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Estates Update 2012

BY DAVID N. ADLER

David N. Adler

The year in trusts and estates was highlighted by the imposition of permanent estate and gift tax rules, notably with respect to threshold and rates, which should serve to finally stabilize the provisional tax remedies offered over the past decade.

HISTORY

In a span of just over ten years the estate tax threshold, also referred to as the exemption amount or exclusion amount, beneath which no federal estate taxes are due, has ranged, in varying years, from 675,000 to 5,000,000 to unlimited (one year only 2010). The rates applied to said tax have ranged from 35% to 55%. In some years the changes have been gradual and in some years the changes have been extreme. The net result of all this volatility has been confusion for individuals and tax planners alike. Certain viable planning techniques intended to maximize tax savings required serious adjustment on a regular basis, with a view to providing maximum flexibility, as future tax rules were indeterminate. The political wrangling only contributed to the general air of instability and confusion

FEDERAL ESTATE TAXATION

On January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012 which was immediately signed into law by the president. In many ways it makes permanent aspects of the prior Tax, Relief Unemployment Insurance Reauthorization and Job Creation Act, of 2010. The lifetime maximum exemption equivalent is set at $5,000,000 and indexed for inflation. As such, the exemption equivalent for this year is $5,250,000. All estates with less than that amount have no federal tax consequences. Further, the top tax rate was raised from 35% to 40%.

As was also the case under the immediately prior law, the step-up in basis was maintained. Thus, for purposes of computation of capital gains on a particular asset, the basis upon which such gain is computed shall be its fair market value as of the date of death. This continues to wipe away any and all gains occurring between acquisition of that asset and death.

FEDERAL GIFT TAXATION

The gift tax lifetime exemption continues to be reunified with the estate tax lifetime exemption, and is set as $5,250,000 for 2013. Thus, lifetime transfers continue to provide the same numerical tax free benefit as do testamentary transfers, subject to the unified cap.

Further the gift tax annual exclusion, now $14,000 per person per year, was preserved. This remains a neglected planning tool. The exclusion, within its limits, is not chargeable to the estate/gift unified lifetime exemption, and essentially operates as a separate device for transfer of assets. A married couple may now transfer up to $28,000 to any individual every year completely free of gift tax and without reducing their lifetime threshold.

Finally the generation skipping tax exemption continues to parallel the federal exemption amount and is now set at $5,250,000. This tax applies to transfers 2 or more generations removed from the transferor and comprise a second level of taxation, often addressed in large estates.

PORTABILITY

A unique aspect of the new law preserved from the prior law, consists in the fact that any unused portion of a spouse's exemption amount may be utilized by the surviving spouse. By example, in the event that spouse #1 (first spouse to die) only utilized $2,000,000 of his exemption equivalent, (estate/gift), the surviving spouse would be able to utilize $8,500,000 of exemption equivalents (her own $5,250,000 plus the unused 3,250,000 from spouse #1).

This approach mirrors some facets of the traditional by-pass (credit shelter) trust in that the second spouse to die may use their exemption amount, plus the amount sheltered in trust in the first spouse to die's estate. One of the remaining advantages of said by-pass trust, is that appreciation and accumulated income remain sheltered in said trust, and continue to avoid taxation in the estate of the second spouse to die.

Further, portability must be formally elected by the executor on the estate tax return of the first spouse to die (form 706). Thus, even if no estate tax is due at that level, such election and filing must occur.

NEW YORK STATE

New York State has not altered exemption equivalents in many years. The New York exemption equivalent (state credit) is $1,000,000. Presumably more New York estates will now be required to file a New York estate tax return, and pay New York estate tax, but not file a federal estate tax return. The state tax rates are significantly lower than their federal counterparts and are capped out at 16%.

OVERVIEW

It is apparent that any planning tools executed over the past 15 years or more, will have to be reevaluated in light of the present tax structure and the portability feature. For example, certain plans viable a few years ago may, by their language, wind up over funding a by-pass trust and leaving nothing for the surviving spouse to utilize

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Trials and Tribulations – Fifty Years of Family Court

BY MERYL KOVIT

Meryl Kovit

Part 4 of a series.

As the United States Supreme Court rendered its landmark decision in *Roe v. Wade,* 410 US. 113, (1973), Wayne Newton was crooning "Daddy Don't You Walk So Fast" on the American airwaves. This song, about the effect on a little girl of the breakup of her parents, was Wayne Newton's biggest hit, peaking at number 4 on the billboard chart in 1972.

As our story of the Family Court began, back in 1962, *Father Knows Best* was at the top of the chart — but, now "Daddy Don't You Walk So Fast" was at the top of the chart.

Robert Young never dealt with what happens when the daddy leaves the family on Father's Knows Best. "Daddy Don't You Walk So Fast," was for many former fans of *Father Knows Best*, an introductory course in how children deal with parental break up. Remedial programs are still being taught to this day, and if Family Court is any indication of how the society is doing as a whole and it is, then few people have ever passed the course. To be fair, most would flunk even after a private tutorial with Robert Young, because just like the issue raised in *Roe v Wade*, breaking up is not only hard to do, it is also a difficult subject to understand from all sides.

Roe was a turning point in the history of the world, and more importantly for our purposes here, in the history of the Family Court. *Roe* showed that the times were clearly changing, and it was clear that *Father knows Best* would never return to the airwaves. This was the world in which Simeon Golar took the bench in Queens Family Court.

Judge Golar became the chairman of the Board of the New York City Housing Authority in 1970. He was the first chairman to have lived in public housing. He was appointed to the bench by Mayor Lindsay in December of 1973.

Just two and one half years later, in 1976, the year of our nation's bicentennial, Judge Simeon Golar, Queens Family Court, resigned from his judgeship — he didn't go quietly. He wrote a res-

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ANSWERS TO MARITAL QUIZ ON PAGE 10

Question #1 - Plaintiff's counsel failed to substantially comply with the matrimonial rules regarding periodic billing statements. Is the Plaintiff's counsel precluded from seeking unpaid fees from the Plaintiff?

Answer: Yes, *Rosado v. Rosado* 2012 NY Slip Op 7977 (2nd Dept.)

Question #2 - In question #1 is Plaintiff's counsel also precluded from seeking counsel fees from the Defendant?

Answer: Yes, *Rosado v. Rosado* 2012 NY Slip Op 7977 (2nd Dept.)

Question #3 - Is there a right to dispute an allegation of irretrievable breakdown under the no-fault divorce ground provided by DRL § 170 (7)?

Answer: No, *Palermo v. Palermo* 2012 N.Y. Slip Op 7528 (4th Dept.) affirming *Palermo v. Palermo,* 35 Misc. 3d 1211 (A)*; 950 N.Y.S.2d 724.*

Question #4 - Is animosity between a grandparent and the grand child's parents sufficient to deprive the grandparent of visitation with the grandchild?

Answer: No, *Gray v. Varone* 2012 NY Slip Op 9064 (2nd Dept.)

Question #5 - Can a distributive award in a judgment of divorce be modified?

Answer: No, *Wasserman v. Wasserman* 2013 NY Slip Op 1078 (2nd Dept.)

Question #6 - Can an equitable distribution award in a judgment of divorce be modified?

Answer: No, *Wasserman v. Wasserman* 2013 NY Slip Op 1078 (2nd Dept.)

Questions #7 - In awarding temporary maintenance, should the court consider the care of disabled adult children that inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment?

Answer: Yes, DRL §236 B 5-a, c, (2) (xii).

Question #8 - In awarding temporary maintenance, should the court consider the care of elderly parents or in-laws that inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment?

Answer: Yes, DRL §236 B 5-a, c, (2) (xii).

Question #9 - Can a substantial distributive award preclude the granting of counsel fees to the recipient of the distributive award?

Answer: Yes, *Heymann v. Heymann* 958 N.Y.S. 2d 448 (2nd Dept. 2013)

Question #10 - In a child support proceeding in the Family Court, after a hearing, may the Support Magistrate order a party represented by assigned counsel, to pay attorneys fees to his assigned counsel?

Answer: Yes, in an amount representing the difference between what the attorney charges a privately retained client and what he received from the assigned counsel plan. *Matter of Olga Cherrez v. Jose Antonio Lazo* 102 A.D.3d 782; 957 N.Y.S.2D 889 (2nd Dept. 2013)

Estates Update

(Continued from page 1)

during her lifetime. Allocation of assets between spouses will often have to be adjusted.

Some practitioners, in potential anticipation of the estate tax exemption amount plummeting, encouraged extensive gift giving towards the end of 2012. Many of these gifts may now prove to be non-feasible. The utilization of beneficiary disclaimer, (EPTL§2-1.11) as long as made within nine months of the transfer, may serve as a correction mechanism for these "accidental" gifts. Certain gifts can be disclaimed by the donee if done before acceptance of any of the benefits of the transfer. The state renunciation statute noted above satisfies all the requirements of the federal disclaimer statute (IRC§2518), and is sufficient.

Finally, the allocation of traditional estate tax deductions (i.e. commissions, legal fees, accounting fees) will need to be reconsidered, as said deductions, may no longer be needed for the large benefits they served on federal estate tax returns. If no federal tax is required, these deductions may either be taken on the New York State estate tax return or the federal estate income tax return (fiduciary return 1041) where they may now be more valuable. Fiduciary income tax rates are generally significantly higher than state estate tax rates. In certain cases, if there is no necessity for filing a federal estate tax return at all, they may be taken on both.

QUEENS COUNTY

In consideration of the much delayed tax changes, our anticipated November Seminar on estate planning was justifiably and voluntarily postponed, and shall be offered in the spring. Further, we intend to offer a practical skills seminar next fall notably focusing on litigation practice and procedure in Surrogate's Court. Surrogate Peter J. Kelly and his excellent staff continue to keep the Court functioning at an exceptional level, despite the recent wave of cutbacks over the past (2) two years. We wish all of our friends who continue to struggle in Sandy's aftermath a peaceful and productive year

David N. Adler is a Past President (98-99) of the Queens County Bar Association and Chairperson of its Surrogate's Court, Estates and Trusts Committee.