Recent Developments in Estate Planning

Stanley M. Johanson

University Distinguished Teaching Professor and
James A. Elkins Centennial Chair in Law
The University of Texas School of Law
Austin, Texas

68th Annual Taxation Conference
University of Texas at Austin

Austin, Texas
December 4, 2020

II. Section 401—Qualified Retirement Plans and IRAs

A. **New life expectancy tables for 2021.** The current Uniform Lifetime Table and Single Life Table, used to calculate required minimum distributions from qualified plans and IRAs, were published in 2002, meaning that the life expectancies built into the tables were rather dated. In Publication 590-B, Treasury has published new tables that incorporate current mortality data, to be effective in 2021. This example is given in the preamble:

> "For example, a 70-year-old IRA owner who uses the Uniform Lifetime Table to calculate required minimum distributions must use a life expectancy of 27.4 years under the existing regulations. Using the Uniform Lifetime Table set forth in the regulations, this IRA owner would use a life expectancy of 29 years to calculate required minimum distributions."

B. **Qualified plans and IRAs: Waiver of 60-day rollover requirement.** A rollover (e.g., an IRA-to-IRA rollover) generally must be completed no later than 60 days following the day on which the distributee receives the distribution. This led to swaths of letter ruling requests for an extension of the 60-day rule based on a variety of excuses—until the Service published Rev. Proc. 2016-47, IRB 2016-37. The Revenue Procedure provides for a self-certification procedure (subject to verification on audit) that may be used to claim an extension. Plan administrators and IRA custodians and trustees can rely on the self-certification, which must satisfy one of eleven listed conditions, including financial institution error, misplaced and uncashed checks, distributions deposited in a non-IRA account, severe damage to taxpayer's residence, a death in the family, serious illness of taxpayer or family member, and postal error.

1. **This one was not covered by the self-certification procedure.** In Ltr. Rul. 202029006, Taxpayer A relied on her spouse to handle financial and tax matters during their 45-year marriage, which ended in divorce. A received a distribution from an IRA maintained by Financial Institution, which did not inform her that this was an IRA distribution She deposited the distribution in a non-IRA account at another financial institution. When A received a Form 1099-R from Financial Institution, she retained an attorney who submitted a waiver on her behalf, but "the ruling request was closed due to procedural deficiencies." W now submitted this request for a waiver, which was granted based on her reliance on her spouse for all financial and tax matters, her recent divorce, and Financial Institution's failure to notify her that this was a distribution

II. Section 2010—Portability Election

A. **Request for extension.** Several rulings granted extensions to make the portability election, without giving any discussion of the facts that support the request for an extension**.** Ltr, Rul. 20194701 "For various reasons, an estate tax return was not timely filed and a portability election was not made…. Information, affidavits, and representations submitted on behalf of Decedent's estate explain the circumstances that resulted in the failure to timely file a valid election." Same thing in Ltr. Ruls. 202017021 and 202018002 ("for various reasons") A couple of rulings gave explanations—sort-of. In Ltr. Rul.202005001, the CPA "was experienced in estate and fiduciary income tax matters [and] was aware that the estate could elect to transfer the DSUE amount to Spouse," but failed to make the election. In Ltr. Rul. 202019022, "Spouse's advisors did not inform Spouse of the availability of the portability election."

b. **Extension of time to elect portability of deceased spouse's DSUE.** Rev. Proc. 2017-34, IRB 2017-26, noted that "the considerable number of ruling requests for an extension of time to elect portability

… indicates a need for continuing relief…. Further, the considerable number of ruling requests received has placed a significant burden on the Service." Under Rev. Proc. 2017-34, an extension is automatically granted without the need for a private letter ruling if a Form 706 is filed "the later of January 2, 2018, or the second anniversary of the decedent's date of death."

1. If failure to make the DSUE election is not discovered until after the surviving spouse's death and two years have elapsed since the death of the first spouse, the two-year window for filing a late return will be of no help. The lesson here: At a certain economic level, it is essential that the DSUE issue be discussed with the client(s). As for determining what is that "certain economic level," I would assume a worst case scenario—that on the surviving spouse's death the exemption could be as low as $5 million, or even $3.5 million, meaning that the spouse's estate will need all of the exemption that it can get. If it is decided that a DSUE election is not to be made (because the parties did not want to incur the cost of an "unnecessary" estate tax return), it is essential that discussion of the issue, and the client's decision, be memorialized in the attorney's files.

2. Cf. *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780 (Tex. 2006): The Texas Supreme Court ruled that a decedent's executor can sue an attorney for estate taxes resulting from allegedly negligent estate planning advice. The court drew an analogy to cases involving injury to property, where an action to recover damages survives the death of the property owner. "A claim that an estate planner's negligence resulted in the improper deletion of a client's estate involves injury to the decedent's property."

III. Section 2036—Transfer With Retained Life Estate

A. Last-minute estate planning—using almost every tool in the toolbox—was handled rather badly. In *Estate of Moore v. Commissioner*, T.C. Memo. 2020-40, 88-year-old Moore owned "a thriving and very lucrative farm" in Arizona. "As Moore entered extreme old age, he began to think about selling the farm. He entered into negotiations with a neighboring farmer. Then a crisis struck"—congestive heart failure. Moore, told that he had six months to live, was released from the hospital and entered hospice care. "Then," said the court, "he began to plan his estate." Moore set out a long list of planning objectives, which included a "wish to maintain control of my assets during my lifetime" [he was receiving hospice care!] and "reduce or eliminate federal estate taxes, if possible." Four days after being discharged from the hospital, Moore created a Living Trust, a Charitable Lead Annuity Trust, a Children's Trust, a Management Trust, an Irrevocable Trust, and a Family Limited Partnership. "So to recap, Moore created a total of five trusts and a family limited partnership in one day." Shortly thereafter, Moore completed negotiations for selling the farm for $16.5 million. He died three months later, at age 89.

1. Moore died in 2005. The family filed its petition protesting a deficiency in 2009, the trial was held in 2012, and the Tax Court decision was filed on April 7, 2020—fifteen years after Moore died and seven years after the trial hearing.

2. The Tax Court opinion is … quite long—56 pages—and complicated. While the opinion is mildly interesting (a rather colorful family) and raises some interesting issue, it would be a challenge to summarize the opinion in the time allotted, so I won't try. (See the Steve Akers-Ron Aucutt's Bessemer Trust report for a thorough analysis.) Some of the court's conclusions:

Title search: Recent Developments Affecting Estate Planning

Also available as part of the eCourse
2020 Stanley M. Johanson Estate Planning eConference

First appeared as part of the conference materials for the
2020 Stanley M. Johanson Estate Planning Workshop session
"Recent Developments Affecting Estate Planning"