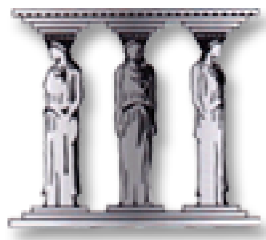

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WOMEN'S BAR ASSOCIATION
of the STATE OF NEW YORK

Presents

Practical Considerations in Representing the (Un)Happily Married Couple

April 30, 2024
12:30 pm – 1:30 pm

Presenter: Sharon L. Klein, Esq.

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Practical Considerations in Representing the (Un)Happily Married Couple

Women's Bar Association of the State of New York
Elder Law/Trusts & Estates Committee

April 25, 2024

Sharon L. Klein
Executive Vice President
Head of National Divorce Advisory Practice

WILMINGTON TRUST

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Expertise In

- Complex wealth management solutions
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- Philanthropic planning and strategies

Sharon is President of Family Wealth, Eastern U.S. Region, for Wilmington Trust, N.A. She is responsible for overseeing the delivery of all Wealth Management services by teams of professionals, including planning, trust, investment management, family governance and education, family office, and private banking services. Sharon also heads Wilmington Trust's National Divorce Advisory Practice.

Sharon has over 25 years of experience in the wealth advisory arena and is a nationally recognized speaker and author. Global media company *Forbes* has featured Sharon as a Top Advisor in multiple categories since 2020. In 2022, 2023 and 2024 she was selected as one of the Top 50 Women Wealth Advisors in America, one of the Top 10 in New York and one of the Top 5 in New York City. Leading business publication *Crain's* named Sharon to its 2020 inaugural list of the Most Notable Women in Financial Advice. In 2023, Sharon was chosen as a Leading High Net Worth Wealth Manager by *Chambers,* an internationally renowned independent ranking company. In 2018, she was honored by the UJA-Federation of New York Lawyers Division for her contributions to the trusts & estates community and the community at large. Sharon is a Fellow of the American College of Trust and Estate Counsel, a highly selective professional organization of preeminent estate planning attorneys in the U.S. and internationally. Sharon was inducted into the Estate Planning Hall of Fame in 2021. This honor is considered the pinnacle of accomplishment in this field. Only 125 people across the U.S. have received the award since its inception in 2004.

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Considerations as Clients Contemplate Divorce

- Increasing overlap among professional disciplines
- Need cross-disciplinary fluency

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New Considerations in Light of Tax Act

Divorce Considerations Under the New Tax Law

Key Changes

- Taxation of Trust Income
  - IRC § 682 repealed as of January 1, 2019
- Alimony Payments
  - After December 31, 2018, alimony payments not deductible to payor or taxable to payee
- Personal Exemption Suspended
- Miscellaneous Itemized Deductions Suspended
- Possible Higher Valuations for Closely Held Businesses

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Tax-Free Transfer Opportunities

Can Facilitate Settlements

IRC §1041

No gain or loss on transfer of property to former spouse, if transfer is "incident to the divorce:"

1. occurs within 1 year after marriage ceases, **or**
2. is related to cessation of the marriage:
    - (a) is pursuant to a divorce or separation instrument, **and**
    - (b) transfer occurs within six years after marriage ceases

Gain deferred, not eliminated

Critical to factor in impact of potential future imbedded gains when negotiating settlement agreements

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Key Estate Planning Considerations in Pre-Marital Planning

Portability of Federal Estate Tax Exemption Amount

- The Tax Cuts and Jobs Act increased the estate and gift tax exemption: In 2024 the exemption is $13.61 million
- Before 2010, the exemption amount was "use-it-or-lose-it"

	Before Portability (Jane leaves all to Joe)		After Portability (Jane leaves all to Joe)	
	Jane's Death	Joe's Death	Jane's Death	Joe's Death
Estate	$3,500,000	$7,000,000	$3,500,000	$7,000,000
Estate Tax Exemption Amount Used	$0	$3,500,000	$0	$7,000,000
Estate Tax Liability	–	$1,575,000	–	–
Net to Beneficiaries	**$0**	**$5,425,000**	**$0**	**$7,000,000**
DSUE	$0		$3,500,000	
			Savings	**$1,575,000**

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Key Estate Planning Considerations in Pre-Marital Planning

Continued

Deceased Spousal Unused Exclusion (DSUE) is a valuable asset to consider when drafting marital agreements.

Consider this hypothetical:

	Wife	Husband	Husband (w/ wife's DSUE)
Estate	$2,000,000	$26,000,000	$26,000,000
Estate Tax Exemption Amount	$13,610,000	$13,610,000	$25,220,000
Estate Tax Liability	–	$4,956,000	$312,000
Net to Beneficiaries	**$2,000,000**	**$21,044,000**	**$25,136,000**
DSUE	$11,610,000		
		Savings	**$4,644,000**

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Key Estate Planning Considerations in Pre-Marital Planning

Continued

Portability of Federal Estate Tax Exemption Amount —

A valuable asset to consider

- Even if estate not taxable, estate tax return (Form 706) must be filed to preserve DSUE
- Consider the costs of filing a return

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Key Estate Planning Considerations in Pre-Marital Planning

Continued

The Delaware Advantage

Another pre-marital agreement option: Asset Protection Trusts

- A Delaware Asset Protection Trust (DAPT)
  - Irrevocable trust created under Delaware law, with a Delaware trustee
- DAPT generally limits the ability of an individual's creditors to reach trust assets
- DAPT allows trust creator to remain a trust beneficiary, including:
  - Right to receive current income distributions
  - Right to receive a 5 percent annual unitrust payout
  - Ability to receive income or principal in discretion of independent trustee.

Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and direction trusts.

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Key Estate Planning Considerations in Pre-Marital Planning

Continued

The Delaware Advantage

Another pre-marital agreement option: Asset Protection Trusts

- Those who can potentially pursue claim are limited: spouse, former spouse, or minor child with claim resulting from agreement or court order for alimony, child support, or property division incident to judicial proceeding regarding separation or divorce
- Does not include spouse if client marries *after* creating trust
- Allowing independent corporate trustee broad discretion to make distributions to class of beneficiaries recommended

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Key Estate Planning Considerations in Pre-Marital Planning

Continued

The Delaware Advantage

Silent Trusts

- Delaware permits creation of so-called “Quiet” or “Silent” Trusts
- Trust creator can restrict beneficiary access to information under certain circumstances

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In the Event of Separation and/or Divorce, Review Documents & Run Analytics

Client's estate planning documents, account titles and beneficiary designations need updating to be certain chosen heirs are still appropriate

- Wills and trusts
- Powers of attorney and healthcare directives
- Retirement accounts and plans, other beneficiary designations, such as life insurance
- Jointly named real estate and financial accounts

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In the Event of Separation and/or Divorce, Review Documents & Run Analytics

Continued

A global asset summary report, including cash flow projections and risk assessment, can provide important analytics

- Risk vs. Return
- Asset Characteristics Matter
- Portfolio Sustainability
- Cash Flows
- Tax Impact
- Optimize Portfolio Allocation

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Use of Leverage

Credit Solutions During Divorce

Leverage may be very useful in a divorce proceeding, if assets do not lend themselves to easy division:

1. Closely held business interests
2. Partnership interests
3. Real estate (personal and investment)
4. Artwork and other collectibles
5. Private market interests with liquidity restraints
6. Aircrafts and watercrafts

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Accessing Trust Assets in Divorce

Review the Trust & Circumstances

Start with the trust terms:

1. Who created the trust?
2. Who are the beneficiaries?
3. On what basis can the trustee make distributions?
4. Is there a spendthrift provision?
5. Does a beneficiary have control powers?
6. Is the settlor's intent clear?
7. Who is the trustee?

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Accessing Trust Assets in Divorce

Review the Trust & Circumstances
Continued

Consider the history of trust distributions

- Have distributions been relied on to fund lifestyle, or were they irregular and uneven?
- A leading case is ***Tannen v. Tannen,*** 416 N.J. Super. 248, 3 A.3d 1229 (App. Div. 2010), *aff'd*, 208 N.J. 409, 31 A.3d 621 (2011)

These issues merit close attention:

- Does marital property transferred into an irrevocable trust lose its character as martial property?
- Definition of "spouse"

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Accessing Trust Assets in Divorce

Review the Trust & Circumstances
Continued

Lessons learned for analyzing if a trust is vulnerable to attack in divorce:

- Broad, unfettered distribution discretion
- Open class of beneficiaries (instead of one beneficiary)
- Clear recital of settlor’s intent that trust assets should not be treated as marital property
- Detailed spendthrift provision
- Independent corporate trustee
- Requiring beneficiary’s spouse to waive marital rights as prerequisite to distribution
- Requiring a prenuptial agreement
- If a trust is created during the marriage:
  - Defining spouse as spouse to whom trust creator is married at time of a distribution (self-adjusts)
  - Requiring that the parties be married for the trust creator’s spouse to be a potential beneficiary

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Trust Decanting Can Be a Powerful Tool:

Revising an Otherwise Irrevocable Trust

Decanting can be a tremendous tool for:

1. Dealing with changed circumstances
2. Correcting mistakes
3. Facilitating tax benefits
4. Optimizing a trust's administration

Decanting has been used for:

1. Changing trustees
2. Changing investment limitations or directions
3. Limiting a beneficiary's rights
4. Eliminating a beneficiary

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Trust Decanting Can Be a Powerful Tool:

Revising an Otherwise Irrevocable Trust
Continued

Ferri v. Powell-Ferri holdings:

- Decanting authorized, trust assets successfully placed out of reach of divorcing spouse
  - ***Ferri v. Powell-Ferri***, 476 Mass. 651, 72 N.E.3d 541 (2017) and ***Ferri v. Powell-Ferri***, 326 Conn. 438, 165 A.3d 1137 (2017)
- New trust not marital asset, but could be considered in determining alimony
  - ***Powell-Ferri v. Ferri***, 326 Conn. 457, 165 A.3d 1124 (2017)

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Trust Decanting Can Be a Powerful Tool:

Revising an Otherwise Irrevocable Trust
Continued

Some further thoughts about decanting

- Important in *Ferri* case is that decanting occurred without husband's permission, knowledge or consent
- Including decanting provisions in trust instruments may maximize flexibility without resorting to state default law
  - Check trust provisions to see if decanting is permitted under document itself
- Trustees successfully relied on powers under trust document without reliance on New York statute
  - ***Davidovich v. Hoppenstein***, 162 A.D.3d 512, 79 N.Y.S.3d 133 (2018)

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Other Potential Ways to Revise Trust Distributions:

Power to Adjust and Unitrust Regimes

Trustees must invest pursuant to the prudent investor rule

- Total return mandate:
  - Trustees must invest for benefit of both income and principal beneficiaries
- However, when beneficial interests clash, as they typically do in a divorce scenario, the source of return becomes critical

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Other Potential Ways to Revise Trust Distributions:

Power to Adjust and Unitrust Regimes
Continued

Two regimes provide trustees with means to implement mandate of total return investing:

1. **Power to Adjust**
   - Under power to adjust regime, trustee permitted to adjust between income and principal to be fair and reasonable to all beneficiaries
2. **Unitrust Regime**
   - Under unitrust regime, trustee can convert income beneficiary's interest into a unitrust payout
   - Most states have 3 – 5 percent band

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Power to Adjust & Unitrust Sample

State	Power to Adjust	Power to Adjust Guidelines	Unitrust Regime	Unitrust Regime Guidelines
Delaware	Yes 12 Del. C. §61-104	No guidelines	Yes 12 Del. C. §61-106	3-5%
Florida	Yes Fla. Stat. §738.104	No guidelines	Yes Fla. Stat. §738.1041	3-5% or 50% of AFR
New Jersey	Yes N.J. Stat. § 3B:19B-4	3-5% adjustment presumed fair and reasonable	No	No guidelines
New York	Yes N.Y. Est. Powers & Trusts Law §11-2.3(b)(5)	No guidelines	Yes N.Y. Est. Powers & Trusts Law §11-2.4	4%

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Life Insurance

Benefits of policy reviews and using irrevocable life insurance trusts

- In many divorce proceedings, life insurance plays an integral role
- Critical to review life insurance policies periodically to ensure they are performing as intended

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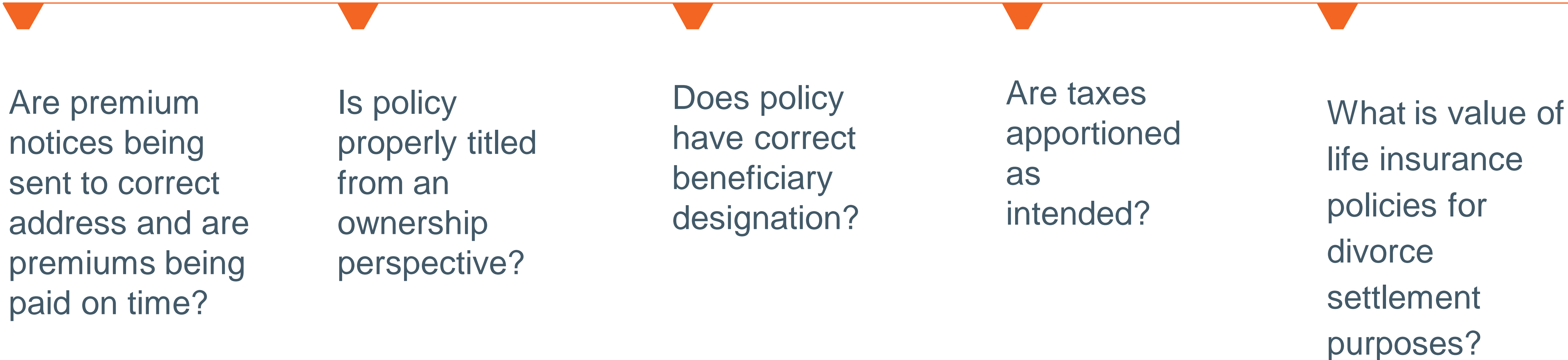
Life Insurance

Continued

Insurance policy reviews focus attention on important details

Other important issues that may be uncovered by having a disciplined policy review procedure in place include:



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Recent Developments Regarding Stored Genetic Material

Use of Genetic Material After Divorce

States have taken four approaches to who owns this genetic material upon divorce

1. **Contractual Approach –**
   honors an agreement entered into by the parties

2. **Contemporaneous Mutual Consent Approach –**
   disallows disposition unless there is mutual consent at the time the decision is being made

3. **Balancing Approach –**
   court evaluates interests of both parties

4. **Hybrid Approach –**
   honors an advance agreement, in absence of agreement, court evaluates interests of both parties

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Recent Developments Regarding Stored Genetic Material

Use of Genetic Material After Death

Under what circumstance is a child born after the death of his genetic parent entitled to inherit?

- Intestacy statues ambiguous
- States have begun to enact legislation to define inheritance rights of posthumously conceived children
- 27 states have enacted legislation addressing this issue

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The Bottom Line

Collaboration is key

- Clients benefit when matrimonial, trusts and estates, and investment professionals partner to balance considerations that cross disciplines
- Advisors who take a collaborative approach can most effectively represent clients

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Questions?

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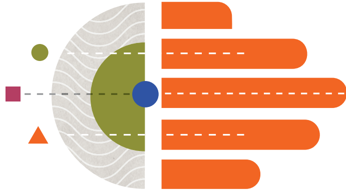
The Wilmington Trust Advantage



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— $26.5 billion in shareholders' equity

— $132.8 billion in loans and leases

— $164.7 billion in deposits

— Tier 1 capital ratio: 10.98% (preliminary)

— Profitable for 190 consecutive quarters

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— Dedicated to finding innovative solutions to complex situations

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With the increasing overlap among different professional disciplines, advisors can benefit from being apprised of the latest developments in the divorce context that can potentially have a dramatic impact on their practice, including:

- critical estate planning considerations in marital agreements;
- pre-marital planning options and other lifetime planning considerations;
- documents that require review in light of a contemplated divorce;
- powerful tools that can potentially change otherwise irrevocable trust terms and distributions in the divorce context;
- the significance of credit solutions in divorce;
- important considerations regarding the use of life insurance;
- issues surrounding stored genetic material in the event of death or divorce; and
- recent tax law changes in the divorce context.

There is certainly much to be gained from having some cross-disciplinary fluency.

I. New Considerations in Light of Tax Act

On December 22, 2017, the Tax Cuts and Jobs Act (the Tax Act) was signed into law. The Tax Act has created significant ramifications in the divorce context, particularly on the income tax front.

A. Alimony Payments Have Lost their Taxable/Tax Deductible Status: Courts Begin to Deal with Impact

Until 2019, alimony payments were characterized as taxable income to the recipient and deductible by the payer.[1] With the spouse paying alimony likely to be in a higher income tax bracket than the recipient spouse, the recipient spouse potentially was able to pay taxes on the alimony at a lower rate. The paying spouse received the benefit of a deduction at a higher tax bracket. This bracket play often resulted in overall tax savings between the parties.

Under the Tax Act, alimony payments made pursuant to a divorce or separation agreement signed after December 31, 2018 are no longer treated as taxable income to the recipient, and alimony payments cannot be deductible by the payer. Divorce or separation agreements signed before January 1, 2019 will be grandfathered. However, since a prenuptial agreement is likely not included in the definition of "divorce or separation agreement," a prenuptial agreement signed

before January 1, 2019 likely will not be grandfathered if the divorce decree that incorporated its terms is issued after December 31, 2018.

All prenuptial agreements signed before January 1, 2019 must be reviewed in light of these changes. A report prepared by the Family Law Section of the American Bar Association describes the unfairness to a couple who entered into a prenuptial agreement with alimony provisions based on the assumption that the alimony deduction would be available:"…the parties who agreed to pay alimony on the assumption that it would be tax deductible will now be required to pay the amount agreed upon without that benefit and the party receiving the alimony will receive a windfall." Reopening a prenuptial agreement to revisit the issue may be undesirable for fear other items may also be revisited.

In ***Wisseman v. Wisseman***,[2] the New York Supreme Court, Duchess County, considered the impact of the new tax law on a maintenance award, where the divorce was not finalized before December 31, 2018. Since the maintenance was no longer deductible to the husband, he argued that the award should be reduced by his tax rate, 22%. The wife argued the award should be reduced by her tax rate, 12%, which is what she would have paid in taxes under prior law, had the maintenance been taxable to her. The court determined to reduce the award by 12%: "the net result of which is application of the guidelines as intended by the New York State Legislature prior to the federal change in the relevant tax law, impacted only by a reduction concomitant with the wife's tax bracket and what she would have been obligated to include as taxable income."

In ***Montemurro v. Montemurro***,[3] the husband complained that a divorce decree, which was entered in November 2018, incorrectly incorporated the new law regarding the taxation of alimony, which only became effective for divorce decrees entered after December 31, 2018. The Arizona Court of Appeals, Division 1, noted that, regardless of what the decree said about the tax effects of spousal maintenance payments, and even assuming the decree incorrectly stated the applicable federal law, federal law, not the decree, governs the tax treatment of those payments: "…ultimately it is the Internal Revenue Code and not State court orders that determines one's eligibility to claim a deduction for Federal income purposes…"

For state purposes, some states have decoupled from the federal treatment of alimony payments. Accordingly, alimony can be subtracted from federal adjusted gross income in computing state taxable income. This is the case, for example, in California,[4] New York[5] and New Jersey.[6] Maryland did not decouple from federal treatment of alimony payments.

The Tax Act changes regarding the taxation of alimony payments are permanent, and do not sunset.

B. Taxation of Trust Income Under the New Tax Laws Has Dramatically Changed

The Tax Act repeals Internal Revenue Code (IRC) §682, which deals with the taxation of trust income following divorce.

For estate planning purposes, individuals can create irrevocable trusts for the benefit of family members. Using the federal gift tax exemption, which at $13.61 million per person for 2024 is an all-time high, they can move assets up to that amount into those irrevocable trusts without a federal gift tax consequence. Property transferred to the trusts (and the appreciation on that

property) is removed from the individuals' taxable estates when they die because they will no longer own those assets at death. With the current top federal estate tax bracket at 40% and with many states imposing their own estate taxes, which can be as high as 16%, significant estate tax savings can be garnered through the use of these irrevocable trusts. Although the trust creator – known as the grantor – does not own the assets after they are transferred to the trust, he can remain responsible for paying the trusts' income and capital gains taxes (a so-called "grantor trust"). Having a grantor assume the tax liability that otherwise would be payable by the trust or trust beneficiaries is a popular planning tool; essentially allowing these trusts to grow tax-free for the trust beneficiaries because someone else is paying those taxes. Although the tax payments are in effect gifts to the trust by the grantor, they are not treated as gifts by the Internal Revenue Service. Accordingly, practitioners often purposely include provisions in trusts that will trigger grantor trust status.

Additionally, under IRC §677(a)(1), a grantor is treated as the owner of any portion of a trust if the income from the trust may be distributed to the grantor or the grantor's spouse. Under IRC §672(e)(1) (the so-called spousal unity rule), a grantor is treated as holding any power or interest held by an individual who was the grantor's spouse at the time the power or interest was *created*. Accordingly, the trust remains a grantor trust even if the grantor and the grantor's spouse subsequently divorce. If, after a divorce, trust income was payable to a grantor's spouse, in the absence of relief, the grantor would continue to be taxed on the income and the ex-spouse would receive the income tax-free. IRC §682 prevented that result by providing that the income distributed to a spouse after a divorce is taxable to the recipient. The Tax Act repeals §682 with regard to divorce or separation agreements signed in 2019 or thereafter. Note that the repeal is keyed to the date of the divorce or separation agreement, not the date of the trust agreement. Accordingly, the grantor spouse will be liable to pay the income tax on trust income from grantor trusts potentially created years before a divorce, even though the ex-spouse will be receiving that income.If the trust agreement is clear that a divorced spouse will cease to be a beneficiary, the trust would remain a grantor trust, but income will not be payable to the former spouse. If the trust document is not clear, collaboration between estate and matrimonial attorneys can be key in investigating any possible techniques to potentially change grantor trust status, being mindful of potential adverse tax consequences, for example, in jeopardizing a trust that qualified for the marital deduction. With that caveat, possibilities might include:

- If the trust allows for discretionary distributions, paying out all the assets to the beneficiary spouse and equalizing the grantor with other assets. This strategy is not an ideal solution from a planning perspective because dissolving the trust will defeat the original transfer tax saving goals;
- Decanting or otherwise modifying a trust to remove the spouse in favor of other beneficiaries, and equalizing with other assets;
- Terminating grantor trust status by decanting or otherwise modifying the trust to require the consent of adverse parties (non-spousal beneficiaries, typically children) before any distribution can be made to the spouse.[7] However, requiring children to consent before every distribution is made to a parent is a very difficult position in which to place the children;
- Including a reimbursement provision or other equalization mechanism in a separation agreement for the taxes payable by the grantor spouse. This also might not be an ideal

solution because typically the goal is to extricate former spouses from each other, not bind them together with on-going obligations.

The tax impact of every trust created during the marriage should be carefully considered when negotiating a divorce settlement or presenting evidence to a court.

The Department of the Treasury and the Internal Revenue Service issued a Notice[8] announcing they will issue regulations clarifying that §682 will continue to apply with regard to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument executed on or before December 31, 2018, unless that instrument is modified after that date and the modification provides that the changes made by the Tax Act apply to the modification. They requested comments regarding the application of certain grantor trust rules to the taxation of trusts for the benefit of a spouse following a divorce or separation, in light of the repeal of §682. Written comments were to be submitted by July 11, 2018.

The American College of Trusts and Estates Counsel (ACTEC) submitted two sets of comments. In a comment letter submitted on July 2, 2018, ACTEC suggests terminating the application of the spousal unity rule in §672(e) once the spousal relationship has been terminated by decree of divorce or legal separation or by the execution of a separation agreement. According to the letter, the spousal unity rule is presumably based on a belief that spouses form a single economic unit. When the end of the marriage separates the unit there is no longer a reason for the rule to apply. According to the comment letter submitted on July 5, 2018, ACTEC believes that tying the effective date provision to the date the divorce or separation agreement is signed, not the date a trust was executed, unfairly applies the repeal to trusts that were irrevocable on the date the Tax Act was enacted. As explained in the letter, a grantor who created a trust for the benefit of his or her spouse before the repeal of §682 likely would not have done so had the grantor expected to continue to be taxed on trust income after divorce. Accordingly, ACTEC recommends that §682 continue to apply to the income of trusts that were irrevocable on December 22, 2017. Whether either of the ACTEC comment letter suggestions will be adopted is yet to be seen since we are still awaiting IRS guidance.

The Tax Act changes regarding the repeal of IRC §682 are permanent, and do not sunset.

C. Other Tax Act Ramifications

1. The New Tax Laws Have Suspended the Personal Exemption

Before 2018, an exemption per child could be taken only by one parent, and was a negotiated benefit. The new law eliminates personal exemptions for dependents beginning December 31, 2017 and ending December 31, 2025.

2. The Tax Act Also Suspended Miscellaneous Itemized Deductions

Before 2018, miscellaneous itemized deductions, including fees related to tax advice incident to a divorce, were deductible to the extent they exceeded 2% of the taxpayer's adjusted gross income. Those fees will no longer be deductible beginning December 31, 2017 and ending December 31, 2025.

3. *Education Expenses Under the New Tax Laws*

The new tax law allows for distributions from 529 Plans to be used for qualified education expenses, not only for college, but also for tuition expenses for elementary, middle, and high school, up to $10,000 per year. Educational funding is often an element in marital agreements.[9]

4. *Child Tax Credit Increased*

The annual child tax credit, which typically is available to the custodial parent, has been increased from $1,000 to $2,000.

5. *Valuation Impact on Closely Held Businesses*

Corporate tax rate changes could potentially impact the valuation of closely held businesses, increasing the strain on liquid assets to divide in a divorce. This highlights the importance of credit solutions to potentially provide liquidity to buy out a spouse not involved in the business, avoiding splitting up the business.

II. Tax-Free Transfer Opportunities

Pursuant to IRC §1041(a)(2), no gain or loss is recognized on a transfer of property from an individual to (or in trust for the benefit of) a spouse, or a former spouse, but only if the transfer is "incident to the divorce." A transfer of property is incident to the divorce if the transfer:

1. Occurs within 1 year after the date on which the marriage ceases, **or**
2. Is related to the cessation of the marriage (IRC §1041(a)(2)).

Thus, a transfer of property occurring not more than one year after the date on which the marriage ceases need not be related to the cessation of the marriage to qualify for §1041 treatment.

A transfer of property is treated as related to the cessation of the marriage if the transfer:

1. Is pursuant to a divorce or separation instrument, **and**
2. Occurs not more than 6 years after the date on which the marriage ceases (Temp. Reg. §1.1041-1T(b)).

Any transfer not made pursuant to a divorce or separation instrument and any transfer occurring more than 6 years after the cessation of the marriage is presumed to be not related to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage (for example, if there were legal or business impediments to the transfer or disputes concerning the value of the property owned at the time of the cessation of the marriage, and the transfer was effected promptly after the impediment was removed).

Pursuant to IRC §2516 there are no gift tax consequences associated with a written marital settlement agreement if divorce occurs within the three-year period beginning on the date one

year before the agreement is entered into (whether or not the agreement is approved by the divorce decree).

Of course, if a trust is created incident to a divorce *after* a couple is divorced, the problem created by the repeal of §682 never arises.

Transfers to which §1041(a) applies are treated as gifts; the basis of the transferee in the property is the adjusted basis of the transferor immediately before the transfer (with a couple of exceptions, including no further basis adjustment for gift taxes paid by the transferor).

Note that §1041 does not eliminate gain; it defers an immediate gain on transfer, postponing gain recognition until the gain actually is realized. Accordingly, it is critical to factor in the impact of potential future imbedded gains when negotiating settlement agreements.

III. Key Estate Planning Related Considerations in Pre-Marital Planning

A. The "Hidden" Asset that Could be Worth Millions - Portability

The federal estate and gift tax, imposed at a top bracket of 40% in 2024, generally does not apply to transfers between U.S. spouses. In addition, each person has an exemption from federal estate, gift and generation-skipping transfer (GST) taxes. The GST tax is a tax, in addition to the estate or gift tax, imposed on transfers in excess of the exemption that skip a generation (for example from a grandparent to a grandchild), and is imposed at the top estate or gift tax rate.

The Tax Act made significant changes to the tax landscape. As of Jan. 1, 2018, the amount exempt from federal estate, gift and GST taxes doubled from $5 million per person to $10 million per person, indexed for inflation from 2010 pursuant to an inflation index known as the chained Consumer Price Index. In 2024, each person can transfer $13.61 million (or $27.22 million per married couple) free of federal gift, estate and GST taxes. As with most of the changes made by the Tax Act, the doubling of the exemption amount is slated to sunset at the end of 2025.

Before 2010, the federal estate/gift exemption amount was a "use-it-or-lose-it" proposition. To give a simple example, assume a married couple both died in 2009 when the exemption amount was $3.5 million, and they each owned assets worth $3.5 million. If they each used their $3.5 million exemption amounts, with trust planning for example, zero federal estate tax would have been due on the death of the survivor. Assume, however, that the first spouse to die did not use her exemption amount and instead left everything to the survivor. If the survivor died with a $7 million estate, the exemption of the first spouse to die would have been wasted and federal estate taxes of up to $1.575 million would potentially have been payable.

Portability, a concept introduced in 2010, and made permanent since 2012, obviates the use-it-or-lose-it nature of the federal estate and gift exemption amount. If one spouse does not use the entire exemption amount, it is possible to transfer or "port" the unused portion – called the Deceased Spouse's Unused Exemption Amount, or "DSUE" Amount – to the surviving spouse. Unused GST exemption is not portable.

DSUE is a valuable asset to consider when drafting marital agreements, particularly in light of the doubling of the federal exemption amount. Consider a prospective husband (H) and wife (W) who are negotiating their pre-marital agreement. H has assets totaling $24 million, while W has assets of only $2 million, which would pass to her heirs other than H, leaving $11.61 million of DSUE based on the 2024 $13.61 million federal exemption amount. Generally, H would not ask for any financial considerations from W because of the imbalance in the assets tilted in his favor. However, if W predeceases H and her executor (who could be H) elects to use portability, her $11.61 million DSUE would pass to H. Assuming H dies in 2024, with a top 40% federal estate tax rate and a $13.61 million exemption, having W's additional exemption amount to shield estate taxes in his estate could save his heirs over $4.6 million in estate taxes! Accordingly, the wealthier spouse (H in this example) should view the DSUE as an important asset, and the less wealthy spouse (W in this example) should use the DSUE as a negotiating tool.

Federal Estate Tax Return Filing Required - Regardless of the size of the decedent's estate, DSUE can only be preserved by a timely-filed federal estate tax return (Form 706), which is due nine months from the date of death, 15 months on extension.[10] This means that estates under the federal filing threshold ($13.61 million in 2024) must still incur the cost of filing a federal return, although the standards for Form 706 filing have been relaxed if the return is necessary only for a portability election.[11] The return can be filed only by the executor, who may or may not be the surviving spouse. Accordingly, the requirement to file the return should be negotiated in prenuptial agreements to avoid a hostile executor spitefully refusing to file. Although it might be possible to bring a petition to request that a court grant someone other than the executor temporary executorial powers solely for the purpose of filing a return, and although there has been at least one reported case in which the court required the recalcitrant executor to file a return and elect portability, it is much better practice to plan ahead for this important matter. The case involving the recalcitrant executor was decided by the Oklahoma Supreme Court in ***In re Matter of the Estate of Anne S. Vose v. Lee***.[12] The court required the personal representative (decedent's son from a prior marriage) to make the portability election requested by the surviving spouse, even though the surviving spouse waived all of his rights to the decedent's estate in a prenuptial agreement.

It is also important to consider the consequences if a return not otherwise required to be filed must be filed solely in order to protect the DSUE. Costs of filing the return, and costs associated with any audit proceedings, might logically be apportioned to the surviving spouse benefiting from the election. If a return must be filed because the estate is over the filing threshold in any event, consider whether the total cost should be borne by the estate. It will be prudent to memorialize who should bear the costs of filing Form 706 in the prenuptial agreement, along with the obligation to file to secure portability.

B. The Delaware Advantage

1. Another Pre-Marital Agreement Option: Asset Protection Trusts

A trust specifically designed for asset protection can present additional formidable obstacles for creditors, including an ex-spouse. A Delaware Asset Protection Trust (DAPT) is an irrevocable trust created under Delaware law, with a Delaware trustee. Neither the trust creator nor any of the

beneficiaries need to live in Delaware to create a Delaware trust. In most jurisdictions, including California and New York, it is not possible for a person to create a trust for himself and protect the assets from their creditors. Under Delaware law, however, the DAPT generally limits the ability of an individual's creditors to reach the trust assets, while allowing the creator of the trust to remain a trust beneficiary. The creator can retain the right to receive current income distributions, the right to receive a 5% annual unitrust payout and the ability to receive income or principal in the discretion of an independent trustee. While 20 jurisdictions have enacted some form of asset protection legislation, it is very common for clients to look outside their home states in setting up these trusts: A driving reason to create an asset protection trust is to build obstacles creditors must overcome. Having to initiate an action in a different jurisdiction, rather than the settlor's home state where the creditor is likely situated, creates additional hurdles to bringing suit. When selecting a trust jurisdiction, Delaware is often the jurisdiction of choice because of its attractive laws. Additionally, while legislation in some states is very new, Delaware has the distinction of being one of the first jurisdictions in the country to enact domestic asset protection laws over two decades ago.

Delaware requires a creditor to bring an action against a DAPT in the Delaware Court of Chancery. For claims arising after an individual creates a DAPT, there is a four-year statute of limitations.[13] For claims arising before an individual creates a DAPT, a creditor must bring suit within four years after creation of the trust or, if later, within one year after the creditor discovered (or should have discovered) the trust.[14] For all claims, the creditor must prove by clear and convincing evidence that creation of the trust was a fraudulent transfer as to that creditor.[15] A very limited number of creditors can pursue claims against a DAPT. In the family context, a spouse, former spouse, or minor child who has a claim resulting from an agreement or court order for alimony, child support, or property division incident to a judicial proceeding with respect to a separation or divorce may potentially reach the assets of a DAPT,[16] but a spouse whom the client marries *after* creating the trust may not take advantage of this exception. Accordingly, since future spouses cannot generally assert claims against a DAPT, clients or their children can establish these trusts to protect assets from claims of future spouses, without providing the financial disclosure that ordinarily is required for enforceable prenuptial agreements.[17]

Giving an independent corporate trustee broad discretion to make distributions to a class of beneficiaries, instead of predicating distributions on an ascertainable standard, is also recommended since a court would be less likely to find such a discretionary interest reachable in divorce.[18] Some practitioners are also recommending inserting provisions in the documents that require a beneficiary's spouse to waive marital rights to trust assets each time the beneficiary is eligible to receive a principal distribution, before the distribution can be made. Others prohibit the trustee from making distributions to any married beneficiary without a prenuptial agreement.

2. Silent Trusts

Delaware permits the creation of so-called "Quiet" or "Silent" Trusts, which allows the trust creator to restrict beneficiary access to information under certain circumstances, even if that information would be required under the laws of other jurisdictions. This might be an effective tool to use in blended marriage situations. A Silent Trust could minimize friction by restricting information access to children of a prior marriage while a trust is in existence for the life of a second spouse. This is particularly so if the family members know that the trustee administering

the trust is a corporate, impartial trustee, with fiduciary obligations to treat beneficiaries fairly within the context of a specific trust agreement.

In some states, including California, the trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.[19]

IV. Trusts & Estates, Matrimonial and Religious Law: Multi-Disciplinary Considerations Can Impact Divorce Planning

Practitioners who become involved in premarital planning should be cognizant of religious issues that can impact divorce.

A Get is a religious divorce under Jewish law that must be given voluntarily by a husband to a wife in order for her and any children of a subsequent marriage to marry freely within the Jewish faith. This has been problematic if, out of spite or as a manipulative tool, a husband refuses to give his wife a Get. There are several incentives that can be imposed by a secular court to facilitate the granting of the Get. However, since the Get must be given willingly to be valid, if a court orders "incentives," this raises the issue of whether the Get is truly "voluntary" if delivered under threat.

In ***Sharabani v. Sharabani***,[20] the court considered the implications of a husband's refusal to grant his wife a religious divorce, and relied on a New York statute[21] with the unstated, but clear, purpose of solving this problem that is unique to Jewish marriages. New York's Domestic Relations laws allow a court to consider the effect of a barrier to marriage when distributing marital assets and determining spousal support awards.[22] In ***Sharabani***, the court found that Husband's refusal to give Wife a Get essentially limited her future financial circumstances in depriving her of the ability to remarry religiously and deprived her of emotional support. Husband's refusal to provide a religious divorce led the court to award Wife 100% of certain marital assets, if Husband continued to refuse. More recently, however, in ***Cohen v. Cohen***,[23] the New York Supreme Court, Appellate Division, disagreed with the Supreme Court's determination that the husband was required to provide the wife with a Get under New York law, and reversed an order directing the husband to provide the Get prior to receiving any distribution of marital property.

To avoid a Get deviously being withheld, the Rabbinical Council of America has had some success in providing a form prenuptial agreement.[24] In order to give the husband financial incentive to grant the Get, the agreement provides for a fixed sum of support to be paid to a spouse until the Get is delivered.

A preferred solution might be to negotiate a contractual promise to deliver a Get upon request and have that promise contained within a prenuptial agreement. A flurry of cases in New York in the 1970s all upheld provisions in parties' separation agreements with respect to the obligation to deliver a Get.[25] Against this statutory and decision framework, although applied to post-marriage agreements, it seems that such promises in prenuptial agreements should be enforced as well. Assuming that the promise to deliver the Get was made voluntarily before the marriage, the prospect of subsequent penalties for failure to honor the promise arguably should not detract from the voluntariness of the initial promise.

Interestingly, a Get granted in New York and presented in Israel allowed the parties to be validly married under Israeli law, and that marriage was recognized as a valid marriage under New York law even though a decedent and his first wife had never obtained a valid divorce under New York

law.[26] New York adheres to the place of celebration rule, which recognizes a marriage validly entered into outside of New York. In the ***Estate of Semone Grossman***,[27] the IRS argued that the decedent's marriage to his last wife was null and void, because he had not validly divorced his first wife, thereby disqualifying the estate from receiving a marital deduction for assets passing to her. However, instead of focusing on the *divorce* and its validity in New York, the Tax Court looked to whether the parties were validly *married* under New York law. New York law required the court to look to whether Israel - the place of celebration - recognized the validity of the marriage performed in Israel, notwithstanding the absence of a lawful divorce under New York law. There was no dispute that the marriage was valid in Israel, which preserved the $79 million marital deduction in Grossman's $87 million estate.

V. <u>Other Lifetime Planning Considerations</u>

A. Marital Trust Planning

With a portability election, it is possible to transfer one spouse's unused federal exemption amount to the survivor. However, in second marriage situations, the ported exemption would be available for the surviving spouse to dispose of as she pleased – including for the benefit of her children from another marriage. In order to utilize the federal exemption amounts of both spouses, but continue to control the disposition of assets after the death of the first to die, the wealthier spouse could consider creating a lifetime marital trust – a so-called Qualified Terminable Interest Trust (QTIP) – in an amount equal to the other spouses' exemption amount, less the value of the other spouse's assets. If properly structured, the QTIP would not have any gift tax consequences when established, would utilize the exemption amount of the less wealthy spouse, and the trust terms would insure that the trust's assets passed to the trust creator's intended beneficiaries after the death of the surviving spouse. Another advantage of this technique is the ability to utilize the survivor's GST exemption by allocating it to the trust, which could then grow free of GST taxes. Using portability alone only transfers the unused estate tax exemption; it does not apply to the unused GST tax exemption, which otherwise would be lost.[28]

B. Formula Planning

One common plan in second marriage situations is for the spouses to each waive rights in the other's estate in exchange for the surviving spouse receiving assets in excess of the federal exemption amount. Assets up to the federal exemption amount can pass free of federal estate taxes to children of a previous marriage. Estate tax on the balance of the assets passing to the surviving spouse would be deferred until the death of that spouse due to the marital deduction. If that plan was effectuated with a formulaic disposition to the children of the "federal exemption amount" and the federal exemption amount was $5 million at the time, $5 million is presumably the amount that was intended to pass to children of a prior marriage. That plan might be distorted with the higher exemption amounts now in effect: in 2024, the children of a prior marriage would receive $13.61 million, leaving much less for a surviving spouse. Accordingly, it is generally advisable to avoid formulaic dispositions based on tax exemptions amounts in prenuptial agreements and estate planning documents. In the planning context, most practitioners now opt to use provisions designed to be very flexible in adapting to changes in family situations and the tax laws.

C. Community Property

Community property jurisdictions have special rules. In California, for example, assets owned prior to a marriage are classified as separate property. Upon marriage, all assets and debts acquired during the marriage are generally classified as community property, giving spouses equal ownership rights to the property even if the property is titled in one spouse's name. In the event of divorce, community property is divided equally between the spouses. Through the process of transmutation the character of property can change from community property to separate property, separate property to community property, or separate property of one spouse to separate property of the other spouse.[29] A transmutation of property is valid, with or without consideration, when the spouse whose interest in the property is adversely affected makes an express declaration in writing consenting to the transmutation.[30]

In the seminal case of ***Estate of MacDonald***,[31] the husband's pension funds, in which the wife undisputedly had a community property interest, were deposited into IRAs, which did not name the wife as beneficiary. The husband signed adoption agreements, indicating his agreement to the terms of the IRA accounts and designating his trust as beneficiary. His wife signed the consent portions of the adoption agreements. The Supreme Court of California ruled that the wife's consent was not akin to waiving her ownership interest in the husband's pension plan because a "writing signed by an adversely affected spouse is not an 'express declaration' for the purposes of section 5110.730(a) *unless* it contains language which expressly states that the characterization or ownership of the property is being changed." The court concluded that the there was no language in the consent paragraphs, or the adoption agreement, expressly stating that the husband was effecting a change in the character or ownership of the wife's interest.

Transmutation can also occur inadvertently in estate planning documents when planners who represent both parties to the marriage do not discuss characterization of property prior to and during the marriage. Commingling of assets during the marriage is an additional way in which inadvertent transmutation occurs. A common example of inadvertent transmutation is when spouses purchase a house using one or both spouse's separate property acquired prior to the marriage but then use their community property to pay for the mortgage. The commingling of separate property and community property becomes an issue when one party files for divorce. The spouse who made contributions to the purchase of the community property will be reimbursed for the amount that the spouse can trace back to a separate property source, excluding interest or appreciation of the property.[32]

Generally, each spouse can dispose of his or her 50% interest in the community property, and the other 50% must be distributed to the surviving spouse.[33] At death, both halves of the community property receive a step-up in basis.[34]

VI. <u>In the Event of Separation and/or Divorce, Review Documents & Run Analytics</u>

A. All Planning Documents, Account Titles and Beneficiary Designations Need Review

All of the client's important planning documents, account titles and beneficiary designations will need to be updated to be certain chosen heirs are still appropriate, as well as designees for

healthcare and power of attorney documents.[35] Of course, during the pendency of a divorce, parties may be prohibited from transacting financial affairs except in the usual course of business for customary and usual household expenses. This prohibition is designed to maintain the status quo and preserve marital property until final determination. Accordingly, clients should change the documents they are entitled to change immediately and be poised to change the balance as soon as they are permitted.

Documents to consider include:

- **Will and trusts**

These documents must be reviewed immediately. In most jurisdictions, a Will can and should be changed as soon as possible, subject to state rights and prior agreement. Typically, unless a spouse has waived marital rights in an agreement, an individual cannot disinherit a spouse. However, it should be possible to modify a Will to leave a soon-to-be ex-spouse the minimum amount required under state law or a marital agreement.

If an individual has been divorced and dies having failed to update his or her estate planning documents to reflect the divorce, some states revoke bequests to former spouses in wills or other estate planning documents. Many do not. Even if a so-called revocation-on-divorce statute does apply, those laws will be inapplicable during the pendency of the divorce, up until the final divorce decree is entered. For example, in ***Acosta-Santana v. Santana***,[36] a husband was in the process of getting divorced, but died before a final decree was entered. If the divorce had been finalized, the wife would likely have received less than half of the amount she received from the husband's estate and property she owned jointly with him, which passed to her by operation of law, because the husband's premarital assets would have been factored into the equitable distribution of their assets. The court denied the executor's motion to continue the divorce proceeding in the husband's place and instead dismissed the complaint with prejudice, finding that divorce proceedings abate with the death of one of the parties prior to the entry of the final order of divorce. The New Jersey appellate court affirmed. Having clear language in a premarital or settlement agreement waiving marital rights to claim against a spouse's estate can be key if one spouse dies before the divorce is finalized. In ***Matter of Estate of Petelle***,[37] the Supreme Court of Washington determined that where parties made a "complete and final settlement of all their marital and property rights" in their settlement agreement and husband died intestate before the marriage was dissolved, that waiver encompassed the wife's right to intestate succession, even though that right was not specifically mentioned. Nevertheless, to avoid ambiguity, explicitly waiving marital rights and intestate succession rights will be preferable.

Some states (like New Jersey[38]) revoke any revocable dispositions or appointments of property to, and executor/trustee nominations of, a former spouse, as well as relatives of a former spouse. Other states (like New York[39] and California[40]), revoke all dispositions or appointments of property from the divorced spouse to the former spouse and all nominations of the former spouse as executor and trustee, but do not extend the revocatory effect of divorce to the relatives of an ex-spouse. That distinction played a pivotal role in **In *Matter of Lewis***,[41] where the New York statute[42] disqualified the decedent's ex-husband from inheriting under her will or acting as executor. However, the ex-husband's father (the decedent's ex-father-in-law), was the successor beneficiary and executor and he was not disqualified under the terms of the statute. Presumably

the ex-husband would just inherit or obtain the property from his father, causing an end-run around the statute. While the court acknowledged this, it opined that the statute was clear and unambiguous in omitting the relatives of ex-spouses from disinheritance.

The Uniform Probate Code (UPC), in effect in Alaska,[43] Arizona,[44] Colorado,[45] Idaho,[46] Massachusetts,[47] Michigan,[48] Montana,[49] New Jersey,[50] New Mexico,[51] North Dakota,[52] South Dakota[53] and Utah,[54] revokes dispositions to and fiduciary nominations of the former spouse, as well relatives of the former spouse.[55] This approach would have prevented the outcome in the ***Lewis*** case, but might not effectuate the decedent's intent in those cases where bequests to relatives of an ex-spouse -for example, step-children of the decedent- are still intended despite a divorce. An example directly in point is the Michigan case, ***In re Joseph & Sally Grablick Trust***.[56] The decedent's step-daughter was eight years old when the decedent married her mother in 1993. Twelve years later in 2005 the decedent executed his will and joint revocable trust with his wife pursuant to which the step-daughter was the residuary beneficiary. In April 2019, when the step-daughter was 34, the couple divorced and the decedent died in July, 2019. Despite the step-daughter's assertions that she maintained a close, loving, father-daughter relationship with the decedent, the Michigan Court of Appeals found that that the Michigan statute[57] revoked the disposition to the step-daughter because she was a relative of the ex-spouse. In contrast, despite specific Arizona law that revokes beneficiary designations of relatives a decedent's former spouse, in a recent Arizona case,[58] the court nevertheless found that "it must consider evidence of a continuing affinity relationship" before revoking dispositions to relatives of an ex-spouse. The court held that courts may decline to apply a revocation on divorce statute if the evidence shows that the testator formed a close personal relationship with the beneficiary and likely decided to provide for the beneficiary regardless of whether the marriage continued. In this case, in which a decedent died after divorce without changing beneficiary designations naming his stepchildren, the decedent maintained his relationship with his stepchildren and the court held that their designation as beneficiaries was not overcome by the statute. Minnesota,[59] Nebraska[60] and South Carolina,[61] which have also adopted the UPC, have modified the language to revoke testamentary bequests to the decedent's former spouse only, and not to the former spouse's relatives. Maine revised its statute, which previously revoked testamentary bequests to the decedent's former spouse only, and now also revokes bequests and fiduciary nominations of a former spouse and the former spouse's relatives.[62] In Maryland, an absolute divorce or annulment of the marriage that occurs subsequent to the execution of the testator's will, revokes the will.[63] On absolute divorce or annulment of marriage after the creation of a revocable trust, all trust distributions to or for the benefit of the ex-spouse are be revoked[64] and an ex-spouse is removed as a trustee or as an advisor to the trustee without further court action.[65]

The lesson to be learned: the most prudent course of action is not to rely on state default law at all. Divorced spouses, spouses in the process of getting a divorce and unmarried couples who are separated should give immediate attention to their planning documents, to ensure they reflect their intent (subject to elective share statutes and other legal restrictions).

Importantly, there is generally no revocation on divorce regarding an ex-spouse's interest in an irrevocable trust. Some practitioners use the concept of a "floating spouse," defined as the spouse to whom the trust creator or beneficiary is married from time to time. If an ex-spouse actually is

named as a trust beneficiary, other techniques may have to be considered to restructure the trust, including decanting, discussed below.

Of course, the prerequisite for a marital disposition is to have a valid marriage. ***In re Estate of Brown***,[66] Tommie Rae Brown did not obtain an annulment of her first marriage until after she had married famed singer James Brown. Even though the prior marriage was subsequently annulled, an annulment is not retroactive but simply allowed Tommie Rae to remarry *thereafter.* The Browns did not have another remarriage ceremony following the annulment of Tommie Rae's first marriage, so the marriage to James Brown was void ab initio.

- **Powers of attorney and healthcare directives**

It is important to carefully review powers of attorney, which allow a designated person to conduct financial transactions, and health care directives, which allow a designated person to make important health care and potentially end-of-life decisions, to ensure that an estranged spouse is removed from those roles.

In some states (like New Jersey[67]), the designation of the declarant's spouse or domestic partner as health care representative is revoked upon divorce, legal separation or termination of the domestic partnership or civil union, unless otherwise specifically provided. In California, if the principal's marriage to the attorney-in-fact is dissolved or annulled, the principal's designation of the former spouse as an attorney-in-fact is revoked.[68] In New York, an agent's authority under a power of attorney terminates when the agent's marriage to the principal is terminated by divorce or annulment, unless the power of attorney expressly provides otherwise.[69]

In other states (like Alabama,[70] Connecticut,[71] Hawaii,[72] and Maryland[73]), an agent's authority under a power of attorney terminates when an action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides. Best practice, however, would not be to rely on state default statutes, but to proactively change documents to ensure they reflect intent.

- **Retirement accounts and other beneficiary designations, such as life insurance**

State laws that do provide for revocation on divorce may not apply to retirement plan beneficiary designations, which should be reviewed promptly. Spousal rights in retirement plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) are subject to special rules. In ***Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan***,[74] the decedent designated his then wife as beneficiary of his retirement plan. When they divorced, the divorce decree stated that the wife waived all rights to the husband's pension benefits. However, the husband did not change his beneficiary designation. Resolving a federal circuit court split as to whether plans were required to recognize the validity of divorce decrees in which surviving spouses waived their rights to an ex-spouse's pension plan benefits, even if the decedent failed to remove them as designated beneficiary, the Supreme Court held that plans may rely on their own plan terms and beneficiary designations after divorce. The court noted that ERISA requires plan administrators to follow their governing plan documents. This case underscores the importance of changing beneficiary designations after divorce.

In ***Orlowski v. Orlowski***,[75] the New Jersey Superior Court Appellate Division noted that, ordinarily, a Qualified Domestic Relations Order (QDRO) should be utilized to enforce counsel and expert fee awards only when there are no other assets sufficient to satisfy the awards. Finding that to be the case, the court held that unpaid awards for counsel fees and expert witness fees relating to child support, property distribution, and college tuition reimbursement are enforceable by a QDRO from ERISA protected pension funds, when an ex-spouse is the alternative payee of the QDRO.

In ***Martinez-Olson v. Est. of Olson***,[76] the parties were divorced in 2017and had entered into a marital settlement agreement which specifically provided that each party waived rights in all benefits of the other party, explicitly including 401(k) plans. When the husband died two years after the divorce was finalized, he had neglected to change the beneficiary designation on his 401(k) plan. His ex-wife was paid the 401(k) plan proceeds because the husband's employer was bound to pay them to her under ERISA. However, the decedent's daughter from a prior marriage bright suit against her stepmother to enforce the marital settlement agreement. The court found that the agreement specifically dictated who was to receive the 401(k) plan proceeds and ordered that the wife turnover all funds to the retirement account.

As a matter of first impression, the court found that ERISA does not preempt post-distribution suits against named beneficiaries to enforce a contractual waiver of plan proceeds. Accordingly, the estate could sue to recover the proceeds after they were distributed by the ERISA plan administrator pursuant to the plan documents.

It is also important to reconsider designated beneficiaries of life insurance policies, discussed further below.

In ***Sveen v. Melin***,[77] the Supreme Court determined that the retroactive application of a Minnesota statute does not violate the Contracts Clause of the U.S. Constitution.

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

The court found that the law does not substantially impair pre-existing contractual arrangements. First, the law is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. It applies a prevalent legislative presumption that a divorcee would not want his former partner to benefit from his life insurance policy and other will substitutes. Second, the law is unlikely to disturb any policyholder's expectations at the time of contracting, because an insured cannot reasonably rely on a beneficiary designation staying in place after a divorce. Lastly, the law supplies a mere default rule, which the policyholder can undo in a moment. If the law's

presumption about what an insured wants after divorcing is wrong, the insured may overthrow it simply by sending a change-of-beneficiary form to his insurer.

Again, however, the most poignant lesson to be learned from cases like this is not to rely on state default law.

- **Jointly named real estate and financial accounts**

Property titled in joint names similarly needs immediate attention. Note that titling of assets is not necessarily determinative. Just as property held in one spouse's name may be considered a marital asset, the fact that one spouse transferred separate property from their name to both spouses' names does not necessarily preclude a property credit to the initial owner equal to the value of the property at the time of transfer. In ***Philogene v. Delpe-Philogene***,[78] one party owned a home before the marriage, which was transferred into joint names soon after the marriage. The Appellate Division affirmed the trial court's grant of a credit to the original owner of the value at the time of the transfer as her separate property, holding: "Even though the defendant changed the character of the property from separate property to marital property by placing the marital residence in both parties' names…a separate property credit is not precluded as a matter of law when separate property has been transmuted into marital property…"

- **Authorizations to access digital accounts, including financial accounts, email accounts, social media accounts, etc.**

Note that authorizations to access online financial accounts, social media accounts and other sensitive information are generally not revoked on divorce and will likely need to be changed as soon as possible. In the context of an account owner dying, a uniform law (Revised Uniform Fiduciary Access to Digital Assets Act [RUFADAA]) provides guidance regarding an executor's and trustee's access to electronic records after the death of the account owner. RUFADAA has been introduced or enacted in all 50 jurisdictions: Alabama,[79] Alaska,[80] Arizona,[81] Arkansas,[82] California,[83] Colorado,[84] Connecticut,[85] Delaware,[86] Florida,[87] Georgia,[88] Hawaii,[89] Idaho,[90] Illinois,[91] Indiana,[92] Iowa,[93] Kansas,[94] Kentucky,[95] Louisiana,[96] Maine,[97] Maryland,[98] Massachusetts,[99] Michigan,[100] Minnesota,[101] Mississippi,[102] Missouri,[103] Montana,[104] Nebraska,[105] Nevada,[106] New Hampshire,[107] New Jersey,[108] New Mexico,[109] New York,[110] North Carolina,[111] North Dakota,[112] Ohio,[113] Oklahoma,[114] Oregon,[115] Pennsylvania,[116] Rhode Island,[117] South Carolina,[118] South Dakota,[119] Tennessee,[120] Texas,[121] Utah,[122] Vermont,[123] Virginia,[124] Washington,[125] Washington D.C.,[126] West Virginia,[127] Wisconsin[128] and Wyoming.[129]

RUFADAA takes a three-tiered approach:[130]

1. Directions given via a provider's online tool that can be modified or deleted at all times (for example, Google's "Inactive Account Manager," or Facebook's "legacy contacts") prevail over any other direction in a will, trust, power of attorney or other record;

2. If the user has not utilized an online tool, or if the custodian has not provided one, a user's direction in a will, trust, power of attorney or other record prevails; and

3. In the absence of any direction, the generic terms of service agreement (TOS) controls, which might provide that the account is terminated at death, and all data is deleted.

Accordingly, in order to avoid a provider's generic TOS Agreement potentially controlling, it is important to use a provider's online tool, if one is provided, to keep that designation updated during lifetime, particularly in the event of separation or divorce, and to address these issues in estate planning documents, which are also appropriately updated.

B. Analytics are Key to Best Position Clients in Negotiations

When an individual is faced with divorce, a global asset summary report, including cash flow projections and risk assessment, can provide important data analytics to best position advisors at the negotiating table and beyond.

- **Dividing up the Assets.** Often the non-monied spouse has not been involved in making investment or financial decisions – he or she may not be savvy with financially related matters, so a large inflow of cash or investments resulting from a divorce settlement can be overwhelming. The monied spouse will be concerned about the impact of a settlement on his or her lifestyle. It will be important to evaluate all assets and forecast whether assets will be sufficient to meet needs.

- **Global Summary of Assets.** A broad-based investment planning analysis can examine portfolio sustainability, the effect of cash flows (alimony/child support), incorporate tax implications, and optimize the investment portfolio allocation. All marital assets should be analyzed, including stocks, bonds, alternatives, homes, real estate investments, and any other asset that has value, liquid or illiquid. This type of analysis is very useful in settlement negotiations, as well as ongoing financial planning after a divorce. In particular, the monied spouse often has multiple tranches of assets with various investment advisors that can be simplified on one detailed global report, which can be helpful in dividing up assets for a proposed settlement.

- **Risk vs. Return.** It is important to look not only at each individual asset, and its risk and potential return characteristics, but also to analyze how the comprehensive portfolio of assets comes together for total risk, total return and portfolio efficiency. An analysis of raw data compiled and categorized into various risk/return buckets with income and cash flow projections can give the non-monied spouse comfort that the financial side of his or her life will be in order.

- **Asset Characteristics Matter.** Assets that may have similar values do not necessarily have similar characteristics: some produce income, some are designed to grow. In a divorce situation, analyzing asset characteristics can help determine how the assets should be divided based on much more than value. Also, how an asset is titled and in what structure it is held may have a significant impact from a tax or long-term growth perspective.

- **Portfolio Sustainability**. Income from an investment portfolio is typically foundational for cash flow in a divorce situation. It may be important for the portfolio to sustain a certain

dollar amount of cash flow over time. It is also important to understand the probability that the assets will last a lifetime and support a desired standard of living given a particular set of cash inflows (alimony, child support, salary, etc.) and outflows (education expenses, living expenses, taxes, etc.). Completing an analysis of all assets and providing the probability that the assets will last a lifetime, along with detailed cash flow expectations broken out on a year-by-year basis, allows for planning well into the future.

- **Cash Flows.** There can be many moving parts and changing cash flows from year to year. For example, it may be important to account for cost-of-living adjustments in an individual's living expenses or anticipate a lump sum expense expected several years into the future. Drilling down into a very detailed cash flow analysis can be particularly helpful in budgeting, planning, and instilling confidence in financial stability.

- **Tax Impact.** It is important to incorporate tax considerations associated with future planning and investing. A thorough tax analysis should include the impact on investment income, salary, inheritance, and funds from any other sources, with the ability to adjust tax rates in the future as tax and financial situations evolve. If applicable, it is important to review the tax deferred growth of retirement assets, including actuarial calculations for required minimum distributions.

- **Optimize Portfolio Allocation.** In order to determine the appropriate portfolio investment allocation, an individual must understand the risks of investing. Although most investors are typically concerned with potential loss of portfolio value, complicated financial industry risk measures like "standard deviation" can be hard to understand. It is often illuminating to demonstrate stress testing the portfolio for multiple market scenarios (like a market downturn – which will resonate with many given the coronavirus impact on the markets – or a terrorist event) to ensure the portfolio can withstand a shock and set expectations appropriately. With cash flows, tax considerations and risk profile accounted for, a skilled advisor can optimize investment allocation to maximize return for an appropriate level of risk.

VII. Use of Leverage: Credit Solutions During Divorce

Leverage may be very useful in a divorce proceeding. There are many instances in which the marital estate being divided is comprised of assets that do not lend themselves to easy division and the remaining assets are not sufficient to make both spouses whole. This might occur in cases including:

- Closely-held business interests
- Partnership interests
- Real Estate (personal and investment)
- Artwork and other collectibles
- Private market interests with liquidity restraints
- Aircrafts, watercraft

In these circumstances, custom credit and leverage solutions can potentially provide the necessary liquidity to effectuate the asset division without major disruption to ownership of the underlying assets. Credit solutions can be tailored to the need, whether it is short-term borrowing with lines of credit or longer-term borrowing through defined term loans.

VIII. Can Trust Assets be Accessed in Divorce?

An key question for advisors is the extent to which trust assets can be considered in a divorce proceeding. Whether included in determining how marital assets are divided or factored into the calculation for alimony or child support, the driving inquiry is whether trust assets are reachable.

To determine whether trust assets are considered marital property, the key question is generally whether the interest of the beneficiary spouse is a property interest that can be considered an asset under the relevant state's law. If so, the methodology used to value the trust interest will be situation-specific, and can also depend on state law. Note that trust interests are routinely valued for transfer tax purposes based on actuarial calculations, and that may be one approach to consider.

Even if excluded from the marital estate for division purposes, the trust may be considered in determining alimony and child support obligations. If a beneficiary spouse was receiving trust distributions on which the family relied for support, the issue is whether those distributions can be factored into the court's analysis.

From separate property states (where a spouse's assets acquired via gift or bequest are generally protected from division in divorce) to all-property states (where a court can divide all assets of the spouses, irrespective of how received), to equitable distribution or community property regimes within those states, the law across the country is highly state-specific. While much will depend on state law in terms of whether a beneficiary's interest can be considered in a divorce proceeding, the starting point will be to determine the nature of the trust interest. Trusts created by third parties (that is, not created by a spouse) in which the beneficiary does not have access or control will afford the strongest protection. It will be foundational to review the trust terms.

A. Start with the Trust Terms

The less certain it is that a beneficiary spouse will receive trust distributions, the less likely a court will find that the trust assets are reachable in divorce. Whether a beneficiary spouse can access the trust is dependent on a number of factors:

1. Who created the trust?

Courts are less likely to consider an irrevocable trust created by a third party as part of the marital estate. The trust principal will not typically be subject to division if the spouse beneficiary is not able to access the trust assets, but a claim for alimony or child support can potentially succeed if there has been a pattern of reliance on trust distributions to support the martial lifestyle. Third party trusts that are revocable are generally treated as mere expectancies since a beneficiary's interest is extinguishable. ***In re Marriage of Githens***, the Oregon Court of Appeals held that a husband's beneficial interest in his mother's revocable trust, which was revocable at his mother's

whim, was too speculative to be considered "property" that could be divided in a dissolution case.[131] While a revocable trust created by a party to the marriage should not have any impact on the division of the marital estate since the grantor spouse can modify or revoke the trust at any time, it can be useful to create a revocable trust before marriage to help clearly distinguish separate property from marital assets, and can minimize the risk of commingling or transmutation.

2. Who are the beneficiaries?

If the trust includes a class of beneficiaries, including multiple people over current and future generations, as opposed to the beneficiary spouse being the sole beneficiary, it will be less likely that the beneficiary spouse will receive trust distributions. Since the timing and amount of any potential distribution is difficult to ascertain, particularly if the class of beneficiaries is left "open" (i.e., the class includes beneficiaries not yet born, such as future issue, leaving the number of potential beneficiaries undeterminable), it is less likely the trust interest will be reachable in divorce.

3. On what basis can trustees make distributions?

The more likely a trustee is to make distributions to a beneficiary spouse, the more likely the trust assets will be considered in a divorce proceeding.

a. Check the trust language:

Trust distribution language that *requires* the trustee to make distributions (the trustee "shall," "must" or "will" pay) causes trust assets to be more vulnerable to attack in divorce than trust distribution language that gives the trustee discretion about whether to make distributions (the trustee "may," or "can"). Mixing distribution standards can lead to confusion: For example, providing that a trustee "shall" make distributions in its sole discretion.

If a trustee is required to pay income or principal to a beneficiary, that beneficiary will likely have the right to compel trust distributions in accordance with the trust terms, and the assets to which that beneficiary is entitled may be factored into the divorce balance sheet. Often, a trust can combine mandatory and discretionary provisions (for example, a trustee may be required to pay all income to a beneficiary while principal distributions remain discretionary with the trustee). In that case, the mandated distributions might be considered a resource in a divorce proceeding while the uncertain discretionary expectancy might not.

b. What is the standard pursuant to which trustees can make distributions?

If a trustee is given broad authority to make distributions within its sole discretion, the timing and amount of distributions is uncertain; no beneficiary is *entitled* to distributions. It is less likely a court will find such a discretionary interest reachable in divorce than if the trustee's ability to pay out to a beneficiary was linked to a so-called "ascertainable standard." A common ascertainable standard is health, education, maintenance and support. That standard tracks language in the IRC and is often used to avoid an adverse tax consequence. An ascertainable standard bestows upon a beneficiary the right to compel a trustee to make distributions in accordance with that standard, which might make those distributions accessible in divorce. In contrast, if the trust contains a broad discretionary standard, a beneficiary ordinarily will only have a claim against the trustee if that beneficiary can demonstrate the trustee has abused its discretion – a formidable standard.[132]

A seminal case on the significance of a broad discretionary standard is the Massachusetts case of ***Pfannensteihl v. Pfannenstiehl***.[133] A trust created by husband's father after husband's marriage named an open class of beneficiaries, composed of father's living issue, which at the time of trial totaled 11 people. The independent trustees could make income and principal distributions, equally or unequally among all beneficiaries, in their sole discretion, to provide for the beneficiaries' comfortable support, health, maintenance, welfare and education. The trustees had made irregular and unequal distributions, including not making any distributions in some years. Specifically, from 2004-2007 the trustees did not make any distributions. From 2008-2010, the trustees made regular distributions to the husband and his siblings. The trustees did not make any further distributions to the husband after the divorce complaint was filed, although they continued to make distributions to the husband's siblings. The lower court initially held that the husband had a one-eleventh interest in the trust, and awarded the wife a portion of it. The decision was reversed on appeal, with the appellate court finding that the husband's interest was too speculative: the interest in a completely discretionary trust was nothing more than an expectancy, and was not assignable to the marital estate. Fundamental to the courts determination were the facts that the class of beneficiaries was open and generational in nature (rendering the husband's one-eleventh interest susceptible to further reduction), the trustees' distribution discretion was broad, it could be exercised unequally among beneficiaries, it was in fact exercised unequally in the past, and the trust contained a specific provision that the settlor's "overarching intent" was that the trust assets would not be treated as marital property or counted as assets available to a beneficiary in a divorce action.

Importantly, in ***Pfannensteihl***, the court noted that because the trial judge determined to divide the husband's trust interest, the judge did not use any future stream of income from distributions in assessing alimony, and did not award alimony. The appellate court noted that, since it concluded that the trust should not have been included in the divisible marital estate, it may be appropriate on remand for the judge and the parties to revisit whether alimony was now appropriate.

Notably, if a trust provides for principal to be distributed at certain ages, once the money is paid out of the trust (unless a technique for preventing that, such as decanting, is successfully implemented), the trust protection will be lost completely, and those assets will be treated as owned by the beneficiary.

4. Is there a "spendthrift" provision?

A spendthrift clause is commonly inserted in trust documents as a form of creditor protection. It circumvents a beneficiary's creditors, which can include an ex-spouse, from accessing trust assets while they remain in trust. It prohibits a beneficiary from pledging, assigning, selling or transferring his/her interest in the trust and provides that a beneficiary's interest will not be subject to that person's debts or liabilities. In essence, creditors must wait until a distribution is made to a beneficiary to assert any claims against those assets.

This is an example of a spendthrift clause:

> *No individual interested in the income from and/or principal of any Trust shall pledge, assign, transfer, sell, or otherwise dispose of any portion or all of such income and/or*

principal, or have the power to anticipate, charge or encumber any portion or all of such income and/or principal, and no interest in such income and/or principal shall be subject to the debts, liabilities or obligations of such individual.

Some states preclude any beneficial interest in a trust that is subject to a spendthrift provision from being classified as marital property.[134] Depending on the state, however, alimony and child support may be treated differently, and trust funds may be factored into the analysis despite the presence of a spendthrift clause. Indeed, a spendthrift clause does not necessarily prevent a court considering a trust interest as part of the marital estate and, although that interest itself may be not be reachable, equalizing with assets outside the trust.

In ***Levitan v. Rosen***,[135] a decision that has been found troublesome by many practitioners, the issue before the Massachusetts Court of Appeals was whether the wife's beneficial interest in an irrevocable discretionary trust governed by Florida law, which contained a spendthrift provision, was includable in the marital estate for equitable distribution purposes. The wife also had the right to withdraw five percent of the trust principal annually, which she exercised consecutively for three years. The wife was the sole beneficiary of the trust, clearly showing the settlor's intent to benefit her exclusively, and she had received trust distributions in the past. The court was not persuaded by the fact that an absolute discretion standard governed, so that the wife did not have a *right* to future distributions. The court included the wife's entire interest in the trust as part of the marital estate subject to equitable distribution, despite finding that the wife's interest was protected by the spendthrift clause, including her five percent withdrawal right since that right was expressly subject to the spendthrift provision. The court circumvented the spendthrift clause by assigning the wife's trust interest to her exclusively, leaving it to the trial judge to distribute the remaining marital property, in his discretion.

In ***Smith v. Smith***,[136] the Supreme Court of Minnesota held that a beneficiary of a spendthrift trust who had an unqualified present right to withdraw certain amounts of trust principal at specified ages (one-third at age 35, two-thirds at age 40 and all at age 45) could, by a stipulated property settlement in a divorce proceeding, make a binding and enforceable agreement to transfer to the other party at a future date such portion of the principal of the trust assets as he, at the time of the agreement, had the unqualified right to presently possess and own. According to the court, the enforcement by court order of a provision of a divorce decree embodying this stipulation does not violate the settlor's intent with respect to the spendthrift provisions of such trust.

Some courts have omitted discretionary interests in spendthrift trusts from the marital estate for division purposes, but have taken those interests into account for alimony purposes.

It may also be possible to move a trust to different jurisdiction to circumvent a spendthrift provision, as was successfully accomplished in the ***Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998***.[137] Under California law, a spendthrift clause does not a prevent a claim for child support against trust assets, but under South Dakota law a creditor cannot compel child support payments from spendthrift trusts. In the ***Cleopatra*** case, trusts that contained spendthrift provisions were moved from California to South Dakota to circumvent an order of a California family court directing the trustees to pay child support from trust funds.

Cleopatra Cameron's father created trusts for her benefit that were governed by California law. Cleopatra subsequently married in 2005, living in California with her husband and two minor children until her husband filed for divorce in 2009. In 2012, in her capacity as trustee, Cleopatra moved the trusts from California to South Dakota, a corporate trustee was ultimately appointed and stopped making child support payments to husband. The Supreme Court of South Dakota confirmed that, while the obligation to pay child support was determined under California law and very much intact, it was South Dakota law that determined whether the order could be enforced. According to the Supreme Court, full faith and credit considerations are not implicated in the means of enforcing judgements, and the South Dakota court was not required to submit to a California order compelling trust payments that were expressly prohibited under South Dakota law.

5. Does a beneficiary have control powers?

The greater the powers of a beneficiary to exert control over a trust, the greater the likelihood that a court will consider the beneficiary's interest in a divorce proceeding. Common features frequently inserted in trust agreements to give a beneficiary some measure of control without triggering adverse tax consequences include the beneficiary's acting as trustee (while not being permitted to make discretionary distributions to himself or having other powers that have negative tax implications), having the power to remove and replace trustees or other advisors or having a so-called power of appointment. A power of appointment allows a beneficiary to direct the disposition of trust assets. A testamentary power of appointment can be exercised only at death, whereas a lifetime power of appointment could allow the appointee of the power to redirect trust assets at any time. Depending on the terms of the power, a spouse who has a lifetime power of appointment might be able to exercise substantial control over the trust assets, potentially making those assets more vulnerable in divorce. Even a testamentary power has been used to argue that a beneficiary had a level of control over trust assets.

In ***Matter of Nerbonne***,[138] the parties to the marriage funded a Family Trust with marital assets, including liquidated investments and funds from a buy-out package the husband received from his employer during the parties' marriage. The Supreme Court of New Hampshire determined that the trust was a marital asset because the parties retained extensive rights and powers to control the trust and trust funds since the wife was trustee and a beneficiary of the trust and the husband as grantor had the power to remove the wife as trustee at any time and for any reason. Furthermore, the wife as trustee had the ability to distribute funds to herself for her health, maintenance, support and education, appoint a special trustee who could, without limitation, distribute some or all of the trust funds to the wife as beneficiary, and amend or terminate the trust for any reason. Since the trust was a marital asset, the court remanded the case for the trial court to determine an equitable division of the trust.

6. Is the settlor's intent clear?

Under common law principles and the Uniform Trust Code (UTC), it is axiomatic that the settlor's intent is paramount. In ***Pfannensteihl***, the court noted that the settlor's "overarching intent" was that the trust assets would not be treated as marital property or counted as assets available to a beneficiary in a divorce action. In ***Tannen*** (discussed below) the settlor's stated intent in the trust

document was that the beneficiary should not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution.

7. Who is the trustee?

If an independent, neutral trustee is acting, particularly a corporate trustee, this usually removes even the appearance of impropriety and can circumvent the suspicion that a family member/friend acting as trustee is manipulating trust distributions for the benefit of a trust beneficiary.

B. Consider the History of Trust Distributions

A court can consider the history of trust distributions to identify any patterns and consider whether couples have used trust funds to support their lifestyle. In other words, have trust distributions "become part of the fabric of the marriage?"[139]

In the leading New Jersey case ***Tannen v. Tannen***,[140] the wife's parents established an irrevocable trust for their daughter's sole benefit, with an ascertainable distribution standard. The trustees, in their sole discretion, could make distributions for the wife's health, support, maintenance, education and general welfare as they determined would be in her best interest, after taking into account her other financial resources, which the court found could include alimony and child support. The trust had paid for certain marital expenses during the marriage, including real estate taxes on the marital home, home improvements and private school for the children. The lower court imputed a $4,000 monthly trust distribution to wife, ordered the trust to make that payment, and to continue making the other marital trust payments. The Appellate Division reversed.

The appellate court's driving inquiry was whether the wife's interest was an "asset held by" her or whether she had "control" over the trust's income generation or "the ability to tap the income source." The court noted there was no history of distributions to the wife, and pointed to the settlor's stated intent in the trust document that the wife should not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution. The trust also contained a spendthrift provision. The court interpreted the fact that the wife had yet to receive a distribution from the trust, which had been in existence for seven years, as evidence that the wife did not have control over the trust or access to trust income. While acknowledging that decisions in other jurisdictions do not reflect unanimity (different courts making distinctions between whether the beneficial interest in a trust is an asset or whether it is reachable by a spouse seeking the payment of child support or alimony already awarded), the Superior Court of New Jersey, Appellate Division, concluded that the trust assets would not be included in the marital estate or used to reduce the wife's claim to alimony or child support. The appellate court also held that the trial court had no power to order the trustees to make a distribution and that the trustees were not proper parties to the litigation. The Supreme Court of New Jersey affirmed the decision.[141]

C. Courts can Consider the Value of a Trust Interest

Generally, the corpus of an irrevocable trust is not considered marital property subject to division in divorce, but if either spouse has a beneficial interest in the trust, that interest can be divided.[142]

The relevant question is whether a spouse has an interest in the trust's assets or control over them, not the source of the trust assets.[143]

Even if a spouse's assets in a trust are not included as marital property, the court may still consider the value of trust assets when awarding marital property to each spouse. In ***In re Marriage of Holman***,[144] the Illinois court noted that, in apportioning the marital property, the court is directed specifically to consider the "value of the property set apart to each spouse."[145] The court held that factor especially important in this case, noting that the wife received a significant amount of nonmarital trust property from her predeceased first husband. According to the court, the wife's significant amount of nonmarital property justified an award of most of the marital property to the husband.

D. Trust Assets May Impact Alimony and Child Support Payments

The settlor's intent, conditions placed on trust distributions, the frequency of distributions, and the beneficiary's ability to access trust funds will also impact whether a nonbeneficiary spouse can access trust assets for alimony and child support payments. As seen in ***Tannen***, one way a settlor can give guidance to the trustee regarding distributions is by making a distribution conditional on the trustee considering the other financial resources available to the beneficiary. If history reveals that no distributions have been made to a beneficiary, that strengthens the position that trust assets should not be considered as a resource available to the beneficiary spouse.

On the other hand, if a divorcing spouse can access trust funds and receives distributions, a court may consider those distributions, and the expectancy that they will continue, when calculating alimony and child support, particularly if the distributions have funded a couple's lifestyle. In the New York case of ***Alvares-Correa v. Alvares-Correa***,[146] the court explicitly stated: "A party's interests in trusts can be taken into account when making maintenance and child support awards." The court considered husband's trust interests in determining whether he would be able to afford maintenance and child support, although his interest in the trust property was not evaluated for equitable distribution purposes. Indeed, the burden was on the husband to show that the extensive trust assets were not available to him. The trial court found that the husband had not met that burden, and the appellate court found no reason to disturb that finding. Not only was the husband a vested beneficiary of the four trusts at issue, he also had a power of appointment, which allowed him to direct the distribution of the trust assets. The court found that the husband had control and management over the trust assets and, pursuant to the trust documents, had "complete and unfettered access to those funds."

In ***In re Marriage of de Guigne***,[147] a husband was ordered to pay child and spousal support that exceeded his total monthly income. Husband was born into wealth and social prominence and he and his wife lived an opulent lifestyle, although neither was employed. The court found it more consistent with the statutory principles of child support in California to consider all of husband's assets in determining his earning capacity, including income from securities holdings and family trusts.

In ***Guagenti v. Guagenti***,[148] the Court of Appeals of Ohio determined that, even though the corpus of an irrevocable trust established by husband's father was not an asset belonging to either spouse, the court could take into consideration income the husband received for the purposes of calculating child and spousal support.

Similarly, in ***D.L. v. G.L.***,[149] a Massachusetts Appeals Court found a husband's interests in certain trusts too remote or speculative to be included within the marital estate, while considering fixed and recurring distributions of income for purposes of determining alimony and child support. According to the trial judge, other than for income payments, that trusts had "never been part of the fabric of [the] marriage."

In ***Sullivan v. Sullivan***,[150] husband was a beneficiary of a trust that provided that no interest of any beneficiary shall be subject to claims for alimony or support. The trust distributions husband received were deposited into a joint bank account held by him and his wife, which was the same account from which the family's bills were paid. The trust distributions were used to purchase cars for the wife and the parties' children, to pay for the children's private school and college tuitions, to renovate the marital residence, and to rent a second house where the family resided for a period. Since the trust distributions were deposited into a joint account and used for family expenses, the court concluded that the evidence was sufficient to prove that the trust distributions had been "used regularly for the common benefit of the parties during their marriage." The Civil Appeals Court of Alabama affirmed the trial court's divorce judgment that the wife was entitled to 25% of any distribution that the husband actually received from the trust.

E. Trusts Created by the Parties to the Marriage

Trusts created by the spouses themselves, instead of third parties (parents, grandparents, etc.) are also common. The parties might not realize the consequences of transferring marital assets into an irrevocable trust during the marriage - until they are going through a divorce. If a marital asset is transferred into an irrevocable trust, it can lose its character as marital property. If the asset is no longer considered marital property, it may not be considered for equitable distribution purposes, even if the asset was a marital asset prior to the transfer. Where an irrevocable trust is set up for the benefit of third parties and neither spouse is a trustee or has a beneficial interest, it has been held that a court may not dispose of it, even if one or both of the spouses created or funded it.[151] The relevant question is whether a spouse has an interest in the trust's assets or control over them, not the source of the trust assets.[152]

In the Missouri case of ***Loomis v. Loomis***,[153] the wife transferred her life insurance policy to an irrevocable trust that was created during the marriage. The Missouri Court of Appeals, Eastern District, agreed with the wife that the life insurance policy could not be classified as marital property. Since the wife was only the settlor of the trust, not a trustee or beneficiary, the wife had no ownership interest in the life insurance policy. Pursuant to the terms of the trust, upon divorce, husband lost his status as beneficiary, highlighting the pivotal importance of the specific trust terms. The appellate court held that the trust was not a marital asset subject to division because neither the husband nor the wife was a trustees or beneficiary, and neither of them had any ownership interest in the trust assets.[154]

Similarly, in the New York case of ***Markowitz v. Markowitz***,[155] the Appellate Division, Second Department, found that the Supreme Court erred in awarding the cash surrender value of a life insurance policy to the wife. According to the appellate court, although marital assets placed in a trust may be subject to equitable distribution, here the trust was irrevocable, and neither spouse

was trustee with the power to transfer control of the trust assets. Accordingly, the trust assets were unavailable to either party.

In ***Vanderlugt v. Vanderlugt***,[156] the New Mexico Court of Appeals found no community lien interest in the corpus of an insurance trust where neither party had a property interest in the Trust, even though policy premiums came from community funds before the policy became self-funding.

However, where the facts point to unfair behavior, courts have come to a different conclusion.

In ***Kim v. Kim***[157] an Ohio Court of Appeals affirmed a trial court's decision that the cash value of the life insurance policies within a trust were marital property because (1) the premiums were paid for with martial monies and (2) despite the fact the policies were held in trust, husband retained control over the policies and had taken loans again the cash value during the marriage. Husband, a self-identified estate and trust attorney, stated that he personally drafted and executed the trust and named his brother as the trustee. He further testified that although wife was the current primary beneficiary of the trust, once their divorce was finalized, she would be deemed to have predeceased him and their three children will become the primary beneficiaries.

In ***Yerushalmi v. Yerushalmi***[158] the Appellate Division of the New York Supreme Court found that a residence that had been transferred to a trust was still marital property. The parties purchased a marital residence in 1983. In 1995, wife transferred the title to a qualified personal residence trust (QPRT) and the couple continued to reside there. The QPRT had a 23-year term. If wife died before the term ended, the home would be disposed of as part of her estate. If the QPRT terminated after 23 years, the property passed into a further trust. In 2013 husband listed the marital residence for sale. Wife moved to enjoin husband from selling or transferring the residence.

The Supreme Court, upon determining that the marital residence was not a marital asset because it was owned by the QPRT, and not by the parties, denied those branches of the motion. However, the Appellate Division reversed, holding that, since the marital residence was purchased by the parties during their marriage, using marital funds, it was presumed to be marital property. According to the court: "The fact that title had been transferred to the QPRT, *allegedly for estate planning purposes*, while the parties continued to reside at the marital residence, was, under the circumstances here, insufficient to rebut the presumption…" (Italics added). As authority for that proposition, the court cited to ***Riechers v. Riechers***,[159] where the husband established an off-shore trust in the Cook Islands, naming himself, the couple's children and "Spouse of the Settlor" as beneficiaries (wife would cease to be a beneficiary after divorce since she was not designated by name). Although the ***Riechers*** court did not find explicitly that the transaction was a subterfuge to deliberately secret marital assets out of reach of wife, the court held that the value of the irrevocable trust asset was subject to equitable distribution. According to the court:

> "…a cause of action would not lie to set aside the trust since the trust was established for the legitimate purpose of protecting family assets for the benefit of the Riechers family members. Nevertheless, it is clear and unequivocal, that the … Trust [was] funded with marital assets…the question remains, therefore, whether… the value of marital assets placed in an irrevocable trust is subject to equitable distribution? The answer is in the

affirmative…this Court awards to the plaintiff one-half of the value of the marital assets placed in the Cook Islands Trust by the defendant…to wit: $2,000,000."

Certainly, if a trust is created by a spouse into which assets are transferred with the intent to fraudulently defeat the rights of the other spouse, the trust will be set aside.[160]

The court in ***Villi v. O'Caining-Villi***[161] distinguished ***Riechers*** in a case involving a trust that was created by spouses to hold their marital home. The home was purchased by the husband after the marriage with a loan from his parents and was initially transferred into a family partnership where husband and wife each held a 49.5% partnership share and the wife's son from a prior marriage held the remaining 1%. The home was later transferred by the spouses to a Family Trust. The expenses and carrying charges were paid using marital funds. The ***Villi*** court found ***Reichers*** was factually distinguishable in two central aspects. First, in ***Reichers***, the parties were the beneficiaries of the trust established by the husband. Thus, there was some expectation that in consideration of the transfer of marital assets to the trust, the wife would receive some distributions in the future. In ***Villi***, the only benefit received by either party under the trust agreement was the right to reside in the home during their lifetimes. Secondly, by virtue of the manner in which the wife's capacity under the ***Reichers*** trust was defined, upon the divorce of the parties she was no longer the "Spouse of the Settlor," and thus was no longer a beneficiary, although the husband remained a beneficiary who was entitled to receive distributions from the trust. The ***Villi*** court found the ***Reichers*** situation clearly different from the one before them, where the trust agreement explicitly denied either party any right to receive a distribution under any circumstances. Ultimately, the ***Villi*** court found that what the parties accomplished by their transfer of the home to the Family Trust was akin to the making of a gift of the home to wife's son, subject only to the condition that both parties may continue to reside in the home during their respective lifetimes: "Thus viewed, the Home no longer constitutes marital property."

In ***Oppenheim v. Oppenheim***,[162] the court refused to equitably distribute the value of a family trust despite the wife's accusations that her husband "commandeered" the family trust, the funding of which came from assets in her name. The wife pointed out that, although the family trust was ostensibly intended to benefit the parties' children, the husband had the power to discharge the independent trustee, was himself a permissible beneficiary and also had a testamentary power of appointment exercisable in favor of any beneficiary, not just the children. Notably, the wife never challenged the validity of the family trust, nor sought to set it aside. Rather, she sought equitable distribution, not of the actual funds held by the family trust, but of funds of that value from her husband's other assets. The appellate court gave deference to the trial court's credibility assessments and agreed that the creation of the family trust and the terms of the trust itself did not support the wife's contentions that the husband acted inequitably in regard to the trust's formation. Although the trial court found it "troubling" that the attorney who created the trust communicated "for the most part" only with the husband, it ultimately found that the husband kept the wife informed during the process and that the wife was fully aware of the source of funding and the trust's anticipated tax implications. The wife reportedly later sued the attorney for malpractice. This case serves as an important reminder that it may be prudent to include in engagement letters that, when an attorney is planning for spouses, the advice is rooted in optimizing planning for the spouses as a married couple, which does not necessarily mean that the planning will be equally fair to both in the event of divorce.

F. Definition of "Spouse" is Key

Note the importance played by a trust agreement's definition of the term "spouse/wife/husband." Some documents make it clear that a divorced spouse will cease to be a beneficiary, either by using a "floating spouse" concept (the spouse to whom the trust creator is married from time to time is the beneficial spouse, a flexible definition that can adjust and readjust after divorce and remarriage), or by naming a particular spouse, provided the spouse and the trust creator remain married. In the absence of guidance in the document addressing divorce or requiring that the parties remain married, courts can search for the creator's intent by examining the trust provisions.[163]

In ***Ochse v. Ochse***,[164] the court had to interpret the word "spouse" in a trust instrument. The grantor named her son's "spouse" as a beneficiary. At the time of the trust's creation, the son was married to his first wife, but they later divorced after thirty years of marriage, and he subsequently remarried. The issue was whether the settlor intended the term "spouse" to mean her son's spouse at the time she created the trust or if the term "spouse" was intended to describe a status, not an individual, since the first spouse was not specifically named as a beneficiary.

After much litigation, the Court of Appeals of Texas finally affirmed that the term "spouse" referred to the son's first spouse at the time of execution, and not a class of persons that would include the second spouse. The court was not persuaded to view "spouse" as a status or class gift, finding that interpretation failed to harmonize the trust's provisions and was inconsistent with Texas precedent regarding the use of class gifts. This prolonged litigation could have been avoided by carefully defining "spouse" to prevent ambiguity.

G. Marital Trusts can Impact Premarital Planning

In ***Crawford v. Crawford***,[165] the Indiana Court of Appeals held that a joint revocable trust amended a couple's premarital agreement. A day before their wedding, the husband instructed wife to go to his lawyer's office to sign the premarital agreement, which set forth their individual assets and provided that neither had interest in the property of the other during their marriage, divorce, or death. When the parties were married, wife was seven months pregnant and working at husband's dental practice. Wife sold her house and the proceeds were deposited into husband's dental practice checking account. Wife's other assets were lost in a fire. Twelve years after they wed, the parties jointly executed a trust, naming husband and wife co-trustees and lifetime beneficiaries and funding the trust with all their property. The trust did not acknowledge the premarital agreement. At the time the trust was executed, husband had retained most of his premarital assets.

The trial court found, and the appellate court agreed, that the trust trumped the premarital agreement, being later in time and totally contrary in philosophy and intent to the premarital agreement. In particular, according to the appellate court, the trust pulled the parties' separate premarital estates into the trust, providing the parties with joint and equal control over all the assets transferred into the trust.

This case is another important reminder of how important it is for trusts & estates and family lawyers to collaborate and insure marital trust planning dovetails with premarital planning.

H. Asset Protection Trusts

A trust specifically designed for asset protection can present additional formidable obstacles for creditors, including an ex-spouse. As previously noted, in most jurisdictions, it is not possible for a person to create a trust for themselves and protect the assets from their creditors. Under the laws of an increasing number of jurisdictions, however, including Delaware, an asset protection trust (APT) generally limits the ability of an individual's creditors to reach the trust assets, while allowing the creator of the trust to remain a trust beneficiary. Creating an APT in a different jurisdiction forces a creditor to initiate an action outside the settlor's home state where the creditor is likely situated, creating additional hurdles to bringing suit. Delaware is often the jurisdiction of choice because of its attractive laws and the fact that it was one of the first jurisdictions in the country to enact domestic asset protection laws over two decades ago. The creator of an APT need not live in the state whose laws govern the trust, but does need to appoint a resident trustee.

A very limited number of creditors can pursue claims against a Delaware APT (DAPT). In the family context, a spouse, former spouse, or minor child who has a claim resulting from an agreement or court order for alimony, child support, or property division incident to a judicial proceeding with respect to a separation or divorce may reach the assets of a DAPT,[166] but a spouse whom the client marries after creating the trust may not take advantage of this exception.

I. Uniform Trust Code Creates Exception Creditors

For those states that have adopted the Uniform Trust Code (UTC), §504 (b) establishes the general rule, which forbids a creditor from compelling a distribution from a discretionary trust, whether or not the trust contains a spendthrift provision, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under UTC §504 (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary.

UTC §504 (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary.

Note that the UTC creates an exception to a spendthrift clause for creditors who have a judgment for support that they are trying to enforce against the beneficiary's trust interest. That is different from the question as to whether a court will consider a beneficiary's interest in a trust for the purposes of determining spousal support. Note also that some states, like California, have adopted the UTC provision, which explicitly excepts children, spouses, or former spouses with support orders. Other states, like North Carolina[167] and Texas,[168] limit the exception from creditor protection to a beneficiary's child who has a judgment or court order, omitting the exception for a spouse or former spouse. In Ohio, exception creditors are limited to children and the current spouse only; a spendthrift provision is enforceable against the beneficiary's former spouse.[169]

Other states, including Delaware, provide significantly greater protection for discretionary trust beneficiaries. When determining trust situs for clients, practitioners should give careful attention to the protections afforded by different state's laws.

Lessons learned for analyzing if a trust is vulnerable to attack in divorce:

The following factors have shown to provide the greatest protection against a future ex-spouse:

- Being prepared before marriage with a prenuptial agreement can shield trust assets in the event of divorce. The requirements for enforceable prenuptial agreements can vary with state law, but they should be signed as far in advance of the marriage as possible and generally require that:
    - The agreement is fair and equitable when signed, and potentially at the time of enforcement as well;
    - There has been full and adequate disclosure;
    - Each party has been represented by competent counsel.[170]
- Shielding separate property in a revocable trust before marriage can help clearly distinguish separate property from marital assets, and can minimize the risk of commingling or transmutation.
- Trust terms are critical, and these features have helped insulate a trust from attack:
    - A trust standard with broad, unfettered discretion
    - An open class of beneficiaries (instead of one beneficiary)
    - A detailed spendthrift provision
    - An independent corporate trustee
    - Requiring a beneficiary's spouse to waive marital rights to trust assets each time the beneficiary is eligible to receive a principal distribution, before the distribution can be made
    - Prohibiting the trustee from making distributions to any beneficiary who is married without a prenuptial agreement
    - If a trust is created during the marriage by one of the parties, subject to not jeopardizing a marital deduction for tax purposes:
        - defining spouse as the spouse to whom the trust creator is married at the time a distribution is made, so the definition self-adjusts with a new marriage;
        - requiring that the parties be married for the trust creator's spouse to be a potential trust beneficiary.

IX. Trust Decanting Can be a Powerful Tool: Revising an Otherwise Irrevocable Trust

When irrevocable trusts are drafted in happier times, and then times change, is it possible to reduce or even eliminate the interest of an ex-spouse or soon to be ex-spouse? Trustees potentially have access to powerful tools that might change beneficial interests. Indeed, it might

be said that there is no such thing as an "irrevocable" trust. In any event, advisors should counsel clients to investigate the options.

"Decanting" is a technique that allows the trustee of an otherwise irrevocable trust to transfer the trust assets into a new trust with different terms. The rationale behind decanting is that a greater power should include a lesser power: If a trustee can make outright discretionary distributions to a beneficiary, then the trustee should also be permitted to do something less than an outright distribution and instead distribute trust assets into another trust for that beneficiary. Decanting can be a tremendous tool for dealing with changed circumstances, correcting mistakes, facilitating tax benefits or optimizing a trust's administration. In the divorce context, a trustee might be able to use the decanting technique to limit a beneficiary's interest, or even eliminate a beneficiary.

Uses of decanting include:

- Limiting a beneficiary's rights or eliminating a beneficiary
- Trustee changes
- Changing investment limitations

Ferri v. Powell-Ferri,[171] is a recent example of the power of decanting in the divorce context. Trust assets were successfully moved out of reach of a divorcing wife, although they were considered for alimony purposes**.** Husband was the beneficiary of a trust (the 1983 Trust) created by his father under which he had the right to receive the trust assets at certain ages. The trust was valued between $69 – $98 million. The trustees, who were concerned divorcing Wife would reach trust assets, transferred the assets to a new trust (the 2011 Trust) without the knowledge or consent of Husband. At the time of the creation of the 2011 Trust, Husband had a right to request outright 75% of the 1983 Trust assets, and during the course of the legal proceedings, his right matured to 100%. The new 2011 Trust extinguished Husband's power to request trust assets at stated ages, making distributions solely discretionary with the trustees. Wife had filed to dissolve the marriage in Connecticut. The trusts were settled in Massachusetts. The Connecticut Supreme Court asked the Supreme Judicial Court of Massachusetts to determine whether the trustees, one of whom was Husband's Brother, validly exercised their powers under the 1983 Trust to distribute the trust property to the 2011 Trust. The Massachusetts Court determined that since Father, who created the 1983 Trust, intended to convey to the trustees almost unlimited discretion to act, the decanting was authorized. The Massachusetts Court did not rule on whether the trust assets must be considered in the divorce, including for alimony purposes.

The Connecticut Supreme Court issued two opinions in the ***Ferri*** matters, one related to the decanting, the other related to the divorce action.

Action for Declaratory Judgment: Decanting was Authorized[172]
The trustees sought a judgment declaring that they were authorized to decant assets to the new trust, and that Wife had no right or interest in those assets. The Connecticut Supreme Court adopted the opinion of the Massachusetts Supreme Judicial Court, and held that the decanting was proper.

The Connecticut Supreme Court did affirm the determination of the Connecticut trial court that Wife had standing to challenge the trustees' actions because their actions regarding the original trust directly affected the dissolution court's ability to make equitable financial orders in the

underlying dissolution action. Under Connecticut law, the 1983 Trust was a marital asset because Husband had an absolute right to withdraw up to 75%, and later 100% of the principal.

Action for Dissolution of Marriage: 2011 Trust not Marital Asset, but Could be Considered in Alimony Determination[173]

The court noted that the Massachusetts Supreme Judicial Court determined that the decanting was appropriate: "Consequently, the assets from the 1983 Trust cannot be considered as part of the dissolution judgment..." With regard to the 2011 trust, because that was a so-called "spendthrift trust" (protected from creditors), it was not considered an asset of the marital estate that the court could divide under Connecticut law. Wife's status was that of a creditor and the court held that, although the court could divide the assets while they were held in the 1983 Trust (Connecticut and Massachusetts, so called "kitchen sink" states, can consider gifts and inheritances received during marriage to be martial property subject to division), it could not reach them once they were moved into the 2011 Trust. The decanting was successful in removing the assets from division.

However, the court noted that, although the trial court could not consider the assets decanted to the 2011 trust for equitable distribution purposes, it could and did consider Husband's ability to earn additional income when creating its alimony orders. The trial court found that the trust funds had routinely supported Husband's investments. Notably, the trial court ordered Husband to pay Wife $300,000 in alimony annually, despite the fact that, when the action was commenced, he had been earning only $200,000 annually.

Some Further Thoughts About Decanting

Note that about half the states, including California,[174] Maryland[175] and New York,[176] provide statutory authority to decant.[177] Most states require that notice be given to beneficiaries. It was important in the ***Ferri*** case that the decanting occurred without Husband's permission, knowledge or consent. Query if the same result would follow if a beneficiary was given notice of the decanting, or whether notice alone would not detract from the Connecticut Supreme Court's holding that Husband took "no *active* role in planning, funding or creating the 2011 Trust" (emphasis added).

Including decanting provisions in trust instruments may maximize flexibility without resort to state default law. Indeed, in a recent New York case, ***Davidovich v. Hoppenstein***,[178] the trustees successfully relied on their powers under a trust document to distribute a life insurance policy on the settlor's life to a new trust that excluded an estranged daughter of the settlor and her issue. Dismissing an objection that the transfer did not satisfy the requirements of the New York decanting statute, the court held that the New York decanting statute had no bearing on the case since the trustees relied on their powers under the document to effectuate the transfer.

In ***Hodges v. Johnson***,[179] however, a New Hampshire court found that trustees had violated their duty of impartiality because they didn't consider the interests of beneficiaries who were removed in decantings. The court found that the decantings were void and ordered the removal of the trustees. Although the court's decision rested on broader grounds, the facts of the case may have influenced the holding: The trial judge found that the trustees decanted the trusts to remove

beneficiaries in three separate decantings at the request of the settlor and commented on the "deeply personal and harsh nature of the decantings." The beneficiaries who were removed were the grantor's second spouse, his stepchildren and one biological child, leaving his other two children as beneficiaries. In each of the three decantings, one of the two individual co-trustees resigned; the settlor's estate attorney was appointed as trustee to replace the trustee who resigned; the co-trustee who remained as trustee delegated his decanting power to the attorney/trustee; and the attorney/trustee executed the decanting documents. Once the decanting documents were executed, the attorney/trustee resigned as co-trustee, and the individual trustee who had resigned was re-appointed. This occurred on three successive occasions.

Perhaps this is just a reminder that trustees must be vigilant about performing their fiduciary obligations, and cannot act at the behest of the settlor or any other individual. Including specific guidance in trust agreements as to why the settlor may wish the trustee to exercise discretion unevenly may be helpful.

X. Other Potential Ways to Modify Trust Distributions: Power to Adjust & Unitrust Regimes

A trustee must invest assets pursuant to the so-called Prudent Investor Rule. Under that rule, a trustee is required to invest for "total return." That is, a trustee must invest in a way that benefits both income and principal beneficiaries. However, when beneficial interests clash - as they typically do in a divorce scenario - the source of return becomes critical, and the tension between investing for income and investing for growth can become more pronounced. Specifically, how does a trustee invest without considering whether return is produced from income or from capital appreciation when the income beneficiary (perhaps a second spouse) is pressuring the trustee for more income and the remainder persons (perhaps children from a prior marriage) are pressuring the trustee for more growth?

Fortunately, there are two regimes that provide trustees with the means to implement the mandate of total return investing - the power to adjust and unitrust regimes. Under a power to adjust regime,[180] the trustee is permitted to make adjustments between income and principal to be fair and reasonable to all beneficiaries. In other words, even if a principal distribution is not permitted under a trust document, or is permissible pursuant only to a very limited standard (like health or education), the trustee can "redefine" a portion of the principal as income, and pay that to the income beneficiary. Under the unitrust regime, the trustee can convert an income beneficiary's interest into a unitrust payout of a fixed percentage of the trust's principal. Most states allow a trustee to determine the appropriate unitrust payout within a band of 3-5%. In a few states, the unitrust payment is fixed. In New York,[181] for example, the unitrust payment is fixed at 4%. In Maryland,[182] 4% is the default, with a different percentage permissible with court order.

These two regimes are intended to ease the tension between competing income and remainder beneficiaries and align interests, so all beneficiaries benefit from the trust's growth, wherever that growth may emanate. Every state in the country has enacted one or both regimes, and every trustee or advisor should be aware of these powerful tools. In the matrimonial context, a trustee might

consider whether to evaluate existing trust terms in the event of divorce to potentially adjust beneficial interests.

Shifting Beneficial Interests by Opting into a Unitrust Regime

In ***Matter of Jacob Heller***,[183] the trustees defended a challenge to their determination to opt into the unitrust regime. Jacob Heller created a trust under his will for the benefit of his second wife, who was to receive income for her life. Decedent's children from a prior marriage were named as remainder beneficiaries, and two of those step-children, the decedent's sons, became trustees.

When Mrs. Heller's two step-sons became trustees of the trust, Mrs. Heller's annual trust payment was $190,000, far above a 4% payout. In 2003, the co-trustees opted into the unitrust regime pursuant to New York law to reduce the payment to their stepmother to 4% *and* opted to make their election retroactive to January 1, 2002 (the date the unitrust regime became effective in New York). As a result of the unitrust election, Mrs. Heller's annual income from the trust was reduced from $190,000 to $70,000. As result of making the election retroactive, Mrs. Heller would have owed the trust $360,000 ($120,000 a year from the date of the 2005 decision, back to each of the three preceding years).

Mrs. Heller commenced a proceeding seeking to annul the unitrust election on the grounds that the co-trustees were also remainder beneficiaries of the trust and conflicted from making that decision, and a determination that the unitrust election could not be made retroactive to January 1, 2002. The court reasoned that the co-trustees owed fiduciary duties to Mrs. Heller as an income beneficiary, but also to all remainder beneficiaries, including the trustees' siblings. The fact that the remainder beneficiaries' interests aligned with the interests of the co-trustees did not disqualify them from opting into the unitrust regime. As such, a question of fact remained as to whether the co-trustees acted reasonably, precluding summary judgment on that issue.

Additionally, since the New York statute allowed a trustee to specify the effective date of a unitrust election, the Court of Appeals held that the co-trustees' retroactive application of the unitrust election was proper. (Note that in some jurisdictions the unitrust election can only be made prospectively.) Since the decision in the ***Heller*** case, New York law has been revised; a retroactive unitrust election is still possible, but only with court approval.[184] In other states, including California, it appears that the unitrust can be exercised only prospectively.[185] A state-by-state analysis is required to determine whether a power to adjust or unitrust election can be made retroactively.

A sampling of state statues is set forth below:

State	Power to Adjust	Power to Adjust Guidelines	Unitrust Regime	Unitrust Regime Guidelines
California	Yes Cal. Prob Code § 16327	No guidelines	Yes Cal. Prob Code §§16335 and 16338	3-5% if trust qualifies for special tax benefit or if the fiduciary is not an independent person, otherwise trustee has latitude to select different percentage
Delaware	Yes 12 Del. C. §61-104	No guidelines	Yes 12 Del. C. §61-106	3%-5% Unitrust
District of Columbia	Yes D.C. Code §28-4801.04	No guidelines	No	
Florida	Yes Fla. Stat. Ann. §738.104	No guidelines	Yes Fla. Stat. Ann. §738.1041	3%-5% Unitrust or 50% of AFR
Maryland	Yes Md. Code Ann., Est. & Trusts §15-502.2	4% floor and ceiling, unless court orders otherwise; must determine Unitrust conversion inappropriate	Yes Md. Code Ann., Est. & Trusts §15-502.1	4% default; different percentage payout permissible with court order
New Jersey	Yes N.J. Stat. §3B:19B-4	3%-5% adjustment presumed fair and reasonable	No	
New York	Yes EPTL §11-2.3(b)(5)	No guidelines	Yes EPTL §11-2.4	4% Unitrust
Pennsylvania	Yes 20 Pa C.S. §8104	No guidelines	Yes 20 Pa C.S. §8105	4% default; different percentage payout permissible with court order
West Virginia	Yes W. Va. Code §44B-1-104	Trustee must first consider power to invade principal or income	Yes W. Va. Code §44B-1-104a	3-5%

Note that even if a divorce action is taking place in one state, a spouse may be a beneficiary of a trust governed by the laws of another jurisdiction, so familiarity with the operation of that other state's power to adjust or unitrust laws may be important. Typically, the state statutes provide a number of factors for a trustee to consider in determining whether or not to make an adjustment or opt into the unitrust regime.[186]

XI. The Role of Life Insurance and Irrevocable Life Insurance Trusts in Divorce

In many divorce proceedings, life insurance plays an integral role as part of the ultimate resolution/settlement, whether it is an asset to be allocated between the parties or is required to be maintained for some period to secure settlement obligations.

Periodic Policy Reviews Can be Critical

It is important to review life insurance policies periodically to ensure they are performing as intended at the best cost, and that the premiums are being paid by the responsible party.

A policy review may uncover some or all of the following factors:

- The interest rate environment could have affected the policy performance, particularly if initial illustrations were run in a different interest rate environment
- Market returns may have underachieved expectations
- Policies issued prior to 2009 are based on 1980 mortality tables. Life expectancies have increased over time which may generate lower premium rates in newer policies
- Newer policies have guaranteed and/or extended Death Benefit Guarantees that may not have been available with the original policy
- There may have been a change in market conditions, the health of the insured or the original intention in purchasing the insurance (for example, to fund education), which may make other insurance options more attractive to consider

Irrevocable Life Insurance Trusts

Utilizing an Irrevocable Life Insurance Trust (ILIT) can be an advantageous way to purchase and maintain life insurance in divorce and other contexts. An ILIT is an irrevocable trust designed to hold ownership of an insurance policy. To create an ILIT, an individual establishes a trust and transfers funds to the trust. The trustee then purchases a life insurance policy payable to the trust upon the insured's death. The primary benefit of using an ILIT is that, upon the death of the insured, policy proceeds pass to heirs free of estate taxes. An ILIT can also hold existing policies transferred to it by an insured. Provided the insured lives for three years following the transfer of the policy, the policy proceeds can avoid taxation in the insured's estate.

Five key questions a family law practitioner should consider when dealing with life insurance

1. **Are premium notices being sent to the correct address and are premiums being paid on time?**

It is critical to ensure that premiums are being paid in a timely fashion. Failure to maintain a policy

can leave the obligor's estate liable to pay the entire amount of the insurance proceeds – but full recovery might not be possible if the estate has insufficient assets. In ***Woytas v. Greenwood Tree Experts, Inc.***,[187] a Marital Settlement Agreement (MSA) required an ex-husband to maintain life insurance policies to secure his child support and alimony obligations. The MSA provided that, if either party failed to maintain the life insurance policy requirements, that party's estate would be liable for any outstanding obligations owned under the agreement. The policy included a "suicide exclusion" barring recovery of benefits if the insured were to commit suicide within two years of purchase, which he did. The New Jersey Supreme Court affirmed that the ex-husband failed to "maintain" life insurance, and therefore breached the MSA, entitling the beneficiaries to payment from the ex-husband's estate for the amount of the unrecoverable proceeds. Since the estate was less than the value of the claim, the court ordered that the entire balance of the estate be paid to the ex-wife.

Similarly, if no one is confirming that the premium notices are being sent to the right address, the result can be disastrous. In ***Orchin v. Great-West Life & Annuity Insurance Company***,[188] the insured's friend and fellow dentist Orchin served as trustee of a trust holding a life insurance policy. He did not miss a single premium payment from 1993 (when the policy was assigned to the trust) through January 2009. In April 2009, Orchin moved his residence. Though he claimed to have told the post office his forwarding address, the insurance company was never notified of this change. It continued to send payment notifications to Orchin's old address, and as a result, Orchin never received them, nor the notices that the policy was in default nor the notice that the policy eventually lapsed.

On January 15, 2010, the insured died suddenly. At this point, Orchin realized he failed to pay the previous premium payments. Omitting to mention that the insured had died, Orchin convinced a supervisor to exercise her authority to make a one-time exception and reinstate the policy.

When Great-West discovered that the insured had died before the insurance was reinstated, they denied the claim. The insured's wife and Orchin brought suit against Great-West for improper termination of the policy and breach of contract, and the insured's wife also brought suit against Orchin for breach of fiduciary duty.

The court held that Great-West's decision to reinstate the coverage was unenforceable. Although "a close question," the court denied Orchin's summary judgment motion because issues of fact remained. Specifically, there were questions regarding whether it was reasonable for Orchin to expect the insurance notices to reach his new address and whether he exercised ordinary diligence.

As noted, if an insurance policy required pursuant to a settlement agreement or court order lapses for failure to pay the premium, there may be a claim against the insured (or his or her estate, if deceased). However, there may not be sufficient assets to satisfy the value of the claim. Accordingly, practitioners might recommend that duplicate premium notices and/or confirmations of payment are sent to the other spouse or another party, or that some other arrangements are made to check that the policy is maintained.

As well as emphasizing the importance of having a reliable policy review mechanism in place to prevent a policy lapse, the ***Orchin*** case also highlights the issue that, when friends or family

members are appointed as trustees, oftentimes they are simply unaware of the myriad of duties to which they are subject. One important step a trustee can take to minimize fiduciary risk is to hire trusted professional advisors who are cognizant of the responsibilities imposed on fiduciaries, and have expertise in fulfilling those responsibilities.

2. Is the Policy Properly Titled from an Ownership Perspective?

If insurance is held in a properly designed insurance trust, the proceeds should pass free of estate taxes to heirs. If, however, a policy is owned by the insured, the proceeds will be includible in his estate, and will be potentially subject to estate tax (in 2020 the top federal estate tax rate is 40% and top state estate tax rates are 16%).

Attorneys may be subject to a malpractice action if insurance is not appropriately titled, and attorneys have been sued for failing to correctly advise clients as to how insurance should be owned. Whether a third-party beneficiary can maintain a malpractice action against an estate planning attorney depends on state law, and most states permit those actions to be brought under the appropriate circumstances. Very few states follow the concept of strict privity, which provides that only the client who suffered the malpractice can maintain an action against the attorney.

A Sampling of How Different States Approach the Issue of Privity

California

In ***Biakanja v. Irving***,[189] the California Supreme Court rejected the strict privity test for professional liability. That court held that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are (1) the extent to which transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

Connecticut

In ***Krawczyk v. Stingle***,[190] the Connecticut Supreme Court noted that determining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy. In addressing this issue, the Supreme Court observed that courts have looked principally to whether the primary or direct purpose of the transaction was to benefit the third party. Additional factors considered include: (1) the foreseeability of harm; (2) the proximity of the injury to the conduct complained of; (3) the policy of preventing future harm; and (4) the burden on the legal profession that would result from the imposition of liability.

Delaware

In Delaware, a beneficiary may sue a testator's attorney where a testator's intent is apparent on the face of a testamentary instrument and the bequest fails solely due to the scrivener's drafting. Where the drafting is correct, yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest's failure at the scrivener's door.[191]

Florida

In Florida, generally, a legal malpractice claim may be brought only by one who is in privity with the attorney. However, an exception exists that permits an intended third-party beneficiary of the legal services to bring suit where "testamentary intent as expressed in the will … [was] frustrated by the attorney's negligence and as a direct result of such negligence the beneficiaries' legacy [wa]s lost or diminished."[192]

Hawaii

In Hawaii, a beneficiary may sue a testator's attorney for failing to draft an instrument that carries out the testator's intentions.[193]

Maryland

In Maryland, strict privity is required to maintain a legal malpractice claim against an attorney. In attorney malpractice cases, absent fraud, collusion, or malice, an attorney is not liable to a nonclient for harm caused by the attorney's negligence in the drafting of a will or planning an estate.[194]

Michigan

In Michigan, a beneficiary may sue a testator's attorney for failing to draft an instrument that carries out the testator's intentions. However, Michigan courts have declined to allow plaintiffs to introduce extrinsic evidence to prove the testator's intent when the trust terms are clear and unambiguous.[195]

New Jersey

In New Jersey, courts have simplified the test for surmounting the privity requirement through reliance, considering the following factors in determining whether the duty undertaken by an attorney extends to a third party not in privity with the attorney: (1) the extent to which [the attorney/client relationship] was intended to affect the plaintiff; (2) the foreseeability of reliance by the plaintiff and the harm it could thereby suffer; (3) the degree of certainty that plaintiff has been harmed; and (4) the need from a public policy standpoint of preventing future harm without unduly burdening the profession.[196]

New York

Until recently in New York, absent fraud, strict privity was required to maintain a legal malpractice claim against an estate planning attorney. Since negligence in the estate planning context is usually not discovered until after a client's death, the strict privity requirement often resulted in the cause of action dying with the client.

In ***Estate of Saul Schneider v. Finmann***,[197] the decedent's estate commenced a malpractice action against the decedent's estate planning attorney, alleging that the attorney negligently advised the decedent to transfer, or failed to advise decedent not to transfer, an insurance policy into his own name. The result was that the insurance proceeds were includable in the decedent's estate and

subject to estate tax. With proper planning, the policy should not have been in the decedent's name, and the proceeds should have passed to heirs free of estate tax.
The New York Court of Appeals held that sufficient privity existed between the personal representative of the estate and the estate planning attorney for the personal representative to maintain a malpractice claim against the attorney on the estate's behalf. According to the court, the strict privity rule leaves the estate with no recourse against an attorney who planned the estate negligently, and the estate essentially "stands in the shoes of a decedent," giving the estate capacity to maintain the malpractice action.

South Carolina

In ***Fabian v. Lindsay***,[198] the South Carolina Supreme Court held that beneficiaries of an existing will or estate planning document may recover as third-party beneficiaries against an attorney whose drafting error defeats or diminishes the client's intent under legal malpractice or breach of contract theories. Recovery is limited to persons who are named in the estate planning document or otherwise identified by their status. The burden of proof for such claims is the clear and convincing standard.

West Virginia

In West Virginia, a direct, intended, and specifically identifiable beneficiary may sue a testator's attorney who prepared the will where the testator's intent expressed in the will has been frustrated by negligence on the part of the attorney so that the beneficiaries' interest(s) under the will is either lost or diminished.[199]

Perhaps the most important lesson is not to rely on a privity doctrine to avoid liability, but for family law attorneys to be cognizant of adverse tax consequences and to carefully consider ownership of insurance policies with estate planning professionals.

3. **Does the Policy Have the Correct Beneficiary Designation?**

Divorced individuals and those in the process of getting divorced should update all their important planning documents, account titles and beneficiary designations to be certain chosen heirs are still appropriate. Of course, during the pendency of a divorce, parties may be prohibited from transacting financial affairs except in the usual course of business for customary and usual household expenses. This prohibition is designed to maintain the status quo and preserve marital property until final determination. Accordingly, clients should change the documents they are entitled to change immediately (in most jurisdictions a Will can and should be changed as soon as possible, subject to state rights and prior agreement), and be poised to change the balance as soon as they are permitted.

In ***Randle v. Farmers New World Life Ins. Co.***,[200] the California Court of Appeal, Second District, held that a life insurance policy's requirements for changing ownership do not control over the provisions of a contract of which the insurer has notice, such as a divorce decree between the insured and insured's spouse addressing rights of the parties under the policy.

What if estate planning documents are not updated following divorce, and an ex-spouse remains

the beneficiary at death? About half the states in the U.S.[201] have so-called revocation on divorce statutes. These statutes can revoke bequests to ex-spouses in wills or other estate planning documents if those documents have not been updated to reflect the divorce at the time of an individual's death. However, half the states in the U.S. do not have these statutes, and even among those that do, not all revoke life insurance designations. ***In re Irrevocable Trust Agreement of Klein***,[202] the court held that, under plain language of an irrevocable trust, which contained no requirement that the parties remain married, the decedent's former spouse was a co-trustee and beneficiary of irrevocable trust. Accordingly, the ex-spouse had standing to file objections to a co-trustee's accounting.

In ***Sveen v. Melin,***[203] discussed above, the Supreme Court determined that the retroactive application of the Minnesota revocation on divorce statute did not violate the Contracts Clause of the U.S. Constitution. That statute specifically revoked life insurance designations of ex-spouses with retroactive application. The court upheld the revocation even though the law was not in effect when the wife at the time was named beneficiary, but later applied to revoke the designation retroactively after the parties were divorced.

Notably, even if a revocation on divorce statue does apply, the statute will be inapplicable during the pendency of the divorce, until the final divorce decree is entered. The key lesson to be learned is not to rely on state default law and to update all estate planning documents and beneficiary designations as soon as possible.

4. Are Taxes Apportioned as Intended?

A case decided in Georgia underscores the importance of having both the correct beneficiary designation and the tax apportionment result that was intended. In ***Smoot v. Smoot***,[204] decedent's ex-wife, Dianne Smoot, was the named beneficiary of life insurance and retirement assets that were included in the taxable estate. The decedent and Dianne had divorced in 2006, but the decedent had not changed any of his beneficiary designations. Having lost a previous action in which the decedent's son from a prior marriage claimed that Dianne was not entitled to the decedent's retirement benefits, the son argued in this action that Dianne was responsible for paying her pro-rata share of the federal estate taxes. The tax apportionment clause in the decedent's will provided for taxes to be pro-rated against those who received property included in his taxable estate.

The court held that federal law governed the tax apportionment concerning the life insurance proceeds. However, regarding the retirement benefits, the court noted that, under Georgia law, "[a]ll provisions of a will made prior to a testator's final divorce…in which no provision is made in contemplation of such event shall take effect as if the former spouse had predeceased the testator..." According to the court, because the will made no provision in contemplation of divorce, the tax apportionment clause had to be construed as if Dianne had predeceased the decedent. Accordingly, the tax apportionment clause did not apply to her, with the harsh result that not only did the ex-wife receive the retirement benefits, but she received them tax-free because her step-son was saddled with the tax liability.

Although some states may have default laws that would have prevented this result (because designations are revoked in the event of divorce or because of default pro-rata tax apportionment

provisions), this case is another stark reminder not to rely on state law but to carefully update beneficiary designations.

5. What is the Value of Life Insurance Policies for Divorce Settlement Purposes?

Oftentimes, parties have existing life insurance policies, the value of which is factored into the division of property between them. Under the right circumstances, practitioners can consider a life settlement: the sale of a life insurance policy to a third-party investor, to raise cash for the divorce settlement. The policy holder can receive cash for the life insurance policy in exchange for the investor taking over the premium payments and receiving the death benefit upon the death of the insured. A life settlement could potentially yield a greater return for the policy holder than surrendering the policy to the insurance carrier for the cash value. The amount of the life settlement depends upon the policy's death benefit and the insured's life expectancy. If the death benefit is substantial and the insured is in poor health, the value of the life settlement will be greater. In comparison, if the death benefit is not very large and the insured is healthy, the value of the life settlement might not be cost effective.

When calculating the expected proceeds from a life settlement, practitioners should be mindful of the tax consequences. The methodology for calculating the basis of life insurance contracts was recently revised under the Tax Cuts and Jobs Act of 2017. The new favorable law provides that no adjustment to basis is made for mortality, expense or other reasonable charges incurred under a life insurance contract.

The tax treatment of life settlement proceeds is generally determined in three tiers:

1. Proceeds received up to the cost basis of the policy are not taxed;
2. Proceeds representing the difference between the cost basis and the policy's cash value are taxed as ordinary income; and
3. Proceeds received in excess of the policy's cash value are taxed as capital gains.[205]

It will be important to value the proceeds from a life settlement after taxes to make sure the transaction is financially sound.

XII. Recent Developments Regarding Genetic Material

With advances in medical technology and sophisticated storage techniques, genetic material – sperm, eggs, pre-embryos, embryos, etc. – can be preserved for increasing lengths of time. What happens if a couple who stored genetic material gets divorced or one of the parties dies? Both possibilities – death or divorce – should be considered.

A. Who Owns Genetic Material in the Event of Divorce?

When couples trying to conceive in happier times have stored genetic material, and they subsequently divorce, does one party have the right to use the stored genetic material? In the divorce context, different states have taken different approaches:

Contractual Approach

When individuals preserve genetic material, they often enter into an agreement, with the fertility

clinic or otherwise, regarding the disposition of that material in the event of certain contingencies, including death or divorce. The contractual approach honors these agreements as an expression of the parties' mutual intent. California and New York, for example, follow the contractual approach.[206]

In California, ***In the re Marriage of Stephen E. Findley and Mimi C. Lee***,[207] a husband and wife made the decision to use invitro fertilization (IVF) and signed a consent agreement, as required by California law.[208] The consent agreement provided that the embryos would be destroyed if the couple were to divorce. The wife challenged the validity of the consent agreement upon filing divorce. Using these embryos was likely her last chance to be a biological mother. The California Superior Court ruled that the consent agreement was a valid and enforceable contract. According to the court, the husband and wife voluntarily and intelligently entered into the consent agreement, and the spouses agreed between themselves and the fertility center to discard the embryos if they divorced while the embryos were in the custody of the fertility center.

In New York, agreements between gamete donors regarding the disposition of their pre-zygotes are generally presumed to be valid and binding and will be enforced in any dispute between them.[209] In ***Finkelstein v. Finkelstein***,[210] for example, a husband and wife signed an agreement with a fertility clinic that permitted either party to withdraw consent to participate in the IVF process. Upon filing for divorce, the husband requested sole custody of the one remaining cryopreserved embryo and revoked his consent to use any of his genetic material. The Supreme Court referred the question of equitable distribution of the embryo to a special referee who narrowly read the consent provisions of the agreement to find the husband could only withdraw consent to the terms of storage of the embryos, but did not have a right to revoke consent to the wife's use of the embryo. The special referee awarded the embryo to the wife, concluding that the balance of equities favored the wife because this represented her last chance to become a biological parent. The Supreme Court confirmed the special referee's report and the husband appealed. The New York Supreme Court, Appellate Division, reversed, finding the special referee's interpretation of the consent agreement contrary to its plain meaning. The Appellate Division found the agreement permitted either party to withdraw consent to participation in the entire IVF process, and that the husband's broadly worded revocation of consent was effective to revoke his consent to the continuation of the IVF process.

In a case of first impression in New York,[211] it has recently been held that contracts with fertility clinics are not required to be acknowledged in the form required for a deed in order to be enforceable.

<u>Contemporaneous Mutual Consent Approach</u>

The contemporaneous mutual consent disallows disposition of the frozen embryos or other material unless the couple that created the material mutually consent to a specific disposition at the time the decision is being made. Due to the highly emotional nature of such a choice, subsequent changes in decision outweigh any prior consent.[212]

<u>Balancing Approach</u>

When ruling on a suit challenging the disposition of genetic material, some courts adopt the balancing approach. Under this approach, the court evaluates the interests of each party in the

genetic material—generally, one's right to procreate, particularly if this is the only means left to have a genetic child, versus another's right to avoid procreation.[213] Alternatively, one party's interest in avoiding procreation may prevail.[214]

In ***J.B. v. M.B.***,[215] the Supreme Court of New Jersey recognized that persuasive reasons exist for enforcing pre-embryo disposition agreements, but determined that the better rule, which the court adopted, is to enforce agreements entered into at the time the in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos. In this case, the court determined that the parties never entered into a binding contract providing for the disposition of the pre-embryos and it evaluated the interest of both parties, noting that ordinarily the party choosing not to become a biological parent will prevail. Here, the court held that seven remaining pre-embryos should be destroyed after considering that the father was capable of fathering additional children.

Hybrid Approach

Some courts have taken a hybrid approach, combining the contractual and balancing approaches: first, by honoring any advance agreement between the parties regarding the disposition of pre-embryos and, alternatively, in the absence of an agreement, by weighing the parties' relative interests in using or not using the pre-embryos.[216] In ***Rooks v. Rooks***,[217] a written agreement with the fertility clinic failed to specify what should be done with pre-embryos in the event of a divorce. In the absence of an agreement, the Colorado Supreme Court held that the approach should be to balance the parties' interests by considering the following factors: 1) intended use of the pre-embryos by the spouse who wishes to preserve them; 2) demonstrated ability (or inability) of the spouse seeking to implant the pre-embryos to have biological children through other means; 3) parties' original reasons for undertaking IVF; 4) hardship for the spouse seeking to avoid becoming a genetic parent; 5) a spouse's demonstrated bad faith or attempts to use the pre-embryos as unfair leverage in the divorce proceedings; and 6) any other considerations relevant to the parties' specific situation. A court should not consider: 1) whether the spouse seeking to use the pre-embryos can afford a child; 2) the sheer number of a party's existing children, standing alone, as reason to preclude implantation; and 3) whether a party could instead adopt.

In ***Markiewicz v. Markiewicz***,[218] the Michigan Court of Appeals held that a blend of the contractual approach and the balancing approach should be used to resolve disputes over the disposition of a frozen embryo during a divorce. This blended approach requires courts to first see if there is a valid agreement between the parties addressing the disposition of the embryo. In the absence of such an agreement, the court must then balance the interests of the parties to determine disposition of the frozen pre-embryos. According to the court, balancing requires the court to consider many factors, including the parties' original reasons for undergoing IVF treatment, taking into account the parties' beliefs as they relate to the creation of an embryo and the parties' positions related to its disposition. In this case, the father sought to avoid procreation because the parties already had for children. A court should also consider whether the party seeking procreation would have any other reasonable means of achieving parenthood and the implications of imposing unwanted parenthood on a party seeking to destroy an embryo, including the possible financial and psychological consequences of doing so. In addition, courts should consider the possibility of a party's bad faith and attempt to use the frozen pre-embryos as leverage in the divorce proceeding. The Michigan appellate court remanded the case so that the

trial court could apply these considerations.

As the use of artificial reproductive techniques continues to grow, planning around genetic material takes on increased significance. When drafting marital agreements, it may be advisable to include provisions detailing the disposition of any genetic material arising during the marriage as marital property, and provisions to mandate the resolutions of dispute regarding disposition of genetic material – mediation, arbitration, etc. – if the genetic material is deemed not to be property that is subject to division.[219] In ***Davis v. Davis,***[220] the court concluded that frozen embryos are special property, occupying an interim category that entitles them to special respect because of the potential for human life. At a minimum, it would seem prudent to include statements of each party's intents and wishes for the disposition of the genetic material. Whatever outcome the parties agree to should be mirrored in any contract(s) signed with fertility clinics, genetic material storage facilities and the like.

Indeed, given the variance in state laws and the fact that this area is in flux due to rapidly advancing technologies, establishing the donor's intent is critical. In the Californian case of ***Estate of Kievernagel***,[221] the court used the intent of the donor to determine the disposition of his stored sperm after his death. His widow wanted to use his frozen sperm to attempt to conceive a child even though he had signed an agreement with the fertility center directing that the frozen sperm be discarded upon his death. The court found by a preponderance of evidence that the intent of the donor must control when determining the disposition of gametic material, to which no other party has contributed and thus another party's right to procreational autonomy is not implicated.

B. Under What Circumstances Should Children Born After the Death of Their Parent(s) be Entitled to Inherit?

With sophisticated storage techniques for genetic material and advances in medical technology, a child can be conceived after the death of one or both of the child's genetic parents. As state legislatures struggle to keep pace with an area in which technology has fast outpaced the law, we are confronted the question: How should posthumously conceived children (PCC) be treated for inheritance, intestacy and other purposes?

Intestacy statutes drafted long before the new technologies could even have been contemplated are often unclear in this context. At its heart, the fundamental issue involves striking a balance between recognizing the interests of the children born of these new technologies and the interests of existing beneficiaries in certainty and finality. State intestacy statutes drafted long before posthumous conception was even contemplated are by definition ambiguous because they were not designed to accommodate the situations with which we are now confronted. Indeed, some courts found PCC entitled to inherit under the state intestacy laws at issue, while others have reached the opposite conclusion.[222]

Scant case law on inheritance rights

As courts have struggled to interpret intestacy statutes drafted well before the new technologies could even have been contemplated, a New York Surrogate faced a similar issue in interpreting the provisions of a trust document drafted well before the grantor could have formed an intent regarding treatment of PCC. ***In re Martin B.***[223] is apparently the only case thus far decided in the U.S. directly concerning the inheritance rights of PCC.

In ***In re Martin B.***, two PCC were born to the wife of a decedent who had stored his sperm before cancer treatment, which was unsuccessful. The father of the decedent had created trusts for the benefit of classes that included the decedent's "issue" and "descendants." The question for determination was whether the decedent's PCC qualified as members of these classes. The surrogate held that the controlling factor was the grantor's intent as gleaned from a reading of the trust agreements. Ironically, since the trusts were created in 1969, the surrogate pointed out that the grantor could not have contemplated that his issue could include PCC. Nevertheless, despite absence of specific intent, she found that the grantor's dispositive scheme was to benefit his sons and their families equally. She referred to Restatement (Third) of Property §14.8[224] that a child of assisted reproduction should be treated for class-gift purposes as a child of the person who consented to be a parent, but was prevented from doing so by death. She determined that a "sympathetic reading" of the instruments warranted the conclusion that the grantor intended all members of his bloodline to receive their share.

According to the surrogate, "Simply put, where a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights for all purposes as those of a natural child." The proceeding before the surrogate was, however, an uncontested application by trustees seeking the court's advice and the surviving spouse had agreed to destroy all remaining stored sperm, thereby closing the class of children. Accordingly, the holding of the case is probably limited to its specific facts, and the surrogate in fact called for comprehensive legislation to resolve the issues raised by advances in biotechnology.

<u>**State legislatures respond**</u>

Because state intestacy statutes were not designed to deal with the new technologies, state legislatures have begun to respond with legislation that specifically defines under what circumstances PCC will be accorded inheritance and other rights. To date, 27 states[225] (including Maryland[226]) have enacted statutes dealing with those conceived posthumously, one state introduced legislation in 2022[227] and four states in 2023.[228]

Of the 27 states with legislation, twelve have enacted a version of the Uniform Parentage Act (UPA),[229] which the Uniform Law Commission (ULC) originally released in 2000 and revised in 2002. Eight states[230] have adopted the UPA language, which provides:[231]

> If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of a resulting child, unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

In an apparent attempt to limit the benefits of the statute to surviving spouses, the other four states that have statutes based on the 2002 UPA[232] refer to a "spouse," instead of an "individual:"

> If a spouse dies before placement of eggs, sperm or embryos, the deceased spouse is not a parent of a resulting child, unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

Originally, the 2002 UPA did not include a time period within which a child was required to be conceived or born after death.[233] The ULC released an updated UPA in 2017.[234] The 2017 version of the UPA, which has been adopted in several states, including Rhode Island,[235] Vermont[236] and Washington State,[237] adds a time frame and the ability to prove intent to reproduce posthumously as an alternative to specific written consent. Under the 2017 UPA, a deceased individual will be considered a parent of a PCC if that individual gave written consent to assisted reproduction by a woman who agreed to give birth if (1) either (A) the individual gave written consent to posthumous reproduction, or (B) the individual's intent to be a parent by posthumous reproduction is established by clear and convincing evidence **and** (2) either (A) the embryo is in utero within 36 months; or (B) the child is born within 45 months of that individual's death.[238] The 2017 UPA also addresses what happens if the marriage of a woman who gives birth to a child conceived by assisted reproduction is terminated through divorce or dissolution, subject to legal separation, declared invalid, or annulled before the transfer of gametes or embryos to the woman. A former spouse of that woman is not a parent of the child unless that former spouse consented in a record to be a parent if assisted reproduction were to occur after divorce, dissolution, annulment, declaration of invalidity, or legal separation and the former spouse did not withdraw consent.[239]

Some state statutes have always imposed time limits within which a child must be conceived or born. Those time limits typically range from requiring birth within one to four years after death.[240] The Uniform Probate Code (UPC), which has been adopted in Colorado and North Dakota regarding PCC, treats a child as in gestation at an individual's death if the child is in utero within 36 months or born with 45 months of death.[241] As noted in the UPC comment,[242] a time frame after death is designed to allow a spouse or partner to grieve, decide whether to proceed with assisted reproduction, and provide a reasonable allowance for unsuccessful attempts to achieve pregnancy. It is part of the overall attempt to strike a balance between the interests of PCC and the interests of current beneficiaries in finality.[243]

Under Maryland law,[244] a child includes a child conceived from the genetic material of a person after the death of the person if:

1. The person consented in a written record to use of the person's genetic material for posthumous conception;
2. The person consented in a written record to be the parent of a child posthumously conceived using the person's genetic material;
3. The child is born within 2 years of the person's death; and
4. With respect to any trust, the person was the creator of the trust and the trust became irrevocable on or after October 1, 2012.

New York's[245] legislation was enacted in 2014 and is found in its Estates Powers and Trust Law (EPTL). The statute previously used the terms "genetic parent" (a man or woman who provided sperm or ova used to conceive a child born after death) and "genetic child" (a child born using the sperm or ova from a genetic parent). New York enacted the Child-Parent Security Act (CPSA), effective February 15, 2021, which modernizes the definition of parent by updating existing law in tying parent to intent, particularly before conception, and setting out rules for determining parentage in the third-party reproduction context.[246] To conform the EPTL with the CPSA, the terms "genetic child" and "genetic

parent" are replaced to read "child" and "intended parent," effective February 15, 2021, with no reference to genetic material. "Child" is simply defined as a child conceived through assisted reproduction and "intended parent" has the same meaning as the CPSA, which is an individual who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction or a surrogacy agreement. Indeed, as the revised EPTL is drafted, it seems possible for a decedent to have a PCC recognized for purposes of inheritance and intestacy, even if there is no genetic connection between the decedent and the child. Only if the decedent's genetic material is involved must the decedent authorize a person to make decisions about the use of the genetic material after the decedent's death.

A child born after the death of an intended parent will be considered a child of that parent if the following requirements are satisfied:

1. In a written instrument signed not more than seven years before death, the intended parent must have expressly consented to the use of the genetic material for posthumous reproduction; and
2. The child must be in utero with 24 months or born within 33 months of the intended parent's death.

If the child was conceived using the genetic material of the intended parent, it must be further established that:

3. In a written instrument signed not more than seven years before death, the intended parent authorized a person to make decisions about the use of the genetic material after the intended person's death;
4. The person authorized in the writing must within seven months of the intended parent's death (a) give notice of the existence of the stored genetic material to the personal representative of the genetic parent's estate; and (b) record the writing in the Surrogate's Court.

If these requirements are met, the child will be considered a distributee of the intended parent and a child of the intended parent for purposes of gifts to children, issue, descendants and similar classes in instruments of the intended parent or of others. With regard to dispositive instruments in which the intended parent was not the creator, this provision is applicable only to wills of those dying on or after September 1, 2014 and to lifetime trusts executed on or after that date. For instruments created by the intended parent, the law will apply regardless of date.

The statute includes a model form of the written instrument. Authority under the written instrument is revoked in the event of divorce. If notice of the availability of the decedent's intended material has been given as provided, the personal representative may delay paying dispositions until the birth of a genetic child entitled to inherit. If a disposition is directed to be paid in advance of the birth, the personal representative may require a bond.[247]

California's statute[248] provides that a child conceived and born after the death of a decedent shall be deemed to have been born during the decedent's lifetime, and after the execution of the decedent's testamentary instruments, if all of the following conditions are satisfied:

1. The decedent, in a signed and dated writing, specifies that the genetic material shall be

used for posthumous conception and designates a person to control the use of the genetic material.
2. The designated person gives written notice to the personal representative within four months of death that the decedent's genetic material is available for posthumous reproduction.
3. The child is in utero within two years of death.

The California statute also includes provisions regarding the effect of the receipt of notice, including:

- No distributions can be made before two years of death, except under certain circumstances, including if the distribution will not be affected by the PCC or the designated person sends written notice that he does not intend to use the genetic material.
- There is no liability for distributions made before the receipt of notice or the acquiring of actual knowledge of the existence of genetic material for posthumous reproduction.
- Beneficiaries to whom distributions are made are personally liable to a PCC who has superior rights, the liability being limited to the fair market value of the property distributed.
- Actions to impose liability are subject to a three-year statute of limitations, which cannot be tolled for any reason.

Further protections are provided if timely notice is not provided, as follows:[249]

- Distributions can be made as if the PCC predeceased the decedent without heirs.
- Wrongful distribution claims against the person making the distribution or the recipient are barred.

XIII. <u>The Bottom Line: Collaboration is Key</u>

Clients benefit when matrimonial, trusts & estates, accounting and investment professionals partner to integrate considerations that cross disciplines. Advisors who take a collaborative approach can most effectively represent clients by considering the many nuanced factors in this arena.

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Note that a few states, including Delaware, have special trust advantages that may not be available under the laws of your state of residence, including asset protection trusts and direction trusts.

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[1] IRC §§71(a) and 215(a)
[2] *Wisseman v. Wisseman*, 63 Misc. 3d 819, 97 N.Y.S.3d 823 (N.Y. Sup. Ct. 2019)
[3] *Montemurro v. Montemurro*, No. 1 CA-CV 19-0228 FC, 2020 WL 632612 (Ariz. Ct. App. Feb. 11, 2020)
[4] Cal. Rev. & Tax. Code §§17071, 17081, 17201, 17302, 17731, 17737
[5] N.Y. Tax Law §612(w)
[6] N.J.S.A. §54A:3-2
[7] IRC §677(a)
[8] Notice 2018-37
[9] Note that, at the state level, 529 Plan distributions for educational expenses below the college level may not be considered qualified distributions
[10] Note that, with the exception of Hawaii and Maryland, portability is generally not available for state level estate tax exemption amounts. Although Delaware also allowed portability, the repeal of the Delaware state estate tax in 2018 renders state level portability moot.
[11] Reg §20.2010-2(a)(7)(ii)
[12] *In re Matter of the Estate of Anne S. Vose v. Lee*, 2017 OK 3, 390 P.3d 238 (2017)
[13] 12 Del. C. §3572
[14] Id.
[15] Id.
[16] 12 Del. C. §3573(1)
[17] There is a risk that a court in the state where the divorce is proceeding might decide that its law, not Delaware law, applies. However, at the least, a properly designed DAPT will raise formidable obstacles for creditors.
[18] *Pfannenstiehl v. Pfannenstiehl* (Massachusetts Supreme Judicial Court) 475 Mass 105, 55 N.E. 3d 933
[19] Cal. Prob. Code § 16060
[20] *Sharabani v. Sharabani* 54890/2010, NYLJ 1202798565597, at *1 (Sup., KI, Decided August 30, 2017))
[21] New York Domestic Relations Law (DRL) §253
[22] DRL §§236(B)(5)(h) and 236 (B)(6)(d)
[23] *Cohen v. Cohen*, 172 A.D.3d 999 (N.Y. App. Div. 2019) but see *Pinto v. Pinto*, 260 A.D.2d 622, 688 N.Y.S.2d 701 (1999) and *Schwartz v. Schwartz*, 235 A.D.2d 468, 652 N.Y.S.2d 616 (1997), which appear to conflict with the holding in *Cohen v. Cohen*.
[24] http://theprenup.org/pdf/Prenup_Standard.pdf
[25] See, for example, *Waxstein v. Waxstein*, 90 Misc.2d 784, 395 N.Y.S.2d 877 (Sup. Ct. 1976), aff'd, 57 A.D.2d 863, 394 N.Y.S.2d 253 (1977)
[26] *Estate of Semone Grossman et al. v. Commissioner of Internal Revenue*, T.C. Memo 2021-65 (May 27, 2021)
[27] Id.
[28] Note that, the income tax consequences if a couple was to get divorced after creating an inter vivos QTIP should be considered, discussed further infra.
[29] Cal. Fam. Code §850
[30] Cal. Fam. Code §852
[31] *Estate of MacDonald*, 51 Cal. 3d 262, 794 P.2d 911 (1990), as modified (Sept. 6, 1990)
[32] Cal. Fam. Code §2640
[33] Cal. Prob. Code §100
[34] I.R.C. §1014

[35] Note that during the pendency of a divorce, parties may be prohibited from doing anything with their financial affairs except in the usual course of business for customary and usual household expenses. This is designed, to maintain the status quo and preserve marital property until final determination.
[36] *Acosta-Santana v. Santana*, No. A-5646-16T4, 2018 WL 6332211 (NJ App. Div. Dec. 5, 2018)
[37] *Matter of Estate of Petelle*, 195 Wash. 2d 661, 462 P.3d 848 (2020)
[38] N.J.S.A. §3B:3-14
[39] New York's Estates Powers and Trusts Law §5-1.4
[40] Cal. Probate Code §6122
[41] *In re Estate of Lewis*, 25 N.Y.3d 456, 34 N.E.3d 833 (2015)
[42] New York's Estates Powers and Trusts Law §5-1.4
[43] A.S. §13.12.804
[44] A.R.S. §14-2804
[45] C.R.S.A. §15-11-804
[46] I.C. §15-2-804
[47] M.G.L.A. 190B §2-804
[48] M.C.L.A. §700.2807
[49] M.C.A §72-2-814
[50] N.J.S.A. §3B:3-14
[51] N. M. S. A. 1978, §45-2-804
[52] NDCC §30.1-10-04
[53] SDCL §29A-2-804
[54] U.C.A. 1953 §75-2-804
[55] Uniform Probate Code §2-804 (1969, last amended 2019)
[56] *Banaszak v. Grablick (In re Joseph & Sally Grablick Tr.)*, No. 353951 (Mich. Ct. App. Dec. 16, 2021)
[57] M.C.L.A. §700.2807(1)(a)(i)
[58] *Estate of Podgorski*, 249 Ariz. 482, 471 P.3d 693 (Ct. App. 2020)
[59] M.S.A. §524.2-802
[60] Neb. Rev. St. §30-2333
[61] Code 1976 §62-2-507
[62] M.R.S. 18-A §2-508
[63] Md. Code Ann., Est. & Trusts §4-105
[64] Md. Code Ann., Est. & Trusts §14.5-604
[65] Id.
[66] *In re Estate of Brown*, 430 S.C. 474, 846 S.E.2d 342 (2020)
[67] N.J.S.A. 26:2H-57
[68] Cal. Prob. Code § 4154
[69] N.Y. Gen. Oblig. Law §5-1511
[70] Ala. Code §26-1A-110
[71] Conn. Gen. Stat. Ann. §1-350i
[72] Hawaii Rev. Stat. §551E-6
[73] Md. Code Ann., Est. & Trusts §17-112
[74] *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009)
[75] *Orlowski v. Orlowski*, 459 N.J. Super. 95, 208 A.3d 1 (App. Div. 2019)
[76] *Martinez-Olson v. Est. of Olson*, 328 So. 3d 14 (Fla. Dist. Ct. App. 2021), *review dismissed*, No. SC21-1378, 2021 WL 5778433 (Fla. Dec. 7, 2021)
[77] *Sveen v. Melin*, 138 S. Ct. 1815, 201 L. Ed 2d 180 (2018)
[78] *Philogene v. Delpe-Philogene*, 195 A.D.3d 963, 146 N.Y.S.3d 495 (2021)
[79] Ala. Code §19-1A-1
[80] Alaska Stat. Ann. §13.63.195
[81] Ariz. Rev. Stat. Ann. §14-13101
[82] Ark. Code Ann. §28-75-101
[83] Calif. Prob. Code §870
[84] Colo. Rev. Stat. §15-1-1501
[85] Conn. Gen. Stat. §45a-334b
[86] 12 Del. C. §5001

[87] Fla. Stat. §740.001
[88] Ga. Code Ann. §53-13-1
[89] Haw. Rev. Stat. Ann. §556A-1
[90] Idaho Code Ann. §15-14-101
[91] 755 ILCS 70/1
[92] Ind. Code §32-39-1-1
[93] Iowa Code Ann. §638.1
[94] Kan. Stat. Ann. §58-4801
[95] KY. Rev. Stat. §395A.010
[96] Louisiana House Bill No. 1118 (2016). This legislation has since died.
[97] Me. Rev. Stat. tit. 18-A, §10-101
[98] Md. Estates and Trust Code §15-601
[99] MA. H.D. 1772/S.D. No. 1822 (2023)
[100] Mich. Comp. Laws Ann. §700.1001
[101] Minn. Stat. §521A.01
[102] Miss. Code. Ann. §91-23-1
[103] Mo. Ann. Stat. §472.400
[104] Mont. Code Ann. §72-31-401
[105] Neb. Rev. Stat. Ann. §§30-501-518
[106] Nev. Rev. Stat. §722.010
[107] N.H. Rev. Stat. Ann. §544-A:1
[108] N.J.S.A. §3B:14-61.1
[109] N.M. Stat. §46-13-1
[110] N.Y. EPTL §13-A-1
[111] N.C. Gen. Stat. §36F-1-518
[112] N.D. Cent. Code Ann. §47-36-01
[113] Ohio Rev. Code §2137.01
[114] Oklahoma House Bill No. 3711 (2020). This legislation has since died.
[115] Ore. Rev. Stat. §119.006
[116] 20 Pa. Cons. Stat. Ann. §3901
[117] 33 R.I. Gen. Laws Ann. §33-27.1-1
[118] S.C. Code §62-2-1010
[119] S.D. Codified Laws §55-19-1
[120] Tenn. Code §35-8-101
[121] Texas Estates Code §2001.001
[122] Utah Code §75-11-101
[123] Vt. Stat. Ann. Tit. 14, §3551
[124] Va. Code Ann. §64.2-116
[125] Wash. Rev. Code Ann. §11.120.010
[126] D.C. Code Ann. §21-2501
[127] W.Va. Code §44-5B-1
[128] Wisc. Stat. §711.01
[129] Wyo. Stat. §2-3-1001
[130] In New York, for example, see EPTL §13-A-2.2
[131] *In re Marriage of Githens*, 227 Or. App. 73, 204 P.3d 835 (2009)
[132] Restatement (Third) of Trusts, §50 (2) provides that "the benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purposes in granting the discretionary power and in creating the trust." Section 50 comment b provides guidance and standards for reviewing discretion. Delaware, for example, has an even more restrictive standard of review, rejecting Restatement (Third) of Trusts, Section 50 and explicitly referencing Restatement (Second) of Trusts §187, which provides that "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Delaware Code, Title 12, §3315(a).
[133] *Pfannensteihl v. Pfannenstiehl,* 475 Mass. 105, 55 N.E.3d 993 (2016)

[134] In New Hampshire, for example, see *Matter of Earley*, 174 N.H. 2020, 261 A.3d 964 (2021), distinguishing *Flaherty v. Flaherty,* 138 N.H. 337 (1994), where a New Hampshire court construed a trust governed by Massachusetts law.
[135] *Levitan v. Rosen*, 95 Mass. App. Ct. 248, 124 N.E.3d 148, *reviewed denied*, 482 Mass. 1105, 127 N.E.3d 266 (2019)
[136] *Smith v. Smith*, 253 N.W.2d 143, 312 Minn. 541 (1977)
[137] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 2019 S.D. 35, 931 N.W.2d 244
[138] *In Matter of Nerbonne*, No. 2013-0281, 2014 WL 11643701 (N.H. Oct. 24, 2014)
[139] *D.L. v. G.L.*, 61 Mass App Ct 488 (2004)
[140] *Tannen v. Tannen*, 416 N.J. Super. 248, 3 A.3d 1229 (App. Div. 2010), *aff'd*, 208 N.J. 409, 31 A.3d 621 (2011)
[141] *Tannen v. Tannen*, 208 N.J. 409, 31 A.3d 621 (2011)
[142] *Vanderlugt v. Vanderlugt, 429 P.3d 1269 (2018)*
[143] Id.
[144] *In re Marriage of Holman*, 122 Ill. App. 3d 1001, 462 N.E.2d 30 (1984)
[145] Ill.Rev.Stat., 1982 Supp., ch. 40, par. 503(d)(2), now 750 Ill. Comp. Stat. Ann. 5/503(d)(3), which provides: value of property "assigned" (instead of "set apart") to each spouse
[146] *Alvares-Correa v. Alvares-Correa*, 285 A.D.2d 123, 726 N.Y.S.2d 668 (2001)
[147] *In re Marriage of de Guigne*, 97 Cal. App. 4th 1353, 119 Cal. Rptr. 2d 430 (2002)
[148] *Guaenti v. Gugenti*, 2017-Ohio-2706, 90 N.E.3d 297
[149] *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 811 N.E.2d 1013 (2004)
[150] *Sullivan v. Sullivan*, 211 So. 3d 836 (Ala. Civ. App. 2016)
[151] *Vanderlugt v. Vanderlugt*, 429 P.3d 1269 (2018)
[152] *Vanderlugt v. Vanderlugt*, *supra*
[153] *Loomis v. Loomis*, 158 S.W.3d 787 (Mo. Ct. App. 2005)
[154] *Vanderlugt v. Vanderlugt, 429 P.3d 1269 (2018)* involved very similar facts
[155] *Markowitz v. Markowitz*, 146 A.D.3d 872, 45 N.Y.S.3d 203 (N.Y. App. Div. 2017)
[156] *Vanderlugt v. Vanderlugt, supra.* The New Mexico Court of Appeals held that the district court correctly noted that it did not have jurisdiction over the trust itself because it was not owned or controlled by either spouse.
[157] *Kim v. Kim*, 2020-Ohio-22, 150 N.E.3d 1229. Husband had argued that the trial court lacked jurisdiction to direct the trustee of the Trust to take any action pursuant to the trust because neither he nor the trust were joined as parties. However, the Court of Appeals noted that the trial court did not order the trustee nor the trust itself to take any action. Rather, the trial court credited the cash value of all the life insurance policies within the trust to husband when the court sought to equalize the distribution of marital property. Accordingly, husband's contention was without merit.
[158] *Yerushalmi v. Yerushalmi*, 26 N.Y.S.3d 114136 A.D.3d 812 (2016)
[159] *Riechers v. Riechers,* 267 A.D.2d at 446, 701 N.Y.S.2d 113 (1999)
[160] *Surasi v. Surasi*, No. 5057/92, 2001 WL 1607927 (N.Y. Sup. Ct. Nov. 20, 2001)
[161] *Villi v. O'Caining-Villi*, 10 Misc. 3d 1060(A), 809 N.Y.S.2d 484 (Sup. Ct. 2005)
[162] *Oppenheim v. Oppenheim*, 168 A.D.3d 1085, 93 N.Y.S.3d 92 (2019)
[163] *In re Erny's Tr.*, 415 Pa. 8, 202 A.2d 30 (1964)*; Wells Fargo Bank v. Marshall*, 20 Cal. App. 4th 447, 24 Cal. Rptr. 2d 507 (1993)
[164] *Ochse v. Ochse*, No. 04-20-00035-CV, 2020 WL 6749044 (Tex. App. Nov. 18, 2020)
[165] *Crawford v. Crawford*, 147 N.E.3d 1047, 2020 WL 2485249 (Ind. Ct. App.)
[166] 12 Del. C. §3573(1)
[167] N.C. Gen. Stat. Ann. §36C-5-503
[168] Tex. Fam. Code Ann. §154.005
[169] Ohio Rev. Code Ann. §5805.02
[170] See, for example, *P.M v. M.M.*, 71 Misc. 3d 666, 144 N.Y.S.3d 312 (N.Y. Sup. Ct. 2021), where the New York Supreme Court found wife raised triable issues of fact as to the validity of the parties' prenuptial agreement, including whether wife was represented by independent counsel and whether the agreement was the product of overreaching, given that wife was pregnant, unemployed and on a 90-day tourist visa at the time of signing the agreement one month prior to the wedding, with marriage being the only way for her to lawfully remain in US. Similar result in Florida in *Bates v. Bates*, No. 3D19-1884, 2021 WL 358188 (Fla Dist. Ct. App. Feb. 3, 2021).
[171] *Ferri v. Powell-Ferri*, 476 Mass. 651, 72 N.E.3d 541 (2017)
[172] *Ferri v. Powell-Ferri*, 326 Conn. 438, 165 A.3d 1137 (2017)
[173] *Powell-Ferri v. Ferri*, 326 Conn. 457, 165 A.3d 1124 (2017)

[174] Cal. Prob. Code §19501
[175] MD. S.B. 446 (2023)
[176] N.Y. EPTL §10-6.6
[177] *See* Susan T. Bart, *Summaries of State Decanting Statutes* (updated Dec. 1, 2021), https://www.actec.org/assets/1/6/Bart-State-Decanting-Statutes.pdf
[178] *Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (2018)
[179] *Hodges v. Johnson*, 170 N.H. 470, 177 A.3d 86 (2017)
[180] New York's power to adjust regime is found in EPTL §11-2.3
[181] N.Y. EPTL §11-2.4
[182] Md. Code Ann., Est. & Trusts §15-502.1
[183] *Matter of Jacob Heller*, 800 N.Y.S. 2d 207 (App. Div. 2005), aff'd, 849 N.E.2d 262 (Ct. App. 2006)
[184] See, for example, *In re Will of Kruszewski*, 116 A.D.3d 1288, 984 N.Y.S. 2d 232 (2014)
[185] Cal. Prob. Code §16336.4
[186] For example, when opting into the unitrust regime in New York, a trustee is required to consider the following factors:
(i) the nature, purpose, and expected duration of the trust;
(ii) the intent of the creator of the trust;
(iii) the identity and circumstances of the beneficiaries;
(iv) the needs for liquidity, regularity of payment, and preservation and appreciation of capital;
(v) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the creator of the trust.
(N.Y. Estates, Powers and Trust Law §11-2.4 (e)(5))
[187] *Woytas v. Greenwood Tree Experts, Inc.*, 237 N.J. 501, 206 A.3d 386 (2019)
[188] *Orchin v. Great-West Life & Annuity Insurance Company*, 2015 WL 5726334, 133 F.Supp.3d 138 (2015)
[189] *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958)
[190] *Krawczyk v. Stingle*, 208 Conn. 239, 543 A.2d 733 (1988)
[191] *Pinckney v. Tigani*, No. CIV.A. 02C-08-129FSS, 2004 WL 2827896 (Del. Super. Ct. Nov. 30, 2004)
[192] *Gallo v. Brady*, 925 So. 2d 363 (Fla. Dist. Ct. App. 2006); *Ellerson v. Moriarty*, No. 2D20-2653, 2021 WL 2557308 (Fla. Dist. Ct. App. June 23, 2021)
[193] *Blair v. Ing*, 95 Haw. 247, 21 P.3d 452 (2001)
[194] *Noble v. Bruce*, 349 Md. 730, 709 A.2d 1264 (1998)
[195] *Mieras v. DeBona*, 452 Mich. 278, 550 N.W.2d 202, at 209 (1996); *In re Solomon Gaston Miller Trust*, No. 341502, 2018 WL 6252061, at 7 (Mich. Ct. App. Nov. 29, 2018)
[196] *Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988); *Varelli v. White*, No. A-4675-16T3, 2019 WL 3229679, (N.J. Super. Ct. App. Div. July 18, 2019), *cert. denied*, 240 N.J. 130, 220 A.3d 986 (2019), and *cert. denied*, 240 N.J. 139, 220 A.3d 991 (2019)
[197] *Estate of Schneider v. Finmann*, 15 N.Y. 3d 306, 933 N.E.2d 718 (2010)
[198] *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014)
[199] *Calvert v. Scharf*, 217 W. Va. 684, 619 S.E.2d 197 (2005)
[200] *Randle v. Farmers New World Life Ins. Co.*, 85 Cal. App. 5th 53, 301 Cal. Rptr. 3d 83 (2022), *review denied* (Feb. 1, 2023)
[201] For example, the Uniform Probate Code, in effect in Alaska, Arizona, Colorado, Idaho, Massachusetts, Michigan, Montana, New Jersey, New Mexico, North Dakota, South Dakota and Utah, revokes dispositions to and fiduciary nominations of the former spouse, as well relatives of the former spouse.
[202] *In re Irrevocable Trust Agreement of Klein*, PICS Case No. 16-0355 (C.P. Monroe Jan. 7, 2016)
[203] *Sveen v. Melin*, 138 S. Ct. 1815, 201 L. Ed 2d 180 (2018)
[204] *Smoot v. Smoot,* 2015 TNT 69-13, No. 2:13-cv00040 (U.S.D.C. S.D. Ga. March 31, 2015)
[205] 26 U.S.C.A. §1016. *See* Rev. Rul. 2020-05
[206] See, for example, *Kass v. Kass*, 91 N.Y. 2d 554, 696 N.E.2d 174 (1998)
[207] *In re the Marriage of Stephen E. Findley and Mimi C. Lee*, Case No. FDI-13-780539, https://www.sfsuperiorcourt.org/sites/default/files/pdfs/FINDLEY_Statement_Of_Decision%20Rev_1.pdf
[208] Cal. Health & Safety Code §125315
[209] *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174 (1998)

[210] *Finkelstein v. Finkelstein*, 162 A.D.3d 401, 79 N.Y.S.3d 17 (N.Y. App. Div. 2018), *leave to appeal denied*, 32 N.Y.3d 1140, 116 N.E.3d 661 (2019)
[211] *K.G. v. J.G.*, 72 Misc. 3d 593 (N.Y. Sup. Ct. 2021)
[212] See, for example, *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003)
[213] See, for example, *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131 (2012)
[214] See, for example, *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992)
[215] *J.B. v. M.B.*, 170 N.J. 9, 783 A.2d 707 (2001)
[216] See, for example, *Szafranksi v. Dunston*, 2015 IL. App (1st) 122975-B, 34 N.E.3d 1132 and *Jocelyn P. v. Joshua P.*, 250 Md. App. 435, 250 A.3d 373 (2021)
[217] *In re Marriage of Rooks*, 2018 CO 85, 429 P.3d 579; see also *In re Marriage of Fabos & Olsen*, 2019 COA 80, 451 P.3d 1218
[218] *Markiewicz v. Markiewicz*, No. 355774, 2022 WL 883683 (Mich. Ct. App. Mar. 24, 2022)
[219] See, for example, *Karungi v. Ejalu*, No. 351165, 2021 WL 3700221 (Mich. Ct. App. Aug. 19, 2021), where the Michigan Court of Appeals remanded the case for further proceedings to determine whether the contract controls disposition of the genetic material in determining the life-status of the embryos and whether child-custody law applies since the parties waived the arbitration provisions of the IVF contract.
[220] *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992)
[221] *Estate of Kievernagel*, 166 Cal. App, 4th 1024, 83 Cal. Rptr. 3d 311 (2008)
[222] PCC eligible to inherit under state intestacy statute: *In re Estate of Kolacy*, 332 N.J. Super. 593, 753 A.2d 1257 (Ch. Div. 2000) (New Jersey); *Woodward v. Comm'r of Soc. Sec*., 760 N.E.2d 257 (2002) (Massachusetts, under certain circumstances). PCC not eligible to inherit under state intestacy statute: *Stephen v. Comm'r of Soc. Sec*., 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (Florida); *Khabbaz v. Comm'r, Soc. Sec. Admin*., 155 N.H. 798, 930 A.2d 1180 (2007) (New Hampshire); *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008) (Arkansas); *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir 2009) (California has a PCC statute, but PCC did not satisfy PCC statute because decedent did not consent to posthumous reproduction and PCC not born within statutory timeframe. PCC was also not eligible to inherit under California intestacy laws); *In re Certified Question from U.S. Dist. Court for W. Michigan*, 493 Mich. 70, 825 N.W.2d 566 (2012) (Michigan); *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012), dismissed by 2013 U.S. Dist. LEXIS 9603 (Neb. 2013) (Nebraska); *Bosco v. Astrue*, 2013 U.S. Dist. LEXIS 93693 (DC N.Y., 2013) (New York); *Capato ex rel. B.N.C. v. Comm'r Soc. Sec*., 532 F. App'x. 251 (3d Cir. 2013) (Florida, remanded determination after United States Supreme Court ruling).
[223] *In re Martin B.*, 17 Misc. 3d 198, 841 N.Y.S.2d 207 (Sur. 2007)
[224] Restatement (Third) of Property Section 14.8 has been subsequently updated.
[225] Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. It is extremely unlikely that North Carolina's statute applies to PCC, although it can literally be read to do so.
[226] Md. Code Ann., Est. & Trusts §1-205
[227] HI. S.B. 2747 (2021). This legislation has since died.
[228] NV. A.B. 371 (2023), PA. H.B. 350 (2023), MA. S.B. 947 (2023) and KS. H.B. 2409 (2023)
[229] Oklahoma has adopted the UPA, but without Article 7, the article that addresses a child of assisted reproduction.
[230] Delaware, Maine, New Mexico, North Dakota, Rhode Island, Vermont, Washington and Wyoming.
[231] Uniform Parentage Act (2000) Section 707 (amended 2002)
[232] Alabama, Colorado, Texas and Utah.
[233] Uniform Parentage Act (2002), ULC, *https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ee7ce93f-78bf-da90-292c-39680396eb82&forceDialog=0 (December, 2002)*.
[234] Uniform Parentage Act (2017), ULC, *https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0 (July 19, 2017).*
[235] R.I. Gen. Laws Ann. § 15-8.1-707
[236] Vt. Stat. Ann. Tit. 15C, §707
[237] Wash. Rev. Code Ann. §26.26A.635
[238] Uniform Parent Act (2017) §708
[239] Uniform Parentage Act (2017) §706

[240] For example, in New York, for the genetic child must be in utero with 24 months or born within 33 months of the genetic parent's death. N.Y. EPTL §4-1.3. In California, the child must be in utero within two years of death. Cal. Prob. Code §249.5-6

[241] Uniform Probate Code (2019) §2-104(b)

[242] Comment to Uniform Probate Code (2019) §2-120 (k)

[243] Comment j to Section 15.1 of Restatement (Third) of Property: Wills and Other Donative Transfers, provides that a child produced posthumously by assisted reproduction is treated as in being at the decedent's death, if the child was born within a reasonable time after death. The UPC timeframe of a child in utero within 36 months or born within 45 months is referred to as appropriate for a court to adopt as reasonable.

[244] Md. Code Ann., Est. & Trusts §1-205

[245] N.Y. EPTL §4-1.3

[246] N.Y. Fam. Ct. Act §581-102

[247] N.Y. EPTL §11-1.5

[248] Cal. Prob. Code §249.5-6

[249] Cal. Prob. Code §249.7