The Top Seven Estate Planning Stories of the Past Half-Decade

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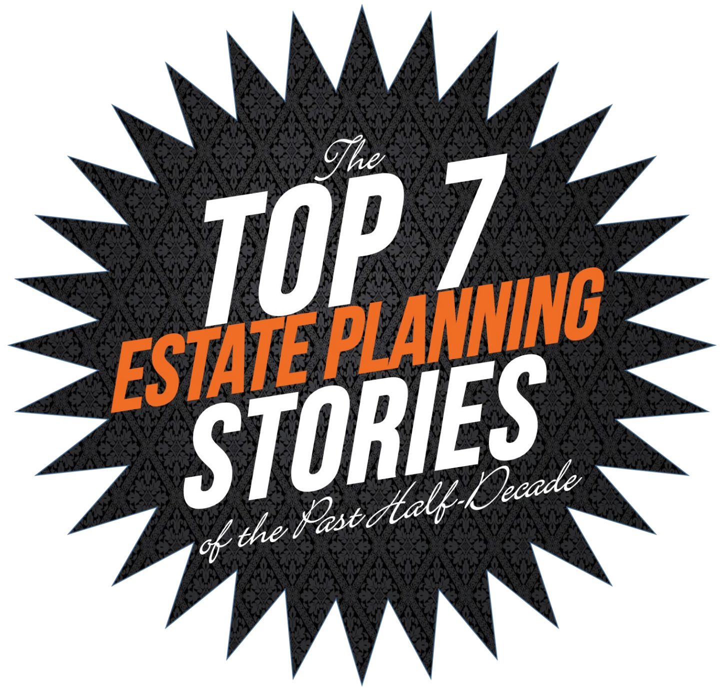
The past half-decade provided the estate planning community with plenty of drama and a lot of uncertainty and twists and turns. This article will briefly describe a number of estate planning-related stories, sometimes dramatic, and other times just plain unexpected and unpredictable.

These stories will appear in reverse-order, David Letterman style.



7. *Obergefell*: States Can't Prohibit Same-Sex Marriages

On June 26, 2015, by a 5-4 majority, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that a state can't prohibit same-sex marriages and also must recognize valid out-of-state marriages. The rationale was that they are protected under the due process and equal protection clauses of the 14th Amendment.

Being a 5-4 decision, certainly there was plenty of opposition to the decision. This discussion will likely continue for quite some time given the highly-sensitive issues involved. Married same-sex couples are now on an equal playing field as married couples of the opposite sex. This includes portability and other advantages that were previously only able to be used by opposite sex married couples.

6. PerpetuitiesGate

If this article was about the most dramatic estate planning stories, then this particular story would have been ranked #1. In 2014, a law review article titled "Unconstitutional Perpetual Trusts" was published and boldly stated that the state perpetuities statutes in Arizona, Nevada, North Carolina, Tennessee and Wyoming are unconstitutional despite substantial authority to the contrary. This article was used by a few trust promoters in one competing state, presumably primarily targeting Nevada, to claim that dynasty trusts in those five states violate the state constitution.

The law review article was met with substantial criticism, especially given that numerous treatises have arrived at a contrary conclusion. North Carolina had already ruled in the 2010 case, *Brown Brothers v. Benson,* that its perpetuities law is effective. Wyoming has an opinion letter, dated January 5, 2001, whereby the Office of the Attorney General ruled that the Wyoming perpetuities statute doesn't violate its constitution either. So two of the five states had already addressed this and found no problems.

Since Nevada appeared to be the big target of the trust promoters, the official end to the discussion unfolded in dramatic fashion as the Nevada Supreme Court ruled unanimously on March 26, 2015 in the now-famous case, *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, that the Nevada 365-year perpetuities statute does, in fact, correctly state the law in Nevada, thereby putting the final nail in the coffin and making the law review article a historical discussion piece centered around the substantial competition among the top-tier trust jurisdictions.

5. **Portability Becomes Permanent**

Portability allows a surviving spouse to use the decedent spouse's unused federal estate tax exemption rather than it going to waste if unused at the first spouse's death. Thus, it can substantially help a family where they neglected to do their estate planning or had bad estate planning documents in effect as of the first spouse's death.

Portability was introduced as part of the Tax Relief, Unemployment Reauthorization, and Jobs Creation Act of 2010. It was effective for married people dying on or after January 1, 2011. It was scheduled to sunset on December 31, 2012, but then was made permanent as a result of the 2012 Act.

Some estate planners use portability intentionally as a means of simplifying their clients' plan, while others use it only as a fallback for a plan that is otherwise never completed or not as well done as planned. There are pros and cons to either approach. The author herein believes that there are so many reasons not to intentionally use portability and that it should be a fallback strategy, not a planning strategy, in most cases.

4. **The Threat of the New IRC Section 2704(b) Treasury Regulations**

This is more about what hasn't happened and what will likely happen than what has happened. Estate planners have been on the edge of their seats awaiting the issuance of the new IRC Section 2704(b) Treasury Regulations which will affect valuation discounts, that is, assuming they are issued.

Estate planners have been waiting since roughly mid-2015 for these Regulations after it was informally announced that they were coming. Estate planners have hurried many plans involving valuation discounts in anticipation that we will likely wake up one day to find that we are planning with less-advantageous rules.

The Treasury appears to be able to make these changes without going through the traditional channels by utilizing the language in IRC Section 2704(b)(4). Although the new Regulations haven't yet been issued, the storyline here is that this has been widely-discussed among estate planners and has created a lot of hurried advanced estate plans in the interim before we ultimately see the new Regulations actually issued.

3. **Revival of ING Trusts and State Income Tax Planning**

A NING Trust (Nevada Incomplete Gift Non-grantor Trust) or DING Trust (Delaware Incomplete Gift Non-grantor Trust) is an irrevocable trust that the settlor sets up for the benefit of himself and other discretionary beneficiaries. Transfers to the trust are not completed gifts for gift tax purposes, yet the trust itself is the owner of the assets for income tax purposes. Because the trust pays the income taxes, a settlor who lives in a high state income tax jurisdiction can transfer assets to the trust and the trustee can sell the assets without any state income tax liability.

Taxpayers in high income tax jurisdictions with large unrealized capital gains or a regular stream of ordinary income from an investment portfolio have always wanted to find a way to eliminate or minimize their state income tax exposure without giving up the economic benefit of the underlying assets. On March 8, 2013, the IRS issued PLRs 20131002 through 20131006 approving such a trust under Nevada law. These landmark Rulings have opened the doors for many practitioners to take advantage of this unique opportunity for their clients who live in high state income tax jurisdictions.

The significance of this March 2013 set of PLRs is that in IR-2007-127 (July 9, 2007) the IRS had announced that it was reconsidering its position on the gift tax consequences to the beneficiaries on the distribution committees used in these types of trusts. That essentially stopped the planners until March of 2013. Since the March 2013 set of PLRs, the IRS has issued even more PLRs on this strategy and it has therefore become mainstream again.

These trusts are known as NING Trusts when done under Nevada law and DING Trusts when done under Delaware law. Although there are a few other states where these can be sitused, Nevada and Delaware are the most popular destinations.

2. **The Obamacare Tax**

When most people think about Obamacare, they think about health care coverage. However, for wealthier individuals, it's not the health care aspect that is bothersome. Rather, it's the tax that appeared to be disguised as pertaining to health care, but in actuality is really just an additional income tax on the wealthy.

Prior to 2013, taxpayers weren't required to pay Medicare tax on income generated from investments such as capital gains, dividends, and taxable interest. However, since 2013, higher-earning taxpayers can owe a 3.8% Medicare tax on some of or all of their net investment income.

The amount owed is based on the lesser of the person's total net investment income or the amount of their modified adjusted gross income that exceeds $200,000 for individuals, $250,000 for couples filing jointly, or $125,000 for spouses filing separately.

This was effectively a very large income tax increase, especially when considered in addition to the highest federal income tax bracket increasing from 35% to 39.6% for income earned in 2013 and later years. The wealthy now have significantly less after-tax income given these substantial changes. Therefore, this was one of the biggest stories of the last half-decade.

1. Fiscal Cliff Averted!

Last, but certainly not least, was the fiscal cliff. This was the biggest story of the past half-decade. It affected estate planners and wealthy individuals like never seen before. It took on a life of its own and created a fear in many people that they would never again have the tax-savings opportunities that they had in 2012.

Without any action taken by Congress, the estate and gift tax exemption would have reverted from $5 million to $1 million at the end of 2012, along with an increase of the estate and gift tax rate to 55%. Over the second half of 2012, estate planners had an amazingly easy time bringing in business as the wealthy were practically lining up at the door. Many top estate planners stopped taking new business in November and December as they had more business than they could handle already.

At the end of the day, the fiscal cliff was averted as Congress agreed to a plan that essentially maintained the rules of 2011 and 2012, except that they increased the top federal estate tax rate from 35% to 40%. The $5 million estate and gift tax exemption is now "permanent" (which means until the next time Congress meets!), and is growing by inflation each year. Needless to say, it was an amazing time for estate planners.

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