Proskauer

Wealth Management Update

September 2023

September 2023 AFRs and 7520 Rate

The September 2023 Section 7520 rate for use with estate planning techniques such as CRTs, CLTs, QPRTs and GRATs is 5%, which was the same as the August 2023 rate. The September applicable federal rate ("AFR") for use with a sale to a defective grantor trust or intra-family loan with a note having a duration of:

- 3 years or less (the short-term rate, compounded annually) is 5.12%, up from 5.07% in August;
- 3 to 9 years (the mid-term rate, compounded annually) is 4.19%, up from 4.09% in August; and
- 9 years or more (the long-term rate, compounded annually) is 4.19%, up from 4.03% in August.

More Large Inflation Adjustments Are in Store for 2024 and 2025

2024 Estimates

- **Estate/Gift Tax Exemption:** $13,660,000 (increase of $740,000 from 2023)
- **Annual Gift Tax Exclusion:** $18,000 (increase of $1,000 from 2023)

2025 Estimates

- **Estate/Gift Tax Exemption:** $14,160,000 (increase of $500,000 from 2024)
- **Annual Gift Tax Exclusion:** $19,000 (increase of $1,000 from 2024)

Summary: On January 1 of each year, the estate and gift tax basic exclusion amount, $12,920,000 per person, is adjusted for inflation. The 2024 inflation adjustment will officially be announced this fall, as it is based on data gathered through August 31st of this year. However, since the inflation adjustment incorporates data going back to September 2021, it is possible to project the 2024 inflation adjustment now with some precision. The adjustment will be approximately $740,000. In addition, the size of the 2025 inflation adjustment depends on the course of inflation over the next year, but $500,000 is a reasonable guess based on currently available data. Furthermore, the gift tax annual exclusion will jump to $18,000 in 2024 and will likely reach $19,000 in 2025.

Planning Opportunities: "Use it, or Lose it"

- **Encourage Lifetime Gifting:** Either outright or in trust.
- **Lending Money:** Clients may be more inclined to lend money to trusts this year, as they will be able to forgive (or partially forgive) the note over the next two years.
- **QPRTs:** As the § 7520 rate continues to increase, it makes QPRTs a more attractive strategy.

IRS Notice 2023-54: Transition Relief and Guidance Relating to Certain RMDs

On July 14, 2023, the IRS issued Notice 2023-54, which (a) extends relief for missed 2023 required minimum distributions ("RMDs") by non-eligible designated beneficiaries ("NEDBs") of IRA owners who are subject to the requirement for annual RMDs within a 10-year payout period and (b) extends the 60-day rollover deadline for IRA owners born in 1951 who received unwanted distributions between January 1, 2023 through July 31, 2023, as the SECURE 2.0 Act delayed their initial RMDs for another year. The IRS is allowing those affected IRA owners until September 30, 2023, to roll the funds back.

a. Relief for Missed 2023 RMDs

In a 2022 Notice, the IRS waived enforcement on missed 2021 and 2022 RMDs by NEDBs if the account owner died in 2020 or 2021, on or after their RMD required beginning date. The 2023 Notice simply adds another year of relief by excusing 2023 missed RMDs for NEDBs of IRA owners who died in 2020, 2021 or 2022 after the required beginning date.

Unfortunately, the IRS notice does not clarify whether NEDBs who missed their RMDs will be required in the future to make them up. Note that the penalty for failing to take required IRA payouts is assessed at 25% of the amount that should have been taken out.

b. 60-Day Rollover Relief

Notice 2023-54 also extends the 60-day rollover deadline until September 30, 2023, for IRA account owners affected by the SECURE 2.0 Act's increase in the first RMD age from 72 to 73. The first RMD year for account owners born in 1951 would have been 2023 under the old rule but is now 2024. Some IRA plan administrators may have inadvertently paid distributions in 2023 to these individuals. Due to the law change, such distributions are not technically RMDs and may not have been wanted by the account owner. Therefore, the IRS is giving these account owners the option to rollback distributions received between January 1, 2023, and July 31, 2023.

Estate of Demuth v. Comm'r[1]: Checks Delivered Before, but Deposited After Decedent's Death, are Includable in Decedent's Estate

In this case, the Third Circuit upheld a US Tax Court decision holding that gifts of checks delivered to the Decedent's family before the Decedent's death, but not deposited until after his death, were includable in the Decedent's gross estate. The court noted that the delivery of a check alone was not a completed gift because the Decedent could revoke the gift up until the time that the check was deposited or cashed. Since neither happened when the Decedent died, the checks were still revocable and thus, includable in the Decedent's gross estate. The court also rejected the Estates argument stating that the transfers were completed gifts causa mortis.

Timeline

- **2007**: Decedent signed a power-of-attorney appointing his son, Donald.
- **2007-2014:** Every December, Donald as attorney-in-fact, wrote checks from his father's account to family members as gifts.
- **September 1, 2015:** Decedent diagnosed with terminal illness.
- **September 6, 2015:** Donald delivered checks to family members.
- **September 11, 2015:** Decedent died.
- **September 12-30, 2015:** Checks were deposited.

Incomplete Gift

- The checks delivered to family members before the Decedent's death, but not deposited until after his death were incomplete gifts, as the Decedent did not part with dominion or control, thereby leaving him with power to change its disposition since the checks were still revocable at the time of the Decedent's death.

Causa Mortis

- The Third Circuit also rejected the Estate's argument that the transfers were completed gifts causa mortis. The court noted that the only evidence arguably supporting this point is that the yearly gifts given to family members were given in December rather than September, which is when the Decedent was diagnosed with his illness. However, there is no evidence that indicates the Decedent directed Donald to distribute the checks in September in contemplation of death. Whether a gift was given in causa mortis, thus, depends primarily upon the state of the Decedent's mind, not Donald's.

Schaddelee v. Deleon[2]: Using a General Assignment as a "Catch All" for Irrevocable Trust Funding Does Not Supersede a Beneficiary Designation

In this case, the Michigan Court of Appeals held that a Declaration of a Trust Ownership Agreement (the "Declaration"), which provided a schedule of general property categories that the Grantor might own and that he expected to flow into the trust at his death, was (a) not part of the agreement creating the trust, (b) did not constitute a contract and (c) does not redirect the disposition of property that is controlled by a beneficiary designation.

By way of background, the Grantor created an irrevocable trust for the benefit of his children, Maria and Ronald Jr., and named them as co-Trustees (the "Trust"). However, two years before creating the Trust, the Grantor established an investment account that only named Maria, as beneficiary. When the Grantor died, the investment account automatically became Maria's individual property by operation of the beneficiary designation.

Ronald Jr. demanded that Maria transfer the proceeds of the investment account to the Trust immediately, and when she refused, Ronald Jr. petitioned the probate court to remove Maria as a co-Trustee asserting that her refusal violated the terms of the Declaration.

The Court of Appeals held in favor of Maria stating that the Declaration was not a binding agreement. Accordingly, the Declaration was nothing more than a general statement listing categories of assets that the Grantor's believed he owned and intended to fund the Trust with. Furthermore, at the Grantor's death, the investment account automatically became Maria's individual property, and the Decedent cannot pass property that he no longer owns.

Matter of Wells[3]: Unsuccessful Attempt at Probating a Conformed Copy of a Will

Pursuant to NY SCPA § 1407, the Surrogate's Court of New York denied the Decedent's brother (the "Petitioner"), from probating a copy of the Decedent's Will, as the Petitioner failed to establish that the Will was not revoked prior to the Decedent's death. Furthermore, the Petitioner's self-serving statements were of no probative value.

Pursuant to NY SCPA § 1407, a lost or destroyed Will may be admitted to probate if:

1. It is established that the Will has not been revoked;
2. Execution of the Will is proved in the manner required for the probate of an existing Will; and
3. All of the provisions of the Will are clearly proved by at least two credible witnesses or by a copy or draft of the will proved to be true and complete.[4]

In order to satisfy the first prong of NY SCPA § 1407, the Petitioner claimed that the Decedent never had custody of her original Will, as her attorney retained the original in his office vault. Therefore, the Decedent never had the opportunity to destroy her Will. In support of the Petitioner's claim, the attorney-draftsman of the Will, who also represents the Petitioner, submitted an affirmation stating that his firm always maintained the original instrument. However, the attorney alleges that when he returned a newly purchased office vault back to the vendor, that vault contained original documents for hundreds of clients, including the original of the Decedent's Will. The Petitioner's attorney further asserted (with no proof to support his claim) that the returned vault containing the originals was immediately destroyed by the vendor. Furthermore, the Petitioner's attorney never informed the Decedent that her Will was destroyed.

The court concluded that the Petitioner presented no evidence to support a specific finding that the Will was in the firm's possession until the time of the Decedent's death or, that it was in the allegedly destroyed Will vault. Therefore, there is no evidence to suggest that the Decedent did not revoke the Will under NY SCPA § 1407(1).

Matter of Fakhra[5]: Renunciations are Irrevocable, and They Do Not Need to be *Physically* Served

The Surrogate's Court of New York held that a Renunciation (a) is irrevocable even if it was only executed due to a misunderstanding between the parties and (b) does not need to be *physically* served by one co-Administrator upon the other co-Administrator, and an Affidavit of Service does not need to be filed for the Renunciation to be effective and irrevocable.

In this case, the Decedent's daughter (the "Petitioner") is seeking to remove the Decedent's son (the "Respondent"), as co-Administrator because the Respondent is refusing to execute the documents necessary to transfer the assets of the Estate to her. The Respondent alleges that he and his sister entered into a verbal agreement that she would pay him an agreed upon sum of money for his Renunciation. However, once he signed the Renunciation, she reneged on her promise. Respondent further claims that because he never physically served her with the Renunciation that it never became effective.

The court ruled in favor of the Decedent's daughter and provided that EPLT § 2-1.11(h) clearly states that "a renunciation filed under this section is irrevocable." A renunciation is irrevocable even if it was only executed due to a misunderstanding between the parties.

In addition, when dealing with electronic filing, EPTL § 2-1.11 must be read in conjunction with the Uniform Rules for Surrogate's Courts, which provides that "filing and service of all documents in a proceeding that have been commenced electronically in accordance with this section shall be by electronic means." In this instance, the estate administration proceeding was commenced electronically on behalf of the co-Administrators. Therefore, when the Respondent electronically filed the Renunciation, they were "served" upon the Petitioner through the NYS Courts Electronic Filing system. The Petitioner's receipt of the Renunciation pursuant to the electronic filing system is considered service under the law.

[1] *Estate of Demuth v. Comm'r*, No. 22-3032, 2023 U.S. App. LEXIS 17613 (3d Cir. July 12, 2023).

[2] *Schaddelee v. Deleon*, No. 362521, 2023 Mich. App. LEXIS 4485 (Ct. App. June 22, 2023).

[3] *Matter of Wells*, No. 2023-1801, 2023 BL 247477 (NY Sur. Ct. July 17, 2023).

[4] NY SCPA § 1407.

[5] *Matter of Fakhra*, 2023 NY Slip Op 23201 (NY Sur. Ct., July 7, 2023).

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