TRUSTS AND ESTATES

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CONTENTS

I. FEDERAL REGULATIONS AND CASES

A. Annual Unified Credit Against Estate Tax, Gift Tax Annual Exclusion, and Exclusion of Gifts to Non-Citizen Spouses Amounts Set for 2014

The Internal Revenue Service ("IRS") released Revenue Procedure 2013-35, announcing multiple inflation and cost-of-living adjustments as required under various provisions of the Internal Revenue Code (the "Code").[1] Revenue Procedure 2013-35 established, among other things, the annual exclusion amounts for gifts and the unified credit against estate tax.[2] For any estate of a decedent who died in 2014, the estate tax annual exclusion amount increased to $5,340,000 in 2014.[3] The gift tax annual exclusion for 2014 remained unchanged from its 2013 level of $14,000.[4] The amount of gifts to a non-citizen spouse not included in the total amount of a taxpayer's taxable gifts for 2014 increased to $145,000, up from $143,000 in 2013.[5]

B. Ability For Certain Estates to Make a Late Portability Election

As a corollary to the American Taxpayer Relief Act of 2012 ("ATRA"), the IRS released Revenue Procedure 2014-18, which provided a simplified method for obtaining an extension of time to elect portability to preserve a deceased spouse's unused exclusion ("DSUE") amount for a surviving spouse.[6] The methods described in Revenue Procedure 2014-18 only apply where the size of the decedent's estate was below the applicable estate tax exclusion amount, and, accordingly, the estate was not required to file an estate tax return.[7] In order to effect a late portability election, representatives of eligible estates were given the opportunity to file a complete federal estate tax return (Form 706) electing portability and noting that the return was being filed pursuant to Revenue Procedure 2014-18.[8]

The relief offered under Revenue Procedure 2014-18 only applies to estates of U.S. citizen or resident decedents who died between January 1,

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1. Rev. Proc. 2013-35, 2013-2 C.B. 537.
2. *Id.* § 3, ¶ 32, 34.
3. *Id.* § 3, ¶ 32.
4. *Id.* § 3, ¶ 34(1).
5. *Id.* § 3, ¶ 34(2).
6. Rev. Proc. 2014-18, 2014-1 7 C.B 513, § 1.
7. *Id.* § 2, ¶ 1(2).
8. *Id.* § 4, ¶ 1(1).

2011, and December 31, 2013, with a surviving spouse.[9] The deadline for filing the late estate tax return in order to elect portability was December 31, 2014.[10]

C. Application of the Decision in United States v. Windsor for Federal Tax Purposes

As indicated in the last *Survey*, on June 26, 2013, the United States Supreme Court ruled section three of the Defense of Marriage Act ("DOMA")[11] unconstitutional.[12] On August 29, 2013, the IRS released Revenue Ruling 2013-17, which provides technical guidance on the treatment of individuals in same-sex marriages for federal tax purposes.[13] Revenue Ruling 2013-17 provided that terms in the Code relating to marriage should be interpreted to include same-sex marriage, and gender-specific terms should be construed as gender-neutral.[14] Additionally, Revenue Ruling 2013-17 established a "place of celebration" rule for purposes of determining whether a marriage is valid:

> [I]ndividuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages.[15]

D. Donee's Assumption of Potential Code Section 2035(b) Estate Tax Can Reduce Value of Gift for Purposes of Determining Gift Tax Liability

In *Steinberg v. Commissioner*, the U.S. Tax Court examined whether a donee's agreement to pay any federal estate tax that may be imposed as a result of Code section 2035(b) reduced the value of the portion of the transfer that was a taxable gift.[16] The donor entered into a binding gift agreement with her four adult daughters (the donees) whereby the donor agreed to make gifts of cash and securities to the donees.[17] In exchange,

9. *Id.* § 3, ¶ 1(1).

10. *Id.* § 4, ¶ 1(1).

11. 1 U.S.C. § 7 (2012) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

12. *See* United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

13. Rev. Rul. 2013-17, 2013-238 C.B. 201.

14. *Id.* at 4, ¶ 2.

15. *Id.* at 10, ¶ 3.

16. 141 T.C. 258, 258 (2013).

17. *Id.* at 259.

the donees agreed to assume and pay any Federal and State gift tax liability, as well as any estate tax liability that may be due under Code section 2035(b) if the donor died within three years of the gifts.[18] Section 2035(b) provides that the amount of a decedent's gross estate for estate tax purposes is increased by the amount of gift taxes paid on any gifts made during the three years prior to the decedent's death.[19]

The donor reported the gift on a duly filed United States Gift Tax Return (Form 709).[20] On that return, the donor reported the value of the gift reflecting a reduction for both the gift tax paid by the donees and the actuarial value of the donees' assumption of the potential estate tax liability under Code section 2035(b).[21] The IRS disallowed the discount taken for the potential 2035(b) estate taxes.[22] Once the donor filed a petition in Tax Court, the IRS filed a motion for summary judgment, arguing that the discount should not be allowed because the donees' assumption of the 2035(b) estate tax liability did not increase the value of the donor's estate and "therefore did not constitute consideration in money or money's worth."[23]

The Tax Court examined this matter largely based on its analysis in *McCord v. Commissioner*[24] and that of the Fifth Circuit Court of Appeals in the same case, which reversed the Tax Court decision below.[25] Although not bound by the decision in the Fifth Circuit,[26] the Tax Court largely adopted the analysis of the court of appeals in *McCord*.[27] Thus, the Tax Court held that "a willing buyer and a willing seller in appropriate circumstances may take into account a donee's assumption of potential section 2035(b) estate tax liability in arriving at a sale price," and, accordingly, the valuation of the net gift could include a discount for the value of such potential liability.[28] However, the court pointed out that in order for the discount to be appropriate, the potential estate tax liability must not be too speculative to be reduced to a monetary value, the

18. *Id.*
19. I.R.C. § 2035(b) (2012).
20. *Steinberg*, 141 T.C. at 261.
21. *Id.*
22. *Id.*
23. *Id.* at 262.
24. 120 T.C. 358 (2003).
25. McCord v. Comm'r, 461 F.3d 614, 632 (5th Cir. 2006).
26. *Steinberg*, 141 T.C. at 270. The donor was a resident of New York at the time the gift was made and the Gift Tax Return was filed. *Id.* at 259. As a result, any appeal of the Tax Court's decision in this matter would be appealed to the Court of Appeals for the Second Circuit.
27. *Id.* at 279-80.
28. *Id.* at 279.

determination of which is a factual issue.[29] Because genuine issues of fact remained (i.e., whether the potential estate tax liability was too speculative to be included), the Tax Court rejected the IRS' application for summary judgment.[30]

II. NEW YORK STATE LEGISLATION

A. Significant Changes to the New York State Estate Tax Included in the New York State 2014-2015 Budget

The New York State 2014-2015 Budget (the "Budget") was signed into law by Governor Andrew Cuomo on March 31, 2014, and became effective the following day, April 1, 2014.[31] Included among the various budget provisions were significant changes to the New York estate tax system. Those changes are discussed below.

1. Alignment of the New York State Estate Tax Credit to the Federal Unified Credit Amount

The Budget legislation increased the amount of the applicable exclusion amount for determining the credit against New York estate tax from the previous exclusion amount of $1 million.[32] The new exclusion amount set by the Budget will increase incrementally over a period of five years.[33] For any estate of a decedent dying between April 1, 2014, and March 31, 2015, the Budget set the exclusion amount at $2,062,500.[34] For the period of April 1, 2015, to March 31, 2016, the exclusion amount is again increased to $3,125,000.[35] From April 1, 2016, to March 31, 2017, the exclusion amount is increased to $4,187,500.[36] From April 1, 2017, to December 31, 2018, the exclusion amount increases to $5,250,000.[37] Finally, beginning on January 1, 2019, and for the estate of any decedent dying thereafter, the New York exclusion amount adjusts to the same level as the federal estate and gift tax exemption.[38]

29. *Id.* at 272.
30. *Steinberg*, 141 T.C. at 283.
31. N.Y. TAX LAW § 952 (McKinney 2014).
32. *Id.* § 952(c)(2)(A).
33. *Id.*
34. *Id.*
35. *Id.*
36. N.Y. TAX LAW § 952(c)(2)(A).
37. *Id.*
38. *Id.* § 952(c)(2)(B). The federal estate and gift tax exemption amount was set by the American Taxpayer Relief Act of 2012 at $5 million indexed for inflation from 2010. *See* American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313.

The Budget provisions indicate that any New York taxable estate with a value less than or equal to the applicable exclusion amount will not be subject to New York estate tax.[39] The credit against New York estate tax is phased out for New York taxable estates that have a value between 100% and 105% of the exclusion amount and completely eliminated for taxable estates that exceed 105% of the exclusion amount.[40] Thus, if a decedent's New York taxable estate exceeds the exclusion amount by more than 5%, the entire taxable estate is subject to New York estate tax.[41]

The top New York estate tax rate remains unchanged from its previous level of 16%.[42]

2. Inclusion of Gifts Made Within Three Years of Death in New York State

Under the Budget, the New York gross estate of a resident decedent will now be increased by the amount of any taxable gifts, as determined for federal gift tax purposes, that are made during the three year period ending on the decedent's date of death and is not otherwise included in the decedent's federal gross estate.[43] This provision excludes any gifts made when the decedent was not a New York resident.[44] The Budget also makes clear that a New York estate tax return is required to be filed for a resident decedent's estate where the decedent's federal gross estate, increased by the amount of any gifts includable in the New York gross estate, exceeds the applicable exclusion amount.[45]

The New York taxable estate of a nonresident decedent will be increased by the amount of any taxable gift of real or tangible personal property located in New York State or intangible personal property employed in a business, trade, or profession conducted in New York State that is made during the three year period ending on the decedent's date of death that is not otherwise included in the decedent's federal gross estate.[46]

39. N.Y. TAX LAW § 952(c)(1).

40. *Id.*

41. *Id.*

42. *Id.* § 952(b).

43. *Id.* § 954(a)(3).

44. N.Y. TAX LAW § 954(a)(3)

45. *Id.* § 971(a)(1). For nonresident decedents, a New York estate tax return is required to be filed if the decedent's federal gross estate includes real or tangible personal property having a situs in New York State. *Id.* § 971(a)(2).

46. *Id.* § 960(b) (McKinney 2014).

These provisions apply only to gifts made on or after April 1, 2014, and before January 1, 2019.[47]

3. Repeal of the New York State Generation Skipping Transfer Tax

The Budget legislation repeals the New York State Generation Skipping Transfer Tax on all estates of decedents dying on or after April 1, 2014.[48]

4. Qualified Terminable Interest Property (QTIP) Election on the New York Return Where No Federal Estate Tax Return Is Required

In the case of an estate that is not required to file a federal estate tax return, but is required to file a New York estate tax return, the estate may qualify for the New York marital deduction by making a QTIP election on its New York estate tax return.[49] If the estate does file a federal estate tax return making a QTIP election, the estate must make a consistent election on its New York return.[50]

B. Income Tax Changes for Certain Resident Trusts Included in the Budget

In addition to the changes made to the New York estate tax, the income tax treatment of certain resident trusts was also changed as part of the Budget legislation.[51] First, a beneficiary of a New York resident trust that is exempt from New York income taxation[52] will now be taxed when accumulated net income is distributed in a future tax year.[53] This change is effective for taxable years beginning on or after January 1, 2014.[54]

Additionally, the income generated by a New York resident trust that is an incomplete gift non-grantor trust (less any deductions of such trust) will be taxed in New York as income to the trust's grantor as if the trust were a grantor trust.[55] This new rule does not apply to income

47. *Id.* §§ 954(a)(3), 960(b).

48. N.Y. TAX LAW § 952(b).

49. *Id.* § 955(c).

50. *Id.*

51. *See id.* § 612.

52. New York resident trusts are exempt from New York income tax if (i) no trustee of the trust is a New York domiciliary, (ii) the trust holds no real or tangible property located in New York, and (iii) the trust does not derive income and/or gains only from or in connection with sources outside of New York. *Id.* § 605(b)(3)(D).

53. N.Y. TAX LAW § 612(b)(40).

54. *Id.*

55. *Id.* § 612(b)(41).

accumulated prior to January 1, 2014, and also does not apply to any income from a trust that is liquidated before June 1, 2014.[56]

C. Effects of the New York Nonprofit Revitalization Act of 2013 on Wholly-Charitable Trusts

The New York Nonprofit Revitalization Act of 2013 ("the Act") was signed into law on December 18, 2013.[57] The Act was designed to reduce the burdens on nonprofit organizations, while also strengthening governance and accountability.[58] The Act applies to New York not-for-profit organizations and non-New York charities registered in New York.[59] Many significant provisions also apply to wholly-charitable trusts by virtue of the addition of the new Estates, Powers and Trusts Law ("EPTL") section 8-1.9.[60]

The Act requires that every nonprofit corporation and wholly-charitable trust adopt a conflict of interest policy and provides the requirements for such a policy.[61] In addition, each trustee must complete annual disclosure statements detailing entities in which the trustee has an interest as an officer, director, trustee, member, owner, or employee and identifying transactions that present potential conflicts of interest.[62] Throughout the year, trustees, officers, and key employees[63] have an obligation to disclose, in good faith, material facts regarding an interest in a related party transaction[64] to the organization or trust's governing

56. *Id*. § 612(b)(40).

57. Act of December 18, 2013, ch. 549, 2013 McKinney's Sess. Laws of N.Y. 8072 (codified at N.Y. E.P.T.L. § 8-1.9).

58. 2013 McKinney's Sess. Laws of N.Y. 8072 (legislative memorandum).

59. *See generally* Act of December 18, 2013, ch. 549, 2013 McKinney's Sess. Laws of N.Y. 8072 (codified at N.Y. E.P.T.L. § 8-1.9).

60. *See* N.Y. EST. POWERS & TRUSTS LAW § 8-1.9 (McKinney 2014).

61. *Id.* § 8-1.9(d)(1); *see also* N.Y. NOT-FOR-PROFIT CORP. LAW § 715-a (McKinney 2014).

62. N.Y. E.P.T.L. § 8-1.9(d)(3).

63. The term "key employee" is defined by the Act as "any person who is in a position to exercise substantial influence over the affairs of the corporation, as referenced in 26 U.S.C. section 4958(f)(1)(A) and further specified in 26 C.F.R. § 53.4958-3(c), (d) and (e), or succeeding paragraphs." *Id.* § 8-1.9(a)(3); *see also* N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(25).

64. The term "related party transaction" is defined by the Act as "any transaction, agreement or any other arrangement in which a related party has a financial interest and in which the trust or any affiliate of the trust is a participant." N.Y. E.P.T.L. § 8-1.9(a)(8). The term "related party" is defined as:

> (i) any trustee or key employee of the trust or any affiliate of the trust; (ii) any relative of any trustee or key employee of the trust or any affiliate of the trust; or (iii) an entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a

board or a designated committee charged with addressing such transactions.[65] Prior to entering into a related party transaction, the trustees or authorized committee of trustees must ensure that the transaction is fair, reasonable, and in the best interests of the organization or trust.[66] In addition, the trustees or the authorized committee must also consider alternatives to the transaction, if available;[67] approve the transaction by a vote of at least a majority of those trustees or committee members present at a meeting;[68] and document the basis for approval and the alternatives considered contemporaneous with such a meeting.[69]

In addition to the provisions of the law regarding conflicts of interest, the Act also requires organizations and trusts to comply with certain audit procedures.[70] Nonprofit corporations and wholly-charitable trusts with twenty or more employees and annual revenue in excess of $1 million must also adopt a whistleblower policy to protect those who report suspected misconduct from retaliation.[71]

Most provisions of the Act took effect on July 1, 2014.[72] For trusts with annual revenues of less than $10 million, the audit procedures addressed in the Act are not effective until January 1, 2015.[73]

D. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("UAGPPJA")

On October 23, 2013, New York State enacted the UAGPPJA, which addresses the issue of jurisdiction over adult guardianships and other protective proceedings.[74] The UAGPPJA provides a mechanism for resolving multi-state jurisdictional disputes in such matters.[75] The UAGPPJA was developed by the Uniform Law Commission to address jurisdictional confusion in adult guardianship and other protective

partnership or professional corporation, a direct ownership interest in excess of five percent.

Id. § 8-1.9(a)(6).

65. *Id.* § 8-1.9(d)(3).

66. *Id.* § 8-1.9(c)(1).

67. *Id.* § 8-1.9(c)(2)(A).

68. N.Y. E.P.T.L. § 8-1.9(c)(2)(B).

69. *Id.* § 8-1.9(c)(2)(C).

70. *Id.* § 8-1.9(b).

71. *Id.* § 8-1.9(e).

72. Act of December 18, 2013, ch. 549, 2013 McKinney's Sess. Laws of N.Y. 8072 (codified at N.Y. E.P.T.L. § 8-1.9).

73. *Id.* (codified at N.Y. E.P.T.L. § 8-1.9).

74. Act of October 23, 2013, ch. 427, 2013 McKinney's Sess. Laws of N.Y. 857 (codified at N.Y. MENTAL HYG. LAW § 83 (McKinney 2014)).

75. *Id.*

proceedings.[76] The Sponsor's Memorandum that accompanied the UAGPPJA bill indicated that "[o]ften, jurisdiction in adult guardianship cases is complicated because multiple states, each with its own adult guardianship system, may have an interest in the case. Consequently, it may be unclear which state court has jurisdiction to decide the guardianship issue."[77]

The UAGPPJA is incorporated into New York law as Article 83 of the Mental Hygiene Law.[78] The terms of the UAGPPJA provide a framework for communication and cooperation between courts of different jurisdictions,[79] including procedures for resolving jurisdictional issues where petitions for guardianship are pending in more than one place,[80] as well as procedures for transferring a guardianship proceeding to or accepting one from another jurisdiction.[81] The UAGPPJA also provides the factors that a court may use in determining whether the adult for whom the protection order is sought has sufficient connection with a particular state for purposes of establishing jurisdiction[82] and defines a three-level priority system for a New York court to establish jurisdiction.[83] Even where a court may not be able to obtain jurisdiction according to those procedures, the UAGPPJA also outlines several special circumstances where a New York court will always have jurisdiction: (i) for a protective order with respect to property located in New York; and (ii) for guardianship appointment in an emergency circumstance where it is likely to result in substantial harm to the person for whom the appointment is sought and there is no other guardian appointed.[84] Once a guardianship appointment or a protective order is obtained, the UAGPPJA provides procedures for registering an out-of-state appointment or order in a New York State court.[85]

76. 2013 *McKinney's Sess. Law News* A-857 (legislative memorandum).

77. *Id.*

78. Act of October 23, 2013, ch. 427, 2013 McKinney's Sess. Laws of N.Y. 857 (codified at N.Y. MENTAL HYG. LAW § 83).

79. *See* N.Y. MENTAL HYG. LAW § 83.05-83.11.

80. *Id.* § 83.29.

81. *Id.* §§ 83.31, 83.33.

82. *Id.* § 83.13.

83. *Id.* § 83.17.

84. N.Y. MENTAL HYG. LAW § 83.19.

85. *Id.* § 83.35, 83.37. Section 83.39 of the Mental Hygiene Law provides that

> [u]pon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property may exercise in this state all powers authorized in the order or appointment except as prohibited under the laws of this state . . . .

Id. § 83.39.

The amendments for the UAGPPJA included references to its provisions in both Article 81 of the Mental Hygiene Law[86] and Article 17-A of the Surrogate's Court Procedure Act ("SCPA").[87] The UAGPPJA went into effect on April 21, 2014.[88]

E. Necessity for Qualified Domestic Trust (QDOT) Eliminated When No Federal Return Required

An amendment to the Tax Law provides that dispositions to an individual's non-U.S. citizen surviving spouse will not be subject to New York State estate tax, despite the disposition not passing through a QDOT, in the circumstance where a federal estate tax return is not due and a disposition to the non-citizen spouse would otherwise qualify for the federal estate tax marital deduction under Code section 2056.[89] The amendment took effect on December 18, 2013, and applies to estates of individuals dying on or after January 1, 2010, but expires and will be deemed repealed on July 1, 2016.[90]

F. Series of Laws Relating to Recommendations of the Chief Administrative Judge

Throughout the 2013 and 2014 legislative sessions, a series of measures were introduced at the request of A. Gail Prudenti, the New York State Unified Court System's Chief Administrative Law Judge, upon the recommendation of her Surrogate's Court Advisory Committee.[91] The measures were signed into law at various points

86. Act of October 23, 2013, ch. 427, 2012 McKinney's Sess. Laws of N.Y. 857 (codified at N.Y. MENTAL HYG. LAW § 81.18).

87. *Id.* (codified at N.Y. SURR. CT. PROC. ACT § 1758(1) (McKinney 2014)).

88. *Id.* (codified at N.Y. S.C.P.A. § 1758(1)).

89. Act of December 18, 2013, ch. 538, 2013 McKinney's Sess. Laws of N.Y. 4851A (codified at N.Y. TAX LAW § 951(b) (McKinney 2014)). The bill indicates the new paragraph relating to eligibility for the estate tax marital deduction for a non-citizen spouse without the use of a QDOT was to be added to Tax Law Section 951 and paragraph (c). However, the 2014-2015 Budget modified Tax Law Section 951 by removing the paragraph that had been Section 951(b) relating to the New York generation-skipping transfer taxes. *See* Act of March 31, 2014, ch. 59, 2014 McKinney's Sess. Laws of N.Y. 6359 (codified at N.Y. TAX LAW § 951(b)).

90. Act of December 18, 2013, ch. 538, 2013 McKinney's Sess. Laws of N.Y. 4851A (codified at N.Y. TAX LAW § 951(b)).

91. *See* 2013 *McKinney's Sess. Law News* A-4061 (legislative memorandum); 2013 *McKinney's Sess. Law News* A-6555 (legislative memorandum); 2013 *McKinney's Sess. Law News* A-7061 (legislative memorandum); 2014 *McKinney's Sess. Law News* A-7461A (legislative memorandum); 2014 *McKinney's Sess. Law News* S-7144 (legislative memorandum); 2014 *McKinney's Sess. Law News* A-9757 (legislative memorandum); 2014 *McKinney's Sess. Law News* S-7077A (legislative memorandum).

throughout 2013 and 2014.[92] A summary of several of the changes is discussed below.

1. Technical Corrections and Clarifying Amendments to the Decanting Statute

The bill package included several bills to correct previous changes made in 2011 to New York's trust decanting statute (EPTL section 10-6.6).[93] The changes took effect on November 13, 2013, the date the bill was signed into law.[94] Among the noteworthy provisions was a clarification that a trustee with unlimited discretion to invade trust principal may decant the principal of that trust (the "invaded trust") to another trust (the "appointed trust") for the benefit of one, more than one, or all of the same current beneficiaries of the invaded trust and the appointed trust may share one, more than one, or all of the successor and remainder beneficiaries with the invaded trust.[95]Additionally, the amendments make clear that the interest of a beneficiary who is entitled to discretionary income, but not principal, of the invaded trust at the time of the decanting may be continued in the appointed trust.[96] Finally, the amendments also clarify that in the case where more than one trustee is

92. *See generally* Act of October 23, 2013, ch. 432, 2013 McKinney's Sess. Laws of N.Y. 4061 (codified at N.Y. E.P.T.L. § 10-6.6 (McKinney 2014)); Act of September 27, 2013, ch. 348, 2013 McKinney's Sess. Laws of N.Y. 6555 (codified at N.Y. E.P.T.L. § 3-3.3); Act of November 13, 2013, ch. 482, 2013 McKinney's Sess. Laws of N.Y. 7061 (codified at N.Y. E.P.T.L. § 10-6.6); Act of November 21, 2014, ch. 439, 2014 McKinney's Sess. Laws of N.Y. 7461A (codified at N.Y. E.P.T.L. § 4-1.3); Act of August 11, 2014, ch. 315, 2014 McKinney's Sess. Laws of N.Y. 7144 (codified at N.Y. E.P.T.L. § 2-1.11); Act of July 22, 2014, ch. 130, 2014 McKinney's Sess. Laws of N.Y. 9757 (codified at N.Y. E.P.T.L. § 10-6.6); Act of September 23, 2014, ch. 391, 2014 McKinney's Sess. Laws of N.Y. 7077A (codified at N.Y. E.P.T.L. § 13-2.3).

93. Act of November 13, 2013, ch. 482, 2013 McKinney's Sess. Laws of N.Y. 7061 (codified at N.Y. E.P.T.L. § 10-6.6).

94. The main bill, which encompasses the bulk of the substantive changes to N.Y. E.P.T.L. section 10-6.6(b), was signed into law on November 13, 2013, and included a provision that the changes would take effect "immediately." Act of November 13, 2013, ch. 482, 2013 McKinney's Sess. Laws of N.Y. 7061 (codified at N.Y. E.P.T.L. § 10-6.6). There were two smaller bills that also amended N.Y. E.P.T.L. § 10-6.6(b) and were signed into law on different dates. *See* Act of October 23, 2013, ch. 432, 2013 McKinney's Sess. Laws of N.Y. 4061 (codified at N.Y. E.P.T.L. § 10-6.6) (clarifying that the amendments made to the decanting statute apply to trusts created *on* the effective date of that legislation, not just to those trusts created prior to and after such date) and Act of July 22, 2014, ch. 130, 2014 McKinney's Sess. Laws of N.Y. 9757 (codified at N.Y. E.P.T.L. § 10-6.6) (correcting a reference in N.Y. E.P.T.L. § 10-6.6(s)(10) from N.Y. E.P.T.L. § 7-1.1 to N.Y. E.P.T.L. § 7-1.11, the correct statute).

95. Act of November 13, 2013, ch. 482, 2013 McKinney's Sess. Laws of N.Y. 7061 (codified at N.Y. E.P.T.L. § 10-6.6).

96. *Id.* (codified at N.Y. E.P.T.L. § 10-6.6(s)(4)).

acting, the decision to decant requires only a majority of the acting trustees, not unanimity among them.[97]

Also included in the amendments is an explanation that if the invaded trust is a non-grantor trust and the appointed trust is a grantor trust, the grantor will not be considered a beneficiary of the trust by reason of the trustee's authority to reimburse the grantor for income taxes attributable to the appointed trust or pay such taxes on the grantor's behalf.[98]

The amendments to EPTL Section 10-6.6 also attempted to answer some questions related to whether a decanting begins the running of the statute of limitations on an action to compel a trustee to account. The amendment provisions indicate that the determination as to whether a decanting triggers the statute of limitations for compelling an accounting shall be based on all the facts and circumstances of the situation.[99] The law now requires that the document memorializing the decanting must state that in certain circumstances the decanting will trigger the start of that statute of limitations.[100]

2. Legislation Regarding Inheritance Rights of a Posthumously-Conceived Child

A new section 4-1.3 of the EPTL provides certain rights to children conceived from the genetic material of a deceased individual.[101] The law now provides that a child (referred to as the "genetic child"[102]) conceived using the sperm or ova (the "genetic material"[103]) of a deceased person (referred to as the "genetic parent"[104]) is a distributee of the genetic child's genetic parent(s).[105] Additionally, if certain conditions are met, the genetic child may be included in any disposition to a class described as "issue," "children," "descendants," "heirs," or any other term of like import included in a will, trust, or other written instrument created by the genetic parent.[106]

97. *Id.* (codified at N.Y. E.P.T.L. §§ 10-6.7, 10-10.7).

98. *Id.* (codified at N.Y. E.P.T.L. § 10-6.6(s)(10)).

99. *Id.* (codified at N.Y. E.P.T.L. § 10-6.6(j)(5)).

100. Act of November 13, 2013, ch. 482, 2013 McKinney's Sess. Laws of N.Y. 7061 (codified at N.Y. E.P.T.L. § 10-6.6(j)(6)).

101. Act of November 21, 2014, ch. 439, 2014 McKinney's Sess. Laws of N.Y. 7461-A (codified at N.Y. E.P.T.L. § 4-1.3).

102. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(a)(3)).

103. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(a)(2)).

104. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(a)(1)).

105. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(b)).

106. Act of November 21, 2014, ch. 439, 2014 McKinney's Sess. Laws of N.Y. 7461-

The conditions required for a genetic child to be eligible to take as a part of such a class disposition include: (1) the written instrument must have been created by the genetic parent within seven years of the genetic parent's death and must specifically provide consent for the use of his or her genetic material and appoint a person to make decisions about the use of that genetic material;[107] (2) the individual appointed to make decisions regarding the genetic parent's genetic material must have provided notice within certain time limits of the existence and availability of the genetic material to both the executor or administrator of the genetic parent's estate and to a distributee of the genetic parent;[108] (3) that notice must be filed in the Surrogate's Court that has jurisdiction over the genetic parent's estate;[109] and (4) the genetic child must be conceived no later than twenty-four months after the genetic parent's death or born thirty-three months after the genetic parent's death.[110]

The law requires that the written instrument created by the genetic parent to authorize the use of his or her genetic material must be executed in the presence of at least two adult witnesses.[111] The statute includes a model form that, if completed and executed properly, would permit a genetic child to benefit from his or her genetic parent's estate.[112] In the event of a divorce, annulment, or judgment of legal separation between the genetic parent and the person appointed in the written document, the statute provides that the written document is automatically revoked.[113] Additional provisions of the law govern the logistical concerns of administering an estate where genetic material and a written authorization and appointment are present.[114]

The law took effect on November 21, 2014, and applies to any estate of a decedent dying thereafter.[115] However, a genetic child otherwise eligible under this statute may only take as beneficiary of a will, trust, and other written testamentary instrument executed on or after September 1, 2014.[116]

A (codified at N.Y. E.P.T.L. § 4-1.3(b)).

107. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(b)(1)(A)-(B)).

108. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(b)(2).

109. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(b)(3).

110. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(b)(4).

111. Act of November 21, 2014, ch. 439, 2014 McKinney's Sess. Laws of N.Y. 7461-A (codified at N.Y. E.P.T.L. § 4-1.3(c)(1)).

112. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(c)(5)).

113. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(d)).

114. *Id.* (codified at N.Y. E.P.T.L. § 11-1.5(a)-(d)).

115. *Id.* (codified at N.Y. E.P.T.L. § 4-1.3(f)).

116. Act of November 21, 2014, ch. 439, 2014 McKinney's Sess. Laws of N.Y. 7461-

3. Requirement for Court Approval for a Personal Representative to Renounce Decedent's Property Eliminated

An amendment to EPTL Section 2-1.11(d)(5) removes the requirement for a personal representative of an estate to obtain court approval in order to renounce property to which the decedent became entitled but did not receive before death.[117] While the change eliminated the requirement for court approval, a personal representative may still seek court approval for renunciation if such approval is so desired.[118] This amendment took effect immediately upon the bill being signed into law on August 11, 2014, and applies to the estates of all decedents dying on or after that date.[119]

4. Amendment Permitting Settlement of a Resigning Fiduciary's Account Informally

Sections 715 and 716 of the N.Y. SCPA were amended to permit a court to approve an informal settlement of a resigning fiduciary's account.[120] Previously, the law required that a resigning fiduciary must settle the fiduciary's account through a formal judicial process.[121] The court maintains the right to compel a full judicial accounting at its discretion.[122] This amendment took effect immediately upon the bill being signed into law on November 13, 2013, and applies to the estates of all decedents dying on or after that date.[123]

5. Amendments to the Anti-Lapse Statute

Prior to recent changes, the anti-lapse statute (N.Y. EPTL section 3-3.3) applied to a disposition to a named beneficiary or to a class, including a class described in the form of "issue" or "descendants."[124] However, the inclusion of such multigenerational classes in the anti-lapse statute could result in conflicting outcomes between the application of the anti-lapse provisions and the application of N.Y. EPTL section 2-1.2, which

A (codified at N.Y. E.P.T.L. § 4-1.3(f)).

117. Act of August 11, 2014, ch. 315, 2014 McKinney's Sess. Laws of N.Y. 7144 (codified as N.Y. E.P.T.L. § 2-1.11(d)(5)).

118. *Id.* (codified at N.Y. E.P.T.L. § 2-1.11(d)(5)).

119. *Id.* (codified at N.Y. E.P.T.L. § 2-1.11(d)(5)).

120. Act of November 13, 2013, ch. 483, 2013 McKinney's Sess. Laws of N.Y. 7062 (codified at N.Y. SURR. CT. PROC. ACT LAW §§ 715-16 (McKinney 2014)).

121. *Id.*

122. *Id.*

123. *Id*.

124. Act of September 27, 2013, ch. 348, 2013 McKinney's Sess. Laws of N.Y. 6555 (codified at N.Y. E.P.T.L § 3-3.3).

provides that a distribution to issue is to be by representation.[125] To cure this apparent conflict, N.Y. EPTL section 3-3.3 was amended to explicitly exclude application of the anti-lapse provisions to class gifts made to "issue," "descendants," and other classes described by words of similar import.[126] The amendment also included language clarifying that the anti-lapse statute would apply to testamentary dispositions of a future estate, such as a remainder interest in a testamentary trust.[127] This change is effective for decedents dying after September 27, 2013.[128]

6. Restrictions on the Filing of Abandoned Property Services Locator Agreements in Surrogate's Court

When a qualifying heir or estate representative utilizes an abandoned property location service (such as an attorney or accountant) to submit a claim to the New York State Office of Unclaimed Funds ("OUF"), OUF requires the claim be accompanied by a court-certified copy of the agreement between the abandoned property location service and the estate representative or qualifying heir.[129] Section 13-2.3 of the N.Y. EPTL was amended to provide that the surrogate's court would only accept for filing an abandoned property location services agreement if the amount at issue is in excess of $1,000 or if the fiduciary seeking the abandoned property has been appointed or has a proceeding seeking appointment pending in the surrogate's court where the agreement is to be filed.[130] This change took effect immediately upon the bill being signed into law on September 23, 2014.[131] The bill jacket indicates that OUF has determined that it "will no longer accept an abandoned property location services agreement where letters have not been issued to an estate representative, unless it is executed by the spouse or children of a decedent or the amount at issue is less than $1,000."[132]

125. Memorandum of Assemb. Lavine, *reprinted in* 2013 A.B. 6555; *see* N.Y. E.P.T.L. § 2-1.2.

126. Act of September 27, 2013, ch. 348, 2013 McKinney's Sess. Laws of N.Y. 6555 (codified at N.Y. E.P.T.L. § 3-3.3).

127. *Id*.

128. *Id*.

129. *See* 2014 *McKinney's Sess. Law News* ch. 391 (legislative memorandum); N.Y. ABAND. PROP. LAW § 1416 (McKinney 2014); *see also* N.Y. GEN. BUS. LAW § 393-e (McKinney 2014).

130. Act of September 23, 2014, ch. 391, 2014 McKinney's Sess. Laws of N.Y. S-7077-A (codified at N.Y. E.P.T.L. § 13-2.3).

131. *Id*.

132. 2014 *McKinney's Sess. Law News* ch. 391 (legislative memorandum).

III. NEW YORK STATE REGULATIONS AND CASES

A. Guidance from the New York State Division of Taxation and Finance (NYSDTF) for Same-Sex Couples in the Wake of United States v. Windsor

NYSDTF issued guidance, following the Supreme Court decision in *United States v. Windsor* and Revenue Ruling 2013-17, regarding implications for same-sex married couples required to file tax returns in New York State. Based upon Revenue Ruling 2013-17, couples who previously filed income and estate tax returns may amend previously filed returns to change their filing status from single to married.[133] For New York taxes, "equal treatment has been given to individuals married to different-sex spouses and same-sex spouses since the enactment of the Marriage Equality Act, which took effect on July 24, 2011."[134] Therefore, the New York guidance makes clear that estates of individuals who were legally married to same-sex spouses and died *prior* to July 24, 2011, may, but are not required to, amend previously filed estate tax returns where the statute of limitations to apply for a refund remains open.[135]

B. Public Access to Surrogate's Court Documents Limited

The Chief Administrative Judge of the New York State Unified Courts System added a new section 207.64 of the Uniform Civil Rules of the surrogate's courts regarding public access to certain filings with the surrogate's courts.[136] The new rule limits access to certain documents to only people interested in the estate of a decedent or their counsel; the Public Administrator or the counsel thereto; counsel for any Federal, State or local governmental agency; or court personnel.[137] Individuals not included in the above list may obtain written permission to access records from the surrogate or chief clerk of the court.[138] The documents subject to the new rule are: (1) all papers and documents in SCPA Article 17 or 17-A guardianship proceedings; (2) death certificates; (3) tax returns; (4) documents containing social security numbers; (5) inventories of firearms; and (6) inventories of assets.[139] The new rule became effective

133. *See* Rev. Rul. 2013-17, 2013-2 C.B. 201.
134. N.Y. Dep't of Taxation and Fin. Mem. TSB-M-13(5)I, (10)M (Sept. 13, 2013).
135. *Id.*
136. N.Y. COMP. CODES R. & REGS. tit. 22 § 207.64 (2014).
137. *Id.*
138. *Id.*
139. *Id.*

on March 19, 2014.[140]

C. Surrogate's Courts Have Jurisdiction to Review Reasonableness of Compensation Paid to Out-of-State Law Firm Representing Estate

In *In Re Askin*, the appellate division examined whether the surrogate's court has subject matter jurisdiction to determine what, if any, legal fees an estate owes to an out-of-state law firm.[141] The decedent died in May 1997, survived by her daughter, son, and three grandchildren.[142] The daughter, who was a resident of Massachusetts at the time of the decedent's death, was the nominated executor under the decedent's will and was issued letters testamentary.[143] The daughter retained a Massachusetts law firm to represent her as executor of the estate.[144] The Massachusetts firm had no offices in New York and was required to retain New York counsel to appear on the estate's behalf in the New York surrogate's court regarding the estate.[145] The daughter later moved to New York and hired a New York firm to serve as successor counsel.[146] Thereafter, the daughter filed a petition for judicial settlement of a final account of the estate.[147] Decedent's son and grandchildren filed objections to the final accounting, including a challenge to the counsel fees paid to the Massachusetts law firm.[148] The Massachusetts firm asserted that the New York surrogate's court did not have jurisdiction to review the reasonableness of the fees it had charged.[149]

The court recognized that the surrogate's court has authority to fix and determine attorneys' fees for services rendered to a fiduciary of an estate under N.Y. SCPA section 2110.[150] The court determined, citing previous case law, that "[a]s the approval or disgorgement of legal fees already paid to [the Massachusetts firm] will, one way or the other, affect the administration of the decedent's estate," the surrogate's court had jurisdiction to fix and determine fair compensation for the services rendered by the out-of-state law firm.[151]

140. *Id.*
141. 113 A.D.3d 72, 74, 976 N.Y.S.2d 492, 493 (2d Dep't 2013).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *In re Askin*, 113 A.D.3d at 74, 976 N.Y.S.2d at 493.
147. *Id.* at 74, 976 N.Y.S.2d at 494.
148. *Id.* at 75, 976 N.Y.S.2d at 494.
149. *Id.* at 76, 976 N.Y.S.2d at 495.
150. *Id.* at 76-77, 976 N.Y.S.2d at 495.
151. *In re Askin*, 113 A.D.3d at 83, 976 N.Y.S.2d at 499.

D. Due Execution Could be Found on Testimony of Attorney Supervising Execution Alone Where Attesting Witnesses Asserted Privilege

In *In re Buchting*, the decedent's surviving spouse sought to probate the decedent's will over the objections of the decedent's children from a prior marriage.[152] At the SCPA section 1404 hearing, the surviving spouse called the attorney who drafted the will and supervised its execution, as well as the two attesting witnesses.[153] The attorney described the events of the will execution, the details of which would satisfy the statutory requirements under N.Y. EPTL section 3-2.1.[154] However, upon taking the stand, the two attesting witnesses both invoked their Fifth Amendment rights against self-incrimination and refused to testify.[155] The decedent's children thereafter moved to dismiss the surviving spouse's petition, alleging–among other things–that the surviving spouse failed to establish due execution.[156] The surviving spouse then cross-moved for summary judgment to admit the will to probate.[157] The surrogate's court denied both motions, but subsequently admitted the will to probate.[158]

The appellate division determined that the testimony of the attorney was sufficient to satisfy the petitioner's burden to prove due execution.[159] The court asserted that invocation of a privilege was akin to failure to recall the events of the execution.[160] As a result, the will could be admitted on the testimony of another witness and other sufficient proof.[161] Although neither of the attesting witnesses testified regarding the substance of the execution ceremony, the court found that the testimony of the attorney was sufficient because a presumption of due execution arises where the execution of a will is supervised by the attorney who drafted it and there was no evidence offered to contradict the testimony of the attorney.[162] The court reasoned that "to preclude the probate of a will as a matter of law because both attesting witnesses refuse[d] to testify on constitutional grounds would come perilously close to drawing a

152. 111 A.D.3d 1114, 1114, 975 N.Y.S.2d 794, 796 (3d Dep't 2013).
153. *Id.*
154. *Id.* at 1115, 975 N.Y.S.2d at 797.
155. *Id.* at 1114, 975 N.Y.S.2d at 796.
156. *Id.*
157. *In re Buchting*, 111 A.D.3d at 1114, 975 N.Y.S.2d at 796.
158. *Id.*
159. *Id.* at 1116, 975 N.Y.S.2d at 797.
160. *Id.* at 1114-15, 975 N.Y.S.2d at 796.
161. *Id.* at 1115, 975 N.Y.S.2d at 796.
162. *In re Buchting*, 111 A.D.3d at 1115-16, 975 N.Y.S.2d at 797.

prohibited inference from the invocation of the privilege by nonparties."[163]

E. Divorce Did Not Revoke Testamentary Disposition and Fiduciary Appointment of Former Father-In-Law

In *In re Lewis*, the decedent had executed a will in Texas in 1996 (the "1996 will") that named her husband as the beneficiary of her entire estate and named him as her executor.[164] In the event that her husband predeceased her, the 1996 will benefitted her father-in-law and named him as successor executor.[165] In 2007, the decedent divorced her husband and moved to New York to live on a piece of real property that she was awarded in the divorce.[166] Decedent died in March 2010 as a New York resident.[167] Decedent's former father-in-law filed a petition to probate decedent's 1996 will, which he asserted had been in his custody since its execution.[168] The former father-in-law's petition argued that the testamentary disposition to decedent's ex-husband and the appointment of the ex-husband as executor under decedent's will were revoked by virtue of the divorce.[169] As a result, the former father-in-law alleged that he was the sole beneficiary of the decedent's estate under the 1996 will and asked the surrogate to issue letters testamentary to him.[170]

Decedent's parents, brother, and half-brother filed objections to probate, alleging (1) that because decedent was a resident of Texas at the time the 1996 will was signed and at the time of her divorce, the provisions of the 1996 will benefiting decedent's former father-in-law and appointing him as her fiduciary were void by virtue of Texas law;[171] (2) that the former father-in-law's failure to return decedent's will at the time of decedent's divorce from her ex-husband violated the terms of the divorce decree and therefore "wrongfully and fraudulently deprived

163. *Id.* at 1115, 975 N.Y.S.2d at 797.

164. 114 A.D.3d 203, 206, 978 N.Y.S.2d 527, 528 (4th Dep't 2014).

165. *Id.*

166. *Id.* at 205, 978 N.Y.S.2d at 528.

167. *Id.*

168. *Id.* at 206, 978 N.Y.S.2d at 528.

169. *In re Lewis*, 114 A.D.3d at 206, 978 N.Y.S.2d at 528.

170. *Id.* at 206, 978 N.Y.S.2d at 528-29.

171. *Id.* at 206, 978 N.Y.S.2d at 529.

> [I]f, after making a will, the testator's marriage is dissolved . . . by divorce . . . , all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will expressly provides otherwise.

Id. (emphasis in original) (internal quotation marks omitted).

decedent of the opportunity to access and evaluate the 1996 will";[172] and (3) that the 1996 will had been revoked by a subsequent will that had since been lost.[173]

In support of their allegation that the decedent had executed a subsequent will which revoked the 1996 will, the objectants submitted the testimony of decedent's former neighbor.[174] The neighbor testified that the decedent had shown her a package that contained a "letter from 'an attorney's office' and a legal document entitled 'Last Will and Testament.'"[175] The neighbor testified that the legal document revoked all prior wills, named decedent's mother as executrix of decedent's estate, benefited primarily decedent's brothers, and was signed by decedent and two witnesses.[176] The neighbor indicated that she had retained the legal document on the decedent's behalf for a period of time, but that she returned it to the decedent prior to moving out of the area.[177] No will or any other legal document fitting the description offered by the neighbor was found in decedent's residence.[178] The objectants argued that even though there was not sufficient evidence to admit the lost will to probate, the testimony of the neighbor provided sufficient evidence that the decedent had executed a subsequent will and revoked the 1996 will.[179] However, the court determined that the evidence offered by decedent's former neighbor was insufficient to establish that a subsequent will had been duly executed and attested under the laws of either New York or Texas.[180] As a result, the court found "that the evidence is insufficient to establish that the earlier will was revoked."[181]

The court also found that the 1996 will was not affected by the provisions of the Texas Probate Code because decedent was a domiciliary of New York at the time of her death.[182] New York law provides that a divorce operates to revoke testamentary dispositions to and fiduciary appointments of former spouses only.[183] As a result, the testamentary

172. *Id.* "[T]he divorce decree required [decedent's] ex-husband to return 'any paperwork associated with any items of the decree.'" *In re Lewis*, 114 A.D.3d at 206, 978 N.Y.S.2d at 529.

173. *Id.*

174. *Id.* at 210, 978 N.Y.S.2d at 532.

175. *Id.*

176. *Id.* at 211, 978 N.Y.S.2d at 532.

177. *In re Lewis*, 114 A.D.3d at 211, 978 N.Y.S.2d at 532.

178. *Id.*

179. *Id.* at 210, 978 N.Y.S.2d at 531-32.

180. *Id.* at 211, 978 N.Y.S.2d at 532.

181. *Id.* at 214, 978 N.Y.S.2d at 534.

182. *In re Lewis*, 114 A.D.3d at 209, 978 N.Y.S.2d at 531.

183. *Id.*

disposition to decedent's ex-husband and the appointment of him as decedent's executor were revoked, but all other provisions of the 1996 will remained in effect.[184]

Finally, the court rejected the objectants' contention that the former father-in-law or the decedent's ex-husband were under any obligation to return the 1996 will to decedent under the terms of the divorce decree.[185] The court ruled that the plain language of the divorce decree only required the return of paperwork needed to effectuate the division of property and the will was not such a document.[186]

F. Evidence of Proper Execution of Will Serve to Refute Claims of Disinherited Children

In *In re Mele*, the decedent executed a will two months before his death that left one dollar each to his two sons and two of his four daughters, and directed that the balance should be divided equally between the other two daughters, who were also named as co-executors of his estate.[187] The decedent had previously executed a will that divided his estate among his six children equally.[188] Three of the four children who were left only one dollar objected to the will, alleging fraud and undue influence on the part of the two daughters who benefited the most from the will, that the will had not been properly executed, and that the decedent did not have testamentary capacity to execute the will.[189]

The appellate division affirmed the surrogate court's rejection of all of the objectants' claims.[190] The court found that the proponents of the will had met their burden of showing "that the decedent understood the nature and consequences of making the will, the nature and extent of his property, and the natural objects of his bounty."[191] The court also found that the will proponents demonstrated that the will was duly executed by virtue of the attestation clause and self-proving affidavit contained in the will, and also by offering the testimony of the attorney-draftsman who supervised the execution ceremony.[192] Finally, the court found that "the objectants [had] failed to submit any evidence, beyond conclusory

184. *Id.*
185. *Id.*
186. *Id.*
187. 113 A.D.3d 858, 859, 979 N.Y.S.2d 403, 404 (2d Dep't 2014).
188. *Id.* at 859, 979 N.Y.S.2d at 404-05.
189. *Id.* at 859, 979 N.Y.S.2d at 405.
190. *Id.* at 858, 979 N.Y.S.2d at 404.
191. *Id.* at 859, 979 N.Y.S.2d at 405.
192. *In re Mele*, 113 A.D.3d at 860, 979 N.Y.S.2d at 405.

allegations and speculation" of fraud and undue influence over the decedent.[193]

G. Courts Have Discretion to Take Subsequent Misconduct into Consideration in Awarding Trustee Commissions for a Different Period

In *In re Gregory Stewart Trust*, the trustee of four family trusts–benefiting the trustee's children–was removed for misconduct.[194] As a result of the misconduct, the trustee was denied commissions from 2006 to the time she was removed in 2012.[195] The trustee then sought commissions for 2003, 2004, and 2005.[196] Three of the trustee's children, who were beneficiaries of the trusts, opposed the claim for commissions.[197]

The court denied the trustee commissions for 2003 and 2004 based upon the report of the special referee appointed in the case, which stated that the trustee had failed "to provide competent evidence as to the value of the trusts for those years."[198] With regard to 2005, the court found that it had the discretion to take into consideration all of a trustee's misconduct in determining whether the trustee was eligible for a commission.[199] However, the court found that the denial of a commission should not serve as an additional penalty for the trustee's later misconduct.[200] Based upon "the nature of the trustee's misconduct, both during 2005 and afterwards," the court permitted the trustee to collect a commission for 2005 only.[201]

H. Putative Father Need Not Acknowledge Paternity of Child to All in Order for Acknowledgement to be Open and Notorious

In *In re Reape*, the decedent died intestate survived by ten siblings and by three individuals who claimed to be his non-marital children.[202] Two of the three non-marital children requested letters of administration in the decedent's estate.[203] The non-marital children submitted affidavits

193. *Id.* at 860, 979 N.Y.S.2d at 406.

194. 109 A.D.3d 755, 756, 974 N.Y.S.2d 11, 12 (1st Dep't 2013).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *In re Gregory Stewart Trust*, 109 A.D.3d at 756-57, 974 N.Y.S.2d at 12.

200. *Id.* at 757, 974 N.Y.S.2d at 13 (citing RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. a (1959)).

201. *Id.* at 758, 974 N.Y.S.2d at 13.

202. 110 A.D.3d 1082, 1082, 974 N.Y.S.2d 496, 497 (2d Dep't 2013).

203. *Id*.

from various individuals as evidence of the decedent's acknowledgement of paternity.[204] The affidavits that were submitted to the court included one from the decedent's sister and one from a family friend, both of which indicated that the decedent had openly acknowledged one of the children as his daughter.[205] An additional affidavit was submitted from the decedent's nephew, indicating that the decedent had acknowledged all three of the children as his own.[206]

One of the decedent's brothers filed an objection, claiming that the decedent died without issue.[207] The surrogate dismissed the brothers' objection and determined that there was sufficient evidence that the three children were indeed the decedent's children and were the distributees of the decedent's estate.[208]

The appellate division affirmed the surrogate's determination.[209] Quoting the language of N.Y. EPTL section 4-1.2, the court stated that paternity must be established by clear and convincing evidence such as "a genetic marker test, *or* . . . evidence that the father openly and notoriously acknowledged the child as his own."[210] The court found that the affidavits submitted in the case adequately demonstrated such an open and notorious acknowledgement.[211] The court noted that "there is no requirement that the putative father disclose paternity to all his friends and relatives. An acknowledgement of paternity in the community in which the child lives is sufficient."[212]

204. *Id*. at 1082-83, 974 N.Y.S.2d at 497.
205. *Id*.
206. *Id.* at 1083, 974 N.Y.S.2d at 497.
207. *Reape*, 110 A.D.3d at 1083, 974 N.Y.S.2d at 497.
208. *Id.*
209. *Id.* at 1084, 974 N.Y.S.2d at 498.
210. *Id.* at 1083, 974 N.Y.S.2d at 497-98 (quoting N.Y. E.P.T.L § 4-1.2).
211. *Id.* at 1083, 974 N.Y.S.2d at 498.
212. *In re Reape*, 10 A.D.3d at 1083, 974 N.Y.S.2d at 498.