

# Queens

## BAR BULLETIN

Queens County Bar Association | qcba.org | 90-35 148th Street, Jamaica, NY 11435 | 718-291-4500

October 2019 | Volume 87, No. 1



## ESTATES UPDATE 2019

BY DAVID ADLER

The year in Trusts and Estates was highlighted by limitations on the operation of marital deduction property, the ongoing viability of updating planning documents, and the manner of disposition of digital assets.

### QTIP ELECTION

Any outright bequest to a surviving spouse qualifies for a marital deduction. As such, there is no estate tax on those bequests in the estate of that first spouse to die. As a rule, any property transferred in trust for a surviving spouse does not qualify for the marital deduction, and is fully estate taxable. The exception in the form of trusts is the Qualified Terminal Interest Property Trust (QTIP Trust). This type of trust in which all the income, at least annually must pass to surviving spouse, will also qualify for the marital deduction. The property in this trust avoids estate tax in the estate of the first spouse to die. Yet, both outright bequest property and QTIP Trust property are included in the surviving spouse's estate. As such, QTIP Trusts, essentially provide tax deferral to the surviving spouse's estate.

The mechanism to trigger this consists of making a QTIP Election on the estate tax return of the first spouse to die, thereby insuring marital deduction status for that property. An interesting scenario arose in 2010, reflected in the Estate of Seiden (2018 NY Slip OP 3254IM). In 2010, there was no federal estate tax whatsoever for that year alone. In Seiden, because no federal estate tax return was required to be filed, the surviving spouse made a QTIP

election on the New York State estate tax return. As such, the QTIP property qualified for marital deduction status for New York State purposes. Interestingly, after the second spouse died, the executor also excluded the value of the trust property from her estate, essentially obtaining a double tax exempt benefit. The rationale offered was that no federal tax marital deduction had been elected or claimed, and thus the property did not have to be included in the surviving spouse's estate either. Internal Revenue Code §2044 normally requires inclusion of the QTIP property in the second estate, as discussed above. But, Seiden distinguished Federal and State QTIP elections, sought the benefit of the New York State QTIP election, and by avoiding any formal federal election (as no federal return was filed), also avoided the necessity of inclusion of the property in the survivor's estate normally mandated by the federal statute.

As such, the QTIP property in Seiden avoided New York and federal estate tax in both estates. Theoretically, this scenario, and its duplicative tax avoidance could apply to any situation in which a federal estate tax return is not required to be filed, and a New York QTIP election is taken on the New York return.

Unfortunately, the 2020 New York Executive Budget, which passed on March 31, 2019, altered the Seiden result. The new law requires the inclusion of QTIP property in the surviving spouse's New York estate, even if only a New York QTIP election, and consequent marital deduction was

effected in the first spouse to die's estate. Thus, avoiding the filing of a federal estate tax return will no longer avoid taxation of QTIP property in both estates. This law takes effect for estates of individuals dying on or after April 1, 2019.

### PLANNING OPTIONS

The relatively recent increase in the Federal and New York State estate tax exemption amounts, and the discrepancy between them continues to present planning challenges. The federal exemption amount is presently 11.4 million dollars; the New York State exemption amount is presently 5.74 million dollars.

Further compounding the issues are (2) two additional factors. The federal amount is scheduled to sunset after the year 2025 and revert to levels prior to the recent increase (5,600,000.00 plus inflation adjustments). The state exemption amount is subject to a unique calculation akin to falling off a cliff. Any New York taxable estate that exceeds 5% of the basic exemption amount, subjects the entire taxable estate to full tax liability; Essentially, not just any monies exceeding the exemption amount are taxable, but the entire estate from dollar one.

The above factors create the need for more review and flexibility in planning. The use of prior credit shelter formula provisions may create vast and unintended disparities in transfers of assets between spouses and children. Dispositive schemes must be reevaluated. The focus on state tax

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scenarios may assume a more prominent role, as there is also no portability in accumulation of the first spouse to die's unused exemption, available in New York State. Older documents will need to be updated to reflect significant numerical shifts. Present documents must anticipate the parallel nature of differing federal and state thresholds, and their manner of calculation.

**DIGITAL ASSETS**

The digital asset presents a new type of property with respect to estate administration. EPTL Article 13-A was enacted in September 2016 and addresses the ability of a fiduciary to gain access to digital assets. Initially, digital assets are defined as any electronic record in which the user has a right or interest. The statute dictates that priority in granting access emanates through the use of an online tool. This is a specific tool dictating the terms of access between the user and the provider. Clearly, the service provider's rights are preserved.

In the event that no online tool or similar

governing instrument is in effect, the user's direction in a will, trust or Power of Attorney prevails. This may incorporate specific language in the above documents pertaining to the digital assets. In all scenarios, the fiduciary must provide a written request to the service provider plus other relevant documentation (i.e. Letters Testamentary, Power of Attorney, etc.). Despite this, the service provider may still request a Court Order reflecting certain facets of access.

The default provision for the above is a Terms of Service Agreement (TOS) Agreement. These are agreements generally entered into between users and providers at the outset of the relationship. They dictate who gains access upon death, among other user guidelines. They are provider created, and may significantly limit access. The impact of the TOS upon a duly appointed and authorized fiduciary's right to access have yet to be clarified.

Ideally, utilization of an online tool and specific direction in a dispositive instrument (will, trust)

should achieve the individual's intent to provide access. Dispositive instruments should include additional language of and pertaining specifically to the fiduciary power to access digital assets. The statute enacted by New York State has national overtones and has been adopted by numerous other states. It attempts to balance the influence maintained by the providers, privacy issues and fiduciary rights and responsibilities. The parameters of this recently enacted statute remain subject to further judicial scrutiny.

**QUEENS COUNTY**

Our spring meeting included an update by Surrogate Peter Kelly and Chief Clerk James Becker on the State of the Court. It is anticipated that our fall seminar will focus on Probate and Administration of estates with a view to addressing common problem areas in the preparation and submission of documents. Let's go Mets!

**BY DAVID ADLER**



ANDREW M. CUOMO  
GOVERNOR

August 12, 2019

Hon. Jeffrey Lebowitz  
Special Counsel  
Jaspen Schlesinger LLP  
300 Garden City Plaza  
Garden City, NY 11530

Dear Judge Lebowitz:

I am pleased to inform you that Governor Andrew M. Cuomo is hereby reappointing you to serve as Chairperson of the Second Department Judicial Screening Committee as established by Executive Order No. 15, issued April 27, 2011. The term of service is for three years commencing today.

Additionally, with this appointment, you will also serve as a member of the New York State Judicial Screening Committee for a term commensurate with your service as Chair of the Second Department committee.

Thank you for your service on the Screening Committees and we appreciate the time and effort devoted to this important endeavor.

Very truly yours,  
*Zackary Knaub*  
Zackary Knaub  
Interim Counsel to the Governor

cc: Douglas Dunham  
James Finke  
Leigh Frany

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