New York State's tax provisions are distinct from federal tax provisions and the tax provisions of other states in various ways affecting the trusts and estates practice and can be a trap for the unwary or ill informed. Notably, New York State imposes a state estate tax and its state exemption amount is different than the federal exemption amount currently in effect. Additionally, under certain circumstances as discussed further below, gifts made by a New York domiciled decedent within three years of his or her death may be included in his or her gross estate for New York estate tax purposes. This outline will serve as an overview and brief update of the New York State tax provisions regarding individual income tax, fiduciary income tax, gift tax, estate tax, and real estate transfer taxes, as well as select New York City tax provisions which oftentimes increase a taxpayer's tax liability.

I. Income Tax

New York State charges an income tax on full-time residents, part-time residents, and nonresidents who earn income in New York State. New York residents are taxed on their worldwide income and nonresidents are taxed on the portion of their income that is allocable to New York sources. N.Y. Tax Law §§ 612(a), 631-639. Part-time residents are subject to an income tax on their worldwide income while they are a resident of New York State and the portion of their income that is derived from or connected with New York sources while they are a nonresident. N.Y. Tax Law § 638. New York State imposes a state income tax on New York taxpayers ranging between 4% and 8.82%, with the rate being determined by a progressive eight-bracket system dependent upon the taxpayer's annual income. N.Y. Tax Law § 601. On March 31, 2019, Governor Cuomo signed into law a bill regarding budget provisions for the 2020 fiscal year (the "2019 Budget Bill") that will gradually reduce the state income tax rates for New York taxpayers whose income falls within some of the income tax brackets that apply to the middle class. N.Y. Tax Law § 601(a)(1)(B). The 2019 Budget Bill also extends previous temporary top tax rates that were imposed on high-income earners for another five years until January 1, 2025. N.Y. Tax Law § 601(a)(1)(B). There is an additional income tax charged to individuals residing in New York City, the amount of which ranges from 3.078% to 3.876%, dependent upon the taxpayer's annual income. N.Y. Tax Law §§ 1302-04.

A person is a New York State resident for income tax purposes if he or she is either domiciled in New York State or is a statutory New York resident. A statutory New York resident is an individual who is not domiciled in New York but maintains a permanent place of abode in New York for more than 11 months of the year and spends more than 183 days of the year in New York. N.Y. Tax Law § 605(b)(1)(A). A permanent place of abode is any dwelling that is suitable for permanent use in which the taxpayer has beneficial use, regardless of ownership or frequency of use. *Gaied v. N.Y. State Tax App. Trib.*, 2014 BL 43395 (N.Y. Ct. App. 2014); N.Y. Dept. of Taxn. and Fin., *District Office Audit Manual for Income Tax*, § 312.5(B) (July 25, 1997). A permanent place of abode can include a vacation home over which the taxpayer maintains dominion and control, regardless of the frequency of its use, although the listing of such residence for sale or lease may disqualify the residence from being considered a permanent abode. *In re Barker*, No. 822324 (N.Y. Div. Tax App. 2011); New York TSB-A-11(9)I (Nov. 8, 2011). However, a residence maintained by one individual for the sole use of another (*e.g.*, parents

maintaining a home for their child attending university in New York) will not be treated as a permanent place of abode for the maintaining taxpayer. N.Y. Dept. of Taxn. and Fin., *District Office Audit Manual for Income Tax*, § 312.5(B) (July 25, 1997). For purposes of day count, any part of a day spent in New York is counted as one day, however if the individual's presence in New York is for the sole purpose of boarding a plane, ship, train or bus for a destination outside of New York, such day will be disregarded for purposes of the day count. N.Y. Comp. Codes R. & Regs. tit 20, § 105.20(c). A non-resident individual is not deemed a resident or a part-year resident.

In 2018, New York State decoupled provisions of its income tax laws from the federal tax law in response to the passage of the federal Tax Cut and Jobs Act of 2017 (the "Act"). While the maximum amount of state and local taxes that can be deducted on a federal income tax return (the "SALT Cap") was limited to $10,000, and the ability to deduct various itemized expenses was reduced, New York taxpayers may still deduct real estate taxes exceeding the $10,000 SALT Cap and other itemized expenses, such as investment management fees, on their New York State income tax returns. N.Y. Tax Law § 615. The 2019 Budget Bill also extends the rules that limit the amount of charitable contributions that can be deducted by taxpayers whose income exceeds $1,000,000 to 50% of the amount contributed to charity, and for taxpayers whose annual income exceeds $10,000,000, to 25% of the amount contributed to charity. N.Y. Tax Law § 615(g)(2).

II. Fiduciary Income Tax

Originally, the 2018 decoupling of state real estate taxes and other miscellaneous expenses from the federal SALT Cap and other restrictions imposed by the Act was not available for use by trusts or estates when computing their taxable income. However, the 2019 Budget Bill corrects this and contains a parallel provision for trusts and estates regarding a deduction for real estate taxes and other miscellaneous expenses that could not be deducted on its federal fiduciary income tax return, and such change was made retroactive to the beginning of 2018. N.Y. Tax Law § 619(e)(2). Trusts and estates may also deduct on their New York State fiduciary income tax returns miscellaneous itemized deductions such as investment management expenses, tax preparation fees, and qualified business income subject to the rules of 199A of the Internal Revenue Code. N.Y. Tax Law § 619(e)(2).

New York State and New York City both impose an income tax on the taxable income of resident trusts and estates and upon the income from New York sources of nonresident trusts. N.Y. Tax Law §§ 601(c), 1301(a). The taxes paid by an estate or trust are paid at the same rate as an individual subject to personal income tax in New York. N.Y. Tax Law § 601(c). A resident trust is a trust consisting of property transferred (i) by the will of a decedent who was a New York domicile at the time of his or her death, (ii) to an irrevocable inter vivos trust by an individual domiciled in New York at the time of the transfer, or (iii) to a revocable inter vivos trust that later became irrevocable by a person domiciled in New York at the time the trust became irrevocable. N.Y. Tax Law § 605(b)(3). Generally, a New York resident trust or a New York estate is subject to New York state income tax on all of its income, regardless of its source.

A New York estate or trust is required to report its New York taxable income after deducting all business and other expenses, such as taxes, interest, legal fees, accounting fees and other administrative expenses. N.Y. Tax Law § 601(c). Some resident trusts are exempt from New York income tax because they lack a sufficient nexus with New York State, such as when all of the trustees are domiciled outside New York, the entire corpus of the trust, including real and tangible property, is outside New York, and all income and gains of the trust are derived from or connected with sources outside New York. N.Y. Tax Law § 605(b)(3)(D). Intangible property is deemed located within New York if one or more trustees are New York domiciles. N.Y. Tax Law § 605(b)(3)(D)(ii). A banking corporation which serves as trustee of a trust is considered to be domiciled outside of New York if at the time such banking corporation became trustee it was domiciled outside New York, even if the banking corporation subsequently becomes a New York domicile as the result of being acquired by, or becoming a branch or office of, a New York domiciled corporate trustee. N.Y. Tax Law § 605(b)(3)(D)(iii).

By a law signed by Governor Cuomo on April 1, 2014, effective January 1, 2014, income that is accumulated by exempt New York resident trusts in previous years and distributed to a New York resident beneficiary in a subsequent year is included in the beneficiary's adjusted gross income and subject to New York taxes. N.Y. Tax Law § 612(b)(40). This "throwback" tax applies to previously untaxed trust income from exempt resident trusts or foreign trusts that is distributed to beneficiaries who are New York State residents 21 years of age or older and distributed on or after January 1, 2014. However, the "throwback" tax does not apply if the income is: (i) earned in a tax year in which the trust is subject to New York income tax; (ii) earned prior to January 1, 2014; (iii) earned in a tax year prior to the beneficiary becoming a New York resident; or (iv) accumulated on behalf of beneficiaries not yet born or younger than 21 years of age. N.Y. Tax Law § 612(b)(40); TSB-M-14(3)I, May 16, 2014. A New York beneficiary who receives such an accumulation distribution may be permitted an accumulation distribution credit for his or her share of the New York State income taxes paid by the trust and any income tax imposed on the trust by another jurisdiction on income sourced from the other jurisdiction. N.Y. Dept. of Taxn. and Fin., *Form IT-201-ATT, Other Tax Credits and Taxes*. As of January 1, 2014, New York residents who create non-resident trusts, such as incomplete gift, non-grantor trusts ("ING Trusts"), are liable to pay New York State income tax on all of the income of any ING Trust. N.Y. Tax Law § 612(b)(41). The New York resident settlor is taxed on an ING Trust's income to the extent that such income would be includible in the settlor's federal taxable income if such ING Trust was treated as a grantor trust for federal tax purposes. N.Y. Tax Law § 612(b)(41).

III. Gift Tax and Tax on Inheritance

There is no state gift tax in New York State. However, gifts made within the three-year period prior to a New York domicile's death may be included in the decedent's gross estate for the calculation of state estate tax liability, as discussed below in further detail.

New York State does not have an inheritance tax.

IV. Estate Tax

Effective April 1, 2014, the New York State legislature had amended its state estate tax laws to gradually increase the state exemption amount until it expected to reach the then anticipated

federal exemption amount on January 1, 2019. However, with the passage of the Act, there exists a large discrepancy between the federal and New York State exemption amounts for decedent's dying on or between January 1, 2018, and December 31, 2024. The New York State estate tax exemption amount is tied to the lower federal exemption amount that existed prior to the passage of the Act, rather than the current federal exemption amount. The current New York State exemption amount is equal to $5,000,000, plus a statutory inflation calculation (the "State Exemption Amount"), as contrasted with the federal exemption amount of $10,000,000 indexed for inflation (the "Federal Exemption Amount"). N.Y. Tax Law § 951(a).

For 2019, the State Exemption Amount is $5,7400,000, for decedents who died as residents of New York State, while the 2019 Federal Exemption Amount is $11,400,000. N.Y. Tax Law § 951(a). The current estate tax rate ranges from 3.06% to 16% dependent upon the size of the New York taxable estate. N.Y. Tax Law § 952(b). If the value of a decedent's gross estate reaches or exceeds the State Exemption Amount, but is less than 105% of the State Exemption Amount (the "NYS Estate Tax Cliff"), (currently the NYS Estate Tax Cliff is $6,027,000), the estate is only liable to pay estate tax on the amount of the estate that exceeds the State Exemption Amount. However, once the value of an estate exceeds the NYS Estate Tax Cliff, New York State will impose its estate tax on the entire amount of the estate without the benefit of any exemption amount. N.Y. Tax Law § 952(c)(1).

When estate planning for New York domiciles, if a taxpayer's future gross estate is likely to approximate or exceed the State Exemption Amount then in effect, the taxpayer's estate planning professionals should take into account the NYS Estate Tax Cliff and the potential resultant New York State estate tax liability. Below are a few examples of how New York State's lower exemption amount and the NYS Estate Tax Cliff can impact an estate's tax liability:

For decedents dying in 2019:

A. If a decedent's gross estate is under $5,740,000, there is no New York State estate tax liability.

B. If a decedent dies with a gross estate valued at $5,950,000, the estate will be liable for New York State estate taxes on $210,000 of the estate, the amount exceeding the State Exemption Amount, with a total New York State estate tax liability approximating $6,426.

C. If a decedent's gross estate was valued at $6,100,000, then the estate would be liable for New York State estate taxes on the entire $6,100,000 because this amount exceeds the NYS Estate Tax Cliff, with a total New York State estate tax liability approximating $522,800.

Being cognizant of the State Exemption Amount and the NYS Estate Tax Cliff in current and future drafting, planners should proceed with caution in drafting language that will tie a New York domicile's estate planning documents to the Federal Exemption Amount, without providing the flexibility to account for a lower State Exemption Amount. Previously drafted documents for New York domiciles should be reviewed as they now may contain language that may have undesirable New York State estate tax consequences and may result in a New York decedent not

being able to take advantage of the State Exemption Amount in effect at the time of his or her death.

In calculating the value of a decedent's gross estate for state estate tax purposes, New York generally includes the value of any gifts that the decedent made within three years of his or her date of death (the "Addback Provision"). N.Y. Tax Law § 954(a)(3). This Addback Provision originally went into effect on April 1, 2014, and had expired on December 31, 2018. The Addback Provision was reinstated by the New York State Legislature in April of 2019, after having been introduced on January 15, 2019, and applies to decedents dying on or between January 16, 2019, and December 31, 2025, at which time the Addback Provision will expire, unless it is subsequently renewed. As a result, estates in which the decedent died on or between January 1, 2019, and January 15, 2019, are not subject to the Addback Provision. The Addback Provision also does not apply to gifts made when the decedent was not a resident of New York State, gifts made on or between January 1, 2019, and January 15, 2019, or to gifts of real or tangible property located outside of New York State. N.Y. Tax Law § 954(a).

New York State also taxes the estate of nonresidents on a decedent's real or tangible personal property that is located within New York State at the time of a decedent's death if such property is either includible in the decedent's federal gross estate or would have been includible in the decedent's New York gross estate if the decedent had been a New York resident. N.Y. Tax Law § 960(a). The New York State estate tax rate imposed upon a nonresident estates is the same rate that would have been charged to a New York resident's estate and a nonresidents "New York taxable estate" shall not include the value of, or any deduction allowable under the IRC related to, any intangible personal property otherwise includible in the decedent's New York gross estate, and shall not include the amount of any gift unless such gift consists of real or tangible personal property located in New York or intangible personal property employed in a business, trade or profession carried on in New York State. N.Y. Tax Law § 960(b).

Also note that the New York State estate tax will not apply to any artwork that is loaned to a New York public gallery or museum solely for exhibition purposes, so long as no part of the net earnings of the public gallery or museum inure to the benefit of any private stockholder or individual, and such artwork is currently on exhibition or en route to or from an exhibition at the time of the decedent's death. N.Y. Tax Law § 960(d).

While the federal estate tax exemption is portable between spouses for federal tax purposes, the New York estate tax exemption is not. New York State does not have portability.

For New York estates, if an executor makes a QTIP election on a federal estate tax return, such election must also be made by the executor on the estate's New York State estate tax return. N.Y. Tax Law § 955(c). If no QTIP election is made on the federal estate tax return when a federal estate tax return is required to be filed, no QTIP election will be allowed for New York State purposes. N.Y. Tax Law § 955(c). New York does not have a separate state QTIP election in such circumstances. However, if a federal return is not required to be filed (*i.e.*, the gross estate is below the threshold required for filing a federal estate tax return), an executor may make a QTIP election on the estate's New York estate tax return to qualify for the New York State marital deduction. N.Y. Tax Law § 955(c). The 2019 Budget Bill requires a binding New York State QTIP election be made on an estate's New York State estate tax return. N.Y. Tax Law § 954(a)(4).

In the case of a New York estate in which a federal estate tax return is not required to be filed (*i.e.*, the gross estate is below the threshold amount required for filing a federal estate tax return), and there is a disposition to a surviving spouse who is not a United States citizen, if such disposition would have qualified for the federal estate tax marital deduction if the surviving spouse was a United States citizen, such disposition will be treated as qualifying for the federal estate tax marital deduction without requiring such disposition to pass to a QDOT for New York State estate tax purposes. N.Y. Tax Law § 951(b). This provision is currently in effect until July 1, 2022, at which time it will expire if it is not subsequently extended by the New York State legislature. N.Y. Tax Law § 951(b).

For New York State purposes, if a federal estate tax return is filed and alternate valuation is elected for federal estate tax purposes under IRC section 2032, such alternate valuation date must also be used for valuing the New York gross estate. N.Y. Tax Law § 954(b)(1). Additionally, if such alternate valuation could have been elected on the federal estate tax return but the decedent's gross estate was below the threshold amount required for filing a federal estate tax return and therefore no federal tax return was filed, an estate's executor may make an alternate valuation election as would have been available under IRC section 2032 if such federal return was filed. N.Y. Tax Law § 954(b)(2). However, an election of alternate valuation may not be made if such election will not decrease the value of the New York gross estate and the amount of tax payable to New York State. N.Y. Tax Law § 954(b)(2). Once the election is made, it is irrevocable. N.Y. Tax Law § 954(b)(2).

V. Real Estate Transfer Tax and Mansion Tax

New York State imposes a Real Estate Transfer Tax ("RETT") on all real estate transactions within the state where consideration paid for the property exceeds $500 at a rate of 0.4%, including transactions in which the seller of the property is an estate or trust. N.Y. Tax Law § 1402(a)(1). As of July 1, 2019, New York City also imposes a RETT on the transfer of properties at the time of the delivery of the deed to the transferee, excepting conveyances of properties pursuant to contracts that were executed on or before April 1, 2019. State of New York, Division of the Budget, *FY 2020 Enacted Budget*, Part OOO, § 5. For residential properties, the New York City RETT is imposed at a rate of 0.25% on transfers in which consideration exceeds $3,000,000. N.Y. Tax Law § 1402(a). Residential property is defined to include any premises that are or may be used in whole or in part as a personal residence at the time of conveyance, including: (i) one-, two, or three-family houses; (ii) individual condominium units; and (iii) cooperative apartment units. N.Y. Tax Law § 1402-a. On June 11, 2019, the New York State Department of Taxation and Finance issued a Technical Memorandum which clarifies that cooperative apartment units are considered residential real property for New York State real estate transfer tax purposes. TSB-M-19(1)R, June 11, 2019. For all non-residential properties, the New York City RETT is imposed at a rate of 0.25% on transfers in which the consideration paid exceeds $2,000,000. N.Y. Tax Law § 1402(a).

Both New York State and New York City impose an additional tax on the sale of high-end residential properties (a "Mansion Tax"), on sales in which the consideration paid exceeds $1,000,000. This tax is paid by the purchaser of the property. N.Y. Tax Law § 1402-A(a). The New York State Mansion Tax imposes a tax of 1% on all residential sales within the state that exceed $1,000,000. N.Y. Tax Law § 1402-A(a). While the Mansion Tax has existed in New York

City for over 30 years and had historically mirrored the New York State Mansion Tax rate, beginning in 2019 a revised Mansion Tax structure was enacted for New York City. While the previous New York City Mansion Tax had been imposed at a rate of 1% on the sale of residences for $1,000,000 or more, the updated structure increases the tax rate for properties selling in New York City for $2,000,000 and above according to a sliding scale dependent upon sale price. For residences selling at or above $25,000,000, the New York City Mansion Tax rate is 2.9%. N.Y. Tax Law § 1402-B.