Estate Planning Briefs

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Tax debates underway

One way or another, the expiration of tax provisions from the 2017 Tax Cuts and Jobs Act will have to be addressed by Congress this year. It's not yet clear whether there will be "one big, beautiful bill" as favored by the House, or two bills as some Senators prefer. House Ways and Means Chair Jason Smith, R-Mo., said he hopes a reconciliation bill that includes tax provisions will be passed by both chambers by Memorial Day.

President Trump continues to press for ending the income tax on tips, overtime pay, and Social Security benefits. To pay for these changes, he is pushing to end the tax-favored treatment of carried interest as well as unspecified tax provisions that benefit the owners of professional sports teams.

The wild card for estate planners concerns the fate of the federal estate tax. At the Heckerling Institute earlier this year, the question was whether or not the amount exempt from federal transfer taxes would drop in half at the end of the year, as provided in current law, and what to recommend to clients about it. But then on February 13, 2025, the Death Tax Repeal Act was introduced by Republicans in the House and Senate, with more than 200 supporters. The bill would entirely eliminate both the federal estate tax and the generation- skipping transfer tax. In the current draft, the federal gift tax would be retained and the current lifetime exclusion extended, so as to limit the opportunity for income shifting within a family. The gift tax rate would fall to 35%. Step-up in basis at death would be retained.

Then the Republican Chairman of the House Budget Committee, Rep. Jodey Arrington, introduced the Estate Tax Reduction Act, which would cut the tax rate for the estate and gift tax in half, to 20%. Given the competing tax cut promises, might this approach be a useful compromise?

COMMENT: Among the many questions yet to be resolved:

- *Will the estate tax be addressed in an early tax bill?*
- *Would death be a realization moment for capital gains?*
- *What effect would repeal have on existing formula clauses in marital and charitable bequests? Could surviving spouses be inadvertently disinherited?*
- *What effect would repeal have on existing QDOT and QTIP trusts?*
- *What happens to dynasty trusts?*
- *What happens if a future Congress decides to bring the estate tax back?*

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Spousal rollover approved

Decedent named his estate as the beneficiary of his IRAs, and his spouse as a secondary beneficiary. This was not a great plan, as the general rule is that when a surviving spouse receives an IRA from a third party, such as an estate, the opportunity for rolling the money into an IRA for the spouse is lost.

In this case, the surviving spouse was the executor of the estate, as well as its only beneficiary. She wanted to roll the funds into an IRA for herself, and requested a ruling on the issue from the IRS. The Service approved the rollover. The surviving spouse "can cause the Decedent's IRA proceeds to be paid to Decedent's estate and then to Taxpayer [the spouse] as beneficiary of the estate. Accordingly, for purposes of Section 408(d)(3)(A), Taxpayer is effectively the

individual for whose benefit Decedent's IRAs are maintained." The surviving spouse may roll the proceeds into an IRA in her name, and there will be no income tax due.

—*Private Letter Ruling 202508002*

COMMENT: The surviving spouse will generally have greater flexibility in timing the distributions from an IRA in her own name than with an inherited IRA.

Helpful neighbors or undue influence?

Donald "Doc" Traylor was a chiropractic doctor in Casper, Wyoming. He had one son and two grandchildren, but he was estranged from them. Doc last saw his grandchildren in 2007, and his final face-to-face meeting with his son, Chadwick, lasted for about an hour in 2007. The nature of subsequent contacts, if any, is not mentioned in the decision.

Doc retired in 2006. He divided his time between Casper and a home in Florida. He befriended his Florida neighbors, the Whites, and in 2019 he asked them for suggestions for his estate plan. They referred him to their lawyer, who had Doc execute a revocable trust. Chadwick and Shannon White were named as successor trustees, and the remainder beneficiaries were primarily Chadwick and his children.

In June, the Whites drove Doc from Florida back to his Casper home. They enlisted a neighbor, the Greens, to help care for Doc's dog and to visit him regularly. About this time, Doc became friends with a handyman, Mr. Dandurand. He drove Doc to Florida in October 2019, and flew to Florida to drive Doc back to Casper in June 2020.

Visiting Doc in August 2020, Mrs. Green discovered he had fallen and could not get up. A visit to the hospital revealed that Doc had prostate cancer. Upon his release, Doc engaged Mel's Helping Hands to provide 24/7 care as he recuperated, owned by Melody and Kevin Kraft. The service was satisfactory.

Doc decided his Florida estate plan was no longer satisfactory, and asked the Krafts for help in getting it revised. Among the changes in the Second Amended Trust, Kevin Kraft was named successor trustee for a $150,000 fee, Mr. Dandurand was left $200,000 and a 21.6% residual interest in the trust, and Mrs. Green was named trustee of a pet trust and also received a residual trust interest. The remainder interest for Chadwick and his children was reduced to 10.58% each.

One of the nurses at Mel's Helping Hands became concerned that Doc was being exploited for his money. She resigned her position and filed a police report. A police investigation found no exploitation, that Doc was "very well taken care of, articulate, and aware of what he was doing and how his funds were being used."

Doc died in August 2021, leaving an estate worth $4 million. In January 2022, Chadwick filed a lawsuit against Kraft, the Greens, and Dandurand alleging undue influence, seeking to have the second trust set aside. After hearing the evidence, the lower court held that there had been no undue influence. What's more, the second trust had included a very clear no- contest clause, which operated to remove Chadwick as a trust beneficiary because he had challenged the testamentary plan. Finally, the court ordered Chadwick to pay the defendant's lawyer's fees.

The appellate court clarified that the standard of proof for under influence was a preponderance of the evidence, not clear and convincing evidence, and that Chadwick had not met that standard. The defendants had indeed had an opportunity to exert undue influence, but they had not done so. The lower court decision was affirmed.

— Traylor v. Kraft, 552 P.3d 351 (Wyo. 2024)

COMMENT: In reaching for more, Chadwick lost everything, but at least his children were not entirely disinherited. The decision did not explain the reason for the estrangement, or why Chadwick was not available to help with Doc in his final years.

Portability election denied

Decedent's estate was not large enough to require filing a federal estate tax return, and so none was filed. However, that necessarily meant that the portability election was not made, as the election can only be communicated to the IRS on the federal estate tax return. Making a portability election permits a surviving spouse to inherit any unused federal estate tax exempt amount, enlarging the amount that will pass free of federal estate tax.

There have been many cases in which an estate planner discovers that a portability election should have been made, asks the IRS for an extension of time to make the election, and the IRS routinely grants the extension if the estate was small enough that an estate tax return was not required. However, in this ruling, the surviving spouse had also died.

The executor of her estate, her son, has now asked for the extension of time to make the election for Decedent's estate. Evidently, without portability there will be an estate tax due from the surviving spouse's death. The IRS refused the extension of time, explaining that "Decedent's estate has used hindsight in requesting relief."

—Private Letter Ruling 202507004

Limits on a durable power

John Garner executed a revocable trust and a durable power of attorney in 2001. He named his nephew, Patrick Garner, as successor trustee in the event of John's incapacity, and as attorney-in-fact. The durable power of attorney was very broad and purported to absolve the power holder from claims of breach of fiduciary duty. Oddly, John never told Patrick about any of this, perhaps because Patrick was still in college at the time. The two were not close, only exchanging occasional notes or Christmas cards.

John fell in the summer of 2020 and was taken to the hospital. As his health deteriorated, and he was found to be incapacitated, the hospital petitioned for appointment of a healthcare guardian. The trial court denied the request because Patrick had already been granted that power. Patrick was contacted about taking responsibility for his uncle, and he said that it was "surprising" that he had been given this role.

In December 2020 John suffered a stroke, and was admitted to the hospital again. On December 23, 2020, Patrick executed an amendment of the trust. Originally, the remainder

was to be divided among three named charities. Patrick substituted himself as the sole remainder beneficiary of the trust, then worth $3 million. He did not discuss this with John beforehand.

This action violated Patrick's fiduciary duty to John, the court holds. It was not in accordance with John's expectations or his best interest. This duty was not waivable, regardless of the language in the durable power of attorney.

— Garner v. University of Texas at Austin, 317 A.3d 333 (D.C. 2024)

COMMENT: Given this decision, the court did not need to reach the question of whether Patrick had violated a fiduciary duty to the charities.

Trust termination taxes

Settlor created an irrevocable trust before September 25, 1985. As such, the generation-skipping transfer tax does not apply to trust distributions, provided no additions have been made to the trust since that date. The trust provides a fixed annual annuity of $x to Grandchild for life. No other distributions are permitted during his life. When Grandchild dies, the annuity is to be divided and paid per stirpes to Grandchild's lineal descendants. Grandchild has two adult children and four minor grandchildren. The trust terminates when the last of ten people have died, and the assets will then be distributed per stirpes to Grandchild's descendants.

Evidently, the heirs of Settlor have lost patience and want their full inheritance now. In accordance with state statutes, all parties to the trust have agreed that it should be terminated immediately. Each trust beneficiary will receive a distribution based upon the actuarial value of his or her interest. The plan has been approved in state court, and will go forward upon securing a favorable ruling from the IRS.

The ruling is indeed favorable. Because the trust qualifies for the "grandfather" exception by virtue of its date of irrevocability, there will be no generation-skipping transfer tax due on the distributions to the beneficiaries. Because the distributions will be measured actuarially, no one will be treated as having made a taxable gift to anyone. Finally, the IRS rules that the distributions will be treated as the sale of interests in the trust, and as such, they will be taxed as long-term capital gains.

— Private Letter Ruling 202509010

COMMENT: It seems that Settlor's intention of creating a long-term financial resource for Grandchild and his descendants has been thwarted. On the other hand, the trust has been providing income for at least 40 years (the specific date of trust creation is not given). Circumstances change, and perhaps the trust has served its purpose after all. Query: What if it had been a dynasty trust? Are there any steps Settlor could have taken to prevent the premature termination of the trust?

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