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## New York's Latest **Legislative Session:** What Passed, What Didn't, What's Next

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The first year of the 2021-2022 legislative session, which began on Jan. 6, 2021 ended on June 10, 2021. Here are some of the most significant developments.

### What Passed

**Highest Income Tax Rates in the Country Enacted (2021-22 Executive Budget, enacted April 19) ... Or Will the Last Wealthy New Yorker To Leave the State Please Turn Out the Lights?** For calendar years 2021 to 2027, New York State's highest income tax rates have increased. The top rate has jumped from 8.82% (on taxable income over \$2,155,350 for joint filers) to 10.9% (on taxable income over \$25 million). Combined with New York City's highest income tax



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rate of 3.88%, the top income tax bracket in New York is now 14.78%, the highest in the nation, eclipsing

taxpayers whose taxable income exceeds \$2,155,350 (the top rate increases from 8.82% to 9.65%). It also creates two additional tax brackets regardless of filing status: A 10.3% bracket on income above \$5,000,000 up to \$25,000,000, and a 10.9% bracket on income exceeding \$25,000,000.

The rate changes are effective immediately, beginning in the current 2021 tax year. Rates revert to pre-2021 levels in 2028. Will the rate increases further incentive

Filing Status	AGI Exceeds	Top NYS Rate 2020	Top NYS Rate 2021	Total with Top NYC Rate (3.88%)
Single	\$1,077,550	8.82%	9.65%	13.53%
Married (joint)	\$2,155,350	8.82%	9.65%	13.53%
All Taxpayers	\$5,000,000	8.82%	10.3%	14.18%
All Taxpayers	\$25,000,000	8.82%	10.9%	14.78%

California's previously highest rate of 13.3%.

The Budget increases taxes by increasing rates on single taxpayers whose taxable income exceeds \$1,077,550, and on joint

New Yorkers to migrate to states like Florida? Many practitioners think so, in which case New York would not only lose out on all of their income tax, but also a slew of other taxes residents pay,

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including sales taxes, and of course estate taxes.

**New Power of Attorney Form Goes Into Effect, Requires Two Disinterested Witnesses and Notary.** New York's new Power of Attorney (POA) legislation, which was enacted on Dec. 15, 2020 (N.Y. Gen. Oblig. Law §5-1513), became effective June 13, 2021. POAs executed before June 13, 2021 will remain effective, if they were valid in accordance with the laws in effect at the time the POA was signed. For example, for an agent to have gifting authority, statutory POAs executed between Sept. 1, 2009 and June 12, 2021 must have a Statutory Gift Rider (SGR). POAs executed on or after June 13, 2021 must comply with the requirements of the new law.

The new POA makes substantial changes to the prior form, including eliminating the SGR and inserting the SGR gifting provisions in the POA's Modifications Section, allowing for substantially compliant language instead of the exact statutory wording and expanding an agent's power to make gifts in a calendar year that aggregate \$5,000 instead of the previous \$500. Legislation enacted on March 25, 2021 (A.2353/S.888), also effective June 13, 2021, adds an additional execution requirement. POAs must now be signed by two disinterested witnesses who are not named in the document as agents or listed as permissible gift recipients. The notary public to the POA may serve as one of the witnesses.

**Brand New Post-Mortem Publicity Rights Take Effect.** The right of publicity (ROP) is an individual's right to control and profit from the commercial use of their name, image or likeness, and to prevent others from exploiting their persona for commercial gain. The post-mortem ROP extends the ROP beyond an individual's lifetime, allowing an executor or heir to enforce the protections provided by law. As the result of a law that became effective on May 29, 2021, New York for the first time will recognize post-mortem publicity rights for 40 years after death. The new law applies to individuals who die domiciled in New York after the effective date whose name, voice, signature, photograph, or likeness has commercial value at the time of or because of their death (N.Y. Civ. Rights Law §50-f). The statute explicitly provides that these rights are property rights, freely descendible and transferable, including by contract, gift, trust, or any other testamentary instrument. In the absence of an express testamentary transfer, these rights will pass under a residuary disposition. Since the post-mortem ROP is a property right that will likely be included in the gross estate for estate tax purposes, it will be prudent for practitioners to consider techniques to enhance its value to heirs while minimizing transfer tax costs, akin to business asset planning. The recent Tax Court decision in Michael Jackson's estate (*Estate of Jackson v. Comm'r*, T.C.



Memo 2021-48), which ended a bitter decade-long battle over the value of Jackson's ROP, brought estate tax valuation issues in this context into sharp focus with the estate initially valuing Jackson's ROP on his estate tax return at about \$2,000, the IRS initially valuing it on audit at approximately \$434 million, and the court deciding the value was about \$4 million.

### What Didn't Pass

**Proposals To Increase Estate Tax Rates (Not Enacted).** In the so-called one-house budget bills that precede New York's final annual Budget, the March 13 Assembly budget bill (A.3009) proposed increasing the top estate tax rate from 16% to 20% for estates above \$10.1 million. The March 14 Senate budget bill (S.2509) proposed increasing the estate tax by two percent across the board, regardless of the estate's size. Neither proposal was adopted as part of the final Budget, and New York estate tax rates remain unchanged for now. Earlier in 2021, a bill was introduced in both houses (A.4643A/S.3462) that would have

imposed both an inheritance tax and a gift tax in New York, but those bills have not moved.

### What's Next?

**Electronic and Remote Procedures ... During the Pandemic and Beyond.** (1) *Executive Orders Permitting Remote Witnessing and Notarization of Documents Expire; Permanent Legislation Pending (introduced in Assembly and Senate)*. In response to the COVID-19 pandemic, Gov. Andrew Cuomo issued Executive Orders (EO) 202.7 and 202.14, which were successively extended throughout the pandemic to allow virtual notarization and witnessing, respectively. Those EOs expired following the Governor's June 23, 2021 announcement that New York State's declared disaster emergency in place from March 7, 2020 to fight COVID-19 was to expire after June 24.

Legislation was introduced to codify the EOs and allow virtual notarization and witnessing permanently (A.6063/S.558) but did not pass before the summer recess. Notary publics can no longer perform notary services remotely.

For wills executed remotely, *Matter of Ryan*, 140 N.Y.S.3d 682 (N.Y. Sur. 2021) marks the first published decision admitting a remotely witnessed will to probate in New York based on fulfilling New York's statutory requirements, irrespective of the EOs. The decedent executed his will dated June 1, 2020 while in hospital, with COVID-19

restrictions precluding outside visitors. The attorney's office delivered the will in a sealed envelope to a social worker at the hospital and arranged for him to be present for the will execution, serving as "videographer" by utilizing a cell phone. A formal execution ceremony was held with counsel and two of his staff attending remotely via a computer in his office. Immediately after the will execution, the original was driven back to the attorney's office, where his two staff executed the attestation clause and the witness affidavit, which had been stapled with the original will in a will cover. The court found the execution ceremony satisfied the statutory formalities for due execution of a will in New York pursuant to Estates, Powers and Trusts Law (EPTL) §3-2.1. The decedent signed the will at the end and the witnesses were able to see him execute the will, in real time, using the cell phone camera and the computer, satisfying the presence requirements of EPTL §3-2.1(a)(2). The decedent had declared the document to be his will and asked the attending witnesses to serve as such with the witnesses attesting to the decedent's signature on the same day, shortly after he signed it. The court held that the procedure for the execution and attestation of a will need not follow in the precise order set forth in the statute, as long as all the requisite formalities are observed in a period of time which, in the Surrogate's view, represents a continuous

attestation ceremony pursuant to EPTL §3-2.1(b). The court found that to be the case.

The court also noted that the execution ceremony satisfied the provisions contained in EO 201.14 regarding remote witnessing. Accordingly, the court found that the will would have been admissible to probate pursuant to the terms of the EO, even if it had not found that the ceremony also satisfied the statutory requirements of EPTL §3-2.1.

(2) *Proposal To Permanently Allow Remote Meetings (Passed Assembly and Senate)*. With the goal of having corporations continue to operate during the pandemic, Gov. Andrew Cuomo issued EOs 202.8 and 202.18 to modify New York's Business Corporation Law and Not-for-Profit Corporation Law to allow New York business and not-for-profit organizations to hold meetings remotely or by electronic means. Legislation codifying the EOs, provided certain guidelines and procedures are met, and extending them to religious institutions was enacted on June 17, 2020 and is effective through Dec. 31, 2021 (N.Y. Legis. 122 (2020)). Due to its success during the pandemic, a bill has passed the Assembly and Senate (A.1237/S.1182) to permanently permit business corporations, not-for-profit corporations, religious institutions, and cooperatives to hold virtual meetings of shareholders, members, and trustees, etc.

**Proposal To Implement a Pied-à-Terre Tax on Non-Primary**



**Residences in New York City (Not Enacted in 2021-22 Budget but Similar Proposal Introduced in Assembly and Senate).** With the justification of targeting absentee owners of luxury properties who do not live or work in New York City, and therefore do not pay city income taxes, several proposals since 2014 have been introduced to impose an additional tax on non-primary residences in New York City. The current proposal (A.5736/S.4199) allows a local law to be enacted for fiscal years beginning July 1, 2021 to provide for taxes on non-primary residences based on both the value and type of residence. For one to three family residences with an average five-year market value greater than \$5 million, a tax between 0.5% and 4.0% would be imposed on the market value above \$5 million. For condominiums and cooperative apartments with an assessed value of at least \$300,000, a tax between 10% and 13.5% would be imposed on the market value above \$300,000. This proposed Pied-à-Terre tax would be in addition to the New York City property transfer tax imposed on a seller and the mansion tax imposed on a buyer, both of which were increased in the 2019-20 Executive Budget. A similar Pied-à-Terre tax proposal was included in the Assembly's budget bill (A.3009), framed as a tax on the owner instead of a property tax. It was not enacted in the 2021-22 Executive Budget.

**Proposal To Revise Commissions of Individual Trustees of**

**Charitable Trusts (Passed Senate).** Individual trustees of wholly charitable trusts and trustees of non-charitable trusts are compensated differently under current law. A proposal to eliminate that discrepancy has been introduced many times over the years, but has never passed. The proposal has been reintroduced this legislative session (A.7800/S.6499). Under Surrogate's Court Procedure Act §2309(5), a trustee of a wholly charitable trust is entitled to only 6% of the annual income collected. The proposal would provide commissions to individual trustees of wholly charitable trusts at the same rates as individual trustees of non-charitable trusts, with a reduced rate of 80% of the rates for a non-charitable trust with a principal value of up to \$20 million, and a reduced rate of 50% on the principal value in excess of \$20 million. As with non-charitable trusts, the charitable trust commissions would be payable one-third from income and two-thirds from principal.

**Proposal To Amend Law That Currently Presumes Immediate Gift When Joint Bank Account Opened (Introduced in Assembly and Senate).** In what many would find a very surprising result, current New York Banking Law (NYBL) §675 creates two presumptions when a deposit is made in a joint bank account in the name of the depositor and another person: (1) Each account holder has the immediate ability to withdraw one-half of the deposited funds, which creates an

irrevocable gift of one-half of the account to the other account holder, regardless of whether any funds are actually withdrawn and (2) on the death of one account holder, the balance vests in the survivor. Since many individuals open these types of accounts for convenience purposes only (for example an elderly person wishing to allow a child to write checks on their account), the statute can often thwart the intent of the depositor. The presumption of an immediate gift also translates to immediate gift tax consequences if the gift exceeds the current annual exclusion amount and is not covered by the marital deduction. Consider, for example, that joint accounts between spouses, one of whom is not a U.S. citizen, could have an immediate federal gift tax consequence if the gift exceeds the annual exclusion for transfers to non-U.S. citizens (\$159,000 for 2021).

In recognition of the fact that many depositors do not intend to make an irrevocable one-half gift to the other account holder or to leave the account to them if the depositor dies first, NYBL §678 was enacted to establish "convenience accounts." These accounts allow the depositor and another account holder to withdraw funds for the depositor's benefit, while ownership of the funds remains in the depositor and, on the depositor's death, the funds pass to the depositor's estate. However, convenience accounts have apparently not been widely adopted.

The current proposal (A.8002/S.6949) would repeal NYBL §678 and amend §675 by clarifying that title remains with the depositor when a joint account is established, expressly providing that the depositor shall not be considered to have made a gift. On the death of the depositor, the funds would pass under the proposal either to the other account holder by right of survivorship, or as part of the depositor's estate, in accordance with the depositor's written designation. Several versions of the current proposal have been introduced over the years, but none have yet passed.

**Proposal To Adopt the New York Trust Code (Introduced in Assembly).** The New York Trust Code (NYTC) (A.7677) is a comprehensive statute that would modernize New York law, updating many statutory provisions to reflect current times, codifying existing case law and generally providing a centralized statutory trust code. NYTC would be codified in a stand-alone Article 7-A of the EPTL. Among the most important new provisions are the following: allows nonjudicial settlement agreements (allows trustees and beneficiaries to settle most issues without judicial intervention); allows judicial modification of dispositive provisions (allows a court to modify dispositive trust provisions or terminate a trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust); allows reformation to correct mistakes (allows a court

to reform a trust's terms, even if unambiguous, to conform the terms to the settlor's intent, if the trust terms were affected by a mistake of fact or law); codifies the standard of capacity necessary to create a revocable trust (same as required to make a will); provides excluded trustee provisions (allows a trust to confer exclusive authority to exercise a power on one or more trust-

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The NYTC has been over a decade in the making, the result of **comprehensive review and study** by all the major professional associations in New York.

ees, relieving an excluded trustee from liability regarding exercise of that power); allows a testamentary trustee to resign without court approval; allows a trust to be "quiet" for the lives of the settlor and the settlor's spouse, and after the last to die of the settlor and the settlor's spouse requires trustees to inform qualified beneficiaries over the age of 25 about an irrevocable trust; and adopts a New York Directed Trust Act, allowing a settlor to separate fiduciary responsibilities by naming a trust director with the authority to direct the trustee regarding the investment, management or distribution of trust property and holding the trust director solely responsible for their decisions, absent willful misconduct on the part of the directed trustee.

The NYTC has been over a decade in the making, the result

of comprehensive review and study by all the major professional associations in New York. It would apply not only to new trusts but to virtually all trusts created before the effective date unless there is a clear indication of contrary intent in the terms of the trust and vested rights will not be adversely affected.

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