16th Annual Estate Planning and Community Property Law CLE & EXPO

2023 Gift and Estate Tax Law Update

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NOTEWORTHY APPELLATE COURT CASES

1. *Estate of Demuth v. Commissioner of Internal Revenue*, 2023 WL 4486739 (U.S. Court of Appeals, Third Circuit).
    a. Mr. Demuth was incapacitated and his son was his agent under a durable power of attorney. Mr. Demuth had apparently directed his son to make annual exclusion gifts on his behalf. On September 6, 2015, his son (as his agent) wrote out a number of checks for family members and delivered them to the payees. The checks were for annual exclusion gifts and tuition payments. Mr. Demuth died on September 11, 2015. The checks were cashed or deposited after Mr. Demuth's death.
    b. The estate filed a federal estate tax return (IRS Form 706) excluding the checks from the gross estate. The IRS issued a deficiency, arguing that the checks should have been included, and the IRS won at the Tax Court level. On appeal, the Third Circuit agreed with the Tax Court. The checks were includable in the gross estate because the decedent could have revoked the checks prior to the checks being cashed or deposited, and therefore were revocable at his death.
    c. The first issue addressed by the Third Circuit was that of a completed gift. The case too place in Pennsylvania. Under Pennsylvania law, a gift of cash paid by check was not complete until the check was cashed or deposited because the payor could stop payment and therefore revoke the check. Accordingly, the gifts were not complete as of Mr. Demuth's death.

d. The second issue was whether the gift was a gift "causa mortis," which means made in contemplation of death. There, the Third Circuit found no evidence suggesting that Mr. Demuth contemplated that he was dying. On the contrary, the gifts appeared to be a pattern of end of year annual exclusion gifts. That argument failed as well.

e. *What, if anything, could have made a difference?* What if the gifts were not written by checks, but paid in actual cash that was delivered with receipts signed by the donees? What if cashier's checks were used – would that have made a difference?

2. *Connelly v. United States Department of the Treasury, et al.*, 70 F.4th 412 (8th Cir. 2023).

   a. Brothers Thomas and Michael were the sole shareholders of a construction company. The entered into a buy-sell agreement that gave the surviving brother, alternatively the company itself, to buy the deceased brother's shares. The agreement provided two mechanisms for determining the price. First, the brothers were to execute a certificate every year in which they agreed upon the value of the company. Two, they could obtain appraisals. The brothers never carried out either mechanism. The company purchased $3.5 Million of life insurance for each brother. Michael died, and his estate sold the shares to the company or surviving brother for $3 Million based upon an agreement between the surviving brother and the decedent's son. No appraisal was obtained. The estate tax return reported a value of $3 Million for the decedent's interest in the company, which the IRS contested. The IRS (1) ignored the stock purchase agreement in determining value; and (2) included the $3.5 million of proceeds in determining the fair market value of the company at Michael's death. The IRS issued a deficiency, which the estate paid and then sued for a refund. The Tax Court sided with the IRS and so did the Eight Circuit.

   b. The first issue was whether the buy-sell agreement was controlling for purposes of determining value. The Eighth Circuit cited to IRC §2703, which says to ignore an agreement such a buy-sell agreement for purposes of determining value unless the following criteria are satisfied: (1) the agreement is a bona fide business arrangement; (2) the agreement is not "a device to transfer property to members of the decedent's family for less than full and adequate consideration;" and (3) have terms comparable to other similar arrangements entered into arm's length transactions.

   c. Here, the Court noted that the buy-sell agreement did not actually provide a formula or a price. Essentially, the brothers were allowed to just agree on a price, or get appraisals, but the Court was not persuaded by the call for an appraisal process. The fact that the brothers never actually carried out the annual pricing process was noteworthy and likely persuasive. The Court focused on the agreement allowing the brothers to simply agree on a price, which they never did during Michael's

lifetime, and that even after death, the $3 Million was paid due to what sounds like a vague agreement between the surviving brother and decedent's son. There was never an appraisal – not during lifetime and not after death. The Court was unpersuaded to ignore §2703 and held that the agreement was not determinative of value.

i. *What, if anything, could have made a difference?* The Court focused on the brothers' failure to carry out the terms of their own agreement on an annual basis. Such a finding is not unusual for a Court. If the parties to an agreement do not abide by an agreement, why should a Court? Would it have made a difference if the brothers actually produced the certificate of value every year? Or created a data-driven formula, such as one based on EBITDA? What about obtaining appraisals every so often?

d. The second issue was whether the life insurance proceeds should have been included in the value of the business for determining the fair market value of Michael's share at his death. The estate argued no, because the life insurance offset an obligation to sell the interest, and because the life insurance resulted in no actual benefit to the estate. The IRS and Court disagreed.

e. The Court reasoned that a neither a hypothetical willing buyer not a hypothetical willing seller – the hallmarks of fair market value under IRC §2031 – would not ignore the life insurance proceeds. The willing buyer could purchase all 100% of the company, extinguish the buy-sell agreement, and then the life insurance proceeds would be a bonus-add to the underlying value of the business. In the same sense, a willing seller would never agree to sell shares to a third party without including the life insurance proceeds. The Court determined that excluding the value of the life insurance proceeds would result in a windfall to the surviving brother.

i. *What, if anything, could have made a difference?* Would it have made a difference if the life insurance were owned by an irrevocable life insurance trust, and the proceeds payable to the trust, which then redeemed the deceased shareholder? What other tax consequences would ensue? What would be the challenges with this approach and would it even work at all? Is this approach practical and appealing to real-world business owners? What other approaches could have worked? What do business owners generally do in these circumstances? How relevant is this issue for most businesses with the estate tax exclusion of today?

f. Note that the Eighth Circuit declined to follow another similar case from the Eleventh Circuit – *Blount v. Commissioner*, 428 F.3d 1338 (11th Cir. 2005). Here, the Eighth Circuit Court did not rationalize why it declined to follow *Blount* other than to say it disagreed with *Blount* because *"Blount's* flaw lies in its premise."

g. This battle is not over. The U.S. Supreme Court granted a writ of certiorari to the estate, so it will take up the issue. See Paul Hood and Ed Morrow, Supreme Court Grants Writ of Certiorari in Connelly v. Internal Revenue Service, LISI Business Entities Newsletter #286 (December 18, 2023).

3. *United States v. Paulson,* 68 F.4th 528 (9th Cir. 2023)

   a. Decedent died with a large taxable estate. The estate elected to pay by installments, during which time it was audited and there was a stipulation as to additional tax owed. The estate elected to pay the additional amount by installment as well. Meanwhile, the decedent's family began fighting for all sorts of reasons, and other than an initial payment or so, nobody paid the remaining estate tax. The IRS tried to collect against virtually everyone involved – the widow, trustees, trust beneficiaries, etc. There was a laundry list of defendants. The family fought hard against liability, each blaming others, to no avail. The Tax Court and Ninth Circuit found personal liability for estate tax owed.

   b. There were many arguments in this case, and the author here focuses only on several of those arguments she found most interesting.

   c. The entire case focuses on IRC §6324(a)(2), which provides:

      > *If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or a beneficiary, <u>who receives, or has on the date of decedent's death</u>, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of decedent's death, of such property, shall be personally liable for such tax.* (Emphasis added.)

   d. One argument was which of two canons of statutory construction apply to the underlined/emphasized text above. The question was whether a person who receives property *after* the date of death is liable for the tax, or to be liable based on "receipt" means that the recipient must receive property on the date of death. In other words, does the phrase "on the decedent's death" apply to "receives" and "has" or only "has?"

      i. The IRS argued for the rule of the last antecedent. The "rule of the last antecedent" that provides "a limiting clause or phrase…should ordinarily be read as modifying only the noun or phrase that immediately it follows." (Citing Lockhart v. United States, 577 U.S. 347, 351, 136 S.Ct. 958, 194 L.Ed.2d 48 (2016)). Under this rule, the phrase "on the decedent's death" applies only to "has" and not to "receives."

ii. The family argued for the series qualifier canon. This canon provides that when "the limiting phrase was separated from the antecedents by a comma, the limiting phrase applied to all the antecedents, not just the immediately preceding one." Under this rule, "on the decedent's death" would also apply to "receives," and anyone who received property *after* the decedent's death would not be liable. The Court was unpersuaded in part because here the limited phrase was not separated from "has" by a comma, so was not separated from *all* of the antecedents by a comma.

iii. The family also argued indirectly the "canon against absurdity," arguing that it would be absurd, among other results, if the value of estate property declined from the date of death and the recipient was left liable for a shortfall. The Court was unpersuaded for a variety of reasons. One, the absurdity doctrine was available only in "rare and exceptional cases" and must "shock the general and moral common sense" (citing Crooks v. Harrelson, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930)). This Court did not feel this case shocked anyone's general or moral common sense or was rare or exceptional. Two, the Court was unpersuaded that the potential calamity offered by the family was realistic.

iv. The family raised numerous other arguments, all of which failed. The Court found personal liability by the recipients.

v. Note that there was a dissenting opinion, which generally focused on the probable intent by Congress and argued that the focus on the rule of the last antecedent was overdone.

e. *What, if anything, could have made a difference?* Paying the tax.

TAX COURT DECISIONS

4. *Estate of MacElhenny v. Commissioner,* T.C. Memo 2023-33

a. The explanation that follows is a significant simplification of the facts; however, the author has weeded out those basic facts that are most relevant. There are complexities including partnerships and other parties that are omitted here.

b. Dad ran a real estate business that started having financial problems when he became ill. Son and daughter stepped in to help. One of dad's businesses had owed a bank a significant debt on which it defaulted, and dad and the bank negotiated a stipulated judgment. Dad failed to make payments, and when son and daughter stepped in the ultimately negotiated to purchase the judgment from the bank and son and daughter were substituted as secured creditors of dad. The same situation happened with another bank as well. Son was acting as dad's agent under a financial power of attorney and he represented dad in settling with the bank. Son

and daughter then bought one of dad's properties in part settlement of one of the debts (for which son and daughter now were the creditors).

c. Dad then died. The son and daughter were co-executors and filed a federal estate tax return deducting the remaining value of the judgments under IRC §2053. They filed a gift tax return but did not report the purchase of the real estate (in partial satisfaction of one of the judgments) as a gift. The IRS disagreed with both positions.

d. The IRS argued that under §2053, the decedent must have owed the debt at death, and that son and daughter's payment to the bank in exchange for the debt (the buying of the debt) essentially was a repayment of the debt – and therefore the decedent did not owe the debt at his death. Although the decedent *did* owe the son and daughter, the intrafamily arrangement was subject to heightened scrutiny under Treas. Reg. §20.2053-1(b)(2)(ii). The Tax Court was unpersuaded by son and daughter that they met the heightened scrutiny standards, which was the son and daughter's burden to prove. The Tax Court determined that the purchase of the judgment – namely the assignment of the remaining judgment to son and daughter in exchange for money – was not done in the ordinary course of business. The Tax Court sided with the IRS and the claims were not deductible.

e. One of the factors the Tax Court mentioned with some significance was the fact that the son and daughter were acting in dad's representative capacity at the time the judgments were purchased. Specifically, the son "was on both sides of the transactions." The Court went on to say that "we do not see any evidence that these individuals actually negotiated amongst themselves."

f. Furthermore, the Court noted "the consent judgments entered against decedent did not resolve a dispute between decedent and his children." Instead, the Court determined that the overall transaction was some kind of scheme for the son and daughter to create a judgment against the estate and offset the purchase price for them to purchase estate assets, all to their own benefit.

g. In this vein, when son and daughter bought real property from dad, they paid some of the purchase price in the form of assuming a third-party debt and paying down the judgment, but they also paid some of the purchase price as a credit against their own judgment. As the Court found the intrafamily judgment to be donative and not bona fide, it held that this part of the purchase price actually was a gift from dad to son and daughter and assessed a gift tax.

h. *What, if anything, could have made a difference?* With the emphasis on the son being on "both sides of the transaction," perhaps having a public guardian acting for dad during all of the negotiations would have helped. The problem was that, at the time the initial negotiations were happening, the son may not have foreseen the

ultimate arrangement and would not have thought to engage a third party on dad's behalf. This case echoes the newer trend against Graegin loans, in which the IRS now is disallowing the interest deduction for estate loans to pay estate tax. This case demonstrates an increasing scrutiny and wariness of intrafamily loans.

5. *Estate of Block v. Commissioner*, T.C. Memo. 2023-30 (2023)

    a. A decedent revocable trust attempted to create a charitable annuity remainder trust (CRAT) at her death; however, instead of providing that the trustee pays $X to the non-charitable beneficiary, the language said to pay the "greater of (i) all net income, or (ii) $50,000" to the beneficiary. The "all net income" language disqualified the CRAT. The trustees had a limited power of amendment in the trust, which they tried to use to amend the CRAT retroactive to date of death to remove the "all net income" language. The amendment was executed after the audit of the estate tax return began.

    b. The estate claimed a charitable deduction on the estate tax return and income tax deduction, both of which were denied by the IRS.

    c. There is a mechanism to fix a CRAT under §2055(e)(3)(C)(iii), which requires a judicial proceeding commenced within 90 days after the due date for the estate tax return. Here, however, the trustees did not use a judicial proceeding, and their own attempt to amend the CRAT was not done within the 90 days.

    d. The Court was unpersuaded and held for the IRS. The CRAT did not qualify for the estate tax charitable deduction or income tax deduction.

    e. *What, if anything, could have made a difference?* Excluding the "net income" language; and applying to the court for a judicial modification of the trust (even if after 90 days, at least it would have given the court less to find wrong).

6. *Estate of Hoensheid v. Commissioner*, T.C. Memo. 2023-34 (2023)

    a. The IRS disallowed a charitable deduction to a donor advised fund (DAF) made in anticipation of a sale of stock, and assessed capital gains tax to the donor, and the Court sided with the IRS. The taxpayer was one of three brothers who owned a manufacturing company, which was being sold.

    b. The timeline is important here and simplified as follows:

        i. Early in year (before April 1): Seller begins soliciting bids for purchase of company.

        ii. April 1: Buyer submits letter of intent to purchase company.

        iii. April 23: Buyer and seller execute a non-binding letter of intent to sell company for $107M. Buyer then begins due diligence process.

iv. June 1: Taxpayer signs a Letter of Understanding that he would contribute some of his stock to a donor advised fund. The Letter of Understanding did not specify the number of shares to be transferred and made explicitly clear that the transfer was not complete until "formally accepted by" the DAF administrator, and also made it clear the DAF had no obligation to do anything with the shares.

v. June 11: Company board ratified agreement to sell the company to the buyer and consented to the transfer of shares to the DAF by the taxpayer, but did not specify the number of shares.

vi. June 12: Buyer approved the acquisition subject to some the resolution of some issues.

vii. June – July: Negotiations ensued for the remaining issues. Some of the purchase plans referred to a transfer of an unspecified number of the taxpayer's shares to a DAF.

viii. July 9-10: Taxpayer decided on a number of shares and delivered a stock certificate to his lawyer, undated, and created an online account with the DAF administrator.

ix. July 10: Millions of dollars of employee bonuses were paid out; a submission was made to the State licensing authority; and a post-dated draft of a stock plan was circulated.

x. July 13-14: Final drafts circulated and revised of the buyout, and a stock certificate to the DAF was executed (including by the DAF). The Tax Court went through numerous time stamped emails, so numerous transactions were happening all in the same 24 or 48 hour period. Of seemingly critical importance was an ambiguity as to whether the DAF actually owned any shares, i.e., whether the taxpayer had transferred shares to the DAF.

xi. July 15: Final documents signed, closing, payment.

xii. November 30: The DAF administrator executed a confirmation of receipt saying that it received the shares on June 11.

xiii. Of note: the taxpayer urged his attorney that he wanted to wait until the last opportunity to transfer the shares to the DAF in case the sale fell through.

c. The taxpayer supplied an appraisal with his income tax return that showed a value of the shares that was *more* than was received in sales proceeds. The appraiser went through what sounded like a thorough analysis.

d. The IRS did not respect the transaction and assessed capital gains tax against the taxpayer.

e. Issue #1: Assessment of capital gains tax. The IRS assessed capital gains tax against the taxpayer. The Court noted the following rule: "the donor must (1) give away the appreciated property absolutely and divest of title; and (2) 'before the property gives rise to income by way of sale.'" (Citing *Humacid Co. v. Commissioner*, 42 T.C. 894, 913 (1964).)

   i. Whether the taxpayer here made a gift turned on state law, in this case Michigan. Under Michigan law, a gift required intent, delivery, and acceptance. Here, the Court found that the delivery did not occur until July 13th when an email with the stock certificate in the name of the DAF was sent to the DAF. The issue here was that there seemed to be many emails back and forth creating an ambiguous record as to when the stock actually transferred to the DAF; the July 13th date was the clearest evidence that the Court could find. In addition, the July 13th date was the best evidence of acceptance because that date was when the DAF executed the buyout plan as holder of shares. All of the arguments for earlier dates failed because there was no clear transfer of the stock one given date – the Court had to search for it. The Court concluded the gift was made on July 13th under Michigan law.

   ii. Next, the Court cited to the "anticipatory assignment of income doctrine" in which a person is taxed on income that the person earned or had the right to receive and then assigned to someone else. "We deem the donor to have effectively realized income and then assigned that income to another when the donor has an already fixed or vested right to the unpaid income." To make a determination here, the Court considered the following four factors: (1) the donee's (DAF's) obligation to sell the stock; (2) the actions already taken by the parties to carry out the transaction; (3) the remaining unresolved transactional contingencies; and (4) the status of the corporate formalities required to finalize the sale.

      1. The Court found that the DAF did not have any obligation to sell the shares, as the Letter of Understanding made it clear it had no such obligation.

      2. The Court found numerous actions had taken place to make the sale a virtual certainty, including the large payouts to the employees on July 10.

      3. The Court found that none of the remaining unresolved transactional contingencies were substantial enough to consider.

4. The Court found that the corporate formalities had for the most part taken place by July 13th and that anything remaining was "purely ministerial."

iii. Looking at all of the facts, the Court held that the anticipatory assignment of income doctrine applied here and upheld the assessment of capital gains tax against the taxpayer.

f. Issue #2: Disallowance of charitable gift tax deduction. The IRS also disallowed the gift tax deduction. Because the gift was over $500,000, IRC §170(f) provides that the two requirements for the deduction were: (1) a contemporaneous written acknowledgment by the DAF administrator; and (2) a qualified appraisal.

i. The IRS tried to argue that the written acknowledgement was insufficient because it referenced stock and not cash, but here the IRS sided with the taxpayer and said the acknowledgement was sufficient.

ii. The issue here was the qualified appraisal. Treas. Reg. § 1.170A-13(c)(3)(i) requires an appraisal no earlier than 60 days from the gift and prepared, signed and dated by a qualified appraiser. The Regulation goes on to elaborate more on the requirements for the appraisal to be qualified.

iii. The IRS argued that the appraisal was lacking, the date was wrong, the appraisal was missing required statements, and other inconsistencies with the requirements under the Regulation, one of the most important of which was that there were no statements as to the appraiser's qualifications.

iv. The Court noted that in the past it had allowed substantial compliance, but here declined to do so. Large focus was placed on the appraiser's lack of qualifications. This appraiser did not have any apparent credentials or verifiable experience.

v. The Court upheld the denial of the charitable deduction.

g. Ultimate result was that the taxpayer was assessed capital gains tax and denied a gift tax charitable deduction.

h. *What, if anything, could have made a difference?* Here, the two most significant issues discussed by the Court were the timing of the gift and lack of qualifications by the appraiser. The taxpayer waiting until the last possible moment to make the transfer to the DAF ended up working against him, because while he wanted to wait until he was all but assured the sale would take place, it was that effective assurance that created the vesting of his income that led to the capital gains tax. As to the appraiser, using an appraiser with the requisite qualifications should have made a difference although there was no guarantee. There were other issues with the gift, but the lack of qualifications was the most significant.

7. *Schlapfer v. Commissioner*, T.C. Memo 2023-65 (2023).

   a. Finally, a pro-taxpayer case!!!

   b. The very simplified factual background is as follows. The taxpayer purchased a life insurance policy and funded the premium in 2006; in 2007, he assigned the policy to family members. The taxpayer filed a gift tax return for 2006 reporting the gift, as part of an offshore disclosure packet (there were international issues at play here as well). The IRS determined that the gift was in 2007 and not 2006, and tried to argue that the taxpayer did not adequately disclose the gift and therefore the statute of limitations did not begin to run on the reporting of the gift.

   c. Here, there was lots of discussion about the international aspects, but the relevant part by way of gift tax is that the Court found substantial compliance. He adequately disclosed the property gifted, the identity of the donees, and the value. This case is a handy case to have for substantial compliance issues.

PRIVATE LETTER RULINGS

8. PLR 202318010 (2023).

   a. This PLR examines the tax consequences of a court approved nonjudicial settlement agreement by the beneficiaries of a trust due to an ambiguity in the language of a trust.

   b. A trust provided that at the death of the last survivor of a group of named individuals, the trustees were to divide the trust "among the descendants in equal shares per stirpes and not per capita, at that time surviving [the decedent's daughter]." Given the following state laws, this language created an ambiguity as to how the trust was to be divided.

   c. One statute provided the following definition of "per stirpes:"

      > *the property is divided into as many equal shares as there are: (1) surviving children of the designated ancestor; and (2) deceased children who left surviving descendants. Each*
      >
      > *surviving child is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner,*
      >
      > *with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.*

   d. The other statute defined "descendant" as all of that person's "progeny of all generations with a relationship of parent and child at each generation being determined by the definition of child and parent."

e. The decedent had one surviving child who also was one of the persons in the named group of individuals, and there were grandchildren (living and deceased) and greatgrandchildren. The ambiguity was whether the per stirpital determination should have been at the daughter's children's generation or her grandchildren's generation.

f. The descendants entered into a settlement agreement that was approved by the court. Nobody received more than they would have received in the best case scenario and everyone received less than in their best case scenario. The outcome was within the reasonable range of outcomes. There was no definitive state law on how to resolve the ambiguity.

g. The ruling request sought, among other things, that there would be no gifts or income generated by the settlement, and the IRS issued a ruling that there would be no such gifts or income. The IRS was persuaded that the ambiguity was genuine, the law unsettled, and the agreement was negotiated at arm's length.

9. PLR 202339008 (2023).

    a. This private letter ruling examines the tax consequences of a surviving spouse's renunciation of her interest in a QTIP marital trust.

    b. Upon a decedent's death, the decedent's revocable trust was divided into a QTIP Marital Trust for spouse and a Nonmarital (credit shelter) trust for spouse and children. The Marital Trust was a traditional QTIP trust with all income to spouse and discretionary principal, and on her death all assets would be distributed to the Nonmarital trust. The Nonmarital trust provided for mandatory income to spouse and children with discretionary principal. Upon spouse's death, all assets in the Nonmarital trust (which would include the remainder of the Marital trust) would be divided into equal shares for the children and distributed outright given their ages. The trust allowed the spouse to renounce her interest in the Marital Trust. State law allowed her to renounce her interest in the Nonmarital trust.

    c. The spouse proposed to disclaim her interest in the Marital Trust and the Nonmarital trust. She proposed to enter into a net gift agreement with the children such that the children would pay the tax attributable under IRC §2511 and §2519.

    d. The ruling made the following determinations:

        i. The spouse's renunciation of the Marital Trust would not be a qualified disclaimer because it was not made within 9 months of the decedent's death and she already had accepted benefits from the Marital Trust; so she will have made a completed gift to the Nonmarital trust. However, her renunciation of the property transferred to the Nonmarital trust as a result

of her disclaimer *is* qualified because the 9 months would start when she transfers the property to the Nonmarital trust.

ii. The value of the gift would be reduced by the gift taxes paid, per the net gift agreement.

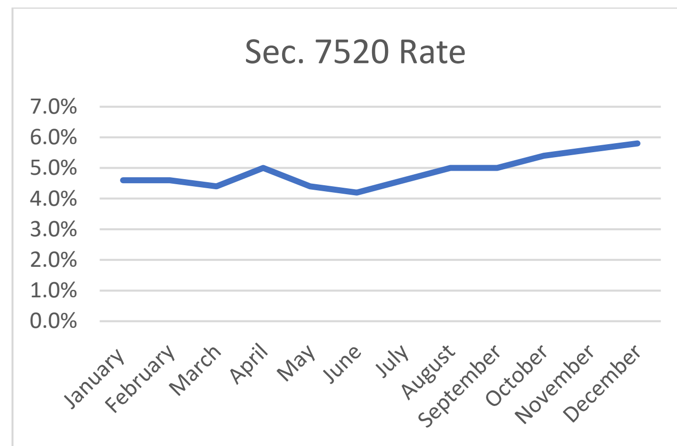
iii. The assets in the Nonmarital trust would be excluded from the spouse's gross estate at her death.

iv. If the spouse dies within 3 years, the gift tax will be included in her estate under IRC §2035(b).

v. The gift tax paid by the children would be taxed as capital gains to the spouse.

OTHER DEVELOPMENTS TO MENTION

1. Trend in § 7520 Rates. The 7520 rates rose 120 basis points between January and December. The following chart illustrates the trend for 2023:



The §7520 rate in 2023 is by far an extreme increase since even just a couple of years ago. This trend reflects the increase in the applicable federal rates. Traditional estate freezing techniques such as sales to grantor trusts in exchange for promissory notes and grantor retained annuity trusts will be less desirable than they used to be in the current interest rate environment.

The §7520 rate for January 2024 is 5.2%, which is a slight relief from the prior three months but still much higher than rates of just a year or two ago. *See* https://www.irs.gov/applicable-federal-rates for Revenue Rulings for each rate.

2. Revenue Ruling 2023-2. This revenue ruling created a lot of buzz in 2023 because the IRS determined that there would be no income tax basis adjustment under IRC §1014 for property held in a grantor trust upon the grantor's death. There had long been an argument held by some practitioners that the assets in a grantor trust would receive a tax basis adjustment even though the assets were excluded from the grantor's estate for estate tax

purposes. This revenue ruling formally disagreed with that line of thinking. There is little discussion in the ruling, but the decision is clear.

3. No More California INGs. An incomplete gift trust (ING) is an irrevocable trust to which a grantor makes an incomplete gift, so the assets are included in the grantor's gross estate at death, but the trust is not a grantor trust under IRC §671 et seq. The motivation behind ING trusts is for the grantor to escape state income tax. In 2023, California eliminated the use of ING trusts, so that the grantor will be taxed on the income. This trend follows New York, which eliminated ING trusts in 2014. *See* Bruce Steiner, *California Eliminates Incomplete Gift Trusts,* LISI Estate Planning Newsletter #3065 (September 18, 2023). Will more states follow suit?

4. 2023-2024 Priority Guidance Plan. The Department of the Treasury released its 2023-2024 Priority Guidance Plan on September 29, 2023. The Guidance includes the following projects relating to gifts, estates, and trusts:

   a. Regulations relating to the §645 election to treat a revocable trust as part of an estate.

   b. Final regulations under §§1014(f) and 6035 regarding basis consistency and person acquiring property from decedent. This will follow the proposed/temporary 2016 regulations.

   c. Final regulation for §2010 as to whether gifts includable in the gross estate should be excepted from the special rule of 20.2010-1(c). Proposed regulations were published in 2022.

   d. Regulations imposing restrictions on estates during the 6-month alternate valuation period under §2032(a). Proposed regulations were published in 2011.

   e. Final regulations for deductibility of certain interest expenses and related concepts (as to Graegin loans) under §2053. Proposed regulations were published in 2022.

   f. Regulations updating QDOT elections.

   g. Regulations regarding GST allocations under §2632, GST trusts and related issues. Also final regulations regarding extensions of time to allocate GST exemption.

   h. Final regulations on tax imposed on U.S. citizens who receive gifts from expatriates.

   i. Regulations regarding uses of CRATs as a listed transaction.

5. 2024 Inflation Adjusted Estate & Gift Rates (Revenue Procedure 2023-34)

   a. Estate tax exclusion amount: $13,610,000.

   b. Annual exclusion amount: $18,000.

   c. Annual exclusion to non-citizen spouse: $185,000.