
Estate Planning Council of Greater Miami

Estate Planning Hot Topics: A Raging Current?

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Mr. Parthemer is Senior Fiduciary Counsel at Bessemer Trust and a member of Bessemer’s Estate Planning Committee, a national “think tank.” He joined Bessemer, an exclusive wealth management firm, in 2004 after private law practice in Pennsylvania and Florida, most recently as a Trust and Estate partner with Duane Morris LLP. He also spent several years at PricewaterhouseCoopers and was involved in private businesses.

Mr. Parthemer is a frequent national lecturer and published author; Chair, ABA Non-Tax Issues of Trusts & Estates; member Florida Bankers Association, Trust Executive Committee and Chair of its Trust Legislation Committee; ABA Liaison to, and Chair of, Synergy Summit; and member, Florida and Pennsylvania Bar Associations. He also writes a regular column for the Journal of Financial Service Professionals magazine and is a member of its editorial staff. He is on the Board of the Palm Beach County Estate Planning Council and Chairs its publication committee. He recently was awarded the 2014 Article of the Year from the American Bar Association’s Probate & Property magazine and was named the Florida Bankers Association 2015 Banker of the Year.

He has been faculty for the University of Miami’s Heckerling Institute, Adjunct Professor, Widener University School of Law, and a guest lecturer at the University of Miami School of Law’s LLM program. He frequently has been honored as one of the Best Lawyers in America, is a member of its Lifetime Achievement Award, and a Florida Super Lawyer.

Mr. Parthemer received his J.D. from The Dickinson School of Law, Penn State University, and his B.A. and B.S. degrees from Franklin and Marshall College.

I always want to say to people who want to be rich and famous: 'try being rich first.' See if that doesn't cover most of it. There's not much downside to being rich, other than paying taxes and having your relatives ask you for money. But when you become famous, you end up with a 24-hour job.

- Bill Murray

Part One:

New Tax Laws/Regulations

The only difference between death and taxes is that death doesn't get worse every time Congress meets.

- Will Rogers

Basis Consistency – New §1014(f) and §6035

- Passed July 31, 2015, effective immediately.
- Applies to all estate tax returns filed after July 31, 2015.
- New §1014(f) requires beneficiaries use finally determined estate tax values (or if not finally determined, then as per a statement) as the basis of property acquired from a decedent under §1014.
- Consistency under §1014(f) apparently only applies to assets whose inclusion increased estate tax (thus not marital or charitable), but reporting requirements under §6035 applies to all assets.

Basis Consistency – New §1014(f) and §6035

- New §6035 requires executors/PRs to report valuation information to beneficiaries and to the IRS when a return is required under §6018(a).
- This likely will exempt returns filed merely to elect portability.
- Information statement due at the time prescribed in regulations, but no later than 30 days after the return's due date, including extensions (or 30 days after filed, if earlier).
- Notice 2015-57 – 1st due date delayed until Feb 29, 2016. **Notice 2016-19 extended the date until March 31, 2016 (and indicated temporary regulations will be published “very shortly”).**
- Information statement must go to broadly defined recipients - may include all current and potential future beneficiaries for assets in revocable trusts or that pass from an estate into a trust.

Final Portability Regulations

- Final Portability Regulations issued June 12, 2015.
- Few surprises, but...
- ...still waiting for guidance on Rev Proc 2001-38.

Final §2801 Regulations

- Section 2801 created by “HEART Act” of 2008.
- Covers tax imposed on US citizens and residents who receive gifts or bequests from certain expatriates.
- Enforcement was delayed until final regulations published.
- Final Regs issued September 9, 2015.
- New Tax Form 708, not yet published.
- Requires recipient to report and remit tax.

Qualified Charitable Distributions (QCDs)

Protecting Americans from Tax Hikes (PATH) Act passed December 18, 2015:

- QCD rules permanent, retroactive to January 1, 2015, allowing certain charitable donations from an IRA without having to treat the distributions as taxable income.
- The maximum QCD permitted annually is \$100,000 per individual and is available only for individuals age 70 $\frac{1}{2}$ or older who make distributions directly to charity.
- The QCDs satisfy required minimum distribution (RMD) requirements for IRAs.
- The QCD must be made directly to a public charity; donor advised funds and private foundations are ineligible recipients.
- There can be no benefit whatsoever received from the charity.
- A QCD can fulfill a previously existing pledge.

New IRS Procedure re Estate Tax Closing Letters

- Announced June 16, 2015.
- Estate tax closing letters will be issued by request only.
- Must request no earlier than 4 months after filing 706.
- Treasury spokesman Catherine Hughes says budget driven, not policy driven.
- She also advises one can request transcript that contains a code which indicates examination is complete.
- Until other practices make changes (e.g., title companies, §645 election), most practitioners will request a letter.

Virtual Currency – Change for a Dollar?

IR-2014-36: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply.

- Over the past year, Bitcoin has ranged from a high of \$1,200 to a low of \$130.
- This fluctuation creates estate tax planning opportunities, *e.g.*, GRATs.
- But may lead to income tax surprise:
 - Betty purchases 1 BTC for \$500.
 - One month later, when 1 BTC is worth \$600, Betty purchases a bike from Suzanne for \$600.
 - Suzanne may have taxable gain from the sale of her bike, but...
 - Betty also may have tax to pay because she received value of \$600 for the bitcoin she purchased for \$500.
 - The \$100 will be treated as capital gain unless Betty was a miner or dealer in bitcoin, in which case it is ordinary income.

Part Two:

Recent Cases of Note

Self Canceling Installment Notes: CA 201330033; *Estate of William Davidson*

- IRS assessment \$2.6 billion.
- Stipulated decision July 2015: \$320,523,233.
- Basic facts:
 - Age 86; Life expectancy 5.8 years under 7520 table
 - IRS expert: 2.5 years
 - Four medical consultants (two IRS; two taxpayer) all said greater than 50% probability of living more than one year (hence, not terminal)
 - Large stock sales in Jan. 2009 for 5-year SCINs
 - Risk premiums: some principal (88%); some interest rate (13% above 7520 rate)
 - Died two months after sales; no Note payments
- IRS position announced in 2013 in Chief Counsel Advice 2013220022 – use medical history on date of gift, not 7520 mortality tables (i.e., willing-buyer/willing-seller).
- Settlement likely has a chilling effect.
- *Aaron v. Deloitte Tax LLP*, N.Y. Sup. Ct., No. 653203/2015 (filed September 24, 2015). \$500MM malpractice suit versus tax advisor who “pitched” concept.

SEC v. Wyly

SEC v. Wyly, 2014 WL 4792229 (S.D.N.Y. Sept. 25, 2014)

- Securities law violation case in which the court determined that the amount of disgorgement would be based in part on the income taxes that the defendants avoided by an offshore trust structure.
- Trust protectors had the power to remove and replace independent trustees located in the Isle of Man.
- The court determined that the settlors controlled all decisions for the trust, by expressing their “recommendations” to trust protectors who relayed those recommendations to the trustee, who *always* did as instructed.
- The court thus ruled that the independent trustee exception to the grantor trust rules under §674(c) did not apply because the settlors in fact controlled all decisions.
- Concern: This use of “facts and circumstances” could have a huge implication as to trustee selection, such as 672(c) “buffer” to the imputing of bad powers to the grantor.



Brief Tangent – Understanding Section 672

Adverse party under §672(a):

- Has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust.
- Has a general power of appointment over the trust property.

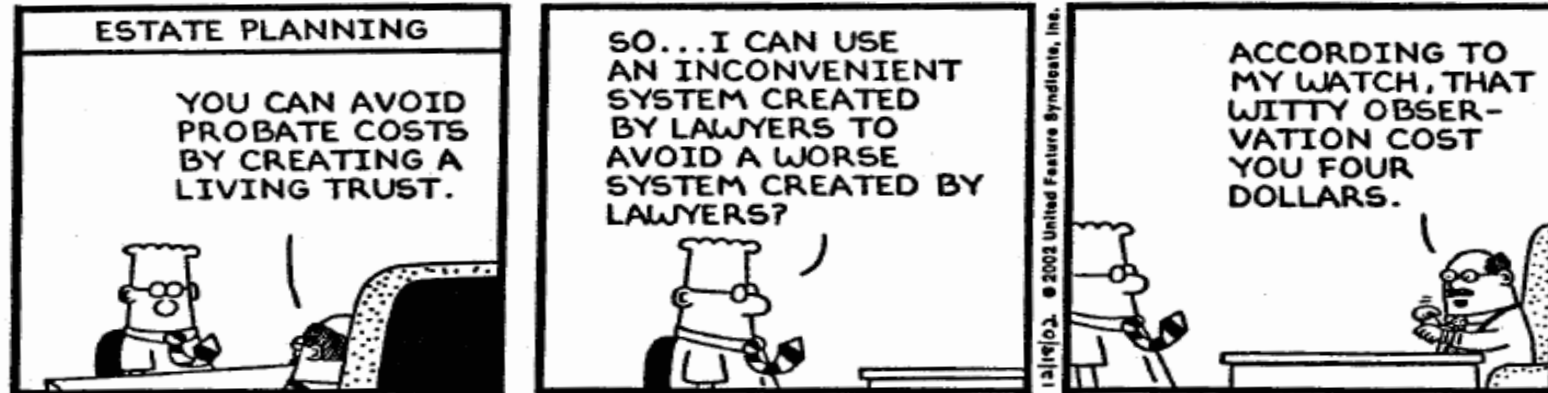
Related or subordinate party §672(c):

- A nonadverse party who is—
 - The grantor’s spouse if living with the grantor.
 - The grantor’s father, mother, issue, brother or sister.
 - An employee of the grantor.
 - A corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control.
 - A subordinate employee of a corporation in which the grantor is an executive.

Estate of Edward Redstone v. Comm; Sumner Redstone v. Comm.

- Basic holdings:
 - ✓ Settlement Agreement Did Not Result in Taxable Gift, *Estate of Edward Redstone v. Commissioner*.
 - ✓ Voluntary Transfer by Brother on Same Terms But Not Under Settlement Agreement Did Result in Gift, *Sumner Redstone v. Commissioner*.
- Transfers in compromise and settlement of trust or estate genuine disputes typically will be treated as transfers for full and adequate consideration that do not result in gifts. E.g., PLR 201342001, 201104001, 200845028, 200825007, 200638020, and 200209008.
- Still, this is one of the scariest things for planners (that almost never happens.) Why? Years later, the IRS not only asserted that the settlement resulted in significant gift tax, but also asserted fraud, negligence and failure to file penalties from a settlement of hostile protracted family litigation.
- Irony – Dispute was between two brothers, Edward and Sumner. Sumner had hired a replacement for brother Eddie, so he left and litigation ensued. Resolution was a transfer of valuable stock to Eddie’s children without gift tax, whereas 30+ years later, Sumner had to pay over \$700,000 in gift tax for same transfers.

Making sense of estate planning...



Part Three:

Potential Law Changes Lurking Around the Corner

Access to Digital Assets – UFADAA Update

Uniform Fiduciary Access to Digital Assets Act

“The purpose of this Act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts.”

- ISP 2015 resistance – successful! Introduced in 26 states; passed in none.
- UFADAA was rewritten this summer with an “opt-in” structure.
- Magic word – consent!
- Senate Bill 494 by Senator Hukill (R-Port Orange) passed the Senate. House Bill 747 by Rep. Jay Fant (R-Jacksonville) passed its last committee and is ready for a vote on the House floor.

12 Key Administration Budget Proposals for FY 2016

1. Treat gifts and bequests as realization events.
2. Restore 2009 estate and gift tax parameters (beginning in 2018).
3. Consistency of basis.
4. **GRAT – remainder to be greater of 25% or \$500,000; no swapping.**
5. GST exemption 90 year expiration.
6. Sales to grantor trusts – assets includible/gift if grantor status turned off; excludes ILITs.
7. Extension of estate tax lien for entire period of §6166 deferral.
8. Health and Education Exclusion (HEET).
9. Further restrictions on discounts under §2704 omitted, but indications of draft proposed regulations winding way through bureaucratic process.
10. **Limits on “stretch IRAs” (for other than spouses); eliminate RMD for under \$100,000 cumulative; permit 60 day rollover for all; limit deduction if total accruals would generate more than \$210,000 annuity (est. to be \$3.4MM for a 62 year old).**
11. Annual exclusion (\$50,000 category for trust and entity transfers); no stacking.
12. Appraiser penalty for unreasonable positions enhanced (exception standard to reasonable cause; not applicable is appraiser also subject to preparer penalty).

§2704 Framework

- Passed in 1990, restrictions that can be unilaterally removed by the family will be ignored for valuation purposes on transfers within the family.
- §2704 an epic fail because there is an exception for any restriction imposed, or required to be imposed, by Federal or State law.
- Most states updated their limited partnership and LLC statutes to embed default limitations (unless overridden by partnership or operating agreement).
- Cathy Hughes, a Treasury official, originally suggested that the regulations will reflect the 2013 Green Book proposal; we now hear otherwise.
- Impact of Richard Dees letter? (available upon request)

Timing and Take-Aways

- Perhaps will see proposed regulations in 1st quarter 2016.
- Effective date usually triggered by final regs (perhaps in 1 – 2 years). In rare cases, it has been “as of” the proposed reg. publish date, but conventional wisdom is not likely here..
- Remember what is at stake. Two of the three typical valuation adjustments:
 - ✓ Lack of marketability.
 - ✓ Minority interest, but not
 - ✓ Underlying value.
- Suggestion: Impact may be delayed, but if contemplating a transfer of FLP or LLC interests, consider doing it sooner rather than later.

The avoidance of taxes is the only intellectual pursuit that still carries any reward.

- John Maynard Keynes

Whoever is for higher taxes, feel free to pay higher taxes.

- Adam Carolla

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