Trusts&Estates

When Lawyers Play Doctor: **Documents Governing End of Life Care**

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BY EVE GREEN KOOPERSMITH, DORIS L. MARTIN AND BARBARA D. KNOTHE

As our aging population grows, stories of end-of-life medical treatment issues seem to appear with increasing frequency in newspapers, television reports, and discussions with friends and family.

Requests for health care decision-making documents are now a standard part of any estate planning discussion with a client and as a result trusts and estates lawyers have had to add health law as another area of expertise they are expected to provide. Keeping abreast of health law can be challenging, as the landscape has changed in important ways with New York's 2010 enactment of the Family Health Care Decisions Act (FHCDA) and the rollout of Medical Orders for Life-Sustaining Treatment (MOLST) forms. Despite efforts to publicize these changes and educate both lawyers and the general public, trusts and estates lawyers are confronted with a client's confusion about what they want and actually need and an array of options and forms to choose from to document a client's wishes in a way they will be honored. Moreover, given the nature of health care issues confronting an individual over his or her lifetime, a client's goals of care will likely change as he or she moves from wellness to managing chronic illness and to the final stages of life. This means that, just as estate planning documents need to be reviewed and updated periodically to address changes in family circumstances and law, health care documents need to be reviewed and updated as health changes. It is in part for this reason and recognition of the need for greater opportunity and flexibility that Medicare recently proposed to establish payment rates for physicians and other practitioners who engage in advance care planning with their patients.

This article reviews the various documents and laws that govern health care decision-making in New York and advises how to use them to address a client's particular circumstances. The principal laws that govern decision-making for patients lacking capacity are the Health Care Proxy law,[1] which applies if the patient appointed a health care agent prior to losing capacity, and the FHCDA,[2] which applies if the patient did not appoint a health care agent and the decision relates to treatment in a hospital, nursing home or hospice. This article also will discuss MOLST forms, do not resuscitate orders (DNRs), living wills, and documents for organ donation and directions regarding the disposition of remains.

A client should choose an agent who **knows the client well**, understands the client's values, goals and morals, and most important, is willing to be reasonably available to handle the responsibility of and **carry out the client's end of life wishes.**

Health Care Proxy

Clients often ask for a living will or DNR stating they want to "pull the plug" and believe that these are the documents they need to ensure that such wishes are honored. What they usually mean is they want a document to state their wishes in that regard and authorize someone to make that decision for them when they cannot speak for themselves. The health care proxy is the New York state authorized document that is the frontline in addressing this request. By signing a health care proxy, an individual can appoint someone (and an alternate) as an "agent" to make medical decisions on his or her behalf in the event that he or she is unable to do so.[3] Every adult is presumed competent to appoint an agent unless adjudged otherwise.[4]

To activate the authority of the agent, the person's attending physician must determine that he or she does not have capacity.[5] Decisions to withhold or withdraw life-sustaining treatment require a concurring determination of incapacity.[6] The agent is required to make medical decisions in accordance with the person's wishes, religious and moral beliefs, and, if the person's wishes are not reasonably known, in accordance with the person's best interests.[7] A client should choose an agent who knows the client well, understands the client's values, goals and morals, and most important, is willing to be reasonably available to handle the responsibility of and carry out the client's end of life wishes. The client also should be counseled to discuss his or her goals of care with the agent so the agent has guidance. The living will, discussed below, can further explain and document what those wishes are, but it is the proxy that should be the foundation of any effort to address end of life issues.

The New York State Department of Health's Health Care Proxy Form can be obtained by visiting www.health.ny.gov/forms/doh-1430.pdf. Lawyers can't help editing forms, but we urge you to use the New York State Health Care Proxy form as published because its format and text are familiar to health care providers and this facilitates quick implementation. We do recommend one critical modification. While an agent can make any and all medical decisions on an individual's behalf,[8] an agent is not legally authorized to decide to withhold and/or withdraw artificial nutrition and hydration unless the agent knows the individual's wishes concerning these matters.[9] For that reason, the following sentence should be added to the form in the blank space provided for instructions: "I have discussed with my agent my wishes concerning all forms of medical treatment, including but not limited to, artificial nutrition and hydration, and I want my agent to make all decisions about these measures."

Once the proxy is signed, the client should share » Page 13

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Snowbirds Beware: The Ins and Outs Of Nonresident Income and Estate Tax

BY MARION HANCOCK FISH AND JAIME J. HUNSICKER

It's that time of year when the snowbirds are breaking out their suitcases and making travel plans to flee the Empire State before the snowflakes start flying. Anyone who has experienced the past few New York winters can appreciate the desire to avoid the back-breaking shoveling, frozen eyelashes and wind-burned cheeks of a typical New York February.

While weather is certainly one incentive to fly off to southern climates, many snowbirds, some of whom may be clients, are heading south for an additional reason—to establish or maintain their non-New York residency for tax purposes.

This article provides an overview of New York income and estate taxation rules for nonresidents. While recent changes in the law have reduced the impact of the New York estate tax, the possibility of incurring New York income tax remains a strong motivator to establish residency outside New York.

Personal Income Taxation

New York taxes residents of the state on all income from all sources, with the highest rate being 8.82 percent.[1] In contrast, nonresidents of New York are only subject to personal income tax for income with New York sources.[2] New York source income is defined as the sum of the income, gain, losses and deductions derived from or connected with New York sources; for example, income from ownership of New York real or tangible property, or from services or business carried on in the state.[3] In other words, an individual who can establish legal residency outside New York will only be obligated to report and pay tax on income actually generated in New York.

Defining Residency. New York tax laws and the regulations of the New York State Department of Taxation and Finance (the Department) are aimed at thwarting "multimillionaires who actually maintain homes in New York and spend ten months of every year in those homes … but … claim to be nonresidents."[4] » Page 12

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New York's Legislative Activity: What Passed, What Didn't, What's Next

BY SHARON L. KLEIN

The 2015-16 legislative session recessed on June 17, 2015. It is instructive to review what has passed so far, what failed to pass before the June recess and what lies ahead before the session resumes in January.[1] Among the most noteworthy measures are the following:

1. Trusts and Estates Related Changes of the Executive Budget for 2015-2016 (Enacted April 13, 2015).[2] The 2014-15 Executive Budget brought many substantial changes to New York law, including increases in the estate tax exemption amount, a resulting dramatic estate tax cliff, a gift add-back and changes to the taxation of resident trusts. In contrast, the 2015-16 Executive Budget brought mainly clarifications and corrections to New York's trusts and estates laws.

The most significant changes include the following:[3]

Prevent Disappearing Estate Tax. Last year's Executive Budget increased the New York estate tax exclusion amount over the next several years from $1 million until it links to the federal exclusion amount beginning Jan. 1, 2019. However, the estate tax rate schedule was expressed to apply only to individuals dying between April 1, 2014 and March 31, 2015. Due to this drafting error, the estate tax was slated to disappear after March 31, 2015. Accordingly, this year's budget removed the expressed time frame, leaving the estate tax rate table to apply generally to all decedents irrespective of the date of death.

Clarify Gift Add-Back. As a result of last year's budgetary changes, the New York gross estate of a deceased resident will be 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.[4] The three-year look-back applied only to gifts made before Jan. 1, 2019. As a result of an amendment this year, the gift add-back does not apply to estates of individuals dying on or after Jan. 1, 2019. It is unclear why the relevant date changed from the date of gift to the date of death, but there is perhaps a more interesting question: Why does the gift add-back end at all? It might be related to revenue projections, but in any event could presumably easily be extended.

Further, the way last year's budgetary language was drafted, there appeared to be a lack of parity with the estate tax regime: Gifts by a New York resident of out-of-state real property or tangible personal property were not specifically excluded from the gift add-back, but out-of-state real and tangible property are specifically excluded from the New York gross estate for New York estate tax purposes. This could lead to anomalous results: For example, if a New York resident gifted an out-of-state residence within three years of death, the value of the real property would be added back to that individual's estate, but if that same individual had died with that same out-of-state property, it would not be included in the New York gross estate.

Intangible personal property of a non-resident is **not included in computing the non-resident's New York taxable estate.**

On Aug. 25, 2014, the New York State Department of Taxation and Finance issued a Technical Memorandum,5 which clarified that gifts are not added back to the gross estate if they consisted of real or tangible property having a location outside New York. This year's budgetary changes formalize that interpretation.

Disallow Deductions Related to Intangible Personal Property for Non-Resident Decedents. Intangible personal property of a non-resident is not included in computing the non-resident's New York taxable estate. Accordingly, as a result of an amendment in this year's budget, deductions related to that property are expressly denied for New York purposes.

Non-Resident's New York Estate Tax Liability Dependent on Value of New York Situs Assets, Not on Apportionment Between New York and Non-New York Situs Assets. Although this change was made last year, it deserves mention as it can provide significant relief for non-residents who die owning New York situs real or tangible property.

Previously, a non-resident's estate tax liability was determined by calculating the estate tax that would have » Page 14

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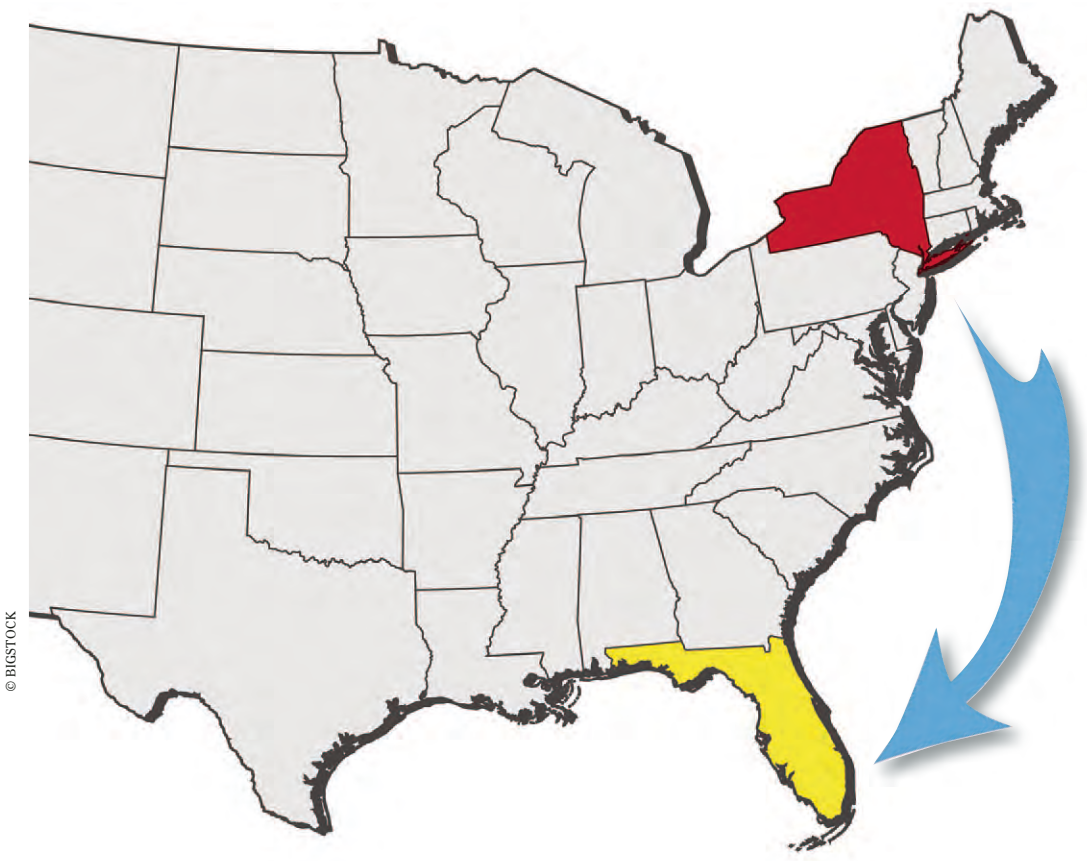

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When Moving From New York To Florida, Consider Estate Planning Differences

BY JAY D. WAXENBERG, DAVID PRATT AND JONATHAN GALLER

It is no secret that many New Yorkers contemplate moving to Florida in their golden years. From an estate and tax planning perspective, there may be substantial advantages to changing one's domicile to Florida.

Those advantages—along with the allure of gated communities and early bird specials (Del Boca Vista, anyone?)—are often the focus of discussions between these clients and their estate planning lawyers.

But for clients who anticipate the possibility of postmortem litigation over their estates, discussions with estate planning lawyers ought to include another topic: the distinctions in how New York and Florida handle those types of disputes.

These cases are especially fact-specific, and given the emotional components, they are overwhelmingly personality-specific as well. There are no "one size fits all" answers. Nevertheless, clients who are contemplating a move from New York to Florida, and who anticipate postmortem disputes, should at least be made aware that changing domicile may very well have a substantive impact on any will or trust contest.

Jurisdiction Over Estate

New York and Florida each have procedures for probating the will of a decedent who is domiciled outside that state.[1] However, absent an intentional multi-state race to the courthouse, clients can generally expect their wills to be probated, and their estates to be administered, in the jurisdiction in which they were domiciled at the time of death. Thus, the will of a Florida domiciliary is likely to be probated in a Florida court. Similarly, any challenges to its validity, as well as the administration of the estate, will generally be governed by Florida law.

It should be noted that, pursuant to EPTL 3-5.1(h), a non-domiciliary with property in New York may elect to have his or her will governed by New York law with respect to that property. That and other exceptions to the general choice-of-law rules are beyond the scope of this article. But the fact that such options may be available further underscores the need to be aware of how different jurisdictions address contested probate proceedings.

The issues of jurisdiction and venue, in and of themselves, can affect a will contest. Petitioning for administration in Florida automatically subjects the executor (Florida uses the term "personal representative") to the jurisdiction of the Florida court, regardless of his or her residency.[2] Even non-Florida beneficiaries are subject to jurisdiction in Florida to the extent of their interests in the estate.[3] This means that any challenge to the validity of a will that is probated in a Florida court will take place in Florida.[4]

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Logistical factors such as the locations and availability of witnesses, medical professionals, and family members—many of whom may still be in New York—can substantially impact the prosecution and defense of any such will contest. For example, will the contesting party be deterred by having to pay for a Florida attorney to meet with and depose New York witnesses? What about a decedent's adult child who is serving as the fiduciary but lives in New York? Will he or she be willing and equipped to travel to Florida for depositions and trial to uphold the validity of the will?

Understandably, given the proliferation of revocable trusts, the site of an anticipated trust contest might be of greater financial significance than the site of a will contest. But under Florida's long-arm statute, the court in which a decedent's estate is being administered often can obtain jurisdiction over the trustee and beneficiaries of the decedent's revocable trust as well, even if that trust is governed by the law of another state.[5] Thus, it would be a mistake for New York clients to assume that even if they move to Florida, any postmortem litigation over their New York trusts will necessarily be confined to the New York courts.

Timing of Will Contests

Clients who anticipate postmortem litigation may also wish to consider the differences in the timing of a will contest in New York and Florida and the potential financial impact on their nominated fiduciary.

In New York, petitions for probate are filed with notice to interested persons to allow them the opportunity to object before the will is admitted to probate.[6] In Florida, however, these petitions are typically filed and granted ex parte; interested persons receive notice after letters of administration have been issued and then have three months to object.[7]

This procedural difference can amount to a significant practical difference for the nominated fiduciary. Not surprisingly, fiduciaries might be reluctant to engage in protracted litigation to uphold the validity of the will if they have to pay for attorney fees personally during the pendency of the litigation. In Florida, fiduciaries will generally be appointed prior to any will contest; thus, they will have access to estate assets to fund the defense of the litigation. Not so in New York. For that reason, the nominated executor may petition for preliminary letters testamentary after a will contest has been filed (which would provide access to estate assets), but the court may deny that petition if it is concerned about a claim that the nominated fiduciary unduly influenced the testator.[8]

Selection of a Fiduciary

New York clients who anticipate litigation over their estates may be inclined to designate a neutral fiduciary, such as an accountant or lawyer, rather than a spouse or children. If these clients are planning a move to Florida, they should be aware that the fiduciary of a Florida estate must be domiciled in Florida or must be a family member of the decedent.[9]

In Terrorem Enforceability

New York clients who anticipate postmortem litigation over their estates are likely to include a no-contest, or "in terrorem," clause in their will. New York courts will enforce such provisions,[10] and they may serve as a powerful deterrent to will contests.

But New Yorkers who are contemplating a move to Florida should be made aware that Florida courts, as a matter of statute and public policy, will not enforce in terrorem provisions.[11] Instead, in Florida, a will or trust contestant is merely obligated to make a conditional renunciation of any beneficial interest in the document being challenged. If the contestant does not prevail, the renunciation is deemed null and void, and the contestant returns to his or her original position.[12] Thus, the primary deterrent to commencing a will contest in Florida is attorney fees rather than disinheritance. If the stakes are high enough, that may not be a sufficient deterrent. Moreover, many lawyers will take these cases on a contingency basis. As discussed below, however, an unsuccessful contestant might be ordered to pay the attorney fees of the will proponent.

There are **no "one size fits all" answers.** Nevertheless, clients who are contemplating a move from New York to Florida should at least be made aware that changing domicile may very well have a **substantive impact on any will or trust contest.**

Undue Influence Claims

Circumstantial Evidence: A will may be contested on various grounds such as failure to comply with the formalities of execution, lack of testamentary capacity, fraud or undue influence.

Undue influence claims often present unique issues. For example, both New York and Florida recognize that undue influence claims, by the very nature of the alleged conduct, are difficult to establish through direct evidence. These cases often turn on circumstantial evidence.[13]

For that reason, New York clients may wish to consider the fact that will contests in New York can be tried before a jury,[14] whereas will contests in Florida are tried exclusively by a judge.[15] Depending on the fact pattern, this distinction alone may be outcome-determinative in an undue influence claim.

One can envision a will contest brought by an adult child who has been replaced in the decedent's estate plan in favor of a new spouse or even a caregiver. The adult child, who is the natural object of the decedent's bounty, may find a jury more sympathetic than a judge, and more disapproving of the settlor's "unnatural" changes. If so, the jury may also be more easily persuaded by circumstantial evidence of undue influence.

Burden of Proof: Clients may also want to understand who will have to prove what in an undue influence claim. In both New York and Florida, the contestant has the burden of proof to demonstrate undue influence by a preponderance of the evidence.[16] Similarly, in both states an inference or presumption of undue influence can be triggered by certain types of evidence, and the burden may then shift to the will proponent. There are, however, some interesting differences.

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Birth After Death

Artificial insemination complicates estate planning and administration.


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BY TERENCE E. SMOLEV

AND CHRISTINA JONATHAN

Famous sayings by the elderly through the ages: "Life was simpler in the past;" "In the good old days …" "If it was good enough for us, it's good enough for you."

The rules of inheritance were also simpler in the past. A man and a woman had a child, the child was their heir, and was entitled to inherit from each of them. If a woman became pregnant and the father-to-be died, the fetus, born live, was the father-to-be's heir, and was entitled to inherit from him.

Life has become more complicated in recent years as advances have been made with respect to artificial insemination, and storing eggs and sperm for future use. In earlier years, you knew when a man's sperm caused conception with an egg of a live female, in that female. Now that is not always the case. Eggs can be fertilized by a sperm years after the eggs and the sperm were stored by those men and women. This certainly complicates estate planning and administration.

The lawyers' responsibilities as to these issues have thus become more complicated. Should the estate planning lawyer ask clients about the topic of having stored their eggs and sperm? Should that lawyer insert provisions in estate planning documents to provide clarity as to these issues? Should the lawyer dealing with an estate's administration be cognizant of the possibility that unborn heirs may exist inside the storage freezers holding sperm and eggs?

It can be said that this issue came to a head when the U.S. Supreme Court had to decide the right to Social Security Benefits of a child with a deceased father. In *Capato*,[1] Karen Capato and Robert Capato married in 1999, and planned to have children. Shortly after their marriage, Robert was diagnosed with esophageal cancer. Due to his deteriorating health, Robert's sperm was frozen and stored for later use by his soon to become widow. The sperm was used after the father's death and twins were born. The widow then applied for benefits under the Social Security Act. At the time of the father's death he was a Florida domiciliary. The Florida intestacy Laws hold that a posthumously conceived child could not inherit from the father. The Social Security Administration, following Florida law, denied the child insurance benefits to Karen Capato. She then appealed the decision of the Social Security Administration.

Capato began its travels through the federal court system in the U.S. District Court for the District of New Jersey, where the widow challenged the Social Security Administration's denial of surviving child's insurance benefits for the posthumous children of her husband. The District Court affirmed the Social Security Administration's denial of benefits. The Court of Appeals for the Third Circuit affirmed in part, vacated in part, and remanded to the District Court. The Supreme Court granted Certiorari. The court held that the following of state law was a reasonable method to determine a child's right to benefits, thereby upholding the Social Security Administration decision.[2]

Now comes the entry of New York into the issue of posthumously conceived children. In 2013, *Bosco v. The Commissioner of Social Security*, was argued in the Southern District of New York.[3] This matter was very similar to *Capato*. A mother of a posthumously born child sought survivor insurance benefits for her child. The Social Security Administration denied the request and the denial was brought to the court. The court ruled that a posthumously born child was not entitled to benefits. Seeing that this issue would become more prevalent, if not already an issue as to inheritance rights of after born children, legislation was enacted by the New York State Legislature and signed into law by the governor, providing an addition to the Estate, Powers and Trusts Laws (EPTL) to deal with the issue.

EPTL §4-1.3 was signed into Law in November 2014, along with amendments to EPTL §11-1.5. The intent of the new law and the amendments is to solve the issue of posthumously conceived children.

The new statute refers to the after-born heir as a "genetic child." EPTL §4-1.3 provides four requirements to be met for a genetic child to inherit from the genetic parent. These following requirements are operative whether we are dealing with intestacy, will or trust.

First, the genetic parent must have expressly consented in writing, no more than seven years before death, to use the parent's genetic material for posthumous conception;

Second, notice of the existence of the genetic material must be provided to the representative of the estate within seven months of the issuance of letters testamentary or administration;

Third, the representative of the estate must record the written instrument with the Surrogate's Court within seven months of death, and with the court granting the letters to the personal representative;

Fourth, the genetic child must be in utero within 24 months of the genetic parent's death, or born no later than 33 months after the genetic parent's death.[4]

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If the requirements of EPTL §4-1.3 are met, then the genetic child is entitled to inherit from the genetic parent under intestacy or any will providing for distribution to a class which would include the genetic child, such as "issue."

Considering the increasing use of stored genetic material, it should become a routine conversation between the estate planning lawyer and the client(s) as to this subject matter. If a client informs the lawyer of the existence of stored genetic material, then appropriate documentation should be created and executed by the client.

EPTL §11-1.5 deals with the extension of time for the delay in distributing assets until the genetic child is born. This coincides with the 33 months statutory provision in EPTL §4-1.3.

An issue not dealt with is the storing of live embryos. This issue was discusses in a prior New York Law Journal article (Jan. 12, 2015) by former Nassau County Surrogate C. Raymond Radigan and his co-author, David R. Schoenhaar. As of now, no New York statute deals with the issues of ownership, transferability, allowing the embryo to grow to birth, or whether that embryo must grow inside a human body or in a laboratory. These issues may be able to be dealt with by a contract, will or trust provision, or otherwise. It would seem that there should be some statute enacted to deal with these issues that will become more prevalent as years pass.

Most lawyers learn about conflicts of law between the laws of different states in law school, but not every lawyer comes across the applicability of conflicts in practice. In dealing with genetic material, embryos and the common movement of Americans among the 50 states, conflicts of law may arise as to which states' laws control the issues of genetic material, genetic children and parents, as well as the issue of embryo conservation, ownership and transferability. That's a lot for estate planning lawyers to swallow.

Documents

What estate planning documents should deal with the issues above mentioned? Should a male's will provide for transfer of ownership or possession of stored sperm? Should that male's will direct what should happen to that stored sperm when 33 months have passed after his death and no birth has occurred under New York Law? Should a female's will provide for ownership or possession of her stored eggs? If it's possible that another state's laws are more liberal than those of New York, can provisions be placed in a New York domiciliary's will as to which state's law should deal with the sperm, eggs, or embryo? These issues transcend the issue of birth within 33 months. They deal with ownership and possession. What about the issue of to whom can the genetic material and embryos be

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Snowbirds

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Between the tax statutes, regulations, countless cases, administrative hearings and the nonresident audit guidelines released by the Department, there is ample guidance on how to determine residency.

Section 605(b) of the New York Tax Law sets forth two separate analyses in determining a taxpayer's residency status. The first question is whether the taxpayer is domiciled in the state. An affirmative finding under §605(b)(1)(A) subjects the taxpayer to tax as a New York resident. Even if not domiciled here, however, the taxpayer may be subject to residency taxation under the two-pronged test of whether the taxpayer (1) maintains a permanent place of abode in New York and (2) spends more than 183 days in the state.[5] This §605(b)(1)(B) test is what often trips up taxpayers who maintain homes here after moving to warmer and tax-friendlier states.

Establishing Domicile. Although in everyday language "residence" and "domicile" are used interchangeably, here they have different meanings. "Domicile" is "the place which an individual intends to be such individual's permanent home—the place to which such individual intends to return whenever such individual may be absent."[6] A person can only have one domicile at any given time, but may have several residences.[7] The determination of domicile is considered a subjective inquiry, with the Court of Appeals offering examples in its decisions, such as: "If at a given time a man exclusively makes his home with his family in a complete domestic establishment, intending so to occupy it for the rest of his days, the place of that habitation is then his domicile, no matter what he may say to the contrary,"[8] and "[a] change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention."[9]

An individual who can establish **legal residency outside New York** will only be obligated to report and pay tax on **income actually generated in New York.**

While these words from the Court of Appeals are helpful, the comprehensive audit guidelines of the Department are also useful. The Department offers five primary factors for determining domicile:[10]

1. Home: the individual's use and maintenance of a New York residence compared to the nature and use patterns of a non-New York residence;
2. Active Business Involvement: the individual's pattern of employment as it relates to compensation derived in the year being reviewed;
3. Time: an analysis of where the individual spends time during the year;
4. "Near and Dear": the location of items the individual holds "near and dear" to his or her heart, or items with significant sentimental value; and
5. Family Connections.

If these five primary factors are insufficient to reach an objective determination of domicile, auditors are directed to consider "other factors" such as: addresses on financial records, location and registration of automobiles, voter registration and location of safe deposit boxes.[11] For the record, there are also "non-factors" considered irrelevant in determining domicile including: where the taxpayer's will is probated, mere location of bank accounts, charitable contributions to organizations in the state and volunteering for nonprofit organizations.[12]

The Statutory Resident Test. Under §605(b), the taxpayer must also pass the "statutory resident" test: Does the taxpayer maintain a permanent place of abode in the state and spend in the aggregate more than 183 days here?[13]

While the Tax Law does not define a "permanent place of abode," the Department considers it to mean a residence that "you maintain, whether you own it or not; and that is suitable for year-round use."[14] The regulations further define a "permanent place of abode" as a "dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse."[15]

It is the 183-day prong of the statutory residency analysis that compels snowbirds to count with care their New York days. A Third Department decision issued in May 2015 held that when calculating the days a taxpayer spends in the state, "day" is defined as "any part of the day" and does not require a 24-hour stay.[16] To hold otherwise, said the court, would allow a person to manipulate the system by "arriving shortly after midnight one day and then leaving shortly before midnight the next day to have a stay of slightly under 48 hours not count as a single day."[17] The court noted that this "would be at odds with the statutory purpose."[18]

Once classified as a nonresident, the out-of-stater may still pay income tax to New York, but only on New York source income.[19]

Estate Tax

On March 31, 2014, Gov. Andrew M. Cuomo signed into law substantial changes to the estate tax, designed in part to match the higher tax thresholds of federal estate tax. Beginning April 1, 2014, the estate tax exclusion amount was increased from $1,000,000 to $2,062,500 with incremental increases in the exclusion amount until 2019 when the exclusion will be the same as the federal amount, projected to be $5,900,000, adjusted for inflation.[20]

Under the new laws, most New Yorkers and former New Yorkers are no longer worried about tax at death. Yet, wealthier snowbirds who maintain property in New York may still face filing requirements and nonresident estate tax.

Estate tax applies to the estate of an "individual who at his or her death was a resident of New York State."[21] Unlike the income tax rules, the estate tax side does not define "resident." As a matter of practice, courts will consider many of the same facts and circumstances that are articulated above for income tax purposes to determine residency in the estate tax context.[22]

A nonresident of New York is required to file a New York estate tax return if "the estate includes real or tangible personal property having an actual location in NYS and the federal gross estate plus any taxable gifts made while the individual was a resident of NYS exceeds the New York basic exclusion amount …"[23]

Real, Tangible or Intangible. Property with New York ties that can be categorized as intangible rather than real or tangible is not subject to New York estate tax. Tangible personal property, defined in §951-a, refers to a person's "stuff" and includes such items as cars, artwork or jewelry.[24] "Intangible property" includes money, credits and securities within the state, except to the extent such property is part of a business, trade, profession or occupation carried on in New York.[25] A personal bank account maintained in New York by a Florida resident is a typical example of an intangible asset located in New York, and is treated as sited outside New York for estate tax purposes. This conclusion is required by New York's state constitution which prohibits the state from imposing estate tax on a nonresident's intangible property even if the property is located in the state.[26]

To avoid the New York estate tax return filing requirements and taxation, taxpayers may eliminate ownership or change the structure of ownership of real or tangible property by use of trusts and business entities. A revocable trust that holds title to the trust grantor's real property directly, with nothing more, does not convert the property to an intangible asset for estate tax purposes.[27] What strategies might the nonresident taxpayer consider? Recent advisory opinions of the Department on business entities holding real estate offer instructive insights. For example, a nonresident's ownership of a single member limited liability company (disregarded for federal income tax purposes) which holds title to a New York condominium does not escape the New York estate tax regime.[28] Conversely, interests in a limited liability company (LLC) which is classified for tax purposes as a partnership constitutes an intangible asset. The real estate held in such an LLC is not part of the nonresident's New York estate.[29] Similarly, stock in a subchapter S corporation holding New York real property is considered intangible, provided the corporation is engaged in business activity.[30]

Filing Requirements and Calculation of Tax. Before April 1, 2014, executors of estates of nonresidents with New York real and tangible property were required to file and pay tax without the benefit of the estate tax exclusion amount.[31] The tax was calculated with reference to the ratio of the New York real and tangible personal property to the federal gross estate.[32] Now, if the total estate is less than or equal to the New York exclusion amount, currently $3,125,000, no filing is required or tax due.[33] If the federal gross estate exceeds the New York exclusion and the estate holds New York real or tangible property, the executor must file a return.[34] New York estate tax is due when the value of the New York situs property exceeds the exclusion.[35]

The new estate tax rules include a gift add-back requirement for certain gifts made within three years of death.[36] Logically, this gift add-back rule does not apply to gifts made when the decedent was not a resident of New York and should not apply to gifts of intangibles, with a narrow exception.[37]

Regardless of level of wealth and income, snowbirds are well advised to consider their tax plans in advance of packing their bags. Taxpayers may want to deploy strategies such as transferring or restructuring New York assets, reducing New York source income and implementing snowbird calendars. With forethought, clients can steer clear of the snowbanks of New York taxation.

1. N.Y. TAX LAW §612; Instructions for Form IT-201-I (2014), www.tax.ny.gov/pdf/current_forms/it/it201i.pdf.
2. N.Y. TAX LAW §631(a); N.Y. TAX LAW §631(b)(1).
3. N.Y. TAX LAW §631(b)(1).
4. *Gaied v. NYS Tax Appeals Tribunal*, 22 N.Y.3d 592, 983 N.Y.S.2d 757, 760 (2014) (quoting *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.*, 91 N.Y.2d 530, 535, 683 N.Y.S.2d 44 (1998)).
5. N.Y. TAX LAW §605(b)(1)(B).
6. N.Y. COMP. CODES R. & REGS. tit. 20 §105.20(d)(1) (2015).
7. *Matter of Trowbridge*, 266 N.Y. 283, 289 (1935).
8. Id. at 291-92.
9. *In re Newcomb's Estate*, 192 N.Y. 238, 251 (1908).
10. State of N.Y. Dept. of Tax and Finance, Nonresident Audit Guidelines (2014), www.tax.ny.gov/pdf/2014/misc/ nonresident_audit_guidelines_2014.pdf.
11. Id.
12. Id.; N.Y. TAX LAW §605(c).
13. N.Y. TAX LAW §605(b)(1)(B); *Gaied*, 983 N.Y.S.2d at 760.
14. N.Y. Tax Bulletin TB-IT-690, Dec. 15, 2011; *Gaied*, 983 N.Y.S.2d at 760.
15. N.Y. COMP. CODES R. & REGS. tit. 20 §105.20(e)(1) (2015).
16. *Zanetti v. NYS Tax Appeals Tribunal*, 128 A.D.3d 1131, 8 N.Y.S.3d 733, 735 (3d Dept. 2015), appeal denied 2015 WL 3892571 (June 25, 2015).
17. Id. at 1133.
18. Id.
19. N.Y. TAX LAW §631(a).
20. N.Y. TAX LAW §952(c)(2).
21. N.Y. TAX LAW §952(a).
22. *In re Daly's Estate*, 178 Misc. 943, 36 N.Y.S.2d 954, 959 (Surr. Ct. New York Cty. 1942) (focusing on the decedent's manner of living, intent and conduct to determine residency at the time of her death).
23. N.Y. TAX LAW §971(a)(2); Instructions for Form ET-706 (4/14, revised July 27, 2015), www.tax.ny.gov/pdf/2015/et/et706i_414.pdf.
24. N.Y. TAX LAW §951-a(c). A nonresident's artwork sited in New York at the time of such taxpayer's death is not subject to New York estate tax if such work is only in the state because it was loaned to a public gallery or museum for exhibition purposes. N.Y. TAX LAW §960(d).
25. N.Y. Const. Art. XIV, §3; New York's Tax Policy Relating to the Taxation of Intangible Personal Property of Nonresidents, 1992 WL 319312, at *2 (Oct. 9, 1992).
26. Id.
27. See Nina Krauthamer, "New York Estate Tax on Real and Tangible Property—When Intangibles Become Tangible," located at http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2013/1_february/te_krauthamer. authcheckdam.pdf (last visited July 31, 2015).
28. N.Y. Advisory Opinion No. TSB-A-15(1)M, May 29, 2015.
29. N.Y. Advisory Opinion No. TSB-A-10(1)M, April 8, 2010.
30. N.Y. Advisory Opinion No. TSB-A-08(1)M, Oct. 24, 2008.
31. N.Y. TAX LAW §960, eff. Aug. 20, 2004-March 31, 2014.
32. Id.
33. N.Y. TAX LAW §960(b).
34. Id.
35. Id.
36. N.Y. TAX LAW §954(a)(3).
37. Id.; N.Y. TAX LAW §960; TSB-M-15(3)M, July 24, 2015; see also Instructions for Form ET-706.

End of Life Care

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copies with the agent, alternate agent and physicians, and keep a copy handy at home (e.g., in a bedside or front entry table so that its accessible in the event of an emergency).

Family Health Care Decisions Act

If an individual does not execute a health care proxy and becomes incapacitated while in a hospital, nursing home or hospice, a family member or close friend may serve as his or her "surrogate" health care decision-maker under FHCDA.[10] Before the enactment of the FHCDA, no one had the right to make decisions about end of life treatment for persons who lacked capacity unless the person had signed a health care proxy or left "clear and convincing" evidence of his or her wishes. Under the FHCDA, a "surrogate" can make these health care decisions on behalf of an incapacitated person, in accordance with the wishes or best interests of the incapacitated person.[11] Persons qualified to be surrogates, in order of priority, include an Article 81 guardian authorized to make medical decisions, a spouse or domestic partner, adult child (age 18 or older), parent, sibling (age 18 or older) or a close friend who presents a signed statement.[12] Prior to relying upon a surrogate, a physician must make "reasonable efforts" to determine whether the person has designated an agent under a health care proxy.[13]

We do not recommend relying on this law because, among other limitations, the order of priority of decision-makers may conflict with an individual's wishes, the decision maker may be unaware or unwilling to follow the person's wishes and because the law grants equal rights to all persons in the same class of relationship (e.g., children) with no order of priority, which may be a problem if such family members do not agree. In addition, an individual acting under the FHCDA has less discretion than an agent under a health care proxy with respect to decisions concerning life-sustaining treatment, as such decisions can only be made if the patient meets certain medical conditions (such as permanently unconscious, terminal condition which is expected to cause death within six months, or incurable or irreversible condition and treatment would reasonably be deemed inhumane or extraordinarily burdensome).[14] Finally, the FHCDA does not apply to end-of-life decisions for patients who are intellectually or developmentally disabled, or residents of a mental health facility, or to any decisions made outside of a hospital, nursing home, or hospice.[15]

Living Will

A living will allows a person to express wishes concerning medical treatment in the event that he or she cannot communicate. A living will typically provides that under certain stated medical circumstances (such as when the person is permanently unconscious or in a persistent vegetative state with no reasonable expectation of recovery) the person does not want specified (or perhaps any) medical treatment. The person must state the applicable medical conditions for the living will to be operative and what treatments he or she does or does not want under those medical circumstances.

It is critically important that a living will be drafted properly to avoid confusion and possible misinterpretation. A living will can provide valuable guidance to the agent appointed in a health care proxy and, when no agent is appointed, to a surrogate decision-maker under FHCDA. However, a living will is limited to its stated terms and it may not address all possible circumstances. As both an agent and surrogate decision-maker are obligated to make medical decisions consistent with the wishes of the person,[16] and health care providers are obligated to honor the preferences expressed by a patient, a living will's terms may limit the decision-making authority of the agent or surrogate. Furthermore, under the FHCDA, if the living will reflects that the individual made a decision concerning the proposed health care, a health care provider need not seek the consent of a surrogate before relying on the living will.[17] For these reasons, it is best practice to have the client appoint an agent in a health care proxy and have the living will state that it is only to be used as non-binding guidance to the agent whose decision controls, or in the event that the agent is not available.

Do Not Resuscitate Order

Every person is presumed to consent to cardiopulmonary resuscitation in the event of cardiac or respiratory arrest in the absence of a DNR order. A DNR states that an individual does not want cardiopulmonary resuscitation (CPR) (e.g., mouth-to-mouth resuscitation, external chest compression, electric shock, or insertion of a tube to open an airway) in the event of cardiac or respiratory arrest. Most individuals do not know that a DNR order is a *physician's order* that has immediate effect. It cannot be prepared by the attorney as part of the estate plan nor is it appropriate for someone who is not terminally ill. If a DNR order is in place, doctors, nurses, emergency responders and other health care practitioners will not render CPR to the person if breathing or heartbeat has stopped. However, a DNR is not a broad license to withdraw or withhold other medical treatment or to withhold respiratory support in the absence of a cardiac or respiratory arrest. DNRs may be particularly important for terminally ill persons who wish for a natural death or to avoid complications that could arise after resuscitation, including brain damage.

Consent for a DNR may be provided by a person who has decisional capacity or, if the person lacks capacity, (1) a health care proxy agent, (2) a surrogate under the FHCDA, or (3) if the person has no surrogate and the person is a patient in a hospital or nursing home, a court or two physicians under certain standards and limited medical circumstances under the FHCDA.[18] (There are special rules for patients in mental hygiene facilities and developmentally disabled persons.) Upon receiving consent from one of these individuals, a physician can execute a DNR.

In a hospital or nursing home setting, a "hospital" DNR applies. Institutions generally provide their own forms. In a private residence or assisted living facility, however, a "non-hospital" DNR signed by a physician on the form provided by New York State's Department of Health is required.[19] A non-hospital DNR offers an advantage in situations involving emergency medical personnel, even where an agent is appointed under a health care proxy. There is a common misperception that the agent named in a health care proxy can direct EMS personnel to not resuscitate the person. EMS personnel cannot, however, honor the direction of the agent appointed in a health care proxy, because the agent is only authorized to act after the person's physician has determined that the person is incapacitated. EMS personnel are generally not qualified to make this determination. This is true even if the person is obviously incapacitated (e.g., unconscious) at the time and had a living will.

> If a **valid donation form** is executed, the consent of the agent, surrogate, or family member is not required for the donation to proceed and such person may not rescind the donation **except upon a showing that the donor revoked it.**

For an individual remaining at home, a non-hospital DNR (or a MOLST, discussed below) should be posted in a visible place, such as the refrigerator door, in case of a medical emergency.

MOLST

The MOLST[20] is designed to document a person's wishes in the final stages of life. As individuals become physically and mentally impaired, they often receive acute hospital care from physicians that do not know them. If they are unable to direct their own care, advance care planning in the form of a MOLST or eMOLST ensures that their values, goals and preferences can be honored. A MOLST is appropriate for a person with serious medical conditions, such as advanced chronic progressive illness, significant frailty or a condition that might result in the person's death or loss of mental capacity within one year. The MOLST documents physician orders consistent with the person's wishes concerning various forms of medical treatment, including CPR (DNR), do-not-intubate (DNI) (instructions for no intubation or mechanical ventilation when the person has a pulse and is breathing), future hospitalization, nutrition and hydration provided through medical administration, antibiotics, and other advance directives. A MOLST may provide for no treatment, a trial period of treatment (e.g., trial period of intubation or artificial nutrition and hydration) or full treatment measures. A MOLST must be based upon the person's current medical condition, values and wishes.

The MOLST is advantageous because it follows a person in any care setting (hospital, nursing home, or residence) and is the only authorized form in New York state for documenting both nonhospital DNR (discussed above) and DNI orders.[21] The MOLST form must be completed by both the person and, if incapacitated, the person's agent or surrogate, and the person's physician. It is intended to apply immediately, not upon a trigger of future incapacity. The MOLST form may be completed in stages as a person's medical condition changes. Conveniently, a Web-based eMOLST form is available.[22] With this readily accessible format, health care providers and EMS personnel can have access to MOLST forms at all sites of care including health care facilities and at a person's residence.

HIPAA

Although an agent designated in a health care proxy or a surrogate appointed under the FHCDA is allowed access to medical information in order to make informed decisions regarding medical care if a person is deemed incapacitated,[23] it is prudent to have a client also execute a HIPAA (the Federal Health Insurance Portability and Accountability Act) privacy release form, an Authorization for Release of Patient Information (the Authorization), for situations in which a patient is not incapacitated, or in which the agent may require the information for other purposes (e.g., legal action). For example, an elderly patient may want a spouse, child or friend to assist him or her in arranging medical care, and access to medical information will facilitate this.

The Authorization allows a health care provider to provide access to medical records to named individuals. Upon the receipt of an Authorization, a health care provider must provide a copy of any patient information requested within a "reasonable" (generally 10-14 days or for certain facilities 24 hours) time.[24] In the absence of an Authorization, only the following "qualified persons" are entitled to access medical records of a living person: the patient, a guardian, or an attorney representing or acting on behalf of a qualified person who holds a power of attorney explicitly authorizing the holder to execute a written request for patient information.[25]

The Authorization can be a blanket authorization or be limited to a specific health care provider's or plan's records, all medical record information, or specific information. A general Authorization is not, however, sufficient to access certain specially protected records, including records relating to alcohol or drug treatment, mental health and HIV-related information unless specific authorization for release of these records is granted.

The New York State Department of Health has approved an authorization form specifically for HIV information[26] and another more general form for all medical information (including specially protected information), which also has been approved by the Office of Court Administration.[27]

Organ and Tissue Donation

Any adult (age 18 or older) of sound mind may make an anatomical gift (general or specific) effective at death.[28] Documentation of a gift can take several forms. A health care proxy or a living will[29] allows an individual to indicate wishes concerning organ donation. An individual can register with New York's Donate Life Registry, an online registry.[30] Donations can also be made on a driver's license or another form of organ donation card,[31] at voter registration, or in a will[32] or disposition of remains form (discussed below).

If a valid donation form is executed, the consent of the agent, surrogate, or family member is not required for the donation to proceed and such person may not rescind the donation except upon a showing that the donor revoked it.[33] This may be an advantage or a disadvantage. For example, a person may be willing to be a donor, but want the agent or family member to have discretion to make (or not make) a donation. Alternatively, if the client fears their wishes to donate may not be respected, those wishes should be stated in one of the approved methods and copies of the document given to the agents and the physicians. The Registry, with its national online access for organ procurement organizations (and no need to locate the donation document when time is of essence), is probably the best way to insure the donation is carried out.

If an individual did not make a valid donation, consent for donation may still be given by the following in order of priority: the agent, the person named in a disposition of remains form, the spouse or domestic partner, an adult child, a parent, an adult sibling, a guardian, or anyone else authorized or under obligation to dispose of the body.[34]

It should be recognized that donation requires coordination with end of life care instructions as care (including mechanical ventilation support) is needed to preserve the body for a donation to be carried out. The living will should be modified to permit services necessary to carry out such donation.

Disposition of Remains

An individual may choose who carries out funeral directions, which can avoid disagreements between family members and ensure an individual's wishes are respected. By signing an Appointment of Agent to Control Disposition of Remains form,[35] an individual can designate a person to be in charge of the disposition of his or her remains (the "agent") and state directions to the agent regarding the disposition. The agent is required to carry out the stated directions to the extent such directions are lawful and practical, and considering the financial capacity of the estate. The agent is directed to dispose of the remains in a manner appropriate to the decedent's moral and individual beliefs, as long as such beliefs do not conflict with the decedent's written directions. The agent may claim reimbursement for such costs from the decedent's estate. If no form has been signed, the following persons (in the order listed) have the right to control the disposition of the remains: the spouse or domestic partner, an adult child, a parent, an adult sibling, a guardian, an adult distributee, the executor or administrator of the estate, or a close friend reasonably familiar with the decedent's wishes and beliefs.[36]

If persons with an equal right to dispose of the remains cannot agree, it must be resolved by a court.

Conclusion

Planning for end-of-life care is not a matter of merely completing forms. Advance care planning requires a thoughtful, considered approach that should be revisited as clients age and enter the final years of life. Clients should be encouraged to engage their loved ones and physicians in the process and communicate their personal values, beliefs, and goals for care. Planning for end-of-life care can be difficult, but not planning can leave family or friends in a difficult position and the client's wishes may not be honored. Taking the time now to make health care wishes and preferences for disposition of remains known, and properly documenting these wishes and preferences, will provide the legal authority to carry out those directions and preferences when necessary. Clients may be reluctant to sign such documents, believing that to do so gives up control. However, it should be explained to them that by signing these documents they are in fact remaining in control by stating their wishes and appointing trusted individuals to carry them out.

1. PHL Art. 29-CC.
2. PHL Art. 29-CC.
3. PHL §2981.
4. PHL §2981(1)(b).
5. PHL §2981(4).
6. PHL §2983(a).
7. PHL §2982(2).
8. PHL §2982(1).
9. PHL §2982(2).
10. PHL §2994-d.
11. PHL Article 29-CC.
12. PHL §2994-d(1).
13. PHL §2994-b.
14. PHL §2994-d(5).
15. PHL §2994-b(3).
16. PHL §§2982 and 2994-d.
17. PHL §2994-d(3)(ii).
18. PHL §2994-g(5).
19. www.health.ny.gov/forms/doh-3474.pdf.
20. DOH-5003 MOLST Form, https://www.healthny.gov/forms/doh-5003.pdf.
21. PHL §2994-dd(6).
22. NYS eMOLST Registry, https://www.NYSeMOLSTregistry.com.
23. PHL §2982(3) and 2994-d(3)(c).
24. PHL §18(2).
25. PHL §18(1)(g).
26. http://www.health.state.ny.us/forms/doh-2557.pdf.
27. http://www.nycourts.gov/courts/12jd/forms/city_part/HIPAA.PDF.
28. PHL §4301(1).
29. *In re Westchester County Medical Center*, 72 N.Y.2d 517, 534 N.Y.S.2d 886 (1988).
30. Life Organ and Tissue Donor Registration Enrollment Form may be found at www.nyhealth.gov or www.donatelifeny.org.
31. PHL§4303(2).
32. EPTL 1-2.19.
33. PHL §4301(1).
34. PHL §4301(2).
35. PHL §4201(2).
36. PHL §4201(1).

Florida

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In New York, if the contestant establishes that the alleged influencer is a beneficiary and shared a confidential relationship with the testator, an inference of undue influence may arise.[17] The proponent of the will can overcome the inference with an alternative explanation for the bequest,[18] and the inference alone does not shift the burden of proof.[19] If the contestant offers additional evidence of influence, some courts have held, under a theory of constructive fraud, that the burden shifts to the proponent to prove by clear and convincing evidence that the bequest is free of undue influence.[20]

In Florida, if the contestant establishes that a beneficiary shared a confidential relationship with the testator and participated in procuring the bequest, a presumption of undue influence arises.[21] By statute, the burden then shifts to the proponent of the will to prove by a preponderance of the evidence that there was no undue influence.[22]

To determine if there has been influence or active procurement, both states will consider a series of non-exclusive factors, including, inter alia, whether the alleged influencer was involved in hiring the drafting attorney, knew of the intended estate plan before the will was executed, was present for the execution of the document, or retained possession of the executed document.[23]

The challenges of proving a negative—i.e., that there was no undue influence—can be substantial. And the difference between a clear and convincing standard versus a preponderance of the evidence can be meaningful when relying on circumstantial evidence.

Interference With Inheritance

A New York client who anticipates a challenge to his or her testamentary intent should also be aware that Florida recognizes a more unusual cause of action known as tortious interference with an inheritance.[24] New York, by contrast, has expressly declined to recognize this cause of action.[25]

> The **challenges of proving a negative**—that there was no undue influence—can be substantial. And the difference between a clear and convincing standard versus a preponderance of the evidence can be meaningful when relying on circumstantial evidence.

The action is available in Florida only when the traditional probate remedy of a will contest is unavailable. For example, imagine a testator who prepares a new will in favor of his neighbor, but the will is never executed due to tortious interference by the testator's child. In such a scenario, the neighbor would have no standing, and thus no remedy available, in the probate process because he or she is not the beneficiary of any prior testamentary instrument.

The key difference between a will contest and a tortious interference claim is that the former seeks to invalidate the will in favor of a prior instrument, whereas the latter seeks damages directly from the alleged tortfeasor. Thus, the client should be aware that certain types of will contestants may have more litigation options available in Florida than in New York.

Assessing Attorney Fees

As discussed above, in light of the fact that in terrorem clauses will not be enforced in Florida, the primary deterrent to a will contest in Florida is attorney fees.

But it is not just his or her own attorney fees that the contesting party may have to pay. In both New York and Florida, courts have the authority to assess against a will contestant the fees incurred by the fiduciary in defending against the will contest. In New York, the fiduciary must establish that the will contest was brought in bad faith or was frivolous.[26] In Florida, however, no such finding is required; instead, the statute provides the court with a non-exclusive list of factors to consider.[27] Thus, it may be more difficult to have these fees assessed in New York than in Florida.

Conclusion

The questions that arise from these jurisdictional distinctions may not always have ready answers, particularly because the emotions that tend to run so high in these litigations after the settlor's death are often tempered while the settlor is still alive. That makes it difficult to predict how the different aspects of a will contest will be perceived by prospective will contestants or by those who will seek to defend the validity of the document. However, those New York clients who are aware enough of their particular circumstances that they anticipate such postmortem litigation, may be in a position to evaluate at least some of these issues when considering changing their domiciles to Florida.

1. SCPA §1605; Fla. Stat. §733.101.
2. *Payette v. Clark*, 559 So. 2d 630 (Fla. 2d DCA 1990).
3. Fla. Stat. §733.301.
4. Fla. Stat. §733.109.
5. Fla. Stat. §736.0202.
6. SCPA §§306; 1403; 1410.
7. Fla. Stat. §733.212. Note that petitioners can voluntarily provide notice and, in some instances, can even be compelled to do so. Fla. Stat. §§733.2123; Fla. Prob. R. 5.260.
8. SCPA §1412; *Estate of Scamardella*, 169 Misc. 2d 55 (Sur. Ct. 1996).
9. Fla. Stat. §733.304.
10. EPTL §3-3.5(b).
11. Fla. Stat. §§732.517; 736.1108.
12. *Carman v. Gilbert*, 641 So. 2d 1323 (Fla. 1994); *Fintak v. Fintak*, 120 So. 3d 177 (Fla. 2d DCA 2013).
13. *Matter of Estate of Bacon*, 169 Misc. 2d 858 (Sur. Ct. 1996); *Blinn v. Carlman*, 159 So. 3d 390 (Fla. 4th DCA 2015).
14. SCPA §502.
15. *Allen v. Dutton's Estate*, 394 So. 2d 132 (Fla. 5th DCA 1980).
16. *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997).
17. *In re Kruszelnicki's Will*, 23 A.D.2d 622 (4th Dep't 1961).
18. *Matter of Estate of Collins*, 124 A.D.2d 48 (4th Dep't 1987).
19. *In re Neenan*, 35 A.D.3d 475 (2d Dep't 2006).
20. *In re Estate of Nealon*, 104 A.D.3d 1088 (3d Dep't 2013); *In re Will of Ehrensberger*, 47 Misc. 3d 1218(A) (Sur. Ct. 2015).
21. *Estate of Madrigal v. Madrigal*, 22 So. 3d 828 (Fla. 3d DCA 2009).
22. Fla. Stat. §733.107; *Diaz v. Ashworth*, 963 So. 2d 731 (Fla. 3d DCA 2007).
23. *In re Carpenter's Estate*, 253 So. 2d 697 (Fla. 1971).
24. *Martin v. Martin*, 687 So. 2d 903 (Fla. 4th DCA 1997).
25. *Vogt v. Witmeyer,* 87 N.Y.2d 998 (1996).
26. SCPA §2302.
27. Fla. Stat. §733.106.

Birth

« Continued from page 11

donated, and for what purposes, i.e., scientific research, or other individuals wanting but not able to have children? What confidential issues are raised by these questions? Certainly there is a lot to deal with.

Possibly, the estate planning lawyer should include certain powers to cover some or all of the above questions in a General Power of Attorney (POA) naming agents for a living individual who later becomes unable to make decisions. However, a POA agent's powers die with the grantor of the POA.

Possibly, a living or testamentary trust can have as part of its corpus genetic material and embryos of the grantor. Then the trust would own the genetic material. Powers can be given to the trustee as to how to deal with the genetic material and embryos, lifespan, transferability, use and the like. Of course, issues of an embryo as a living being need to be fleshed out. Can sperm, eggs and embryos be destroyed after a period of time? Can the trustee make those decisions without being subject to criminal charges and lawsuits from disagreeing individuals, groups or heirs of the donor? A significant issue that needs to be dealt with is how litigation may ensue from right-to-life organizations relating to these issues as to individual family matters. Do such groups have standing to challenge decisions of family members, executors, administrators or trustees? Will courts believe that guardians need be appointed to protect the rights of genetic material and frozen embryos?

As to the conflict of laws issue, can the estate planning lawyer designate in estate planning documents which state's laws should apply as to the above issues? What if the genetic material is stored in one state and a separated husband and wife are in different states? Which state controls the use and storage of the genetic material and embryos? From *Capato* we know that Florida law terminates rights of posthumous children on the death of the father. New York does not. Therefore, if a family was considering having posthumous children, Florida should not be state of domicile at the father's death.

The authors have not done an analysis of the laws of all 50 states as to which states allow rights for posthumous children, what period of time the child can be born after death of a father and be considered an heir entitled to inherit from the father. Similarly, they have not analyzed each state's laws as to rights of embryos, nor the laws as to the length of time for storage and use of genetic material and embryos, if any. Laws of foreign nations may also be considered. However, this article is meant to raise the issues caused by advancing science and the desires of couples, and individuals to have children using their own or someone else's genetic material or embryos. As science continues to advance, estate planning law needs to catch up or be in step with the continuing scientific advances and desires of clients. Laws need to be enacted to protect family representatives (executors, administrators, and trustees) when making decisions regarding a deceased person's genetic material and embryos. EPTL §4-1.3 and similar laws in other jurisdictions are only the beginning of law changes that are sure to come in the years ahead. Estate planning lawyers need to be cognizant of the developing area of law.

1. *Astrue v. Capato*, 132 S. Ct. 2021 (2012).
2. Id.
3. *Bosco v. Astrue*, S.D. New York (2013).
4. EPTL §4-1.3.

N.Y. Activity

« Continued from page 9

been due had the decedent been a resident. That estate tax liability was then multiplied by a fraction equal to the percentage the New York situs property bore to the gross estate. This calculation often led to the imposition of New York estate taxes even if the New York situs property was *under* the New York estate tax exclusion amount. Now, it appears that there will be no New York tax if the value of the non-resident's New York situs property does not exceed the applicable New York estate tax exclusion amount in the year of death. It is no longer necessary to apportion the tax by reference to the percentage of the estate located in New York.[6] The latest New York Estate Tax Return Form ET-706, dated 4/14, for individuals dying after April 1, 2014 and before March 31, 2015, reflects this change.

What was conspicuously absent:

Relief From New York's Estate Tax Cliff. The changes effected by last year's Executive Budget resulted in a very steep estate tax "cliff": Estates that are less than or equal to the New York estate tax exclusion amount will pay no tax, but the credit for New York taxable estates that are between 100 and 105 percent of the basic exclusion amount is rapidly phased out and eliminated entirely if the New York taxable estate exceeds 105 percent of the basic exclusion amount. The Senate budget proposal contained a modest revision to the cliff by extending the runway over which the applicable credit amount is phased out to between 100 and 110 percent of the basic exclusion amount (instead of between 100 and 105 percent).

A proposal to eliminate the cliff was introduced in the Assembly on March 24, 2015,[7] but the proposed language would need some modifications to achieve its goal, and it has in any event not moved since its introduction.

Portability. "Portability" refers to the ability of a surviving spouse to utilize the federal unused gift and estate tax exclusion of the first spouse to die ($5.43 million for 2015). Portability has been permitted for federal purposes since 2011. The Assembly budget proposal contained a state-level portability proposal, however, that was not enacted.

Lowering of the Estate Tax Rates. Last year's proposals from the Governor and Senate (which were not enacted) included provisions to reduce the top estate tax rate from 16 to 10 percent. There were no proposed rate reductions this year.

2. Recant a Decanting (Passed Both Houses, Awaiting Delivery to Governor).[8] New York's decanting statute[9] requires that notice of a decanting be served upon interested persons. Unless those interested persons consent in writing to an earlier effective date, the decanting becomes effective 30 days after service. The new law makes explicit that the decanting can be recanted (withdrawn) before the 30-day notice period expires. Presumably the intent is to allow a trustee to recant a decanting if there are objections received within the 30-day period, so as to prevent litigation. Once the decanting has become effective, the new trust is irrevocable and can only be changed by a new decanting.

3. Clarifying Amendments to Non-Profit Revitalization Act of 2013 (Passed Both Houses, Awaiting Delivery to Governor).[10] On Dec. 18, 2013, Gov. Andrew M. Cuomo signed the Non-Profit Revitalization Act of 2013, bringing sweeping changes to the governance of the nonprofit sector. The Act, most provisions of which took effect on July 1, 2014, creates enhanced oversight responsibilities, new requirements to guard against self-dealing and mandates the adoption of written conflict of interest policies and whistleblower policies to protect those who report suspected improper conduct from retaliation.

This proposal, which has passed both houses, makes clarifying amendments. The definition of "independent director" has been expanded to mean a director who is not and does not have a relative who is an owner, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit during the previous three years. The definition of "relative" has been expanded to include domestic partner. The definition of "related party" (in addition to meaning any director, officer or key employee of the corporation or any affiliate) has been expanded to include any other person who exercises the powers of directors, officers or key employees over the affairs of the corporation or an affiliate. Although only independent directors may participate in board deliberations and voting, the proposal clarifies that a person with a conflict of interest may attend committee meetings for the purpose of presenting information or answering questions. Corporations would be permitted to publish their conflict of interest policy on their websites. Estates, Powers and Trusts Law (EPTL) §8-1.9 was created to make the Non-Profit Revitalization Act requirements concerning audits, related party transactions, conflicts of interest and whistleblower policies applicable to wholly charitable trusts. Proposed amendments to EPTL §8-1.9 would make this bill's changes applicable in the trust context.

4. Harmonizing Amendment to Posthumously Conceived Children Statute (Passed Both Houses, Awaiting Delivery to Governor).[11] With sophisticated storage techniques for genetic material and advances in medical technology, a child can be conceived posthumously, meaning after the death of one or both of the child's genetic parents. Last November, New York enacted landmark legislation[12] that codifies the requirements that must be met for a posthumously conceived child to be considered a child of a genetic parent for inheritance and intestacy purposes: (1) Not more than seven years before death, the genetic parent must have expressly consented in writing to the use of the genetic material for posthumous reproduction and authorized a person to make decisions about the use of the genetic material, (2) within seven months after letters issue the person authorized must give notice of the existence of the stored genetic material to the personal representative and record the writing in Surrogate's Court, and (3) the genetic child must be in utero within 24 months or born within 33 months of the genetic parent's death. If these requirements are met, the child will be considered a distributee of the genetic parent and a child of the genetic parent for purposes of gifts to children, issue, descendants and similar classes in instruments of the genetic parent or of others.

Pursuant to EPTL §11-A-2.1, interest is payable on a pecuniary legacy that is unpaid seven months after letters issue (or death, if letters are not required). An amendment that has passed both houses harmonizes a genetic posthumous child's entitlement to interest. The right to interest will commence on the later of the seven month mark or the genetic child's date of birth.

5. Proposed Amendment to Rule Limiting Public Access to Surrogate's Court Documents. By Administrative Order[13] dated Feb. 19, 2014, a new Surrogate's Court rule was adopted, which limits public access to certain documents. By their nature, filings in Surrogate's Court proceedings often contain confidential identifying and financial information. To protect privacy and enhance security given the dangers of information misuse (including identity theft), the new rule limits access to certain documents. Only (1) persons interested in the decedent's estate[14] or their counsel, (2) the Public Administrator or counsel, (3) counsel for any federal, state or local governmental agency, or (4) court personnel can view certain documents, including Guardianship proceeding filings pursuant to Surrogate's Court Procedure Act (SCPA) Articles 17 and 17A, death certificates, tax returns, documents containing social security numbers, Inventories of Firearms and Inventories of Assets. Others can view these records with written permission of the Surrogate or Chief Clerk, which permission cannot be unreasonably withheld.

The Surrogate's Court Advisory Committee (SCAC) has proposed an amendment[15] to the new rule to refine the balance between two competing interests: public access to judicial proceedings and privacy concerns. Instead of limiting public access, the proposed amendment would require counsel to redact confidential personal information (CPI) prior to filing with the Surrogate's Court. CPI would more narrowly be defined to include information such as taxpayer identification numbers, social security numbers and financial account numbers. Viewing or copying of certain documents (guardianship proceeding filings pursuant to SCPA Articles 17 and 17A, death certificates, tax returns, and Inventories of Firearms) would be prohibited except (1) by parties to the proceeding, their counsel, the Public Administrator or counsel, counsel for any federal, state or local governmental agency, or (2) upon court order or written permission of the Surrogate or Chief Clerk. The proposed amendments would also promote uniformity, given that similar redaction requirements are already in effect in Supreme and County Courts.[16]

The SCAC has also recommended eliminating the current requirement to furnish the Surrogate's Court with a list of assets constituting the gross estate for tax purposes.[17] A proposed new court rule and Inventory of Assets form would dispense with the need for detailed financial information.[18] Instead, the fiduciary would designate broad categories of value for each asset type.

6. Fiduciary Access and Control Over a Decedent's Digital Assets and Accounts (Multiple Bills, Introduced in One or Both Houses).[19] As digitization in our modern world explodes, the ownership, transfer and disposition of digital assets present unprecedented challenges. Family members can face many issues in unlocking a decedent's digital information, including establishing their rights to access that information, and retrieving confidential user IDs and passwords. Terms of Service (TOS) Agreements with individual providers (which are typically entered into by clicking "I agree" when opening) usually govern what happens to an account on the death of the owner. Oftentimes, they can provide that the account is not transferable and all rights to the account cease on death. Federal and state laws that criminalize unauthorized access to computers and prohibit the release of electronic account information can prevent fiduciary access to digital assets.

As digitization in our modern world explodes, the ownership, transfer and disposition of digital assets present unprecedented challenges. Family members can face many issues in unlocking a decedent's digital information, including establishing their rights to access that information, and retrieving confidential user IDs and passwords.

The Uniform Fiduciary Access to Digital Assets Act[20] (UFADAA) was originally approved by the Uniform Law Commission[21] (ULC) on July 16, 2014. The goal of that UFADAA was to remove barriers to a fiduciary's access to electronic records by reinforcing the concept that the fiduciary "steps into the shoes" of the account holder. The Act approved in July 2014 uses the concept of asset neutrality: If a fiduciary would have access to a tangible asset, the fiduciary would also have access to a similar type of digital asset. "Digital asset" is very broadly defined to mean a record that is electronic. The Act extends to four types of fiduciaries: personal representatives, guardians, agents acting under a power of attorney and trustees. It maneuvers around federal and state privacy and computer fraud/abuse laws by codifying that fiduciaries have the lawful consent of the account holder to access information and by defining fiduciaries as authorized users. It also supersedes any contradictory TOS agreements. A custodian must comply with a fiduciary's written request for access, control or a copy of digital property within 60 days. Custodians are granted immunity from taking any action in compliance with the statute.

Following the ULC's approval, there was a flurry of legislative activity across the country, with at least 26 states introducing legislation in 2015 modeled on the uniform law. However, only Delaware has enacted a version of the uniform act.[22] The issue? UFADAA met opposition from the powerful service providers, like Facebook and Google. The opponents argue that access granted under UFADAA is too broad, raises serious privacy concerns, potentially conflicts with federal and state laws and improperly overrides TOS agreements. They have proposed an alternative, the Privacy Expectation Afterlife and Choices Act (PEAC),[23] which is far more restrictive than UFADAA and deals only with executors and administrators. Instead of the default access approach taken by UFADAA (unless the decedent provided otherwise), PEAC takes a default privacy approach that always requires a court order before access. An executor would not be permitted to access the content of records without a court finding that the decedent expressly consented to the disclosure and ordering that the estate first indemnify the provider. Access to user records without content (like the "to" and "from" lines in an email) is referred to as a "catalogue" of electronic information. Even a request to access a catalogue of information is allowable only by court order and the request must be to access records within one year of death and must be "narrowly tailored to effect the purpose of the administration of the estate." Requests for access to the content of records, or just a catalogue without content, must specifically identify the account in question. A bill that incorporates some of these provisions has been introduced in New York.[24] That bill also provides that a fiduciary can petition the court for disclosure of the content of specific commercial, but not personal, email messages.

In response to this opposition, the ULC approved a revised UFADAA[25] on July 15, 2015. Instead of default access by a personal representative, access to the content of a decedent's accounts would not be permitted unless the decedent consented to disclosure, which can be via an online tool provided by the custodian. Additionally, the custodian can request a court order identifying the account; finding that disclosure would not violate federal privacy laws, laws regarding unlawful access to electronic communications or other applicable laws; and finding that the user consented to disclosure, or that disclosure is reasonably necessary for estate administration. Access to a catalogue of electronic information, excluding content, would be allowed, unless the decedent opted out. Even if only catalogue access is sought, the custodian can also request a court order identifying the account or finding that disclosure is reasonably necessary for estate administration.

In the meantime, pending in New York is a bill proposed by the SCAC.[26] It simply amends the EPTL by adding a new subparagraph to §11-1.1 (fiduciary powers). The new paragraph expressly authorizes a fiduciary to gain access to and exercise control over digital assets and accounts, to the fullest extent permitted under applicable local, state or federal law, notwithstanding the provisions of any end user agreement.

Given the continued proliferation of digital assets, the need to come to grips with an area in which technology has fast out-paced the law, and the approval of the revised UFADAA, it is likely that proposals based on the revised uniform law will receive consideration.

7. Revocatory Effect of Divorce (Introduced in Both Houses).[27] At issue in *Matter of Lewis*[28] was EPTL §5-1.4. That section provides that divorce revokes dispositions to, and fiduciary nominations of, former spouses, but the revocatory effect of the section does not extend to the *relatives* of an ex-spouse.

In *Lewis*, the decedent executed a will in 1996, nine years prior to her divorce. The will left her entire estate to her husband, who she also appointed as executor. In the event the decedent's husband predeceased her, she named his father as the alternate executor and alternate beneficiary of all her property. While they were married and residing in Texas, the couple bought from the decedent's parents New York real property that had been in the decedent's family for generations. When the couple divorced in 2007, the property was awarded to the decedent, who relocated there permanently until her death in 2010.

After her ex-husband learned of her death, the decedent's former father-in-law offered the 1996 will for probate. The decedent's parents and brothers objected, but a divided Appellate Division affirmed the Surrogate's holding to dismiss the objections. According to the majority, the statute is clear and unambiguous in omitting the relatives of an ex-spouse—even "if we could assume that the ex-husband might someday inherit or obtain the property from [his father] …"

In a strongly-worded dissent, the dissenting judge noted that the father-in-law was petitioner in name only, the true party in interest being the ex-husband, who was barred under EPTL §5-1.4 from taking under his former wife's will. According to the dissent, admitting the 1996 will to probate was "manifestly unjust and inequitable … [and] would defeat the purpose and spirit of EPTL §5-1.4."

Although Texas law was inapplicable in *Lewis*, that state's probate code provides that, after divorce, all will provisions (including fiduciary appointments) must be read as if the former spouse *and each relative of the former spouse who is not a relative of the testator predeceased the testator*.[29] The Uniform Probate Code revokes testamentary bequests to the former spouse, as well as bequests to the former spouse's relatives.[30]

A proposal introduced in both houses embodies a middle ground: Dispositions to divorced spouses would continue to be expressly revoked, but there would be a rebuttable presumption that dispositions to relatives of an ex-spouse are revoked. The presumed revocatory effect to such relatives could be rebutted by any substantial evidence, including evidence otherwise disqualified under the Dead Man's Statute.[31]

Perhaps the most poignant lesson to draw from *Lewis* and this proposal is not to rely on state default law at all: Divorced spouses should give immediate attention to their planning documents, to ensure they reflect their intent.

8. Proposal to Allow a Trustee to Allocate Realized Capital Gains to Income (Passed Senate).[32] The memorandum in support of this SCAC proposal points out that a trustee's ability to allocate capital gains to income has become increasingly important, given the rise in capital gains tax rates (including the 3.8 percent tax on undistributed income, which includes realized capital gains). In order to achieve reasonable and impartial results, a trustee must be able effectively to determine whether to tax gains to the income beneficiaries or the trust. This proposal would amend the New York Principal and Income Act[33] to clarify that a trustee can, in a reasonable and impartial exercise of discretion, allocate gains to income. The power to do so would apply where the trustee is investing for total return pursuant to the power to adjust,[34] or if the trustee has unlimited discretionary power to distribute principal (which in effect permits total return investing because the power to distribute principal can be used in a similar manner as the power to adjust).

9. Proposal to Extend Attorney-Client Privilege to Lifetime Trustees (Passed Assembly).[35] Pursuant to Civil Practice Law Rules §4503(a)(2), the attorney-client privilege extends to a client who is a personal representative. If an attorney represents a personal representative in that capacity, a beneficiary of the estate will not be treated as a client of the attorney solely by reason of his beneficiary status. Further, the existence of a fiduciary relationship between the personal representative and the beneficiary will not constitute a waiver of the attorney-client privilege between the personal representative and the attorney. According to the memorandum in support of this proposal, although there is no reason to exclude lifetime trustees from the protection of the attorney-client privilege, lifetime trustees were not included in the definition of "personal representative" due to an omission. The proposal would include "lifetime trustees" in that definition.

10. Proposal Regarding Directed Trusts (Introduced in Senate).[36] A directed trust allows for the separation of investment, distribution and administrative responsibilities traditionally associated with the role of trustee. Some jurisdictions, like Delaware, have statutes that specifically allow for a separation of responsibilities. The issue, in the absence of legislation, is whether a trustee can rely on a separation of these responsibilities, or whether there is some level of continuing fiduciary responsibility and oversight.

A proposal supported by the New York State Bankers Association would allow for a clear division of trustee responsibility and liability. The bill provides that, where one or more people are given the authority to direct a fiduciary's investment, distribution or other decisions, those persons are considered advisors and fiduciaries. If the governing instrument provides that a fiduciary is to follow the direction of an advisor, and the fiduciary acts in accordance with the direction, then, except in the case of willful misconduct, the fiduciary will not be liable for any resulting loss. A directed fiduciary has no duty to monitor or consult with the advisor or communicate with or warn any beneficiary that the fiduciary might have exercised its discretion differently.

11. Proposal to Increase Value of Small Estate (Introduced in Assembly).[37] The SCPA, Article 13, allows for simplified administration of small estates. This proposal increases the threshold of a small estate from the current $30,000 to $100,000 in recognition of current economic times.

1. Including developments through Aug. 15, 2015.
2. New York A.3009B/S2009B (2015).
3. See also N.Y. TSB-M-15(3)M, July 24, 2015.
4. N.Y. Tax Law §954(a)(3).
5. N.Y. TSB-M-14(6)M, August 25, 2014.
6. N.Y. Tax Law §960(b).
7. New York A.6419 (2015).
8. New York A.6263/S.5191 (2015).
9. Estates, Powers and Trusts Law (EPTL) §10-6.6.
10. New York A.8118B/S.5868A (2015).
11. New York A.6024A/S.5160 (2015).
12. N.Y. EPTL §4-1.3.
13. Administrative Order AO/43/14; 22 NYCRR §207.64.
14. As defined by Surrogate's Court Procedure Act §103(39), which includes any person entitled or allegedly entitled to share as beneficiary in the estate.
15. http://www.nycourts.gov/rules/comments/PDF/Rule207-64.pdf.
16. Uniform Civil Rules for Supreme and County Courts—22 NYCRR §202.5(e).
17. Uniform Rules for Surrogate's Courts—22 NYCRR §207.20.
18. See http://www.nycourts.gov/rules/comments/PDF/Rule207-20.pdf.
19. New York S.1565 (2015); S.1741 (2015); A.7869/S.5775 (2015); A.4154 (2015); S.5438 (2015).
20. Available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_draft.pdf.
21. The ULC is comprised of commissioners from each state who are appointed by their states to draft and promote enactment of uniform laws where uniformity is desirable and practical.
22. A version of the uniform act was signed into law in Delaware on Aug. 12, 2014. 12 Del. C. §§5001-5007.
23. Available at http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/.
24. New York S.5438 (2015).
25. Available at http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015AM_RevFiduciaryAccessDigitalAssets_VBS.pdf.
26. New York A.7869/S.5775 (2015).
27. New York A.7638/S.5684 (2015).
28. *Matter of Lewis*, 114 A.D.3d 203, 978 N.Y.S.2d 527 (4th Dept. 2014).
29. Tex. Estates Code §123.001.
30. Uniform Probate Code §2-804 (1969, last amended 2010).
31. Civil Practice Law and Rules §4519.
32. New York S.5620 (2015).
33. N.Y. EPTL Article 11-A.
34. N.Y. EPTL §11-2.3(b)(5).
35. New York A.7868 (2015).
36. New York S.1635 (2015).
37. New York A.2827 (2015).