FEATURE:
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By **Sharon L. Klein** & **Jenna M. Cohn**

The State of the States: 2020

An update on key planning developments

State legislatures have been very busy on several trust and estate related fronts. Here's an update on some key planning developments across the country, through Dec. 2, 2020.

Telecommuting

The coronavirus pandemic has upended how people work. With lockdowns, stay-at-home orders or privately imposed company restrictions, millions of people are telecommuting, and many will be for the foreseeable future. If someone lives in one jurisdiction and ordinarily works in another, but has been locked down in their home jurisdiction, what are the personal income tax implications?

Generally, an employee pays taxes in the jurisdiction where the employee physically performs services. Even prior to the pandemic, however, six states—Arkansas,[1] Connecticut,[2] Delaware,[3] Nebraska,[4] New York[5] and Pennsylvania[6]—imposed a so-called "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 their employer's physical office. With coronavirus-imposed telecommuting, the question becomes, at whose convenience is the employee working from home?

Of the states that follow the convenience rule, only Nebraska, New York and Pennsylvania have issued guidance on telecommuting during the pandemic:

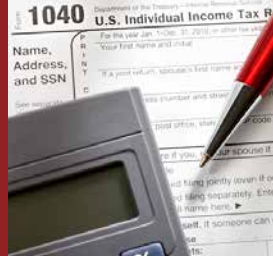
Nebraska. This state issued guidance providing that it won't require employers to change the state that was previously established in their payroll systems for income tax withholding purposes for employees who are now telecommuting or temporarily relocated to a work location within or outside Nebraska due to the COVID-19 pandemic. A change in work location isn't required beginning with the date the emergency was declared, March 13, 2020, and ending on Jan. 1, 2021, unless the emergency is extended.[7]

New York. This state's Department of Taxation and Finance posted FAQs regarding telecommuting,[8] including the following question:

> My primary office is inside New York State, but I am telecommuting from outside of the state due to the COVID-19 pandemic. Do I owe New York taxes on the income I earn while telecommuting?

The Department responded that, if a nonresident's primary office is in New York State, even if they're telecommuting from outside the state due to the pandemic, their days telecommuting are considered days worked in New York, unless their employer has established a bona fide employer office at their telecommuting location. In general, even pre-COVID, unless an employer specifically established a bona fide employer office at the employee's telecommuting location, the employee would continue to owe New York State income tax on income earned while telecommuting. For an office to be considered a bona fide employer office, the office must either contain

(From left to right) **Sharon L. Klein** (sklein@wilmingtontrust.com) is president of Family Wealth, Eastern U.S. Region at Wilmington Trust, N.A, and **Jenna M. Cohn** (jcohn@wilmingtontrust.com) is a family wealth advisor at Wilmington Trust, N.A., both in New York City.



or be near specialized facilities or satisfy a number of secondary and other factors (which can include the home office being a requirement of employment, the employee performing some core duties at the home office, meeting with clients on a regular and continuous basis at the office and using a specific area of the home exclusively to conduct the business of the employer that's separate from the living area).[9]

Pennsylvania. According to guidance[10] from this state's Department of Revenue, if an employee is working from home temporarily due to the pandemic, the Department doesn't consider that a change to the sourcing of the employee's compensation. For nonresidents who were working in Pennsylvania before the pandemic, their compensation would remain Pennsylvania-sourced income for all tax purposes. Conversely, for Pennsylvania residents who were working out of state before the pandemic, their compensation would remain sourced to the other state, and they would still be able to claim a resident credit for tax paid to the other state on the compensation. This guidance will remain in effect until the earlier of June 30, 2021 or 90 days after the Proclamation of Disaster Emergency in Pennsylvania is lifted.

Apart from states that follow the convenience rule, other states have issued guidance regarding the tax impact of telecommuting. Those states include:

Massachusetts. This state recently enacted a final version[11] of a previous emergency order that provides that nonresidents who were employed in Massachusetts prior to the COVID-19 state of emergency and now work outside of the state due to pandemic-related circumstances will continue to have Massachusetts source income and be subject to personal income tax withholding. Massachusetts residents who worked in another state before the COVID-19 pandemic and now are confined to work in the state will receive a tax credit for taxes paid to that other state. This new regulation applies to telecommuting work from March 10, 2020 to Dec. 31, 2020 or 90 days after the governor lifts the state of emergency.

Vermont. The Vermont Department of Taxes issued guidance[12] providing that nonresidents temporarily living and working in the state have an obligation to pay Vermont income taxes on the income earned while they were living and performing work in Vermont. According to the guidance, this is the case even if they were in Vermont due to the COVID-19 pandemic and regardless of whether their employer is located inside or outside of the state.

It's a state-specific determination as to whether states will apply a physical presence test and impose tax on those working from home or whether they'll allow income tax obligations to continue to flow to the pre-COVID-19 work state. States that have issued guidance confirming that they won't impose a taxable nexus as a result of telecommuting from a temporary location due to the pandemic include Alabama,[13] Georgia,[14] Maine,[15] Maryland,[16] Mississippi,[17] New Jersey,[18] Rhode Island[19] and South Carolina.[20] For tax years beginning in 2020, Maine has announced[21] that it will introduce legislation in January to ensure Maine residents avoid double taxation as a result of COVID-19 related telework. Maine will provide relief from double taxation by allowing a tax credit for income tax paid to other jurisdictions if another jurisdiction is asserting an income tax obligation for the same income despite the employee no longer physically working in that jurisdiction due to COVID-19.

As jurisdictions struggle to close increasingly large budget deficits, there have already been and will likely continue to be battles among them as to which jurisdictions can tax a telecommuter, with the risk of multiple taxation.

Typically, individuals who work in one jurisdiction, live in another and have a tax liability to both receive a tax credit in their jurisdiction of residence to eliminate double taxation. However, as jurisdictions struggle to close increasingly large budget deficits, there have already been and will likely continue to be battles among them as to which jurisdictions can

tax a telecommuter, with the risk of multiple taxation. While there may be reciprocal agreements among certain jurisdictions and tax credits, the analysis can be complicated and merits close attention.

Electronic Wills and Related Issues

Even before the pandemic, in today's technologically driven society, courts have increasingly been called on to adjudicate the validity of electronic writings purporting to be wills.[22] While a controversial topic, jurisdictions had begun to advance their laws to enter the electronic world. With the pandemic igniting a wave of governors signing executive orders authorizing remote witnessing and notarization,[23] COVID-19 may have accelerated the movement into the electronic space. While some alleged that the traditional formality of a will execution should be sacrosanct to protect individuals who might be more susceptible to abuse and undue influence and to increase the likelihood that testators will seek professional guidance in this complicated arena, those arguments may have been weakened in light of adjustments that have been required in the pandemic. Those who argue that will formalities, which date back a couple of centuries, are simply outdated may have had their viewpoints validated as people have increasingly relied on the remote and digital space during the current health crisis. Additionally, many point to the fact that formality generally isn't required to dispose of much other property—for example, retirement benefits and life insurance require a beneficiary designation; jointly held assets pass by operation of law; and trust agreements might not require all the execution formalities of a will.

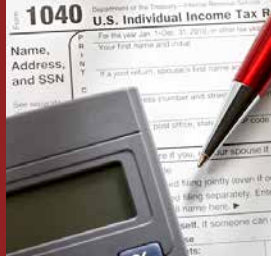
An electronic will should be recognized as valid if it's valid under the law of the jurisdiction where the testator was physically located at the time of signing.

Nevada was the first state to enact legislation allowing electronic wills in 2001, which was amended in 2017.[24] Indiana passed legislation permitting electronic wills in 2018.[25] Arizona enacted legislation permitting electronic wills, effective on June 30, 2019.[26] Florida enacted an Electronic Documents Act in June 2019, which became effective Jan. 1, 2020 and includes electronic wills.[27] Other states that have introduced but not yet enacted electronic wills legislation include New Hampshire,[28] Texas[29] and Virginia.[30]

In July 2019, the Uniform Law Commission (ULC) promulgated the Uniform Electronic Wills Act (UEWA), which gives a testator the ability to electronically execute a will, while using the protections available to an individual executing a traditional will on paper, as well as providing execution requirements which, if followed, will produce a valid self-proving will. The UEWA adapts the formalities of writing, signing and attesting a will to the electronic era by incorporating the following policies: when signing a will electronically, the will must exist in the electronic equivalent of text (no audio or video wills); the requisite number of witnesses must be physically present or, in jurisdictions that will allow it, virtually present for the signing of the electronic will; and 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.

California introduced the UEWA in 2019,[31] and Ohio introduced the UEWA in June 2020,[32] but it hasn't been enacted in either of those states yet.

Utah was the first state to enact the UEWA in August 2020.[33] An individual may execute their will in the "electronic presence" of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.[34] Utah's UEWA includes a broad definition for signing a will: An individual doesn't need to sign their name to authenticate the will, a tangible symbol with present intent to



authenticate or adopt a record is sufficient.[35] Unlike Arizona and Florida, which require a "qualified custodian" to store the will,[36] Utah's statute, which is adopted from the UEWA, doesn't contain a requirement for a qualified custodian.

Due to the complications of executing a will in person during the COVID-19 pandemic, it's probably reasonable to expect many other jurisdictions to follow Utah in adopting the UEWA.

In the meantime, some jurisdictions have enacted emergency legislation in response to the pandemic. On July 7, 2020, the District of Columbia (D.C.) enacted an emergency electronic wills statute through the Coronavirus Support Temporary Amendment Act of 2020.[37] This electronic wills statute, effective Oct. 9, 2020:[38] defines an electronic will as a will or codicil executed by electronic means; allows the testator to sign in the physical or electronic presence of at least two witnesses; provides that an electronic will may revoke all or part of a previous will, electronic or not; and specifically states that the statute applies to electronic wills made during the period for which the mayor has declared a public health emergency. D.C.'s will attestation statute was also updated to allow the electronic presence of at least two witnesses while there's a public health emergency.[39]

Many jurisdictions have issued executive orders authorizing remote witnessing and notarization. The exact requirements can vary among jurisdictions, but conditions can include that:

1. The signatory affirmatively represents that they're physically situated in the jurisdiction where the notarization or witnessing is taking place;
2. If not personally known to the notary or witnesses, the individuals seeking notary services or witnesses must present satisfactory evidence identifying themselves during the videoconference;
3. The videoconference must allow for contemporaneous interaction between the signatory and the notary or the witnesses, where one can see, hear and communicate; and
4. In some jurisdictions, the signatory must transmit by fax or electronic means a legible copy of the signed document directly to the notary or the witnesses within 24 hours of receipt or on the same day it was executed.[40]

Due to the length of the pandemic, many jurisdictions have repeatedly extended the time frame of their executive orders authorizing remote witnessing and notarization. Indeed, some states, including Alaska,[41] Colorado,[42] Kentucky,[43] Massachusetts[44] and Missouri,[45] have enacted legislation that permanently allows remote witnessing and notarization. Other states, including New York,[46] have introduced permanent legislation. COVID-19 may launch a wave of permanent proposals.

The decoupled jurisdictions could potentially have *higher* estate tax exemptions than the federal amount if President-elect Joe Biden lowers the exemption.

Jurisdiction-Level Estate Tax

When the Tax Cuts and Jobs Act (the Act), which was enacted in December 2017, doubled the federal estate, gift and generation-skipping transfer (GST) tax exemption amounts, this caught by surprise those jurisdictions that had exemption amounts tied to the federal amount. Some jurisdictions that didn't intend to offer exemption amounts of this magnitude had to lower their exemption levels by decoupling from the latest federal laws. In a strange twist of events, those jurisdictions that decoupled from federal law to keep their exemptions below federal levels won't automatically adjust to any federal decreases in the exemption. Accordingly, the decoupled jurisdictions could potentially have *higher* estate tax exemptions than the federal amount if President-elect Joe Biden lowers the exemption, possibly to $3.5 million. If that's not what the decoupled jurisdictions intended, they'll have to act affirmatively to lower their exemption levels. Here's some of the latest jurisdiction level activity on the estate and gift tax front:

Connecticut. The Connecticut estate and gift tax exemption is up from $3.6 million in 2019 to $5.1 million for 2020 and increases to $7.1 million for

2021 and $9.1 million for 2022.[47] For the year 2023 and beyond, Connecticut's exemption amounts will equal the federal exemption amounts.[48] There's a $15 million cap on an individual's estate and gift tax liability.

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.[49]

D.C. Due to the increased federal exemption, D.C.'s City Council enacted emergency legislation that decoupled D.C.'s estate tax from the federal amount and changed the exemption amount back to $5.6 million, retroactive to Jan. 1, 2018.[50] The 2020 exclusion amount is $5,762,400, an increase from the 2019 amount of $5,681,760.[51] In response to the financial impact of the pandemic, in August 2020, D.C. adopted the Estate Tax Adjustment Emergency Amendment Act of 2020.[52] The new law dramatically reduces D.C.'s estate tax exemption by over $1.75 million to $4 million for individuals dying on or after Jan. 1, 2021. Beginning Jan. 1, 2022, the new exemption amount will increase annually by cost-of-living adjustments.

With federal exemption amounts at all-time highs, portability is increasingly valuable.

Hawaii. In June 2019, this state clarified that Hawaii's $5.49 million estate tax exemption, which is applicable to individuals dying after Dec. 31, 2017, wasn't adjusted for inflation and remains the same for those dying after Dec. 31, 2018 and thereafter.[53] Effective for individuals dying on or after Jan. 1, 2019, Hawaii added a top estate tax rate of 20% on estates valued over $10 million.[54]

Maine. Maine's estate tax exemption was linked to the federal exemption amount. This state revised its laws to change Maine's exclusion amount to $5.6 million, indexed for inflation for individuals dying after Jan. 1, 2018.[55] For 2020, the estate tax exemption amount increased to $5.8 million.

Maryland. Beginning in 2019, this state's exemption amount would have been linked with the federal exemption amount. To prevent this result, Maryland enacted new legislation to set the state exemption amount in 2019 and thereafter to $5 million.[56] Maryland also continues to impose an inheritance tax, which is triggered based on the relationship of the decedent to a beneficiary. The inheritance tax rate is 10% for assets transferred to certain beneficiaries.

Minnesota. Minnesota's estate tax exclusion amount is $3 million for individuals dying in 2020 and thereafter, up from $2.7 million in 2019.[57]

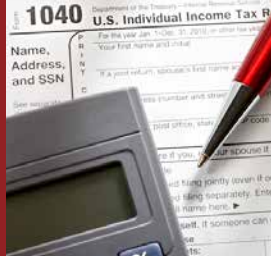
New York. Effective for those dying on or after Jan. 1, 2019, New York's exemption amount is linked to the 2010 federal exemption amount of $5 million, indexed for inflation.[58] In 2020, New York's exemption amount was $5.85 million, up from $5.74 million in 2019. However, the New York estate tax regime maintains its built-in "cliff."[59] 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.

Note that 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. There's no longer a requirement to calculate the estate tax as if the nonresident was a resident and apportion the tax based on the percentage of property located in the state.

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.[60] For 2020, the estate tax exemption amount increased to $1,579,922.

Vermont. On June 18, 2019, Gov. Phil Scott signed this state's budget into law, increasing the estate tax



exemption amount from $2.75 million to $4.25 million for those dying on or after Jan. 1, 2020 and to $5 million for those dying on or after Jan. 1, 2021.[61] A flat 16% tax applies to amounts that exceed those levels.

Washington. The current exemption amount is $2 million, indexed for inflation. For 2020, this state's estate tax was $2.193 million.[62]

Portability

With federal portability, a deceased spouse's executor can transfer the deceased spouse's unused exemption (DSUE) amount to the surviving spouse. With federal exemption amounts at all-time highs, portability is increasingly valuable. However, portability generally isn't available at the state level. That means state exemption amounts are usually use-it-or-lose-it propositions. If one spouse simply leaves everything to the other, the exemption of the first to die is wasted. Ordinarily, some form of credit shelter planning is required to prevent loss of the first-to-die's state exemption amount.

Currently, Hawaii and Maryland permit portability at the state level. Hawaii allows portability for individuals dying after Jan. 25, 2012 if the personal representative of the predeceased spouse files a Hawaii estate tax return.[63] Maryland's estate tax exemption became portable in 2019 and, interestingly, is retroactive for spouses who died between 2011 and 2018.[64]

Here are the latest developments for 2020:

D.C. In September 2020, D.C. introduced the Trust and Estate Conformity Amendment Act of 2020 to allow a surviving spouse or domestic partner to claim a DSUE amount on their estate tax return.[65] Under the proposed legislation, if the first-to-die's date of death is 2019 or thereafter, the executor must timely file a D.C. estate tax return for the first to die, calculate the DSUE amount and make an irrevocable portability election. If the first-to-die's date of death is before 2019 or the first to die wasn't a D.C. resident and had no D.C.-sitused property for estate tax purposes, a federal portability election must be made on the federal estate tax return.

Illinois. In January 2020, this state introduced legislation to amend the Illinois Estate and Generation-Skipping Transfer Tax Act for individuals dying on or after Jan. 1, 2021, aligning the DSUE amount with the applicable exclusion amount calculated under Internal Revenue Code Section 2010.[66] A similar bill was introduced in 2019 for individuals dying on or after Jan. 1, 2020, but failed to pass.[67]

Maryland. In May 2020, Maryland repealed and reenacted with amendments its estate tax portability statute, which became effective June 1, 2020.[68] Under the new law, if an individual is filing a Maryland estate tax return for the sole purpose of capturing an individual's DSUE amount, the individual must file a Maryland estate tax return within two years of the decedent's date of death.[69] Additionally under the new law, the Comptroller may examine a Maryland estate tax return of a predeceased spouse after the expiration of the 3-year statute of limitations solely for the purpose of determining the validity and amount of the DSUE election.[70]

Many jurisdictions have responded with legislation to define the circumstances under which the PCC are entitled to inherit from their predeceased parents.

Rhode Island. In January 2020, Rhode Island introduced a bill that would establish portability for those dying after Dec. 31, 2019.[71] The executor of the deceased spouse's estate would have to file a Rhode Island estate tax return, compute the DSUE credit amount and elect portability within the time period allotted by law.[72] A similar bill was introduced in 2019 for individuals dying after Dec. 31, 2018, but failed to pass.[73]

Children Conceived After Death

With advances in medical technology, a child can be conceived with stored genetic material after the death of one or both genetic parents. Intestacy statutes drafted long before the new technologies could have been envisioned are ambiguous regarding the treatment of posthumously conceived children (PCC). Competing interests clash: the inheritance rights of children born

from these new technologies and the rights of existing beneficiaries to certainty and finality. To strike a balance, many jurisdictions have responded with legislation to define the circumstances under which PCC are entitled to inherit from their predeceased parents. The legislation generally requires that an individual consent specifically to posthumous reproduction, and some jurisdictions impose time limits within which a child must be conceived or born.

The Uniform Parentage Act (UPA), which the ULC promulgated in 2000 and amended in 2002, provides that, if an individual who consented in a record to be a parent by assisted reproduction (AR) dies before placement of eggs, sperm or embryos, the deceased individual isn't a parent of a resulting child, unless the deceased individual consented in a record that if AR were to occur after death, the deceased individual would be a parent of the child. In an apparent attempt to limit the benefits of the statute to surviving spouses, some jurisdictions that have statutes based on the 2002 UPA[74] refer to a "spouse," instead of an "individual."

The ULC released an updated UPA in 2017.[75] The 2002 UPA didn't include a time limit within which a child was required to be conceived or born after death.[76] The 2017 version of the UPA, which was adopted in 2018 in Vermont[77] and the state of Washington,[78] adds a time frame and the ability to prove intent to reproduce posthumously as an alternative to specific written consent to posthumous reproduction. Under the 2017 UPA, a deceased individual will be considered a parent of a PCC if that individual gave written consent to AR by a woman who agreed to give birth if: (1) either (A) the individual gave written consent to posthumous reproduction, or (B) the individual's intent to be a parent by posthumous reproduction is established by clear and convincing evidence; *and* (2) either (A) the embryo is in utero within 36 months, or (B) the child is born within 45 months of that individual's death.[79] Washington enacted the above provision, while Vermont changed the evidentiary standard from clear and convincing evidence to a preponderance of the evidence.

> The CPSA, which goes into effect on Feb. 15, 2021, revolutionizes New York law by legally establishing a child's relationship to their parents when the child is conceived through AR.

Here are the latest developments for 2020:

Colorado. This state's current statute requires a spouse's written consent that, if AR were to occur after death, the deceased spouse would be a parent of the child. In addition to the consent requirement, the child must be: (1) in utero within 36 months of death; or (2) born within 45 months of death.[80] In February 2020, Colorado introduced a bill that would remove the limitation that the deceased be a spouse, replacing the term "spouse" with the term "individual," as it appears in the UPA. In addition to the timeframe requirement, as provided in the 2017 UPA, an individual's intent to parent by posthumous reproduction could be established by clear and convincing evidence.[81]

Connecticut. This state's statute provides that a child conceived and born after the death of an individual is deemed to have been born during the decedent's lifetime and after the execution of the decedent's testamentary instruments, if the following conditions are satisfied: (1) the decedent, in a writing signed and dated by both the decedent and the decedent' spouse, specifies that genetic material may be used for posthumous conception and specifically designates the spouse to control the use of the genetic material after death; and (2) the child is in utero within one year of death.[82]

In February 2020, this state introduced the Connecticut Parentage Act, which would update the current statute by removing the restriction to designate the decedent's spouse, allowing the decedent to designate any individual. The Connecticut Parentage Act also addresses what happens when a couple's marriage is terminated through dissolution, annulment or legal separation before placement of eggs, sperm or embryos. The birth mother's former spouse isn't

a parent to a child born from AR unless the former spouse consented in a record to parent the child if AR were to occur after a dissolution of marriage, annulment or legal separation, and the former spouse didn't withdraw consent.[83]

Kentucky. This state presently doesn't have PCC legislation. In January 2020, Kentucky introduced legislation to adopt the 2017 UPA regarding parenting posthumously, including the UPA's time frames.[84]

Maine. Maine's current statute requires an individual's written consent that, if AR were to occur after death, the deceased individual would be a parent of the child.[85] In 2020, Maine introduced a bill that would have added the 2017 UPA time frames within which the child would have to be born or conceived, but the bill failed to pass.[86]

Clients with stored genetic material should properly document their intent regarding use of that material posthumously (or in the event of divorce).

Massachusetts. This state doesn't currently have PCC legislation. In 2020, a bill was introduced to enact the Massachusetts Parentage Act, which has the same time-frame requirement as the 2017 UPA but changes the evidentiary standard to prove intent to posthumous reproduction from clear and convincing evidence to a preponderance of the evidence.[87]

Michigan. This state presently doesn't have PCC legislation. In January 2020, Michigan introduced a bill[88] defining the status of children born from AR. A child conceived through AR after the individual's death is deemed to be in gestation at the time of decedent's death if the child is in utero within 36 months or born within 45 months after the individual's death, and a notice to creditors is given within nine months that genetic material of the decedent is available for possible use in posthumous conception. A parent-child relationship will exist when a child is conceived under a gestational agreement using sperm or eggs after an individual's death or incapacity as long as the individual intended to be treated as the parent of the child. The individual's intent may be shown through a signed record or facts and circumstances establishing intent by clear and convincing evidence.

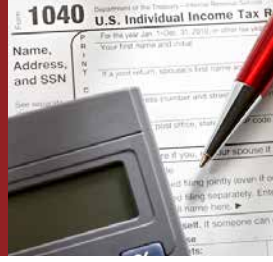
In the divorce context, if a married couple divorces before the placement of eggs, sperm or embryos, the birth mother's former spouse isn't a parent to a child born from AR unless the former spouse consented in a record to parent the child if AR were to occur after divorce.

New York. The Child-Parent Security Act (CPSA), which goes into effect on Feb. 15, 2021, revolutionizes New York law by legally establishing a child's relationship to their parents when the child is conceived through AR.[89] The CPSA modernizes the definition of "parent" by overhauling existing law in tying parent to intent, particularly before conception, and setting out rules for determining parentage in the third-party reproduction context.[90] Under New York's current Estates, Powers and Trusts Law (EPTL), a PCC must be in utero no later than 24 months after death of the individual or born within 33 months of death of the individual.[91] A written instrument giving specific consent to posthumous reproduction must be signed in the presence of two witnesses not more than seven years before death.[92] The CPSA aligns posthumous conception with the EPTL by providing that, if an individual who consented in a record to be a parent by AR dies before the transfer of eggs, sperm or embryos, the deceased individual isn't a parent of the resulting child unless the deceased individual specifically consented in writing to posthumous reproduction, provided that the writing complies with the EPTL.[93]

Pennsylvania. This state currently doesn't have legislation about PCC. In 2020, Pennsylvania proposed legislation that mirrors the 2017 UPA regarding an individual's intent to be a parent of a child conceived by AR after the individual's death, including the UPA's time frames.[94]

Rhode Island. In July 2020, Rhode Island repealed its dated state law on parentage, which hadn't been updated in over 40 years, and replaced it with the 2017 UPA to provide procedures to establish parentage, genetic testing, surrogacy agreements and AR.[95]

Rhode Island's new PCC statute mirrors the 2017



UPA regarding an individual's intent to be a parent posthumously, including the UPA's time frames, but changed the evidentiary standard to prove intent to reproduce posthumously from clear and convincing evidence to a preponderance of the evidence.[96]

Planning considerations in light of rapidly advancing technology. As assisted reproductive technology rapidly advances, this topic will continue to receive ongoing attention. In the meantime, practitioners might consider incorporating these suggestions in their practice:

Clients with stored genetic material should properly document their intent regarding use of that material posthumously (or in the event of divorce), including in the agreement with the fertility clinic, estate-planning documents and other memoranda.

Consider drafting specific provisions to address how a client wants to treat PCC. Many jurisdictions have no laws regarding the inheritance rights of PCC. Even if there's a relevant statute, clients may wish to modify the statutory default provisions: Some may wish to exclude PCC, others may want to include them within certain parameters. For example, some clients may want to require conditions, such as specific consent to posthumous reproduction, a time frame within which birth must occur, birth to a surviving spouse or life partner and proof of maternity or paternity.

Remember that provisions governing PCC can be applicable both to the testator/grantor and to their descendants. Even if not applicable to a given client's situation, the client's descendants may use reproductive technology. In the context of a dynasty trust, for example, set up to last for future generations when available technologies can't currently be contemplated, it will be important to define the class of potential beneficiaries.

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Endnotes

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5. TSB-M-06(5)I Income Tax, "New York Tax Treatment of Nonresidents and Part-Year Residents Application of the *Convenience of the Employer* Test to Telecommuters and Others," *www.tax.ny.gov/pdf/memos/income/m06_5i.pdf* (May 15, 2006).
6. 61 Pa. Code Section 109.8.
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24. Nev. Rev. Stat. Section 133.085.
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26. Ariz. Rev. Stat. Section 14-2518.
27. Fla. H.B. No. 409 (2019).
28. N.H. S.B. 40 (2017).
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30. VA. H.B. 1403 (2018).
31. CA. A.B. 1667 (2019).
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33. Utah Code Ann. Section 75-2-1401.
34. Utah Code Ann. Section 75-2-1402.
35. *Ibid.*
36. For example, qualified custodians must maintain continuous custody, can't be related to the creator of the will nor a recipient under the will and must employ a storage system to protect the document from destruction and alteration.
37. D.C. L.B. 758 (2019).
38. D.C. Code Ann. Section 18-113.
39. D.C. Code Ann. Section 18-103.
40. Connecticut Executive Order No. 7Q, extended for the duration of the public health and civil preparedness emergency by Executive Order No. 7ZZ; Illinois Executive Order 2020-14; Kansas Executive Order No. 20-20; Maine Executive Order No. 37 FY 19/20; New York Executive Order No. 202.7, extended until Jan. 1, 2021 by Executive Order No. 202.79.
41. AK. H.B. 124 (2019) and AK. S.B. 241 (2019).
42. CO. S.B. 96 (2020).
43. KY. S.B. 150 (2020).
44. MA. S.B. 2645 (2019).
45. MO. H.B. 1655 (2020).
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47. CT. Gen. Stat. Section 12-391(g).
48. *Ibid.*
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71. R.I. H.B. 7188 (2019).
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91. *Ibid.*
92. N.Y. EPTL Section 4-1.3.
93. N.Y. Fam. Ct. Act Section 581-307.
94. PA. H.B. 243 (2019).
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