# Estate Planning Briefs

February 2020

## Estate Planning Bonanza?

In December, as part of the budget deal, the Congress passed the SECURE Act (Setting Every Community Up For Retirement Enhancement Act), and the President quickly signed it. The new legislation included liberalization of retirement plan rules for small employers, repeal of the old rule that those over 70½ are barred from contributing to a traditional IRA, and permission to use up to $10,000of 529 plan money to repay student loans (lifetime cap, not per year), among other things. According to the bipartisan Joint Committee on Taxation, the costliest change in terms of lost revenue is an increase in the age at which Required Minimum Distributions (RMDs) must begin to 72, up from the familiar 70½. The Congress decided to look to those who inherit IRAs and other qualified retirement plan assets to offset the revenue loss. The “stretch IRA” has largely been eliminated as an estate planning strategy.

The new rule, when decedents die in 2020 or later, requires that the inherited IRA be paid out in ten years, not over a lifetime.

There are important exceptions to this new rule. These designated beneficiaries will be permitted distribution periods longer than ten years:

- a surviving spouse;
- a minor child or children;
- a disabled beneficiary;
- a chronically ill individual; and
- beneficiaries who are less than ten years younger than the account owner (such as a brother or sister).

The exception for the minor child lasts only until he or she reaches the age of majority (18 or 21, depending upon state law), because then the ten-year rule kicks in. For the other categories of designated beneficiaries, the exception ends at death when a ten-year distribution must begin.

We’ll have complete coverage of the SECURE Act in our April Estate Planning Study.

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## Long Drought Ending?

The IRS lost popularity with the Congress after it was revealed that the Service had inappropriately targeted conservative groups seeking §501(c)(3) status before the 2012 election. Eventually a settlement was reached in litigation over the matter. IRS budgets were cut and have been slow to recover, even though the policies have since been adjusted.

The constraints on funding the IRS may soon loosen. President Trump's fiscal 2021 budget proposes an increase in IRS funding of $15 billion over the next 10 years. An additional $300 million would be poured into IRS technology systems in the next year. The increase in funding is projected to raise $79 billion in new revenue during the budget window.

*COMMENT: Even before a new budget is adopted, the head count is growing at the IRS. Some 1,000 temporary phone assistors were expected to be hired in March, as well as some 850 permanent collections specialists.*

## Green Light on Lock-In Strategies?

In the history of the U.S. estate tax, the amount exempt from the tax has never been reduced. Rather, the threshold of taxation has been increased from time to time, so as to keep targeting the federal estate tax on only the largest estates. However, the exemption is slated to fall roughly in half in 2026 under current law. That has led some estate planners to recommend making large taxable gifts before 2026, so as to "lock in" the larger exemption amount. In November the IRS issued Final Regulations that show how this strategy will work [IR-2019-189, T.D. 9884].

*Basic example*. Elizabeth made a $5 million taxable gift in 2018, and so used up that much of her basic exempt amount. If she dies in 2020, her basic estate tax exemption will be reduced by that $5 million, and so it will be $6.58 million. If she dies in 2026, assuming that the exemption has then fallen to $6.8 million, her basic exclusion amount will be just $1.8 million.

*Larger gift*. Now assume Elizabeth makes $10 million worth of taxable gifts in 2020 and survives to 2026, when the exemption has fallen to$6.8 million. The estate tax is determined by bringing taxable gifts back into the calculation and allowing whatever credits were granted for those lifetime gifts. That means Elizabeth's basic exclusion amount in 2026 will be $10 million, even though under the statute it will have fallen much lower for anyone who made no taxable gifts at all. There is no "clawback" of the larger exempt amount, as some planners had feared might happen.

*Married couple*. When Fred died in 2019 his executor elected to have Ethel inherit his unused exemption amount (the DSUE), then $11.4 million. If Ethel dies in 2020, she has her own exempt amount of $11.58 million, plus the exemption she inherited from Fred, for a total basic exempt amount of $22.98 million. What happens if Ethel survives until 2026? The exempt amount inherited from Fred does not change, but her own exemption will fall. Assuming that it's then $6.8 million, her basic exempt amount would be $18.2 million. Again, there is no clawback of the larger exemption.

*—IR-2019-189, T.D. 9884*

*COMMENT: Under the Regulations, one cannot use the "bonus" exempt amount first, to save the basic exempt amount for the future. In the basic example above, Elizabeth cannot try to shield a $5 million gift with the enhanced portion of her basic exempt amount. She must exhaust the basic amount before the bonus is tapped, under the ordering rules. In short, the IRS has made it explicit that, as it stands today, the extra protection from the federal transfer tax provided by TCJA2017 is a "use it or lose it" proposition.*

## No Transfer, No Trust

Robert Homan executed a trust agreement for the management of his farm in 2013. He named himself as the initial trustee and his nephew, John, as successor trustee. The trust property was listed on Schedule A attached to the trust agreement. Unfortunately, that page was left blank.

Robert never effectively transferred anything into the trust.

The lower court held that because Robert never declared himself the trustee of the farm land, the land never became the property of the trust, and the terms of the trust will not affect the administration of the estate. The Indiana Court of Appeals now affirms.

*—Homan v. Estate of Homan, 121 N.E.3d 1104 (Ind. Ct. App. 2019)*

## Separation Sufficient

After some six years of marriage, Michael filed for a divorce from his wife Michelle on January 27, 2017.They executed a separation agreement on February 14, 2017. Michael died intestate on May 1, 2017, before the final decree dissolving the marriage was entered.

Michelle asked to be named administrator of Michael's estate. Her petition did not mention the pending divorce, and she did not notify any potential heirs of the estate. Michelle expected to inherit a share of the estate as a surviving spouse.

Michael's mother Gloria objected. The trial court rejected Gloria's argument, but the Court of Appeals now reverses. The separation agreement stated that it was a final settlement of the couple's marital and property rights. As such, it was a waiver of marital inheritance rights. Michelle tried to introduce evidence that a reconciliation had been underway before Michael's death, but the court held that irrelevant. The separation agreement stated explicitly that it could only be modified in writing if signed by both parties.

*—In re Estate of Petelle, 440 P.3d 1026 (Wash. Ct. App. 2019)*

*COMMENT: As Michael did not have any children, his mother Gloria was his sole intestate heir.*

## Murderer Might Inherit

Marjorie Ivy was Mordechai Faskowitz' girlfriend for 32 years. She named him as the beneficiary of her IRA, an annuity, two investment accounts and the "Mordechai Faskowitz Supplemental Care Trust." Faskowitz was schizophrenic, a condition that was controlled by medication. Unfortunately, there was a problem getting his prescription filled in June2013, and without the drugs, Faskowitz deteriorated rapidly. The following September he was arrested for attacking a man walking a dog, and he was sent to a psychiatric hospital. Despite the fact that he attacked two more people while he was hospitalized, Faskowitz was released without medication after he told a doctor he would not attack anyone if no one attacked him.

In October Faskowitz brought a knife to Ivy's home, stabbed her more than 40 times, and cut her neck to be certain of her death. Three psychiatrists testified at his subsequent trial that Faskowitz was suffering from delusions and did not understand the consequences of his actions. He was found not guilty by reason of insanity.

Ivy's nephew was named the administrator of her estate. In August 2016 he filed a motion to disqualify Faskowitz from receiving any benefits from the estate under the "slayer's statute." That law bars inheritance by a "person who intentionally and unjustifiably causes the death of another." Summary judgment was granted.

The appellate court now reverses. The slayer's statute explicitly applies to anyone convicted of first- or second-degree murder. It does not necessarily apply to one who is not guilty by reason of insanity. The reasons for the verdict were not provided in the criminal trial, so further proceedings are needed. It may be that Faskowitz did not intend to kill Ivy, or that he was under the delusion that it was not Ivy he was attacking, but a demon of some sort.

*—In re Estate of Ivy, 2019 WL 2710036 (Ill. App. Ct. June 26, 2019)*