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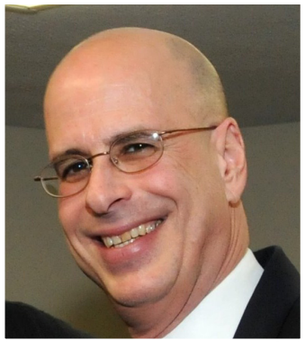
ESTATES UPDATE 2016

By: David Adler



The year in Trusts and Estates was highlighted by estate tax uncertainty, modification of the attorney client privilege, and the manner of disposition of digital assets.

TAXATION

The volatility of Federal and State estate tax scenarios continues. The present federal lifetime maximum exemption is $5,490,000. The federal concept of portability continues to apply, in that a surviving spouse may acquire the first spouse to die's unused exemption amount, up to a maximum of $10,980,000. The New York State exemption amount is presently $4,187,500, but will adjust upward to $5,250,000 on April 1, 2017. Portability does not apply for state tax purposes. Yet, the new administration's proposed federal tax guidelines include the elimination of the estate tax. Over the past 50 plus years, the estate tax has only been eliminated on one occasion, for one year (2010) due to a unique sunset provision pending a change of tax laws.

The elimination of the federal estate tax remains a drastic measure, and may not survive in its present proposed format. It appears that a more likely scenario will be the lowering of the estate tax rates which now top out at 40%. Further, our New York State exemption amount is slated to equal the federal exemption amount within 2 years, A change in federal law may well trigger a change in state estate tax law as our present tax law is, by its terms, tied to the federal amount.

As such, all planners are advised to build as much flexibility into the plans as logic permits. More frequent review of all planning documents remain a necessity under the federal tax climate. New York presently has no formal proposal to eliminate their estate tax, and dual planning scenarios (New York and Federal) still need to be addressed.

ATTORNEY CLIENT PRIVILEGE

Confidential communications between attorney and client are generally privileged. This is codified in CPLR § 4503 (a). Yet, there is an exception to this privilege in actions involving the probate, validity or construction of a will. In those types of actions, an attorney will be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument (CPLR § 4503(b)) The exception is limited to communications which would not tend to disgrace the memory of the

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Achieving Juvenile Justice in NY: Part 2

By: Priyanka Verma

V. Collateral Consequences

Criminal records can inhibit success in the academic and career realms for adolescents.[106] This can increase the likelihood of an adolescent becoming a career criminal and includes collateral consequences in the future.[107] This includes myriad barriers to real opportunities for personal and professional growth.[108] Youths with unsealed adolescent arrests and convictions must disclose criminal information on job applications.[109] Also, an unsealed conviction can hinder a youth's chances to gain Lawful Permanent Resident Status and/or US Citizenship.[110] Children prosecuted and convicted as adults are subject to having permanent criminal records.[111] Adult criminal convictions can often lead to long-term collateral consequences relating to housing, employment, public benefits, educations, voting and health care.[112] For instance, after incarceration, only one-third of young adults in New York complete their education.[113] And without a high school diploma, these juveniles are more likely to be unemployed and may require public assistance.[114] For those juveniles who complete high school, opportunities for higher education are lowered because of their criminal history.[115] In addition, prospective students with a criminal conviction have limited access to federal student aid loans.[116] Juveniles with criminal records also face impediments to securing both private and public housing.[117] In New York, property owners may decline an application due to the applicant's criminal record and the New York City Housing Authority

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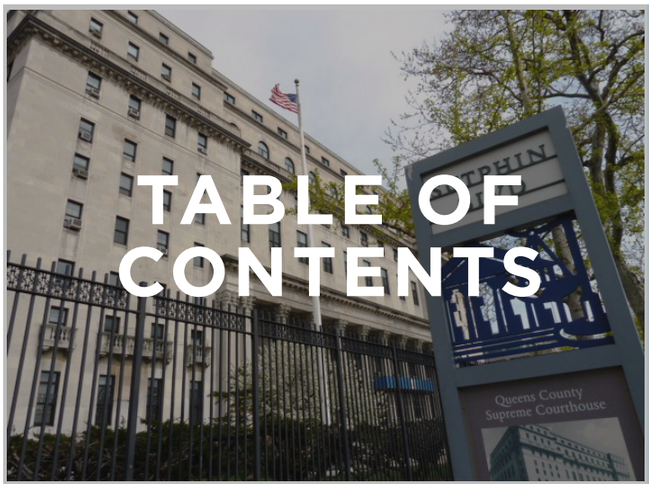

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decedent. This type of disclosure is most common to SCPA § 1404 examinations in which the attorney/draftsman testifies as to the testator's genealogy, instructions, and other facts disclosed necessary to his preparation and execution of the will.

This exception has been extended to actions concerning revocable trusts. This is purportedly because revocable trusts function similarly, if not as the equivalent, of wills in many ways. Both remain revocable documents until death. Yet, this exception is not applicable during the life of the grantor, as it would not be applicable during the life of the testator. This new trust exception is only applicable after the grantor's death.

DIGITAL ASSETS

Traditionally, fiduciaries can gain access to all the property of a decedent. In estate and many trust scenarios this is part of the marshalling process, as a preliminary step to distribution. Property has been traditionally designated as real, personal, tangible personal, intangible personal, and mixed. The internet creates a new type of property, essentially a digital asset. One way of describing it is the providing of access to information. That access has become, in the computer age, an asset.

The Revised Uniform Fiduciary Access to Digital Assets Act, (RUFADAA)has been signed into law in this State as of September 29,2016. This statute has national overtones and has been adopted by numerous other states. It's prior format had a different focus, and the present statute is the result of extensive negotiations between the Uniform Law Commission and powerful service providers (Facebook, Google).

The statute has had limited interpretation to date in this State, and contains terminology and concepts germane to the internet world. Essentially, privacy is the rule, and access is not permitted unless the decedent consented to the disclosure of the digital asset. Basically the service providers have significantly protected their rights.

By way of some basic definitions, "Digital Asset" is broadly defined to mean an electronic record; "Terms of Service Agreements (TOS)" are entered into between individuals and service providers, and dictate who gains access upon death, among other user guidelines.

There is a three-tiered approach to fiduciary access to a decedent's digital assets, in order of descending priority:

1) Direction given via an online tool that can be modified or deleted at all times prevail. This is a specific tool dictating the terms of access between the individual and the provider.

2) In the absence of the use of an online tool, or if none was provided, the user's direction in a Will, Trust, Power of Attorney or other record prevails. This may incorporate specific language in the above documents pertaining to digital assets.

3) In the absence of any directions as per above, the Terms of Service Agreement controls. The TOS Agreements are provider created and may limit access or require Court Orders to gain access.

The four types of fiduciaries who may qualify to gain access are personal representatives (executor, administrator), Trustees, Agents Acting under Power of Attorney and Guardians.

Ideally, utilization of an online tool, and direction in a dispositive instrument (will, trust), with specificity, should achieve the individual's intent to provide access. The application of presently existing and traditional dispositive language of Wills and Trusts may not accomplish that goal. The parameters of this newly enacted statute have yet to be practically tested or qualified.

QUEENS COUNTY

Our seminar last year focused primarily on complex litigation in Surrogate's Court, and incorporated a discussion of Turnover Proceedings, Motions for Summary Judgment, and Renunciation of Property Interests. We thank Moderator and Surrogate Peter J. Kelly and Speakers Scott G. Kaufman, Francis A. Kahn, and Gerard J. Sweeney for their excellent presentations.

Further, our fall meeting included an update by Surrogate Kelly and Chief Clerk Margaret Gribbon on the State of The Court. We wish Ms. Gribbon a healthy and happy retirement, as she has been an invaluable asset to the Court.

Be Well!