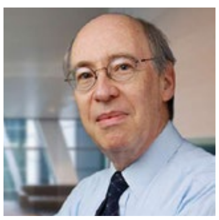
ESTATE PLANNING UPDATES: A MISCELLANY

KATHLEEN R. SHERBY is senior counsel in the Private Client Group and a member of the Fiduciary Litigation Team of Bryan Cave Leighton Paisner LLP, in Saint Louis. Her practice involves representation of private individuals in all aspects of wealth transfer planning, including the implementation of sophisticated planning techniques involving grantor retained annuity trusts, family limited partnerships/limited liability companies, charitable remainder trusts, charitable lead trusts and other similar wealth transfer techniques. A particular focus of her practice is estate planning for retirement benefits, integrating the planning for minimization of transfer tax and income tax with the required minimum distribution rules. Ms. Sherby has represented both trustees and beneficiaries on a wide variety of fiduciary issues and has advised trustees over the years as to their fiduciary duties in administering trusts. As a member of the fiduciary litigation team, she regularly represents trustees and beneficiaries in court controversies involving a variety of issues relating to the administration of trusts and estates. In addition, Ms. Sherby has represented the taxpayer in estate and gift tax audits, in U.S. District Court, the U.S. Tax Court, and in the Missouri Supreme Court. An active participant in the estate planning bar, Ms. Sherby is a Fellow of the American College of Trust and Estate Counsel, and is a past president and a Regent Emeritus of the College, and has served as chair of the Employee Benefits in Estate Planning Committee and as Missouri State Chair. She has also served as chair of the Probate and Trust Committee of the Missouri Bar, as chair of the Probate Section of the Bar Association of Metropolitan St. Louis, and as president of the Estate Planning Council of St. Louis.



LARRY KATZENSTEIN is a partner with Thompson Coburn LLP, in St. Louis. He practices in the firm's private client services area and is a frequent speaker around the country to professional groups. He appears annually on several ALI CLE estate planning programs and has spoken at many other national tax institutes, including the Notre Dame Tax Institute, the University of Miami Heckerling Estate Planning Institute, and the Southern Federal Tax Institute. Larry has served as an adjunct professor at the Washington University School of Law, where he has taught both estate and gift taxation and fiduciary income taxation. A former chair of the American Bar Association Tax Section Fiduciary Income Tax Committee, he is the current chair of several Tax Section charitable planning subcommittees. He is a fellow of the American College of Trust and Estate Counsel and a member of its Charitable Planning Committee and a member of the advisory board of the New York University National Center on Philanthropy and the Law. He was named the St. Louis Non-Profit/Charities Lawyer of the Year in 2011 and 2015 and the St. Louis Trusts and Estates Lawyer of the Year in 2010 and 2013 by Best Lawyers® (by BL Rankings). He was nationally ranked in the 2009-2017 editions of Chambers USA for Wealth Management (by Chambers & Partners). Larry is also the creator of Tiger Tables actuarial software, which is widely used by tax lawyers and accountants as well as the Internal Revenue Service.

IRS NIXES ABUSIVE CHARITABLE REMAINDER ANNUITY TRUST

AM 2020-006

There are so many defects in the plan examined in the Chief Counsel Memorandum released on June 26, 2020, that there is little to learn from it. But it is a fascinating read, for no other reason, than to marvel at how promoters of this plan could have gotten so deep into the promotion without understanding the basics of how a charitable remainder annuity trust (CRAT) works. The plan purported to be a way to avoid all tax on highly appreciated assets sold by the trust. The Memorandum noted that the same structure had been replicated numerous times by other promoters.

In brief, the plan envisioned a CRAT to be funded with interests in a closely held business or farmland, crops produced by the farmland, or both. The trust would provide for payment of the annuity by purchasing one or more single premium immediate annuities. In each taxable year of the trust, the trustee would pay to the beneficiary an annuity amount equal to the greater of 10 percent of the initial fair market value of the property transferred to the trust or the payments received by the trustee from one or more of the annuities. The plan seemed to assume that the capital gain generated from sale of the assets would sit forever untaxed in the trust as principal. Because part of the annuity payment would be tax-free return of investment in the contract under Internal Revenue Code section 72, only the tax-free income would ever be distributed to the beneficiary.

What's wrong with this picture? First, a CRAT cannot pay the greater of 10 percent or payments received by the trustee from investments. A CRAT must pay an annuity, period. It can't pay less than the annuity, and it cannot pay more than the annuity. But that is not the worst of it. The trust also provided that, in lieu of paying the remainder to charity, the trustee could at any time pay to the charitable organization a cash sum equal to 10 percent of the initial fair market value of the property, plus $100. At that point, the charity would have no further rights under the trust and would not receive the remainder at the end of the trust term. The promoters seemed to assume that this was permissible because section 664(d)(1)(D) mandates that the actuarial value of the remainder at inception be at least 10 percent of the initial fair market value of the trust. But clearly, this doesn't work. Charitable remainder beneficiaries must receive the remainder. That seems pretty basic.

The promoters simply did not understand how the tier system works and thought that somehow the annuity income would bypass the trust and appear directly on the income beneficiary's return. "Put differently, the annuity is a funding mechanism for the CRT's required payments to the income beneficiaries, not an income stream of the beneficiaries in lieu of such payments." And if the tax-free income goes into the tiers as income, that doesn't help the beneficiaries, because capital gain rests in a higher tier than nontaxable income. Although it is clear that a single premium immediate annuity can be owned by a charitable remainder trust, and the payments from the annuity will be partly nontaxable under section 72, the income still goes into the tiers and won't come out until any higher tier, such as capital gain recognized on sale of the appreciated assets, is distributed first.

—LK

TAXPAYERS WIN CHARITABLE DEDUCTION CASE

Emanouil v. Commissioner
T.C. Memo 2020-120

We have seen so many cases of charitable deduction abuse followed by government victories that it is a pleasure to read a case in which an honest taxpayer, trying to do good, actually prevailed on all points. The facts in Emanouil are complex but, boiled down to the basics, taxpayer Emanouil was a real estate developer with substantial undeveloped property. Taxpayer considered various development plans for portions of the property and engaged in extensive discussions with the town regarding options, including sale of portions of the property to the town and rezoning for development projects, and made a number of presentations with his attorney to the various governing bodies. At one or more of the meetings, taxpayer mentioned that possibly he would contribute a portion of the property to the town for conservation purposes. Ultimately the redevelopment plans were approved, and some parcels were later contributed to the town to be held for conservation purposes.

The first charitable deduction issue was whether the deduction should be disallowed because of failure to comply with some of the technical requirements under the section 170 charitable substantiation rules. For example, the appraisals did not include a statement explicitly indicating that they were prepared for income tax purposes and did not include a statement as to the expected date of contribution. The Tax Court pointed out that a taxpayer who does not strictly comply with the details of the qualified appraisal rules may nevertheless satisfy the elements if he or she has substantially complied with the requirements. The requirements are "directory" rather than "mandatory." "The fact that a Code provision conditions entitlement of a tax benefit upon compliance with respondent's regulation does not mean that literal as opposed to substantial compliance is mandated," citing Bond v. Commissioner, 100 T.C. 32 (1993). Although the specific date of contribution was not included in the appraisals, the appraisals were dated within 30 days of the contributions and, in each case, the appraisals explicitly stated that the values were current market values rather than historic values as of a previous date.

What about the failure to include language that the appraisals were obtained for income tax purposes? Although the exact language was not there, the appraisals provided sufficient information for the Service to evaluate the contributions and investigate possible over-valuation. In fact, one might wonder why the statement is needed in the appraisal at all, because Form 8283 requires the signature of the appraiser affirming the exact same statement that the appraisal was prepared for income tax purposes.

The Service next tried to deny or reduce the charitable deduction on a quid pro quo, bargain sale theory, that the requested zoning was granted only because the taxpayer was willing to contribute a portion of the land to the town. But there simply wasn't any evidence to support that theory. Beyond a mention at the zoning meeting of the possibility of the gift, there was no requirement of such a gift and the court found no evidence that the town directed the zoning board not to approve the project unless the land donations were made. The fact that the gift wasn't made until after the zoning was approved was further evidence in the taxpayer's favor.

The taxpayer also won on valuation. The court compared the government appraiser's valuation with the valuation prepared by the taxpayer's appraiser and found that the taxpayer's appraisal correctly stated highest and best use of the property.

What lessons can we draw from this? One lesson that I draw is that courts may be willing to permit minor deviations from the strict letter of the substantiation regulations in cases in which they do not see attempts to abuse the system by over-valuation or otherwise. I think the court felt this was an honest taxpayer who did not overvalue property and was trying to do a good thing for his community by donating some of the land for conservation purposes. Note that this was not a conservation easement case but a gift outright of the taxpayer's entire interest in the property. The conservation easement cases are very different and many of them have involved gross abuses, often packaged in syndications. This was not that case.

—LK

GUIDANCE ON CARES ACT WAIVER OF RMDs

IRS Notice 2020-51

CARES Act section 2203 added IRC section 401(a)(9)(I), waiving required minimum distributions (RMDs) for 2020 for defined contribution plans and IRAs (but not for defined benefit plans, generally referred to as pensions). Notice 2020-51 (issued on June 23, 2020) provides guidance as to the implementation of this waiver of all 2020 RMDs (and any 2019 RMD required to be taken by a taxpayer's required beginning date of April 1, 2020).

Because the CARES Act was enacted in March of 2020, many taxpayers had already taken RMDs otherwise required to be taken in 2020. Many other taxpayers did not learn of the waiver of these RMDs until later in the year. Therefore, the Notice clarified that a taxpayer may roll over the amount of any of these RMDs to an IRA or plan, without regard to the 60-day rollover period, provided that the rollover was completed by the later of August 31, 2020, or 60 days from the date of the distribution.

If a taxpayer turns age 72 in 2020, the taxpayer's new first distribution year would have been 2020, with this distribution required to be taken by April 1, 2021, the taxpayer's new required beginning date. As a result of the RMD waiver, no distributions must be taken in 2020. Any distributions during 2021, even if prior to April 1, 2021, will be deemed to be the RMD for 2021. However, the taxpayer's required beginning date does not change as a result of the waiver of 2020 RMDs.

A distribution from a qualified plan that would have been a 2020 RMD can be rolled back into the qualified plan, if the plan authorizes such rollovers, or it can be rolled over into an IRA. A rollover of a required minimum distribution from a traditional IRA can be made to any IRA. However, exceptions apply for a distribution from a traditional IRA not to be subject to the one rollover per 12-month period limitation in section 408(d)(3)(B), and for a distribution from an inherited IRA not to be subject to the restriction on rollovers for nonspousal beneficiaries in section 408(d)(3)(C). These distributions can be repaid only to the distributing IRA, and they must have been completed by August 31, 2020.

Some qualified plans authorize the employee or beneficiary to elect whether the five-year rule or the life expectancy rule is to apply in determining RMDs. If the qualified plan contains such an election, the deadline for the election would be the end of the calendar year of the year following the employee's death. If an employee participant in such a plan died in 2019, the election would be required by the end of 2020 (unless the plan is amended to permit the extension of the deadline for this election to the end of 2021). However, if the five-year rule applies to a benefit under a plan with respect to an employee who died in 2019, the nonspouse designated beneficiary has until the end of 2021 to make a direct rollover and use the life expectancy rule.

If an employee died in 2015 through 2019 and the distribution was subject to the five-year rule, one year is added to the end of the five-year distribution period. However, if an employee died in 2020, there is no extension of the five-year distribution period or the 10-year distribution period. There is also no extension of the September 30 Beneficiary Determination Date, the October 31 deadline to provide copies of the trust to the plan administrator, or the December 31 deadline for establishing separate accounts.

—KS

GUIDANCE ON IRA CONTRIBUTIONS AND QCDS AFTER SECURE ACT

Notice 2020-68

SECURE Act section 107, enacted in December of 2019, repealed Code section 219(d)(1) and amended IRC §408(d)(8)(A). Prior to the repeal of §219(d)(1), an individual who had attained age 70½ could no longer contribute to an IRA. As a result of the repeal of section 219(d)(1), an individual now may make a deductible contribution to an IRA regardless of age for any year after 2019. However, Notice 2020-68 concludes that an IRA custodian or trustee is not required to permit such contributions, and financial institution that choose to accept post-age 70½ contributions must amend the IRA Plan Agreement no later than December 31, 2022, to provide for these contributions. They also must distribute a copy of the amended IRA Plan Agreement and a new disclosure statement to all IRA account owners. If an individual makes a post-age 70½ contribution for a year in which the individual has a required minimum distribution, Notice 2020-68 further states that the individual must take the RMD and make the post-age 70½ contribution in a separate transaction. The individual may not simply offset one with the other.

Code 408(d)(8)(A) also allows an individual who is over age 70½ to make a direct distribution, of up to $100,000, from an IRA to a public charity without including the amount of that qualified charitable distribution in income. However, to eliminate any possibility of doubling up on deductions (using the post-age 70½ deductible contribution and the qualified charitable distribution exclusion), section 408(d)(8)(A) was amended to provide for a reduction in the amount that can be excluded by a taxpayer for a qualified charitable distribution by the aggregate amount of any post-age 70½ deductible contributions to a traditional IRA. Notice 2020-68 provides the following example of how this works.

> Ted who turned age 72 in 2020 contributes $5,000 to his traditional IRA in 2020 and again in 2021. He does not make any contribution to his IRA in 2022, but arranges for a $6,000 qualified charitable distribution (QCD) to the Humane

Society in 2021. Due to the post-age 70½ deductible IRA contributions in 2020 and 2021, no part of the $6,000 QCD would be excluded from Ted's 2021 income. He makes another QCD to the Humane Society in 2022 of $6,500. The remaining $4,000 of his post-age 70½ deductible IRA contributions from 2020 and 2021 reduce the excludible amount of this 2022 QCD. The result for 2022 is that he can exclude $2,500 of the QCD from his income in 2022 and reports $4,000 of the QCD as part of his income in 2022. Any QCDs after 2022 would be fully excludible from Ted's income, so long as he made no further deductible contributions to his traditional IRA. The same result would occur if the QCDs occurred in 2025 and 2026. As long as the post-age 70½ deductible contributions to the traditional IRA had not yet offset Ted's QCDs, these remain outstanding and will reduce the excludible portion of any QCD after the date the post-age 70½ deductible contributions are made.

Note that the reduction in the excludible portion of Ted's QCDs is triggered only by deductible contributions to a traditional IRA. There is no reduction for a contribution to a Roth IRA or to a SEP IRA. The bottom line is that no post-age 70½ deductible contributions should be made to a traditional IRA if there is any possibility that a taxpayer will want to make QCDs from an IRA.

—KS

SPOUSAL ROLLOVERS OF IRA INTEREST RECEIVED THROUGH A TRUST

PLRs 202034002 and 202040003

Once again a surviving spouse had to seek a private letter ruling to complete a rollover of IRA benefits received, albeit indirectly through a trust, on the death of the IRA owner (her deceased husband). A multitude of such PLRs have been issued over the years, including these PLRs 202034002 and 202040003. Only a few such PLRs have dealt with community property.

In PLR 202034002, the decedent and the taxpayer lived in a community property state, and had a community property trust as the focal point of their estate plan. The decedent named this community property trust as the beneficiary of his IRA. The trust directed that the surviving spouse's community property half interest in the decedent's IRA was to be added to the survivor's trust created under that trust. The survivor was the sole beneficiary of the trust for her over life and had a right to withdraw the entire corpus of the survivor's trust for any reason. The survivor also was sole trustee of the community property trust and of the survivor's trust after the decedent died.

Under these circumstances, the surviving spouse was permitted to roll over the proceeds of her community property half interest in the decedent's IRA, which was allocated to the survivor's trust, provided that the rollover was completed within 60 days of the distribution to her from the IRA. The surviving spouse was deemed to have received the IRA directly from the decedent, not from the community property trust, because the community property trust directed allocation of the survivor's community property half interest in the decedent's IRA to the survivor's trust, and she was the sole beneficiary and trustee and had a right of withdrawal.

Again in PLR 202040003, the decedent left his IRA to a trust, which named his surviving spouse as the sole trustee and gave her a power to amend or revoke the trust and to distribute all of the trust corpus to herself. As a result, the Ruling regarded the surviving spouse as "effectively the individual for whose benefit the IRA is maintained." As a result, she was entitled to roll over the benefits to her own IRA, despite the decedent naming his trust as the beneficiary.

In the discussion of the law underpinning each of these Rulings, the government mentioned the one-roll-over-per-12-month-period limitation in section 408(d)(1)(B) ("the limitation"). PLR 202034002 stated that it was subject to the limitation, and PLR 202040003 stated an assumption that there no other amounts were received and rolled over from an IRA within the 12-month period ending on the date of the distribution from the decedent's IRA. It always is important to consider the limitation when working through any spousal rollovers.

When dealing with spousal rollovers, it is certain that careful planning must be undertaken in dealing in designating a trust as beneficiary. In each PLR, the decedent must have intended his surviving spouse to be able to roll over the IRA interest to her own IRA. This is clear, given the direction in each beneficiary trust that allocated the IRA to a trust that: (i) made the surviving spouse the sole beneficiary; (ii) trustee; and (iii) granted her the right to withdraw the IRA interest from the trust. Better planning would have named the spouse as a direct beneficiary of the IRA, or provide in the trust that any interest received by the trust as beneficiary was immediately distributable to the spouse.

—KS

NEW ACTUARIAL TABLES ARE COMING

On August 7, 2020, the National Center for Health Statistics at the Centers for Disease Control and Prevention issued the decennial life table for 2009-2011. And why, you may ask, would anyone except nerds like me care? Because this is the source for the IRS actuarial tables. The tables are required by Code section 7520 to be updated every 10 years. Since the enactment of section 7520 in 1989 this happened on May 1 in 1989, 1999, and 2009, but not in 2019. The IRS couldn't move forward because the CDC had not yet issued the decennial table. Now that this data has been released, I expect the IRS to issue its updated actuarial tables in the form of proposed regulations shortly.

What is the decennial table? The table is a distillation of the entire U.S. population, on a unisex basis (derived from the most recent census) of the number of persons living at each age from 0 to 110. That single Lx table is the basis of every actuarial calculation that estate planners need: life estates, reversions, unitrust interests, and all the rest. It is used for only one thing—to calculate the probability of surviving from one age to another age—but that is what underlies every actuarial calculation involving a life or lives. How does the current table compare to the new decennial table?

AGE	OLD LX TABLE	NEW LX TABLE	GAIN
0	100000	100,000	0
1	99305	99,382	77
2	99255	99,341	86
3	99222	99,314	92
4	99197	99,293	96
5	99176	99,276	100
6	99158	99,262	104
7	99140	99,248	108
8	99124	99,237	113
9	99110	99,226	116
10	99097	99,217	120
11	99085	99,209	124
12	99073	99,200	127
13	99057	99,188	131
14	99033	99,171	138
15	98998	99,145	147
16	98950	99,112	162
17	98891	99,071	180
18	98822	99,022	200
19	98745	98,964	219
20	98664	98,899	235
21	98577	98,824	247
22	98485	98,741	256
23	98390	98,652	262
24	98295	98,560	265
25	98202	98,467	265
26	98111	98,374	263
27	98022	98,280	258
28	97934	98,186	252
29	97844	98,089	245
30	97750	97,990	240
31	97652	97,887	235

AGE	OLD LX TABLE	NEW LX TABLE	GAIN
32	97549	97,782	233
33	97441	97,672	231
34	97324	97,559	235
35	97199	97,443	244
36	97065	97,321	256
37	96921	97,194	273
38	96767	97,059	292
39	96600	96,915	315
40	96419	96,761	342
41	96223	96,596	373
42	96010	96,416	406
43	95782	96,221	439
44	95535	96,005	470
45	95268	95,769	501
46	94981	95,510	529
47	94670	95,229	559
48	94335	94,923	588
49	93975	94,590	615
50	93591	94,226	635
51	93180	93,828	648
52	92741	93,398	657
53	92270	92,935	665
54	91762	92,438	676
55	91211	91,908	697
56	90607	91,342	735
57	89947	90,737	790
58	89225	90,091	866
59	88441	89,401	960
60	87595	88,666	1,071
61	86681	87,884	1,203
62	85691	87,052	1,361
63	84620	86,168	1,548
64	83465	85,227	1,762
65	82224	84,222	1,998
66	80916	83,142	2,226

AGE	OLD LX TABLE	NEW LX TABLE	GAIN
67	79530	81,978	2,448
68	78054	80,729	2,675
69	76478	79,388	2,910
70	74794	77,958	3,164
71	73001	76,430	3,429
72	71092	74,798	3,706
73	69056	73,049	3,993
74	66882	71,178	4,296
75	64561	69,175	4,614
76	62091	67,045	4,954
77	59476	64,774	5,298
78	56721	62,366	5,645
79	53833	59,796	5,963
80	50819	57,081	6,262
81	47694	54,214	6,520
82	44475	51,205	6,730
83	41181	48,060	6,879
84	37837	44,809	6,972
85	34471	41,400	6,929
86	31114	37,895	6,781
87	27799	34,314	6,515
88	24564	30,701	6,137
89	21443	27,107	5,664
90	18472	23,587	5,115
91	15685	20,198	4,513
92	13111	16,996	3,885
93	10773	14,032	3,259
94	8690	11,348	2,658
95	6871	8,976	2,105
96	5315	6,932	1,617
97	4016	5,218	1,202
98	2959	3,824	865
99	2122	2,723	601
100	1477	1,882	405
101	997	1,261	264

AGE	OLD LX TABLE	NEW LX TABLE	GAIN
102	650	818	168
103	410	514	104
104	248	312	64
105	144	183	39
106	81	104	23
107	43	57	14
108	22	30	8
109	11	15	4
110	0	0	0

The table, which is already 10 years out of date, shows remarkable improvements in longevity. Take a look at age 84:

AGE	OLD LX TABLE	NEW LX TABLE	GAIN
84	37837	44,809	6,972

Almost 7000 more people out of 100,000 are alive at age 84 than under the old table. The improvements in longevity at older ages is truly remarkable. For example, the probability of survival from age 60 to age 90 went from 21.008 percent to 26.6021 percent. No wonder the Today show stopped years ago sending birthday wishes to viewers on their 100th birthday.

It is possible that the IRS could make small tweaks to the CDC Lx table, but I expect any tweaks to be minor and this gives us at least a good idea of the effect the new tables will eventually have. Obviously, once the new tables are effective the value of a life estate will be greater and the value of a remainder after a life shorter under the new assumptions. Assuming a five percent section 7520 rate, the life estate factor for a person age 60 jumps from .60739 to .63394.

Longer life expectancies will be advantageous in some cases and disadvantageous in others. A longer life expectancy can be advantageous if the value being measured is a charitable lead interest for life (or the shorter of life or a term). But the deduction for a contribution to a charitable remainder trust for a life or lives will be smaller. For example, the deduction for a $100,000 contribution by a 70-year-old donor to a charitable remainder unitrust paying a five percent unitrust interest quarterly will fall from $51,981 to $49,111. There will be other effects as well. It will become even harder to get a CRAT to qualify for the 10 percent remainder value test and the five percent exhaustion test. Also reduced will be the value of the remainder in a personal residence after a retained life estate.

Questions remain. Will we be allowed to elect to use the new rates for any transaction after April 30, 2019, when the new tables were mandated by section 7520 to be effective? Will there be a transition period in which we can elect which table to use? Will we be allowed to use exact computer-generated factors rather than almost-exact published factors? Stay tuned.

—LK

MERGER OF BENEFICIARY TRUST STILL TREATED AS SEE-THROUGH TRUST

PLR 202035010

What modifications may be made without causing a trust that is the beneficiary of a decedent's retirement plan to lose its status as a see-through trust? PLR 202035010 answered this question (in part) with respect to a merger of the beneficiary trust into another trust.

During his lifetime, the decedent (D) establish an irrevocable trust (Trust A) and a revocable trust (Trust B) that became irrevocable when the decedent died. D designated Trust B as the beneficiary of his IRAs. D's three children were the only beneficiaries of both Trust A and Trust B. Prior to September 30 of the year following the year of D's death, Trust B was merged into Trust A, which granted the trustee discretion to change the rights of D's children in the assets of Trust A. However, the merger agreement precluded the trustee from altering the rights of D's children with respect to D's IRA, such that the merger did not affect the interests of D's children in D's IRA. The trustee provided the IRA custodian with copies of Trust A, Trust B, and the Merger Agreement, all prior to October 31 of the year following the year of the D's death.

Because the Merger Agreement precluded alteration of the rights of the only beneficiaries of Trust B as of the D's death, the three children remained the only beneficiaries of the IRAs as of September 30 of the year following D's death (which was the beneficiary determination date). The children were identifiable as of that date, so that Trust A (which became the beneficiary of D's IRAs as a result of the merger) was a see-through trust. Accordingly, the PLR ruled that D's IRAs may be distributed to Trust A using the life expectancy of the oldest of D's three children.

Modern trust law provides several ways to modify trusts, including by merger, decanting, judicial order, nonjudicial settlement agreements, and the like. If a trust that will be named as the beneficiary of a decedent's retirement plans is meant to be a see -through trust, then it is good practice to include a provision in the trust that precludes modification of the trust in any way that would cause the trust not to be a see-through trust.

—KS

TIME REMAINS FOR UNLIMITED QUASI-IRA CHARITABLE ROLLOVERS

Code section 508(d)(8) allows an IRA beneficiary who has reached age 70½ to have as much as $100,000 go directly from the IRA to a public charity. The distribution does not go into the IRA beneficiary's income (and is not deductible) but may enable the donor to use the standard deduction and still have the benefit of removal of the required distribution from income. But many donors would like to be able to use the IRA to get more than $100,000 to charity and for a few more months that will be possible—not as a section 408 rollover but because of a provision in the CARES Act.

Cares Act section 2205 eliminates the section 170 percentage limitations on most cash gifts to public charities made in 2020. Under the law in effect prior to this change, contributions of cash to a public charity were limited to 60 percent of adjusted gross income. (Because of a drafting error in the 2018 tax legislation, it appears that the 60 percent percentage limitation is only allowable to taxpayers making no noncash contributions in the same year. It was expected this would be fixed in technical corrections but that has not yet happened. As drafted, this is not an issue with the new 100 percent cash deduction limit.) As with the $300 "above-the-line" deduction, the suspension of percentage limitations for cash contributions does not apply to gifts to supporting organizations or donor advised funds. Finally, if a contribution exceeds a donor's adjusted gross income, the excess can be carried over to subsequent years, but subject to the percentage limitations in the carryover years.

Because of the unlimited charitable deduction allowed for cash gifts to charity this year, a taxpayer can in effect make a tax free quasi-rollover of any amount to charity in 2020 by making a taxable withdrawal from an IRA that will be included in income, giving a cash to a public charity, and offsetting the income completely by the charitable deduction, regardless of amount. This may present real opportunities for charities and donors. For all years other than 2020, the only way to transfer a large IRA to charity without tax was at death by beneficiary designation. But in 2020 the IRA can sell assets if necessary and distribute the cash proceeds to the IRA holder, who can then give them to charity and deduct them in any amount without regard to percentage limitations. It might have been even simpler if Congress had simply suspended the $100,000 limit on IRA charitable rollovers for 2020.

Donors need to consult their tax advisors and do the math however. The IRA distribution goes into adjusted gross income, which can affect other things on the return, although most taxpayers who can afford to make $100,000+ gifts to charity are probably already subject to the AGI thresholds. But you need to do the math.

—LK

IRS LOSES CHARITABLE ASSIGNMENT OF INCOME CASE

Dickinson v. Commissioner T.C. Memo 2020-128

Assignment of income cases are legion in the charitable arena. The typical fact pattern in these cases is that a taxpayer signs a binding commitment to sell property and subsequently decides to shelter some of the gain by transferring the property to a charitable remainder trust, or avoid the gain altogether by giving the property to charity. The question in these cases is always the extent to which there is a binding deal at the time of the gift. In Dickinson, the IRS tried to tax gain to taxpayers on an assignment of income theory, but this was a weaker case for the IRS than those more typical cases.

The facts were undisputed. The taxpayer was the chief financial officer of a privately held company. The company board authorized shareholders to donate shares to the Fidelity Investments donor-advised fund. Although not legally obligated to do so, the DAF immediately tendered the donated stock to the company and the company redeemed the shares for cash. There was no issue as to the charitable deduction itself. What the government argued was that, in substance, each donation of shares followed by the exchange of the shares for cash by the donor advised fund should be treated as redemption of shares from the taxpayer for cash, followed by the taxpayer's donation of the cash redemption proceeds to the donor advised fund.

But here there was no obligation on the part of the DAF donor to sell the stock nor the company to redeem, and a pre-existing understanding among the parties that the company would redeem the donated stock did not convert a post-donation redemption into a pre-donation redemption. "Furthermore, neither a pattern of stock donations followed by donee redemptions, a stock donation closely followed by a donee redemption, or a selection of a donee on the basis of the donee's internal policy of redeeming donated stock suggests that the donor failed to transfer all his rights in the donated stock." Citing the famous case of Palmer v Commissioner, 62 T.C. 684 (1974), the court held that "where a donee redeems shares shortly after a donation, the assignment of income doctrine applies only if the redemption was practically certain to occur at the time of the gift, and would have occurred whether the shareholder made the gift or not." The court distinguished Dickinson from cases like Hudspeth v United States, 471 F.2d 275 (8th Cir. 1972), in which the taxpayer donated stock after the issuing corporation's directors and shareholders had adopted a plan of complete liquidation.

—LK

NOT ALL AGENCIES ARE DURABLE

Newton Centre Realty, Inc. v. Jaffe 2020 WL 3422495 (Mass. Ct. App.)

The term "durable power of attorney" is familiar to most planners. Some, however, are not aware of the significance of the word "durable." Its critical importance is highlighted by Jaffe, which involved an agency agreement that was not durable.

A power of attorney is a form of principal-agent relation, governed by the law of Agency. An attorney-client relation is another common form of agency. Jaffe involved the agency between a Realtor and the owner of residential real estate, listed for sale under an "exclusive" right-to-sell agreement. Executed by the decedent premortem, the listing agreement was for a period that did not end before the decedent's death. When the decedent's personal representative sold the listed properties postmortem, the listing agent claimed a right to the commission provided under the agreement.

Citing comment d to the black letter Restatement (Third) of Agency §3.07, the court reminds us that:

> [T]he death of the principal automatically terminates the actual and apparent authority of the agent "because it negates the existence of the person on whose behalf the agent acts." . . .
>
> . . . [A] real estate listing agreement creates an agency relationship between the broker and the property owner. . . . Because of the personal

> and fiduciary character of the principal-agent relationship, the death of the seller terminates the agency relationship between the seller and real estate agent.

The net result was that the plaintiff was not entitled to a commission.

The same automatic termination of an agency relation also occurs when the principal becomes incompetent, unless the power expressly is "durable." In which case the power may continue under its terms until it expires, by operation of law, upon the principal's death. Like the listing agreement, however, all principal-agent relations terminate when the principal dies, even those denominated as "durable."

Several things about Jaffe seem odd. Real estate professionals routinely are called "agents," but they are not typical agents as the term is used in the law of Agency. Under traditional principles, an agent has legal authority to act for another. That is not true about real estate agents, who have no legal authority to bind the party for whom they work. They only deliver offers to the seller, who decides whether to accept or reject. This distinction was not addressed by the Jaffe court.

Also puzzling is why the typical brokerage agreement fails to deal with this situation, to clarify the exact nature of the relationship. Is there any legal reason why the parties to a listing agreement do not agree in the contract (typically written by the real estate profession) that it survives death of the seller? Could it say something along the lines of: "This agreement is a contract for services and it is binding on Seller or Seller's personal representative. Agent shall be entitled to its commission for any offer brought to Seller's personal representative, even after the Seller's death, if that offer results in a sale"? Is there any reason such a provision would not be legally enforceable?

—LK