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Green Book clarifications

When President Biden unveiled the "American Families Plan" it included a call to end stepped-up basis at death. The White House later clarified that a $1 million exemption from the new rule would be included, but did not say how ending basis step-up at death would be accomplished.

The "Green Book" explaining the fiscal 2022 revenue proposals, issued in June, filled in the details. Death would become a moment for recognizing asset appreciation and paying tax on the capital gains, as would lifetime giving and having a trust that lasted too long. The good news for estate planning is that the new rules would not be retroactive, but would take effect beginning next year.

Resolution coming for Aretha Franklin's estate plan?

A trial has been set for August to determine the disposition of Aretha Franklin's estate. Initially everyone assumed the famous singer had died without a will. However, three hand-written documents were later discovered that appeared to potentially be wills, some under the sofa cushions, and their terms were inconsistent. In particular, questions were raised over who would be responsible for settling the estate.

A trial was initially set for the summer of 2020 to sort out the three documents, but it was delayed by the pandemic. During the delay, typed estate planning documents were discovered, suggesting that Ms. Franklin had consulted with an estate planner before her death but had died before the documents were properly executed. There was an 8-page will and a 23-page trust for Franklin's special needs son. Initials were found on some pages, but there were no signatures or witnesses as required by law for valid testamentary instruments.

The August trial will resolve which of the four documents, if any, will be followed, as well as who will administer the estate.

The larger cost of failing to complete an estate plan is that Ms. Franklin's heirs have been forced to wait nearly three years for their inheritance. In addition, there has been much unwelcome publicity

during the probate process, including revealing family secrets that should have remained private.

— https://trustcounsel.com/2021/05/aretha-franklins-poor-estate-planning-continues-to-haunt-her-family/

COMMENT: Compare this to the results of the estate plan of Supreme Court Justice Ruth Bader Ginsburg. There was very little written about her testamentary planning after her death in September 2020. On May 25, 2021, internet news service TMZ reported that Ginsburg's meticulous will left $40,000 to her housekeeper and divided the rest of her personal property between her two adult children. The will named the two children as co-executors of the estate, so there will be no controversy on that score, and the estate should be settled fairly promptly. The TMZ report noted that Ginsburg may also have employed a private trust so as to shield the rest of her estate plan from public scrutiny. If so, the strategy worked.

Marriage, Israeli style

Semone Grossman, a German Jew who had survived Nazi concentration camps, immigrated to New York after the war. He had a successful life. At his death in 2014, Grossman left the bulk of his $87 million estate to Ziona, his wife of 27 years, with whom he had had two children. However, the IRS denied the estate's marital deduction and demanded some $35 million in estate taxes and over $7 million in accuracy-related penalties.

Wait, what?

Ziona was Semone's third wife. He married his first wife, Hilda, in 1955, and they had two children. However, they separated in 1965, and Semone made regular payments to Hilda. In 1967, Semone started a new relationship with Katia. Before marrying her, Semone traveled to Mexico to obtain a divorce from Hilda. Although the marriage to Katia also produced two children, it ended by 1974.

That year Hilda filed a lawsuit to have the Mexican divorce declared null and void, a lawsuit that she won following a trial in 1976. The marriage to Katia was nullified, and Hilda was again the legal spouse of Semone. However, the couple never again cohabited, nor filed joint tax returns.

In 1986, then 56 years old, Semone became engaged to Ziona. Both of them had relatives in Israel, and they decided to marry there. Before the ceremony, Semone asked Hilda to cooperate in obtaining a divorce under Jewish religious law. She agreed. They appeared before a rabbi and obtained the necessary paperwork, which Semone brought with him to Israel. The Israeli religious authorities found everything in order, and permitted the wedding to go forward. After the marriage, the couple returned to New York where they lived as a married couple for the rest of Semone's life.

After his estate tax return was filed, the IRS somehow noticed that Semone and Hilda had never formally, legally divorced under New York law. Therefore, the Service reasoned, Hilda was the surviving spouse, not Ziona, even though Semone and Ziona had filed all their tax returns as married filing jointly, even though Hilda had filed all of her tax returns as a single person, and even though Hilda had not attempted to claim her marital share under New York law after Semone's death. Under New York law, the IRS contended, Hilda remained the spouse. Hence, no marital deduction for property passing to Ziona.

The Tax Court concluded that the rule in New York has long been that the validity of a marriage is determined by the place of its celebration. Semone and Ziona had satisfied Israel's fairly strict rules for having a marriage in that country, and public policy generally favors recognition of second marriages.

— Estate of Semone Grossman et al. v. Commissioner; T.C. Memo. 2021-65

COMMENT ONE: Semone and Ziona probably could not have legally married in New York. That was in part the basis for the IRS denying the marital deduction. The Tax Court holds that fact was irrelevant to whether they could be legally married elsewhere.

COMMENT TWO: Should Semone's estate planning advisors have spotted and prepared for this potential tax problem? If the IRS spotted the issue, an attorney assisting with an $87 million estate could have also. Why did Semone and Hilda never get divorced? Did they believe it was irrelevant?

No double dipping

Lawyer Gerry Calvert drafted the R. C. Ford Jr. Trust, and served as attorney for the trust. He arranged for his son (also a lawyer), Gerry Calvert II, to be the trustee of the trust. Unfortunately, this proved to be a poor choice.

The trust accepted a 150-acre parcel of real estate as its primary asset in 1998. In May 2009 a five-acre tract was sold for $400,000, and a bank account was established to hold the sales proceeds. Calvert II sent a letter to the trust beneficiaries in July 2009 promising an accounting of the sale and the management of the trust.

No accounting was ever delivered. Letters from the beneficiaries and their attorneys to Calvert went unanswered. In 2014, a petition to remove Calvert as trustee was granted, and he was ordered by the court to provide an accounting. He continued to resist. A partial accounting was eventually supplied, and it showed that Calvert had used some of the trust's cash to pay his personal expenses.

For his misconduct as fiduciary, Calvert received a five-year suspension from the practice of law from the Kentucky Bar Association. His appeal of the suspension as excessive eventually reached the Kentucky Supreme Court. That Court went out of its way to note that it is never allowable for one firm to collect both attorney's fees and trustee's fee from a trust. Based upon the facts presented, the suspension was sustained, and Calvert was ordered to be monitored by the Kentucky Lawyer's Assistance Program at his own expense.

—Kentucky Bar Association v. Calvert II, 607 S.W.3d 700 (Ky. 2020)

COMMENT: One dissenting judge believed that the proper remedy for the breach of fiduciary duty in this case should have been permanent disbarment from the practice of law.

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