

THE TOP TEN ESTATE PLANNING AND ESTATE TAX DEVELOPMENTS OF 2015

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- 1. The Administration's present and future assaults on estate planning techniques:** In the *Davidson* cases, which have now settled, and the *Woelbing* cases, for which a trial date has been set and continued twice, the IRS has attacked a number of techniques frequently used in estate tax planning. Meanwhile, the Administration Budget Proposals and Treasury-IRS Priority Guidance Plan also take aim at estate planning techniques, especially those involving grantor trusts and valuation. In contrast, in *Estate of Purdue v. Commissioner*, T.C. Memo. 2015-249 (Dec. 28, 2015), the Tax Court held that holding and managing marketable securities and a commercial building as a family asset is a "legitimate nontax motive" for transfers to a family-owned LLC, and therefore the value of the LLC assets is not included in the transferor's gross estate.
- 2. New leadership in the House of Representatives:** The leadership in the House of Representatives has provided *some* reason for *some* optimism, including the broader "regular order" participation of Members and the section-by-section attention illustrated in the congressional consideration of the Protecting Americans from Tax Hikes Act ("PATH Act") of 2015 (part of Public Law 114-113) (Dec. 18, 2015). And it is significant that the new Speaker, Congressman Paul Ryan (R-WI), has chaired the Ways and Means Committee, and that the new chair of the Ways and Means Committee, Congressman Kevin Brady (R-TX), has been outspoken in his opposition to the estate tax. After the 2016 elections, of course, control of the Senate is not guaranteed to either party, and 60 votes (required to "call the question" through a cloture vote) is not likely for either party, not to mention the uncertainty of the presidential election itself. As a result, neither repeal nor any other fundamental change to the estate tax is likely.
- 3. Consistency-of-basis legislation:** New section 1014(f), added by ill-conceived legislation enacted on July 31, 2015, requires the basis of property received from a decedent to be no greater than its estate tax value, if that property increased the estate tax. Section 6035 requires all executors to report those values to recipients within 30 days of filing the estate tax return. Notice 2015-57, 2015-36 I.R.B. 294, provides that no such reports are due before February 29, 2016. Form 8971 is being created for making those reports.
- 4. Same-sex marriage recognized as a constitutionally protected right:** The United States Supreme Court's 5-4 decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (June 26, 2015), should produce a short-term acceleration of transitional issues, including retroactivity, but a long-term increase in uniformity and thus in simplification.
- 5. Final portability regulations:** The final portability regulations, T.D. 9725, 80 FED. REG. 34279 (June 16, 2015), make only a few changes to the proposed regulations published June 18, 2012. Because they were finalized within three years, they maintain the continuity of helpful guidance since portability took effect on January 1, 2011.

6. **New Uniform Acts:** The Uniform Trust Decanting Act (UTDA) reflects prudent choices, including extensive explicit safeguards, called “tax-related limitations,” to prevent decanting from jeopardizing any intended beneficial tax characteristics of the trust. UTDA should pave the way for long-awaited IRS guidance regarding decanting, which, because of those safeguards, might not be as difficult to complete or as harsh in its application as many might have feared. Meanwhile, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) appears to have the support or at least acquiescence of internet providers that opposed the 2014 version (UFADAA).
7. **More flexibility in the support and administration of charities:** The PATH Act (Dec. 18, 2015) makes direct charitable contributions from IRAs and other provisions permanent. *Green v. United States*, 116 AFTR 2d 2015-6668 (W.D. Okla. Nov. 4, 2015), allows a trust a full fair market value deduction for charitable contributions in kind. Notice 2015-62, 2015-39 I.R.B. 441 (Sept. 15, 2015), blesses “mission-related investments” that are not wholly charitable.
8. **Continued erosion of the power of states to tax trust income:** In limited decisions that stopped short of declaring taxing statutes unconstitutional on their face, North Carolina and New Jersey courts denied those states the power to tax the income of certain trusts administered outside of those states by trustees who were not residents of those states.
9. **Developments regarding Crummey powers:** In *Mikel v. Commissioner*, T.C. Memo 2015-64 (April 6, 2015), the Tax Court denied summary judgment that would reject 60 “Crummey” withdrawal powers, but left open a review to see if all of the 60 powers should be respected and if the transferred property was correctly valued. Meanwhile, Treasury seeks to limit Crummey powers and other techniques that arguably make the identity of the real recipients uncertain.
10. **Gift tax and settlement of family disputes:** *Estate of Edward Redstone v. Commissioner*, 145 T.C. No. 11 (Oct. 26, 2015), and *Sumner Redstone v. Commissioner*, T.C. Memo 2015-237 (Dec. 9, 2015), dramatically illustrate the gift tax significance of a settlement of family litigation.

See also:

“Ron Aucutt’s ‘Top Ten’ Estate Planning and Estate Tax Developments of 2015” at <https://www.mcguirewoods.com/Client-Resources/Alerts/2015/12/Ron-Aucutt-Top-Ten-Estate-Planning-Tax-Developments-2015.aspx>

and

“Estate Tax Changes Past, Present and Future” at <http://www.mcguirewoods.com/estate-tax-changes>.