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The Top Ten Estate Planning and Estate Tax Developments of 2020

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In an annual tradition, Ron Aucutt, Senior Fiduciary Counsel, has identified the following as the top ten estate planning and estate tax developments of 2020. Ron is a past president of The American College of Trust and Estate Counsel; he has been an observer and frequent participant in the formation of tax policy and regulatory and interpretive guidance in Washington, D.C.; and he is the editor of the Recent Developments materials that are presented each year at the Heckerling Institute on Estate Planning.

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Number Ten: Hazards of Death-Bed Planning and of Post-Opinion Analysis (*Moore*)

Estate of Moore v. Commissioner, T.C. Memo. 2020-40 (April 7, 2020), turns a spotlight on deathbed planning with many issues. This discussion will look at just a few of them.

Facts. In September 2004 the decedent began negotiating to sell his farm in Arizona to an unrelated third party. In December 2004, before the negotiations were completed, he had a heart attack and was told by a hospice doctor that he had less than six months to live, and in fact he died at the end of March 2005. But by the end of 2004, he had created a family limited partnership, a charitable foundation, and a series of trusts, in pursuit of goals the court summarized as showing "that he was focused primarily on maintaining *control* and eliminating his estate tax" (emphasis is the court's). He then completed the negotiation of the sale of the farm for about $16.5 million (retaining the right to live on the farm and work it), but before the sale closed in February 2005 he had transferred a four-fifths interest in the farm to the FLP in return for a 95% limited partner interest. A trust (with two of the decedent's children as co-trustees) was the 1% general partner, but the decedent exercised practical control over the FLP and caused the FLP to transfer $2 million of the farm sale proceeds to himself, $2 million to his children (in exchange for their promissory notes), and $500,000 to a grandson as a gift.

The decedent subsequently gave $500,000 to an irrevocable trust for his children and several weeks later transferred his 95% limited partnership interest to that trust for a $500,000 cash down payment and a $4.8 million note (the gift and sale amount reflecting a discount of just over 50% for the FLP interest).

The decedent's revocable trust provided a formula transfer to a charitable lead trust in an amount to "result in the least possible federal estate tax." In addition, the irrevocable trust provided that the trustee would distribute to the revocable trust "the value of any asset of this trust which is includible in my gross estate." Following the decedent's death, the charitable lead trust apparently was funded with a substantial amount under the revocable trust's formula transfer.

An IRS examination resulted in alleged deficiencies of more than $1.3 million in gift taxes and nearly $6.4 million in estate taxes.

Holdings. Not surprisingly, Judge Holmes determined that the value of the farm was included in the decedent's gross estate under section 2036(a)(1). The bona fide sale for full consideration exception in section 2036(a) did not apply because no businesses required active management, the children did not manage the farm sale proceeds in the FLP, no legitimate creditor concerns existed, and the "whole plan" involving the FLP had a "testamentary essence." The decedent retained enjoyment or possession of the assets transferred to the FLP under section 2036(a)(1) (at least by implied agreement) because, although he had kept sufficient assets for personal needs, he instead "scooped into FLP assets to pay personal expenses," and his relationship to the assets remained unchanged after the transfer to the FLP.

Judge Holmes refused to respect the payments to the children as loans because there was no payment schedule and no evidence the children had resources to pay, the children never made payments, and the FLP never made any effort to collect. Additional gift taxes from treating the loans as gifts were included in the gross estate under section 2035(b). A flat fee of $475,000 for attorney's fees was not allowed as a deduction because the evidence did not establish what services were performed for the fee and that it was necessarily incurred in the administration of the estate.

Judge Holmes followed up on the discussion of section 2043 in *Estate of Powell v. Commissioner*, 148 T.C. 392 (2017) (reviewed by the Court), of which he stated: "We discovered and analyzed there, apparently for the first time, section 2043(a) of the Code as it applies to family limited partnerships." Judge Holmes offered his own lengthy analysis, but on the facts of *Moore* (particularly with the decedent dying so soon there had been little opportunity for changes in values), the application of section 2043 had little practical impact.

Judge Holmes also refused to allow any additional charitable deduction under the "least possible federal estate tax" formula transfer provision in the irrevocable trust as a result of the inclusion of the value of the farm in the gross estate because (1) specific wording in the formula limited any transfer, and (2) the charitable amount was not ascertainable at the decedent's death but depended on subsequent events (the IRS audit and tax litigation). He distinguished *Estate of Christiansen v. Commissioner*, 586 F.3d 1061 (8th Cir. 2009), *aff'g* 130 T.C. 1 (2008) (reviewed by the Court) (approving a formula disclaimer in favor of charity) and *Estate of Petter v.*

Commissioner, 653 F.3d 1012 (9th Cir. 2011), *aff'g* T.C. Memo. 2009-280 (approving a defined value clause, with the excess going to charity), "where we knew the charity would get some transfer of value, just not how much. Here, we *don't know* if the charity would get any additional assets at all" (emphasis is the court's).

Comment. Although it is easy to understand the application of section 2036 to the four-fifths interest in the farm the decedent transferred to the FLP, Judge Holmes seems to have applied it to the entire value of the farm, even the one-fifth interest the decedent sold outright to the unrelated buyer, which presumably met the bona fide sale exception of section 2036(a), possibly even including the decedent's retention of a right to live on the farm and work it. There is no explanation of that. Nevertheless, like the section 2043 discussion, it made little or no difference because the decedent died before there had been significant changes in values.

As for section 2043, estate planners are no doubt frustrated to see this come up again, after entertaining the hopeful view that its discussion in *Powell* might have been a one-off aberration, despite the fact, for example, that Professor Jeff Pennell has been warning us about it for decades. *See*, *e.g.*, Jeffrey Pennell, "Recent Wealth Transfer Developments," ABA Real Prop., Prob. & Tr. Law Section 14th Ann. Est. Pl. Symposium, at 21-23 (2003). Section 2043(a), which has not been changed since it appeared in the Revenue Act of 1926, just doesn't seem to fit very well in the context of transfers of interests in entities or an ongoing series of transfers. But *Moore* may be an indication that it is not going to be overlooked.

Likewise, it is frustrating to see a charitable disposition described with reference to the "least possible federal estate tax" rejected. Haven't such charitable formulas, as well as marital formulas, been used successfully forever? What does the opinion mean when it distinguishes cases "where we knew the charity would get some transfer of value, just not how much. Here, we *don't know* if the charity would get any additional assets at all"? It seems to compare "some transfer" in the first sentence with "any additional assets" in the second sentence, but the insertion of the word "additional" messes up that comparison and begs the question, particularly when the opinion also reports that the IRS's notice of deficiency itself allowed an estate tax deduction of $516,000 for a transfer to the charitable trust – that is, "some transfer of value."

On the other hand, it is encouraging to see Judge Holmes distinguish, not question, the effectiveness of the formulas in *Christiansen* and *Petter*, indicating that he continues to view those precedents as sound. This is especially important in light of the fact that Judge Holmes himself wrote the *Christiansen* and *Petter* opinions, and he of all people would have known the difference. (*Christiansen* and *Petter* will be discussed again, in a different context, in Number Three below.)

The explanation probably lies in the details of the Moore estate plan structure, reflected in the opinion's reference, noted above, to two reasons for rejecting an additional charitable deduction. In elaborating the first reason, the opinion states:

> There are two problems for the estate here. The first is a very specific problem in the actual language of the Irrevocable Trust, which doesn't speak of increased value, but instead speaks of "an amount equal to the value of any asset *of this trust* which is includible in my gross estate for federal estate tax purposes" (emphasis added [by the court]). The asset's value that we find is includible in Moore's gross estate is his farm, and his farm is not an asset of the Irrevocable Trust—it's an asset of the [buyers] now and was in part an asset of the FLP. All the Irrevocable Trust owns is a large chunk of that FLP, not that partnership's assets.

In other words, the estate planning documents just didn't reflect the unfolding pattern of ownership of the decedent's assets.

In his typical thought-provoking style, Judge Holmes revealed his skepticism about the decedent's death-bed flurry of planning in the first two paragraphs of his opinion:

> Howard Moore was born into rural poverty but over a long life built a thriving and very lucrative farm in Arizona. In September 2004 he began negotiating its sale, but his health went bad. He was released from the hospital and entered hospice care by the end of that year.
>
> Then he began to plan his estate.

So viewed, it is easy to see why Judge Holmes would view the estate plan as imperfect, not just in its ultimate failure to avoid estate tax while maintaining the decedent's complete control, but in the details supporting the elements relied on to achieve that goal. Therefore, it is entirely plausible that there were glitches – or at least Judge Holmes saw glitches – that prevented those elements from succeeding. Put another way, there had to be back stories, not evident on the face of the opinion, that affect the results. We just don't know.

That may be the most important takeaway from *Moore*. When a court's opinion seems a little off, it may be for reasons we do not see. While we should always be wary, we do not have to assume the worst, unless the judge clearly tells us to. It is not just that bad facts make bad law. Sometimes bad facts mean that no law is made at all.

Mr. Moore's executor and trustee filed notices of appeal to the Court of Appeals for the Ninth Circuit on September 28, 2020.

Number Nine: Assignment of Income Avoided on Charitable Donation of Stock (*Dickinson*)

Facts. In *Dickinson v. Commissioner*, T.C. Memo. 2020-128 (Sept. 3, 2020), a shareholder and chief financial officer of a privately held consulting and engineering company donated stock to Fidelity Investments Charitable Gift Fund in 2013, 2014, and 2015. Each donation followed a grant of authority of the Board of Directors that acknowledged that Fidelity, pursuant to its policies regarding nonmarketable securities, would promptly tender the stock for redemption for cash. And that's what Fidelity did. The IRS asserted that the donor was liable for income tax on the redemption, treating the donation followed by a redemption for cash as in substance the same as a redemption followed by a donation of cash.

Holding. Judge Greaves disagreed and, in summary judgment, fully upheld the taxpayer's choice of ordering. Citing *Humacid Co. v. Commissioner*, 42 T.C. 894, 913 (1964), and other cases, he noted that "we respect the form of this kind of transaction if the donor (1) gives the property away absolutely and parts with title thereto (2) before the property gives rise to income by way of a sale." He added that "[w]here a donee redeems shares shortly after a donation, the assignment of income doctrine applies only if the redemption was practically certain to occur at the time of the gift, and would have occurred whether the shareholder made the gift or not."

Judge Greaves declined to follow the "bright-line" test of Rev. Rul. 78-197, 1978-1 C.B. 83, that finds recognition of income "only if the donee is legally bound, or can be compelled by the corporation, to surrender the shares for redemption," which he said "[t]his Court has not adopted."

Comment. The court's refusal to adopt a bright-line test could be unsettling, because it appears to leave us with the blurry alternative of "if the redemption was practically certain to occur at the time of the gift." That test would probably have been met in *Dickinson*, because of Fidelity's policies and the company's acknowledgment of them. But, more importantly, the court's use of this arguably subjective test is coupled – by the word "and" – with the test of "if the redemption … would have occurred whether the shareholder made the gift or not." In other words, this analysis should leave no cause for concern about a typical, perhaps recurring, donation of stock of an ongoing corporation, when there would have been no redemption in the absence of the gift. *Dickinson* offers less comfort for the case of, for example, a scheduled liquidation, or even a scheduled partial buy-back of shares, which a shareholder tries to beat by making a charitable donation.

The court's summary of the background facts includes this observation:

> For each stock donation, petitioner husband signed a letter of understanding (LOU) to Fidelity, indicating that the transferred stock was "exclusively owned and controlled by Fidelity", and that Fidelity "maintains full discretion over all conditions of any subsequent sale" of the stock and "is not and will not be under any obligation to redeem, sell, or otherwise transfer" the stock. Petitioners received confirmation letters from Fidelity, which explained that Fidelity had "exclusive legal control over the contributed asset".

Such documentation could be a helpful template for similar donations.

Number Eight: Revenue Ruling 85-13 Applied to Transfers Between Trusts (PLR 202022002)

Facts. In Letter Ruling 202022002 (issued Feb. 25, 2020; released May 29, 2020), A (not the grantor) could withdraw all assets of Trust 1 except certain LLC interests. Trust 1 transferred to Subtrust some of those LLC interests, which became the only assets of Subtrust. In addition, Trust 2 "is a grantor trust with respect to A"; no details are given about the features of Trust 2 that make it a grantor trust.

Subtrust proposed to sell its LLC interest to Trust 2 for cash and a promissory note. After such a sale, A would have the right to withdraw from Subtrust all of its assets, because those assets would then be the cash and promissory note received in the sale, not the LLC interests excepted from the withdrawal right. A would

thereby be treated as the owner of both of these trusts – of Subtrust under section 678 of the Internal Revenue Code and of Trust 2 under some provision of sections 673-677.

The Ruling. The ruling concluded that "[c]onsequently, the transfer of the LLC interests to Trust 2 is not recognized as a sale for federal income tax purposes because Trust 2 and Subtrust are both wholly owned by A." It cited Rev. Rul. 85-13, 1985-1 C.B. 184, for the proposition that "the owner of a grantor trust is not merely taxable on a trust's income, but is treated as the owner of the trust's assets for federal income tax purposes." (Interestingly, in both Subtrust in this ruling and the trust in Rev. Rul. 85-13, the trust did not start out as a deemed-owned trust. It was the sale that made it a deemed-owned trust.)

Comment. The immediate consequence of grantor trust status (or deemed-owned status under section 678) is simple – the grantor or deemed owner is taxed on the trust's income. But there sometimes still is reluctance to assume that all transactions with the trust are therefore necessarily ignored. After all, Rev. Rul. 85-13 itself could not reach the result it did without repudiating a recent opinion, written by a highly respected judge, involving "a transaction that is in substance identical," *Rothstein v. United States*, 735 F.2d 704 (2d Cir. 1984, Judge Henry Friendly). Because of that reluctance, it is helpful to have this confirmation, even if it is just a letter ruling. The ruling, for example, takes this confirmation a step beyond Letter Ruling 201633021 (issued April 29, 2016; released Aug. 12, 2016; one trust owned by another) and Rev. Rul. 2007-13, 2007-1 C.B. 684 (two grantor trusts owned by the same grantor).

But also because of that understandable reluctance to jump from a taxed-on-income assumption to a disregarded-for-all-purposes assurance, it should probably not be assumed that the conclusion in this ruling would apply, for example, to a Beneficiary Defective Inheritor's Trust ("BDIT") (beneficiary can withdraw only the initial contribution), and maybe not even to a Beneficiary Defective Owned Trust ("BDOT") (beneficiary can withdraw only income).

Number Seven: Section 2703 Substantial Modification Rules Applied (PLR 202014006)

In 25 substantially identical letter rulings on the same set of facts, released in 2020, the IRS provided helpful insights on its view of the effective date rules for section 2703. Specifically, the IRS ruled that neither the past transactions and events nor the proposed actions described in the ruling request would be "substantial modifications" that would cause a pre-section 2703 stock restriction to lose its grandfathered protection and be disregarded under section 2703(a). Letter Rulings 202014006-010 (issued Oct. 16, 2019; released April 3, 2020); 202015004-013 (issued Oct. 16, 2019; released April 10, 2020); 202017001-006 & 011-014 (issued Oct. 16, 2019; released April 24, 2020).

Transactions and Events Before October 8, 1990. In these rulings, prior to October 8, 1990 (the effective date of section 2703 is October 9, 1990), a shareholders' agreement gave a corporation a right of first refusal to buy shares pursuant to a formula clause or at a price fixed by all the shareholders, paid in ten annual installments. The parties to the shareholders' agreement were the two parents (the First Generation), their three daughters (the Second Generation), trusts for the benefit of each daughter (also assigned to the Second Generation), and trusts for the benefit of each of their six grandchildren (assigned to the Third Generation). Subsequently, but still before October 8, 1990, a trust created for a seventh grandchild was funded with stock subject to the agreement.

Transactions and Events Since October 8, 1990. The IRS counted nine transactions or events since October 8, 1990, that were treated as adding new parties to the agreement, including the deaths of the First Generation, distributions by reason of their deaths, and the creation of new generation-skipping trusts by the Second Generation for the initial benefit of the Third Generation.

Currently Proposed Transactions. The board of directors of the company proposed a recapitalization (comparable to a stock split), in which each share of common stock would be exchanged for one share of voting common stock and a specified (redacted) number of shares of nonvoting stock. It was also proposed that after the recapitalization the Second Generation would transfer nonvoting shares to the generation-skipping trusts they had created. The objective of the recapitalization was stated as: "So that newly issued voting stock in Company can thereafter be primarily held by shareholders who are active in the management of Company." The voting interests of the trusts would not be eliminated, but by transferring new nonvoting

shares to those trusts the voting control, viewed as a proportion of all equity, would be more heavily concentrated in the transferors.

The Rulings. Section 2703 requires that "for purposes of [estate, gift, and generation-skipping transfer taxes], the value of any property shall be determined without regard to (1) any option, agreement, or other right to acquire or use the property at a price less than the fair market value of the property (without regard to such option, agreement, or right), or (2) any restriction on the right to sell or use such property. It was added to the Code by section 11602(a) of the Omnibus Budget Reconciliation Act of 1990. Section 11602(e)(1)(A)(ii) of the Act provides that section 2703 applies to "agreements, options, rights, or restrictions entered into or granted after October 8, 1990" or "which are substantially modified after October 8, 1990." The concept of a "substantial modification" is elaborated in Reg. §25.2703-1(c), which was finalized in January 1992. Section 25.2703-1(c)(1) provides, in part:

> The addition of any family member as a party to a right or restriction (including by reason of a transfer of property that subjects the transferee family member to a right or restriction with respect to the transferred property) is considered a substantial modification unless the addition is mandatory under the terms of the right or restriction or the added family member is assigned to a generation (determined under the rules of section 2651 of the Internal Revenue Code) no lower than the lowest generation occupied by individuals already party to the right or restriction.

Applying those standards, which are very much like and explicitly incorporate the familiar standards applied very often in GST tax rulings, the rulings concluded:

- No family member previously added as a party to the shareholders' agreement is assigned to a lower generation than were the parties to the agreement before October 8, 1990. Therefore, there has been no "substantial modification" of the pre-October 8, 1990, agreement.
- Shareholders will receive in the recapitalization nonvoting common stock pro rata to their holdings of common stock. Therefore, the recapitalization will not be a "substantial modification."
- No family member proposed to be added as a party to the shareholders' agreement is assigned to a lower generation than were the parties to the agreement before October 8, 1990. Therefore, the proposed transfers after the recapitalization will not cause a "substantial modification."

Comment: These rulings are interesting partly because section 2703 rulings are relatively rare (compared to GST tax rulings, for example), but mostly because of the way they clean up the past as well as approve the proposed transaction for the future. (For example, Letter Ruling 201536009 (issued April 16, 2015; released Sept. 4, 2015) favorably addressed a proposed stock split, but not in the context of previous and proposed transfers.) Whether the issue is chapter 14, the GST tax, or something else, when contemplating a transaction for which a letter ruling would be helpful, it is important to review what has gone before that the IRS might bring up, and then deal with it proactively. The mere complexity of dealing with so many transactions over such a long period of time might seem as if it would be off-putting for the IRS. But if handled proactively, comprehensively, and well – which seems to have been the case here – these rulings confirm that the IRS is willing to help. From the date of the ruling request (May 10, 2019), it took barely five months to get these 25 rulings. (Presumably there were so many rulings because there was one for each individual and trust that was a shareholder.)

Number Six: Crunch Time for Syndicated Conservation Easements

This is not the first time conservation easements have been in the Top Ten. In the Top Ten of 2012, Number Eight reported 16 decided cases on various subjects. In the Top Ten of 2017, Number Ten reported 11 decided cases, plus Notice 2017-10, 2017-4 I.R.B. 544, which identified syndicated partnership "conservation easement transactions that purport to give investors the opportunity to obtain charitable contribution deductions in amounts that significantly exceed the amount invested" as "listed transactions" requiring reporting by taxpayers, other participants, investors, and advisors under sections 6111 and 6112. This year has brought a surge of developments involving the public interest in conservation, administrative procedure, valuation, penalties, disclosure of tax return information, criminal tax fraud, and professional malpractice.

Twenty-Six Decided Cases in 2020

Appellate Courts. The Sixth Circuit affirmed the Tax Court's disallowance of an historic façade easement because the easement was not "protected in perpetuity." *Hoffman Properties II, LP v. Commissioner*, 956 F.3d 832, 125 AFTR 2d 2020-1708, *petition for rehearing en banc denied*, 125 AFTR 2d 2020-2485 (6th Cir. 2020).

The Eleventh Circuit reversed the Tax Court's determination that a taxpayer was not allowed a deduction for a conservation easement over property that included a private golf course and undeveloped land. *Champions Retreat Golf Founders, LLC v. Commissioner*, 959 F.3d 1033, 125 AFTR 2d 2020-2057 (11th Cir. 2020), *vac'g and rem'g* T.C. Memo. 2018-146.

Pine Mountain Preserve. In a very important case to keep watching, the Court of Appeals for the Eleventh Circuit gave a victory to the taxpayer by reversing the Tax Court's holding that two of three challenged easements were not "**granted** in perpetuity" under section 170(h)(2)(C). The appellate court also sided with the taxpayer in affirming the Tax Court's holding that the third easement satisfied the "**protected** in perpetuity" requirement of section 170(h)(5)(A), although it rejected the Tax Court's "split the baby" determination of the value of that allowed easement. *Pine Mountain Preserve, LLP v. Commissioner*, 126 AFTR 2d 2020-6617 (11th Cir. 2020), *aff'g in part, rev'g in part, and vacating and remanding* 151 T.C. 247 (2018) (reviewed by the Court) and T.C. Memo. 2018-214.

In addition to reconsidering the value of the third easement, the Tax Court must now address the issue of whether the first two easements also satisfy section 170(h)(5)(A)'s "**protected** in perpetuity" requirement, as elaborated in Reg. §1.170A-14(g). This requirement was a principal focus of an eye-opening amicus brief submitted in October 2019 by five law professors, a land trust accreditation commissioner, and a member of the Uniform Law Commission's drafting committee for the Uniform Conservation Easement Act approved by the ULC in 1981. Among other things, the brief tied the "protected in perpetuity" requirement to the skepticism of partial-interest donations Congress showed in the Tax Reform Act of 1969, and in doing so demonstrated that the requirement constrains both parties to a conservation easement, the donor and the donee tax-exempt organization, in effect treating the public as an indispensable third party. Therefore, the brief emphasized, "deductible easements are not mere contracts" that the parties are free to amend.

The Eleventh Circuit seems to have missed that point, resting its 512-word analysis of that issue on the propositions that "a bilateral contract … is all a conservation easement is" and "[i]t is (literally) hornbook contract law that contracting parties are free to amend their agreements after the fact." Much now turns on how the Tax Court on remand treats this fundamental difference of perspective regarding the origin, purpose, and role of section 170(h)(5)(A).

Tax Court. Two "regular" "reviewed" decisions in 2020 revealed divisions on the Tax Court. In *Belair Woods, LLC v. Commissioner*, 154 T.C. 1 (2020) (reviewed by the Court), a divided court upheld the imposition of a penalty against procedural objections.

In *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. No. 10 (reviewed by the Court) (*notices of appeal to 6th Cir. filed* Oct. 16, 2020, by the taxpayer and Nov. 12, 2020, by the IRS), with Judge Holmes dissenting and four other judges concurring in only part of the majority's reasoning, the majority held that Reg. §1.170A-14(g)(6)(ii), covering judicial extinguishment of easements and allocation of the resulting proceeds, is valid under the two-part test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Oakbrook* opinion provides a good summary of the history of the regulations governing charitable contributions for conservation easements. Regarding penalties, see Chief Counsel Advice 202044009 (issued Oct. 23, 2020; released Oct. 30, 2020) and 202044010 (issued Oct. 5, 2020; released Oct. 30, 2020) (both elaborating the "clear and convincing evidence" standard for determining a fraud penalty and the allocation of the penalty between a partnership and its partners).

Meanwhile, 18 Tax Court decisions (many of them citing the full-court decisions in *Belair* and *Oakbrook*) rejected easements (many in "syndicated" entity contexts) as not "protected in perpetuity," as required by section 170(h)(5)(A) and Reg. §1.170A-14(g), especially §1.170A-14(g)(6)(ii). *Carter v. Commissioner*, T.C. Memo. 2020-21, *notices of appeal to 11th Cir. filed* June 10, 2020, by the taxpayer and Sept. 3, 2020, by the IRS; *Railroad Holdings, LLC v. Commissioner*, T.C. Memo. 2020-22; *Oakhill Woods, LLC v. Commissioner*, T.C. Memo. 2020-24, *supplemented by* Order, Dkt. No. 26557-17 (July 14, 2020); *Oakbrook Land Holdings, LLC v.*

Commissioner, T.C. Memo. 2020-54 (issued contemporaneously with the full-court opinion noted above), *notices of appeal to 6th Cir, filed* Oct. 16, 2020, by the taxpayer and Nov. 12, 2020, by the IRS; *Woodland Property Holdings, LLC v. Commissioner*, T.C. Memo. 2020-55; *Hewitt v. Commissioner*, T.C. Memo. 2020-89; *Plateau Holdings LLC v. Commissioner*, T.C. Memo. 2020-93; *Lumpkin One Five Six LLC v. Commissioner*, T.C. Memo. 2020-94, *taxpayer's motion for reconsideration denied* Sept. 14, 2020; *Lumpkin HC LLC v. Commissioner*, T.C. Memo. 2020-95, *taxpayer's motion for reconsideration denied* Sept. 14, 2020; *Village at Effingham v. Commissioner*, T.C. Memo. 2020-102; *Riverside Place LLC v. Commissioner*, T.C. Memo. 2020-103; *Maple Landing, LLC v. Commissioner*, T.C. Memo. 2020-104; *Englewood Place, LLC v. Commissioner*, T.C. Memo. 2020-105 (and also the taxpayer had not provided cost basis information on the appraisal summary (Form 8283) attached to its income tax return); *Smith Lake LLC v. Commissioner*, T.C. Memo. 2020-107; *Belair Woods, LLC v. Commissioner*, T.C. Memo. 2020-112, *taxpayer's motion for reconsideration denied* Nov. 10, 2020; *Cottonwood Place, LLC v. Commissioner*, T.C. Memo. 2020-115; *Red Oak Estates, LLC v. Commissioner*, T.C. Memo. 2020-116; *Glade Creek Partners LLC v. Commissioner*, T.C. Memo. 2020-148.

One other case could not be decided on summary judgment without further factual development. *Oconee Landing Property, LLC v. Commissioner*, Order, Dkt. No. 11814-19 (Aug. 18, 2920).

In three cases the Tax Court determined the value of easements (not in syndicated entity contexts). *Johnson v. Commissioner*, T.C. Memo. 2020-79; *Kissling v. Commissioner*, T.C. Memo. 2020-153 (involving an historic façade easements); *Kumar v. Commissioner*, T.C. Memo. 2020-159.

Fakiris v. Commissioner, T.C. Memo. 2020-157, supplemented T.C. Memo. 2017-125 with respect to the court's refusal to impose a penalty.

Many more cases are pending.

Other Court Proceedings. Meanwhile, a federal district court upheld the IRS's enforcement of a second summons it had issued to replace a summons that apparently had misstated a bank loan number. *Gretsch Stone LLC v. United States*, No. 3:20-mc-00002 (M.D. Ga. 2020). (On a somewhat related subject, Chief Counsel Notice 2020-8 (Sept. 8, 2020) elaborated the permissible disclosures of third-part tax information the IRS might obtain in its audits of syndicated conservation easement transactions.)

The Government has also sued promoters of suspected abusive tax shelter/conservation easement syndication schemes. *See United States v. Zak*, 124 AFTR 2d 2019-6993; 126 AFTR 2d 2020-5847; 126 AFTR 2d 2020-6854 (N.D. Ga. 2020). A Department of Justice news release on December 21, 2020, reported guilty pleas by two accountants in the first criminal case involving conservation easements and tax fraud. And private class action lawsuits have been brought against easement promoters and their advisers, including lawyers, accountants, and appraisers.

IRS Settlement Initiative. In News Release 2020-130 (June 25, 2020), the IRS announced a rather tough "time-limited settlement offer to certain taxpayers with pending docketed Tax Court cases involving syndicated conservation easement transactions." The news release added that taxpayers eligible for the offer would be notified by mail and identified the following "key terms" of such settlements:

> The deduction for the contributed easement is disallowed in full.
>
> All partners must agree to settle, and the partnership must pay the full amount of tax, penalties and interest before settlement. [News Release 2020-196 (Aug. 31, 2020) elaborated: "If less than all the partners agree to settle, the IRS may settle with those partners but will normally impose less favorable terms on the settling partners."]
>
> "Investor" partners can deduct their cost of acquiring their partnership interests and pay a reduced penalty of 10 to 20% depending on the ratio of the deduction claimed to partnership investment.
>
> Partners who provided services in connection with ANY Syndicated Conservation Easement transaction must pay the maximum penalty asserted by IRS (typically 40%) with NO deduction for costs.

The June news release went on to warn:

> Taxpayers should not expect to settle their docketed Tax Court cases on better terms. Based on cases the Independent Office of Appeals has encountered to date, and the existing state of the law, taxpayers should not later expect a better result than what is provided in this settlement offer.

In News Release 2020-152 (July 16, 2020), IRS Commissioner Chuck Rettig warned:

> The IRS will continue to actively identify, audit and litigate these syndicated conservation easement deals as part of its vigorous and relentless effort to combat abusive transactions. These abusive transactions undermine the public's trust in private land conservation and defraud the government of revenue. We strongly recommend that participants seek the advice of competent, independent advisors. Ending these abusive schemes remains a top priority for the IRS.

That new release continued:

> The IRS recognizes the important role of legitimate conservation easement deductions in incentivizing land preservation for future generations. However, abusive syndicated conservation easement transactions have been of concern to the IRS for several years.
>
> The IRS is aware that some promoters of these abusive transactions have downplayed the significance of the string of recent court decisions holding in the government's favor, arguing that their cases are somehow different or that those decisions might be reversed on appeal. These promoters ignore common sense and argue that the real dispute is about value, neglecting to explain how the reporting of short-term appreciation, often exceeding many multiples of reality, could possibly withstand judicial scrutiny.
>
> "Taxpayers should ignore this nonsense, take an objective look at their cases, and cut their losses," said IRS Chief Counsel Mike Desmond. "Abusive transactions, like settlement offers, do not get better with time, and this is a good opportunity to get out."

News Release 2020-196 (August 31, 2020), announced that the first taker of the settlement offer was Coal Property Holdings, LLC, which agreed to a disallowance of the entire $155 million charitable contribution deduction claimed for an easement placed on a 3,700-acre tract of land in Tennessee. See *Coal Property Holdings, LLC. v. Commissioner*, 153 T.C. 126 (2019) (granting the IRS's motion for partial summary judgment that the "judicial extinguishment" provisions of the easement deed did not satisfy the requirements of Reg. §1.170A-14(g)(6)).

Chief Counsel Notice 2021-1, reported in News Release 2020-228 (Oct. 1, 2020), indicated that the IRS may extend the settlement terms to certain newly petitioned cases.

Congressional Interest. As in other areas involving charitable contribution deductions, Senate Finance Committee Chairman Chuck Grassley (R-IA) and Ranking Member Ron Wyden (D-OR) have been active in encouraging bipartisan responses. In August 2020, they released a detailed 196-page bipartisan report titled "Syndicated Conservation-Easement Transactions." On September 21, they released a September 17 letter from the IRS with data on the extent and growth of "potentially-abusive tax shelter transactions."

Meanwhile, the bipartisan "Charitable Conservation Easement Program Integrity Act," introduced in early 2019, gained interest and cosponsors, especially in the Senate. The latest versions, H.R. 8842 (introduced Dec. 2, 2020, by Reps. Mike Thompson (D-CA) and Mike Kelly (R-PA)) and S. 5019 (introduced Dec. 15, 2020, by Sens. Steve Daines (R-MT), Debbie Stabenow (D-MI), Grassley, and Wyden, would deny a partner a deduction that exceeds 2.5 times the applicable portion of that partner's basis in the partnership for any contribution made within three years of the partnership's acquisition of the real property or the partner's acquisition of the interest in the partnership, unless substantially all of the partnership interests are held by the same family. The legislation would "apply to contributions made in taxable years ending after December 23, 2016." That is the day the IRS first announced the listed transaction treatment in Notice 2017-10, although of course for most taxpayers (those on a calendar year), the legislation would in effect apply to contributions anytime in 2016. But with respect to contributions involving historic structures the legislation would take effect in 2019.

Comment. It is a bit uncomfortable to write about the phenomenon of tax policies and rules designed to encourage such a virtuous cause as preservation of the environment being exploited in ways seen by the IRS and many others as abusive or at least projecting a "too good to be true" signal. But it was written about a lot in 2020, with "crunch time" for such uses apparently drawing near. The following is a sample:

General:

- Although it is not from 2020, the pivotal and thoughtful observations and recommendations reported by W. William Weeks (Chair), Turney Berry, Jonathan Blattmachr, Jason Havens, Nancy A. McLaughlin, James Slaton, Steve Swartz & Philip Tabas, "ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law," 53 Real Property, Trust and Estate Law Journal 245 (Fall 2018/Winter 2019)

- Nancy A. McLaughlin, "Trying Times: Conservation Easements and Federal Tax Law 2020," available at **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691101** (a periodically updated outline covering many of the cases and offering suggestions as to how to minimize the risk of audit if a client is donating an easement)
- Nancy Ortmeyer Kuhn, "Charitable Conservation Easements—IRS and Tax Court Act to Shut Them Down," Bloomberg Law Daily Tax Report (July 22, 2020) (a brief overview of current cases)
- Lee A. Sheppard, "Clamping Down on Conservation Easement Shelters," 168 Tax Notes Federal 1753 (Sept. 7, 2020) (a thoughtful review of the current status of conservation easement shelters on many fronts)
- William E. Ellis, "The Anatomy of Overvalued Syndicated Conservation Easements," 169 Tax Notes Federal 583 (Oct. 26, 2020) (a good detailed review, especially for appraisers)
- Lee A. Sheppard, "The Fashion for Conservation Easements," 169 Tax Notes Federal 715 (Nov. 2, 2020) (following a not-too-relevant 3½-page introduction that is reflected in the title, an updated review of the status of conservation easement litigation, including a discussion of the significance of the Eleventh Circuit's *Pine Mountain Preserve* decision)

Focus on Protection in Perpetuity:

- Nancy A. McLaughlin, "Amendment Clauses in Easements: Ensuring Protection in Perpetuity," 168 Tax Notes Federal 819 (Aug. 3, 2020) (an in-depth analysis of section 170(h)(5)(A))
- Nancy A. McLaughlin & Ann Taylor Schwing, "Conservation Easements and Development Rights: Law and Policy," 86 Exempt Organization Tax Review 539 (Nov. 2020) (an excellent historical perspective of the legal and policy issues)

Policy Debate:

- Robert Ramsay, "A Dirty Dozen Myths About Conservation Easements and One Sad Truth," 85 Exempt Organization Tax Review 279 (May 2020) (a good example of the views of promoters and their advocates)
- Stephen J. Small, Mark Weston, Nancy A. McLaughlin & Philip Tabas, "Some Dirty Realities About Syndicated Conservation Easements," 167 Tax Notes Federal 1729 (June 8, 2020) (a good answer to the Ramsay article)
- Timothy Lindstrom, "Tax Court Takes an Ax to Conservation Easement Deductions," 168 Tax Notes Federal 1409 (Aug. 24, 2020) (another article from the perspective of the defenders of syndicated conservation easements)
- Katherine S. Jordan & Douglas L. Longhofer, "Eroding Conservation, Preserving Abuse – A Flawed IRS Strategy," 169 Tax Notes Federal 1259 (Nov. 23, 2020) & 86 Exempt Organization Tax Review 637 (Dec. 2020) (a criticism of the IRS's approach to conservation easements)
- William E. Ellis, Letter to the Editor: "The 'Secret' to Syndicated Conservation Easement Valuations Revealed," 169 Tax Notes Federal 2011 (Dec. 21, 2020) (a short answer to the Jordan & Longhofer article)
- Hale E. Sheppard, "Conservation Easement Settlement: More Guidance, More Questions," 86 Exempt Organization Tax Review 657 (Dec. 2020) (another criticism of the IRS, particularly of its public pronouncements about the settlement initiative)

Administrative Procedure Issues:

- Aysha Bagchi, "Easement Deal Appeal Offers Early Test for Old Treasury Rules," Bloomberg Law Daily Tax Report (Oct. 20, 2020) (a review of the administrative procedure issues involved in the *Oakbrook* appeal)

Lawsuits:

- Kristen A. Parillo, "Second Class Action Suit Filed Against Easement Promoters," 168 Tax Notes Federal 320 (July 13, 2020) (a discussion of the class action lawsuits mentioned above)
- Craig Weiner, Qian Julie Wang & Alexander Newman, "How Conservation Easement Deductions Have Created a New Area of Legal Malpractice Litigation," Bloomberg Law Daily Tax Report (Aug. 20, 2020) (a reminder of legal malpractice risk)

Number Five: Deductibility of Estate and Trust Administration Expenses (Reg. §§1.67-4, 1.642(h)-2)

Deductions by Estates and Non-Grantor Trusts. The Tax Reform Act of 1986 added section 67 to the Internal Revenue Code, allowing an individual to take "miscellaneous itemized deductions" for any taxable year only to the extent that the aggregate of such deductions exceeds 2% of adjusted gross income – the "2% floor." For estates and trusts, however, section 67(e), after a technical amendment in 1988, has provided:

> For purposes of this section, the adjusted gross income of an estate or trust shall be computed in the same manner as in the case of an individual, except that (1) the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate … shall be treated as allowable in arriving at adjusted gross income.

The 2017 Tax Act added section 67(g), stating that "[n]otwithstanding subsection (a), no miscellaneous itemized deduction shall be allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026." Because section 67(e) was not addressed, there was reason to expect that the deductibility of the expenses of estates and trusts would not be affected.

Less than seven months after the enactment of the 2017 Act, Notice 2018-61, 2018-31 I.R.B. 278, acknowledged that commentators had expressed concern about the effect of section 67(g) on estates and trusts and confirmed that "[t]he Treasury Department and the IRS intend to issue regulations clarifying that estates and non-grantor trusts may continue to deduct expenses described in section 67(e)(1)." After issuing Notice 2018-31, the IRS received comments from the public agreeing with that intention. Treasury and the IRS then confirmed that outcome in an amendment to Reg. §1.67-4(a)(1) proposed in REG-113295-18, 85 Fed. Reg. 27693 (May 11, 2020), and finalized by T.D. 9918, 85 Fed. Reg. 66219 (Oct. 19, 2020).

Deductibility, however, continues to be limited by the harsh treatment in the 2014 regulations (Reg. §1.67-4(b)(4) & (c)(2)) of fees for investment advice, including the portion of a "bundled" fiduciary fee attributable to investment advice (which now will mean total disallowance, not just the application of a 2-percent floor). Reg. §1.67-4(a)(1)(i)(A) & 4(a)(2). Notice 2018-61 had stated flatly that "nothing in section 67(g) impacts the determination of what expenses are described in section 67(e)(1)." In addition, the new regulations do not address the treatment of deductions for purposes of the alternative minimum tax, which the preambles to both the proposed and final regulations stated "is outside the scope of these [proposed] regulations."

Deductions by Beneficiaries. Notice 2018-61 also indicated that regulations would address the availability of "excess deductions" to individual beneficiaries under section 642(h)(2) on termination of an estate or trust, including the treatment of those deductions as miscellaneous itemized deductions (and therefore entirely nondeductible through 2025) as current Reg. §1.642(h)-2 implies, and the Notice asked for comments on those issues. Public comments urged relief on those points, noting, as the preamble to the proposed regulations put it, "that the regulations under §1.642(h)-2 were written before the concept of miscellaneous itemized deductions was added to the Code and need to be updated." The regulations affirm the availability to beneficiaries of such excess deductions and affirm, as comments recommended, that "[e]ach deduction comprising the excess deductions under section 642(h)(2) retains, in the hands of the beneficiary, its character (specifically, as allowable in arriving at adjusted gross income, as a non-miscellaneous itemized deduction, or as a miscellaneous itemized deduction) while in the estate or trust." Reg. §1.642(h)-2(b)(1). That was done even though the regulations under section 642 were arguably a heavier lift than the regulations under section 67, because of the less accommodating statute and existing regulations.

The final regulations include helpful clarifications of the allocation of expenses among items of income, including the fiduciary's discretion to make those allocations, recommended by public comments on the proposed regulations. The 2020 "Instructions for Schedule K-1 (Form 1041) for a Beneficiary Filing Form 1040 or 1040-SR" (released Oct. 21, 2020), citing the final regulations, clarify and elaborate previous versions in

explanations titled "Box 11, Code A—Excess Deductions on Termination - Section 67(e) Expenses" and "Box 11, Code B—Excess Deductions on Termination - Non-Miscellaneous Itemized Deductions."

It is common for an estate or trust to have extra expenses related to its wind-up and distributions in its final taxable year, as well as the catch-up payments of some expenses that have been deferred, at the same time the income of the estate or trust has declined because of its sales or distributions of income-producing assets. An eight-year suspension of the ability of fiduciaries to pass through those final-year excess deductions would have created pressure to artificially time the payment of expenses, the sale or distribution of assets, and the termination of the estate or trust in ways that could be unfair and frustrating to both fiduciaries and beneficiaries. Thus, these regulations provide very important relief.

Notably, although these regulations as such got a late start – not proposed until almost 2½ years after section 67(g) had been enacted – it is clear that in the meantime Treasury and the IRS were paying attention to the comments from the public and contemplating the practical pros and cons of their regulatory options. Also, as noted, they continued to pay attention to public comments after the proposed regulations were issued, and made important necessary adjustments in the final regulations. That is as it should be. That is good news.

Number Four: Valuation of Interests in Entities (*Grieve, Nelson*)

In two 2020 cases, the Tax Court considered variations of methods for valuing interests in closely held entities that could seem aggressive. The first, in *Grieve v. Commissioner*, T.C. Memo. 2020-28 (March 2, 2020), was a theoretical approach in support of an asserted result that seemed aggressive on the part of the IRS. The second, in *Nelson v. Commissioner*, T.C. Memo. 2020-81 (June 10, 2020), *taxpayers' notices of appeal to 5th Cir. filed* Oct. 16, 2020, was the use of multi-tiered discounts where there were two levels of entities, which, without more careful analysis, could also sound aggressive, this time on the part of the taxpayer. But the first approach was rejected, and the second was accepted – both taxpayer victories on those issues.

***Grieve*: "Theoretical Application."** In *Grieve*, the taxpayer created two LLCs in 2012 and 2013. In each LLC, a 0.2% voting interest was owned by a corporation of which the taxpayer's daughter was the owner and president; she was also the manager of each LLC. Also in 2013, the taxpayer (or his revocable trust) transferred the 99.8% nonvoting LLC interests, in the case of one LLC to a zeroed-out GRAT and in the case of the other LLC to an irrevocable trust he had created in 2012 in exchange for a single-life private annuity. The assets of the LLCs were largely cash, cash equivalents, and marketable securities having a fair market value on the respective transfer dates of about $9 million in the LLC transferred to the GRAT and about $32 million in the LLC sold in exchange for the private annuity.

On his 2013 gift tax return, the taxpayer valued the transferred nonvoting LLC interests with combined lack-of-control and lack-of-marketability discounts of about 35%. The IRS asserted values that reflected almost no discounts. In the ensuing Tax Court litigation, the IRS offered the testimony of Mark Mitchell, who used "a theoretical application" of a discounted net asset value approach, in which he assumed that the buyer of a 99.8% nonvoting interest, to maximize the economic return, would consolidate ownership by also purchasing the 0.2% voting interest, at a premium. On that premise, he determined fair market values of the LLC interests that reflected combined lack-of-control and lack-of-marketability discounts of only about 1.4%.

The taxpayer's expert in the Tax Court, Will Frazier, used a combination of an asset approach and an income approach he had developed, which he called the nonmarketable investment company evaluation (NICE) method. Giving equal weight to those market and income approaches, he determined fair market values of the transferred 99.8% interests that were slightly less than the values that had been used on the gift tax return.

In a footnote to her opinion, Judge Kerrigan stated that "[w]ith agreement of the parties we directed the expert witnesses to testify concurrently. The procedure was implemented in substantially the same way as in Rovakat, LLC v. Commissioner, T.C. Memo. 2011-225 [affirmed, 529 Fed. Appx. 124 (3d Cir. 2013)]." In *Rovakat*, Judge Laro had explained:

> To implement the concurrent testimony, the Court sat at a large table in the middle of the courtroom with all three experts, each of whom was under oath. The parties' counsel sat a few feet away. The Court then engaged the experts in a three-way conversation about ultimate issues of fact. Counsel could, but did not, object to any of the experts' testimony. When necessary, the Court directed the discussion and focused on matters that the Court considered important to resolve. By engaging in this conversational testimony, the experts were able and allowed to

> speak to each other, to ask questions, and to probe weaknesses in any other expert's testimony. The discussion that followed was highly focused, highly structured, and directed by the Court.

The engagement of expert witnesses around a table like this has been referred to colloquially as "hot tubbing," and in *Rovakat* Judge Laro actually cited an article titled "Experts in the Tub" (21 Antitrust 95, 97 (2007)).

Ultimately Judge Kerrigan totally rejected Mr. Mitchell's approach, stating bluntly that "[w]e do not engage in imaginary scenarios as to who a purchaser might be," citing *Estate of Giustina v. Commissioner*, 586 F. App'x 417, 418 (9th Cir. 2014), *rev'g and rem'g* T.C. Memo. 2011-141. She did not criticize Mr. Frazier's reports, although she declined to substitute his conclusions for the slightly higher values reported on the gift tax return.

The appraisal community has reportedly been exasperated in other cases with Mr. Mitchell's "theoretical" approach, which some appraisers call a "game theory" approach. Now a memorandum opinion of the Tax Court has provided some comfort. To be sure, a transfer of 99.8% (which rounds to 100%!) of the interests in an entity recently created and funded largely with cash, cash equivalents, and marketable securities might not require many other "bad facts" to look suspicious. But those were avoided in *Grieve*. Moreover, whatever aggressiveness superficially attaches to such facts, could it be that it was neutralized by the aggressiveness of the IRS's own expert in trying to push an "imaginary" scenario on the court?

The taxpayer was alive when the case was decided, and thus there was neither a "death-bed planning" issue nor a section 2036(a)(2) issue. And the court's opinion states that the nonvoting LLC units "could not vote on or participate in any proceedings in which the entity or its members took action," indicating that the organizers had taken measures that would avoid such an issue.

***Nelson*: Multi-Tiered Discounts.** The facts of *Nelson* began with a business the taxpayer's father had cofounded in 1971. The business expanded. In 1990, a holding company was formed to directly or indirectly hold 100% of the stock of what ultimately became six operating businesses, a related service company, and a real estate holding company. After her father's death in 1999, the taxpayer came to own about 27% of the common stock of the holding company, which she transferred to a newly-formed limited partnership in 2008. About three months later, she transferred some limited partner interests, some by gift and some by sale, to a newly-formed irrevocable trust. One issue in the case was the value of the transferred limited partner interests. (Another issue, involving a defined value clause, is discussed in the following Number Three.)

Regarding the value of the 27% block of the holding company's stock owned by the limited partnership, Judge Pugh resolved issues of whether and to what extent it should be valued as a controlling interest and whether a market approach as well as asset approach was appropriate in valuing two of the operating subsidiaries. There were also disagreements over the lack-of-control and lack-of-marketability discounts to be applied to the transferred partnership interests, which Judge Pugh also resolved.

But the IRS did not question applying substantial discounts both to the holding company stock owned by the partnership and to the interests in the partnership itself – "two-tiered discounts" – and thus the issue did not come up. This is encouraging. It should be noted, however, that, although the creation of the partnership, funding of the partnership, and transfers of partnership interests occurred within about three months, the holding company that was the context for one level of discounts had been created and funded 18 years before. Moreover, the underlying assets were active operating businesses, and there is no suggestion that the holding company did not serve serious business purposes. So it would be wrong to see in *Nelson* an invitation to create a lot of layers of entities within a short period of time as part of an integrated plan, with the lowest tier of entities funded, for example, with marketable securities, and expect multiple tiers of robust discounts.

Even so, *Nelson* represents a repudiation of any notion that there might be something wrong with multiple-tiered discounts *per se* in all cases.

Number Three: Increasing Confirmation of Solutions to Defined Value Clause Dilemmas

Defined value clauses have been the subject of much discussion, writing, drafting, litigation, and even, since 2015, a potential Treasury-IRS guidance project. They have created, for many, opportunities; for others, challenges; and, as depicted in this Number Three, for some, dilemmas. But in 2020 something happened that may have made the opportunities, challenges, and dilemmas all more manageable. It was – of all things – a footnote.

Defined value clauses are designed to eliminate the risk of an increased gift subject to gift tax if the property reported on the gift tax return is later determined to have a value higher than the value shown on the return, particularly in the context of gifts of interests in a partnership, corporation, or other entity. They attempt to achieve that objective by defining the gift in terms of the value to be transferred, not in terms of a certain number of units or shares or percentage. A variation is a "price adjustment clause" designed to eliminate an increased gift by adjusting the value of the consideration paid for the transferred property, such as by adjusting the face amount of the transferee's promissory note. The two approaches could be used together, although the drafting could thereby be made more complicated.

History and Evolution. Defined value clauses have had an interesting history and evolution, which might be organized into the following phases:

> **Medieval – *Procter*:** *Commissioner v. Procter*, 142 F.2d 824 (4th Cir. 1944), *rev'g and rem'g* 2 T.C.M. 429 (1943), *cert. denied*, 323 U.S. 756 (1944), involved a trust created by a great-grandson of one of the founders of the Procter & Gamble Company. The facts bear little resemblance to the typical uses of defined value clauses today. The case is remembered today only because a provision of the trust instrument providing that "the excess property hereby transferred which is deemed by [a] court to be subject to gift tax shall automatically be deemed not to be included in the conveyance" was rejected by the Fourth Circuit as "clearly a condition subsequent and void because contrary to public policy" (an issue the Tax Court, having found that there were no taxable gifts, had not addressed). On remand the Tax Court determined a gift tax deficiency of $10,566.07. 4 T.C.M. 359, *aff'd*, 151 F.2d 603 (4th Cir. 1945).
>
> **Classic – TAM 8611004:** The IRS approved a transfer of "such interest in X Partnership … as has a fair market value of $13,000" in Technical Advice Memorandum 8611004 (issued Nov. 15, 1985). Citing Reg. §25.2512-3, the technical advice memorandum observed simply that "the fractional portion of the partnership that is attributable to each gift is determined by the relation of the stated fair market value of each gift to the fair market value of the entire partnership (valued at the time of each gift), the fair market value of the entire partnership being determined according to recognized valuation principles."
>
> **Refined – *McCord*:** In *McCord v. Commissioner*, 120 T.C. 358 (2003) (reviewed by the Court), *rev'd*, 461 F.3d 614 (5th Cir. 2006), donors created a limited partnership, with their sons as general partners, and later assigned their entire limited partner interests, allocated as follows:
>
> - first, to a generation-skipping trust, the donors' remaining GST exemption, on a net gift basis,
> - second, to the donors' sons, $6,910,932.52, less the amount given to the generation-skipping trust, on a net gift basis,
> - third, to the Shreveport Symphony, $134,000, and
> - last, to the Community Foundation of Texas, "[t]he dollar amount of the interests of the Taxpayers in [the partnership], if any, that remained after satisfying the gifts to the GST trusts, the Sons, and the Symphony."
>
> About six months after the transfers, the sons caused the partnership to redeem, at agreed values, the interests of the two charities, which executed releases acknowledging payment in full. The formula was rejected by the IRS in Field Service Advice 200122011 (issued Feb. 20, 2001; released June 11, 2001). Citing the releases, the IRS stated that "the conclusion is inescapable that, both as of the date of the gift and today, [the Community Foundation] would not receive any additional value should the Commissioner successfully determine that the value transferred was greater than that reported." Then, citing *Procter*, the IRS explained:
>
> > Though Procter involved a savings clause as opposed to a formula clause, the principles of Procter are applicable to this case. If formula clauses like the one at issue actually function to require payment of any increased value to the charitable donee, these clauses would be similar in effect to savings clauses in that they recharacterize the transaction in a manner that would render any adjustment nontaxable. A valuation increase resulting from an examination would serve only to increase the charitable deduction, but would not otherwise generate any gift tax deficiency. Moreover, the adjustment would substantiate a claim for an increase in the income tax charitable deduction claimed by the donor. The sole justification for the Commissioner's

examination would be to insure that charity received all that it was entitled to under the transfer documents. This would place federal tax administrators in the position of policing charitable transactions, a role more appropriately performed by the states' attorneys general.

The Tax Court agreed with the taxpayers that the transferred interests should be valued as assignee interests and on that basis determined that the total value transferred was almost exactly the average of the conclusions of the taxpayers' and IRS's experts. The court disagreed with the taxpayers' use of future estate tax liabilities in the net gift calculation. Regarding the allocation to the Community Foundation of Texas, without citing *Procter* (although the IRS and one concurring and two dissenting judges did), the majority opinion rejected the taxpayers' argument that the assignment agreement's definition of fair market value "in a manner that closely tracks the definition of fair market value for Federal gift tax purposes" implies the allocation of the transfer "only by reference to the fair market value of that interest as finally determined for Federal gift tax purposes."

Ironically, and perhaps prophetically of future Tax Court decisions, the majority went on to comment (emphasis added) that "[h]ad petitioners provided that each donee had an enforceable right to a fraction of the gifted interest determined with reference to the fair market value of the gifted interest **as finally determined for Federal gift tax purposes**, we might have reached a different result." In support of that comment, the court cited regulations permitting the annuity amounts in a charitable remainder annuity trust (Reg. §1.664-2(a)(1)(iii)), charitable lead annuity trust (Reg. §20.2055-2(e)(2)(vi)(*a*)), or grantor retained annuity trust (Reg. §25.2702- 3(b)(1)(ii)(B)), to be expressed as a fraction or percentage of the value of property as finally determined for federal tax purposes, as well as Rev. Proc. 64-19, 1964-1 C.B. 682, addressing the satisfaction of a pecuniary marital bequest with assets at their values as finally determined for federal estate tax purposes.

In *Succession of McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006), the Court of Appeals for the Fifth Circuit reversed, agreeing with the values determined by the taxpayers' expert and with use of future estate tax liabilities in the net gift calculation. Thus, the court of appeals found no understatement of value and did not have to address the formula allocation or the violation-of-public policy theory, which the court stated the Commissioner had not advanced on appeal and therefore had waived.

Next-Gen – *Petter*: In *Estate of Petter v. Commissioner*, T.C. Memo. 2009-280, *aff'd*, 653 F.3d 1012 (9th Cir. 2011), a decedent had inherited stock of United Parcel Service of America, Inc. (UPS) from her uncle, who was one of the first investors in UPS. She created an LLC and contributed UPS stock to it. Then she created grantor trusts for two of her children and their descendants. She transferred to each trust a specific number of LLC interests allocated:

- as a gift, "one-half the minimum dollar amount that can pass free of federal gift tax by reason of Transferor's applicable exclusion amount allowed by Code Section 2010(c),"
- as a sale in exchange for 20-year interest-bearing notes, "the number of Units … that equals a value of $4,085,190 [which was 9 times the amount of each gift] as finally determined for federal gift tax purposes," and
- the excess in each case as gifts to two charitable community foundations, one of which was assisted by a lawyer who participated in negotiating the terms of the transfers, including assurances that the community foundations would bear no legal costs, would become members of the LLC rather than mere assignees, and would be protected from exposure to unrelated business taxable income.

The IRS originally contended that the value of the LLC interests was about half again the value the decedent had reported on her gift tax return, although the IRS and the decedent ultimately agreed on a compromise value. While the formula clauses would have self-adjusted to prevent an increase in the gifts to the trusts in either case, the IRS denied the validity and effectiveness of those clauses as "contrary to public policy."

Judge Holmes, who had also written the majority Tax Court opinion in *Estate of Christiansen v. Commissioner*, 130 T.C. 1 (2008) (reviewed by the Court), *aff'd*, 586 F.3d 1061 (8th Cir. 2009) (involving a formula disclaimer of a testamentary bequest), recalled that in *Christiansen* the Tax Court had "found that

the public-policy arguments were undermined by *Commissioner v. Tellier*, 383 U.S. 687, 694 (1966), where the Supreme Court warned against invoking public-policy exceptions to the Code too freely." He emphasized that "[a]lthough Christiansen was a split decision on other issues [relating to the validity of the disclaimer], we were unanimous in concluding that 'This case is not Procter.'" Thus armed with the encouragement of the Supreme Court and the authority of a unanimous Tax Court, but faced with the IRS's determined stand on the public policy issue, Judge Holmes elaborated:

> The distinction is between a donor who gives away a fixed set of rights with uncertain value – that's Christiansen – and a donor who tries to take property back – that's Procter. The Christiansen formula was sufficiently different from the Procter formula that we held it did not raise the same policy problems.
>
> A shorthand for this distinction is that savings clauses are void, but formula clauses are fine…
>
> … The plain language of the documents shows that [the decedent] was giving gifts of an ascertainable dollar value of stock; she did not give a specific number of shares or a specific percentage interest in the [the LLC]. Much as in Christiansen, the number of shares given to the trusts was set by an appraisal occurring after the date of the gift. This makes the Petter gift more like a Christiansen formula clause than a Procter savings clause.

Judge Holmes also cited the authorities cited in *McCord* specifically sanctioning formula clauses without showing any "public policy" concern, and to that list he added Reg. §26.2632-1(d)(1) ("An executor may allocate the decedent's GST exemption by use of a formula.") and Reg. §25.2518-3(d), Example (20) (allowing a fractional qualified disclaimer where "[t]he numerator of the fraction disclaimed is the smallest amount which will allow A's estate to pass free of Federal estate tax and the denominator is the value of the residuary estate").

Curiously, in the Ninth Circuit, the Government did not argue the "public policy" element of *Procter* but relied on the argument that "[t]he adjustment feature of the defined-value clauses … make the additional charitable gifts subject to the occurrence of a condition precedent" – an IRS audit – in violation of Reg. §25.2522(c)-3(b)(1)," which provides that no gift tax charitable deduction is allowed for a transfer to charity that is dependent on a future act or "a precedent event" for the transfer to be effective. The Ninth Circuit rejected that argument.

Rad – *Wandry*: Then came *Wandry v. Commissioner*, T.C. Memo. 2012-88. The donors, husband and wife, each defined their gifts as follows:

> I hereby assign and transfer as gifts, effective as of January 1, 2004, a sufficient number of my Units as a Member of Norseman Capital, LLC, a Colorado limited liability company, so that the fair market value of such Units for federal gift tax purposes shall be as follows:
>
> [Here each donor listed their four children and five grandchildren with corresponding dollar amounts calculated to use the then $11,000 annual gift tax exclusion for each of the nine donees and one-fourth of the then $1 million lifetime gift tax exclusion amount for each of the four children.]
>
> Although the number of Units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted Units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date. Furthermore, the value determined is subject to challenge by the Internal Revenue Service ("IRS"). I intend to have a good-faith determination of such value made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination. Nevertheless, if, after the number of gifted Units is determined based on such valuation, the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted Units shall be adjusted accordingly so that the value of the number of Units gifted to each person equals the amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law.

The donors filed gift tax returns reporting gifts of the prescribed dollar amounts, but ("[h]owever," as the court said) described the gifts as the percentage Norseman membership interests determined by an independent appraiser to correspond to those prescribed dollar amounts. On audit, the IRS held the donors to those percentage interests, revalued at higher values (which values, for purposes of the litigation, the donors agreed to).

The Tax Court (Judge Haines) rejected the Service's contention that the donors' gift tax returns were admissions of the percentage interests transferred.

The court also rejected the Service's contention that the contemporaneous accounting entries to Norseman's capital accounts determined the amount of the gifts. The court stated that "[t]he facts and circumstances determine Norseman's capital accounts, not the other way around," and pointed out that "the Commissioner routinely challenges the accuracy of partnership capital accounts, resulting in reallocations that affect previous years."

The court then turned to the "old issue" of public policy based on *Procter*. The court cited *Christiansen*, *Petter*, and *McCord*, as well as *King v. United States*, 545 F.2d 700 (10th Cir. 1976) (in which a purchase price adjustment clause was upheld by the court of appeals to which *Wandry* would be appealed, but which, because the adjustment was to the price paid in a sale, not the quantity of interest transferred, the court said was not "squarely on point"). (The IRS has repudiated *King*, without mentioning it by name, in Situation 2 of Rev. Rul. 86-41, 1986-1 C.B. 300.) The *Wandry* court stressed the now familiar

> distinction between a "savings clause", which a taxpayer may not use to avoid the tax imposed by section 2501, and a "formula clause", which is valid. … A savings clause is void because it creates a donor that tries "to take property back". … On the other hand, a "formula clause" is valid because it merely transfers a "fixed set of rights with uncertain value".

The court offered the following analysis:

> It is inconsequential that the adjustment clause reallocates membership units among petitioners and the donees rather than a charitable organization because the reallocations do not alter the transfers. On January 1, 2004, each donee was entitled to a predefined Norseman percentage interest expressed through a formula. The gift documents do not allow for petitioners to "take property back". Rather, the gift documents correct the allocation of Norseman membership units among petitioners and the donees because the [appraisal] report understated Norseman's value. The clauses at issue are valid formula clauses.

This is a fascinating comparison, because it equates the rights of the charitable foundations in *Petter* that were the "pourover" recipients of any value in excess of the stated values with the rights of the children and grandchildren in *Wandry* who were the primary recipients of the stated values themselves. In a way, the facts of *Wandry* were the reverse of the facts in *Petter*. The effect of the increased value in *Petter* was an **increase** in what the charitable foundations **received**, whereas the effect of the increased value in *Wandry* was a **decrease** in what the donees **received**. The real analogs in *Wandry* to the charitable foundations in *Petter* were the donors themselves, who experienced an **increase** in what they **retained** as a result of the increases in value on audit.

Judge Haines did not explicitly acknowledge that economic equivalence, which might mean either that he overlooked it or that he viewed it as immaterial. It does not appear that he overlooked it, however, because he stated that absent the audit "the foundations [in *Petter*] may never have received **all the units** they were entitled to" (meaning the audit showed that they were entitled to **more**) but "the donees [in *Wandry*] might never have received **the proper Norseman percentage interests they were entitled to**" (meaning the audit showed that they were entitled merely to a **different** percentage, namely **less**). But that is pretty subtle.

It is also telling that in the court's words the effect of the language in the gift documents was to "correct the **allocation** of Norseman membership units among petitioners and the donees because the [appraisal] report understated Norseman's value." Until *Wandry*, some observers had believed that the courts had approved not "formula transfers" but "formula allocations" of a clearly fixed transfer. In fact, the *Wandry* court used a variation of the word "allocate" five times to describe the determination of what was transferred and what was retained. But the "allocation" was between the donees and the original donors. "Allocation" to the donors looks a lot like **retention** by the donors, if not a way to "take property back," and thus the court might be suggesting that the time-honored distinction between "formula transfers" and "formula allocations" might not be so crucial after all.

The IRS issued a nonacquiescence in *Wandry* (Action on Decision 2012-004, 2012-46 I.R.B.), taking the view that "on the date of the gift the taxpayers relinquished all dominion and control over the fixed percentage interests" because "[t]he final determination of value for federal gift tax purposes is an occurrence beyond the taxpayers' control." It went on to say that "[i]n Petter, there was no possibility that the transferred property would return to the donor, and thus, the court had no need to consider the extent to which the gift was complete."

Retro – Flubbed (Or Was It?) – *Nelson*: And now, finally, a 2020 development – actually a look at a different feature of a development first discussed under Number Four. In *Nelson v. Commissioner*, T.C. Memo. 2020-81 (June 10, 2020), *taxpayers' notices of appeal to 5th Cir. filed* Oct. 16, 2020, about three months after forming a limited partnership, the taxpayer made a gift on December 31, 2008, of a limited partner interest in the partnership to a trust (the "Trust") for her husband and her four daughters of which her husband was the trustee. The gift assignment provided:

> [The taxpayer] desires to make a gift and to assign to * * * [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWO MILLION NINETY-SIX THOUSAND AND NO/100THS DOLLARS ($2,096,000.00) as of December 31, 2008 * * *, as determined by a qualified appraiser within ninety (90) days of the effective date of this Assignment.

Two days later, on January 2, 2009, the taxpayer sold additional limited partner interests to the Trust in return for a $20 million note. The note provided for 2.06% interest on unpaid principal, was secured by the limited partner interest that was sold, and required annual interest payments through the end of 2017 (suggesting that it was a 9-year note). (Under Rev. Rul. 2009-1, 2009-2 I.R.B. 248, 2.06% was the mid-term AFR for January 2009, applicable for debt instruments over 3 years but not over 9 years.) The sale and assignment document provided:

> [The taxpayer] desires to sell and assign to * * * [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWENTY MILLION AND NO/100THS DOLLARS ($20,000,000.00) as of January 2, 2009 * * *, as determined by a qualified appraiser within one hundred eighty (180) days of the effective date of this Assignment * * *.

The IRS challenged the values used in the transactions. A proposed settlement agreement was negotiated in the administrative appeals process. In light of those settlement discussions, the partnership agreement was amended to reduce the percentage interest owned by the Trust by 26.24%, from 64.79% to 38.55%, resulting in a proportional 40% reduction in the interest owned by the Trust. But the settlement was never completed.

Like the McCords, the taxpayer, citing *Petter* and *Wandry* (which were decided after the taxpayer's transfers), argued that the taxpayer had transferred limited partner interests worth the stated dollar amounts as finally determined for gift tax purposes, despite the language in the assignment documents. They argued that this was confirmed by their subsequent actions to modify the purported transferred amounts to reflect the settlement discussions with the IRS. The Tax Court (Judge Pugh) disagreed, stating: "While they may have intended this, they did not write this. They are bound by what they wrote at the time." The court ultimately determined that the taxpayers made additional gifts of about $4.5 million, resulting, according to the court's decisions of July 28, 2020, in additional gift taxes of just over $2 million.

Did the Nelson family flub it? The court determined the undiscounted value of the limited partnership's assets at the time of the transfers to be about $60.7 million. The taxpayers had attempted to settle the case with IRS Appeals by reducing the trust's interest by 26.24%, which would have represented about $15.9 million of value of the underlying asset. It might have been thought that the family in retrospect would be delighted that they "lost" their argument that the assignments were defined value transfers, and thereby, at a gift tax cost of only $2 million, were allowed to potentially keep out of the taxpayer's estate an additional $15.9 million (effectively, at a 45% gift tax rate, locking in an initial valuation discount of about 72%), plus subsequent income and appreciation since 2009.

Nevertheless, the taxpayers filed notices of appeal to the Court of Appeals for the Fifth Circuit on October 16, 2020.

It was also significant that the IRS not only accepted the formulas based on appraisals within a specified time but actually advocated for them, obviously not offended by such formula transfers as it is by *Wandry* clauses. This is understandable, because by the time the IRS looks at the return the transferred quantity will already have been determined, and the IRS can contest the valuation of that quantity.

The Problem. The IRS concern about defined value clauses, articulated in Field Service Advice 200122011 in the context of the *McCord* facts, is basically that they waste the time of IRS examiners. At the end of all their hard work, even if it is successful – nothing. This is essentially the first of the three reasons the Fourth Circuit

gave in *Procter* for its holding that the trust provision it was considering was "clearly a condition subsequent and void because contrary to public policy." The court elaborated:

> The condition is contrary to public policy for three reasons: In the first place, it has a tendency to discourage the collection of the tax by the public officials charged with its collection, since the only effect of an attempt to enforce the tax would be to defeat the gift. In the second place, the effect of the condition would be to obstruct the administration of justice by requiring the courts to pass upon a moot case. If the condition were valid and the gift were held subject to tax, the only effect of the holding would be to defeat the gift so that it would not be subject to tax. The donor would thus secure the opinion of the court as to the taxability of the gift, when there would be before the court no controversy whatever with the taxing authorities which the court could decide, the only possible controversy being as to the validity of the gift and being between the donor and persons not before the court. …
>
> In the third place the condition is to the effect that the final judgment of a court is to be held for naught because of the provision of an indenture necessarily before the court when the judgment is rendered. It should be remembered that it is not possible to obtain a declaratory judgment from a federal court as to whether the gift in question is subject to the gift tax. 28 U.S.C.A. § 400; Wilson v. Wilson, 4 Cir., 141 F.2d 599. The only way, therefore, in which it could be determined by "final judgment" of a federal court of last resort that any part of a transfer was subject to a gift tax would be for a tax to be assessed by the Commissioner and upheld by such court in the course of legal proceedings instituted for its enforcement or for its recovery after payment. This final judgment would fix the liability of the donor for the tax; and only then could the condition become operative. The condition, however, could not be given the effect of invalidating a judgment which had been rendered when the instrument containing the condition was before the court, since all matters are merged in the judgment. To state the matter differently, the condition is not to become operative until there has been a judgment; but after the judgment has been rendered it cannot become operative because the matter involved is concluded by the judgment.

In other words – in the context of a modern-day "*Wandry* clause":

- For a *Wandry* formula clause to work, the value has to be "finally determined."
- The only "determination" an IRS audit or court decision makes is a deficiency in tax.
- If the formula clause then works, it adjusts the amount of the gift so there is no deficiency.
- If there is no deficiency, then there is no "determination."
- But if there is no "determination," then the clause can't work.
- So the only way the clause can work is to not work!

For analysis of even more vexing limitations on the effectiveness of *Wandry* clauses to achieve finality, see Austin Bramwell & Brad Dillon, "Not Another *Wandry* Article: Real Issue With *Wandry* Formulas," 41 Estate Planning 3 (May 2014).

A Solution – Less Than 100% Adjustment. One approach to avoiding that dilemma is to make the adjustment, based on finally determined values, **less than 100%** of what it needs to be to completely eliminate the additional tax. To the extent any adjustment is less than 100%, there is tax exposure that prevents the issue from being made moot. If the adjustment is close to 100% – say, 99% – then the taxpayer's risk is arguably limited to the difference – 1% – plus of course the cost and hassle of enduring an audit. This is how it would work:

- Assume that the target gift (or sale) is 100 units of some entity, with an appraised value of $10,000,000, or $100,000 per unit.
- Transfer **"that amount of units that has a fair market value as finally determined for federal gift tax purposes of $9,900,000, plus one unit."**

  Note: This is a simplified articulation of a defined value clause, designed to focus on the math involved. It is not intended to be a complete reflection of all the provisions that would be appropriate in any particular context. Thus, it is not intended to be used as a drafting model without consideration of the requirements of the context. And this clause uses 1% as the target adjustment and uses a round number of units, both solely to simplify and illustrate the math. This clause could be used either to define the amount of a transfer or to define the amount of a transfer allocated to one beneficiary or set of beneficiaries with the balance allocated, for example, to a charity. A similar clause might also be considered for use with transfers at death, but would have to be further modified to adapt to that context.

- Assume that after an audit, or litigation, the correct per-unit value is "determined" to be $200,000 – in other words, doubled.
- The dollar value component of the target transfer is $9,900,000 ÷ $200,000 per unit, or 49.5 units.
- So the defined transfer for purposes of the formula is 49.5 units plus one unit, or 50.5 units.
- The "determined" value of the transferred 50.5 units is 50.5 × $200,000 per unit, or $10,100,000.
- The increase in taxable gifts is $10,100,000 - $10,000,000, or **$100,000**.

Or, if a "price adjustment clause" is used, as in *King v. United States*, 545 F.2d 700 (10th Cir. 1976):

- Again assume a target sale of 100 units, with an appraised value of $10,000,000, or $100,000 per unit.
- Use a promissory note in the amount of **"$10,000,000, plus 99 percent of the amount by which the fair market value of 100 units, as finally determined for federal gift tax purposes, exceeds $10,000,000."**

  Note: The caveats in the first paragraph of the Note above are also applicable to this clause.
- Assume that after an audit, or litigation, the correct per-unit value is "determined" to be $200,000 – again doubled.
- The finally determined value of 100 units is 100 × $200,000, or $20,000,000.
- So the excess for purposes of the formula is $20,000,000 - $10,000,000, or $10,000,000.
- The amount of the note is increased by 99% of $10,000,000, or $9,900,000, to $19,900,000.
- The increase in taxable gifts again is **$100,000**.

Another Possible Solution. There is another possible solution to the only-way-it-can-work-is-to-not-work dilemma, unfolding before our eyes over the past several years in the processes of audits and litigation themselves. And, unlike the partial-adjustment approaches illustrated above, this solution applies to the simple total-adjustment *Wandry*-style clauses that have doubtless been in greater use since the Tax Court decided the *Wandry* case in 2012. Here is how it works:

- Start by assuming an IRS audit as usual of a transfer involving a defined value clause (or, with appropriate adaptations, a price adjustment clause). Surely it is not hard to imagine that the IRS is auditing such transfers, undeterred by the *Wandry* decision in which it nonacquiesced in 2012.
- Before agreeing to settle the audit, the IRS simply requires the parties to actually make the "adjustment" to return some of the asset back to the donor or seller.
- If the parties refuse to make the adjustment, and they go to the Tax Court, they would have the same opportunity to make the adjustment as part of a settlement.
- If they don't settle and the Tax Court agrees with the IRS that the value has been understated, the IRS could require an adjustment as a condition to agreeing to a Rule 155 computation and a stipulated order.

  Note: This last step is uncertain, as explained in "Procedural Questions" below.

The interests of the government would arguably be protected because the defined value or price adjustment would in effect replenish the donor's estate and subject that property to transfer tax later. Even if the computed excess value is merely shifted to a charitable donee (as in *Petter*), or given or bequeathed to charity later, the donor and the noncharitable donees would have forfeited control of it, which serves the policy of the charitable deduction. If the donor and donees do not make the adjustment, or make it incompletely, the IRS is free to challenge that action as a further gift when it audits the estate tax return of the donor's estate (or earlier if the failure to make the adjustment is disclosed on a gift tax return).

Recent Hints of This Approach. Aside from anecdotal indications that the IRS uses this approach in audits and litigation, there have been a few hints in connection with the settlement of cases involving defined value clauses.

Woelbing **– Defined Value Clause.** In *Estate of Donald Woelbing v. Commissioner* (Tax Court Docket No. 30261-13) and *Estate of Marion Woelbing v. Commissioner* (Tax Court Docket No. 30260-13), the Tax Court was asked to consider a 2006 sale by Donald Woelbing, who owned the majority of the voting and nonvoting stock of Carma Laboratories, Inc., of Franklin, Wisconsin, the maker of Carmex skin care products. Mr. Woelbing died in 2009, and the IRS challenged the 2006 sale in connection with its audit of Mr. Woelbing's estate tax return. During the audit, Mrs. Woelbing also died. In their December 26, 2013, Tax Court petition, Mr. Woelbing's executors described the sale as follows:

> In the 2006 stock sale transaction, Decedent sold all of his nonvoting stock of Carma Laboratories, Inc. to the Trust in exchange for an interest-bearing promissory note in the amount of $59,004,508.05. The purchase price was determined by an appraisal of the nonvoting stock's fair market value by an independent appraiser…
>
> The sale of the nonvoting stock was made pursuant to an Installment Sale Agreement, which provided that the Decedent sold stock to the Trust worth $59,004,508.05. The Installment Sale Agreement further provided that both the number of shares of stock sold and the purchase price of $59,004,508.05 were determined on February 28, 2006, but that Decedent and the Trust acknowledge that the exact number of shares of stock purchased by the Trust depends on the fair market value of each share of stock. The Installment Sale Agreement further provided that based on a recent appraisal of the stock, this results in 1,092,271.53 shares of stock being purchased but that in the event that the value of a share of stock is determined to be higher or lower than that set forth in the Appraisal, whether by the Internal Revenue Service or a court, then the $59,004,508.05 purchase price shall remain the same but the number of shares of stock purchased shall automatically adjust so that the fair market value of the stock purchased equals $59,004,508.05.

The IRS basically ignored the note, doubled the value of the stock on the date of the gift to $117 million, again increased the value on the date of Mr. Woelbing's death to $162 million and included that value in his gross estate, and asserted gift and estate tax negligence and substantial underpayment penalties. But the cases were settled, and stipulated decisions were entered on March 25 and 28, 2016, finding no additional gift taxes due with respect to either Mr. or Mrs. Woelbing, no additional estate tax due with respect to Mr. Woelbing's estate, and no penalties.

One way – perhaps the only way – the IRS would have agreed to this settlement would be that an agreed upward valuation adjustment in the settlement was reflected in an agreed downward adjustment in the number of shares Mr. Woelbing transferred in the 2006 sale, much as the defined value clause contemplated. In that case, the value of those shares would have been included in his gross estate, would have qualified for a marital deduction, and thus presumably would increase the size of Mrs. Woelbing's gross estate and increase the amount of estate tax owed by her estate. Conspicuously, the stipulated decisions addressed the gift tax liabilities of both Mr. and Mrs. Woelbing but the estate tax liabilities of only Mr. Woelbing's estate. It is reasonable to assume that the settlement with the IRS included Mrs. Woelbing's executors' agreement to make or accept those changes to her estate tax return.

True **– Defined Value and Price Adjustment Clauses.** A similar pair of cases is *Karen S. True v. Commissioner* (Tax Court Docket No. 21896-16) and *H.A. True III v. Commissioner* (Tax Court Docket No. 21897-16). H.A. True III is the son of the late H.A. True Jr. and, as his father's executor, he had been the petitioner in *Estate of True v. Commissioner*, T.C. Memo. 2001-167, which involved buy-sell agreements, promissory notes, and interest rates. In his own case, he made gifts of interests in a family business to one of his daughters and made sales of the business interests to all of his children and a trust, with values based on an appraisal. The transfers to his children were subject to a "transfer agreement" with a defined value/price adjustment provision. He and his wife made a split-gift election.

According to the October 11, 2016, petitions, the transfer agreement for the gift provided that if those interests were determined for federal gift tax purposes to be worth more than the anticipated $34,044,838 amount of the gift, "(i) the ownership interest gifted would be adjusted so that the value of the gift remained at $34,044,838, and (ii) [the donee] would be treated as having purchased the ownership interests that were removed from her gift." The transfer agreement for the sales "provided that if it is determined for federal gift tax purposes that the interests sold were undervalued …, the purchase price would be increased to reflect the finally-determined fair market values." The IRS asserted a gift tax deficiency of $16,591,418 for each of the taxpayers. The taxpayers argued that their valuations were correct, but if the transferred interests were determined to have a higher value, no gift should result because of the price adjustment provisions in the transfer agreement.

These cases were also settled. According to stipulated decisions filed July 9 and 6, 2018, the agreed gift tax deficiencies totaled $4,008,643, less than one-eighth of the deficiencies the IRS had asserted. That probably means that either

- the IRS on reflection found the appraisal to be much more persuasive after all,
- or, more likely, the IRS agreed to allow the taxpayers to increase the purchase prices as the transfer agreements provided and exacted corresponding side-agreements from the taxpayers as it probably did in *Woelbing*, which would ultimately increase the taxpayers' gross estates,
- or some combination of those two.

And Now, in 2020, the Footnote! – Confirmation on the Record – *Grieve*. In another case reprised from Number Four, *Grieve v. Commissioner*, T.C. Memo. 2020-28, a two-year GRAT created in 2013 was to pay annuity amounts determined as stated percentages of what the opinion describes only as "the fair market value of assets transferred to the trust for Federal gift tax purposes." And it was evidently designed with the intention of exactly zeroing-out the gift. Nevertheless, it worked. And Judge Kerrigan noted in footnote 2:

> The parties stipulated that petitioner will not owe additional gift tax if we determine that he understated the initial fair market value of assets transferred to the GRAT if, within a reasonable time, the GRAT pays to petitioner, or to his personal representative in the event of his passing, an amount equal to the difference of the properly payable annuity and the annuity actually paid.

They never had the opportunity to make such a payment, however, because, as discussed in Number Four, the taxpayer won the case on the underlying valuation issue.

Seeing this reference in *Grieve* with respect to a GRAT, not a typical outright gift of a defined value, brings full circle the analysis, noted above, in *McCord*, where, foreshadowing acceptance of defined value clauses based on values finally determined for tax purposes, the Tax Court majority cited regulations authorizing **the annuity amounts** in a charitable remainder annuity trust (Reg. §1.664-2(a)(1)(iii)), charitable lead annuity trust (Reg. §20.2055-2(e)(2)(vi)(*a*)), or grantor retained annuity trust (Reg. §25.2702- 3(b)(1)(ii)(B)), to be expressed as a fraction or percentage of the value of property as finally determined for federal tax purposes. In elaboration of that authorization, Reg. §1.664-2(a)(1)(iii) advises (emphasis added):

> The stated dollar amount may be expressed as a fraction or a percentage of the initial net fair market value of the property irrevocably passing in trust as finally determined for Federal tax purposes. If the stated dollar amount is so expressed and such market value is incorrectly determined by the fiduciary, the requirement of this subparagraph will be satisfied if the governing instrument provides that in such event the trust **shall pay** to the recipient (in the case of an undervaluation) or be repaid by the recipient (in the case of an overvaluation) an amount equal to the difference between the amount which the trust should have paid the recipient if the correct value were used and the amount which the trust actually paid the recipient. **Such payments or repayments must be made within a reasonable period after the final determination of such value.**

As in the case of giving effect to a *Wandry* clause, the adjustment contemplated by that CRAT regulation would eliminate what otherwise could have been a tax deficiency (a "final determination"), thus posing the only-way-it-can-work-is-to-not-work dilemma. The regulation reveals that there is no problem with that after all, **if prompt and reasonable corrective action is taken**. Why not take the same view of *Wandry* clauses?

As also noted above, the *McCord* opinion added a citation to Rev. Proc. 64-19, 1964-1 C.B. 682, addressing the satisfaction of a pecuniary marital bequest with assets at their values as finally determined for federal estate tax purposes. Section 2.01 of Rev. Proc. 64-19 makes it clear (emphasis added):

> The question is the same whether the amount of the bequest or transfer is determined by a **formula** fixing it by reference to the adjusted gross estate of the decedent **as finally determined** for Federal estate tax purposes, or its amount is determined in some other fashion by which a fixed dollar amount distributable to the surviving spouse can be computed.

Section 2.02 of Rev. Proc. 64-19 goes on to provide (emphasis added):

> Where, by virtue of the **duties imposed on the fiduciary either by applicable state law or by the express or implied provisions of the instrument**, it is clear that the fiduciary, in order to implement such a bequest or transfer, must distribute assets, including cash, having an aggregate fair market value at the date, or dates, of distribution amounting to **no less than the amount of the pecuniary bequest or transfer, as finally determined for Federal estate tax purposes**, the marital deduction may be allowed in the full amount of the pecuniary bequest or transfer in trust. Alternatively, where, by virtue of such duties, it is clear that the fiduciary must distribute assets, including cash,

> **fairly representative of appreciation or depreciation in the value of all property thus available for distribution** in satisfaction of such pecuniary bequest or transfer, the marital deduction is equally determinable and may be allowed in the full amount of the pecuniary bequest or transfer in trust passing to the surviving spouse.

These have become well-known standards that are routinely incorporated into estate planning documents. Rev. Proc. 64-19 was originally released on March 19, 1964. Providing an approximately six-month grace period, section 3.01 provides (emphasis added):

> In cases where it is not clear on the record available that the discretion of the executor would be limited, as set forth in section 2.02, the marital deduction may nevertheless be allowed for the value of such a pecuniary bequest or transfer in trust, **under an instrument executed prior to October 1, 1964**, if the Internal Revenue Service receives **appropriate agreements** from the fiduciary and the surviving spouse that the assets of the estate, both cash and other property, available for distribution will be so distributed between the marital deduction bequest or transfer in trust and the balance of the estate available for distribution in satisfaction of such pecuniary bequest or transfer that the cash and other property distributed in satisfaction of the marital deduction pecuniary bequest or transfer in trust will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution.

Section 5 of Rev. Proc. 64-19 provides forms for such agreements, including the surviving spouse's agreement that

> in the event cash and other property accepted in full satisfaction of this bequest or transfer in trust is not fairly representative of my proportionate share of any net appreciation in the value, to the date or dates of distribution, of all property then available for distribution in satisfaction of such pecuniary bequest or transfer, the difference in value will be treated as a transfer or transfers by gift as of the date, or dates, of distribution, and a Federal gift tax return or returns with respect to such transfer or transfers by gift will be filed if required under the gift tax provisions of the Internal Revenue Code.

In other words, for such pre-October 1964 instruments (regardless of the date of death), the parties will be allowed to make the adjustment as close as they can to the elimination of further tax liability or to agree to be responsible for any further tax liability that cannot be, or simply is not, addressed. That is the way the settlements in *Woelbing* and *True* presumably worked, and that is the way the defined annuity clause in *Grieve* was stipulated on the Tax Court record to work if it had been necessary.

Comment. If this approach to addressing defined value and price adjustment clauses by actually enforcing them becomes an accepted norm, planning may be affected. For example, because it could take a long time to resolve a valuation dispute (the *Nelson* transfers were completed January 2, 2009, but the litigation did not end until July 28, 2020), it is important that the transfer remains susceptible of adjustment. What that means might depend on the type of transaction and the nature of the asset. Perhaps the transferee must still be around, suggesting it should be a trust, which usually will be a good idea anyway. Perhaps the transferee will have to avoid retransferring any of the subject property. If there is a promissory note, maybe it should have a relatively long term, if prudent. In any event, this demonstrates the importance of using grantor trusts in such transactions, because the grantor would be taxed on the income from the transferred property even if the amount of the transfer is later adjusted.

Some situations will require special consideration. For example, in *Grieve* a two-year GRAT created in 2013 was obligated to pay the grantor or his personal representative the amount by which the annuity amounts actually paid were determined to be insufficient. The IRS issued its notice of deficiency in 2018 and the Tax Court issued its opinion in 2020. It turned out that no such payment was needed because the court approved the taxpayer's valuation, but if a payment had been needed it would have been important that the GRAT continued as a longer-term trust after the two-year GRAT term ended. Alternatively, if the GRAT terminated, it might have been necessary to secure the remainder beneficiaries' indemnities regarding this contingent payment obligation. But there is no assurance in the opinion that the gift tax audit even began before the two-year GRAT term ended.

Moreover, recent developments might prompt some reconsideration of whether a defined value clause will be helpful in all circumstances anyway. In *Nelson*, for example (as discussed above), the failure of the taxpayer's argument that she had transferred limited partner interests worth the stated dollar amounts as finally determined for gift tax purposes potentially resulted in keeping about $15.9 million, plus subsequent income and appreciation since 2009, out of her estate, at a gift tax cost of only about $2 million.

Procedural Questions. As noted above, the step of last resort in this approach, a Tax Court Rule 155 computation, is uncertain. It is common to see a Tax Court opinion conclude with "Decision will be entered under Rule 155" when, for example, the court determines a value of an asset and leaves it to the parties to compute the tax owed, because it isn't always just a matter of simply multiplying the change in value by the tax rate, and, in an estate tax case, the computation could be affected by such things as additional deductible expenses. I know of no case where the court has remitted the parties to a Rule 155 computation with the understanding that it would produce no change in the tax. In *Grieve*, Judge Kerrigan invoked Rule 155, even though, as noted above, she had accepted the taxpayer's values. Those values did include a slight stipulated change to the value of the underlying assets of the LLC used to fund the GRAT, but, as also noted above, she assumed that the stipulated adjustment to the GRAT would prevent any deficiency. In any event, the stipulated decision in *Grieve*, entered June 11, 2020, showed a gift tax overpayment of about $3.66 million, indicating that there were dollar amounts for the parties to discuss after all. Rule 155 does contemplate that the computation could produce either an overpayment (for which it requires additional information about the amount and timing of the taxpayer's payments) or an underpayment, so why not zero?

There undoubtedly are many remaining questions (including the application to refund suits in district court and questions about finality raised in the article by Austin Bramwell and Brad Dillon cited above). Meanwhile, however, it appears reasonable to expect that the settlement of cases, either administratively in the audit or while the case is pending in court, will continue to see the IRS holding taxpayers to the terms of clauses it hates.

The Last Word. The Court of Appeals for the Ninth Circuit concluded its opinion affirming the Tax Court in *Petter* with the following somewhat abrupt (and punctuation-challenging) quotation of one Supreme Court opinion quoting another:

> "[W]e expressly invite[ ] the Treasury Department to "amend its regulations" if troubled by the consequences of our resolution of th[is] case." *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (quoting *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 838 (2001)).

In 2015-2016 and 2016-2017, the Obama Administration's Treasury-IRS Priority Guidance Plans included a project titled "Guidance on the gift tax effect of defined value formula clauses under §§2512 and 2511." It has been omitted from the Priority Guidance Plans in the Trump Administration. If that project is revived, it might be an opportunity for Treasury to accept the Ninth Circuit's invitation. Then all the analysis will have to be reconsidered. A future Top Ten development perhaps.

Number Two: The 2020 Election

Frankly, the 2020 election is ranked high on the Top Ten list more for the intensity of its anticipation and the estate planning activity the anticipation spurred than for the issues relevant to estate planning that it might have actually settled.

Anticipation. Like 2010 and 2012, much of 2020, especially the last half of the year, witnessed a scramble to develop and complete estate planning actions. This time it was not in anticipation of a scheduled sunset of favorable estate tax laws, but in anticipation of increased control of the legislative agenda by Democrats after the election. While the 2011 and 2013 sunsets had ultimately been avoided by last-minute legislation, no legislation this time would have avoided the election. The rush was slowed when Democratic gains proved to be less decisive than predicted. Democrats indeed gained control of the White House. But they actually lost seats in the House of Representatives and will control the House by a slimmer majority than in 2019-2020. And, after the January 5, 2021, runoff elections in Georgia produced a 50-50 split, Democrats will control the Senate only through the tie-breaking vote of Vice President Harris.

On the other hand, while the lack of a stronger Democratic presence in Congress will make it harder to expect sudden and sweeping changes, the possibility of more Democratic losses in the House in the 2022 elections (which is often the fate of the incumbent President's party) will provide some incentive for Democrats to not delay, but to do what they can now. On the other hand, Democrats might be anticipating gains in the 2022 Senate races, as Republicans will be defending 20 of the 34 open seats, including two seats in states (Pennsylvania and Wisconsin) won by President-Elect Biden, while Democrats will not be defending any seat in a state won by President Trump. All of this makes confident predictions very difficult.

The 2021 Agenda. Over the last few decades, we have seen the Administration's tax proposals included each spring in the Treasury Department's "General Explanations of the Administration's Fiscal Year Revenue Proposals" (popularly called "Greenbooks"). The use of Greenbooks in the traditional sense was suspended by the Trump Administration, but the election outcome has opened the possibility that they now will be restored. Whether in Greenbooks or in other forms, many of the following objectives President-Elect Biden identified during the campaign should be assumed to be among the proposals he will advocate to Congress in 2021 and beyond:

- Undoing much of the 2017 Tax Act (including an accelerated sunset of the doubled exclusion amount)
- Returning the estate tax to 2009 levels (a 45% rate, with exclusions of $3.5 million for estate and GST tax and $1 million for gift tax, both unindexed but portable)
- Raising the corporate income tax rate from 21% to 28%
- Raising individual income tax rates on taxable incomes over $400,000
- Raising the top individual tax rate from 36% to 39.6%
- Taxing capital gains the same as ordinary income for individuals with taxable incomes over $1 million
- Subjecting appreciated assets to capital gains tax upon gift or transfer at death (with thresholds, exemptions, carryover basis for transfers to a spouse or charity, deferred recognition for family businesses, deferred payment for other illiquid assets, and similar details, all to be worked out)

Other ideas are likely to be drawn from the "For the 99.8 Percent Act," introduced with various titles by Senator Bernie Sanders (I-VT) in every Congress since 2010 and featured as Number Four in 2019's Top Ten, including:

- Quadrupling the special use valuation cap (relieving family farms and other businesses of some of the burdens of increased estate taxes, a targeted approach Democrats have supported in the past as an answer to Republican calls for total and permanent repeal of the estate tax)
- Extending consistent-basis rules to gifts
- Valuing non-business assets held in entities on a look-through basis as if they were owned outright
- Requiring GRAT terms to be at least 10 years and, perhaps even more significantly, requiring GRAT remainders to be at least 25% of the value of the assets transferred to the GRAT
- Treating grantor trusts as owned by the grantor for gift and estate tax purposes (that is, treating all distributions from the trust except to the grantor as gifts by the grantor, treating termination of grantor trust status during the grantor's life as a gift of all the trust assets by the grantor, and including in the grantor's gross estate the value of all the assets of the trust if it is still a grantor trust at the grantor's death)
- Denying allocation of GST exemption to a trust that may last longer than 50 years
- Limiting the annual exclusion for gifts not outright (that is, gifts of interests in trust, gift of interests in entities, and gifts of assets subject to restrictions)

The 2021 Priorities and Process. The legislative process in 2021 will be affected by the close margins in Congress. It will also be affected by some obvious priorities – COVID relief and prevention, social justice, environmental concerns, and infrastructure. But another priority is raising revenue, particularly after the 2020 surge of spending in response to the COVID pandemic on an emergency basis that postponed the issue of paying for it (appropriately so in an emergency). Even in 2021, raising revenue to make up for 2020's spending will probably proceed with caution, to avoid undoing some of the 2020 relief or jeopardizing the recipients of that relief. But sooner or later both Democrats and Republicans will have a keen interest in raising revenue again, although very likely with different reasons and different ideas how to do it and how to allocate the burden.

Because unanimity, even within a single party, can be hard to achieve, the close margins in Congress may require more deliberation and negotiation, which could take more time and could produce results that reflect

moderation and tradeoffs in unpredictable mixes. In the Senate, budget reconciliation under the Congressional Budget Act of 1974 (2 U.S.C. §621 *et seq.*) could be used to avoid the need for 60 votes to call the question and bring a measure to a vote – in other words, to avoid a Republican filibuster. But budget reconciliation has its limitations. It may be used only once for each fiscal year and only in accordance with a sometimes prolonged and deliberate process of setting spending and tax priorities in a budget resolution (generally by April 15), followed by the consideration and contributions of multiple committees by subject matter, followed by the "reconciliation" of those committees' various inputs. In the famous "Byrd Rule" (sponsored by the late Senator Robert Byrd (D-WV), added in 1985, amended in 1990, and codified in 2 U.S.C. §644), "extraneous" provisions in budget reconciliation are subject to a point of order in the Senate. Basically, reconciliation is limited to fiscal matters – revenue and expenditures. It cannot be used to affect certain Social Security benefits, which is probably one of the reasons the Qualified Business Income Deduction in section 199A (added, using budget reconciliation, by the 2017 Tax Act) is so complicated, to avoid a collateral effect on Social Security benefits from some of its tests measured by "W-2 wages." "Extraneous" measures also include the reduction of net revenues in years beyond the period provided for in the budget resolution (typically 10 years), which explains the 2026 "sunset" of many tax cuts in the 2017 Tax Act, including of course the doubling of the transfer tax exclusion amount. Ironically, because it is not "extraneous" to **increase** revenue beyond that budget period, many anticipated Biden Administration proposals to raise taxes (including the proposals in the two bulleted lists above) would not be restricted, and would not have to be sunsetted, like the 2017 tax cuts were. Even so, when budget reconciliation is used, either as an intentional strategy or as an unintended consequence – or, perhaps more importantly, is perceived to have been used – to enact legislation without bipartisan support, that legislation almost inevitably is controversial and fragile. Examples include fiscal portions of the 2010 Affordable Care Act (passed with no Republican votes) and the 2017 Tax Act (passed with no Democratic votes).

In any event, there may be less interest and urgency for estate tax changes (compared to income tax changes with wider and more immediate effect), less likelihood of making income tax changes (other than changes offering COVID relief) effective January 1, 2021, and even less likelihood of a January 1, 2021, effective date for transfer tax changes, for which the calendar year is less relevant**.**

Putting all this together, while there may be little likelihood of sufficient support even among Democrats for comprehensive tax repurposing and restructuring, almost any change in the two bulleted lists above could be supported, even by Republicans, (1) if it happens in a hurry and someone who doesn't like it is simply busy with other things, (2) if it happens partially or moderately, (3) if it is given the right "curb appeal" (like "consistency" or "simplification"), or (4) if it is combined with something else that is supported or has the right revenue estimate to pay for something else that is supported. That last cited scenario is exactly what happened, for example, when "Consistent Basis Reporting Between Estate and Person Acquiring Property from Decedent" was added to the Surface Transportation and Veterans Health Care Choice Improvement Act (Public Law 114-41) by a Republican-controlled Congress in July 2015. It raised just the right amount of revenue to fund a desired extension of the Highway Trust Fund that was scheduled to expire on the day President Obama signed the Act into law. Significantly, the first version of introduced statutory wording for that consistent basis provision had been section 6 of the "Responsible Estate Tax Act" (S. 3533), introduced on June 24, 2010, by Senator Sanders – the original predecessor of what most recently is his "For the 99.8 Percent Act" (summarized above).

And perhaps dominating all of this is the recollection of Vice President Biden's role in negotiating, for example, the estate tax provisions of the 2012 Tax Act with a Republican House and Democratic Senate. As President, he will probably be just as inclined to such a role, particularly at the beginning of his term, subject to how much members of both parties will permit that, and subject of course to the increase in his other responsibilities as President.

Bottom Line. So – bottom line prediction – not much and not soon? But it is never possible to be sure.

And estate planning that is a good idea anyway, even if its timing and pace was affected by anticipation of the 2020 election, should probably still proceed.

Number One: Social Disruption and Refocus: Health and Racial Justice

The COVID Pandemic. The coronavirus – the COVID-19 pandemic – defined 2020.

We have seen tremendous changes in our work lives – working from home with a steady parade of virtual meetings for some, unemployment and other economic disruptions and bankruptcy for others, varying greatly by industry. We have seen tremendous changes in the way we interact with other people, even our own families. Tensions have grown. Wearing a mask has created conflict between natural impulses toward interdependence and natural impulses toward autonomy.

Like all professions and trades, estate planners and those who work with estate planners have faced tremendous professional challenges. Without face-to-face meetings in which to fully express feelings and opinions and apprehend and appreciate reactions, how can we ever:

- mentor and be mentored?
- train and be trained?
- develop teamwork?
- develop trusting relationships?
- develop focused advice?
- deliver that advice candidly and sensitively?

And without in-person contact, great imagination and perseverance has been required for things previously thought routine, such as preparing, executing, and storing estate planning documents, appraising assets, and preparing and filing tax returns.

We closed 2020 with optimism that the end was in sight, that COVID would be defeated, and that we would "get back to normal." But do we know what "normal" means? Even those of us who remember what it was have a hard time envisioning a total return to it. Can there be any doubt that there will be great pressure to keep some of the innovations we have made out of necessities of health? We stayed home to avoid contagion, but might like to stay home to avoid traffic. We have met virtually because we have had to, but airports and highways are not big attractions for us, and maybe some of that travel, even to really nice places, can be traded for convenience. And virtual signing – how did we ever survive without it (as much as clients love their attorneys, they might balk at one more trip to the attorney's office)? Or, from a different perspective, how will the solemnity of the most important estate planning documents ever survive the loss of the formal conference table execution?

And how will we strike the right balance to serve the important objectives of mentoring, training, teamwork, trusting relationships, and effective advice set forth in the bulleted list above?

We may not have gotten quite to the point of having to face these issues yet. But we will.

Racial Injustice. Into that 2020 climate of greater awareness and sensitivity – both greater compassion and greater wariness – was dropped another awareness. There have been many reminders over our lifetimes that we have a long way still to go to achieve racial justice. The death of George Floyd in Minneapolis on May 25 was, sadly, not unique. But, in its documentation and clarity, it was different for some, and it became an eye-opener for many. I personally was struck, among other things, by the fact that it happened just eight blocks from where I lived when I was in kindergarten through third grade. And I cannot forget or overlook my friends who have told me that they cringe whenever they see a police car. Nor can I forget or overlook my own privilege that has meant that I have been spared all of that.

So at the same time we as a society have been finding ways to cope with the COVID that just hit us, we are scrambling to find ways to catch up from behind in dealing with something that has been poisoning our culture for centuries. There is, tragically, still no guarantee that we will get it right this time either. But there is reason to hope that now there is a consensus that waiting is neither sustainable nor justifiable. It is a serious priority to bring both conservatives and liberals together to find solutions that are, so to speak, both conservative of basic values of human worth and dignity and individual responsibility and liberal in embrace of social justice and equality of individual opportunity.

And this new (for some) or renewed (for others) awareness and resolve presents more challenges for estate planning. Differences in status and opportunity based on race are perpetuated in large part by differences in status and opportunity based on income and access to wealth. Estate planning is in large part about preserving and transmitting wealth. So what do estate planners do? It is awkward to think that estate planners must urge their clients to consider values and priorities that do not come naturally to them – aren't those the client's prerogatives after all, which advisers merely implement? But haven't advisers always had a role in – well – advising? Advising about the subtle distinctions between mere ownership and stewardship, or advising about philanthropy as an option? And should philanthropy itself also be reexamined? In some cases, for example, could that mean a conscious shift of focus from merely helping to strategically empowering? And what about taxes? Reexamination might also include not only the government's policies about taxing and spending at the public level, but even attitudes about tax planning at the individual level. And that could really get challenging.

Answers do not come easily. But these are big and serious challenges. Big and serious enough to affect estate planning for generations. Big and serious enough to be 2020's Number One.