

**PRESENTED AT**

2022 Stanley M. Johanson Estate Planning Workshop

Friday, December 2, 2022  
Austin, Texas

Recent Developments Affecting Estate Planning

**Turney P. Berry**

Turney P. Berry  
WYATT, TARRANT & COMBS, LLP  
400 West Market Street, Suite 2000  
Louisville, Kentucky 40202-3227  
502.562-7505 – Direct Dial  
[tberry@wyattfirm.com](mailto:tberry@wyattfirm.com)

## **RECENT DEVELOPMENTS AFFECTING ESTATE PLANNING**

Turney P. Berry  
WYATT, TARRANT & COMBS, LLP  
400 West Market Street, Suite 2000  
Louisville, Kentucky 40202-3227  
502.562-7505 – Direct Dial  
[tberry@wyattfirm.com](mailto:tberry@wyattfirm.com)

**Disclaimer:** This information is intended as a resource for attorneys, fiduciaries, and wealth management professionals, but it does not constitute legal advice and reliance thereon does not establish an attorney-client relationship. This information is not a substitute for an attorney's judgment and application of the relevant law to a client's circumstances.

The author thanks Charles A. Redd for his contribution to these materials. Mistakes are the author's own.

The ethical rules of the Kentucky Bar may require identification of this information as advertising material.  
THIS IS AN ADVERTISEMENT.

Copyright 2022 Turney P. Berry

## TABLE OF CONTENTS

<b>PART 1 – 2017 TAX ACT IS STILL WITH US.....</b>	<b>1</b>
A.    Effective Date and Sunset.....	1
B.    New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-Skipping Transfer Exemption and Clawback .....	1
C.    Proposed Anti-Abuse Regulations. ....	3
D.    Divorce – Income Tax. ....	6
<b>PART 2 – IS MORE TAX REFORM ON THE WAY? .....</b>	<b>7</b>
<b>PART 3 – ESTATE PLANNING PRACTICE IN 2018 AND BEYOND.....</b>	<b>14</b>
<b>I.        WHERE WE ARE TODAY .....</b>	<b>14</b>
A.    New Planning Approaches .....	14
B.    Portability Planning.....	15
<b>II.      OBTAINING AND RETAINING BASIS.....</b>	<b>17</b>
A.    Generally.....	17
B.    Swapping Assets with Existing Grantor Trusts.....	17
C.    Should Valuation Discounts Be Undone?.....	18
D.    Powers of Appointment For Basis Purposes .....	19
<b>PART 4 – FEDERAL RULINGS, CASES AND OTHER DEVELOPMENTS .....</b>	<b>24</b>
<b>A.        INCOME TAX MATTERS .....</b>	<b>24</b>
1.    Consistent Basis Reporting.....	24
2.    Termination of Trust Results In Capital Gains.....	24
3.    Qualified Replacement Property and A Grantor Trust .....	26
<b>B.        CHARITABLE AND TAX-EXEMPT MATTERS - Sections 170, 642, 664, 501, 509, 2055, 2522, and 4940-4947 .....</b>	<b>26</b>
1.    Charitable Distributions From Trusts .....	26
2.    Use of Section 501(c)(4) Organizations to Facilitate Business Interest Ownership.....	29
3.    Estate Income Tax Deduction .....	31
4.    Conservation Easement Controversy .....	31
5.    Granted In Perpetuity and Protected In Perpetuity Requirements .....	33
6.    Protected In Perpetuity; Validity of Regulation.....	38
7.    Savings Clause In Easement Ineffective.....	62
8.    Government Language for Extinguishment Clause.....	65
9.    Pre-Arranged Sales.....	65
10.   Notes Owned By A Private Foundation .....	71
11.   Disqualified Person for Section 4958 Purposes .....	73
12.   Donor Challenge to Charity’s Promise .....	74
13.   LLC May Qualify As A Section 501(c)(3) Organization.....	76
14.   Basis of Assets of Former Public Charities for Section 4940 Purposes .....	77
15.   No Contemporaneous Written Acknowledgement Inferred From Gift Documents and Special Rule for Contributions to Donor Advised Funds.....	78

16.	Discretionary Marital and Charitable CRT Disallowed; Treasury Reverses Course.....	80
C.	SECTION 408 — IRAs AND RETIREMENT PLANS .....	81
1.	SECURE Act Changes.....	81
2.	Waiver of 2020 Required Minimum Distributions .....	84
3.	Transfer to Inherited IRA Denied .....	85
D.	SECTIONS 671-678 -- GRANTOR TRUST RULES .....	86
1.	Section 678 and a Presently Exercisable General Power of Appointment As A Planning Device .....	86
2.	Grantor Trusts and Spouses .....	92
3.	DING Trusts .....	92
E.	SECTION 1361 – S CORPORATIONS .....	100
F.	SECTIONS 2031 and 2512 – VALUATION .....	100
1.	Valuation of LLCs Holding Leased Property For Gift, Estate, and Charitable Purposes.....	100
2.	Valuation of Image and Likeness.....	102
3.	Validity of Buy-Sell Agreement and Effect of Life Insurance Paid to Company On The Value.....	105
4.	Valuation of Two Simultaneous Fractional Gifts.....	111
G.	SECTION 2032 — ALTERNATE VALUATION AND SECTION 2032A — SPECIAL USE VALUATION .....	115
1.	New Proposed Alternate Valuation Regulations .....	115
H.	SECTION 2033 – GROSS ESTATE.....	115
I.	SECTIONS 2035-2038 – RETAINED INTERESTS .....	115
1.	Tax Court Strikes A Blow Against Discount Planning .....	115
2.	Application of Section 2043 to Defective FLP Transfer.....	121
J.	SECTIONS 2041 AND 2514 — GENERAL POWERS OF APPOINTMENT .....	126
K.	SECTIONS 61, 83, 409A, 2042 AND 7872 - LIFE INSURANCE .....	126
1.	Analysis of Split Dollar Plan .....	126
L.	SECTION 2053 and 2054 - DEBTS AND ADMINISTRATION EXPENSES .....	146
1.	Guidance Under Section 2053 Regarding Deduction for Interest Expense and Amounts Paid Under a Personal Guarantee, Certain Substantiation Requirements, and Applicability of Present Value Concepts .....	146
M.	SECTIONS 2056, 2056A AND 2519- MARITAL DEDUCTION.....	151
1.	Termination of QTIP Trust Creates Double Gifts.....	151

2.	Time to Elect Portability Extended to Five Years.....	159
N.	SECTIONS 2501 TO 2524 – GIFTS .....	160
1.	Unusual Assignment Clause Produced A Gift.....	160
2.	Step-Transaction .....	170
3.	Timeliness of Checks as Gifts.....	173
O.	SECTION 2518 – DISCLAIMERS .....	175
P.	SECTIONS 2601-2654 - GENERATION-SKIPPING TRANSFER TAX.....	175
1.	Trust Amendment Approved .....	175
Q.	SECTIONS 2701-2704 - SPECIAL VALUATION RULES .....	177
1.	How Might The Doctrine Of Merger Be Used With A GRAT? .....	177
2.	GRAT Invalidated.....	178
3.	Valuation of Publicly Traded Stock .....	180
R.	SECTION 6166 — EXTENSION OF TIME TO PAY TAX .....	182
S.	TAX ADMINISTRATION .....	182
1.	Priority Guidance Plan .....	182
2.	No Ruling Positions.....	185
3.	Meaning of Tax Reimbursement Clause .....	189
4.	CBO Publication, Understanding Federal Estate and Gift Taxes .....	190
5.	No Penalties Quite Yet.....	192
6.	Notices Creating “Listed Transactions” Require Notice and Comment.....	194
7.	Decanting QTIP Challenged By IRS .....	198
T.	MISCELLANEOUS .....	200
	PART 4 – STATE DEVELOPMENTS .....	201
U.	STATE DEVELOPMENTS .....	201
1.	Failure to Discuss Basis Planning .....	201
2.	Trust Protector As Fiduciary With A Duty To Whom? .....	201
3.	In Terrorem Clause In An Undue Influence Situation .....	203
4.	Effect of No Contest Clause.....	206
5.	Georgia Allows Beneficiaries To Amend Trust To Give Themselves The Power To Remove And Replace Trustees .....	208
6.	Attorney’s Insurance Policy Does Not Cover Attorney Acting as Trustee .....	210
7.	Trusts Reformed to Avoid Reciprocity .....	211
8.	The Ethics of Lawyers Working Remotely .....	211
9.	Entity Transparency .....	212
10.	Exercise of Power of Appointment .....	213
11.	Trust Termination Would Violate Material Purpose (Nebraska) .....	218
12.	Conflicts of Law – Will .....	219
13.	Common-Law Same Sex Marriage Before Same Sex Marriage Allowed .....	221
14.	Non-Participants In Mediation Beware .....	223
15.	Court In One State Applying The Law of Another Is Problematic .....	224

16.	Trust Protector Subject To Indirect Undue Influence.....	227
17.	Attorney-Client Privilege After Client's Death .....	230
18.	Place of Celebration Controls Existence of Marriage.....	233
19.	Power to Appoint to Charity Does Not Create Assets Countable for Medicaid Purposes.....	234
20.	Amount of Wrongful Death Proceeds Included in An Estate .....	235
21.	Oregon Grabs Out of State QTIP for Estate Tax.....	236
22.	Effect of Entity Governing Instrument On Testamentary Dispositions.....	241
23.	Even A Small Interest In A Trust Confers Jurisdiction On A Beneficiary.....	244
24.	Letter From 1954 Remains A Fee Agreement.....	246
25.	Receiver Appointed And LLC Assets Liquidated – 10 <sup>th</sup> Circuit.....	250
26.	Where Inheritance Taxes Are To Be Paid From An Insufficient Residue, The Excess Is Apportioned To The Recipients of Assets – Nebraska.....	253
27.	Attorney Has No Duty To Non-Client Prospective Beneficiaries.....	254
28.	Remote Signing Procedures During The Pandemic Not Followed – New York .....	258
29.	A Trust Is Not A Contract For Arbitration Purposes.....	260
30.	Action Against An Attorney-In-Fact May Not Require Production Of The Principal's Will.....	262
31.	Not Simultaneous Deaths.....	264
32.	Interpretation of Situs Clause In Trust.....	266
33.	Power of Appointment Exercised To Unfunded Trust Was Valid .....	268
34.	No Distribution Outright “If Beneficiary Is Married” – Upheld (Indiana).....	269
35.	Attorney Escapes Punishment Despite Pre-Notarizing Estate Planning Documents.....	271
36.	Divorce Removes Only Wife, Not Wife's Heirs .....	272
37.	Modification of Trust After One of Two Settlers Has Died .....	274
38.	Trust Investment Missteps Create Liability in a Rabbi Trust .....	276
39.	Ohio Court Affirms Telephonic Marriage of a U.S. Resident Under Mohammedan and Bangladeshi Law.....	278

## **APPENDIX A - Biden Administration Greenbook**

## **NOTABLE DEVELOPMENTS OF INTEREST TO ESTATE PLANNERS**

### **PART 1 – 2017 TAX ACT IS STILL WITH US**

On December 22, 2017 was enacted “An Act To Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018,” Pub. L. No. 115-97, (“2017 Tax Act”). The 2017 Tax Act makes significant income tax changes, the effects of which will not really be understood for some time, particularly after regulations are issued. The major transfer tax change is the doubling of the wealth transfer exclusion.

#### **A. Effective Date and Sunset**

Most provisions in the 2017 Tax Act became effective January 1, 2018. Except with respect to the change in the calculation of inflation adjustments, many of the changes to business taxes and other changes, discussed below, many of the provisions of the 2017 Tax Act will sunset on January 1, 2026 and the law in effect on December 31, 2017 will become effective again, unless legislation is enacted altering this sunset.

#### **B. New Basic Exclusion Amounts for Estate and Gift Taxes and New Generation-Skipping Transfer Exemption and Clawback**

For estate and gift tax purposes, the 2017 Tax Act increased the basic exclusion amount under section 2010(c)(3) to \$10 million as adjusted for inflation with a 2010 base year (the same base year as under prior law). Thus, the basic exclusion amount for 2022 for gift and estate tax purposes, and the generation-skipping transfer (“GST”) exemption amount under section 2631(c), is \$12,060,000. Under the current applicable exclusion amount, the number of decedent’s estates subject to federal estate tax may only reach a few thousand, and taxpayers have the ability to make larger gifts during their lives free of gift tax. Just as important, taxpayers with less than the exclusion amount may transfer assets among themselves in order to include assets in the estate of a taxpayer most likely to die soonest. This creates enormous basis planning opportunities.

On November 26, 2019, final clawback regulations were issued (§20.2010-1(c)). T.D. 9884. In a nutshell, the regulations take the positions that (1) donors who paid gift tax on gifts prior to 2017 in excess of the original basic exclusion amount can make up to \$5 million of gifts in 2018-2025 which will be protected from tax by the additional basic exclusion amount and (2) donors who die after 2025 and who made gifts in 2018-2025 that were protected from gift tax by the additional basic exclusion amount will be able to preserve the additional basic exclusion amount used against those gifts when their estate taxes are determined. So there is no “clawback” but in order to preserve the additional basic exclusion amount, a gift will have to be made. In other words, a donor who makes only a \$5 million gifts before 2025 and dies after 2025 will not benefit from the additional exclusion.

Suppose the first spouse dies before 2026 and portability is elected. The surviving spouse may use the full unused exclusion amount of the first spouse, even after January 1, 2026. Examples 3 and 4 of the final regulations state:

(iii) Example 3. Individual B's predeceased spouse, C, died before 2026, at a time when the basic exclusion amount was \$11.4 million. C had made no taxable gifts and had no taxable estate. C's executor elected, pursuant to §20.2010-2, to allow B to take into account C's \$11.4 million DSUE amount. B made no taxable gifts and did not remarry. The basic exclusion amount on B's date of death is \$6.8 million. Because the total of the amounts allowable as a credit in computing the gift tax payable on B's post-1976 gifts attributable to the basic exclusion amount (zero) is less than the credit based on the basic exclusion amount allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's \$18.2 million applicable exclusion amount, consisting of the \$6.8 million basic exclusion amount on B's date of death plus the \$11.4 million DSUE amount, subject to the limitation of section 2010(d).

(iv) Example 4. Assume the facts are the same as in Example 3 of paragraph (c)(2)(iii) of this section except that, after C's death and before 2026, B makes taxable gifts of \$14 million in a year when the basic exclusion amount is \$12 million. B is considered to apply the DSUE amount to the gifts before applying B's basic exclusion amount. The amount allowable as a credit in computing the gift tax payable on B's post-1976 gifts for that year (\$5,545,800) is the tax on \$14 million, consisting of \$11.4 million in DSUE amount and \$2.6 million in basic exclusion amount. This basic exclusion amount is 18.6 percent of the \$14 million exclusion amount allocable to those gifts, with the result that \$1,031,519 ( $0.186 \times \$5,545,800$ ) of the amount allowable as a credit for that year in computing gift tax payable is based solely on the basic exclusion amount. The amount allowable as a credit based solely on the basic exclusion amount for purposes of computing B's estate tax (\$2,665,800) is the tax on the \$6.8 million basic exclusion amount on B's date of death. Because the portion of the credit allowable in computing the gift tax payable on B's post-1976 gifts based solely on the basic exclusion amount (\$1,031,519) is less than the credit based solely on the basic exclusion amount (\$2,665,800) allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's \$18.2 million applicable exclusion amount, consisting of the \$6.8 million basic exclusion amount on B's date of death plus the \$11.4 million DSUE amount, subject to the limitation of section 2010(d).

The Preamble also has a “warning” styled an Anti-abuse Rule which states:

#### 6. Anti-abuse Rule

A commenter recommended consideration of an anti-abuse provision to prevent the application of the special rule to transfers made during the increased BEA period that are not true inter vivos transfers, but rather are treated as testamentary transfers for transfer tax purposes. Examples include transfers subject to a retained life estate or other retained powers or interests, and certain transfers within the purview of chapter 14 of subtitle B of the Code. The purpose of the special rule is to ensure that bona fide inter vivos transfers are not subject to inconsistent treatment for estate tax purposes. Arguably, the possibility of inconsistent treatment does not arise with regard to transfers that are treated as part of the gross estate for estate tax purposes, rather than as adjusted taxable gifts. An anti-abuse provision could except from the application of the special rule transfers where value is included in the donor's gross estate at death. Although the Treasury Department and the IRS agree that such a provision is within the scope of the regulatory authority granted in section 2001(g)(2), such an anti-abuse provision would benefit from prior notice and comment. Accordingly, this issue will be reserved to allow further consideration of this comment.



Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Recent Developments Affecting Estate Planning

Also available as part of the eCourse

[2022 Recent Developments Affecting Estate Planning](#)

First appeared as part of the conference materials for the  
2022 Stanley M. Johanson Estate Planning Workshop session  
"Recent Developments Affecting Estate Planning"