Proskauer

Wealth Management Update

November 2019

November 2019 Interest Rates for GRATs, Sales to Defective Grantor Trusts, Intra-Family Loans and Split-Interest Charitable Trusts

The November Section 7520 rate for use with estate planning techniques such as CRTs, CLTs, QPRTs and GRATs is 2.0%, which is up slightly from the October rate of 1.8%. The November applicable federal rate ("AFR") for use with a sale to a defective grantor trust, self-canceling installment note ("SCIN") or intra-family loan with a note having a duration of 3 to 9 years (the mid-term rate, compounded annually) is 1.59%, up slightly from 1.51% in October.

The low Section 7520 rate and AFRs continue to present potentially rewarding opportunities to fund GRATs in November with depressed assets that are expected to perform better in the coming years.

The AFRs (based on annual compounding) used in connection with intra-family loans are 1.68% for loans with a term of 3 years or less, 1.59% for loans with a term between 3 and 9 years, and 1.94% for loans with a term of longer than 9 years. With the mid-term rate now less than the short-term rate, clients will likely prefer the mid-term rate in their estate planning transactions.

Thus, for example, if a 9-year loan is made to a child, and the child can invest the funds and obtain a return in excess of 1.59%, the child will be able to keep any returns over 1.59%. These same rates are used in connection with sales to defective grantor trusts.

Amendment to California Family Code Section 1615 – Seven Day Waiting Period Before Signing Premarital Agreement

Existing California law establishes conditions under which a premarital agreement is not enforceable, including when the party against whom enforcement is sought proves that party did not execute the agreement voluntarily. California Family Code Section 1615 currently deems that a premarital agreement was not executed voluntarily unless the court finds, among other things, that the party against whom enforcement is sought (1) was represented by independent legal counsel at the time of signing the agreement or was advised to seek legal counsel and waived representation and (2) had at least seven days between being first presented with the agreement and being advised to seek counsel and the time the agreement was signed.

California Family Code Section 1615(c) is amended so that with respect to a premarital agreement executed on or after January 1, 2020, the party against whom enforcement is sought must have had not less than seven calendar days between the time that party was first presented with the *final* agreement and the time the agreement was signed, *regardless of whether the party is represented by legal counsel*. This requirement does not apply to non-substantive amendments that do not change the terms of the agreement.

The key change is that the seven day waiting period will apply even when a party is represented by independent counsel. Amended California Family Code Section 1615(c) also makes clear that the waiting period starts to run upon the presentation of the *final* agreement.

***Rosenberg v. Commissioner*, T.C. Memo 2019-124 — IRA Withdrawal After Divorce Transfer Includible in Income**

The Tax Court ruled that an IRA distribution, made after a couple divorced, was taxable and subject to the 10% additional tax on early distributions from qualified retirement plans imposed by Internal Revenue Code Section 72(t) because (1) no exception to the 10% additional tax applied and (2) the Court did not find any equitable exception to the distribution being taxable.

Pursuant to a Judgment with Property Order, Petitioner's former spouse was ordered to pay Petitioner $10,000 to be paid from the proceeds of her retirement account. Instead of withdrawing the funds from her retirement account and making a cash payment to Petitioner, she arranged for those funds to be transferred from her retirement account to a new IRA that Petitioner had opened for this purpose. The statutory scheme expressly addresses transfers as part of property settlements incident to divorce or separation, providing an exception for a distribution made to an alternative payee pursuant to a qualified domestic relations order. IRC Section 72(t)(2)(C). Petitioner's withdrawal in this case did not fit that exception and the Court said it would not use common law doctrines to create an equitable exception to the statutory scheme in IRC Section 72.

Chief Counsel Advice Memorandum CCA 201939002 — Value of Stock Must Take Into Consideration a Pending Merger

The IRS Office of Chief Counsel advised that the valuation of publicly traded corporate stock contributed to a trust prior to a pending merger (by a donor who knew of the merger) must take into consideration the pending merger, because a willing buyer and seller of the stock would consider the merger.

The donor was a co-founder and chairman of the board of directors of Corporation A, a publicly traded corporation. On Date 1, the donor transferred Corporation A stock to a newly formed GRAT. On Date 2, after the market closed, Corporation A announced a merger with Corporation B. On the "X" day of trading after the merger was announced, the value of the Corporation A stock increased substantially (although less than the agreed merger price).

The hypothetical willing buyer and willing seller are presumed to have made a reasonable investigation of all the relevant facts. Therefore, in addition to facts that are publicly available, reasonable knowledge includes those facts that a reasonable buyer or seller would uncover during the course of negotiations over the purchase price of the property. A hypothetical willing buyer is also presumed to be "reasonably informed" and "prudent" and to have asked the hypothetical willing seller for information that is not publicly available.

In this case, the fair market value of the stock in Corporation A must take into consideration the likelihood of the merger as of the Date 1 transfer of stock to the trust, since the merger was reasonably foreseeable as of the valuation date and a hypothetical willing buyer of the stock could have anticipated that the price of Corporation A stock would trade at a premium.

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