State legislatures have been very busy on a number of trust and estate-related fronts. Here’s an update on some key planning developments across the country, through Nov. 30, 2018.

Estate and Gift Tax

Over the last year, there have been significant changes to the estate and gift tax landscape at both the federal and state level. At this time last year, states were eagerly awaiting the final version of the Tax Cuts and Jobs Act (the Act) to assess the state-level impact. The Act doubled the federal estate, gift and generation-skipping transfer (GST) tax exemption amounts to $11.18 million per individual, indexed for inflation. This caught by surprise those states that had exemption amounts tied to the federal amount. States that didn’t intend to offer exemption amounts of this magnitude have been active in revising their state legislation. Here’s some of the latest state-level activity.

**Connecticut.** Connecticut remains the only jurisdiction in the country with a true gift tax. Connecticut had a $2 million gift and estate tax exemption amount in 2017. On Oct. 31, 2017, Gov. Dannel P. Malloy signed this state’s budget into law, increasing the estate and gift tax exemption amount to $2.6 million for those dying on or after Jan. 1, 2018 and to $3.6 million for those dying on or after Jan. 1, 2019. In 2020, the exemption amount was slated to increase to $5.1 million in 2020, $7.1 million in 2021 and $9.1 million in 2022. In 2023, the exemption amount would match the federal exemption. The second statute conforms to Gov. Malloy’s original budget bill in its increased exemptions for 2018 and 2019, but provides for a $5.49 million exemption in 2020 with no increase after. The Connecticut legislature has to resolve the conflict, and until it does, the exemption amount remains uncertain in 2020 and beyond. For 2019, under both statutes, the exemption amount is $3.6 million.

Importantly for planning purposes, Connecticut doesn’t impose a tax on gifts of tangible or real property located outside the state. There’s also a $15 million estate and gift tax cap effective Jan. 1, 2019, meaning no further estate or gift tax will be owed once the cap is reached. This cap reduces the current legislative cap of $20 million. Using current rates, the new cap will generally kick in for estates exceeding approximately $130 million (the old cap applied to estates exceeding $170.5 million).

**District of Columbia.** A 2018 budget bill, enacted on July 31, 2017, aligned the D.C. estate tax exemption with the federal estate tax exemption effective Jan. 1, 2018 for decedents dying after Dec. 31, 2017. Due to the increased federal exemption, the D.C. City Council enacted emergency legislation that changes the exemption amount back to $5.6 million, retroactive to Jan. 1, 2018.

**Hawaii.** Hawaii’s estate tax exemption was linked to the federal exemption. In June, this state linked its exemption amount to the federal exemption as of Dec. 21, 2017, adjusted for inflation.

**Maine.** Maine’s estate tax exemption was linked to the federal exemption amount. This state revised its laws to decouple from the enhanced federal exemption amount in 2018. Unfortunately, in May 2018, Connecticut enacted two conflicting pieces of legislation. The first statute would gradually increase the exemption to $5.1 million in 2020, $7.1 million in 2021 and $9.1 million in 2022. In 2023, the exemption amount would match the federal exemption. The second statute conforms to Gov. Malloy’s original budget bill in its increased exemptions for 2018 and 2019, but provides for a $5.49 million exemption in 2020 with no increase after. The Connecticut legislature has to resolve the conflict, and until it does, the exemption amount remains uncertain in 2020 and beyond. For 2019, under both statutes, the exemption amount is $3.6 million.

**Maryland.** On May 15, 2014, this state increased its estate exemption amount from $1 million in 2014 to $1.5 million in 2015, $2 million in 2016, $3 million in 2017 and $4 million in 2018. Beginning in 2019, the state exemption amount would have been linked with the federal exemption amount. To prevent this, Maryland enacted new legislation to set the state exemption amount in 2019 and thereafter to $5 million. 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 percent for assets transferred to certain beneficiaries.
Minneapolis. As part of a larger bill signed into law on March 21, 2014, this state increased the estate tax exemption annually until 2018, when it was slated to reach and remain at $2 million. However, pursuant to legislation signed by Gov. Mark Dayton on May 30, 2017, the exclusion amounts were further increased to: $2.1 million for individuals dying in 2017; $2.4 million for individuals dying in 2018; $2.7 million for individuals dying in 2019; and $3 million for individuals dying in 2020 and thereafter.

New Jersey. Effective for those dying after Jan. 1, 2018, New Jersey repealed its estate tax. Note, however, that New Jersey still imposes an inheritance tax. Transfers to spouses, domestic partners, parents, grandparents and children won’t generate an inheritance tax. Bequests to others, including friends, siblings, nieces and nephews are subject to inheritance tax at rates between 11 percent and 16 percent.15

Some practitioners have expressed skepticism that the estate tax will remain repealed.

New York. New York increased its exemption amount to $5.25 million for those dying on or after April 1, 2017 and on or before Dec. 31, 2018. For those dying on or after Jan. 1, 2019, the exemption amount will be linked to the 2010 federal exemption amount of $5 million, as indexed for inflation. Accordingly, the doubling of the federal amount won’t affect the New York exemption amount. However, the New York estate tax regime maintains its built-in “cliff.” 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 percent and 105 percent of the exemption amount, there’s a rapid phase-out of the exemption; and those estates that exceed 105 percent of the exemption amount will lose the benefit of the exemption amount entirely and be subject to tax from dollar one. Note, however, 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 on June 19, 2014, this state increased its estate tax exemption amount to $1.5 million in 2015, indexed for inflation. For 2018, the estate tax exemption amount increased to $1,537,656.

Washington State. The current exemption amount is $2 million, indexed for inflation, which was $2.193 million for 2018.

Portability

With federal portability, a deceased spouse’s executor can transfer the deceased’s unused exemption amount to the surviving spouse. With the increased federal exemption amount under the Act, portability is increasingly valuable. 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. Few states allow portability of the state estate tax exemption. Hawaii allows portability for individuals dying after Jan. 25, 2012 if the personal representative of the predeceased spouse files a Hawaii estate tax return. Maryland’s estate tax exemption is portable, beginning in 2019. Massachusetts currently has a portability proposal pending.

Formula Bequests

Beware of formula bequests for tax reasons. As a result of the doubling of the federal exemption amount, the gap between state and federal exemption amounts has widened significantly. In those jurisdictions where the federal exemption exceeds the state exemption, clients must take care to avoid inadvertently triggering a large state estate tax if a credit shelter bequest is designed to take advantage of the full federal exemption.

Beware of formula bequests for dispositive reasons. In addition to unintended state estate taxes, dispositive distortions can also result from linking bequests to the federal exemption amount, as that amount has risen sharply. In states that have rising exemption amounts, a formula bequest that’s pegged to the state exemption amount won’t produce unanticipated state estate taxes, but may produce distorted results if the state exemption amount has risen beyond what was originally envisioned. In New Jersey, for example, a formula bequest pegged to the largest amount that can pass free of state estate taxes would have produced a bequest of $675,000 in 2016, a bequest of $2 million in 2017 and a bequest of the entire estate in 2018 because the New Jersey estate tax has been eliminated.
Flexibility is Key
The bottom line is that it's important to build flexibility into plans to deal with a variety of outcomes. The permanence of changes made to the federal tax laws can't be predicted with any confidence.

**Flexibly drafted documents**: Many practitioners now rely on techniques that maximize flexibility after death, enabling family and fiduciaries to make a post-mortem determination regarding trust funding amounts. Some of these techniques include:

- **Disclaimer trusts**: The first spouse to die leaves everything outright to the survivor, who can disclaim an appropriate amount considering the tax laws, amount of wealth, family situation and specific needs, into a disclaimer marital and/or credit shelter trust (CST).
- **Partial qualified terminable interest property (QTIP) election**: The first spouse to die leaves assets to the survivor in a QTIP marital trust, and the fiduciary can make a partial QTIP election to use the exclusion amount of the first spouse to die. Because the trust must be drafted to qualify for the marital deduction, there isn't any ability in this scenario to accumulate income or make distributions to any beneficiaries other than the spouse. However, the trust can be invested to maximize growth if the spouse doesn't require a high income yield.
- **Clayton QTIP**: The first spouse to die provides that the estate is eligible to pass into a QTIP marital trust, but only if the executor makes a QTIP election. To the extent the QTIP election isn't made, property typically passes into a CST. To avoid adverse tax consequences, practitioners generally recommend that a Clayton QTIP election be made by a fiduciary other than the surviving spouse, often an independent corporate trustee.

**Federal and state interplay could lead to flood of estate tax refund claims for state-only QTIP property**: In *Estate of Evelyn Seiden,* a New York court found that a QTIP trust, created for state purposes after a husband died in 2010 when the federal estate tax lapsed for the year, wasn't includible in the estate of the surviving wife for New York estate tax purposes. Specifically, because the federal estate tax had lapsed in 2010 when the husband died, no federal estate tax return was filed. The husband's executor made a QTIP election on a pro forma federal return filed with the New York return, taking a marital deduction for New York estate tax purposes. The Tax Department issued a closing letter in 2012. After the wife died, her executor excluded the value of the trust property on her federal estate tax return on the basis that no federal marital deduction had been claimed or "allowed" in her husband's estate, as is required to trigger inclusion in the second estate under Internal Revenue Code Section 2044.

The Internal Revenue Service issued a closing letter accepting the return as filed. The estate also excluded the trust property on the wife's New York estate tax return, taking the position that New York law defines "gross estate" by reference to the federal gross estate, which clearly excluded the property. The Tax Department disagreed and assessed additional tax and interest of almost $530,000. However, the New York court rejected the Department's various arguments that Section 2044 applied, finding that the husband's executor simply didn't make that election. Consequently, the property wasn't included in the wife's federal gross estate, nor in her New York gross estate.

Accordingly, the QTIP property escaped New York and federal estate taxation in both estates! Further, the rationale of the case doesn't seem to be limited to estates of surviving spouses when the first spouse died in 2010. If an estate was under the federal filing threshold and filed only a New York estate tax return with a pro forma federal return that contained a QTIP election, the same logic should apply to exclude QTIP trust assets from a survivor's estate.

Other states with a comparable statutory framework might have a similar result. *(Note, the 2019-2020 New York Executive Budget, released Jan. 15, 2019, includes a proposal to prevent the result in the Seiden case by expressly requiring QTIP property to be included in the surviving spouse's estate if a New York marital deduction for the property was previously allowed, applicable to estates of individuals dying on or after April 1, 2019.)*

**Gifting via trusts with flexible terms**: Gifting is a strategy that remains attractive. In light of the doubling of the federal gift tax exemption, there's added incentive for some to make significant lifetime gifts before the enhanced exemption amount potentially disappears.
increased gift exemption may be clawed back if exemption levels are lower on the date of death.

Many people are choosing to fund irrevocable trusts up to the federal gift tax exclusion amount to facilitate their succession planning goals, while building in flexible terms, designed to adapt to possible future tax regimes. GST tax exemption can also be allocated to these trusts to protect against the future imposition of those taxes, potentially in perpetuity in jurisdictions like Delaware that permit perpetual trusts.

The trust can be drafted flexibly to allow the trust assets to remain outside the creator's estate and minimize estate tax or be included back in the creator's estate if a step-up in basis is preferred. The power for the creator to substitute existing trust assets with other assets can maximize this type of basis versus estate tax consideration. The power to substitute assets would also potentially make the trust a so-called grantor trust, which is taxable to the trust's creator. This enables the trust to essentially grow tax-free for the trust beneficiaries, who are relieved of the tax burden, significantly magnifying the value of the transfer to family members. Grantor trust status also allows the grantor to engage in sales or other transactions with the trust without gains recognition. In addition, with inheritances often delayed due to much longer life expectancies nowadays, many people find pleasure in transferring assets to family members while they're still around to watch their family enjoy use of those assets. If the trust is established in a jurisdiction like Delaware, it might also escape state income taxes on accumulated income and capital gains and provide additional asset protection from creditors. Some individuals use a spousal lifetime access trust (SLAT) structure, so a grantor's spouse is a beneficiary of the trust, allowing the grantor indirect access to trust assets as long he's married to the spouse beneficiary. A popular technique is for each spouse to create a SLAT and name the other as a beneficiary, but the trusts must be sufficiently different to avoid the reciprocal trust doctrine and adverse tax consequences.

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Gift Add Back
A number of states tax gifts that are made within a certain time period before death, by bringing the value of those gifts back into the taxable estate for state estate tax purposes. The rules are designed to prevent a perceived abuse: deathbed gifts. If there's no state gift tax consequence to gifting (and Connecticut is the only state that currently imposes a true gift tax), there's an incentive to make deathbed gifts to remove the gifted property from the taxable estate. Among the states that have a gift add back rule are:

- **Iowa.** This state imposes a 3-year look back.25
- **Kentucky.** This state taxes gifts made in contemplation of death. Gifts made within three years of death are construed prima facie to have been made in contemplation of death.26 If a gift was made more than three years prior to death, it will be a question of fact, to be determined by the proper tribunal, whether the transfer was made in contemplation of death.
- **Maine.** This state imposes a 1-year look back.27
- **Maryland.** This state taxes gifts made in contemplation of death. Gifts made within two years of death are taxable if they're "not shown to not have been made in contemplation of death."28
- **Minnesota.** This state imposes a 3-year look back.29
- **Nebraska.** This state taxes gifts made in contemplation of death. Gifts made within three years of death are deemed to have been made in contemplation of death.30
- **New Jersey.** This state taxes gifts made in contemplation of death. Gifts made within three years of death are deemed to have been made in contemplation of death.31 However, with the repeal of the New Jersey estate tax, the rule is relevant only for inheritance tax purposes.
- **New York.** This state imposed a 3-year look back.32 Originally, this gift “add back” was tied to the date of the gift only, not the date of death, and applied to gifts made before Jan.1, 2019 if the decedent was a New York resident at the time the gift was made and at the time of death. As a result of a subsequent statutory amendment, the gift add back doesn't apply to estates of individuals dying on or after Jan. 1, 2019.33 This means that, even if a gift is made before Jan. 1, 2019, it won't be brought back into the estate if the donor dies after Jan. 1, 2019. (Note, the 2019-2020 New York Executive Budget, released Jan. 15, 2019, includes a proposal to extend the three-year add-back to Jan. 1, 2026 and would apply to estates of individuals dying on or after Jan. 1, 2019.)
- **Pennsylvania.** This state imposes a 1-year look back for transfers over $3,000.34
- **Vermont.** Effective July 1, 2018, this state adopted a statute that imposes a 2-year look back.35
Decanting

There's been continued state-level activity regarding decanting, which allows the trustee of an otherwise irrevocable trust potentially to appoint the trust assets into a new trust with different terms. The rationale behind decanting is that if a trustee has the ability to make discretionary distributions to or for the benefit of a beneficiary, the trustee should also be permitted to exercise that discretion to distribute trust assets into another trust for that beneficiary. More than half the states now have statutory authority to decant trusts.

Some states have adopted the Uniform Trust Decanting Act (UTDA), which creates a complete model set of rules intended to allow decanting for appropriate purposes, while preventing abuse. In 2018, Alabama and California enacted the UTDA. Illinois introduced it, but the bill has since died. Since its promulgation in July 2015, the UTDA has been enacted in Colorado, New Mexico, North Carolina, Virginia and Washington. Under the UTDA, how broadly a trustee can exercise a decanting power depends on the breadth of the trustee's discretionary distribution power. The UTDA bifurcates a trustee's discretion into two categories: limited or expansive. Limited distributive discretion is subject to an ascertainable standard or reasonably definite standard. Under the UTDA, this standard requires the trustee to decant so that each beneficiary's interest is "substantially similar" in the second trust. Accordingly, limited discretion usually allows for administrative, not dispositive, changes. The UTDA provides broader rules for decanting under an expanded distributive discretion. For example, although the fiduciary may not add new beneficiaries or eliminate vested interests, the fiduciary may grant a power of appointment (POA) to a beneficiary of the second trust that's exercisable among a class of permissible appointees that's broader or different from beneficiaries of the first trust. Further, the fiduciary can also remove beneficiaries, omit POAs and eliminate rights that aren't vested interests. Court approval of a decanting isn't required, nor is beneficiary consent, but there's a 60-day notice requirement to interested persons.

Decanting can be an invaluable tool for trustees in dealing with changed circumstances, correcting mistakes or optimizing a trust's administration.

Indeed, many practitioners include their own decanting provisions in their trust documents, tailored to the desires of the trust creator, so there's no need to rely on state default law. In a recent New York case, In re Hopenstein, the trustees successfully relied on their powers under a trust document to distribute a life insurance policy on the settlor's life to a new trust that excluded an estranged daughter of the settlor and her issue. Dismissing an objection that the transfer didn't satisfy the requirements of the New York decanting statute, the court held that the New York decanting statute had no bearing on the case because the trustees relied on their powers under the document to effectuate the transfer.

In Hodges v. Johnson, however, a New Hampshire court found that trustees had violated their duty of impartiality because they didn't consider the interests of beneficiaries who were removed in decantings. The court found that the decantings were void and ordered the removal of the trustees. Although the court's decision rested on broader grounds, the facts of the case may have influenced the holding. The trial judge found that the trustees decanted the trusts to remove beneficiaries in three separate decantings at the request of the settlor and commented on the "deeply personal and harsh nature of the decantings." The beneficiaries who were removed were the grantor's second spouse, his stepchildren and one biological child, leaving his other two children as beneficiaries. In each of the three decantings, one of the two individual co-trustees resigned, he was replaced by the settlor's estate attorney, the other co-trustee delegated his decanting power to the attorney/trustee who executed the decanting documents and once the decanting documents were executed, the attorney/trustee resigned as co-trustee and the individual trustee who had resigned was re-appointed.

Including specific guidance in trust agreements as to why the settlor may wish the trustee to exercise discretion unevenly may be helpful.

Section 529 Plan Enhancements

Daunting college tuition bills continue to concern parents and grandparents. In evaluating different college funding alternatives, the pros and cons of the various options should each be considered, along with income and transfer tax consequences, as well as the ability of a student to qualify for financial aid. The most efficient plan often involves integrating a number of techniques with overall financial and estate planning. One very popular technique for college funding is the Internal Revenue Code Section 529 plan (Section 529 plan).

The Section 529 plan is an investment account created by a donor in the name of a designated beneficiary, for the purpose of paying educational expenses. Each state sets its own limits for Section 529 plan contributions. Funds invested in a Section 529 plan will accumulate and grow federal income tax-free, and if the funds are used for qualified educational expenses (such as tuition, room and board, fees, books, supplies and equipment for college), they're exempt from federal income tax. Many states accord similar favorable tax treatment to Section 529 plans and allow an income tax deduction for contributions to a resident's state-sponsored
Section 529 plan. In New York, for example, taxpayers can deduct up to $5,000 ($10,000 for a married couple filing jointly) of contributions to a Section 529 plan on their state income tax return.

Previously, Section 529 plans could be used solely for the purpose of paying for qualified higher education expenses. However, as a result of changes effected by the Act, as of Jan. 1, 2018, Section 529 plans (up to $10,000 annually) can now be used to pay for tuition for elementary and secondary schools for federal tax purposes. However, not all states will characterize Section 529 plan distributions for K-12 year tuition as qualified distributions for state tax purposes. States that have conformed their tax laws to align with the federal code will likely automatically include tuition for K-12 education as a qualified expense, however some states may take a different approach.

Here’s a sampling of state responses to date:

**New York.** The New York Department of Taxation & Finance issued a Preliminary Report in January 2018, which provides:

New Federal Law: The new federal law makes several changes to the rules governing education savings, including expanding the use of 529 accounts to include annual distributions of up to $10,000 for K-12 public, private and religious school tuition. In New York, about 195,000 taxpayers claimed about $985 million in qualified contributions on state tax returns in 2015.

Impact to New York: It appears that distributions for K-12 tuition expenses would not be considered qualified distributions under the New York statutes implementing 529 accounts and would trigger the recapture of any tax benefits that had accrued on contributions. We will continue to review the federal law’s provisions on New York residents, and welcome discussion for possible solutions and alternatives.

**Oregon.** This state passed legislation to decouple from the federal law regarding qualified distributions for Section 529 plans. Withdrawals from Section 529 plans to “pay expenses in connection with enrollment or attendance at an elementary or secondary school” are added back for state income tax purposes.

**Vermont.** This state’s current statute defines eligible education as “postsecondary” programs. Therefore, it appears that withdrawals from a Vermont Section 529 plan for K-12 tuition expenses wouldn’t qualify for tax free state income tax treatment.

Not all states will characterize Section 529 plan distributions for K-12 tuition as qualified distributions for state tax purposes.

**California.** In its summary of federal income tax changes, this state’s Franchise Tax Board issued a report providing: California law conforms to the treatment of qualified tuition programs under Section 529 as of Jan. 1, 2015, but “does not conform to IRC section 529 account funding for elementary and secondary education or to the new federal rules relating to the maximum distribution amount.”

**Colorado.** This state’s pending legislation provides that a state tuition program is maintained pursuant to Section 529, “Except that a subtraction is not allowed under this subsection. . . if the payment or contribution made during the taxable year is intended for elementary or secondary school expenses.”

**Maine.** This state has enacted legislation to allow K-12 withdrawals to be free from state tax.

**New Jersey.** This state has legislation pending that wouldn’t permit distributions from Section 529 plans for K-12 expenses to qualify as deductions for income tax purposes. The proposed statute defines qualified education expenses as those under Section 529, but “excludes expenses for tuition in connection with enrollment or attendance at an elementary or secondary…. School.”

**Revocatory Effect of Divorce**

If an individual gets divorced and fails to update dispositions and beneficiary designations that benefit a former spouse, some states have laws that revoke those dispositions and designations. Otherwise don’t. Even in those states that have default revocation statutes, relying on state default law can frustrate the intent of the decedent.

The Uniform Probate Code (UPC), in effect in Alaska, Arizona, Colorado, Idaho, Massachusetts, Michigan, Montana, North Carolina, New Jersey, Nebraska, New Mexico, North Dakota, South Dakota, and Utah, revokes dispositions to and fiduciary nominations of a former spouse, as well relatives of the former spouse.
York, by contrast, divorce revokes dispositions to, and fiduciary nominations of, former spouses, but the revocatory effect of the section doesn’t extend to the relatives of an ex-spouse. In *In re Estate of Lewis*, Estates Powers and Trusts Law Section 5-1.4 disqualified the decedent’s ex-husband from inheriting under her will or acting as executor. However, the ex-husband’s father (the decedent’s ex-father-in-law), was the successor beneficiary and executor, and he wasn’t disqualified under the terms of the statute. Presumably the ex-husband would inherit or obtain the property from his father, causing an end-run around the statute. While the court acknowledged this, it opined that the statute was clear and unambiguous in omitting the relatives of ex-spouses from disinheritance.

The UPC approach of revoking dispositions to former spouses and relatives of former spouses would have prevented the outcome in the *Lewis* case. However, that approach might not effectuate the decedent’s intent in those cases in which bequests to relatives of an ex-spouse (for example, stepchildren of the decedent) are still intended despite a divorce.

Hawaii, Minnesota and South Carolina, which have also adopted the UPC, have modified the language to revoke testamentary bequests to the decedent’s former spouse only and not to the former spouse’s relatives. Similarly Indiana, Oregon (which enacted its statute in 2018), Virginia, West Virginia and Wyoming revoke bequests to ex-spouses only. Maine revised its statute, which previously revoked testamentary bequests to the decedent’s former spouse only and now also revokes bequests and fiduciary nominations of a former spouse and the former spouse’s relatives.

Importantly, state revocation-on-divorce statutes don’t apply during the pendency of a divorce proceeding. Accordingly, it’s important to review documents during this time. The most prudent course of action is not to rely on state default law at all. Divorced spouses, spouses in the process of getting a divorce and unmarried couples who are separated should give immediate attention to their planning documents to ensure they reflect their intent (subject to elective share statutes and other legal restrictions).

There’s generally no revocation on divorce regarding an ex-spouse’s interest in an irrevocable trust. Some practitioners use the concept of a “floating spouse,” defined as the spouse to whom the trust creator or beneficiary is married from time to time. If an ex-spouse actually is named as a trust beneficiary, other techniques may have to be considered to restructure the trust, including decanting, discussed above.

Note that state laws that do provide for revocation on divorce may not apply to retirement plan beneficiary designations, which should be reviewed promptly. Spousal rights in retirement plans governed by the Employee Retirement Income Security Act are subject to special rules. It’s also important to reconsider designated beneficiaries of life insurance policies.

In *Sveen v Melin*, decided by the U.S. Supreme Court on June 11, 2018, the court determined that the retroactive application of a Minnesota statute doesn’t violate the contracts clause of the U.S. Constitution.

The statute under consideration provided that “the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual’s former spouse.” Under the statute, if one spouse had made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revoked that designation so that the insurance proceeds would instead pass to the contingent beneficiary or the policyholder’s estate on death. The decedent’s children argued that under Minnesota’s revocation-on-divorce law, their father’s divorce canceled his ex-spouse’s beneficiary designation, leaving them as the rightful beneficiaries. The ex-spouse claimed that, because the law didn’t exist when the policy was purchased and she was named as the primary beneficiary, applying the later-enacted law to the policy violates the Constitution’s contracts clause.

The Supreme Court found that the law didn’t substantially impair pre-existing contractual arrangements. First, the law was designed to reflect a policyholder’s intent—and so to support, rather than impair, the contractual scheme. It applied a prevalent legislative presumption that a divorcee wouldn’t want his former partner to benefit from his life insurance policy and other will substitutes. Second, the law was unlikely to disturb any policyholder’s expectations at the time of contracting, because an insured can’t reasonably rely on a beneficiary designation staying in place after a divorce. Lastly, the law supplied a mere default rule, which the policyholder could undo in a moment.

These cases are stark reminders not to rely on state default law, but to carefully update dispositive documents and beneficiary designations, especially after events such as divorce, marriage or the birth of children.

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Endnotes
8. DC Code Section 47-309.
9. HRS Section 236D-6.
10. 36-MRSA Section 4012, sub-Section 5.
13. IRC Section 529(3)(a)(iii).
17. ME ST Section 11472.
19. Ibid., at (3).
21. OR ST Section 316.680(2)(k).
22. VT ST 33 Section 1123(5).
25. A.R.S. Section 14-2804.
27. I.C. Section 15-2-804.
28. M.G.L.A Section 700.2807.
29. M.C.L.A Section 72-2-814.
30. N.Y. Tax Law Section 952(c)(2)(A).
31. N.Y. Tax Law Section 952(c)(1).
33. WA ST Section 83.100.020(1)(iii).
35. Maryland Tax General Section 7-309.
38. 83 FR 59343.
39. I.C.A. Section 450.31(2).
40. KRS Section 140.120(2).
41. 36-MRSA Section 4102(7)(c).
42. MD Code, Tax—General, Section 7-201(10)(o)(4).
43. M.S.A. Section 291.016, subd.2(3).
45. N.J.S.A. 54:34-1(c).
46. N.J.S.A. 54:34-1(c).
47. N.J.S.A. 54:34-1(c).
49. N.J.S.A. 54:34-1(c).
50. N.J.S.A. 54:34-1(c).
51. N.Y. Tax Law Section 954(a)(3).
52. Ibid.
53. 72 P.S. Section 9107(c)(3).
54. 32 V.S.A. Section 362(4).
55. Al ST Section 76-3-8 (effective Jan. 1, 2019).
56. CA Probate Section 15901.
59. NPM Stat Code 46-12-102.
60. N.U.S.A. Sections 366.18b-1.
61. VA Code Ann. Sections 64.2-7793 – 64.2-77925.