First Bankers Trust Services

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## In This Issue


- Hope springs eternal
- Beneficiaries are liable
- Extension granted for citizenship notification
- 2010 QTIP trust avoids state death tax
- A trust will go on
- No contest clause enforced


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# Hope springs eternal

The Death Tax Repeal Act of 2019 has been introduced in the House (H.R. 218) by Ways and Means Committee member Jason Smith (R-Mo.) and in the Senate (S. 215) by Senate Finance Committee member John Thune (R-S.D.). Both the federal estate tax and the generation-skipping transfer tax would be eliminated permanently upon the date of enactment. The federal gift tax would be retained, but with the top tax rate lowered to 35%. The likely rationale for keeping the gift tax is to deter income-shifting techniques, not to raise revenue from the tax.

Some 150 organizations sent a letter to the Senate Finance Committee in support of the legislation. The organizations range from the National Cattleman's Beef Association to the National Black Chamber of Commerce, and generally are associated with family-owned businesses. The letter identified four key reasons for repeal of death taxes:

• Repealing the death tax would spur job creation and grow the economy.

• The death tax contributes a very small portion of federal revenues.

• A super-majority of likely voters support eliminating the death tax.

• The death tax is unfair.

*COMMENT: Action on this legislation is unlikely in this Congressional session. The more important fight will come as we approach the expiration of the enlarged credit against the federal estate tax.*

# Beneficiaries are liable

Harold Arshem's will divided his estate among his three daughters, who also were nominated as co-personal representatives for the estate. Harold had been a farmer. Before his death he transferred real estate and a corn crop to his grandson, so the grandson could continue working the family farm.

Arshem died in 1999. The daughters did not file a federal estate tax return for him. One daughter later asserted that a tax attorney had advised them that no federal estate tax return was required, but had no evidence to back that up. In June 2004 a special administrator was

appointed for the probate proceedings. Two months later he requested permission to file a federal estate tax return. The request was granted. The court ordered the administrator to file the federal return and amend the state inheritance tax return, because the earlier version had used assessed values for real estate instead of appraised values.

Although the order was made in 2004, the federal estate tax return was not filed until 2008. No explanation is provided for the delay. The gross estate was reported as $834,336.00, with a net estate tax due of $28,939.00. No payment was included with the return.

The IRS accepted the return as filed, but tacked on a late filing penalty, a failure to pay the tax penalty, and interest on all of it, bringing the total obligation to $65,874.80. Over the next few years, each of the daughters and the grandson made payments of roughly $28,000 toward the tax, but as the interest kept running, there was still $63,479 outstanding as of May 2018.

The IRS filed for a judgment against each of the beneficiaries in federal court for the unpaid estate taxes. Only one beneficiary even attempted an answer, which the Court analyzed and dismissed. Summary judgment for the IRS was ordered.

*—United States v. Donna Ringling et al.; No. 4:17-CV-04006*

## Extension granted for citizenship notification

When Decedent died, Spouse was not a U.S. citizen. Accordingly, a Qualified Domestic Trust (QDOT) was established for her, and the proper elections were made on Decedent's estate tax return. An estate tax is imposed on any distribution of principal from a QDOT (other than on account of hardship) before the date of death of the surviving spouse [IRC §2056A(b)(1)(A)]. In addition, an estate tax is imposed on the value of the property remaining in a qualified domestic trust on the date of the death of the surviving spouse [IRC §2056A(b)(1)(B)].

Spouse has lived in the United States continuously since Decedent died. She later became a U.S. citizen. Under these circumstances, the taxes imposed on the QDOT by IRC §2056A(b) will not apply, but the IRS needs to be informed of the change of status by the QDOT trustee. Notification is due by April 15 of the year following the change of citizenship.

Spouse was not told about this by her CPA, and so she has asked the IRS for an extension of time to provide the notification late. The amount of time that has elapsed is not provided in the letter ruling, but the IRS granted the request. The date for filing the notification is not expressly provided in the statute, which gives the Service greater flexibility. Spouse reasonably relied in good faith upon a tax professional, who let her down.

*COMMENT: Might it be possible some day for such changes in citizenship to be communicated automatically throughout the federal government?*

*—Private Letter Ruling 201903012*

## 2010 QTIP trust avoids state death tax

Husband died a resident of New York in 2010, the year without a federal estate tax. His will created a Qualified Terminable Interest Property trust (QTIP trust) for his surviving spouse, but because the federal estate tax had lapsed, no Form 706 was filed to elect the marital deduction. However, a state QTIP election was timely made by the executor of Husband's estate.

Surviving Spouse died in 2014. On Form 706 her executor did not include the value of the QTIP trust, on the theory that Husband's estate had not claimed a marital deduction for the trust, and, therefore, IRC §2044 did not apply. The IRS accepted the executor's position.

State taxing authorities disagreed, claiming that the trust was taxable in the survivor's estate and more than $500,000 in state estate taxes were payable. The Surrogate's Court disagreed, noting that state law relied upon federal definitions to determine the taxable estate.

*—Estate of Evelyn Seiden (N.Y. Surr. Ct., Oct. 9, 2018)*

*COMMENT: Legislation has been introduced in New York to reverse this decision as to future taxpayers if a state QTIP election is made. It would apply to estates of decedents dying after April 1, 2019.*

## A trust will go on

Yvonne Cosden's revocable trust became irrevocable at her death in 2010. The trustees of the trust were Yvonne's only child, Christopher, and Yvonne's personal assistant and friend. Joseph Horgan. The trust provided for an immediate distribution of $250,000 and the payment of all trust income to Christopher at least quarterly for life. At Christopher's death, the remainder will be divided among several charities.

After five years of payments, Christopher grew dissatisfied with his income interest. He negotiated a termination of the trust with the charitable remaindermen, under which he would receive some $2 million immediately and the remaindermen would get the balance, about $1 million. Unfortunately, Horgan refused to go along with the plan.

The trial court found for Christopher and ordered the trust to be terminated, essentially to avoid the expenses of additional trust administration. The Florida Court of Appeals now reverses. The intent of the settlor was expressed clearly in the design of the trust—she wanted to protect her son with an income for life, and she may not have trusted him with a lump sum distribution. What's more, the trust included spendthrift provisions to protect the income interest. There has been no waste of trust assets, and the expenses of administration have not been extraordinary. Early trust termination would contradict the settlor's purpose. Although there was no trust provision prohibiting early termination, the other provisions make clear that termination would frustrate the settlor's intentions.

*—Cosden v. Horgan, 249 So. 3rd 683 (2018)*

## No contest clause enforced

Roberto Goizueta and his wife, Olga, emigrated to the United States from Cuba after Castro came to power. Goizueta eventually became the head of Coca-Cola. He died in 1997 at age 65. Olga remained active in managing the family foundation.

In February 2013 Olga executed the 31st amendment and restatement of her revocable trust, naming two of her children as trustees. The trust included Schedule B, which provided for monetary gifts for 15 of Olga's employees. The trust also included an in terrorem clause, canceling the gift to anyone challenging the interpretation of the trust. Schedule B was amended in March 2013, reducing some of the gifts. The 32nd amendment and restatement of the revocable trust occurred on August 1, 2013. This trust also had the in terrorem clause, but it omitted the Schedule B entirely.

Olga died in 2015. The children, in their capacity as trustees, made distributions to some of the 15 employees, but in an amount less than specified in the original Schedule B. Some of the employees retained counsel, and they sent a letter asking that the full amounts under Schedule B be paid. The trustees instead filed for a declaratory judgment that the August 2013 trust was valid, and that the beneficiaries had forfeited their rights by contesting the trust. The disappointed beneficiaries counterclaimed undue influence by the children, tortious interference with their expectations of gifts, and breach of fiduciary duty.

The trial court enforced the no-contest clause, and the appellate court affirms. There is no exception in state law for challenges made in good faith or with probable cause. However, the no-contest clause does not extend to claims of breach of fiduciary duty, and it may not apply to the claim of tortious interference. The case was remanded for further proceedings.

*—Duncan v. Rawls, 812 S.E. 2d 647 (2018)*

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