Estate Planning Tax Update — Highlights of Current Developments

Steve R. Akers, Bessemer Trust

BESSEMER TRUST

This summary includes observations from the 60th Annual Heckerling Institute on Estate Planning™. In particular, Items 7-15 are briefs summaries of some musings about presentations or panel discussions at the Heckerling Institute. The highlights discussed in this summary are addressed in considerably more detail in Akers & Nipp, "LOOKING AHEAD – Estate Planning in 2026 Current Developments & Hot Topics (February 2026), available at www.bessemertrust.com/for-professional-partners/advisor-insights.

Table of Contents

March 16, 2026

Important Information Regarding This Summary

This summary is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This summary is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information and disclaims any liability in connection with the use of this information. Views expressed herein are current only as of the date indicated, and are subject to change without notice. Forecasts may not be realized due to a variety of factors, including changes in law, regulation, interest rates, and inflation.

Estate Planning Tax Update — Highlights of Current Developments

Steve R. Akers, Bessemer Trust

BESSEMER TRUST

4. Trending in 2026

a. Basic estate planning and coordination

b. Transfer planning trends in 2026: Transfer taxes are of diminishing concern for the 99.5% of the U.S. population with assets under $15 million; exemption amount will not likely be decreased anytime soon; transfer planning is still important for clients comfortable making gifts (but likely less SLAT planning); estate tax repeal very unlikely; state estate tax planning still important.

c. Traditional transfer planning activities: First assure lifestyle needs; grantor trusts with GST planning; SLATs; defined value clauses; adequate disclosure; "topping off" gifts

d. Decanting; trust modification

e. Trust flexibility; directed trusts

f. Review of wills or revocable trust agreements with formula credit shelter trusts or GST trusts; addressing "unneeded" (or disadvantageous) trusts

g. Increased emphasis on the use of non-grantor trusts and basis adjustment planning

5. Legislative Developments (Other Than OBBBA)

a. **Trump Administration Budget Proposals**. The Fiscal Year 2026 budget proposal (the "Greenbook"), released on May 2, 2025, does not include any detailed list of legislative tax proposals (similar to Trump first term).

a. **IRS Funding**.

- Clawback of Funding from Inflation Reduction Act. Much of the $79.6 billion of additional long-term IRS funding in the Inflations Reduction Act of 2022 has been used or has been rescinded (including an additional rescission of $11.66 billion in the Feb. 3, 2026 appropriations package, discussed immediately below).
- FY 2026 Appropriations. The five-bill fiscal 2026 appropriations "minibus," signed by President Trump on Feb. 3, 2026, funds the Treasury and the IRS through September 2026. It reduces funding for the IRS to $11.2 billion, 9 percent less than the $12.3 billion IRS budget for fiscal year 2025.
- Workforce Reduction. The workforce has reduced by about 25%, from about 103,000 employees in February 2025 to about 75,000. Further cuts may be made because of the Administration's reduction in appropriated IRS funding for 2026.

b. **Second Reconciliation Act in 2026**? There are no current discussions of pursuing a reconciliation bill in 2025. If Republicans think a second reconciliation bill could benefit them in the 2026 mid-term elections, a legislative vehicle could emerge in early 2026 before the election season begins in earnest. If Democrats win control of the House or Senate in the 2026 mid-terms, a lame duck reconciliation bill might be rushed through in late 2026 before surrendering to a divided government for the last two years of President Trump's term.

c. **Ending Capital Gains on Primary Home Sales**. The No Tax on Home Sales Act (H.R. 1340), introduced in February by House Ways and Means Committee member Jimmy Panetta (D-CA), would raise the exclusion to $500,000 ($1,000,000 for joint returns) and index the cap for

inflation Senate Finance Committee member John Cornyn, R-Texas introduced an identical bill. S. 3332) The law currently provides an exclusion of just $250,000 ($500,000 for joint returns), which was set in 1997. The measure has been criticized as primarily benefiting higher income taxpayers. President Trump has indicated he may be open to that relief.

Senators Ted Cruz (R-TX) and Tim Scott (R-SC) have urged Treasury Secretary to provide additional tax relief on capital gains without going to Congress in hopes of boosting the housing supply. They maintain that the IRS has the authority to define cost basis to adjust the basis of stocks or real estate for inflation. Some estimates are that indexing gains for inflation could cost $100 to $200 billion over a decade.

d. **Indexing Gain on Investment Accounts.** President Trump has expressed support for the concept of indexing stocks and other assets to inflation, so inflationary gains will not be taxed.

6. Musings About Selected Provisions of "One Big Beautiful Bill Act" (OBBBA) (the Act)

a. **Bluebook from Joint Committee on Taxation**. The Joint Committee on Taxation typically issues a "General Explanation of Tax Legislation," commonly referred to as the "Bluebook," at the end of each two-year term of Congress. It sometimes also issues a separate Bluebook regarding significant tax legislation, such as it did for the Tax Cuts and Jobs Act. An OBBBA-dedicated Bluebook "is in process (including a preliminary version being submitted for proofing by the Government Printing Office) and there is hope it will be released soon." Miller & Chevalier, *Book of Dreams – Status Update on the Greenbook and the Blueb*ook (March 16, 2026).

b. **"Permanent" Tax Cuts**. Tax cuts under "reconciliation legislation" typically sunset after eight or ten years because of a restriction in the Byrd Rule that a reconciliation act cannot have the effect of increasing deficits outside the budget window. That was avoided in OBBBA by applying a "current policy" baseline (which had never been done before in reconciliation legislation). (The Senate simply voted, by majority vote, that the approach did not violate the Byrd Rule.) That approach will likely be used in future reconciliation legislation.

c. **Estate and Gift Exclusion Amount**. The "permanent" $15 million (to be inflation adjusted) federal estate and gift exclusion amount provides a level of stability to the transfer tax system we have not had for decades. A reduction of the exclusion amount is unlikely in the foreseeable future. There is no discussion of estate tax repeal.

d. **Application of the 2/37ths Reduction Under §68 to Trusts and Estates**. Section 68 requires reducing itemized deductions by 2/37ths (about 5.4%) for taxpayers in the top marginal income tax bracket ($16,000 for trusts and estates). The statutory provisions of §68 and other relevant sections are rather convoluted, but they literally provide that trust and estate expenses unique to trusts and estates, distribution deductions, and charitable deductions for trusts and estates are all "itemized deductions," and therefore are subject to the 2/37ths reduction. This issue will arise for trusts and estates filing their 2026 income tax returns (typically sometime in 2027).

Applying §68 to distribution deductions is especially unfair. If §68 applies to distribution deductions, generally there will be double tax on 5.4% of the income of trusts and estates. The IRS conceivably could issue guidance (perhaps in Form 1041 instructions) providing that distribution deductions under §651 and §661 are viewed for §68 purposes not as deductions but as allocations, so the 5.4% reduction of itemized deductions under §68 would not apply to distribution deductions of trusts and estates.

e. **Charitable Planning**. The Act adds a 0.5% floor on charitable deductions and allows an above-the-line charitable deduction of $1,000 ($2,000 for joint filers) (not indexed for inflation) for non-itemizers. The Tax Foundation estimates that nearly 86% of taxpayers will take the standard deduction in 2026. If an individual does not have substantial deductions other than charitable deductions, "bunch" charitable contributions (say, once every four years, perhaps partly to a donor advised fund that can dole out contributions to charities in the other three years), which would permit the individual to take advantage of the standard deduction and the $1,000/$2,000 above-the-line charitable deduction in those other three years.

f. **Trump Accounts; A Way to Fund Roth IRAs (Eventually) for Minors**. The Act permits contributions of up to $5,000 per year to "Trump accounts" for children under age 18. Special limitations apply regarding distributions, investments, etc. until January 1 of the year the minor turns age 18 (the "growth period"), at which time the account is subject to the rules for individual retirement accounts (IRAs). That is not overly attractive; as IRAs, withdrawals will ultimately be subject to ordinary income tax, and the parent might prefer to simply fund investment accounts in the name of the minor so that future growth would eventually be taxed as long-term capital gain. However, at age 18, when the accounts convert to IRAs, they can be converted to Roth IRAs. (Notice 2025-68 specifically says the rules regarding "Roth conversions" will apply.) As Roth IRAs, no minimum distributions would be required during the individual's lifetime, and when amounts are withdrawn they would be income-tax free. That is very attractive.

   Contributions to Trump accounts are not treated as "present interest" gifts qualifying for the gift tax annual exclusion. Accordingly, donors to Trump accounts will be required to file gift tax returns reporting the gifts. The American Institute of CPAs has recommended to the IRS that it issue guidance providing that transfers to Trump Accounts would be treated as present interest gifts.

g. **529 Account Enhancements; Trust and UTMA 529 Accounts**. Section 529 savings plans have more favorable tax treatment than Trump accounts, and the Act makes significant helpful enhancements for 529 accounts (including increased permissible annual distributions for purposes beyond just tuition and distributions for credentialing expenses).

   A trust can create separate 529 plans for trust beneficiaries (meaning that the trust would avoid income taxation on the growth within the 529 account). The trust would be the owner and would have the authority to change the beneficiary once a particular trust beneficiary no longer needed educational expenses.

   The Uniform Transfers to Minors Act will be revised in the summer of 2026 to allow the custodian of a UTMA account to fund a 529 account.

h. **Qualified Small Business Stock (QSBS) Exclusion**. The exclusion of income under §1202 resulting from income from the sale of qualified small business stock (QSBS) is expanded under the Act in several significant ways. See Item 8 below.

7. Impact of Estate and Gift Tax Measures in the Act on Planning

a. **Reduced Perceived Pressure To Make Gifts**. The permanent extension of the increased $15 million exclusion amount has reduced the perceived pressure on clients to take advantage of the large exclusion amount before it may have been slashed in half. With indexing for inflation,

the exclusion could easily be over $20-$30 million in 10 years. That could be changed by a future Congress, but likely only if Democrats were to have control of the administration, the Senate, and the House, and clients would have plenty of lead time for planning before the exclusion might be decreased.

b. **Transfer Planning**. Clients who have enough wealth that they are comfortable making gifts are best advised to make the gifts currently, so that future appreciation can be removed from the estate. There seems to be more stability in the estate tax system than perhaps in decades. There has been little (or no) discussion of estate tax repeal.

Transfer planning involving closely held entities must navigate potential estate tax inclusion attacks under §2036 and §2038 if the donor has expressed or implied retained interests or controls. See Item 25 of LOOKING AHEAD – Estate Planning in 2026 Current Developments & Hot Topics (February 2026).

This may be a good time for reporting gift and sales transactions to commence a 3-year period of limitations on the assessment of additional gift tax in light of governmental policy priorities. (Appraisers report that they are becoming busy with 2025 year-end transfer planning transactions.)

While the large exclusion amount means that many clients will not have federal transfer tax concerns, many states have estate taxes with exemptions much lower than the federal exemption, and transfer planning can still be important for saving state estate taxes.

c. **Non-Grantor Trusts**. The large exclusion amount means that many clients will not have federal transfer tax concerns (but many states have estate taxes with exemptions much lower than the federal exemption). While grantor trusts offer very significant advantages for transfer tax planning purposes, planning with non-grantor trusts may become more significant for various purposes (*e.g.*, income shifting, SALT deduction caps, QSBS stacking, state income tax savings), but the multiple trust rule of §643(f) must be avoided.

Structuring a trust as a non-grantor trust is not necessarily easy; landmines must be carefully navigated. The general rule is that a trust is a grantor trust if anyone, including the grantor or grantor's spouse, has a power of disposition affecting beneficial enjoyment of the income or corpus without the consent of an adverse party. (§674(a)) For a detailed checklist for structuring non-grantor trusts, see Item 8.c of LOOKING AHEAD – Estate Planning in 2025 Current Developments & Hot Topics (Dec. 31, 2025), found here and available at www.bessemertrust.com/for-professional-partners/advisor-insights.

d. **Basis Adjustment Planning**. Relatively speaking, almost no decedents will pay federal estate taxes, but all estates enjoy a basis adjustment under §1014 at an individual's death. Planning to take advantage of the basis adjustment at death under §1014 will be especially important for those clients who will pay no federal estate t ax.

e. **Changed Paradigm**. Concepts that have been central to the thought processes of estate planning professionals for their entire careers are no longer relevant for most clients – even for "moderately wealthy" clients (with assets of $10 million dollars, or even more). For example, qualifying gifts as present interests or qualifying bequests for the estate tax charitable deduction will be irrelevant for most of population. Using credit shelter trusts can be tax

disadvantageous for clients who will pay no estate tax (by losing the basis adjustment at the surviving spouse's death).

f. **Will Updating; Planning Issues for Unneeded Existing Trusts**. Clients should have their estate plans revised in light of the important estate tax changes made in the Act. Clients who do not have transfer tax concerns may want to remove formula bequests to credit shelter trusts. Portability planning may become more important to maximize basis adjustment planning flexibility. Planners may be faced with an increasing number of situations involving clients with existing irrevocable trusts that no longer provide transfer tax benefits and that may be disadvantageous for basis adjustment purposes.

8. Basis Adjustment Planning

a. **Significance**. The "permanent" increase of the estate tax exclusion amount to $15 million (indexed) under the Act means that almost all of the population will have no estate tax concerns but, nevertheless, will be entitled to basis adjustments to the date of death value under §1014. Basis adjustment planning takes on added significance in light of the enhanced $15 million (indexed) exclusion amount and because the exclusion amount is indefinite and does not sunset after a period of time. The exclusion amount likely would be reduced only if a future Congress has Democratic majorities in the House and Senate well in excess of a mere greater-than-50% majority.

b. **Preserving Basis Adjustment Upon Death of Donor/Settlor**.

- Give an independent party the authority to grant a power to the settlor that would cause estate inclusion, such as a testamentary limited power of appointment, which would cause estate inclusion under §2038 (*i.e.*, settlor held the power at death to alter, amend, revoke or terminate the interest) and result in a basis adjustment under §1014(b)(9). Estate inclusion will not occur under §2038 unless the power is actually granted (as long as no understanding exists that the power will be granted whenever requested by the settlor). Estate inclusion theoretically could occur under §2036(a)(2) even before the power of appointment is actually granted, but would not apply if the power is merely to grant a *testamentary* limited power of appointment.
- Repurchase appreciated asset from grantor trust.
- Avoid valuation discounts for FLP/LLCs. (Possible estate inclusion under §2036 under *Powell* and *Estate of Fields* cases; or amend agreement to remove transfer restrictions as much as possible; or convert to a general partnership.)
- Does donor use of gifted property create an implied agreement of retained enjoyment, triggering estate inclusion under §2036(a)(1)?
- Sell loss assets to grantor trust (to avoid a step-down in basis under §1014).

c. **Basis Adjustment for Beneficiary**.

- Make distributions to the beneficiary (either pursuant to a wide discretionary distribution standard or under the exercise of a non-fiduciary nontaxable power of appointment).
- Structure trust so someone can grant a general power of appointment to the beneficiary, which possibly could be exercisable only with the consent a non-adverse

party,)but not the grantor) or exercisable only after being requested by a designated family member to consider granting the power; consider using broad exculpatory language for the person authorized to grant the power of appointment and consider providing that the powerholder has no duty to monitor whether a general power should be granted. Query, is it a power exercisable "in conjunction with another person," making it a general power under §2041(b)(1)(C) even though never granted?

- Use a formula general power of appointment.
- Bear in mind that the existence of the general power may have creditor effects, but the actual exercise of a testamentary general power of appointment may be more likely to subject the assets to the decedent-beneficiary's creditors than if the general power is not exercised.
- Trigger the Delaware tax trap by the exercise of a nontaxable power of appointment to appoint the assets into a trust of which a beneficiary has a presently exercisable general power of appointment.
- Plan to obtain a basis adjustment at the first spouse's death regardless of which spouse dies first by using community property (or possibly a community property trust) or a joint trust structured as a "JEST" trust.
- Section 1014(e) provides that the basis of property received from a decedent will be equal to the decedent's basis immediately prior to death, rather than its estate tax value, if the property had been given to the decedent within one year before the date of death and if the property passes back to the original donor (or his or her spouse). That provision likely does not apply, however, if the assets do not return "to" the donor.
- Make an "upstream" gift, giving a "non-rich" ascendant a general power of appointment.
- GST impact – For non-exempt trusts, if a taxable termination occurs at a beneficiary's death (for example, when the last non-skip person dies), a GST tax is imposed and a basis adjustment is allowed. §2654(a)(2).

d. **Testamentary Planning**.

- Most of the population is not subject to the estate or gift tax. (However, non-U.S. persons are still subject to estate taxes with an exemption of only $60,000.)
- Review formula clauses to make sure the large exclusion amount does not upset intended results.
- Even low to moderate-wealth individuals cannot ignore the GST tax.
- Clients who are no longer subject to transfer taxes may wish to change existing trusts that are designed to save transfer taxes. Alternatives include making distributions within the trust distribution standards, amending the trust by someone holding an amendment power, appointing assets to individuals (or other more appropriate trusts) under a power of appointment, using judicial or non-judicial modification proceedings, or having an individual exercise a substitution power or otherwise purchase "favored" assets from the trust. At a minimum, the client may want to "turn off" grantor trust status so the client does not have to continue paying income taxes on the trust's income.

- Structuring approaches
  - Couples with assets under $15 million – address whether assets will be left outright to the surviving spouse, outright to the spouse with a possible disclaimer into a trust, or directly in trust, and cause estate inclusion at the surviving spouse's subsequent death to receive a basis adjustment.
  - Couples with assets over $15 million but less than $30 million – make use of the first decedent-spouse's exclusion amount with an outright gift with disclaimer planning or a QTIPable trust approach, creating flexibility through the manner in which the portability election is made (the portability election could create the possibility of using both spouses' exclusion amounts but allowing a basis adjustment of all of the estate assets at the second spouse's death).
  - Couples with assets over $30 million – same as category 2 but also consider gifts using some of the increased gift exclusion amount to save estate tax and consider making transfers in a way that one or both spouses have potential access to some of the transferred assets for clients making large transfers.
- Increased importance of portability
- The QTIPable trust approach is very flexible (it could include a *Clayton* provision).
- QTIPable trust with delayed power of withdrawal – If clients want to have the flexibilities afforded by using a QTIP trust (*e.g.*, to have 15 months to decide what QTIP election to make, to make a formula QTIP election, etc.) but still want the spouse to have an unlimited withdrawal power, consider creating a standard QTIP trust but including a delayed withdrawal power (*e.g.*, sometime after the estate tax filing date). Reg. §20.2056-5(a)(4) ("must be exercisable in all events") & §20.2056-5(g)(1).

9. Miscellaneous Administrative and IRS Guidance; Finalized Regulations; Forms

a. **Executive Orders.**

- An executive order dated January 31, 2025, reinstates an April 11, 2018 memorandum of agreement between the Treasury and OMB to allow OIRA to review proposed regulations. The order also stipulates that for every new regulation, 10 other regulations should be identified for repeal.
- An executive order dated Feb. 19, 2025, charges agency heads to identify regulations meeting certain conditions, including those that extend beyond legislative authority and other situations encompassed by the *Loper Bright* decision. It also directs agencies to "preserve their limited enforcement resources by generally de-prioritizing actions to enforce regulations that are based on anything other than the best reading of a statute."
- An April 2025 Presidential Memorandum required federal agencies to identify unlawful regulations within 60 days and take steps to repeal them without notice and comment. That Memorandum suggested that we will see the completion of fewer guidance projects from the IRS.
- Some agencies have responded to that directive by seeking to invalidate certain regulations by invoking the Supreme Court's "major questions doctrine," which bars agencies from acting on issues of vast economic and political significance without clear congressional authorization.

- On September 4, 2025, the Trump administration re-released its spring 2025 regulatory agenda, adding more than 30 proposed rules that were not on the Fall 2024 regulatory agenda and incorporating a catch-all rule to "remove or amend existing tax regulations with the goal of reducing regulatory burden for taxpayers."

b. **Inflation Adjusted Amounts**. The inflation adjusted amounts for 2026 (based on C-CPI-U data for August 2025) were announced in Rev. Proc. 2025-32 (Oct. 9, 2025). Some of the numbers for 2026:

- The Act provides that the estate, gift and GST "exemption" amount for 2026 will be $15 million, to be inflation adjusted in subsequent years
- Gift tax annual exclusion – $19,000 (same as in 2025; the annual exclusion had increased by $1,000 in each of the four prior years [2022-2025], after remaining at $15,000 for four years [2018-2021])
- The top 37% income tax bracket for estates and trusts will begin at $16,000 in 2026 (up from $15,650 in 2025)

c. **2025-2026 Priority Guidance Plan**. The 2025-2026 Treasury-IRS Priority Guidance Plan for July 1, 2025 to June 30, 2026 (dated September 30, 2025) is dramatically different from prior Plans, containing just 105 projects (down from 231 projects in the 2024-2025 Plan), 11 of which have already been released or published. Some of the excluded projects "may be considered for inclusion on a future priority guidance plan."

The 2025-2026 Plan includes the following transfer tax issue: "Regulations under §2010 regarding extension and enhancement of increased estate and gift tax exemption amounts and related issues." It is not clear what that refers to. All 12 provisions in the 2024-2025 Plan in the "Gifts and Estates and Trusts" section were omitted from the 2025-2026 plan (five of those projects were completed in 2024 or 2025). For an excellent summary of the 2025-2026 Plan, see Beth Kaufman, *2025-2026 Treasury-IRS Priority Guidance Plan*, ACTEC CAPITAL LETTER No. 64 (Oct. 8, 2025).

d. **"No Rulings" List; Decanting**. Revenue Procedure 2026-3, issued Dec. 29, 2025, is the "no rulings" Rev. Proc. for 2026. One significant change is that several items regarding decanting transactions have been moved from the section for "Areas under study in which rulings will not be issued" to the section for "Areas in which rulings will not ordinarily be issued" (perhaps suggesting that the decanting issues are no longer under study?

e. **Section 2801 Final Regulations**. Final regulations under §2801 were issued on January 10, 2025 (T.D. 10027). Section 2801 very generally imposes a tax on certain transfers of property by gift (covered gifts) and on certain transfers of property by bequest (covered bequests) from certain individuals who expatriate on or after June 17, 2008 (covered expatriates).

f. **Basis Consistency Final Regulations; Form 8971**. Final basis consistency regulations were published in the Federal Register on Sept. 17, 2024. In particular, three issues in the proposed regulations were highly criticized by planners, and the IRS has reversed course as to all three of those issues: (1) reporting of undistributed property; (2) removal of the zero basis rule for unreported property; and (3) eliminating the subsequent transfer reporting requirement for all beneficiaries other than trustees. Changes in the final regulations were incorporated in an August 2025 updated version of Form 8971.

g. **Form 709**. Revised Form 709 for 2024 was released Jan. 3, 2025. As one panelist at Heckerling quipped, "The IRS decided the old form was way too straightforward."

- The mechanics of making the gift-splitting election are dramatically different (and will create confusion).
- The manner of making the "reverse QTIP election" for gifts to QTIP trusts has also changed (and the election may easily be missed).
- Software platforms do not seem to be coordinating well with the new forms.

h. **Form 706**. Revised Form 706 for Decedents Dying After 2024 was posted September 4, 2025.

- Schedules are separate documents (and must be downloaded separately); the Form 706 document has Parts I-VI only, not the Schedules.
- Draft instructions say to "File Schedules A through I, as appropriate, to support the entries in Part V, items 1 through 9."
- The Schedules have universal formatting changes including multiple rows, headings for columns, additional pages for the separate schedules, and cross references to the appropriate line for inputting values from the schedule to the Recapitulation in Part V of the Form 706.
- Because the Schedules and Form 706 are not part of the same package (making it easier for the IRS to amend a Schedule without having to amend an entire Form 706 package with all schedules), planners will need to verify that they are using the most updated version of relevant Schedules.

i. **Form 8971**. Form 8971 was updated in a version dated August 2025. It reflects changes made in the basis consistency final regulations.

j. **Postmark Rule; Clarification from U.S. Postal Service of When Postmarks Are Applied**. Section 7502 provides generally that documents postmarked before the due date will be considered timely filed or paid even if received by the IRS after the deadline. The U.S. Postal Service published a final rule, Postmarks and Postal Possession, in the Federal Register on Nov. 24, 2025, effective Dec 24, 2025. The preamble to the final rule warns that the placing of a postmark is not necessarily "the date on which the Postal Service first accepted possession of a mailpiece" and that the greater reliance by the Postal Service on processing centers will result in this difference between the time of acceptance to the time of posting a postmark becoming "more common." The final rule states that "postmarks are generally applied by the Postal Service via automation on machines in originating processing facilities but may also be applied manually by Postal Service personnel at those facilities, or by a Postal Service employee at a retail unit when a customer presents a mailpiece at a retail counter and requests a postmark."

While most documents filed with the IRS are sent by traditional first-class mail, prudent advisers may mail documents using certified mail with a return receipt or by an authorized private delivery service.

10. Updating of Conflict of Laws in Trusts and Estates – Projects by Uniform Law Commission and American Law Institute

a. **Two Reform Projects**.

- Uniform Law Commission, Uniform Conflict Of Laws In Trusts And Estates Act
- American Law Institute, Restatement (Third) Of Conflict Of Laws
- These are being coordinated, and both are expected to be finalized in the summer of 2026.

b. **Real vs. Personal Property and Inter Vivos vs. Testamentary Trust Distinctions Eliminated**. Real property and personal property are generally treated together under the new approach. Similarly, inter vivos and testamentary trusts are generally treated together, with intuitive timing differences (*e.g.*, domicile measured at death vs. at execution/creation).

c. **Issue-by-Issue Distinctions Generally**. Important conflicts issues arise for important issues – validity, administration, interpretation, construction, restraints on alienation, and powers of appointment. Some distinctions in the rules will apply for these various issues, but the goal is to reduce distinctions to the extent it can reasonably be done. As a general rule, absent a choice by the donor, governing law will track the donor's domicile, except that administrative matters are keyed to the place of administration.

d. **Validity Issues**.

- Formal validity (execution) – if formalities of any materially connected jurisdiction are satisfied
- Capacity/Consent (undue influence, fraud – donor's domicile is emphasized.
- Substantive validity (duration, asset protection, restraints on alienation) – donor choice of law is respected if the chosen state has a **substantial relation** to the trust (*e.g.*, trustee's domicile or place of business) and the selection does not violate **a strong public policy** of the state with the most significant connection to the trust as to the matter at issue; if no choice is made, the default looks to the state with the **most significant connection** to the particular issue.
- The Act does not address how to determine if a state has a "strong public policy," but it means more than just having a different law in the other state. Rather, a "strong public policy" of a state would more appropriately be understood to be "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.).

e. **Construction and Interpretation**. Matters of construction and interpretation are treated the same. The donor/settlor's choice generally controls, with forum evidence rules (for example, rule about authenticity, best evidence, and hearsay) remaining matters of procedure. For construction/interpretation issues, any state law can be selected, and the trust does not have to have any connection with that state. (After all, the trust agreement could just clarify directly what is meant by terms in the trust.)

f. **Administration**. Administration issues include pretty much everything related to the exercise of trustee powers and duties. General approach (in order): (1) apply the law named by the settlor for administration if the chosen state has a substantial relation (*e.g.*, a trustee in that state); (2) administrative governing law can change if the principal place of administration changes, unless the instrument clearly "locks" administration law notwithstanding a move; (3) if the settlor is silent, apply the law of the principal place of administration; and (4) where multiple

states could exercise jurisdiction (*e.g.*, because trustees are amenable to service in more than one place), courts outside the principal place of administration generally should defer (or can defer) to courts of the principal place of administration. The Uniform Act provides guidance in determining the principal place of administration.

g. **Drafting**. Governing law clauses are often unclear as to whether they apply to validity, construction and interpretation, or administration. (For example, the clause may just say "administered under" a particular state law. Does that also apply to issues of validity and construction/interpretation?) The Uniform Act says that "governed by" will presumptively include all three categories of issues.

11. Qualified Small Business Stock (QSBS) Expansion Under OBBBA and Planning Opportunities

a. **QSBS Overview**. Shareholders in a C corporation have a very significant opportunity to sell the stock and exclude a substantial part (if not all) of the gain on the sale of the stock – if the stock qualifies as qualified small business stock (QSBS) under §1202. Some of the requirements are that the stock was issued after Aug. 10, 1993, the shareholder must have acquired the stock at original issue from the corporation for money or property (not stock) or as compensation, and over 80% (by value) of the assets must be used in the active conduct of one or more qualified trades or businesses.

b. **Expansion in OBBBA**. The three changes listed below are effective for tax years beginning after July 4, 2025.

- Tiered gain exclusion (50% exclusion after 3 years, 75% exclusion after 4 years, and 100% exclusion after 5 years)
- Dollar cap on per-issuer exclusion – the per-issuer limitation for each taxpayer has two mutually exclusive limitations: (i) the "applicable dollar cap," which is increased in the Act from $10 million to $15 million (indexed for inflation beginning in 2027); and (ii) "10 times the aggregate basis of QSBS issued by such corporation and disposed by the taxpayer during the taxable year" (the "10 times basis limitation"); the 10 times basis limitation was not changed in the Act
- Aggregate gross asset threshold – the corporate-level aggregate gross asset ceiling is increased from $50 million to $75 million, indexed for inflation beginning in 2027; stock issued after the corporation exceeds the threshold would not be QSBS

c. **"Stacking" To Maximize Use of $15 Million Cap Exclusion**. If separate family members own stock, each gets its own $15 million exclusion (except that spouses share one $15 million exclusion). Shareholders of shares issued both before and after July 4, 2025 cannot "double dip" to exclude $10 million of gain for the pre-July 4, 2025 shares and an additional $15 million of gain for the post-July 4, 2025 shares. Multiple non-grantor trusts may be owners, but avoid the §643(f) multiple trust rule by having different primary beneficiaries of each trust.

A planning alternative to maximize use of the $15 million dollar cap is to transfer QSBS stock to GRATs, with remainders to separate trusts that would be non-grantor trusts after termination of the GRATs.

d. **New Planning Trend: "Packing" To Maximize Use of Ten Times Basis Limitation and $75 Million Aggregate Gross Assets Threshold**. Special rules–

FMV, not just basis for 10 times basis limitation. For purposes of the 10 times basis limitation, if property (other than money or stock) was contributed to the corporation in exchange for the issuance of QSBS, the basis of the shares is determined using the fair market value of the property when contributed rather than just the basis of such property (in addition to the amount of money contributed in exchange for the issuance of the stock). For example, if stock is issued in return for a contribution of appreciated property worth $50 million, the 10 times basis limitation would be $500 million.

- Basis, not FMV, for aggregate gross assets threshold. The aggregate gross assets threshold is the basis of the corporation's assets, with some special rules, one of which is that the basis of assets contributed to the corporation is equal to its FMV at the time of contribution. However, the immediate expensing of domestic research and experimental expenditures and 100% bonus deprecation for qualified property, both allowed under OBBBA, may reduce the basis of the corporation's assets.
- Durability. Unlike the dollar cap limitation, the 10 times basis limitation is not "used up" with prior sales. The limitation is 10 times the basis of the shares being sold, regardless how much gain has been excluded in prior sales of QSBS from that issuer.
- Planning if low-basis and high-basis QSBS. Dispose of low-basis QSBS before disposing of high-basis QSBS. The gain on the low-basis shares may be covered by the $15 million dollar cap, leaving the 10 times basis threshold to cover the gain on the high-basis shares.
- Planning observation for technology/research companies or companies with assets qualifying for 100% depreciation. For many technology development or research companies, the largest expense is the salary of developers/researchers, and those amounts can be deducted immediately (as a result of a change in OBBBA). For AI companies building data farms, the building expenses could be depreciated immediately (OBBBA allows 100% bonus depreciation for qualified property). For example, if the shareholders contribute serial rounds of funding of $10, $20, $40, and $80 million, the contributing shareholders would have a basis of $150 million, resulting in possible exclusion of 10 times that, or $1.5 billion, but the basis of the company's assets (*i.e.*, the aggregate gross asset value) might remain well below $75 million at all times if the investments were used for immediately deductible salaries or building expenses.

12. IRA and Retirement Plan Distributions for Surviving Spouse, Conduit QTIP Trust

a. **SECURE Act; Conduit Trust**. IRA or retirement plan distributions to an individual (or trust treated as an individual) following the death of the owner generally must be paid over 10 years, with five exceptions, one of which is for a surviving spouse. Benefits paid to a spouse may be paid over the spouse's lifetime (with even more beneficial rules if the spouse makes a spousal rollover). Benefits paid to a trust for a spouse qualify for the lifetime payout only if the trust is a "conduit trust" (meaning the distributions from the plan to the trust must immediately be paid to the trust beneficiary).

b. **Special Benefits of Spousal Rollover**.

- Recalculate life expectancy annually (otherwise, benefits would be paid over the spouse's life expectancy at the owner's death, and no further distributions would be available if the spouse outlived her life expectancy).
- The spouse does not have to start taking distributions until the decedent-owner would have reached her RBD (age 73).
- Most important, the single life expectancy table does not apply, but the "uniform life table" can be used; it is based on the life expectancy of the person and someone 10 years younger. (For example, if the spouse is age 75 when the owner dies, her single life expectancy payout would be 14.8 years, but the uniform life table payout would be 24.6 years (roughly, a 4 percent rather than a 7 percent payout in the first year, and the payout would not exceed 10 percent until the spouse is in her 90s).

c. **SECURE 2.0 Extends Rollover Benefits to Conduit Trusts for Surviving Spouse**. Under SECURE 2.0, beginning in 2024, the conduit trust for the spouse may use the uniform life table (rather than the single life table) and may recalculate life expectancy annually for determining distributions over the spouse's life expectancy. (Those special benefits previously were available only if the spouse was the direct beneficiary of the plan and elected a spousal rollover.) SECURE 2.0 allows these added benefits for the spousal conduit trust only if the spouse makes an election for the rules to apply, but the IRS views the spouse as being *deemed* to make the election unless the spouse affirmatively elects otherwise.

13. Spousal Lifetime Access Trust Planning Musings

a. **Potential Conflicts of Interest Between Spouses**. Transferring assets to a SLAT can result in a very significant shift of the relative ownership of marital assets as between the spouses and possible adverse implications if the spouses should later divorce.

b. **Review Tax Apportionment Clause**. In case a SLAT should be included in the donor's gross estate under §2036 (this is more of a concern if the spouses each create SLATs for each other, even though they are planned to be "non-reciprocal"), review the tax apportionment clause so the estate tax attributable to the SLAT inclusion is not allocated to the residuary estate, which might be passing largely or entirely to the surviving spouse to qualify for the marital deduction (the estate tax would reduce the marital deduction, which further increases the estate tax, which further reduces the marital deduction, etc.). (The tax apportionment clause could also result in children of a second marriage having to pay estate taxes on assets passing to children of the first marriage.)

c. **Continuing Grantor Trust Treatment Following Divorce**. The 2017 Tax Cuts and Jobs Act repealed §682; that section provided that if one spouse created a grantor trust for the benefit of the other spouse, following the divorce the trust income would not be taxed to the grantor-spouse under the grantor trust rules to the extent of any fiduciary accounting income that the donee-spouse is "entitled to receive." Because of the repeal of §682, the donor-spouse could be stuck paying income tax on income of the SLAT (if it continues with the ex-spouse as a potential beneficiary). This is one of the potential conflicts of interest between the spouses when SLATs are created.

Alternatives for dealing with this concern include (1) providing that the spouse would no longer be a beneficiary following a divorce (perhaps by using a "floating spouse" provision in the trust agreement definition of "spouse"), (2) requiring adverse party consent to (or giving an

adverse party veto power over) any distributions to the ex-spouse beneficiary following divorce (both (1) and (2) would mean the trust may no longer be a grantor trust following divorce), (3) including a reimbursement provision permitting the trustee in its discretion to reimburse the grantor for income taxes attributable to the SLAT income, or (4) having an agreement between the spouses as to how income taxes would be paid regarding SLAT income following a divorce.

d. **SWAP Power**. Giving the grantor a swap power over the SLAT assets may be helpful to (1) assure the trust is a grantor trust as to the entire trust, §675(4)(C), (2) give the grantor flexibility to "buy back" favored assets that were transferred to the SLAT, (3) reacquire highly appreciated assets so they may receive a step-up in basis at the grantor's death, and (4) address the grantor's liability for income taxes resulting from a sale of highly appreciated assets by having the grantor reacquire some or all of those assets before the sale (the grantor would still have the tax on the gain when the asset is sold, but the sale proceeds would be paid to the grantor and the grantor would have cash to pay the income tax).

14. Navigating the Ethical Minefield of Estate Planning with Married Couples

a. **Divorce Statistics**. Divorce statistics from the Centers for Disease Control and Protection: 42% of first marriages end in divorce (median duration of 8.2 years); 2/3rds of second marriages end in divorce; 3/4ths of third marriages end in divorce; 1/3 of "gray" marriages (over age 65) end in divorce. (The incidence of divorce may be significantly lower for couples with higher wealth accumulation, educational achievement, or longer marriage durations.)

b. **Lawyer's Duty in Light of the Divorce Statistics**. Considering these statistics, does the lawyer have a duty to discuss with clients what they want to happen regarding planned transactions in the event of a divorce? There could be inherent conflicts of interest in that discussion (what is good for one spouse may be bad for the other spouse). Led to an extreme, that could suggest that the couple be represented by an estate planning attorney with each spouse having a family lawyer to advise about issues with potential conflicts, resulting in three attorneys for what seems at the outset as routine estate planning. That is obviously unworkable, so what should estate planning attorneys do to protect the clients' interests and protect themselves?

Following a divorce, the spouse disadvantaged by some estate planning transaction will ask why the attorney did not advise about the possibility of that bad result. "Are you stupid, or were you primarily looking out for the interests of my ex-spouse?"

Addressing the potentially disadvantageous impact upon a spouse in the joint estate planning discussion may be uncomfortable, and attorneys must address these issues in a gentle manner.

c. **Key Ethical Rules**. Key relevant ethical rules are Model Rule 1.7 (conflicts of interest) and Model Rule 1.4 (communication).

d. **Florida Bar Ethics Opinion 95-4 (May 30, 1997)**. This ethics opinion illustrates the difficult issues that can arise. It involved joint representation of spouses to prepare their wills. Several months later, the husband tells the attorney he is having a long-term affair and asks what will happen if his wife elects against the will. The Florida Bar came to the conclusion that:

- The attorney was not ethically obligated to discuss the lawyer's obligations regarding separate confidences

- The ethical obligation to H *prohibits* the lawyer from disclosing the information to W
- The attorney must withdraw from the representation because of the adversity of interests that has arisen; continued representation on the basis of informed consent is not possible on these facts
- A sudden withdrawal almost certainly will raise suspicions by W; nevertheless, the attorney must withdraw using the following script: "Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters. Lawyer may also advise both Wife and Husband that each should retain separate counsel."

Florida attorneys have been uncomfortable with some of the conclusions in this opinion.

In withdrawing from representing the clients, do not elaborate even if questioned repeatedly. Respond to every question with "A conflict has arisen that precludes me from representing either of you."

Send written notice separately to both spouses. (Separate email messages may be the best way to reach each of them.)

The opinion leaves the attorney in a lurch. The attorney is prohibited by the Bar from communicating material facts to W because of ethical obligations. However, W may still sue the attorney for damages following a contentious divorce, claiming that if she had known about the other woman, she could have taken steps to protect herself. Bruce Stone asks, "how will the attorney's response that ethical rules did not allow disclosure play to the jury?"

e. **Marital Agreements**.

- Significance. (a) "Everyone has a prenup – either you wrote it or your state legislature wrote it. Often, you can do better than what the law provides." (b) People move around; set the rules that will apply regardless of where the spouses move.
- Premarital Debt. Under the laws of many states (particularly many community property states), if one spouse's debt is paid with marital property, on divorce the other spouse will have a right to be reimbursed for half of the payments. This would be a huge crushing surprise on divorce. The spouse who paid his debt with his earnings would also have to pay the other spouse half of that amount.
- Disclosure of Financial Information. The Uniform Premarital and Marital Agreements Act allows a waiver of financial disclosure. Panelists said they would never do a prenuptial agreement without full disclosure. Full disclosure includes complete financial statements, trust documents or summaries of trust beneficial interests, valuations of trust discretionary interests if possible, and written acknowledgement of the disclosure received.

15. Musings About Artificial Intelligence Issues for Estate Planners

a. **Planning Tip**. A practical use of generative AI is to write the first draft of difficult emails, letters, messages, etc. The planner may procrastinate writing the difficult message, struggling over "just the right words," and getting a first draft is a huge help.

b. **Verbal Prompts**. A panelist demonstrated giving a verbal prompt (several minutes long) describing in detail the context, the purpose and audience of the message, the type of message desired, the various points to be made in the message, and the tone, format, length, etc. The more detail and direction that is given, the better the output will be.

c. **Popular Platforms**. ChatGPT (60.3%), Co-Pilot (14.3%), and Gemini (13.5%) are the most popular generative AI platforms. Others are Perplexity, Claude Opus (which many clients like), Grok, DeepSeek, Brave Leo AI, Komo, Sonnet, and Andi. Users should be aware that DeepSeek is monitored by the Chinese government.

d. **Enterprise Platforms**. Some of the AI platforms have developed "Enterprise" systems (*e.g.*, ChatGPT Enterprise) that do not share information publicly. Users should not upload any client information to a generative AI system that is not a private "enterprise" system.

e. **Transcription; Automatic Notetaker Systems**. Fireflies.ai is a free AI notetaker program that is popular. (It is generally considered safe, with robust security features.) Generally, the planner would prefer a service selected by the planner, which will be vetted to make sure it is secure, rather than using a transcription service selected by the client. (If it is not secure, attorney-client privilege may be waived as to discussions during the meeting.) Some planners will not allow calls to be recorded or transcribed.

f. **Common Client Concerns and Questions**. Common client concerns, for which the planner should have a response, include: (1) "why can't I just prepare my documents using AI instead of you?," (2) explaining why the planner is still needed and why AI does not replace the planner, (3) whether using AI reduces the bill, (4) "why didn't using AI reduce the bill, or if AI was not used, why didn't you use AI to reduce the bill?," (5) how the AI platform accesses the client's information, and (6) a general understandable explanation of how the planner's use of AI affects clients.

g. **Rapid Very Powerful AI Changes Coming (And Are Here!)**. Matt Shumer wrote an article in February 2025 that created a big buzz (and scare) about the power of AI. Each newer version of AI is dramatically better and faster than the last. Matt is a developer of apps, and he says that AI now creates all the coding that he previously labored over to develop apps. One managing partner of a large law firm says that using AI is "like having a team of associates available instantly." The following are a few excerpts from his article.

> For years, AI had been improving steadily. Big jumps here and there, but each big jump was spaced out enough that you could absorb them as they came. Then in 2025, new techniques for building these models unlocked a much faster pace of progress. And then it got even faster. And then faster again. Each new model wasn't just better than the last... it was better by a wider margin, and the time between new model releases was shorter. I was using AI more and more, going back and forth with it less and less, watching it handle things I used to think required my expertise.
>
> Then, on February 5th, two major AI labs released new models on the same day: GPT-5.3 Codex from OpenAI, and Opus 4.6 from Anthropic (the makers of Claude, one of the main competitors to ChatGPT). And something clicked. Not like a light switch... more like the moment you realize the water has been rising around you and is now at your chest.
>
> **I am no longer needed for the actual technical work of my job.** I describe what I want built, in plain English, and it just... appears. Not a rough draft I need to fix. The finished thing. I tell the AI what I want, walk away from my computer for four hours, and come back to find the work done. Done well, done better than I would have done it myself, with no corrections needed. A couple of months ago, I was going back and forth with the AI, guiding it, making edits. Now I just describe the outcome and leave.

> Let me give you an example so you can understand what this actually looks like in practice. I'll tell the AI: "I want to build this app. Here's what it should do, here's roughly what it should look like. Figure out the user flow, the design, all of it." And it does. It writes tens of thousands of lines of code. Then, and this is the part that would have been unthinkable a year ago, it **opens the app itself**. It clicks through the buttons. It tests the features. It uses the app the way a person would. If it doesn't like how something looks or feels, it goes back and changes it, on its own. It iterates, like a developer would, fixing and refining until it's satisfied. Only once it has decided the app meets its own standards does it come back to me and say: "It's ready for you to test." And when I test it, it's usually perfect.
>
> …
>
> The models available today are unrecognizable from what existed even six months ago….
>
> Part of the problem is that most people are using the free version of AI tools. The free version is over a year behind what paying users have access to….
>
> … [One partner at a law firm], the managing partner at a large firm, spends hours every day using AI. He told me it's like having a team of associates available instantly….
>
> …
>
> **This might be the most important year of your career. Work accordingly.** I don't say that to stress you out. I say it because right now, there is a brief window where most people at most companies are still ignoring this. The person who walks into a meeting and says "I used AI to do this analysis in an hour instead of three days" is going to be the most valuable person in the room. Not eventually. Right now. Learn these tools. Get proficient. Demonstrate what's possible. If you're early enough, this is how you move up: by being the person who understands what's coming and can show others how to navigate it. That window won't stay open long. Once everyone figures it out, the advantage disappears.
>
> **...**
>
> Here's a simple commitment that will put you ahead of almost everyone: spend one hour a day experimenting with AI. Not passively reading about it. Using it. Every day, try to get it to do something new... something you haven't tried before, something you're not sure it can handle.
>
> …
>
> Blog by Matt Schumer, *Something Big is Happening* (Feb. 9, 2026) (emphasis in original), ttps://shumer.dev/something-big-is-happening.

16. Aging and Disability Planning – Cracks in the Safety Net

a. **Aging Demographics**. Fifty-seven million Americans are age 65 and older (17% of population); 25% of these are expected to reach age 90, and 10% will reach age 95. Six million Americans have Alzheimer's disease; projected to be 18 million by 2050.

b. **Disabilities**. Sixty million Americans live with a disability (18% of the population), and life expectancy of individuals with disabilities is increasing.

c. **Caregiving and Care Industry Workforce**. The U.S. birth rate has fallen 20% since 2007, leading to a smaller work force and fewer family caregivers. There has been a 45% increase in the number of Americans providing ongoing care to adults or disabled children between 2015-2025; 20% of individuals age 45-54 and 21% of individuals age 55-64 are providing that care.

   In the care industry, 37% of direct care workers (DCWs) live in or near poverty and 49% rely on public assistance programs to make ends meet. Care industry direct care workers have a median wage of $16.72 per hour, close to the poverty level; they can make more at McDonalds.

d. **Striking Impact**. The smaller workforce + aging population + increasing disability population will put substantial pressure on social insurance programs like Social Security, Medicare, and

Medicaid (funded by taxes but the tax base is shrinking) and the ability of caregivers and the care industry to provide needed care.

e. **Key Message**. Planners must tell clients the truth—they cannot rely on the public provider system, which is woefully underfunded.

f. **Letter of Intent or Lifecare Plan**. A practical planning pointer for someone providing care for a family member is to draft a detailed letter describing all the services the person provides each day, week, and year so someone else can step in to provide support. Include food preferences and other lifestyle preferences.

17. Trusts – Eroding the "Irreducible Core"

a. **"Irreducible Core."** An English case captures the concept of the "irreducible core" of a trust: "There is an irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. *If the beneficiaries have no rights enforceable against the trustee there are no trusts*." *Armitage v. Nurse,* [1997] EWCA Civ 1279, [1998] Ch. 241 (Eng.) (emphasis added). Justice Cardozo famously declared that "[a] trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive...." *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (N.Y. 1928).

b. **Race of States to Attract Trust Business in a Way that Erodes the Irreducible Core**. Following the adoption of the generation-skipping transfer tax in 1986, and the movement by a few states to eliminate the perpetuities limitations on trusts, some states have proceeded to outdo themselves to allow maximum freedom to settlors, to the point of allowing the erosion of the fundamental essential characteristics of a trust. These trends include eliminating limitations on perpetuities, exculpation of trustees, limits on the requirement to provide information to trust beneficiaries ("silent trust" provisions), directed trusts, decanting, and an expanded ability to modify trusts.

   Example: Some directed trust statutes allow appointing an advisor who does not act as a fiduciary, and the trustee has no liability for following those directions (or perhaps is liable only for the trustee's "wilful misconduct" in following that those directions). In South Dakota, the excluded fiduciary is not liable for any loss from complying with directions from a trust advisor, including if the advisor is breaching fiduciary responsibilities or *even if the advisor is acting beyond the scope of the advisor's direction authority*. (In South Dakota, at least the advisor must be a fiduciary.)

c. **Decanting**. Some states allow decanting to a trust with substantial changes in trust provisions, including elimination of mandatory distribution or withdrawal rights, adding or removing beneficiaries, changing the standard for discretionary distributions, and granting a general power of appointment to a beneficiary of the decanted trust. The trustee might be able to decant the trust to a trust with a trustee in another state that allows those kinds of substantial changes. If the settlor does not want to permit that broad of a change to the trust by decanting, consider adopting decanting restrictions in the trust agreement in lieu of relying on a statute and providing that the governing law for decanting cannot change by changing the place of administration.

d. **Recognition of Trust for Income Tax Purposes**. Reg. § 301.7701-4(a) defines a trust as an arrangement "whereby trustees take title to property for the purpose of protecting or

conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts." If a trust arrangement has pretty much all of the fiduciary protection afforded beneficiaries stripped away from the trust, will it be recognized as a trust for income tax purposes or will it be treated as an association?

18. Musings about Creditor Protection Planning (Including Issues for SLATs)

a. **Degree of Control**. The extent of the debtor's control over assets is very important in determining if the assets are subject to the debtor's creditors. One of the "badges of fraud" to determine if a transfer is a fraudulent transfer (or a voidable transfer) is whether the debtor has control over the assets. The less control the better. For example, the ability to remove and replace a trustee or to direct when distributions are made (such as being the distribution adviser of a directed trust) would be very significant. Judge Mindy Mora (Bankruptcy Court judge) made this overarching observation: "It comes down to control. If the client wants to keep control, that will be a weak link in the asset protection planning."

b. **State DAPT Statutes**. Twenty-one states now have domestic asset protection trust statutes. (Alabama, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada New Hampshire, Ohio, Oklahoma (with restrictions), Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.)

c. **State QTIP Statutes**. If a spouse creates a QTIP trust that passes at the other spouse's death to a trust for the settlor-spouse, a regulation says that does not trigger §2036, but a state may view that as a self-settled trust created by a settlor of which the settlor has become a beneficiary. At least nineteen states have state statutes addressing that QTIP trust situation, providing that the settlor's creditors could not reach the trust assets. The non-DAPT states with these statutes regarding inter vivos QTIP trusts include Arizona, Arkansas, Florida, Georgia, Kentucky, Maryland, North Carolina, Oregon, South Carolina, Texas, and Wisconsin.

d. **State SLAT Statutes**. Statutes in at least eight states, Arizona, Florida, Maryland, Michigan, Mississippi, North Carolina, Ohio, and Texas, also address the issue for all inter vivos trusts initially created for the settlor's spouse (including a SLAT) where the assets end up in a trust for the original settlor-spouse. The non-DAPT states with these provisions include Arizona, Florida, Maryland, North Carolina, and Texas.

e. **State Tax Reimbursement Protection Statutes**. If the trust agreement for a grantor trust authorizes the trustee in its discretion to reimburse the grantor for income taxes the grantor pays with respect to income of the trust, the trust becomes a self-settled trust potentially subject to creditors' claims to that extent. That would not be a problem for qualifying trusts in DAPT states; trusts in non-DAPT states with these "tax reimbursement protection" statutes include Arizona, Florida, Kentucky, Maryland, New Jersey, North Carolina, Oregon, New York, and Texas.

f. **Citations**. Citations to all of these statutes are included in Item 24 of LOOKING AHEAD – Estate Planning in 2026 Current Developments & Hot Topics (February 2026), available at www.bessemertrust.com/for-professional-partners/advisor-insights.

19. QTIP Trust Planning; Do Remainder Beneficiaries Make Gifts By Consenting to Spouse Receiving All QTIP Assets?, *Estate of Anenberg v. Commissioner*, 162 T.C. 199 (May 20, 2024); *McDougall v. Commissioner,* 163 T.C. No. 5 (Sept. 17, 2024)

a. ***Estate of Anenberg***. *Estate of Anenberg v. Commissioner*, 162 T.C. 199 (May 20, 2024), held that wife did not owe tax under §2519 as a result of a QTIP trust being terminated by judicial modification to leave all the trust assets to wife, which she then transferred to descendants. Even if the QTIP trust termination triggered §2519, no gift by wife occurred because she ended up receiving all the assets.

b. **CCA 202118008**. *McDougall* is the case (actually three consolidated cases) that was addressed in CCA 202118008 (family settlement under which all QTIP assets were distributed to the surviving spouse (H) who immediately gave and sold assets to trusts for descendants; IRS concluded that [1] two children (Children) who were the remainder beneficiaries made gifts of the remainder interest to H, [2] H made a gift of QTIP trust remainder interest under §2519, and [3] H used his estate and gift exclusion amount and would have notes from the sale included in his gross estate).

c. ***McDougall* Reviewed Opinion; Final Order as to Father**. The Tax Court issued a reviewed opinion on September 17, 2024, addressing motions for summary judgment. *McDougall v. Commissioner,* 163 T.C. No. 5 (Sept. 17, 2024). All the gift issues have been resolved regarding H, and a final order and decision for H's case was entered January 30, 2025. (Taxpayers resided in Washington, so an appeal would have been heard by the Ninth Circuit Court of Federal Appeals, but the IRS did not file a timely notice of appeal.)

d. ***McDougall* Holding**.

- No Gift by H of Remainder Under §2519. Relying on *Anenberg,* the court held that neither (1) the termination of the trust and distribution of all assets to H nor (2) the distribution of assets to H coupled with the sale of almost all the assets to trusts in return for notes resulted in a taxable gift under §2519.
- Gifts by Children. The court concluded that the two Children (the remainder beneficiaries) made gifts by agreeing that all assets could be distributed to H.

e. ***McDougall*, Value of Children's Gifts**. The court will determine the value of the Children's gifts to H in a later proceeding. H held a testamentary power of appointment to appoint trust assets to the wife's descendants. The court specifically observed that "under the terms of [the wife's] will, [H] could have decided in his own will to reduce one of the children's shares significantly," and added in a footnote that "[t]he import (if any) of these terms for the value of [the Children's] remainder rights remains to be decided." (emphasis added) The valuation issue raises various interesting elements.

- H, as trustee, can make fiduciary decisions to allocate receipts and expenses between income and principal, thus impacting the amount of mandatory income distributions. The trustee may make discretionary principal distributions to H, which would reduce the value of the remainder interest.
- Because of H's testamentary power of appointment, any particular remainder beneficiary has significant contingencies on actually receiving trust assets. H could cut off any particular remainder beneficiary's interest. How will the court value those contingencies?

- The IRS dismissed the impact of H's power of appointment in CCA 202118008 and is taking the position in *McDougall* that the early termination of the trust means the power of appointment no longer exists and is irrelevant to the valuation issue.
- Why did the IRS take the position that the gifts were made merely by the two Children rather than allocating gifts among all of the descendants who were remainder beneficiaries?
- The case was remanded to the trial court (Judge Halpern as the trial judge) to determine the value of the Children's gifts. (T.C. Docket Nos. 2459-22 & 2460-22) The trial court entered an Order on April 25, 2025, concluding that the value of the Children's gifts "equaled the value of the distributions to which they would have been entitled under section 12.8 of [the predeceased wife's] will upon the termination of the Residuary Trust had they not agreed in section 2 of the Nonjudicial Agreement that all of the trust property be distributed to [H]." The court left open the effect of H's testamentary power of appointment, but stated that "because the termination of the Residuary Trust extinguished the testamentary power of appointment granted to [H] …, it is not clear that the power of appointment would have affected the value of [the Children's] interests in the Residuary Trust … to determine the distribution to which [the Children] would have been entitled upon the termination of the trust."
- A one-and-a-half day trial on the valuation issue was held before Judge Halpern on June 16-17, 2025.
- Briefs were filed by the parties on October 1, 2025.
- The taxpayer's brief included the following points: (i) the Children never had a right to receive property outright and free of trust; (ii) property rights must be determined under state law before their value can be determined; (iii) the §7520 actuarial tables do not apply because the remainder interests are subject to a contingency and therefore are "restricted beneficial interests"; (iv) H is treated as the owner of the QTIP assets under the QTIP regime, which would mean he is the owner and donee of the same assets at the same time; (v) under the hypothetical willing buyer- willing seller standard for valuing gifts, a hypothetical buyer of the remainder interest would know it would receive nothing unless it convinced H not to appoint assets to his family members, and the remainder interest therefore has nominal value. In effect, the taxpayer's position is that the interest to be valued was a contingent remainder interest in the trust as it existed immediately before signing the settlement agreement. At that time, the value was affected by various contingencies, so the interests were "restricted beneficial interests" that could not be valued under §7520. Each of the Children's gifts was valued at $156,000 under the hypothetical willing buyer/willing seller standard.
- The IRS's brief included the following points: (i) H's likelihood of exercising his right to principal distributions is so remote as to be negligible; (ii) the contingency of the power of appointment does not cause the remainder interest to be a "restricted beneficial interest" and does not reduce the value of the remainder interest because transformations brought about by the nonjudicial agreement must be taken into consideration and the agreement terminated the Residuary Trust making the power of appointment inoperative; and (iii) Taxpayers have the burden to show there is more than a remote possibility that H would appoint the assets away from the Children, and

under the exercise of H's power of appointment, he left the assets to trusts for the Children, but the trust "afforded [the Children] almost identical rights entitling them to withdraw nearly the entire corpus...." The IRS maintains that the Children's gifts were the right to receive terminating distributions equal to the value of their actuarial interests; after executing the settlement agreement, no contingencies remained, so the gift values must be determined under the §7520 tables (each of the Children's gifts was valued by the IRS at $35.1 million to $38.3 million).

f. **Income Tax Issue**. Apparently, the IRS did not take the position in either *Estate of Anenberg* or *McDougall* that the early termination of the QTIP trust resulted in an income taxable transaction between the income and remainder beneficiaries. However, that is not totally clear in *McDougall*. At the IRS's request, the court on January 30, 2025, vacated an order entered on December 26, 2024, stating that there was "no deficiency or penalties in income tax due from [H] for the taxable year" of the commutation. It is unclear whether the IRS is still pursuing an income tax deficiency (or whether it can pursue an income tax efficiency at this point).

   The IRS has made that argument sometimes in transactions involving early terminations of trusts. Amounts "paid" by the remainder beneficiaries to the spouse for the remainder interest of the QTIP trust may be gifts (and not taxable under §102(a)), but amounts paid for the spouse's income interest may be fully taxable because the spouse's basis in the income interest is zero under the uniform basis rules of §1001(e). The remainder interest may recognize gain to the extent that appreciated property is used to satisfy the value of the commuted income interest. It is hard to say the remainder beneficiaries "purchased" the income interest when the remainder beneficiaries did not receive anything, but they may be treated as having first commuted the income and remainder interests (resulting in an income tax event) and then having gifted their remainder interest to H (an income-tax free gift). *E.g.*, PLRs 202509010, 201932001-201932010.

g. **CCA 202352018 (Judicial Modification To Add Reimbursement Power)**. The holding that the Children made gifts by consenting to the distribution of QTIP assets to H is consistent with CCA 202352018. It concluded that the judicial modification of an irrevocable grantor trust with beneficiaries' consent, to add a tax reimbursement clause providing the trustee with a discretionary power to reimburse the grantor for income tax attributable to inclusion of the trust's income in grantor's taxable income, would constitute a taxable gift by the beneficiaries of a portion of their respective interest in income and/or principal of the trust. (The CCA acknowledged that this was a change of position from that taken in Letter Ruling 201647001 and acknowledged that the gift may be difficult to value.)

h. **QTIP Trust Planning in Light of *Estate of Anenberg* and *McDougall***.

   - The trustee may enter into estate freezing transactions directly with the QTIP trust assets (*e.g.*, invest in fixed income portfolios or sell QTIP assets to other family trusts or entities for notes).
   - Consider distributions to the beneficiary-spouse pursuant to the trust distribution standards; the spouse can then enter into estate freezing transactions.
   - Classic commutations, in which the spouse merely receives the value of the income interest, would result in a taxable gift under §2519 of the entire value of the remainder interest (that is the clear purpose of §2519 and the spouse receives nothing with respect to the remainder interest to offset the deemed transfer of the remainder interest).

- Terminating QTIP trusts early and distributing everything to the spouse should be viewed as an aggressive transaction; this is clearly on the IRS "hot list" (the Tax Court held that this approach did not result in a deemed gift of the remainder interest under §2519 by the spouse-beneficiary, but the IRS may ultimately appeal a §2519 case).
- Using decanting rather than judicial termination to transfer assets to the spouse (perhaps by adopting a broad distribution standard) may avoid having explicit consent from remainder beneficiaries, but there are fiduciary concerns and the IRS took the position in CCA 202352018 that failing to object would result in a gift, the same as with consent.
- In a planning mode, draft QTIP trusts to give someone a power to appoint assets to the spouse-beneficiary (assuming the client is comfortable giving someone that power); Reg. §25.2519-1(e) says appointing assets to the spouse does not trigger §2519 even if the spouse subsequently disposes of the appointed property; the power is not exercisable in a fiduciary capacity whereas a decision by the trustee to terminate the trust and distribute substantial assets to the spouse must be appropriate consistent with the trustee's fiduciary duty.
- Similarly, in a planning mode give the spouse (or someone) a power to appoint the remainder interest at the spouse's death to minimize the possible gift by any particular beneficiary resulting from the beneficiary's consent to an early termination of the QTIP trust; however, the IRS dismissed the impact of the spouse's power of appointment in CCA 202118008 and apparently is taking the position in *McDougall* that the early termination of the trust means the power of appointment no longer exists and is irrelevant to the valuation issue.
- Consider the possibility of adding such powers of appointment in a decanting action (if allowed under state law); but the failure of remainder beneficiaries to object might still raise gift concerns.
- Dividing a single QTIP trust into separate QTIP trusts may minimize the §2519 risk; transfers to the spouse to allow transfer planning by the spouse could be made from just one of the trusts, not risking the application of §2519 to the assets of the other trust. Many PLRs have allowed taxpayers to sever QTIP trusts in anticipation of this type of planning. *E.g.*, Ltr. Ruls. 202504006-202504007; 202146001.
- Planning with large QTIP trusts is difficult. *See* Joy Miyasaki & Read Moore, *Estate Planning Strategies for QTIP Trusts: Do Good Things Come to Those Who Defer?*, AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL 2023 ANNUAL MEETING (Mar. 2023); Read Moore, Neil Kawashima & Joy Miyasaki, *Estate Planning for QTIP Trust Assets*, 44th U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 12 1202.3 (2010); Richard S. Franklin, *Lifetime QTIPs—Why They Should Be Ubiquitous in Estate Planning*, 50th HECKERLING INST. ON EST. PL. ch. 16 (2016); Richard S. Franklin & George Karibjanian, *The Lifetime QTIP Trust – the Perfect (Best) Approach to Using Your Spouse's New Applicable Exclusion Amount and GST Exemption*, 44 BLOOMBERG TAX MGMT. ESTATES, GIFTS & TR. J. 1 (Mar. 14, 2019).

20. GRAT Examinations Involving Valuations and Substitution Transactions for Grantor Notes, *Elcan v. Commissioner*, Tax Court Docket No. 3405-25 (Petition filed March 14, 2025)

a. **Two Surprising Issues Arising in Examinations of GRATs**. The IRS appears to be examining a number of GRAT transactions, involving both (1) valuations of assets contributed to GRATs and (2) substitutions for notes with grantor-notes. One observer (not a party in the case) has described *Elcan v. Commissisoner* as "part of the IRS's GRAT crusade." Other planners have noted that the IRS has made and is making these arguments in various pending IRS examinations.

(1) **Valuation**. The IRS Response does not stipulate the accuracy of the values contributed to the GRATs, even though the Answer filed by the IRS in *Elcan* agreed to the values reported for the contributions to the GRATs. There have been various examinations of GRATs involving valuations, and the IRS sometimes takes a position similar to its position in CCA 202152018 that treated a GRAT annuity as not being a qualified interest because of the undervalued appraisal used to determine the annuity amounts that were paid by the GRAT over its two-year term. Accordingly, the donor was treated as making a gift equal to the full finally determined value of the shares transferred to the GRAT, without any offset for the value of the donor's retained annuity payments. The IRS did not make that argument in its Response (although it not stipulate the accuracy of the values of the contributions).

- CCA 202152018 analogized to *Atkinson v. Commissioner*, 115 T.C. 26 (2000), *aff'd*, 309 F.3d 1290 (11th Cir. 2002), which denied an income tax charitable deduction for the creation of a charitable remainder annuity trust because of the manner in which the trust was operated (no annuity payments were actually made), even though the agreement itself met the technical requirements for CRATs.
- CCA 202152018 reasoned that the result was appropriate because of the donor's "deliberately using an undervalued appraisal." Perhaps the IRS concern in this CCA was not so much with the appraised *amount* but with the *process.* The donor appeared to have used a valuation that the donor knew was seven months out of date, prepared for another purpose, and which substantially undervalued the shares because of intervening events (obviously unknown to the appraiser). The case underlying that CCA is currently in litigation.

(2) **Using Grantor Notes to Satisfy Annuity Payments**. Substitutions for notes and using the grantor's notes to satisfy annuity payments have also been a target of various gift tax examinations (including *Elcan*). If notes are substituted for GRAT assets using inflated values of GRAT assets, the IRS would certainly be expected to treat the excess value as an additional gift (which would be a prohibited additional contribution to the GRAT and which might result in the contribution as being treated as held by the trustee as a constructive trustee for the grantor). However, when GRAT assets are valued appropriately (and in this case they were based on appraisals of the Frisco stock and on the basis of the actual values of publicly traded stock held by Hercules), the substitution transaction is merely an investment decision (the trustee must determine that it is receiving "an equivalent value").

- Using grantor notes held by the GRAT to satisfy annuity payments does *not* violate the prohibition in regulations prohibiting a GRAT from "issuing a note, other debt instrument, option, or other similar financial arrangement in satisfaction of the annuity or unitrust payment obligation." Reg. §25.2702-3(d)(6). *See also* Reg. §25.2702-3(b)(1)(i) ("Issuance of a note, other debt instrument, option, or other

similar financial arrangement, directly or indirectly, in satisfaction of the annuity amount does not constitute payment of the annuity amount"). In *Elcan*, none of the three GRATs "issued a note" in satisfaction of annuity payments. Instead, the GRAT used some of its assets (notes payable to it) to satisfy the annuity payments. The IRS's Response to the fact that the grantor rather than the GRAT "issued" the note is that "the issuance of the notes and withdrawal of the other assets of the trusts operated to cause the trust to, directly, or indirectly, satisfy the amounts in a manner prohibited by Treas. Reg. §25.2702-3(b)(1)(i)."

- The taxpayer's Petition quotes an article by Carlyn McCaffrey for support of the position that using notes from another party (including the grantor) to satisfy annuity payments does not violate the prohibition in the regulations from the GRAT issuing its own note to satisfy annuity payments. The petition quotes the article as follows.

  The prohibition against the "issuance" of a note or similar financial arrangement does not prevent the use of notes issued by other persons to satisfy the payment obligation. *For example, a note issued by the grantor's spouse, by another trust, or even by the grantor would not violate this prohibition. The trustees of the GRAT might acquire such a note by selling some or all of the GRAT's assets to the issuer of the note.* (emphasis added in the petition). See e.g., C. McCaffrey, "The Care and Feeding of GRATs – Enhancing GRAT Performance Through Careful Structuring, Investing and Mentoring."

b. **Brief Summary of *Elcan*.** The that had been contributed to the GRATs. Notes from the grantor received by the GRATs in the substitution transactions were subsequently distributed to the grantor to satisfy required annuity payments. (The final annuity payment could not be fully satisfied with the remaining assets in the GRAT.) The IRS issued deficiency notices to each spouse for $306,929,994 gift tax and $61,385,999 penalties, for total deficiencies of over $736 million.

   The notices of deficiency stated that the initial gifts to the GRATs were taxable gifts in their entirety because the grantor's retained annuity interests were not qualified interests under §2702. Alternatively, if the retained interests are determined to be qualified interests, the transfers of the grantor's notes to the GRATs in substitution transactions in which the grantor re-acquired partnership interests and stock that had been contributed to the GRATs were taxable gifts. The notices did not state why the retained interests were not qualified interests under §2702 or why the notes given to the GRATs in the substitution transactions were taxable gifts. Twenty percent accuracy-related penalties were assessed under §6662 because the underpayment was due to negligence or disregard of the rules and regulations.

   The IRS's Answer was filed July 9, 2025; it gives no further insight as to the rationale for the gift conclusions in the deficiency notices. *Elcan v. Commissioner*, Tax Court Docket No. 3405-25 (Petition filed March 14, 2025).

c. **Basic Facts of *Elcan*.**

   - GRAT I and GRAT II were created on Feb. 20, 2018 and May 22, 2018, respectively. Shares of a Delaware S corporation (Frisco), an investment holding company, and units of a general partnership (Hercules), an investment holding company, were transferred to the GRATs. The values of the interests in Frisco and Hercules transferred to the GRATs collectively were $687,503,860. The GRATs provided for two annual annuity payments, described as specified percentages of the values transferred to the GRATs. The annuity payments from GRATs I and II totaled $721,624,342.13.

- The values of the Frisco shares transferred to the GRATs were valued by appraisal and the values of the Hercules units were determined based on the average of the high and low trading prices of the publicly held stock owned by Hercules on the transfer dates. (The same valuation method was used to determine all transfers to and from the GRATs and from GRAT III, described below.)
- The grantor substituted a note for $1.27 million from GRAT II on July 13, 2018, and substituted notes in the collective amount of $852,742,730.49 for the interests in Frisco and Hercules that had been transferred to each of GRAT I and GRAT II on August 15, 2018.
- All the notes used in the transactions with the GRATs bore a commercial interest rate (Prime + 1%).
- The substitution of notes for the units and stock in GRATs I and II had the effect of leaving a net of $852,742,730.49 - $721,624,342.13, or $131,118,388.36, plus interest on the notes, that would remain at the termination of the GRATs to pass to the GRAT remaindermen without further gift taxes.
- Shares of Frisco (slightly more than the number contributed to GRATs I and II) and units of Hercules (same number as contributed to GRATs I and II) were contributed to GRAT III on August 15, 2018.
- Substitution powers were exercised to substitute notes (Prime + 1%) for cash transfers from GRAT III (in amounts ranging from about $1.2 million to almost $1.5 million) on October 15, 2018, Jan. 10, 2019, April 10, 2019, and July 6, 2019. (Observe that some of those were close to the grantor's income tax estimated payments dates.)
- On May 12, 2020, the grantor exercised her substitution power (1) to acquire all of the Frisco shares and some of the Hercules units from GRAT III in return for a $360,303,240.73 note and (2) to acquire additional units of Hercules in return for a $200,000 note.
- The first annuity payment, due on August 20, 2019, was satisfied by transferring some of the grantor's notes and some of the Hercules units to the grantor. The second annuity payment, due on August 15, 2020, was satisfied in part by transferring all the remaining assets of GRAT III to the grantor (some notes and units of Hercules). The entire second annuity payment could not be satisfied fully, and no remainder was left in GRAT III to pass to remainder beneficiaries.
- The grantor filed a 2018 gift tax return that made the split-gift election.
- The IRS mailed notices of deficiency on December 18, 2024, to the grantor and her husband, and they filed a Petition with the Tax Court on March 14, 2025. The IRS filed its Answer on July 9, 2025; the Answer provided no further explanation of the IRS's positions.

d. **Notices of Deficiency**. On December 18, 2024, notices of deficiency were mailed to grantor and her husband reporting gift tax deficiencies by the grantor and her husband in the aggregate amount of $613,859,989 and under-valuation penalties of $122,771,998, for total deficiencies of $736,631,987.

e. **Rationale for Deficiencies**. The notices of deficiencies gave very little reasons for the determination of the tax deficiencies. They gave two summary reasons: (1) the transfers to the GRATs I, II, and III were not made in returns for qualified interests under §2702 (without any explanation of why they were not qualified interests); and (2) alternatively, that the transfers of the grantor's notes to the GRATs in substitution transactions in which the grantor re-acquired interests in Frisco and Hercules that had been contributed to the GRATs were taxable gifts.

Twenty percent accuracy-related penalties were assessed under §6662 because the underpayment was due to negligence or disregard of the rules and regulations.

f. **Taxpayers' Motion for Partial Summary Judgment, Filed Oct. 1, 2025**. The taxpayers filed a motion for partial summary judgment on October 1, 2025. The motion described in detail the relevant facts of the funding and operation of the three GRATs (including the exercises of substitution powers and the use of grantor-notes to satisfy annuity amounts). The motion makes three major points in response to the contention in the Notice of Deficiency that the annuity interests were not "qualified interests" under §2702:

(i) the annuities were "qualified interests" under the unambiguous provisions of § 2702(b)(1);

(ii) given the unambiguous definition of a "qualified interest" under § 2702(b), the additional "qualified interest" requirements imposed by Treas. Reg. § 25.2702-3 are (i) irrelevant to determining whether Trisha's retained annuity interests were "qualified interests," and (ii) invalid under *Loper Bright* and related case law; and

(iii) the GRATs satisfied the "qualified interest" requirements of Treas. Reg. § 25.2702-3.

Some of the specific arguments include the following.

- Section 2702(b) describes three different ways an interest can meet the definition of a qualified interest. The first is an interest that is a fixed right to receive fixed amounts payable no less frequently than annually. The IRS conceded the GRATs satisfied that requirement, so the annuity interests were qualified interests under §2702, and "no further analysis is required."
- Regulations cannot override an unambiguous statute. [Observation: The opening line of a recent Eighth Circuit Court of Appeals case very concisely emphasizes this important principle: "Statutes trump regulations." *3M Company, and Subsidiaries v. Commissioner*, 154 F.4th 574 (8th Cir. Oct. 1, 2025).]
- The §2702 regulations are interpretive regulations issued under the general authority of §7805(a). They are valid only if they are the "best reading" of the statute.
- The regulatory requirements in Reg. §25.2702-3 are inconsistent with §2512, which says that gifts are valued on the date of their transfer. Events that postdated the funding of the GRATs (such as the reacquisition of assets using substitution powers and the GRATs' satisfaction of annuity amounts with notes they acquired from the grantor) cannot be used to determine the values of gifts under §2512.
- Furthermore, those events are not inconsistent with the regulations, which only require that the trust agreement prohibit certain events, and the trust agreements contained all of those restrictions.

- The distribution of the grantor's notes in satisfaction of annuity amounts did not violate Reg. §25.2702-3(b)(1) and (d)(6), which prohibit a GRAT from issuing its note in satisfaction of annuity amounts. "No notes were issued by any of the trusts to satisfy Trisha's retained annuity interests under Treas. Reg. §25.2702-3(b)(1)."

g. **IRS's Response to Motion for Partial Summary Judgment.** The IRS filed its Response to Motion for Partial Summary Judgment on Jan. 16, 2026 (the Response). The Response's conclusion summarized its three major points:

(i) several issues of material fact remain in dispute;

(ii) the retained interests are not qualified interests within the meaning of §2702 and Reg. §25.2702-3 based on the objective facts of the transfers and the surrounding circumstances and did not meet the definition of and function exclusively as a qualified interest from the creation of the trusts; and

(iii) the qualified interest requirements of Reg. §25.2702-3 are valid under *Loper Bright* because they are the best reading of the statute and the taxpayers' interpretation would lead to unreasonable and absurd results.

(1) **Disputed Factual Issues – A Few Observations.**

- The IRS does not stipulate the accuracy of any appraisal or valuation. [**Observation:** the IRS's Answer, filed on July 9, 2025, did not object to any of the values of the assets contributed to the GRATs.]
- One of the interesting factual observations is that the GRATs were structured as "zeroed-out" GRATs that purported to eliminate any gift tax. Planners sometimes structure GRATs intentionally to leave a few dollars of gift. The IRS in this case has raised no objection to the GRATs being structured as "zeroed-out" GRATs.
- The Response repeatedly states that the taxpayers provided no appraisal or other documentation evidencing the fair market value of the notes or demonstrating that they were worth their stated face amounts.
- **Observation**: The IRS takes essentially opposite positions as alternative arguments – that the exercises of the substitution power to acquire GRAT assets were either "withdrawals" of assets from the GRATs or were additional contributions to the GRAT because (1) the notes were worth more than the acquired assets because they had an interest rate in excess of the §7520 rate or (2) the use of the notes "to lock in the gain in the trust assets provided an additional economic benefit to the remainder beneficiaries of the trust."

(2) **Not Qualified Interests.**

- Withdrawing assets from the GRATs at will in return for unsecured notes, on which payments were never made, and using the "capital account" on her notes to pay annuity payments demonstrated that the objective facts and surrounding circumstances indicate that the retained interests were not "the fixed payment structure" that would be a qualified interest under §2702(b)(1).
- Reg. §25.2702-3(b)(1)(i) states that issuing a note, "directly or indirectly" in satisfaction of the annuity amount does not constitute payment of the annuity. The preamble to the issuance of that final regulation stated that "the step transaction doctrine will be

applied where a series of transactions is used to achieve a result that is inconsistent with the regulations."

- The Response acknowledges that the taxpayers rather than the GRAT "issued" the notes used to make the annuity payments, but "the issuance of the notes and withdrawal of the other assets of the trusts operated to cause the trust to, directly, or indirectly, satisfy the amounts in a manner prohibited by Treas. Reg. §25.2702-3(b)(1)(i)."
- Reg. §25.2702-3(b)(1)(i) says a right of withdrawal is not a qualified annuity interest. The withdrawal of GRAT assets in return for notes "functioned as a prohibited withdrawal right" that "causes Petitioner's retained interests to fail as qualified annuity interests." Response, at 85. [***Observation:*** *The IRS position seems to be that that any exercise of a substitution power to acquire GRAT assets in return for notes means the annuity interest is not a qualified interest so that the full amount transferred to the GRAT was a gift.*]
- "Here, like in *Atkinson*, it is not sufficient for Petitioner to establish trusts under the GRAT rules and then completely ignore the rules during the trusts' administration."
- Under traditional gift principles, "Commissioner may look to post-gift events to determine the substance of the transfer as of the date of the gift," and that applies to §2702.

(3) **Qualified Interest Requirements Of Reg. §25.2702-3 Are Valid Under *Loper Bright*.**

- "[T]he best reading of section 2702 is one that precludes the manipulation of value using early withdrawals to lock in gains and early terminations to capture price rebounds. Thus, the statute requires that, in form and substance, a qualified interest consists of the right to receive the statutorily required fixed payment amounts and that retained interests that are given value at the time of the transfer must reflect amounts that will *actually be paid* to the term holder."
- "A note is merely a promise to make a payment in the future," and "delaying payment by using a note to satisfy the annuity interest alters the true value of the grantor's retained interest, contrary to the statutory purpose of ensuring an accurate valuation of that interest." The regulation's prohibition of "the use of a note or other debt instrument in payment of the annuity, and the corollary provision that the use of a note or other debt instrument does not constitute payment of the annuity amount, are entirely consistent with the Congressional intent of making sure that the actual payments are consistent with the initial valuation assumptions."
- "Accordingly, the best reading of section 2702 is one that obviates the manipulation of value using (1) early withdrawals to lock in gains, and (2) early termination to capture price rebounds." Response, at 97. [***Observation:*** *Again, this is a startling position that traditional GRAT monitoring planning would cause the entire transfer to a GRAT to be a taxable gift; this statement suggests the IRS maintains that highly appreciated or depreciated GRAT assets cannot be purchased from GRATs.*]
- Section 7805 gives the IRS authority to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."

- Section 2702 does not define "fixed amounts" and does not constrain the IRS from exercising its §7805 authority to promulgate needful regulations.
- In summary, "each of the qualified interest requirements in Treas. Reg. § 25.2702-3 is in accord with the text, legislative history, and purpose of section 2702. Further, the regulation is a valid exercise of delegated rulemaking authority under section 7805(a) and constitutes a body of experience and informed judgment that is entitled to due respect."

h. **Taxpayers' Reply to IRS's Response to Motion for Partial Summary Judgment**. The taxpayers' reply was filed March 5, 2026. The arguments included the following.

- The IRS cannot rewrite §2702's clear and unambiguous plain text, which provides the "best reading" of that statutory provision.
- The IRS improperly departs from §2702's plain text to add new requirements of its own making.
- The IRS's appeals to deference cannot save its rewriting of §2702.
- The annuity interests meet §2702's textual requirements.
  - The IRS concedes that under the trust terms, the annuity interests satisfy the statutory requirements for "qualified interests" under §2702.
  - The IRS's post-valuation date, substance over form arguments are irrelevant and unavailing. The IRS's arguments, that the exercise of the power of substitution may have been an unauthorized withdrawal (if the note was not bona fide debt or if the note value was less than the value of the assets substituted) or may have been a prohibited additional contribution (if the value of the notes exceeded the value of the assets substituted), have no bearing on whether the grantor retained a qualified interest under §2702. They are independent transactions, and the IRS can make gift arguments for those specific valuation dates, but those values do not somehow "relate back" to the GRAT creation to mean the annuity interests are not "qualified interests" under §2702.
  - In response to the IRS's argument that the issuance of notes by the grantor "operated to cause the trust to, directly or indirectly, satisfy the annuity amounts in a manner prohibited by Treas. Reg. § 25.2702-3(b)(1))i)," the taxpayers respond that the regulation "merely prohibits the trustee from **issuing** a note in satisfaction of the annuity; it does not prohibit a trustee from **offsetting or discharging** a note owned by the trust in satisfaction of the annuity…. Stated another way, a trustee of a GRAT is not allowed to satisfy an annuity with a so-called 'IOU'." (emphasis in original)
  - "In the 35 years since Congress enacted § 2702, no case or IRS ruling has ever reached a conclusion consistent with the position asserted by Respondent, even though the challenged transactions have been a common estate planning technique for nearly three decades." The Reply (in footnote 8) cites three articles (the first being in 1999) stating that successful investment results can be locked in by purchasing GRAT assets in exchange for a promissory note.

i. **Planning Considerations**.

- Planning Alternative. A possible alternative to avoid the IRS's argument is for the grantor to transfer assets to the GRAT before the annuity payment date to pay off the note, and the GRAT could distribute those assets back to the grantor on the annuity payment date. Another approach is for the grantor to borrow funds from a bank to pay off the note shortly before the annuity payment is due; the cash could be used to make the upcoming annuity payment and the grantor could use the cash to pay back the bank loan.
- What to Do Going Forward? Should taxpayers use substitution transactions with GRATs in return for notes from the grantor in the future? The position being taken by the IRS is not supported by the literal words of the regulations. Some reputable firms are still advising grantors that substitution transactions in return for grantor notes do not violate the regulations but are advising them of the position being taken by the IRS.
- Political Challenges. The IRS is facing political challenges to its "aggressive and novel positions" in GRAT audits and litigation. Written questions have been submitted to Donald Korb in proceedings in the Senate Finance Committee regarding his confirmation of IRS Chief Counsel. Some of those questions have expressly addressed positions that the IRS has been taking in audits and litigation involving GRATs. Senator Cornyn (R-TX) asked:

  Legislative proposals which would curtail GRATs have been introduced but never passed into law. The IRS under the last Administration instead pursued audits and litigation to impose requirements and standards not written in the statute or Treasury regulations.

  Do you agree the IRS must follow Treasury's regulations consistent with statute and not use audits or litigation to impose novel tax theories, including in cases regarding GRATs?

  Answer: I believe that staff at both the Treasury and IRS must follow the law as written. Further, the IRS should not place unnecessary regulatory burdens on any taxpayers through audit or litigation. If confirmed, I look forward to working with you on this matter.

  Senator Daines (R-MT) asked:

  I have heard from constituents that during the Biden administration, the IRS took aggressive and novel positions challenging the use of grantor retained annuity trusts ("GRATs") driven by staff's political ideologies. It is my understanding that these positions are contrary to both the clear wording of section 2702, the statute by which GRATs are sanctioned, and the interpretive regulations issued by the Treasury Department under that statute.

  If confirmed, will you and your staff commit to enforcing the tax code by applying the laws as written by Congress?

  If confirmed, will you and your staff commit to reviewing from a fresh perspective those pending matters where the IRS is challenging the use of GRATs, to ensure that the IRS personnel in charge are correctly applying I.R.C. § 2702 and its regulations as those provisions were written and not imposing their own views on what the law should be?

  Answer: I believe that staff at both the Treasury and IRS must follow the law as written. If confirmed, I will instruct all my staff to do just that.

  United States Committee on Finance, Hearing to Consider the Nominations of Jonathan Greenstein, to be a Deputy Under Secretary of the Treasury, and Donald Korb, to be Chief Counsel of the Internal Revenue Service and an Assistant General Counsel in the Department of the Treasury (Sept. 10, 2025).

- It is interesting that GRATs have come to the attention of Senators, who are of the view that the IRS is taking aggressive and novel positions to impose their own views on what the law should be and that the new IRS Chief Counsel should review "from a fresh perspective those pending matters where the IRS is challenging the use of GRATs."

- *Loper Bright* Attack. The regulation itself might be attacked on *Loper Bright* grounds as not being the "best reading" of the statute. The IRS's Response is that the regulation is in accord with the text, legislative history, and purpose of §2702, and that the regulation is a valid exercise of delegated rulemaking authority under §7805 and constitutes a body of experience and informed judgment that is entitled to due respect.
- SWAP Transactions. Substitution transactions to acquire GRAT assets in return for a promissory note from the grantor are used routinely in various situations including (1) to obtain cash from the GRAT for the grantor to make estimated income tax payments, (2) to insulate a successful GRAT from later losses, or (3) to reacquire depreciated assets from a "losing" GRAT to re-GRAT them and hope the assets will appreciate from their depreciated values. In *Elcan*, it appears that all three reasons may have been applicable. The IRS's Response stated that the use of the notes "to lock in the gain in the trust assets provided an additional economic benefit to the remainder beneficiaries of the trust."
- Interest Rate on Notes. What interest rate should be used in substitution transactions with GRATs? The notes must represent "equivalent value" for the assets acquired from the GRAT. In *Elcan*, the parties used a commercial rate. Arguably, an interest rate equal to the AFR could be used because for gift tax purposes, a transfer in return for an AFR note is not a gift under §7872. Using too high an interest rate could be abusive (it would shift additional value to the GRAT), and the IRS could argue that it would result in an additional contribution to the GRAT, which is prohibited under the regulations. In the event the values transferred to the GRAT in the substitution transaction are determined to be excessive, the taxpayer could take the position (or the trust agreement might explicitly provide) that the excess value is held by the trustee as a constructive trustee for the benefit of the person who made the excess value transfer. (The taxpayers made that argument in *Elcan* in case the IRS should determine that the notes used an excessive interest rate.)

21. Loan of Money for Note Bearing AFR Interest Rate Is Valued at the Face Amount of the Note for Gift Tax Purposes under Section 7872 (As Long as the Loan is a Bona Fide Loan), *Estate of Galli v. Commissioner* (Tax Court Docket Nos. 7003-20 & 7005-20, April 1, 2025)

a. **Facts**. Barbara Galli loaned $2.3 million to her son in return for an unsecured 9-year balloon note, with interest at the applicable federal rate (AFR), providing for annual payments of interest with the principal being due at the end of nine years. The loan transaction was not reported on a gift tax return. The son made three annual interest payments, and the mother reported the interest as income on her income tax return. Soon after the third interest payment was made, the mother died, and her estate reported the note as having a value of $1.624 million, representing an almost 30% discount.

The IRS took the position that the initial loan resulted in a gift of $869,000 because it was not reasonably comparable to commercial loans and because of concerns about the son's ability or

intent to repay the loan. The IRS also determined that the note was undervalued on the estate tax return by $544,000.

The estate moved for summary judgment in the gift tax case and for partial summary judgment in the estate tax case.

b. **Two Separate Issues; (1) Bona Fide Loan and (2) Note Valuation**. Two separate issues arise regarding the gift tax treatment of the loan. First, is it disregarded entirely as not being a bona fide loan with a reasonable expectation of repayment so the entire transfer is a gift? Second, if that is not the case, how is the note valued?

- (1) The court's Order determines that the IRS did not plead that the loan was not bona fide, such that the entire transaction should be characterized as a gift (and even if it had, such position was not supported with adequate proof).
- (2) As to the valuation of the note, the Order concludes that §7872 governs the field of loans with below-market interest rates. The Order cites *Frazee v. Commissioner*, 98 T.C. 554 (1992), regarding whether to characterize a loan as a partial gift if it carries an interest rate below market but equal to above the AFR. It quotes the *Frazee* opinion: "[In §7872] Congress displaced the traditional fair market methodology of valuation of below-market loans by substituting a discounting methodology."

  Despite the IRS allegations that the note was unsecured and was not comparable to commercial loans, the Order concludes very succinctly that "under [section 7872], this transaction was not a gift at all."

c. **Bona Fide Loan Issue Background**. Many cases have addressed the bona fide loan issue. Some cases list nine factors that are determinative. *E.g. Miller v. Commissioner*, T.C. Memo. 1996-3, *aff'd*, 113 F.3d 1241 (9th Cir. 1997). Others list eleven factors. *E.g.*, *Estate of Moore v. Commissioner*, T.C. Memo. 2020-40. The key seems to be whether there is a reasonable expectation of repayment. Distinctions between the facts of *Galli* (treatment as a loan) and *Miller* (treatment as a gift) are the existence of a written note, charging of interest, actual payment of interest, and the existence of a repayment schedule. Some of the practical pointers include charging AFR or higher interest, using signed notes, paying interest annually, reporting loans accurately on balance sheets and tax returns, securing the loan if practical, and enforcing formalities. See Alan Gassman, Peter Farrell & Nickolas Tibbetts, *Galli: Good Galli Miss Molly Tax Court Finds That a Taxpayer's Family Loan Was Not a Gift, but That Doesn't Mean That the Applicable Federal Rate is Acceptable Between an Irrevocable Trust and Its Grantor*, LEIMBERG ESTATE PLANNING NEWSLETTER #3201 (May 5, 2025).

d. **Non-Payment Risks**. Arguments that non-payment risks should be relevant in valuing notes in loan transactions include:

- The willing buyer-willing seller test would consider all relevant factors that a hypothetical third party lender (or seller for a sales note) would consider.
- *Frazee* and *Estate of True* did not address non-payment risks. *Frazee* and *Estate of True v. Commissioner*, T.C. Memo. 2001-167, both applied §7872 in valuing notes from sale transactions, but neither of them involved non-payment risks.
- Private letter rulings have been consistent in considering non-payment risks in valuing notes received in sales transactions. *E.g.*, Letter Rulings 9535026 & 9408018.

e. **Conclusion About Note Valuation**. From a taxpayer perspective, the *Galli* Order is helpful in concluding that a note received in a sale transaction that had interest at the AFR was valued at face despite IRS arguments that its value should be discounted because of non-payment risks. This issue has been pursued by the IRS in various recent estate and gift tax examinations, and the IRS will likely continue to press this issue. For example, one such case is *Estate of Sakioka v. Commissioner*, T.C. Docket Nos. 7132-19 & 7138-19. The trial was set for Jan. 12, 2026, but the parties filed a Stipulation of Settled Issues on Dec. 22, 2025, which settled all remaining issues in the case (on terms favorable to the taxpayer).

22. Tax Risks if Exempt and Non-Exempt Trusts Created Under a Trust Agreement Have Differing Terms, Private Letter Rulings 202507003 (Feb. 14, 2025), 202507005 (Feb. 14, 2025) and 202531005 (Aug. 1, 2025)

a. **Brief Summary**. Private Letter Rulings (PLR) 202507003 (Aug. 14, 2025), 202507005 (Feb. 14, 2025)) and 202531005 (Aug. 1, 2025) raise serious tax risks associated with trusts whose terms vary depending on whether Generation-Skipping Transfer (GST) exemption is allocated.

In PLRs 202507003 and 202507005, withdrawal rights and appointment powers differ based on whether the trust portion is GST-exempt or non-exempt. The beneficiary had incremental withdrawal rights over only the non-exempt trust, had a testamentary general power of appointment over the non-exempt trust, and had a testamentary limited power of appointment over the exempt trust.

In PLR 202531005, the only differences between the exempt and non-exempt trusts were the beneficiary's testamentary powers of appointment over the trusts.

Both rulings granted an extension to allocate GST exemption but notably "express[ed] no opinion" as to whether the settlor's retained power to make a late allocation could cause inclusion in the estate under §§ 2036(a)(2) or 2038 or trigger an estate tax inclusion period (ETIP). Both of those problems could cause catastrophic tax results, meaning that trust assets would be included the grantor's estate and GST exemption would not have been effectively allocated to the trust.

b. **Trust Terms and Conclusions in the Private Letter Rulings**. In PLRs 202507003 and 202507005, withdrawal rights and appointment powers differ based on whether the trust portion is GST-exempt or non-exempt. The beneficiary had incremental withdrawal rights over only the non-exempt trust, had a testamentary general power of appointment over the non-exempt trust, and had a testamentary limited power of appointment over the exempt trust.

In PLR 202531005, the only differences between the exempt and non-exempt trusts were the beneficiary's testamentary powers of appointment over the trusts. The beneficiary had a limited power of appointment over the exempt trust (to appoint assets to the beneficiary's issue). The beneficiary had a testamentary formula power of appointment over the non-exempt trust. It was a general power of appointment, but if that "would subject the GST Non-Exempt Trust to tax at a rate greater than or equal to the rate of GST tax, then the beneficiary has a testamentary power of appointment in favor of the beneficiary's issue." Perhaps the intent was to have a general power of appointment over a portion of the non-exempt trust, but only a limited power of appointment over the portion of the trust that would otherwise be subject to

an estate tax rate greater than or equal to the GST tax rate. (That type of testamentary formula general power of appointment is often seen in trust agreements for non-exempt trusts.)

Both rulings granted an extension to allocate GST exemption but notably "express[ed] no opinion" as to whether the settlor's retained power to make a late allocation could cause inclusion in the estate under §§ 2036(a)(2) or 2038 or trigger an estate tax inclusion period (ETIP).

Interestingly, the "express no opinion" paragraph in PLRs 202507003 and 202507005 made reference only to the difference in the withdrawal rights over the exempt and non-exempt trust (not the difference in the testamentary powers of appointment over the exempt and non-exempt trusts). Did that mean the IRS was not concerned with differences in the testamentary powers of appointment? Unfortunately, that is not the case. In PLR 202531005, the only difference was the testamentary powers of appointment, and the "express no opinion" paragraph referenced "Donor's power to alter a beneficiary's testamentary power of appointment" by the ability to change the portion of the trust that exempt from GST tax through a late allocation of GST exemption.

c. **Potentially Devastating Tax Implications of These Rulings**. IRS agents may in the future make arguments that the retained power to make a late allocation of GST exemption, if the trust has differing terms for exempt and non-exempt trusts, creates:

- A potential for estate inclusion under §§ 2036(a)(2) and 2038,
- An ETIP preventing effective GST allocation until expiration of that period,
- And, possibly, an incomplete gift for gift tax purposes (the rulings do not mention the incomplete gift possibility).

These concerns stem from the settlor's ability to shift beneficial interests by choosing whether or not to allocate GST exemption and even to "undo" an election not to allocate GST exemption under a ruling request from the IRS.

This is a huge problem because tens or hundreds of thousands of trusts provide for differences in testamentary powers of appointment for exempt and non-exempt portions of the trust. Over 40 years have passed since the enactment of the GST tax, and the IRS has never previously suggested this Draconian result, implicitly acknowledging that these differences were permissible without causing catastrophic results. If the differences between exempt and non-exempt trusts cause an ETIP to apply, any allocation of GST exemption would not be effective. Many thousands of trusts that clients think are GST exempt may not be under the IRS's position.

Carol Harrington (Chicago, Illinois), one of the country's top experts on GST matters, summarizes: **"40 years of gotcha is just wrong."**

d. **Planning Considerations, Including Possible Alternatives To Mitigate These Risks**.

- Avoiding the Issue. These potential problems could be avoided by drafting the exempt and non-exempt portions of trusts to be identical (with the possible flexibility of giving someone the authority to grant general powers of appointment to beneficiaries). An alternative would be to include formula general powers of appointment in both exempt

and non-exempt trusts (but the formula would never be triggered in any exempt trusts because transfer taxes would not be reduced by the grant of a general power of appointment). Planning techniques like decanting or trust modification are possible alternatives to mitigate these risks (but a trust modification requiring the settlor's consent may require a 3-year waiting period under §2035 to avoid the §2036(a)(2) and §2038 and ETIP risks).

- Problematic Situations. Situations in which the IRS could make these arguments include (1) the donor has not allocated sufficient GST exemption to result in a zero inclusion ratio and retains the ability to make a late allocation or to seek ruling to make a timely election (even though made late), or (2) the donor opted out of an automatic allocation on the gift tax return (under §2632(b)(3) for allocations to lifetime direct skips or under §2632(c(5)(B)(i) for allocations to GST trusts) but retains the ability to seek a ruling allowing allocation of GST exemption.
- Affirmative GST Exemption Allocation. Affirmatively allocating GST exemption to a trust sufficient for the trust to have a zero inclusion ratio (so no non-exempt trust is created), should ameliorate the concern, because the IRS will not grant relief "to decrease or revoke an affirmative allocation (as opposed to an automatic allocation) of GST exemption." Preamble to Final Regulations, §26.26742-7, TD 9996 (RIN 1545-BH63) (published in Federal Register May 6, 2024). Therefore, the grantor would have no ability to shift the trust terms from the exempt to the non-exempt trust terms.
    - However, under the rationale raised by the IRS's statements in these PLRs, a grantor may be unable to allocate GST exemption to a trust with differences between the exempt and non-exempt trusts. The IRS might conceivably raise a "chicken and egg" problem. The allocation of GST exemption may resolve the inclusion issue, but the allocation may be ineffective (because of the ETIP, according to the IRS possible position). From the time the trust is funded until GST exemption is allocated, the grantor has the ability to shift beneficial interests by the decision of whether or not to allocate GST exemption. Theoretically, this means that trusts with differences between the exempt and non-exempt trusts may not have had GST exemption effectively allocated to the trust even though clients may think GST exemption was allocated to the trust to make it an exempt trust decades ago.
    - If GST exemption is allocated to the trust later, the IRS might argue that an additional three-year period of inclusion should apply under §2035(a).
- Trusts Exempt by Automatic Allocation May Still Be Subject to the Risk. If the trust is fully exempt by reason of allocation of GST exemption to a "GST trust" under the automatic allocation rules, that same reasoning may not apply because the preamble to Reg. §2642-7 suggests that the grantor may have the ability to seek later relief to decrease or revoke an automatic allocation of GST exemption. (In addition, the preamble states that "[t]he Treasury Department and the IRS will address the effect of a grant of relief on automatic allocations in future guidance to be issued under section 2642(g).") *See e.g.*, Letter Rulings 202547002 & 202547006. However, the IRS's position is that an "election in" to automatic allocation (*i.e.*, electing to treating the trust as a "GST trust") cannot be changed.

    - The IRS has issued three PLRs taking the position that a trust with a testamentary formula general power of appointment (with a power to appoint over 25% of the principal of the trust, which might suggest it is not a GST trust under §2632(c)(3)(B)(iii)) is nevertheless a GST trust because of the contingency of whether the formula general power of appointment applies. PLRs 202210010, 201925013, & 201924016. Accordingly, if GST exemption has not been affirmatively allocated to a trust with a testamentary formula general power of appointment, the donor might be able to seek a letter ruling to confirm that automatic allocation applied from when the trust was created. Even without seeking a ruling, a donor might be able to argue, under the reasoning of PLR 202210010 (as terse as that reasoning is), that the trust has always been fully exempt because GST exemption was automatically allocated, and, therefore, there would be no §2036-§2038 inclusion or ETIP.

- IRS's Future Position. There are informal indications that the IRS intend to pursue these positions in future estate audits, especially where the inclusion ratio is not zero and the donor's allocation decision alters beneficial rights. The possibility of inclusion under §2036 and §2038, the existence of an ETIP, and gift incompleteness all pose substantial risk for taxpayers with similar trust structures. But, perhaps the IRS will change its position. A planner has indicated that he anticipates receiving, before the end of the year, a ruling granting an extension to make a late allocation or ruling that automatic allocation applied to a transfer. It will be interesting to see if this additional "we express no opinion" paragraph is included in that ruling.
- Counterarguments. A strong argument to counter a possible IRS position for estate inclusion is that the decision to allocate or not allocate GST exemption is a fact of independent significance. Carol Harrington: "Just as you don't marry or have a child to shift interests in an irrevocable trust, you don't allocate GST exemption or forgo that allocation to shift interests."
    - The extent to which additional GST exemption could be allocated under an IRS ruling to allow a late allocation as if made timely should not trigger estate inclusion, because it is something the government has to grant and is not within the control of the transferor.
- Statute of Limitations. One way to cause the statute of limitations to run on the inclusion ratio of the trust is to make a small taxable distribution after transferor's death. The distribution should be reported on a Form 706(GS)D taking the position that the trust has a zero inclusion ratio. Following the later of (i) three years after the Form 706(GS)D is filed or (ii) the expiration of the period of assessment for estate taxes with respect to the on the transferor's estate, the inclusion ratio will be determined with finality. *See* Reg. §26.2642-5(b). However, that does not help for the long period of time of the trust's existence when the transferor is still alive; but this risk exists primarily for trusts for which the inclusion ratio is not zero.
- Planning Going Forward. In cases where the trust already exists, and allocation is contemplated or has not yet occurred, careful analysis should be made as to whether the gift was complete, whether the trust falls within an ETIP, and whether any allocation would be effective. Disclosure on a timely filed Form 709 remains essential to protect against an incomplete gift challenge (after the statute of limitations has run on the gift

tax return). Where possible, allocations should be structured to result in an inclusion ratio of zero, though practitioners should recognize that even this may not resolve all issues under the IRS's current reasoning.

If a trust is already in place with variable terms based on exemption status, decanting may be possible to eliminate distinctions between exempt and non-exempt portions. If the trust is reformed to mitigate the §2036/§2038 issue and ETIP issue in an action that requires the consent of the donor, estate inclusion and a continuing ETIP will exist for an additional three years because of §2035(a) (the donor will be deemed to have "relinquished a power," as described in §2035(a)(1)).

23. Portability Election Not Validly Made Because No "Complete and Properly Prepared" Estate Tax Return, *Estate of Rowland v. Commissioner*, T.C. Memo. 2025-76 (July 5, 2025)

a. **Brief Summary**. The Tax Court's decision in *Estate of Rowland v. Commissioner*, T.C. Memo. 2025-76, is a critical reminder of the strict compliance required for making a valid portability election under IRC § 2010(c). The court held that the surviving spouse's estate could not use the deceased spousal unused exclusion (DSUE) because the predeceased spouse's estate failed to timely file a "complete and properly prepared" estate tax return.

- Even though the return was filed within the two-year time window established by Rev. Proc. 2017-34 (for estates that are not otherwise required to file an estate tax return,) it did not satisfy the requirement in that Revenue Procedure of filing a "complete and properly prepared estate tax return"—specifically, it lacked detailed valuations and misapplied the relaxed reporting rule for charitable and marital deduction property.
- The return did not list values of properties passing to various individuals (other than the surviving spouse or charities). That is enough reason to conclude the estate did not file a "complete and properly prepared" return and therefore did not make the portability election.
- Furthermore, valuation information should also have been provided for marital and charitable deduction property under the facts of this case. The regulations allow a relaxed reporting requirement for marital and charitable deduction property (merely listing assets that qualify for the marital or charitable deduction but not detailed valuation information about the assets, presumably because the value of the marital or charitable deduction assets would not affect the calculation of the DSUE amount) if an estate tax return is filed solely for the purpose of making the portability election. Reg. §20.2010-2(a)(7)(ii). However, that relaxed reporting requirement does not apply to marital or charitable deduction property the value of which "relates to, affects, or is needed to determine, the value passing from the decedent to a recipient other than the recipient of the marital or charitable deduction property." *Id*. In *Rowland*, the revocable trust directed 20% of her trust to a charitable foundation and one-quarter of the gross estate (including testamentary gifts) to her husband. The remainder was distributed to other beneficiaries, including grandchildren. Therefore, the value of marital or charitable deduction property impacted the amounts passing to other beneficiaries, and the special relaxed valuation rule did not apply.
- The court also rejected the taxpayer's substantial compliance and equitable estoppel arguments. The court reasoned that the valuation reporting failures by the predeceased

decedent's estate undermined the IRS's ability to assess the DSUE election, and no affirmative misconduct by the IRS was found.

Estate of Rowland v. Commissioner, T.C. Memo. 2025-76 (July 15, 2025, Judge Urda).

b. **Basic Facts.**

- Fay Rowland died in 2016. Her gross estate was estimated at $3 million, under the $5.45 million exclusion, making an estate tax return otherwise unnecessary.
- Her revocable trust provides for a distribution of 20% of the trust estate to a charitable family foundation and "such amount … as when added to property to [the surviving husband] under my Last Will and Testament … will be equal to one-fourth of my gross estate." The remainder was distributed to other beneficiaries, including grandchildren.
- Her executor filed Form 706 late—on January 2, 2018—relying on the extended two-year timeline under Rev. Proc. 2017-34 but did not include fair market valuations for any individual assets – neither assets passing to the surviving spouse or a charity nor assets passing to other beneficiaries.
- The surviving husband died later that same month (suggesting that the planners may have rushed to prepare the return for Fay's estate after finding the surviving husband was seriously ill and his estate needed the DSUE from Fay's estate to avoid having to pay estate tax). His estate claimed the DSUE amount of $3,712,562 from Fay's estate, which the IRS later disallowed.

c. **Planning Considerations.**

- Return preparers can point to this case as an example of why it makes sense for clients to incur the expenses necessary to have a "complete and properly prepared" estate tax return to make the portability election.
- The IRS will scrutinize portability election returns to confirm they are "complete and properly prepared" returns and that all technical filing requirements are satisfied.
- Code §2010(c)(5)(B) authorizes a review of the estate of a predeceased spouse to determine the DSUE amount available to the surviving spouse even though the estate tax statute of limitations has expired for the predeceased spouse's estate. *See Sower v. Commissioner*, 149 T.C. 279 (2017); Chuck Rubin, Estate of *Sower - Audit of Predeceased Spouse Permitted for Purposes of DSUE Adjustment for Surviving Spouse's Estate*, Leimberg Estate Planning Newsletter #2588 (Oct. 5, 2017). Section 2010(c)(5)(B) and *Sower* address the determination of the DSUE *amount*, not the validity of the portability *election*. *Rowland* does not directly address whether the *election* can be questioned (because of the failure to file a "complete and properly prepared" return) even though the period of assessment of estate taxes has run against the predeceased spouse's estate, because the surviving spouse died very shortly after the predeceased spouse's return was filed (late, but within the extended relief period).
- A way to accelerate the limitations period may be for the surviving spouse to make substantial gifts using the DSUE amount. (Gifts must use the DSUE before using the donor's own exclusion amount. *See* Reg. §20.2010-1(c)(2)(iv), Ex. 4.) To assure that the period to review the DSUE amount has closed after three years, the gift presumably

would have to be sufficient to utilize all the donor's available gift exclusion amount (including the DSUE amount).

- Consider preparing the Form 706 with the same rigor as if estate tax were due, regardless of whether it is filed solely to elect portability. The extent to which a future court would overlook foot-faults under a substantial compliance doctrine is inherently uncertain.
- The extended time for filing a return to make the portability election (if the estate was not otherwise required to file an estate tax return), without the necessity of obtaining an IRS ruling, is now five years. Rev. Proc. 2022-32.
- Some portability returns require full valuation (if the plan includes marital or charitable bequests and has percentage-based bequests or residuary clauses tied to the gross estate).
- Timeliness is not enough – the return must be a "complete and properly prepared return."
- High Tax Liability Risk. In *Rowland*, the loss of the DSUE led to an added tax of approximately $1 million.
- Planners should discuss the portability election with executors of all decedents' estates.

24. Divorce Proceeding, Irrevocable Trust Created by Spouses Treated as Marital Assets Considered in Divorce Division. *C.S. v. R.H.*, 2025 N.Y. Slip Op. 51426(U) (Sept. 8, 2025)

a. **Brief Summary**. In *C.S. v. R.H.*, the New York Supreme Court faced a novel and high-stakes question: whether assets placed in irrevocable trusts—created during marriage for estate-tax planning and funded entirely with marital wealth—should be treated as marital property in a divorce.

C.S. ("Wife") and R.H. ("Husband") were married for twenty-four years and enjoyed extraordinary wealth following the $6.5 billion sale of the investment firm where Husband worked, Spear Leeds & Kellogg, to Goldman Sachs. Their net worth exceeded $120 million, leading to the creation of two irrevocable trusts in 2001—the R.H. 2001 Family Trust and the R.H. 2001 GST Trust (collectively, the "Trusts")—intended to protect and transfer wealth for their descendants while minimizing estate taxes. The GST Trust was initially funded with $1.275 million and Husband sold 99% of an LLC with $20 million of assets to the trust for an $11.63 million promissory note (reflecting a 41.5% discount because of transfer restrictions). Husband forgave portions of the note at various times. GRATs were also formed in 2001 that transferred an additional $10 million to the Trusts.

Although the trusts were formally irrevocable, the court found that Husband retained near-total control over trust assets: he could remove trustees, manage investments, and used the trust-owned homes and funds to sustain the family's lavish lifestyle. "The family living expenses and lifestyle have been paid by the Trusts since 2002, when Husband retired and stopped taking a salary." When Wife filed for divorce in 2018, Husband unilaterally removed her from all fiduciary roles, evicted her from trust-owned residences, and decanted the trusts into new Delaware structures that granted him even broader authority.

The court held that these assets—though held in trusts—were effectively part of the marital estate because Husband had never relinquished control and both parties benefited from them throughout the marriage. Consequently, the court included the full $111 million value of the trust assets in the marital estate. None of the trust assets were awarded to Wife, but the value of the trust assets was considered in dividing the marital assets, resulting in an award of all non-trust marital assets to Wife and an additional $35.8 million "distributive payment" from Husband to Wife, as well as the payment of child support.

By the time of the court's opinion, the assets of the Trusts were worth $111.2 million and the non-trust assets were worth $70.2 million, for a total value of marital assets of $181.5 million. Wife received 50% of the total $181 million marital estate, comprising transfers of non-trust assets, a $35.8 million distributive payment (to be made in equal payments over ten years), and $1.68 million in attorney's fees. She also obtained child support of $8,333 per month (retroactive for a period of 87 months, or $724,971) though no ongoing maintenance was awarded due to the size of her settlement.

The decision underscores that when a grantor retains economic benefit or control over the assets of trusts created by the grantor, those assets may be treated as marital property in divorce. Even though the trust assets may not be awarded to a spouse, they may be considered as marital property in determining a "just and proper" division of non-trust marital assets. *C.S. v. R.H.*, 2025 N.Y. Slip Op. 51426(U) (Sept. 8, 2025) (Judge Kathleen Waterman-Marshall).

b. **Central Legal Issue and Case of First Impression in New York**. The core issue was whether the court, in a divorce proceeding, could consider the value of assets placed in irrevocable trusts—funded with marital property and controlled by one spouse—as part of the marital estate for equitable distribution, without dissolving or making distributions from those trusts.

c. **Husband's Retained Control and Economic Benefit**. The court found that Husband (1) exercised unilateral authority to appoint and remove trustees and LLC managers, (2) personally directed all investment and real estate transactions, (3) used trust assets for personal and family living expenses, using the family real estate "rent free for many years" and under below-market leases in later years, and (4) was paid no salary but continued to manage trust-owned businesses. The court described Husband as the de facto trustee and held that "he never relinquished control, not even for a moment." The trusts were "embedded in the family's lifestyle."

d. **Equitable Principles**. The decision relied on two guiding principles: (1) marital property is sacrosanct, and the court must protect each spouse's equitable interest; and (2) equity treats as done that which ought to be done (Cardozo's maxim), empowering the court to treat trust assets as if they remained marital. Because Wife's contributions—raising four children, managing homes, using her gift exemption amount, and sacrificing her career—enabled Husband to build and manage the trusts, her equitable claim to treat their value as marital property was recognized even without formal ownership.

e. **Outcome and Legal Holding**. The court included the full value of trust assets ($111 million) in the marital estate for equitable distribution but did not dissolve the trusts or award trust assets to Wife. Instead, the court (1) awarded Wife with 50% of the entire $181 million estate (valued with trust and non-trust assets combined), (2) ordered transfers of real estate and investment

accounts totaling $79.9 million and a $35.8 million distributive payment (to be made in equal payments over ten years), (3) awarded $1.68 million in attorney's fees to Wife, and (4) awarded Wife child support of $8,333 per month (retroactive for a period of 87 months, or $724,971). No ongoing maintenance (alimony) was awarded because the distributive award was sufficient for Wife's future support.

f. **Planning Considerations**.

- The grantor's retained control and economic benefit for the spouses raise the risk of considering trust assets as marital assets in a property division on divorce.
- Drafting and structuring implications to maximize divorce protection: (i) use independent trustees, (ii) do not give the grantor a trustee removal power, (iii) do not give the grantor investment powers.
- Respect formalities.
- Don't inflame the divorce court judge – the divorce court judge appeared to be inflamed by actions the Husband took during the pendency of the divorce proceedings, sometimes in direct violation of court orders, finding his behavior was "unwarranted and hateful."
- Good planning gone awry.
- Section 2036 estate tax inclusion risk.

25. Distribution of Insider Stock To Satisfy GRAT Annuity Payment Is Not a "Purchase" Under the Section 16(b) Short-Swing Profits Rule If the Insider is the Grantor, Trustee, and Annuitant of the GRAT; No Mention of Existence of Swap Power in Final Order Dismissing the Case, *Nosirrah Management, LLC v. AutoZone, Inc.*, (W.D. Tenn. April 14, 2025)

a. **Facts**. William Rhodes III (Defendant) created a GRAT that gave him a power of substitution for fair consideration (generally referred to as a swap power). The plaintiff alleged that Defendant was a company insider who received distributions of stock from the GRAT in satisfaction of a required annuity payment and subsequently sold stock in the company within six months for a profit, so the profit should be disgorged under Section 16(b) of the Securities Exchange Act of 1934.

b. ***Kight* SEC No-Action Letter**. A prior SEC No-Action Letter (*Peter J. Kight*) (Oct. 16, 1997) ruled that the creation of a GRAT and subsequent return of stock to the settlor in satisfaction of annuity payments satisfied a "mere change of form and no change in pecuniary interest" exception to what constitutes a "purchase" under Section 16(b) where the individual was the settlor, trustee, and beneficiary.

c. **Initial 2024 Order**. In an Order dated November 15, 2024, the court denied summary judgment for Defendant because he had not submitted evidence that he was the settlor, trustee, and beneficiary. That Order also had confusing language suggesting that the "mere change of form" exception might not apply because of the mere existence of the swap power in the GRAT, even if the swap power is not exercised, and could somehow treat the insider as having "purchased" the stock while it was in the GRAT so that distribution of stock in satisfaction of the annuity would trigger the short-swing profits rule. That did not make sense. Carlyn McCaffrey has noted that "the gist of the Rule 16a-13 exemption is that an insider's economic position has not changed when the insider is the sole beneficiary of the GRAT and stock is

used to satisfy the insider's annuity interest. A power of substitution would not have any bearing on this central question." Nevertheless, the November 15, 2024 Order led some planners to be concerned about including swap powers in GRATs for corporate insiders.

d. **Subsequent 2025 Order**. The court entered an Order April 14, 2025, granting in part and denying in part motions for summary judgment submitted by each of the parties; it dismissed the action. The donor-insider was the sole donor, trustee and annuitant of the GRAT. The Order recognized that the plaintiff had standing to bring the action but determined that the "mere change of form and no change in pecuniary interest" exemption applied. Rule 16a-13. It states that "[a] transaction … that effects only a change in the form of beneficial ownership without changing a person's pecuniary interest in the in the subject securities shall be exempt from [Section 16(b)]." The Order separately analyzed the pecuniary interest and beneficial ownership elements of the exemption and concluded that the exemption applied. The April 14, 2025 Order made no mention of the swap power in the GRAT agreement or comment on the court's earlier hint that the mere existence of the swap power could somehow treat the insider as having "purchased" the stock while it was in the GRAT.

The April 14, 2025 Order represents a very helpful turnaround. The absence of any discussion about the swap power in the final Order ameliorates concerns of some planners about using swap powers in GRATs for insiders because of the initial Order. The case is now extremely helpful; a court order supports the notion that distributions of insider stock in satisfaction of GRAT annuity payments do not constitute "purchases" under Section 16(b), rather than merely relying on the *Kight* SEC No-Action letter as support for that position.

26. Assets of Delaware Domestic Asset Protection Trust Created by Michigan Resident Could Not Be Reached To Satisfy Michigan Judgment Against the Settlor-Beneficiary, *In the Matter of the CES 2007 Trust* (Del. Chancery Ct. Vice Chancellor Order Oct. 1, 2025, Magistrate Report May 2, 2025)

a. **Brief Summary**. A creditor sought to reach the assets of an irrevocable Delaware asset protection trust (the CES 2007 Trust) that had been created about a decade earlier by a Michigan resident at a time that Michigan did not have a domestic asset protection trust (DAPT) statute. The trust included the Grantor and others as discretionary beneficiaries. A creditor, holding a 2019 $14 million judgment from a Michigan court against the Grantor, sought to invalidate the CES 2007 Trust or its spendthrift provision, arguing the trust was a sham designed to evade payment and that the Grantor acted as a de facto trustee by managing LLCs owned by the trust. The trust, created in 2007, held 90% membership interests in three Delaware LLCs that owned Michigan and Colorado real estate. The Grantor served as manager of the LLCs and as investment advisor to the trust with the authority to give directions regarding management and investment of the trust assets, while an institutional trustee retained sole discretion over distributions.

The Senior Magistrate of the Delaware Court of Chancery filed a Report recommending dismissal of the creditor's petition. The decision found that the trust satisfied Delaware's Qualified Dispositions in Trust Act requirements: it was irrevocable; had a spendthrift clause; included a qualified Delaware trustee; and validly received "qualified dispositions." Importantly, the Court declined to equate the Grantor's role as LLC manager with being a de facto trustee and refused to pierce the LLC veil.

The Magistrate's Report was subject to *de novo* review by the Vice Chancellor, who entered an Order on October 1, 2025, dismissing the case for lack of standing. (That Order can and likely

will be appealed.) The Vice Chancellor raised the standing issue *sua sponte*. The Order noted that the creditor complained that there had been various transfers of Properties back and forth between the debtor and LLCs that were owned 90% by the trust and that the debtor was the manager of the LLCs. The Order reasoned:

> Here, the Lender lacks any type of injury that could support standing. The Lender did not loan money to the Trust; the Lender loaned money to one of [the debtor]'s entities. The Lender complains that [the debtor] and the Companies transferred properties back and forth, but that did not affect the Trust, and the Trust's assets did not change. There is no connection between the Trust and any injury that may have resulted from the transfers. Nor is there any connection between the Lender and any of the supposed problems with the Trust that the Lender identifies.

Although the Order dismissing the case did not turn on the DAPT issues, the Vice Chancellor did note that "the Report's analysis appears correct, but … [its] conclusions are technically advisory opinions."

The decision represents a notable affirmation of the viability of properly structured Delaware DAPTs. The decision reinforces the statutory integrity of properly structured Delaware DAPTs, even where the settlor is a discretionary beneficiary, exercises managerial control over trust-owned LLCs, and is not a resident of Delaware. However, the ruling does not address a possible argument that the out-of-state judgment should be enforced under the Full Faith and Credit Clause, nor does it address conflict of laws issues regarding the viability of a DAPT created by a resident of a state that did not have DAPT legislation when the trust was created, thus possibly being contrary to a strong public policy of the resident-state. *In the Matter of the CES 2007 Trust* (Del. Ch., C.A. No. 2023-0925-SEM, Vice Chancellor Order Oct. 1, 2025, Magistrate Report May 2, 2025).

b. **Planning Considerations.**

- Creditor not able to reach assets even though DAPT was created under laws of a second state (Delaware), and the debtor's resident state (Michigan) did not have a DAPT law when the trust was created
- DAPTs can own LLCs managed by the settlor, but planners should caution clients against self-serving or non-arm's-length transactions at the LLC level, as such conduct could provide grounds for veil-piercing in future cases
- Hybrid DAPTs – settlor would not be a named beneficiary of the trust, but the trust would give a third party the ability to add the settlor as a discretionary beneficiary at a later date
- SPATs – settlor is not a beneficiary but trust grants to a third power a nonfiduciary power of appointment to appoint trust assets to the settlor or to a trust for the settlor's benefit
- Full Faith and Credit Clause – *CES 2007 Trust* case does not address this issue of whether a judgment in one state will be entitled to "full faith and credit" in an enforcement action against a DAPT in another state; *In the Matter of Cleopatra Cameron Gift Trust*, 931 N.W.2d 244 (S.D. 2019), did not allow paying a child support obligation (from an out-of-state court order) from a South Dakota trust, relying on a 1998 U.S. Supreme Court case to reason that "the means of enforcing judgments does not implicate full faith and credit considerations"

- Conflict of laws issues – *CES 2007 Trust* case does not address the conflict of laws issue as to whether the law of the DAPT state where the trust is situsedor the laws of the debtor's state will apply; conflict of laws principles may suggest that the governing law selected in the trust will apply if it does not violate a strong public policy of the state with which the trust has its most significant relationship; *see* UNIFORM TRUST CODE §107; *In re Huber*, 2013 WL 2154218 (Bankr. W.D. Wash. 2013) (Washington creditor reached assets in Alaska trust because transfer was a fraudulent transfer and was voidable under §548 of Bankruptcy Act (the transfer was made with actual intent to defraud creditors); trust also held invalid under conflict of laws analysis because Washington (the debtor's state) had a strong public policy against asset protection for self-settled trusts and court applied the law of Washington rather than Alaska); *Toni I Trust v. Wacker*, 413 P.3d 1199 (Alaska 2018) (Alaska statute cannot bar a Montana creditor from bringing a claim under Montana law against a Montana debtor over property located in Montana, just because the property had been assigned to an Alaska trust; the exclusive jurisdiction provision in the Alaska DAPT statute is unconstitutional)
- Excess settlor control; de facto trustee argument – the excess settlor control and de facto trustee argument has been raised by various courts in recent years in various contexts; *e.g.*, *SEC v. Wyly* 2014 WL 4792229 (S.D.N.Y. Sept. 25, 2014) (securities law disgorgement case; court determined that the settlors controlled all decisions for the trust, by expressing their "recommendations" to trust protectors who relayed those recommendations to the trustee, who *always* did as instructed

27. California Real Estate in Nevada Trust Created by California Resident Not Protected from IRS Levies Under Conflict of Laws Principles, *United States v. Huckaby*, No. 2:23-cv-00587-DAD-JDP (E.D. Calif. March 2, 2026)

a. **Brief Summary**. Two individuals (Defendants) who were California residents transferred a California real estate property that they owned as joint tenants to a "Nevada Spendthrift Trust" in 2011 (one month after being served with an IRS levy that eventually resulted in a 2018 judgment against Defendant Huckaby). Defendants were the trust's settlors, trustees, and its sole beneficiaries during their lifetimes. The United States filed a motion for summary judgment seeking to enforce the IRS lien against the California property. Nevada has a domestic asset protection trust statute, but the Nevada trust did not satisfy the Nevada statute because there was no Nevada trustee. The court did not address the application of the Nevada statute but determined under conflict of laws principles that the law of the situs (California, where the real property was located) governed as to whether trust property could be reached by creditors. The court cited §280 of the Restatement (Second) of Conflict of Laws ("[w]hether the interest of a beneficiary of a trust or an interest in land is assignable by him and can be reached by his creditors, is determined by the law that would be applied by the courts of the situs"). California does not recognize creditor protection for self-settled trusts. The court concluded that Huckaby had a property interest in the property as the trustee and beneficiary of the trust and that, "applying California law regarding the effectiveness of a spendthrift trust in shielding property from creditors," the liens were enforceable to the extent of Defendant Huckaby's interest in the property. *United States v. Huckaby*, No. 2:23-cv-00587-DAD-JDP (E.D. Calif. March 2, 2026) (granting plaintiff's motion for summary judgment in part).

b. **Observations**.

(1) **Terrible Facts**. This was a classic bad facts case. The bad facts included that (1) the original transfer to the trust was possibly a "voidable transaction" (i.e., fraudulent conveyance), (2) Defendants were California residents, (3) Defendants were sole trustees of the trust, (4) Defendants were the sole beneficiaries of the trust, (5) the trust property subject to the foreclosure claim was real estate located in California, and (6) the creditor is the United States for a tax lien. On these facts, it is not surprising the IRS could reach the real estate in this Nevada Spendthrift Trust.

(2) **LLC Wrapper**. If the real estate had been in an LLC, the court's analysis likely would have been different because member interests in LLCs are typically treated as intangible assets personal property. The analysis would have used other conflict of laws principles than the real estate situs principle or would have considered whether the trust qualified as a domestic asset protection trust under requirements of the Nevada statute.

(3) **"Hybrid DAPTs"; "SPATs."** See Item 23.b above (in the discussion of *In the Matter of the CES 2007 Trust*) regarding structuring a trust as a "hybrid DAPT" or "SPAT," particularly when a trust in a DAPT state is being created by a resident of a state that does not have a statute protecting domestic asset protection trusts.

28. Basis Adjustment at Grantor's Death for Grantor Trust Assets, *Belmont Investments, LLC v. Commissioner,* T.C. Docket No. 14039-25 (petition filed Oct. 3, 2025) (taking a position contrary to Rev. Rul. 2023-2)

a. **Brief Synopsis of Case Facts and Issues**. Husband and Wife created an irrevocable grantor trust (the Seldin Grantor Trust) in 2002 and another in 2004 (the Grandchildren's Trust), both funded with their community property. In 2015, the Grandchildren's Trust was divided into six separate irrevocable grantor trusts for their grandchildren. The seven irrevocable grantor trusts are referred to collectively as the Grantor Trusts. The Grantor Trusts contributed various amounts to Belmont Investments, LLC (Belmont), and in December 2018, the Grantor Trusts collectively owned 91.824% of the member interests in Belmont.

Wife died on December 14, 2018. Thereafter, each trust was longer a grantor trust as to the portion contributed by her, and one-half the assets in each trust were deemed transferred by her to a non-grantor trust. Each trust remained a grantor trust for Husband as to the one-half portion contributed by him.

The trust agreements authorized the trustee to allocate assets disproportionately between trusts so long as the total value of all property owned by each Grantor Trust was divided equally. The trustee allocated the 91.824% member interest disproportionately between Husband's and Wife's portions of the trusts, allocating 65.014% to the non-grantor trusts (representing Wife's portion) and 26.810% to the continuing grantor trusts (representing Husband's portion). The trustee presumably disproportionately allocated other assets to equalize the values of Husband's and Wife's portions of the Grantor Trusts.

On its 2018 partnership income tax return, Belmont made the §754 election as a result of Wife's death. This election would adjust the basis of partnership assets attributable to the non-grantor trusts (representing Wife's portion) to reflect the adjustment in basis (if any) under §1014 of the non-grantor trusts' basis in its member interest. The 2018 return took the position that this optional basis adjustment of LLC assets was about $37.3 million.

The Grantor Trusts attributable to Wife's portion were not included in her gross estate for estate tax purposes, and Revenue Ruling 2023-2 takes the position that a basis adjustment is not available for assets in a grantor trust that are not included in the deceased grantor's gross estate. Accordingly, Belmont attached a Form 8275, Disclosure Statement, to its 2018 Form 1065 stating:

> THE PARTNERSHIP MADE AN OPTIONAL BASIS ADJUSTMENT IN 2018 DUE TO THE DEATH OF A PARTNER. THE DECEASED PARTNER HELD THE PARTNERSHIP INTEREST IN A GRANTOR TRUST FOR WHICH A BASIS ADJUSTMENT WAS MADE UNDER I.R.C. SECTION 1014. THE GRANTOR TRUST WAS AN IRREVOCABLE TRUST THAT WAS NOT INCLUDABLE IN THE ESTATE OF THE DECEDENT.

On December 20, 2018, Belmont sold land for about $12.8 million and adjusted the basis of such land by $4,623,309 (attributable to the non-grantor's trusts' pro rata portion of the land for its 65.014% interest). The basis adjustment also reduced gain reported on the installment method and increased a depreciation deduction on the 2019 Belmont income tax return as a result of the basis adjustment.

Husband exercised his substitution power on November 30, 2019, to acquire the 26.20767% member interest owned by the Seldin Grantor Trust (but not the 0.1003017% interests owned by the Grandchildren's Grantor Trusts that were treated as owned by Husband because they were grantor trusts).

Husband died on January 13, 2020, and Belmont's 2020 partnership income tax return made the §754 election to adjust the basis of partnership assets by reason of Husband's death regarding (i) the 26.20767% interest that had been acquired by Husband and that was included in his gross estate, as well as (ii) the 0.1003017% interest that was owned by Husband's portion of the Grandchildren's Grantor Trusts (and that was not included in his gross estate). (The IRS does not dispute the basis adjustment attributable to the 26.20767% interest that was included in Husband's gross estate.) The Form 8275, Disclosure Statement was attached to the 2020 partnership income tax return.

The IRS position is that the trusts do not receive a basis adjustment at the death of each respective grantor as to assets in the trusts that are not included in the decedent's gross estate. Accordingly, no optional basis adjustment of assets inside the partnership would be made relating to the member interests in the Grantor Trusts at each spouse's death, resulting in tax underpayments of about $21 million in 2018-2020.

Belmont Investments, LLC v. Commissioner, T.C. Docket No. 14039-25 (petition filed Oct. 3, 2025).

b. **Income Tax Treatment of Joint Grantor Trusts**. The treatment of a grantor trust created jointly by spouses as a result of contributing community property to the trust is unclear. During the joint lives of the grantors, the trust is treated as grantor trusts as to the portions represented by each grantor's contribution to the trust. Case law does not establish how the trust is treated for income tax purposes at the death of the first of the grantors. An alternative that is often used in practice is to divide that trust into separate equal trusts, one of which would be a non-grantor trust as to the deceased spouse's portion of the contribution, and the other would continue as a grantor trust as to the surviving spouse's portion of the contribution. That seems to be the simplest approach administratively (for both the taxpayer and the IRS), but conceivably the trust could be treated as continuing as a single trust for income tax purposes, with one-half

being reported as a non-grantor trust and one-half being reported as a grantor trust. (Some planners have referred to an analogy of cream in coffee; once mixed, the cream and coffee cannot be separated.)

If the trust is divided into separate trusts (one a non-grantor trust and the other a grantor trust as to the surviving spouse), another uncertainty is whether the assets can be divided in a non pro rata fashion in making that division. While a trust agreement may authorize a trust to allocate assets in a non pro rata manner if trusts are divided, whether that non pro rata division will be respected for federal income tax purposes is another issue. In *Belmont*, the trustee of the trusts allocated about two-thirds of the member interest in Belmont that was owned by the Grantor Trusts to the Wife's portion (which became non-grantor trusts) to increase the basis adjustment in the LLC assets if a basis adjustment is allowed under §1014 at the grantor death as to assets in the trust (even though they are not included in the grantor's gross estate).

c. **Section 1014 Background and Rev. Rul. 2023-2**.

- Section 1014 Statutory Provisions. Section 1014(a) provides generally that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent is adjusted to the fair market value at the date of death. Section 1014(b) describes seven categories of assets that "shall be considered to have been acquired from or to have passed from the decedent. (An eighth category applies for decedents dying before 2005.)

- Arguments. Some planners maintain that assets in a grantor trust should receive a basis step-up at the grantor's death because until that time the assets were deemed owned by the grantor for income tax purposes (*See* Rev. Rul. 85-13, 1985-1 C.B. 184), and after the grantor's death they are "acquired from a decedent" by someone else. *See e.g.*, Gans & Blattmachr, *Grantor Trust Assets and Section 1014: New Ruling Doesn't Solve the Problem*, J. TAX'N (Sept. 2023); Blattmachr, Gans & Jacobson, *Income Tax Effects of Termination of Grantor Trust Status by Reason of the Grantor's Death*, 97 J. TAX'N 149 (Sept. 2002); Treas. Reg. §1.1001-2(c), Ex. 5 (grantor of grantor trust was considered the owner of all trust property in a grantor trust and when grantor renounced powers that caused trust to be a grantor trust, partnership interest owned by the trust was considered to have been transferred from grantor to trust for Federal income tax purposes). Many other planners are uncomfortable with that position. *See* Austin Bramwell & Stephanie Vera, *Basis of Grantor Trust Assets at Death: What Treasury Should Do,* 160 TAX NOTES FEDERAL 793 (Aug. 6, 2018) (suggesting that §1015(b) could provide a rationale for not adjusting basis of grantor trust assets at the grantor's death).

  That argument would depend on a construction of §1041(b) as not providing an exclusive list of ways for property to be "acquired from a decedent" but as merely listing safe harbors of situations in which the property "shall be considered" to have been acquired from a decedent. One reported case has directly rejected that interpretation of §1041(b). *Collins v. United States*, 318 F. Supp. 382 (C.D. Cal. 1970), *aff'd*, 448 F.2d 787 (9th Cir. 1971).

- Political Pressure. Item 2 of the 2022-2023 Treasury-IRS Priority Guidance Plan was described as "Guidance regarding availability of §1014 basis adjustment at the death of the owner of a grantor trust described in §671 when the trust assets are not included in the owner's gross estate for estate tax purposes." That item in the 2022-2023 Plan is

apparently the IRS's response to a statement by Secretary of the Treasury Janet Yellen's in a dialogue with Representative Bill Pascrell (D-New Jersey) at a June 8, 2022, House Ways and Means Committee hearing that the IRS would be implementing guidance on the "infamous stepped-up basis loophole … Very soon. Very soon." The IRS responded by adding the issue to the Priority Guidance Plan (released November 4, 2022) and on March 29, 2023, by releasing Rev. Rul. 2023-2. This item was omitted from the 2023-2024 Priority Guidance Plan.

- Revenue Ruling 2023-2. Rev. Rul. 2023-2, IRB 2023-16 denies a basis adjustment under §1014(a) for assets gifted to an irrevocable grantor trust by completed gift that are not included in the deceased grantor's gross estate (or otherwise included in §1014(b)). This result was anticipated. The Ruling reasons in a very straightforward manner that such assets are not in any of the categories in §1014(b) that "shall be considered to have been acquired from or passed from the decedent" and therefore do not receive a basis adjustment under §1014(a). The Revenue Procedure cites a case supporting its position that only transfers described in §1014(b) qualify for a basis adjustment and that no other transfer can be considered as being "acquired from a decedent" as described in §1014(a). *Collins v. United States*, 318 F. Supp. 382 (C.D. Cal. 1970), *aff'd*, 448 F.2d 787 (9th Cir. 1971).
- Penalties. If a taxpayer wants to take the position that the IRS's position in Rev. Rul. 2023-2 is wrong, the recipient of the grantor trust asset might want to report capital gain upon the sale of the asset as if no basis adjustment applied, and then claim a refund, taking the position that a basis adjustment did apply at the death of the grantor of the grantor trust. That approach would avoid underpayment penalties if the taxpayer's position is not upheld.

  If the refund approach is not used, must the taxpayer disclose the position on Form 8275 to avoid accuracy related and understatement penalties if the position of Rev. Rul. 2023-2 is upheld? Section 6694(a) provides that such penalties may apply if the preparer knew of the position and either (a) the position is related to a tax shelter or reportable transaction, (b) the position is not disclosed and there was not substantial authority for the position, or (c) the position is disclosed but there was not a reasonable basis for the position. Whether there is substantial authority for the view that a basis adjustment applies for assets in grantor trusts at the grantor's death is uncertain. Some commentators take the position that substantial authority exists and penalties would not apply even if the position is not reported on Form 8275. *See* Alan Gassman, Kenneth Crotty, Brandon Ketron, & Peter Farrell, *Revenue Ruling 2023-2 Got It Wrong? The Case for a Stepped-Up Basis When the Grantor Dies*, LEIMBERG INCOME TAX PLANNING NEWSLETTER #244 (April 3, 2023). The taxpayer could expect strong resistance from the IRS, though, in light of the priority it has placed on this issue and the clear position it has taken in Rev. Rul. 2023-2. In *Belmont*, the partnership income tax return making the §754 election included the Form 8275 disclosure statement.

29. Income Tax Effects of Early Termination of Trust, PLR 202509010 (Released Feb. 28, 2025)

a. **Facts and Rulings Requested**. Letter Ruling 202509010 involves a trust distributing an annual annuity to a grandchild of the settlor (Grandchild) for life, and following Grandchild's death, the annuity would be paid to Grandchild's issue, per stripes. The trust would terminate on the last to die of ten individuals, including Grandchild, at which time the trust would be distributed

to Grandchild's issue, per stirpes. The parties proposed terminating the trust and paying to Grandchild and the Successor Remaindermen the actuarial value of their respective interests. At termination, the trust would be distributed in accordance with each beneficiary's actuarial value of his/her interest in the trust. The trustee could make non-pro rata distributions to satisfy the amounts passing to each beneficiary. The court approved the parties' proposed agreement, contingent upon receiving a favorable private letter ruling from the IRS.

The parties sought three rulings: (1) the termination will not cause the trust to lose is GST grandfather status, (2) no gifts will result, and (3) the termination "will cause Grandchild and the Successor Remaindermen to recognize long-term capital gain" and will cause the Current Remaindermen to recognize capital gain or loss on property exchanged "for Grandchild's and Successor Remaindermen's interests in Trust," and "the amount realized by the Current Remaindermen will be equal to the fair market value of the property transferred to Grandchild and the Successor Remaindermen as the Proposed Distribution."

The ruling granted all three rulings requested. The first two were standard rulings. The third ruling addresses the income tax effects of early trust terminations.

PLR 202509010 is similar to Letter Rulings 201932001-201932010. Some differences include that in the 2019 rulings, the current beneficiary held a mandatory income interest rather than an annuity interest, and the trusts were scheduled to terminate at the current beneficiary's death rather than continuing for current beneficiaries.

b. **Devastating Income Tax Effect**. The current beneficiary has a zero basis in his or her interest under the uniform basis rules, §1001(e)(1), so the full fair value that passes to Grandchild is long-term capital gain. (Grandchild had held his or her interest in the trust for more than one year.) The amount realized by the Successor Remaindermen is the fair market value of property transferred "to Grandchild and to the Successor Remaindermen." The ruling doesn't explicitly say so, but apparently the *gain* realized by the Successor Remaindermen upon the early termination is the amount realized (*i.e.*, the total amount received) less their respective share of the uniform basis.

   The parties could be recognizing gain equal to a substantial percentage of the entire trust value! This depends on the amount of unrealized appreciation in the trust assets and the relative value of the current beneficiary's interest (because everything the current income beneficiary receives is gain with *no* basis reduction).

c. **Authorities**. PLR 202509010 cited Rev. Rul. 72-243 and *McAllister v. Commissioner*, 157 F.2d 235 (2d Cir. 1946), *cert. denied*, 330 U.S. 826 (1947) as authority for its position. The reasoning is that the term beneficiary received a distribution in exchange for transferring the term interest to the remainder beneficiaries. That reasoning may be questionable since the beneficiaries merely received the actuarial value of their respective interests and no value shifted among them. Conceivably, the IRS might argue that the beneficiaries received "materially different" interests within the meaning of *Cottage Savings Association v. Commissioner*, 499 U.S. 554 (1991), but the PLR does not cite *Cottage Savings* and does not mention "material differences." (The gift tax portion of the ruling stated that "the beneficial interests, rights, and expectancies of the beneficiaries will be substantially the same, both before and after the termination.")

d. **Resources**. For a much more detailed of the issues, see the summary of 2019 rulings at Item 16 of Estate Planning Current Developments and Hot Topics (December 2020) found here and available at www.bessemertrust.com/for-professional-partners/advisor-insights. For an

outstanding analysis of the 2019 rulings and of the IRS's views about trust commutations, see Edwin Morrow, *Trust Modifications and Trust Terminations: Unintended Tax Consequences and How to Avoid Them*, SOUTHERN FEDERAL TAX INST. (Oct. 2025); Ladson Boyle, Howard Zaritsky & Ryan Wallace, *The Uniform Basis Rules and Terminating Interests in Trusts Early*, REAL PROP., TR. & EST. L.J. 1 (Spring 2020) (hereinafter "Boyle, Zaritsky & Wallace, Uniform Basis Rules"); Ed Morrow, *Potential Income Tax Disasters for Early Trust Terminations*, LEIMBERG ESTATE PLANNING NEWSLETTERS #2753 (October 9, 2019) (hereinafter "Morrow, Early Trust Terminations"), Steven Gorin, *Structuring Ownership of Privately-Owned Businesses: Tax and Estate Planning Implications*, ¶II.J.18 (2019) (available from author), and Douglas A. Kahn, *Gain from the Sale of an Income Interest in a Trust*, 30 VA. L. REV. 445 (2010).

30. Corporate Transparency Act, BOI Reporting Applies Only to Foreign Reporting Companies; Residential Real Estate Reporting Delayed Until March 1, 2026

a. **FinCEN Will Not Enforce for U.S. Citizens or Domestic Entities**. The FinCEN posted a press release on March 2, 2025, stating that it will not enforce any penalties or fines on U.S. citizens or domestic reporting companies or their beneficial owners. It will narrow the scope of the rule for reporting beneficial ownership information (BOI) to foreign reporting companies only. It plans to finalize rules in 2025.

b. **Constitutionality**. Various cases involving the constitutionality of the CTA are ongoing. Few if any of those cases involve foreign reporting companies. Courts have held most of these cases in abeyance pending the release of final rules by FinCEN. The first of the cases finding the CTA unconstitutional was reversed by the Eleventh Circuit. *National Small Business United v. Dept of Treasury*, No. 24-10736 (11th Cir. Dec. 16, 2025). *See* Amanda Athanasiou, *Eleventh Circuit Rejects Constitutional Challenges to CTA*, TAX NOTES TODAY (Dec. 17, 2025).

c. **Nationwide Injunction**. An interesting legal issue that has arisen is whether a district court can impose a nationwide injunction. The Supreme Court, in *Trump v. CASA, Inc.*, restricted the authority of district courts to issue nationwide injunctions.

Residential Real Estate Non-Financed Transfers. Final rules, issued on August 28, 2024, generally require that certain residential real estate transfers (including gifts or transfers for cash or using private financing) to trusts or entities must be reported to FinCEN. The rules were effective December 1, 2025, but FinCEN released an announcement on September 30, 2025, delaying the reporting requirements for residential real estate until March 1, 2026, "to provide industry with more time to comply—consistent with the Administration's agenda to reduce compliance burden." Various exceptions apply, including gifts by an individual (or an individual and his or her spouse) to a trust of which the same individual(s) are the settlor or grantor. Sales are not included in that exception. A detailed Frequently Asked Questions webpage is available on the FinCEN website, at https://www.fincen.gov/rre-faqs.

31. Challenges to Validity of Tax Regulations, Supreme Court Rejection of 40-Year Old *Chevron* Doctrine, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (June 28, 2024), and Subsequent Cases, *Bondi v. VanDerStok*, 604 U.S.458 (March 26, 2025); *Federal Communications Commission v. Consumers' Research*, 606 U.S. 656 (June 27, 2025); *3M Company v. Commissioner*, 154 F.4th 574 (8th Cir. Oct. 1, 2025)

a. ***Loper Bright*, Overruling *Chevron* Doctrine**. In this landmark case, the Supreme Court, in a major shift of approach in analyzing the validity of actions of federal agencies (including

regulations), overruled a 40-year rule announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Six justices joined in the majority opinion (written by Chief Justice Roberts). Courts will ultimately determine the "best" interpretation of the statute rather than deferring to administrative interpretations by federal agencies. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (June 28, 2024).

b. **Statutory Regulatory Authorization, §7805**. If a statute explicitly authorizes an agency to interpret or provide details about implementation of a statutory provision, courts will consider if the delegation was within constitutional limits and whether the agency acted within the scope of the delegation. Section 7805 authorizes the issuance of "all needful rules and regulations for the enforcement of" the Code. Relatively few of the transfer tax statutes include specific authorization for implementing regulations. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (June 28, 2024).

   The IRS is taking the position in *Elcan* that the authority of the IRS to provide "needful rules and regulations" in §7805 constitutes statutory authorization of the GRAT regulations.

c. **Statute of Limitations Regarding Attacks on Old Regulations**. The Supreme Court followed *Loper Bright* with an opinion several days later saying that the six-year statute of limitations "after the right of action first accrues" under 28 U. S. C. §2401(a) for claims against the United States would not bar attacks on even very old regulations as being in violation of the Administrative Procedure Act requirements for valid agency actions. The Court concluded that the six-year statute does not begin to run until a particular plaintiff is injured by agency action. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799 (July 1, 2024).

d. **Supreme Court Case Suggests that Rulemaking Authorizations Similar to §7805 May Not Support a Higher Level of Deference Than *Skidmore* Deference**. The Supreme Court considered the validity of a federal agency rule (classifying "ghost gun" kits as firearms) that was promulgated pursuant to statutory authority in the Gun Control Act that was similar to §7805. The Gun Control Act authorizes the Attorney General to prescribe "only such rules and regulations as are necessary to carry out the provisions of this chapter …" 18 U.S.C. § 926(a). The majority opinion applied a standard making reference to the "contemporary and consistent views of a coordinate branch of government" rather than greater deference that might be afforded to rules promulgated pursuant to specific grants of rulemaking authority for the implementation of a statute. *Bondi v. VanDerStok*, 604 U.S. 458 (March 26, 2025). The concurring opinion by Justice Jackson reasoned that the agency rule was consistent with delegated rulemaking authority: "Proper excess-of-authority review must focus on actual statutory boundaries, not on whether the agency's discretionary choices overlap precisely with what we, as unelected judges, would have done if we were standing in the agency's shoes."

e. **Supreme Court Holding that Nondelegation Doctrine Did Not Invalidate Administrative Rule**. In *Federal Communications Commission v. Consumers' Research*, the Fifth Circuit applied the nondelegation doctrine to void a delegation of rulemaking authority to the Federal Communications Commission. The Supreme Court reversed in a 6-3 decision, finding that Congress provided sufficiently concrete, guiding standards—such as defining beneficiaries (*e.g.*, rural areas, low-income consumers, schools, libraries), requiring services to be essential to education, public health, or public safety, and mandating affordability—to satisfy constitutional requirements. The Court also rejected challenges based on the so-called "private non-delegation" doctrine—namely, the argument that the FCC unlawfully delegated its

authority to a private entity, finding that the entity acts in a subordinate, advisory role and that the FCC retains final decision-making authority. *Federal Communications Commission v. Consumers' Research*, 606 U.S. 656 (June 27, 2025). The New York State Bar Association Tax Section Report No. 1508, *Comment on Tax Implications of* Loper Bright, (March 7. 2025), is an outstanding detailed analysis of the nondelegation doctrine and the effect of differing types of statutory regulatory delegations.

f. **First Circuit Level Case To Invalidate a Regulation Using *Loper Bright* Reasoning, "Fighting Regulations," *3M Company v. Commissioner*.** The first federal circuit court of appeals case to use the *Loper Bright* reasoning regarding the validity of a tax regulation is *3M Company v. Commissioner*, 154 F.4th 574 (8th Cir. Oct. 1, 2025), *petition and rehearing en banc and rehearing by the panel denied* (Feb. 19, 2026). The Eighth Circuit opinion reversed the Tax Court opinion, relying on *Loper Bright* to analyze its construction of §482. (The Tax Court opinion had been delivered before the Supreme Court decided *Loper Bright*.) The first three words of the *3M Company* opinion are a starkly concise summary of its reasoning: "Statutes trump regulations." Following *3M*, courts may take a much more skeptical view of "fighting regulations" that are promulgated to reverse the effect of court losses by the IRS. Such "fighting regulations" had been protected by the Supreme Court in a divided opinion, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

g. **Notable Example of *Chevron* Analysis in GRAT Case.** An example of a case rejecting a tax regulation under the *Chevron* analysis is *Walton v. Commissioner*, 115 T.C. 589 (2000), reasoning that the infamous "Example 5" in the original GRAT regulations was not a reasonable interpretation of the statute.

h. **Standard of Review Going Forward.** The *Loper Bright* Court did not make clear what standard of review would be applied going forward. The *Skidmore* case (323 U.S. 134 (1944)) before *Chevron* said courts would consider the viewpoint of an agency in light of its thoroughness, reasoning, consistency, and power to persuade. More detail about that standard for reviewing a tax regulation was provided in *National Muffler* (440 U.S. 472 (1979) (factors include whether the regulation carries out the language, origin, and purpose of the statute; if it is a substantially contemporaneous construction; manner in which it evolved; length of time it has been in effect; reliance placed on it; consistency of the Commissioner's interpretation; and degree of Congressional scrutiny of the regulation during subsequent re-enactments of the statute).

i. ***Loper Bright* May Lead to Increased Executive Branch Actions, Driving Policy Making "Into the Shadows."** Prior IRS Commissioner Danny Weurfel suggests that the Supreme Court in *Loper Bright* may have wanted to rein in the executive branch's power by its broad interpretation of implied authority under statutes, but the decision may have had the opposite effect. The executive branch may be incentivized to take direct executive actions rather than going through the regulatory rulemaking process. "The Supreme Court itself invited a recalibration of the balance between Congress and executive branch. Yet in practice, executive action seems to be rolling along as if *Loper Bright* never happened. The current trend feels less like *Chevron's* demise and more like its expansion." Danny Werfel, *Executive Branch Power Grows as Loper Bright Order Fades: Werfel*, BLOOMBERG DAILY TAX REPORT (Oct. 17, 2025).

32. Residence Sold to Son Included in Gross Estate; Transferee Liability To Find Executor Personally Liable for Estate Tax, *Estate of Spenlinhauer v. Commissioner*, T.C. Memo. 2025-134 (Dec. 30, 2025)

a. **Brief Summary**. The executor (the decedent's son) filed the estate tax return eleven years late with various errors and dubious valuations. The Court included a residence that the decedent had sold to her son in the gross estate under §2036(a)(1) because the decedent continued to live in the residence and the intra-family sale was not shown to be a bona fide sale for adequate and full consideration. The Court also sustained a multi-million-dollar estate tax deficiency and (importantly) held the executor/residuary beneficiary personally liable as a transferee after he distributed essentially all estate assets to himself. The court upheld the §6651(a)(1) failure-to-file penalty, rejecting the "reliance on an accountant" argument. Various other issues were all decided in the government's favor. *Estate of Spenlinhauer v. Commissioner*, T.C. Memo. 2025-134 (Dec. 30, 2025) (Judge Ashford).

b. **Section 2036 Inclusion of Residence That Had Been Sold**. The decedent transferred the Milton property to her son in 1998 in exchange for a promissory note, but she continued to reside in the property until her death. The court held that the property's value was includible in the gross estate under §2036(a)(1) because the decedent retained possession/enjoyment and the estate failed to establish the exception for a bona fide sale for adequate and full consideration.

   The court concluded that the sale was not a bona fide sale for adequate and full consideration because of the lack of credible payment history (the son testified that he paid less than what was required by the terms of the note) and behavior inconsistent with forming a debtor-creditor relationship. The late-life addition of a self-canceling feature where the parties could not have reasonably expected the debt would be repaid in full further suggested the lack of a legitimate debtor-creditor relationship.

c. **Failure to File Penalty Under §6651(a)(1)**. The court sustained the §6651(a)(1) addition to tax because the Form 706 was filed far beyond the extended due date, and the executor failed to show "reasonable cause." The executor argued reliance on an accountant, but the evidence showed the accountant expressly cautioned that he lacked estate tax expertise and did not prepare estate tax returns, and the executor also failed to provide key information needed to prepare the return (including an appraisal). Under those facts, reliance did not constitute reasonable cause. Other recent cases finding that reasonable cause did not exist include *Estate of Fields v. Commissioner*, T.C. Memo. 2024-90, and *Estate of Helen P. Richmond v. Commissioner,* T.C. Memo. 2014-26.

33. Other Relatively Recent Cases—Valuation, Formula, Indirect Gift, §2036-2038 Issues, Decanting, Assignment of Income, Personal Liability for Estate Tax, Loans

Each of the following cases are discussed in Estate Planning Current Development papers available at **www.bessemertrust.com/for-professional-partners/advisor-insights**.

a. *Smaldino*, T. C. Memo. 2021-127 (indirect gift; "purported" gift of LLC interest to wife followed by gift the next day from wife to trust for descendants [to use wife's exclusion])

b. *Estate of Michael Jackson*, T.C. Memo. 2021-48 (valuation of publicity rights; undervaluation penalties; tax-affecting not appropriate because taxpayer's experts had not persuaded the court that the buyers would be C corporations)

c. *Nelson*, T.C. Memo. 2020-81, *aff'd*, 17 F.4th 556 (5th Cir. 2021) (appeal: assignments were not defined value transfers based on finally determined values)

d. *Estate of Moore*, T.C. Memo. 2020-40, *aff'd* 124 AFTR 2d 2021-6604 (9th Cir. 2021) (transfer to FLP included under §2036; discussion of §2043; charitable formula transfer not recognized by Tax Court; affirmed, but on narrow grounds)

e. *Estate of Warne*, T.C. Memo. 2021-17 (valuation of majority interests in LLCs owning real estate [4% LOC & 5% LOM discounts]; charitable deduction based on values passing to each separate charity)

f. *Estate of Levine*, 158 T.C. No. 2 (2022) (intergenerational split dollar life insurance in trust; mother advanced $6.5 million for premiums; unrelated business associate controlled insurance for ILIT and he alone (not in conjunction with decedent) could terminate the split dollar arrangement early; Sections 2036, 2038 not applicable because of fiduciary duties and mere ability to amend contract was not "in conjunction with" under §§2036(a)(2) and 2038); Section 2703 not applicable)

g. *Estate of Morrissette*, T.C. Memo. 2021-60 (no §2036, 2038 or 2703; valued reimbursement rights with very little discount; undervaluation penalties applied despite reputable appraisals)

h. *Estate of Cecil v. Commissioner*, T.C. Memo. 2023-24 (2023) (tax affecting allowed in valuing S stock; marketability discounts of 19% for voting stock; 22% for 15.57% nonvoting stock; 27% for 23.36% nonvoting stock; business was valued at its going concern value with zero weight given to its asset value (roughly $15 million vs. $147 million))

i. *Sorensen v. Commissioner*, T.C. Docket 24797-18, 24798-18, 20284-19, 20285-19 (2022) (*Wandry* clause gift tax case settled)

j. *Estate of Horvitz v. Commissioner*, Dkt. No. 20409-19 (Order dated Feb. 7, 2023, Judge Gustafson) (recognition of decanting for tax purposes)

k. *Estate of Hoensheid v. Commissioner*, T.C. Memo. 2023-34 (Mar. 15, 2023); *Keefer v. U.S.*, 130 AFTR 2d 2022-5405 (N.D. Tx. August 10, 2022) (denying motion for reconsideration of Order), 130 AFTR 2d 2022-5002 (July 6, 2022) (assignment of income cases for sales soon after transfers to charity)

l. *United States v. Paulson*, 131 AFTR 2d 2023-1743 (9th Cir. May 17, 2023), *cert. denied* (U.S. Mar. 4, 2024) (No. 23-436) (personal liability for unpaid estate tax by successor trustees and beneficiaries of decedent's funded revocable trust)

m. *Schlapfer v. Commissioner,* T.C. Memo. 2023-65 (May 22, 2023) (gift tax adequate disclosure; substantial compliance analysis)

n. *M. Joseph DeMatteo v. Commissioner*, Tax Court Docket No. 3634-21 (Stipulated Decision Feb. 22, 2024) (valuation of life insurance policies)

o. *Cinader v. Commissioner*, Tax Court Docket No. 13491-22 to 13496-22 & 5245-22 (Stipulated Decision Jan. 3, 2024) (reverse split dollar life insurance)

p. *Estate of Bolles v. Commissioner*, 133 AFTR 2d 2024-1235 (9th Cir. April 1, 2024) (unpublished opinion), *aff'g per curiam*, T.C. Memo. 2020-71 (treatment of advances to son as legitimate loans vs. gifts)

q. *Huffman v. Commissioner*, T.C. Memo. 2024-12 (Jan. 31, 2024) (option agreement not recognized for gift tax purposes under §2703)

r. *Connelly v. United States*, 602 U.S. 257 (June 6, 2024) (Justice Thomas, unanimous), *aff'g* 131 AFTR 2d 2023-1902 (8th Cir. 2023), *aff'g* 128 AFTR 2d 2021-5955 (E.D. Mo. 2021) (buy sell agreement value does not fix the estate tax value; life insurance proceeds payable to corporation under corporate redemption arrangement included in estate tax value and not offset by redemption obligation)

s. *Estate of Becker v. Commissioner*, T.C. Memo. 2024-89 (Sept. 24, 2024) (step transaction doctrine discussed in connection with life insurance proceeds inclusion because of alleged lack of insurable interest)

t. *Estate of Fields v. Commissioner*, T.C. Memo 2024-90 (Sept. 26, 2024, corrected opinion issued Nov. 4, 2024) (limited partnership assets included in gross estate under §2036(a)(1) & §2036(a)(2); §2043 analysis; 20% penalty applied, reasonable clause exception not met)

u. *Pierce v. Commissioner*, T.C. Memo. 2025-29 (April 7, 2025) (tax affecting recognized, detailed analysis of determination of discount rate for discounting cash flows to present value, 5% LOC discount and 25% LOM discount)