Recent Developments in Estate Planning

Sean R. Weissbart, Esq.
Morris & McVeigh LLP, NYC

Bradley A. Dillon, Esq.
Brown Brothers Harriman, NYC

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Brad Dillon and Sean R. Weissbart

FEDERAL DEVELOPMENTS

Section 2704 Regulations

Background. Section 2704 generally disregards certain restrictions on the ability to liquidate family controlled corporations, partnerships, and limited liability companies when valuing the entity for estate, gift, and GST tax purposes. Much of section 2704 has been eroded by changes in state law and developments in case law. To combat some of this erosion, the Treasury Department issued proposed regulations for section 2704 that addressed the perceived abuse of certain valuation discounts for family owned entities.

Withdrawal of Proposed Regulations. In April 2017, President Trump signed executive order 13789 directing the Treasury Department to examine certain regulatory projects that imposed an undue financial burden on taxpayers, added undue complexity to federal tax laws, or exceeded the statutory authority of the IRS. On October 4, 2017, Treasury released a final report recommending that the proposed regulations under section 2704 should be withdrawn because they "would have hurt family owned and operated businesses by limiting valuation discounts. The regulations would have made it difficult and costly for families to transfer their businesses to the next generation."[1]

Planning Consideration. Therefore, the rules and regulations regarding restrictions on liquidation for valuation purposes for estate, gift, and GST tax purposes remains as it did prior to the proposed regulations. As such, the valuation discounts associated with said restrictions remain unaffected. There does not appear to be another iteration of the proposed regulations on the horizon.

Tax Cuts and Jobs Act of 2017

Qualified Business Income from Pass-Through Entities

A new complex provision was added to the Code under section 199A, which provides for a deduction of up to 20% of business income from pass-through entities (sole proprietorships, partnerships, limited liability companies, or S corporations). In years preceding 2018, income from those entities was taxed at the individual owners' highest marginal rate. The new section 199A allows for a deduction for certain business income in order to bring tax rates for these corporate-like entities more in line with the new, permanent corporate tax rate of 21%. The section is riddled with many exceptions,

[1] Federal Register, Vol. 82, No. 198 (October 16, 2017).

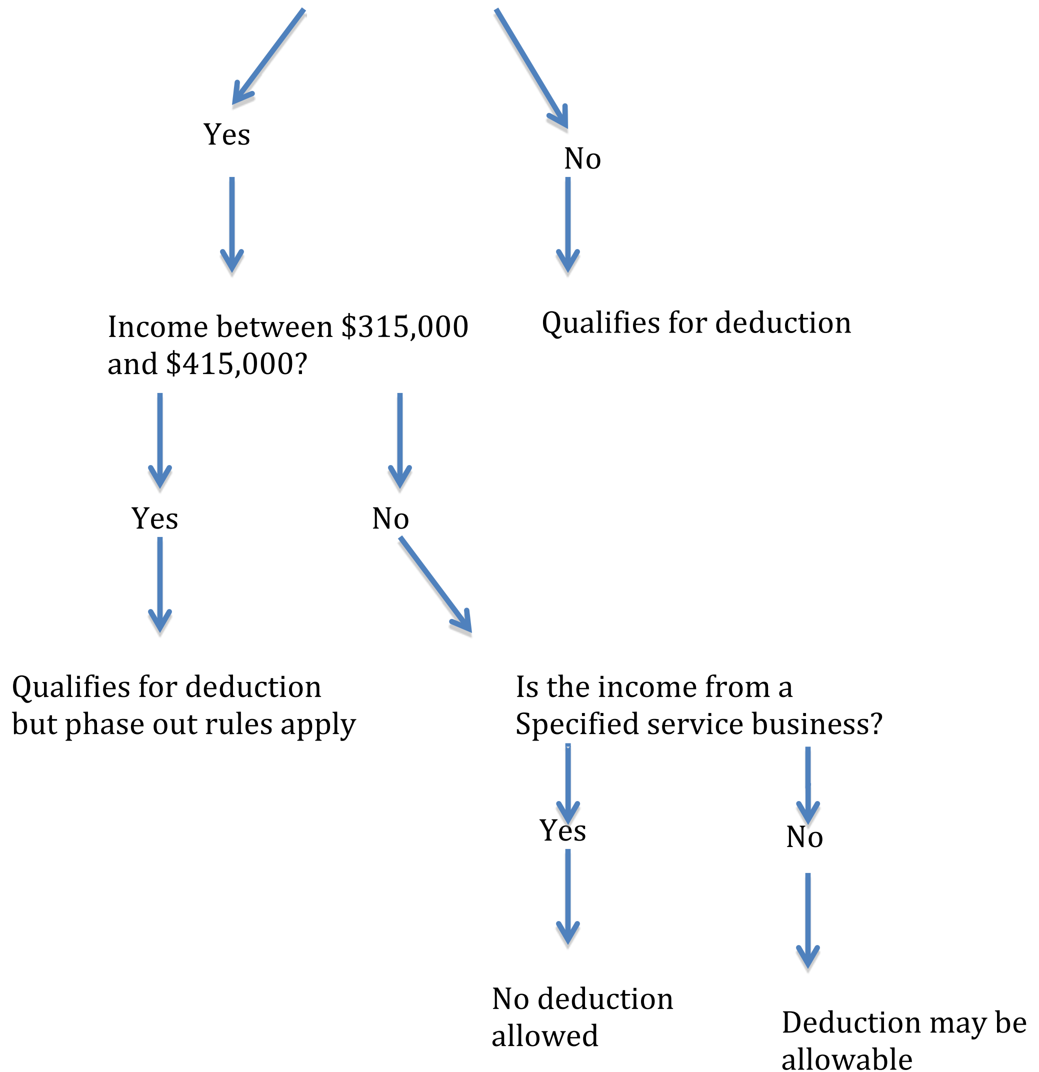
qualifications, and limitations, so any practitioner should be cautious when providing advice to clients about its applicability.

To "deter high-income taxpayers from attempting to convert wages or other compensation for personal services to income eligible for the 20-percent deduction,"[2] the deduction is capped at 50% of the taxpayer's pro rata share of the total W-2 wages paid by the business. For this reason, the top effective rate for pass-through entities that qualify for the deduction is 29.6%, far below the top individual marginal rate of 37% but well above the top corporate marginal rate of 21%.

The deduction is allowed only for qualified business income, which is generally the net amount of income, gain, deduction, and loss from an active trade or business within the United States; qualified business income does not include, among other items, capital gains, dividends, or interest generally.

Notably, the deduction does not apply to specified service businesses in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerages services, or any business where the principal asset is the reputation or skill of one or more of its employees. However, the wage and specified service business limitations do not apply if the taxpayer has taxable income below the specified threshold amounts ($315,000 for married individuals filing jointly), and the deduction is phased out for the next $100,000 of business income.

[2] The Joint Explanatory Statement.



The deduction is also available to trusts and estates. To determine the wage limitation, income is apportioned between beneficiaries and the fiduciary under section 199(d)(1)(B)(i).

Unlike the corporate tax rate, which was made permanent, section 199A expires at the end of 2025.

Increase to Basic Exclusion Amount under section 2010

The Tax Cuts and Jobs Act increases the basic exclusion amount under section 2010(c)(3) from $5 million to $10 million (indexed for inflation after 2011) for estates of decedents dying, generation-skipping transfers, and gifts made after 2017 and before 2026. The indexed amount for 2018 using the new chained CPI approach is $11,180,000.[3] Notably, aside from change to trusts' income tax brackets and the elimination of certain deductions, this is the only change made directly to transfer taxes. However, because the GST exemption is directly tied to section 2010, the GST exemption has also nearly doubled to $11,180,000 for individuals. This will similarly expire at the end of 2025. Previously created nonexempt trusts should be examined to determine whether it now makes sense to allocate GST exemption to the trust to shield it from this additional transfer tax in the future.

While many practitioners have returned to their similar concerns in 2012 about clawback, most commentators believe that clawback is unlikely, and Steve Akers has noted that Congressional staffers indicated that clawback was not intended in 2012.

Given the increased exemptions, it may be time to review existing formula clauses in existing documents or in template documents that practitioners and their firms use. A standard bequest of the maximum federal exclusion amount possible to a credit shelter trust may no longer make sense or align with the client's wishes, particularly if the surviving spouse is not a beneficiary of the credit shelter trust. Such a formula may also produce state estate taxes. There could also be potentially devastating consequences of an incorrect GST exemption formula clause, so these should be reviewed, as well.

Planning Opportunities in Light of Temporarily Increased Exemption

Given the temporary nature of the increased exemptions, the calculus involved in determining what kind of planning should be done for clients has become dramatically more complex. The client's level of wealth, the likelihood of appreciation of potentially gifted assets, and an assessment of the client's risk of death prior to 2026 will all play enhanced roles for the next several years as practitioners choose between income or estate tax savings and consider additional gifting strategies.

For example, a client whose wealth is substantially below the new exemption amount may forego typical estate tax planning strategies, such as making gifts, to qualify the assets for a step-up in basis under section 1014. Meanwhile, a client whose wealth is substantially over the new exemption amount may continue to use trust estate planning strategies such as sales to defective grantor trusts and discount planning. For most clients, however, flexibility will remain a crucial feature of any estate plans, so that the income tax/estate tax tradeoff decisions can be deferred until the client dies. Flexibility will also be crucial in allowing clients to avoid any buyer's remorse from making gifts to

[3] Rev. Proc. 2018-18.

utilize the increased exemptions while they exist without creating additional stress on the client. To create flexibility in our clients' planning documents, there are a number of strategies that may be useful to employ, such as QTIP planning, disclaimers, portability, powers of appointment, toggling of gross estate inclusion[4], and SLATs.

It may also be prudent for clients to consider specific gifting opportunities in light of the temporarily increased exemption amounts, such as gifts to dynasty trusts, forgiveness of intra-family loans, equalizing gifts between descendants, and decreasing the leverage in sale to a grantor trust.

Miscellaneous Itemized Deductions

Background. The Tax Cuts and Jobs Act added Section 67(g) to the Code, which provides that no taxpayer may deduct any expense defined as a "miscellaneous itemized deduction" for taxable years 2018-2025. This addition caused uncertainty regarding the ability for a trust or estate to deduct amounts paid to fiduciaries as commissions. Although fiduciary commissions constitute a miscellaneous itemized deduction, Section 67(e)(1) contains an exception that, at least previously, excepted it from the general limitation (discussed below) on deducting miscellaneous itemized deductions. Among other reasons, because Section 67(g) did not specifically address the exception for fiduciary commissions, Congress left practitioners wondering whether it intended to only eliminate the deductions subject to the prior limitation or all deductions considered miscellaneous itemized deductions, including a trust's or estate's ability to deduct commissions paid to its fiduciaries.

Overview of Miscellaneous Itemized Deductions. Section 67(a) provides that individual taxpayers may deduct miscellaneous itemized deductions only to the extent they exceed 2% of the taxpayer's adjusted gross income ("AGI"). Section 67(e) provides that trusts and estates should generally compute their adjusted gross income in the same manner as individuals. Accordingly, trusts and estates also faced the 2%-of-AGI limitation.

The Code does not actually list deductions considered miscellaneous itemized deductions. Instead, the Code defines miscellaneous itemized deductions as all itemized deductions other than the twelve deductions listed in Section 67(b).

Application of Rules to Fiduciary Commissions. This list of Section 67(b) does not include commissions paid by a trust or estate to its fiduciaries; thus, this expense constitutes a miscellaneous itemized deduction. However, as already noted above,

[4] For an excellent discussion of this strategy, which can help clients choose between estate and income tax benefits in their planning, see Bramwell & Madden, "Toggling Gross Estate Inclusion On and Off: A Powerful Strategy," *Estate Planning Journal*, Mar 2017.

Section 67(e)(1) contains an exception that has enabled trusts and estates to fully deduct[5] commissions paid to fiduciaries irrespective of the 2%-percent-of-AGI limitation.

Section 67(e)(1) provides, "the adjusted gross income of an estate or trust shall be computed in the same manner as in the case of an individual, except that the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate…shall be treated as allowable in arriving at adjusted gross income." The Regulations and case law are clear that fiduciary commissions meet the two-part analysis of being an expense (1) incurred in connection with the administration of an estate or trust and (2) that would not have been incurred unless the property was held in trust. Treas. Reg. § 1.67-4(c); *Mellon Bank v. U.S.,* 265 F.3d 1275 (Fed. Cir. 2001) ("It is undisputed that trustee fees are fully deductible").

No Resolution, but Indications Favor Continued Deductibility. As of March 2018, the IRS has not issued any regulations clarifying this issue. However, several factors indicate it is likely that trusts and estates will continue to be able to deduct fiduciary fees. <u>First</u>, the Joint Explanatory Statement on the Tax Cuts and Jobs Act provides that Congress added Section 67(g) to "suspend[] all miscellaneous itemized deductions *that are subject to the 2% floor under present law*." Joint Explanatory Statement 115-97, comments to Section 11045 (emphasis added). Section 67(e) excepted fiduciary fees from the so-called 2% floor. Thus, it appears that Congress did not intend to preclude trusts and estates from continuing to deduct these fees under new section 67(g).

<u>Second</u>, in addition to excepting fiduciary fees from the 2% floor, Section 67(e) also created another exception: despite being miscellaneous itemized deductions, trusts and estates can fully deduct their deduction in lieu of a personal exemption (642(b)) and distribution deduction (651 for simple trusts and 661 for complex trusts and estates). Section 67(e)(2). It is highly improbable that Congress intended to repeal these deductions. With respect to the personal exemption, the Tax Cuts and Jobs Act increased the personal exemption of disability trusts by the addition of Section 642(b)(2)(C)(iii). And if Congress eliminated the distribution deduction, trusts and estates would pay tax on amounts distributed and taxable to beneficiaries – a double taxation that contradicts the very purpose of the quasi-conduit regime of Subchapter J.

Although no certainty will exist until the IRS issues regulations, it seems likely that the Act did not eliminate a trust's or estate's deduction for fiduciary fees.

[5] If any portion of commissions is attributable to expenses that would be incurred irrespective of whether the property is held by a trust, such as investment management fees, that portion of the commission, is subject to the 2%-of-AGI limitation. The Regulations authorize using any reasonable method to make this allocation.

Investment Advisory Fees Not Deductible. The Act did suspend a trust's or estate's ability to deduct investment advisory or management fees. Such expenses are also miscellaneous itemized deductions that are not covered under the exception in Section 67(e). Accordingly, under the Act, these expenses cannot be deducted between 2018 and 2025. Finally, it's worth noting that, where a fiduciary fee is based in part on the fiduciary's investment management services, Treas. Reg. 1.67-4(c) requires the trust or estate to use a "reasonable method" to apportion the commission between the amount (hopefully) deductible in full under Section 67(e) and the amount temporarily not deductible.

Expanded Definition of U.S. Shareholder of Controlled Foreign Corporation

Background. The Tax Cuts and Jobs Act expanded the definition of who constitutes a "U.S. shareholder" of a controlled foreign corporation ("CFC"). Depending on certain factors, persons considered U.S. shareholders may be subject to a tax on the income of the foreign corporation irrespective of whether the corporation makes a distribution to its shareholders.[6]

The expanded definition may subject U.S. beneficiaries of foreign non-grantor trusts to U.S. shareholder status. Previously, the Code defined U.S. shareholder of a CFC as a U.S. person owning ten percent or more of its *voting* power. The definition of "U.S. person" includes individual citizens, resident aliens, and domestic partnerships, corporations, trusts and estates.[7] Although foreign trusts are not U.S. persons, indirect ownership rules[8] attributed ownership of foreign trust assets, including stock of a foreign corporation, to its U.S.-person beneficiaries. However, despite these indirect ownership rules,[9] U.S.-person beneficiaries of foreign non-grantor trusts had a strong argument to avoid U.S. shareholder status: trustees – not beneficiaries – hold the voting rights of stock owned by a trust.

New Definition of U.S. Shareholder. U.S. shareholder is now a U.S. person who owns at least 10% of the vote *or value* of the stock of the corporation.[10] Under the expanded vote-or-value definition, discretionary beneficiaries have increased susceptibility to U.S shareholder status. Although beneficiaries can no longer avoid U.S. shareholder status because they lack voting rights, trust beneficiaries – particularly wholly discretionary beneficiaries – may still be able to argue the value of their interest is beneath the 10% threshold for U.S. shareholder status.

[6] For more information on controlled foreign corporations, *see* Meltzer, Schwartz and Weissbart, *International Estate Planning for the Domestic Lawyer*, 43 ETPL 13 (April 2016).
[7] Section 7701(a)(30).
[8] Section 958(a)(2).
[9] Section 958(a)(2).
[10] Section 951(b).

Valuation of Discretionary Interests. The interest of a wholly discretionary trust beneficiary cannot be easily (if at all) valued because such a beneficiary has no mandatory economic rights at any given time. Compared to non-voting shareholders in a corporation and non-voting partners in a partnership, no similar uncertainty exists in determining the value of these interests, which have specific economic rights, including financial rights on liquidation. Indeed, the limited authority on valuing beneficial interests in trusts [11] does not even address the challenging valuation of wholly discretionary interests, [12] potentially leaving a narrow basis for U.S. beneficiaries of foreign trusts to continue to avoid U.S. shareholder status.

For more information on the subject, *see* Weissbart, *Impact of Expanded Definition of U.S. Shareholder on Trust Beneficiaries*, Estate Planning (anticipated May or June 2018).

Increased Deductibility for Cash Contributions to Public Charities

The Tax Cuts and Jobs Act added Section 170(b)(1)(G)(i) to the Code, which temporarily increases the limitation on tax deductions for cash contributions to public charities and certain private foundations. Previously, donors could deduct cash contributions provided the amount did not exceed 50% of the donor's adjusted gross income. For tax years 2018-2025, the limitation is increased to 60%. All other contribution limitations remain the same.

Estate of Powell v. Comm'r[13]

Background. Several commentators have suggested that *Powell* is the most important tax court case addressing FLPs and LLCs in at least a decade. The facts of the case involve aggressive deathbed tax planning, as the Tax Court called it, though the court's extension of section 2036(a)(2) to ownership of only limited partnership interests is surprising (prior cases, such as *Estate of Strangi v. Comm'r*[14], found estate inclusion when the decedent owned the LP interest and a portion of the GP interest). The case is an unfortunate example of bad facts producing bad law.

Facts and Reasoning of Tax Court. The decedent's son, acting through a power of attorney for his mother, contributed cash and marketable securities to a family limited partnership in return for a 99% limited partnership interest; two sons contributed unsecured promissory notes in return for the 1% general partnership interest. The partnership agreement gave the GP sole discretion to determine the amount and timing of

[11] Reg. 1.958-1(d)(3), Example 3 (addressing valuation of trusts with separate and distinct shares).
[12] PLR 8535020 (May 30, 1985) ("The fact that the trustee has discretion regarding distributions of income and principal to you is a factor that must be taken into account in determining the fair market value of your beneficial interest").
[13] 148 T.C. No. 18 (May 18, 2017) (reviewed by the Court).
[14] T.C. Memo. 2003-145, *aff'd* 417 F.3d 468 (5th Cir. 2005).

distributions, but importantly it also allowed for the dissolution of the partnership with the consent of all of the partners. Acting as attorney-in-fact, the son transferred the decedent's entire LP interest to a CLAT at a 25% discount for lack of control and marketability. Notably, the power of attorney did not authorize gifts greater than the annual exclusion amount. The decedent died unexpectedly one week later.

On audit of the estate tax return, the IRS claimed that the assets contributed to the FLP were includible in the decedent's estate under sections 2036(a)(1), 2036(a)(2), 2038 and 2035(a), though the Tax Court considered only the arguments for application of section 2036(a)(2),[15] which they considered to be persuasive. Reasoning that the decedent, in conjunction with the other partners, could dissolve the partnership pursuant to the partnership agreement, and that the decedent, through her son as GP and attorney-in-fact, could control the amount and timing of distributions, the Tax Court held that the assets contributed to the FLP were includible in her estate. Notably, the Tax Court also dismissed the "fiduciary duty" analysis at play in *United States v. Byrum*[16] as "illusory."

Observations. As Steve Akers has pointed out, Powell is the first case to apply section 2036(a)(2) "when the decedent owned merely a limited partnership interest."[17] Query whether the court would have come to a similar conclusion had the decedent owned a small limited partnership interest, though it made no distinction between a 99% or 1% limited partnership interest. In dicta, the majority opinion also analyzed whether there could potentially be "double inclusion" under section 2036 and section 2043 and decided that such double inclusion is illogical and not allowed.

It is not surprising that the taxpayer lost the case. Several bad facts were at play here, including the death bed transfer, the invalid transfer under the power of attorney, as well as the contribution by the sons of unsecured promissory notes in exchange for GP interest. However, the *Powell* case may not represent a significant practical change, since the section 2036 exception for bona fide sale for full consideration exception has been the primary defense in claims involving FLP or LLC interest under section 2036. Importantly, steps should be taken to ensure that a legitimate and significant business purpose exists to qualify for the bona fide sale exception to section 2036. Some commentators have also suggested considering a conservative valuation position to improve the optics of the transaction.[18]

<u>Notice 2017-15 – Retroactive Relief for Same-Sex Married Couples</u>

[15] The Court did consider the application of section 2035, but its application was denied because the gift tax deficiency associated with the transfer to the CLAT was not effective, since the transfer to the CLAT was void.
[16] 408 U.S. 125 (1972).
[17] Heckerling Recent Updates, page 21.
[18] Angkatavanich, Dougherty & Fisher, Estate of Power: Stranger Than Strangi and Partially Fiction, Tr. & Ests. 30 (Sept. 2017).

Same-sex couples may now retroactively claim marital deductions and recalculate GST exemptions. Prior to U.S. v. Windsor, 111 AFTR 2d 2013-2285, 133 S. Ct. 2675 (2013), same-sex couples were not recognized for federal tax purposes, which did not allow them to claim marital deductions for gifts and bequests or use generational assignments for GST tax purposes. This IRS notice states that same-sex couples who were validly married under state law at the time of a gift between spouses may claim marital deductions for gift tax purposes, even if the statute of limitations has run on the return reporting a transfer. As a result, the applicable exclusion amount and the DSUE amount may be recalculated.

Taxpayers in these situations may file a new or amended return, or executors may amend or revise any estate tax return for a deceased same-sex spouse. The Notice provides instructions for how to proceed. Importantly, couples may not claim a refund of taxes paid if the statute of limitations has expired. In addition, any allocation of GST exemption made in the past that ignored the marital status of same-sex spouses may be voided, and the exemption may be recalculated. Notably, same-sex marriage became legal in New York State in 2010, so the notice will apply only to those gifts made between spouses after that time.

STATE DEVELOPMENTS

In re Hoppenstein

Background. Prior to *In re Hoppenstein*, no case had addressed either the common law right to decant or the right to decant pursuant to the terms of a trust's governing instrument, though several cases in other jurisdictions have analyzed the extent of a trustee's common law power to decant.[19] In *In re Hoppenstein*[20], the New York Surrogate's Court dealt a potentially devastating blow to the necessity and relevance of New York Estates, Powers and Trusts Law 10-6.6 for trust decantings.

Facts and Ruling. The trustees of an irrevocable trust relied on their broad discretionary distribution authority in the trust instrument itself, as opposed to the New York's decanting statute, to transfer trust assets from one trust to another. The trust instrument authorized the trustees "to pay such sums out of principal of the trust (even to the extent of the whole thereof) to the settlor's descendants, living from time to time, in equal or unequal amounts, and to any one or more of them to the exclusion of the others, as the Trustees, in their absolute discretion, shall determine." The only administrative requirement provided within the instrument was one requiring the trustees to give the settlor's descendants 45 days notice prior to the distribution.

[19] See *Phipps v. Palm Beach Trust Co.*, 142 Fla. 782 (1940); *In re Spencer's Estate*, 232 N.W.2d. 491 (Iowa 1975); and *Wiedenmayer v. Johnson*, 106 N.J. Super. 161 (App. Div. 1969), *judgment aff'd* 55 N.J. 81 (1969).
[20] 2015-2918/A,NYLJ 1202784244139, at *1 (Sur. Ct., N.Y. Co., decided on March 31, 2017).

The daughter of the Settlor and her four children sought to void the trustee's distribution of an insurance policy from the trust to a new trust that eliminated the daughter and four children as beneficiaries. The plaintiffs claimed, inter alia, that the transfer did not comply with EPTL 10-6.6. In granting summary judgment in favor of the trustees, the court summarily dismissed the daughter's argument, noting that the trustees did not reply on the EPTL but rather on their power to make such distributions within the trust instrument itself. The court cited EPTL 10-6.6(k), which allows trustees to decant based on the provisions of the trust instrument or common law, in affirming the trustees' rights to decant under the terms of the trust instrument rather than the EPTL.

Practical Planning Outcome. By confirming the validity of the transfer to the new trust, the court allowed the trustees to effectively remove a trust beneficiary without having to follow the specific statutory requirements of EPTL 10-6.6. Notably absent from the language allowing the trustee's discretion over principal in this case was the language "to or for the benefit of" the beneficiaries. Therefore, it appears that mere discretion over principal distributions alone engenders the power to decant. It may now be possible to decant under the trust's governing instrument in ways that the EPTL did not allow. For example, a trust instrument might provide that a trustee has the ability to decant to a new trust with additional beneficiaries. Other non-statutory objectives could be achieved, such as elevating remainderpersons to present beneficiaries, prolonging the perpetuities period, altering the provisions regarding trustee compensation, or providing for other substantially different dispositive terms. Burdensome administrative requirements that the EPTL requires could be eliminated.[21]

In any event, *Hoppenstein* should provide comfort to practitioners who may have previously been hesitant to rely on this statutory exception.

Allocation of Capital Gain to Trust Income

Background. On February 27, 2018, the New York State Assembly unanimously passed (with several members absent) a bill that would permit trustees to allocate capital gain to income. *See* Bill Number A09765. The bill has been delivered to the State Senate, but as of March 2018, no vote has yet been taken. As explained below, the ability for a trustee to allocate capital gain to income effectively gives the trustee power to determine whether tax on the capital gain income will be paid by the trust or its beneficiaries. In certain instances, whether the trust or beneficiary pays the tax can yield dramatically different results because of different (1) tax brackets for trusts and individuals and (2) state income tax obligations (i.e., beneficiary in Florida, which has no income tax; trust pays New York state income tax).

Overview of the Proposed Legislation. The bill would amend sections 11-2.3(b)(5)(A) and 11-A-4.4(2) of the Estates, Powers and Trusts Law to provide that,

[21] For a detailed discussion of the non-statutory decanting options, see Dillon & Schwartz, "Who Needs a Decanting Statute," Trusts and Estates Law Section Newsletter, Vol. 60, No. 3 (Fall 2017).

unless a trust instrument otherwise provides, a trustee may make a reasonable and impartial allocation of realized capital gains to income.

The purpose of the new law is not to provide trustees with the ability to increase the dollar amounts distributed to income beneficiaries; this can already be accomplished under New York's power-to-adjust statute. EPTL 11-2.3(b)(5). Most importantly, granting the trustee discretion to allocate capital gain to income effectively, based on provisions of the Treasury Regulations, gives the trustee the power to determine whether capital gain is included in the distributable net income (DNI) of the trust. Treas. Reg. 1.643(a)-3(b). Although DNI could be a presentation unto itself, generally, tax on amounts included in DNI are paid by the trust's beneficiaries; tax on amounts not included in DNI are paid by the trust. Thus, a trustee's discretionary power to allocate capital gain to income effectively gives the trustee power to determine tax consequences.

Reasons the Legislation is Necessary. Under the Treasury Regulations, a trustee's allocation of capital gain to income will only result in its inclusion in DNI if the trustee exercises the power (1) " in accordance with a power granted to the fiduciary by applicable local law" or (2) "by [authority in] the governing instrument if not prohibited by applicable local law." Currently, New York law does not grant this power to trustees; thus, trustees may only allocate capital gain to income (and facilitate its inclusion in distributable net income) if the power to do so exists in the governing instrument.

The new law is necessary because many existing trusts do not contain a power granting the trustee discretionary authority to allocate capital gain to income. Additionally, draftspersons may neglect to include this power in future trusts. Thus, the new law will enable all trustees to make this allocation that can yield favorable tax consequences. If the law passes, clients who do not want trustees to have this power would need to include restrictive language in the governing instrument.

Planning Tip. As noted above, until the law passes, trustees of New York trusts can only allocate capital gain to income (and facilitate its inclusion in distributable net income) if the power to do so exists in the governing instrument. Thus, practitioners should be sure to include the power to allocate capital gain to income in all relevant documents.

In re Brecher – Will modification allowed to avoid estate tax

Background. A New York Surrogate's Court allowed a modification to a 27-year old will to eliminate over $500,000 of New York state estate tax. The modification was a reformation to a marital deduction formula provision to reflect changes to federal and state law since the execution of the will 27 years prior. The Surrogate's court noted that the movement of assets from the nonmarital to the marital trust would "protect the

testator's intent from being thwarted by a change in the tax law."[22] None of the beneficiaries opposed the modification.

Considerations. Query whether the beneficiaries' failure to oppose the modification constitutes a gift by them to the surviving spouse. Query also why a disclaimer by those same beneficiaries would not have been sufficient. While the decedent was not likely subject to federal estate tax, query whether this state court's opinion would be binding for federal estate tax marital deduction purposes.

[22] In re Brecher, 2017 N.Y. Misc. LEXIS 38 (Surr. Ct).