35. R.I. Gen. Laws Ann. Section 33-5-7.
36. S.C. Code Ann. Section 62-2-505.
37. Wash. Rev. Code Ann. Section 11.12.020.
38. Wis. Stat. Ann. Section 853.05.
39. Md. Code Ann., Est. and Trusts Section 4-103(a).

COMMITTEE REPORT: ESTATE PLANNING & TAXATION



40. Md. Code Ann., Est. and Trusts Section 4-103(b).
41. N.Y. Est. Powers and Trusts Law Section 3-2.2(b).
42. N.Y. Est. Powers and Trusts Law Section 3-2.2(c).
43. N.Y. Est. Powers and Trusts Law Section 3-2.2(d).
44. R.I. Gen. Laws Ann. Section 33-5-6.
45. CA. S.B. 522 (2023).
46. Ark. Code Ann. Section 28-77-101 to Section 28-77-803.
47. Colo. Rev. Stat. Ann. Section 15-1.2-101 to Section 15-1.2-804.
48. Kan. Stat. Ann. Section 58-9a-101 to Section 58-9a-804.
49. Utah Code Ann. Section 22-3-101 to Section 22-3-804.
50. Va. Code Ann. Section 64.2-1033 to Section 64.2-1078.
51. Wash. Rev. Code Ann. Section 11.104B.001 to Section 11.104B.905.
52. MO. H.B. 968 (2023).
53. New York Tax Law Section 612.
54. Cal. Rev. and Tax. Code Section 17082.
55. Ark. Rev. Legal Counsel Op. 20200203 (Feb. 20, 2020).
56. Conn. Gen. Stat. Section 12-711(b)(2)(C).
57. 30 Del. C. Section 1124(b).
58. Neb. Admin. R. and Regs. tit. 316, Ch. 22, Section 003.01C.
59. N.Y. Dept. of Tax. and Finance, TSB-M-06(5)I, www.tax.ny.gov/pdf/memos/income/m06_5i.pdf (March 15, 2006).
60. 61 Pa. Code Section 109.8.
61. Arkansas, Connecticut, Hawaii, Iowa, Indiana, Kentucky, Louisiana, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Texas and Utah.
62. *New Hampshire v. Massachusetts*, 2020, Court file No 220154.
63. Amicus Curiae Brief for States of New Jersey, Connecticut, et al. in Support of New Hampshire, filed Dec. 22, 2020.
64. N.J. A 4694 (2022).
65. Denial of certiorari for *New York v. Yellen*, No. 21-966 (U.S. 2022).
66. Ala. Code Section 40-18-24.2.
67. Ariz. Rev. Stat. Ann. Section 43-1014.
68. Ark. Code Ann. Section 26-65-103.
69. Cal. Rev. and Tax. Code Section 19900(a)(1).
70. Colo. Rev. Stat. Ann. Section 39-22-344.
71. Conn. Gen. Stat. Ann. Section 12-699.
72. Ga. Code Ann. Sections 48-7-21(b)(7) and 48-7-23(b).
73. HI. S.B. 1437 (2023).
74. Idaho Code Ann. Section 63-3026B.
75. 35 Ill. Comp. Stat. Ann. 5/201(p).
76. Ind. Code Section 6-3-2.1-3.
77. IA. Code Ann. Section 422.16C.
78. Kan. Stat. Ann. Sections 79-32,284 through 79-32,289.
79. Ky. Rev. Stat. Ann. Section 141.209.
80. La. Stat. Ann. Sections 47:287.732.2.
81. Md. Code Ann., Tax-Gen. Sections 10-102.1.
82. Mass. Gen. Laws Ann. ch. 63D, Section 2.
83. Mich. Comp. Laws Ann. Section 206.813.
84. Minn. Stat. Ann. Section 289A.08(7a).
85. Miss. Code Ann. Section 27-7-26.
86. Mo. Ann. Stat. Section 143.436.
87. Mont. Code Ann. Section 15-30-3326.
88. Neb. Rev. Stat. Ann. Section 77-2727 (6).
89. N.J. Stat. Ann. Section 54A:12-3.
90. N.M. Stat. Ann. Section 7-3A-10.
91. N.Y. Tax Law Section 861.
92. N.C. Gen. Stat. Ann. Section 105-153.5(c3).
93. Ohio Rev. Code Ann. Section 5747.38.
94. Okla. Stat. Ann. tit. 68, Section 2355.1P-4.
95. OR. S.B. 727 (2021) and OR. H.B. 2082 (2023).
96. R.I. Gen. Laws Ann. Section 44-11-2.3.
97. S.C. Code Ann. Section 12-6-545(B).
98. Utah Code Ann. Section 59-10-1403.2(2)(a).
99. Va. Code Ann. Section 58.1-390.3.
100. W. Va. Code Ann. Section 11-21-3a.
101. Wis. Stat. Ann. Sections 71.21(6)(a) and 71.365(4m)(a).
102. ME. L.D 1891, H.P. 1212 (2023).
103. PA. S.B. 659 (2023).
104. VT. S.B. 45 (2023).
105. N.Y. S.B. 9454 (2021).
106. Conn. Gen. Stat. Ann. Section 12-699.
107. HI. S.B. 1437 (2023).
108. Ind. Code Section 6-3-2.1-3.
109. Ind. Code Sections 6-3-2.1-4(b) and 6-3-2-1.
110. Ind. Code Section 6-3-2.1-5(b).
111. Ind. Code Ann. Section 6-3-3-3(d).
112. Iowa Code Ann. Section 422.5A.
113. Ky. Rev. Stat. Ann. Section 141.020.
114. Ky. Rev. Stat. Ann. Section 141.209.
115. MT SB 554 (2023).
116. MT SB 121 (2023).
117. Mont. Code Ann. Section 15-30-3328.
118. Mont. Code Ann. Section 15-30-3325.
119. Mont. Code Ann. Section 15-30-3326.
120. Neb. Rev. Stat. Ann. Section 77-2727 (6).
121. N.Y. Tax Law Section 861.
122. N.Y. Tax Law Section 868 (McKinney).
123. N.Y. Tax Law Section 869.
124. N.Y. Tax Law Section 870.
125. N.Y. Tax Law Section 860(h).
126. N.Y. Tax Law Section 867 (e)(2).
127. W. Va. Code Ann. Section 11-21-3a.
128. W. Va. Code Ann. Section 11-21-4g.
129. W. Va. Code Ann. Section 11-21-20.
130. IRC Section 2010(c)(3)(C).



FEATURE: ESTATE PLANNING & TAXATION

131. CT. Gen. Stat. Section 12-391(g).
132. D.C Code Ann. Section 47-3701.
133. Haw. Rev. Stat. Section 236E-8.
134. 35 Ill. Comp. State. Ann. 405/3.
135. Me. Rev. Stat. tit. 36, Sections 4102 and 4119.
136. Md. Code Ann., Tax-Gen. Section 7-309(b)(3)(i).
137. Mass. Gen. Law Ann. Ch. 65C, Section 2A.
138. Minn. Stat. Ann. Section 291.016.
139. N.Y. Tax Law Section 952(c)(2)(B).
140. Or. Rev. Stat. Ann. Section 118.010.
141. R.I. Gen. Laws Section 44-22-1.1.
142. Vt. Stat. Section 7442a(b).
143. Wash. Rev. Code Section 83.100.020.
144. Iowa Code Ann. Section 450.2.
145. Ky. Rev. Stat. Ann. Section 140.070.
146. Md. Code Ann., Tax-Gen. Section 7-202.
147. Neb. Rev. Stat. Ann. Sections 77-2004, 77-2005 and 77-2006.
148. N.J. Stat. Ann. Section 54:34 1.
149. 72 Pa. Stat. Ann. Section 9116.
150. *Ibid.*
151. CT. Gen. Stat. Section 12-641.
152. 2020 D.C. Laws 23-149 Section 7191.
153. D.C. Code Ann. Section 47-3701.
154. IA. S.F. 619 (2021).
155. Me. Rev. Stat. tit. 36, Sections 4102 and 4119.
156. MA. H.B. 4104 (2023).
157. NE. L.B. 310 (2021).
158. N.Y. Tax Law Section 952(c)(2)(B).
159. N.Y. Tax Law Section 952(c)(1).
160. R.I. Gen. Laws Section 44-22-1.1.
161. Wash. Rev. Code Section 83.100.020.
162. *See In re Estate of Javier Castro*, No. 2013ES00140 (Ct. Common Pleas, Lorain County, Prob. Div., Ohio, June 19, 2013) (will written with two witnesses on Samsung Galaxy Tablet) and *In re Estate of Horton*, 925 N.W.2d 207 (Mich. Ct. App. 2018) (typed electronic note on decedent's phone recognized as valid will).
163. Nev. Rev. Stat. Section 133.085.
164. Ind. Code Section 29-1-21-1.
165. Ariz. Rev. Stat. Section 14-2518.
166. Fla. Stat. Ann. Section 732.522.
167. 755 Ill. Comp. Stat. Ann. 6/1-1.
168. Md. Code Ann., Est. and Trusts Section 4-102.
169. Utah Code Ann. Section 75-2-1401.
170. Colo. Rev. Stat. Ann. Section 15-11-1302(3).
171. N.D. Cent. Code Ann. Section 30.1-37-01.
172. Wash. Rev. Code Ann. Section 11.12.400.
173. MO. S.B. 72 (2023).
174. N.J. S 2923 (2022).
175. TX S.B. 1779 (2023).
176. D.C. Code Ann. Section 18-905.
177. D.C. Code Ann. Section 18-904.
178. Idaho Code Ann. Sections 15-2-1105 and 15-2-1108.
179. Idaho Code Ann. Section 15-2-1104.
180. CA. S.B. 696 (2023).
181. Minn. Stat. Ann. Section 524.2-506.
182. Del. Code Ann. tit. 12, Section 3550.
183. *Ibid.*
184. IL. S.B. 1930 (2023).
185. *Ibid.*
186. *Ibid.*
187. *Ibid.*
188. *See, for example*, Delaware, Illinois, Kansas, Kentucky, Louisiana, Maine, New Mexico and New York.
189. AL. S.B. 275 (2021).
190. AK. S.B. 340 (2021).
191. IL. S.B. 2664 (2021).
192. KS. S.B. 106 (2021).
193. ME. H.P. 1033 (2021).
194. N.H. S.B. 134 (2021).
195. N.J. A.B. 4250 (2020).
196. N.M. S.B. 12 (2021).
197. OR. S.B. 765 (2021).
198. WY. S.F. 0029 (2021).
199. DC B24-457, effective Sept. 21, 2022.
200. DE Senate Bill 262, effective Aug. 1, 2023.
201. ME LD 2023, effective July 1, 2023.
202. NC H.B. 776, effective July 1, 2023.
203. NY A.8691/S.7780, effective Jan. 31, 2023.
204. RI H.B. 7363, effective June 30, 2022.
205. VT HB 512, effective July 1, 2022.
206. MA. H.B 58 (2023).
207. Me. Rev. Stat. tit. 4, Sections 1901-1933.
208. *Ibid.*
209. CT. S.B. 1040 (2023).
210. Remote Electronic Notarization | NASS, www.nass.org/initiatives/remote-electronic-notarization.