



The Year in Review, 2004

By Robert L. Moshman

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The nation is one year older and deeper in debt. Although the landscape of estate planning seems unchanged, with all the same issues on the table, everything has progressed.

There is new grist for the mill concerning the fate of the estate tax repeal. “Decoupling” is the operative word of the year as attention has been directed to the changing map of state death tax consequences. Some of the same family limited partnership cases (Strangi and Kimbell) remain on the table. And there has been another chapter in the Schiavo case.

There have been celebrity estates in the news, lawsuits over long-lost artworks, and a full smorgasbord of news and developments that defy description. So without further adieu, on with the review.

Tax Context

Gift Tax: After being combined for 28 years, the gift tax exemption parted company from the estate tax exemption in 2004. While the estate tax exemption equivalent rose to \$1.5 million, the lifetime gift tax exemption remained at \$1 million, where it will slipped up during the year and assumed the gift tax exemption had risen, don't feel bad. One of the very best in the business slipped up while giving a lecture and fessed up later online as a warning: If the best can slip up, the rest of us need all the help and reminders we can get.

Estate Tax Repeal: Will the estate tax repeal become permanent? In 2004, President Bush and 258 members of Congress signed a “no new taxes” pledge about achieving the estate tax repeal and making it permanent by 2010 or sooner. On the other side, a group called United for a Fair Economy issued a press release from Bill Gates, Sr., and former Federal Reserve Chairman Paul Volcker in opposition to the repeal of the estate tax.

The reelection of President Bush provided at least a partial mandate for estate tax repeal. On the other hand, budget surpluses are now large budget deficits, the federal debt ceiling had to be raised by \$800 billion, and there will be another Presidential election before 2010.

Add two more thoughts to this subject. First, stabilizing the Social Security trust fund may soon become an urgent matter. Second, the prospect of implementing the carryover basis is an ugly chapter that is best avoided—we should have learned our lesson the last time this was attempted a generation ago. One or both of these issues could be used to justify a compromise on the estate tax, perhaps with a \$3.5-million exemption but stopping short of a complete repeal.

Tax Strategies

CRTs Looking Good: Tax specialists waiting by their mailboxes for arcane accounting news may long remember 2004 as the year that proposed regulations affected the ordering rules for distributions. As a result, the first distributions from a charitable remainder trust will be dividends, which in turn will be subject to tax at a capital gain rate of 15%. Meanwhile, assets that would be subject to higher income tax rates remain in the trust. This makes it attractive to utilize CRTs and fund them with stock paying high dividends—a development that should not be lost on charitable-trust portfolio managers.



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Family Limited Partnerships: When it comes to FLPs, the Fifth Circuit giveth, the Fifth Circuit taketh away, and the Fifth Circuit doth cloudeth the issue. Recap: In the beginning the FLP seemed like the Teflon technique; it could slide past the IRS and the courts with ease, e.g., *Strangi I*. But the IRS regrouped and has made inroads against FLPs in various jurisdictions for the past three years. In fact, the IRS even managed to get the Fifth Circuit to reopen *Strangi* (i.e., *Strangi II*), whereupon it made successful new arguments at the trial level based on section 2036(a)(1).

But in May, the Fifth Circuit rejected IRS arguments based on §2036 in a similar case. Fitting the typical fact pattern of these FLP cases, *Kimbell v. U. S.*, arose in Texas and involved a 96-year-old woman who formed the FLP two months prior to her death. The Court cited the case of *Wheeler* in applying objective tests to establish whether a bona fide FLP entity existed. Significantly, the same Fifth Circuit received written argument in the appeal of *Strangi II*. If the Fifth Circuit follows the same reasoning as it applied in *Kimbell*, plaintiffs in *Strangi II* may finally prevail after all.

FLP Alternatives: Although the FLP remains useful and the imminent resolution of the main battleground issues may stabilize the technique and make it more attractive than ever, the current status of issues varying among the circuits has prompted at least one practitioner to create a detailed checklist to cope with the many variables that must now enter into the use of FLPs. As a result, several FLP alternatives have been noted. In *Estate of Hillgren, T.C. Memo. 2004-46 (2004)*, the FLP arrangement failed, yet valuation discounts as high as 50% were achieved due to a valid business-loan agreement. Experts have also suggested the restricted management account as an alternative.

Decoupling Coast to Coast

The last vestige of the "sponge tax" vanishes at midnight of December 31, 2004, and there are already more than 20 different state approaches to state death taxation. As of June 30, 2004, 12 states had state inheritance or estate taxes, 19 states have a state death tax that kicks in once estates exceed an exemption amount ranging from \$675,000 in New Jersey to \$1.5 million in Illinois, and 25 states have no state death taxes.

As a result of these state-tax discrepancies, some people are being advised to change their legal residence. In one article, an analyst determined that an Illinois resident dying with a \$50-million estate in 2004 would avoid \$7.5 million in state tax by changing his legal residency to Florida. But the stakes are very high and the situation remains dynamic.

Legal Issues of Relevance

The Right to Die: Last year, Florida's Legislature, quickly enacted a law which then enabled Governor Jeb Bush to prevent feeding tubes from being removed from Terri Schiavo, a woman who has been legally ruled to be in a persistent vegetative state for 14 years. This year, Florida's Supreme Court has struck down Florida's new law, saying that it violated the separation of powers between the legislative, judicial, and executive branches.

More legal appeals are pending. Ms. Schiavo's husband received a court's permission to remove feeding tubes in 2000, a ruling that Ms. Schiavo's parents have been fighting ever since. A group of 55 bioethicists have lined up in Mr. Schiavo's corner. Disabled rights groups and religious organizations are opposed to removing the feeding tubes.



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Same-Sex Marriage: Same-sex marriages are being sanctioned in a growing number of jurisdictions (Netherlands, Canada) and performed in various other jurisdictions (California and Vermont). As 2004 progressed, however, voters in numerous states expressed their opposition to same-sex unions.

And by the end of the year, a new issue had arisen: A court in Toronto had granted what some claimed as the world's first same-sex divorce. However, in 2003, a court in France annulled a same-sex wedding performed by a mayor and an Iowa judge granted a divorce for a lesbian couple who had obtained a civil union in Vermont without realizing the same-sex status of the couple.

An Analogy: For a preview of family relations being respected across state lines, consider the fate of "Nutkin," a grey squirrel who'd been legally kept as a pet in South Carolina before its owners moved to Pennsylvania, where wild animals may not be kept as pets. In an 11-page ruling, Judge Joseph Hudock compared the situation "to that of an old appellate judge, like the undersigned, attempting to return to the boiling cauldron of the trial court after being tamed by years of peace and quiet above the fray." (Nutkin was permitted to stay with its human family.) *Commonwealth v. Gosselin, No. 1978 MDA 2003*.

Lost Estate-Planning Opportunity: A novel cause of action was permitted in *Del Broccolo*, a New York wrongful-death case. The court permitted compensatory damages to be sought for damage resulting from a lost estate-planning opportunity. The critical factor was that the loss was not speculative. The deceased plaintiff had placed her residence in a qualified personal residence trust (QPRT) in 1994. The duration of the trust was to be five years. As a result of being wrongfully killed, the plaintiff died eight months before the term of the trust was to end. As a result, the value of the QPRT was included in her estate.

A cause of action to recover the taxes triggered by the QPRT's inclusion was permitted. However, the court granted the defendants' motion to dismiss claims for recovery of reduced taxes resulting from a lifetime gifting program since such gifts and taxes saved thereby would be speculative. *Del Broccolo v. Torres*, Supreme Court, Nassau County 2004 NYSlipOp 24207 (June 16, 2004)(As corrected through Wednesday, September 8, 2004). For a discussion of this case, see, Ben-Jacob and Marsh, "Cut Down in the Prime of Her Estate Planning", 143 *Trust & Estates* 9 at p. 43 (Sept., 2004).

Note: Another New York decision, this one from the appellate court decision in *New York, Scalp & Blade v. Advest*, recently allowed a trust fund to bring a claim for the profits it would have earned if its account had been invested so as to track the S&P 500.

Legal Issues of Relevance

Dead Celebrities: The fourth annual list of the top-earning celebrities from beyond the grave was compiled by Forbes. The list is relatively stable, but the estate of J.R.R. Tolkien, author of "The Lord of the Rings" moved up into third place with \$23 million on the strength of the recent movies.

Elvis Presley and Charles Schultz headed this year's list. Also in the top ten were the estates of John Lennon, Theodore "Dr. Seuss" Geisel, Marilyn Monroe, George Harrison, Irving Berlin, Bob Marley, and Richard Rogers.



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Another author who has been successful posthumously has been Ian Fleming. Though he wrote only 14 James Bond novels, the 21st Bond motion picture is now in production.

And death did not prevent the late Steve McQueen from starring in a new commercial for the Ford Mustang. Although McQueen died in 1980, scenes of him driving a Mustang in the 1968 film "Bullitt" will be featured in a new ad.

Joan Krok, whose husband founded McDonald's, left \$1.5 billion to the Salvation Army.

Half of Gianni Versace's fashion house went to Versace's niece this year when she turned 18 (she had been 11 at the time Versace was killed).

The State of California will pay \$95 million in cash and tax benefits to heirs of William Randolph Hearst to preserve the 82,000-acre Hearst Ranch.

Rock guitarist Jimi Hendrix died intestate in 1970. His estate has been in litigation ever since. This year, a court upheld the will of Hendrix's father which had excluded Hendrix's brother from sharing in the \$80 million estate. The court also determined which family members had mismanaged the estate.

Posthumous and Outrageous

Johnny Cash's children rejected an ad agency's idea to use Cash's hit song, "Ring Of Fire," in a commercial for hemorrhoid relief.

Ted Williams: The last man to bat .400 might roll over in his grave...if he were in a grave. After he died in 2002, Ted Williams was frozen at the Alcor cryogenics facility in Arizona at the insistence of his son, John Henry. But other Williams family members objected to the freezing and a former Alcor executive disclosed indicating that John Henry used his father's power of attorney to sign the Alcor documents after his father was dead.

It looked like the odds were against the Williams family, but who knew the Boston Red Sox would "reverse the curse" and win the World Series this year?

In March, 2004, John Henry, 35, died and is thought to also be a client at Alcor. In June, Ted Williams' daughter ended her battle to remove her father from the lab after spending \$100,000 in legal fees. Meanwhile, Williams' nephews have continued the battle. In September, a court ordered Alcor to produce documents demonstrating that Ted Williams intended to be frozen.

A Final Intrusion: George Harrison of the Beatles died of cancer in 2001. This year his estate sued a New York physician for "shameless self-promotion," breaching physician/patient confidentiality, and coercing Harrison to sign autographs from his deathbed. The physician was also censured and paid a \$5,000 fine in this matter.

Pardoned: Comedian Lenny Bruce was granted the first posthumous pardon in New York state history by Gov. George Pataki. The pardon came 40 years after an obscenity conviction. A campaign to win the pardon was supported by Bruce's ex-wife and daughter, two dozen First Amendment lawyers, Robin Williams, the Smothers Brothers, and Penn and Teller.



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Dude, Where's My Obelisk?

Whatever happened to "finders keepers"? Nowadays, more finders are having to give things back. Thus, in 2004, Italy agreed to return the 2000-year-old Axum obelisk to Ethiopia after having it for 65 years.

Stolen Art Trends: During the 1990s, a new political climate led to legislation and efforts to help restore works of art stolen by the Nazis to their rightful owners. The New York Times reports that although thousands of works have been identified as stolen, very few have been returned. After the passage of so much time, there are few heirs who have any means of documenting what their families lost three generations ago.

The Supremes Go Retro: The 88-year-old heir of an Austrian Jewish art collector received permission from the U.S. Supreme Court to sue the Austrian government and its national art museum for the return of six paintings by Gustave Klimt, which are now worth in excess of \$100 million. The court ruled that the Foreign Sovereign Immunities Act of 1976 was intended to apply retroactively to conduct taking place prior to the law's enactment.

View of the Asylum: A painting by Vincent van Gogh, *View of the Asylum and Chapel at Saint-Remy*, now hangs in the Beverly Hills home of actress Elizabeth Taylor, but heirs of Margarete Mauthner, who fled Nazi Germany in 1939, have filed a lawsuit to recover the painting. The lawsuit is based on a federal law that entitles Holocaust victims to reclaim artwork confiscated by the Nazis and Soviets before and after World War II. The painting had passed through several art dealers before Taylor's father acquired it at a 1963 Sotheby's auction in London. The painting, worth \$260,000 42 years ago, may now be worth more than \$15 million.

Miscellaneous

Next Stop, Hell: In New Mexico, family members sued a former disc-jockey priest who spoke at the funeral of their relative and referred to him as a "luke-warm Catholic" who was "going to hell."

Meaningful Exits: Several new services for human remains were introduced in 2004. In Westminster, South Carolina, numerous people have opted for environmentally friendly burials. They have been willing to pay \$1,950 for plots in the Ramsey Creek Preserve where remains must be prepared coffins and with no traditional headstones. For \$995 to \$5,300, Space Services, Inc. (a spin off from Celestis, Inc.), will launch one to seven grams of remains from a Russian satellite in a capsule that will orbit the earth for about 156 years and then reenter the earth's atmosphere as a shooting star. For \$12,500, the company offers to send remains to the moon. Another company offers to compress remains into diamonds. And for \$1,000 to \$5,000, a Georgia company will mix the ashes of loved ones into concrete "reef balls" which are dropped into the ocean to form fish habitats.



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