ESTATE PLANNING UPDATE

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A. ESTATE TAX

1. Tax Court Holds that Personal Checks Written by Decedent before Death Are Includible in Estate if Not Paid until after Death. *Estate of William E. DeMuth, Jr. v. Commissioner*, No. 18724-19, T.C. Memo. 2022-72 (July 12, 2022).

The Tax Court held that personal checks written by a Decedent before his death but not paid until after his death were properly includible in his gross estate. The relevant facts were as follows:

- On September 6, 2015, five days before his death, the Decedent wrote eleven checks, totaling $464,000.
- Only one of the eleven checks was actually paid by the Decedent's bank to the relevant payee's bank before the Decedent's death on September 11, 2015.
- Another three of the remaining ten checks were apparently deposited by the respective payees and credited to their accounts by the depositary banks (i.e., the payees' banks) before the Decedent's death. However, in its prior briefing, the IRS erroneously conceded that these three checks had been deposited by the payees and credited by the drawee bank (i.e., the Decedent's bank) prior to the Decedent's death.

As a starting point for its analysis, the Court stated that "the value of any check written by a decedent that still belongs to them at their death is includible in their gross estate; however, the funds from such a check no longer belong to a decedent at their death if they executed a completed gift of the check during their life." Accordingly, the Court focused its inquiry on the determination of when an inter vivos gift of a check is deemed complete under the state law of the Decedent's domicile, Pennsylvania. The Court found that Pennsylvania law provides, in effect, that the gift of a check is not complete until the time at which a stop-payment order can no longer be made by the donor, which in turn can be no earlier than the time "when the drawee bank accepts, certifies or makes final payment of the check."

Thus, the Court reasoned that ten of the eleven checks at issue here should have been includible in the Decedent's gross estate, because they were not paid by the Decedent's bank (the drawee bank) until after his death. However, the Court also determined that it would be prejudicial to the Taxpayer to allow the IRS to withdraw its prior erroneous concession (discussed above) that three of the remaining ten checks were deposited by the payees and credited by the drawee banks before the Decedent's death, an error which supposedly stemmed from the IRS's conflating the terms of art "drawee bank" and "depositary bank". Consequently, the Court held that only seven of those remaining ten checks were includible in the Decedent's gross estate.

B. GIFT AND GST TAX

1. Fifth Circuit Court of Appeals Upholds Finding of Gift Tax Deficiencies After Taxpayer's Failed Attempt to Use Self-Adjusting Formula Clauses. *Mary P. Nelson et al. v. Commissioner* (5th Cir., No. 20-61068, November 3, 2021).

In *Nelson*, the federal Fifth Circuit Court of Appeals upheld the IRS's imposition of gift tax deficiencies relating to a client's attempted use of a formula clause to make separate gifts and sales of limited partnership interests. The taxpayer in this case entered into separate transactions where she and her husband sought to sell and gift separate limited partnership interests with a specified fair market value "as determined by a qualified appraiser within ninety days of the effective date of the [Agreement]."

The court acknowledged that self-adjusting formula clauses have been accepted by other courts in various forms. In particular, the court references self-adjusting formula clauses that refer to either (a) a specified fair market value "as finally determined for transfer tax purposes," as in *Wandry v. Comm'r*, T.C. Memo. 2012-88 (2012 Tax Ct) or (b) a specified fair market value "as finally determined by the willing-buyer/willing-seller" test used in the relevant Treasury regulation in *Succession of McCord*, 461 F.3d 614 (5th Cir. 2006).

However, the clause used by the taxpayer in Nelson was determined by reference to the initial appraisal, and therefore was not subject to adjustment in the event that the IRS determined that the transferred interests had a different value. Accordingly, once the initial appraisal was finalized, the value of the transferred interest was established for purposes of the transfer instruments. The Court thus held that the IRS's subsequent determination that the value of the transferred interests was greater than the value stated in the initial appraisal properly resulted in the taxpayer being found to have made additional gifts and subject to a corresponding gift tax liability.

2. Tax Court Recharacterizes a Husband and Wife Gifting Transaction. *Smaldino v. Comm'r of Internal Revenue*, 122 T.C.M. (CCH) 298 (T.C. 2021).

In *Smaldino*, Husband held 10 real properties through an LLC which was comprised of voting and non-voting units. Husband wanted to transfer non-voting units in the LLC to a trust that he created for his children and grandchildren in December 2012 (the "Dynasty Trust"). In order to utilize both Husband and Wife's remaining federal lifetime gift tax exemptions, Husband transferred non-voting units in the LLC to (1) Wife and (2) the Dynasty Trust directly. Wife transferred the non-voting units in the LLC she received from Husband to the Dynasty Trust. The following is a summary of the timeline of the transactions:

- Effective April 14, 2013, Husband assigned that number of non-voting units in the LLC to Wife with a fair market value as determined for federal gift tax purposes equal to $5,249,118.42.

- Effective April 15, 2013:
    - Wife assigned that number of non-voting units in the LLC to the Dynasty Trust with a fair market value as determined for federal gift tax purposes equal to $5,249,118.42.
    - Husband assigned that number of non-voting units in the LLC to the Dynasty Trust with a fair market value as determined for federal gift tax purposes equal to $1,031,881.58.
    - Exhibit A to the operating agreement for the LLC (the "LLC Agreement") is amended to reflect that the Dynasty Trust owned 49% of the LLC and Husband owned the remaining 51% of the LLC.
- An appraisal was received dated August 22, 2013 valuing a 49% interest in the LLC at $6,281,000.
- Husband and Wife each file a 2013 federal gift tax return (not electing to split gifts) reporting their respective transfers of non-voting units in the LLC to the Dynasty Trust.

The Tax Court held that the Husband did not effectively transfer membership interests in LLC to Wife because:

- Wife was not a permitted transferee under the LLC Agreement and there was never any documentation approving the transfer to her in accordance with the terms of the LLC Agreement;
- Wife never signed any document agreeing to be bound by the terms of the LLC Agreement as was required under the terms of the LLC Agreement;
- Exhibit A to the LLC Agreement was never amended to reflect Wife as a member;
- The assignment to the Wife of non-voting units in the LLC was effective April 14, 2013, but it used values from the appraisal dated August 22, 2013 (more than four months after the effective date of the assignments), so the Court believed the assignment to the Wife could not have been executed prior to August 22, 2013, which meant Wife never had an opportunity to exercise any ownership rights with respect to those non-voting units in the LLC; and
- The LLC's tax returns for 2013 never reflected Wife as a member.

As a result, the Tax Court determined that Husband gifted the entire 49% LLC interest to the Dynasty Trust, which resulted in Husband owing gift tax as the value of the 49% LLC interest exceeded his remaining federal lifetime gift tax exemption.

3. <u>IRS Proposes Limits on Large Gifts from Future Estates</u>

- In 2019, the IRS issued Final Regulations that created a special rule, referred to as the "Anti-Clawback Rule," ensuring that the donor's estate would not be taxed on completed gifts that were tax free when made as a result of the higher exemption.

- The Treasury Department recently released proposed regulations limiting the Anti-Clawback Rule

- Under the proposed regulations, transfers where the donor continues to have title, possession, or other retained rights in the transferred property during life—treated as still owned by the donor upon death, which occur under §§2035, 2036, 2037, 2038, and 2042 of the Internal Revenue Code—would not qualify for the Anti-Clawback Rule.

4. <u>*Yost v. Carroll*, DC IL, 130 AFTR 2d ¶2022-5086</u>

This case involves Plaintiff, Mr. Yost's ("Yost") attempt to collect on two promissory notes (the "Notes") totaling $8,261,333.79, plus interest, costs, and attorneys' fees that were signed by his daughter, Anne, and her then husband, the defendant, Mr. Carroll ("Carroll"), which Yost alleged were signed in connection with "loans" from Yost totaling approximately $7,000,000 for the purchase of homes by the married couple. No payments were made on either Note and until recently, none were due. In June 2020, after Anne and Carroll began divorce proceedings, Yost demanded payment of over $8,000,000 from Carroll on the Notes, which included claimed interest. Yost did not demand payment from his daughter, though she was a co-signer on the Notes. In Carroll's Affirmative Defenses he argued that the large transfers of money purporting to be promissory notes were in fact gifts, and that Yost had "orchestrated a scheme to evade the payment of gift taxes to the United States on large transfers of money to his daughter and her then husband, Mr. Carroll." The Amended Pleading suggests that Yost expressed the view that the Notes were a necessary tool to enable him to make gifts that appear to be loans so that gift taxes would not have to be paid, and to serve as a device to keep track of the money given to his daughters. The Amended Pleading states that Yost promised never to enforce the Notes, and they would be forgiven at his death.

In considering Yost's Motion to Dismiss the Amended Pleading, the Court recognizes the common law defense of in *pari delicto*, that is, a plaintiff is precluded from prevailing in a suit against a defendant when they share equal or mutual fault in the very transaction at issue. Carroll alleged that Yost expressly stated that the Notes were essential to avoiding tax liability and were never intended by either party to be promissory notes at all. Thus, by executing the Notes, Carroll and Anne became part of the alleged scheme and have implicated the doctrine of in pari delicto. Carroll also argued that because Yost was not only an "eager participant" in the tax evasion scheme, he devised it, he "should not benefit from it."

The central question in this case rests on whether Yost made the statements and promises that are alleged in the Amended Pleading, not on the legal accuracy of his conclusion that the Notes were necessary to avoid gift taxes. The Court concludes that Carroll's Amended Pleading stated a viable defense or claim and therefore, denies the Motion to Dismiss.

5. *Jennifer Joy Fields et al. v. Commissioner*, No. 2925-20S, T.C. Summary Op. 2022-22 (November 10, 2022).

The Tax Court rejected a Taxpayer's argument that certain payments from her employer reflected gifts unrelated to work that were made in the context of the Taxpayer's personal relationship with the employer's CEO, rather than taxable compensation.

The relevant facts were as follows:

- The Taxpayer was employed by the employer from January 2009 to January 2017.
- The Taxpayer's text messages with the employer's CEO indicated that there was some personal relationship between the two outside of the workplace.
- On February 29, 2012, the employer wired $35,000 (CAD) to the Taxpayer.
- On March 20, 2014, the employer wired $53,020 (USD), an amount equal to the Taxpayer's downpayment on the new house she was then purchasing to the title company acting as escrow for such purchase.
- Upon the Taxpayer's severance from the employer in January 2017, the severance agreement signed by the Taxpayer and a representative of the employer indicated that the payments described above were employee advances which would be written off by the employer, thereby triggering cancellation of debt income to the Taxpayer that would be reflected in a Form 1099 issued by the employer.
- Soon thereafter, the Taxpayer purportedly entered an oral agreement with the employer's CEO to revise the terms of her severance agreement; this revised severance agreement was put in writing but never signed by the relevant parties. Under the terms of the revised agreement, the payments described above were characterized as personal loans from the employer to the Taxpayer that would be withheld from the Taxpayer's total severance package.
- The Taxpayer's 2017 income tax return did not include any amounts reported on the Form 1099-MISC issued by the employer in accordance with the original, signed severance agreement.
- The IRS issued a notice of deficiency with respect to the payments described above, which it characterized as unreported income to the Taxpayer.

The Tax Court sustained the notice of deficiency, noting that "[t]here is a strong presumption that payments made beyond an employee's salary are compensation for services and not gifts." Although the Tax Court recognized the existence of an exception to this general rule, which provides that a "payment between an employer and an employee may be a gift when the relationship between the employer and the employee is personal and unrelated to work" (see, e.g., *Caglia v. Commissioner*, T.C. Memo. 1989-143; *Harrington v. Commissioner*, T.C. Memo.

1958-194), the Court reasoned that there was insufficient evidence to support applying this exception to the case at bar.

First, the only evidence of the Taxpayer's personal relationship with her employer's CEO here were "an email with [the CEO's] administrator scheduling dinner in 2017, a meeting scheduling email with Paragon stakeholders in 2019, and unverified text messages from petitioner to [the CEO]." Second, the Taxpayer's reliance on the revised draft severance agreement that she orally negotiated with the CEO (which provided that the payments at issue were personal loans being withheld from the Taxpayer's severance) was misplaced because the agreement was never signed, and even if it had been signed, it was still ambiguous with regard to whether the payments at issue were intended as gifts or compensation. "At best, [the revised draft severance agreement] reflects petitioner's attempt to recharacterize the payments as a gift, which apparently neither [the CEO] nor [the employer] agreed to."

C. INCOME TAX

1. Estate of Miriam M. Warne vs. Comm'r (T.C. Memo 2021-17)

In Warne, a decedent's estate included a 100% membership interest in an LLC valued at over $25 million. The Decedent left a 25% membership interest in the LLC to her church and a 75% membership interest in the LLC to her family foundation. Schedule O of her estate tax return listed separate deductions for a 25% interest in the LLC and a 75% interest LLC, with an aggregate value equal to the Decedent's 100% ownership interest in the LLC.

In its notice of deficiency, the IRS discounted the values of the two separate LLC interests reducing the amount of the charitable contribution deduction applicable to the estate. The IRS asserted that discounts should apply to the charitable contribution deduction for lack of control and lack of marketability even though the two separate interests collectively represented the entirety of the decedent's ownership interest, and were each left to charitable beneficiaries.

The United States Tax Court agreed with the IRS's position and held that even though the entire LLC was left to charities, "when valuing charitable contributions, we do not value what an estate contributed; we value what the charitable organizations received." As a result, the estate received a charitable deduction worth less than the value of the LLC, resulting in additional estate taxes even though the LLC was distributed entirely to charities.

D. CHARITABLE PLANNING

1. Fourth Circuit Rejects Taxpayer's Valuation of Real Property Contributed to Charity Where Existing Structures were Intended to Be Demolished and Salvaged and Taxpayer's Conveyed Less than Their Full Interest in the Property. *Mann v. United States*, 984 F.3d 317 (4th Cir. 2021).

Linda and Lawrence Mann purchased real property in Bethesda, Maryland. The Manns had intended to renovate the property, but after discovering water issues in the basement and learning from their architect of the high cost of desired changes to the house's layout, they decided to tear down the existing house and build a new one in its place. Accordingly, the Manns hired a building contractor to demolish the existing house, clear the site, and build a new house. Other builders whom the Manns knew suggested that the Manns work with Second Chance, a 501(c)(3) organization offering "deconstruction" services, which would not only further the organization's mission but also allow the Manns to obtain a tax deduction in the process.

The Manns entered into an agreement to donate their residence to Second Chance and subsequently took a charitable deduction for $675,000, representing the appraised value of the house as if it were moved intact to another lot.

However, Second Chance deconstructed some of the house, salvaged some components, and left the remainder of the residence for destruction by the couple's contractor. The IRS disallowed the deduction because the Manns did not convey their entire interest in the house to Second Chance and the appraisal provided did not accurately reflect the nature of their donation. The IRS also rejected the Manns' attempt to amend the deduction to $313,353 as supported by a subsequent appraisal representing the aggregate value of donating all of the house's components.

The Circuit Court affirmed the district court's ruling that the subsequent appraisal did not qualify as a qualified appraisal since "a valuation of over $300,000 based on the extraction and resale of all building materials does not properly value the donation in light of the conditions placed on the conveyance."

2. <u>Proposed Treasury Regulations – REG-106134-22, Syndicated Conservation Easement Transactions as Listed Transactions (Dec. 6, 2022).</u>

These proposed regulations categorize "syndicated conservation easement transactions" as "listed transactions" which are subject to various reporting requirements. Crucially, the proposed regulations require any "material advisor" (including an attorney) who assists with such a transaction to file a Form 8918 Material Advisor Disclosure Statement with the IRS Office of Tax Shelter Analysis.

Syndicated conservation easement transactions are defined in Proposed Reg. 1.6011-9(b) as transactions that include the following steps, in any order:

1. "A taxpayer receives promotional materials that offer investors in a pass-through entity the possibility of being allocated a charitable contribution deduction that equals or exceeds an amount that is two and one-half times the amount of the taxpayer's investment in the pass-through entity . . . ;"

2. "The taxpayer acquires an interest directly, or indirectly through one or more tiers of pass-through entities, in the pass-through entity that owns real property (that is, becomes an investor in the entity);"

3. "The pass-through entity that owns the real property contributes an easement on such real property, which it treats as a conservation easement . . . , to a qualified

organization and allocates, directly or through one or more tiers of pass-through entities, a charitable contribution deduction to the taxpayer; and"

4. "The taxpayer claims a charitable contribution deduction with respect to the conservation easement on the taxpayer's Federal income tax return."

E. <u>SECURE ACT 2.0</u>

1. The SECURE Act 2.0 or the Setting Every Community Up for Retirement Enhancement Act 2.0 was passed signed into law on December 29, 2022, as part of the Consolidated Appropriations Act of 2023

2. Increased age for required minimum distributions from 72 to 73 as of January 1, 2023, and then again to 75 on January 1, 2033.

3. Beginning January 1, 2023, a participant aged 50 or older can make an additional "catch up" contribution $7,500 adjusted for inflation. Beginning January 1, 205, participants aged 60-63 may make "catch up" contributions equal to $10,000 adjusted for inflation or 150% of the regular catch-up limit.

4. Beginning January 1, 2024, the "catch up" contributions for participants earning more than $145,000 indexed from inflation must be made to a Roth account.

5. As of now, a participant aged 50 or older can make an additional "catch up" contribution to a traditional or Roth IRA up to $1,000. Beginning January 1, 2024, the $1,000 will be indexed for inflation.

6. As of now, an individual aged 70.5 or older can make a qualified charitable distribution up to $100,000 from an IRA to a qualified charity without recognizing income on the donated amount, now that $100,000 will be indexed for inflation.

7. For individuals aged 70.5 or older, a one-time qualified charitable distribution of up to $50,000 from an IRA to a charitable gift annuity, CRUT or CRAT that benefits the participant or their spouse. The $50,000 one-time qualified charitable distribution can count toward the individual's required minimum distribution.

8. A lifetime limit of $35,000 is permitted to be rolled over from a 529 college savings plan to a Roth IRA, 100% free of any tax or penalties so long as the 529 plan was (1) open for at least 15 years; (2) contributions to the 529 plan made within the last 5 years are ineligible to be rolled over; and (3) the amount that can be rolled over to a Roth IRA is limited based on annual contribution limitations ($6,500 for 2023, or $7,500 if 50 or older), which will apply to the aggregate of any rolled over amounts from the 529 plans plus any other contributed funds.

9. Beginning January 1, 2024, employers can choose to match student loan payments with contributions to an employee's retirement plan.

10. Beginning January 1, 2024, required minimum distributions will no longer be required from a Roth account under a 401(k), 403(b) or governmental 457(b) plan are no longer required except for those due by April 1 for those reaching required minimum distribution age prior to 2024.

11. An employer may elect to have employer matching or non-elective contributions made on a Roth basis.

12. Beginning January 1, 2023, the excise tax is reduced to 25% on individuals who fail to take their required minimum distribution. The excise tax is reduced to 10% if the individual: (1) receives all their past-due required minimum distributions; and (2) files a tax return paying such tax before receiving notice of assessment of the excise tax and within two years after the year of the missed required minimum distribution.

13. Beginning January 1, 2025, for most 401(k) and 403(b) plans starting with the 2025 plan year, newly eligible employees must be automatically enrolled at a rate of at least 3% of pay with an automatic annual increase of at least 1% until the participant reaches a contribution level of at least 10% of pay. Exceptions apply to governmental plans, plans for small businesses (10 or fewer employees) and plans of new employers in business for less than three years.

14. For economic losses in connection with a federal disaster after January 25, 2021, participants can withdraw up to $22,000 without a 10% early withdrawal penalty and may repay the withdrawal within three years to avoid income tax. Such participants may take a loan from a defined contribution plan up to the lesser of$100,000 or 100% of the balance and can delay repayment for one year.

F. FIDUCIARY CONCERNS

1. Federal District Court Imposed Constructive Trust Over Estate Assets and Granted a Temporary Injunction Preventing Estate Dispositions Based on Allegations of Decedent's Embezzlement From Employer. *Van Horn, Metz & Co. v. Crisafulli*, 2021 WL 4317186 (D.N.J. Sept. 23, 2021)

The United States District Court for the District of New Jersey held in favor of a decedent's former employer who sued the decedent's New Jersey estate alleging that the decedent embezzled over $4.3 million while working as the employer's Controller.

The employer provided significant evidence that the estate could not refute regarding the decedent's embezzlement, including forensic accounting showing that the decedent took excessive compensation, made improper ACH transfers from the employer and improperly used the employer's credit card without authorization. This evidence of wrongful acts that benefitted the decedent were strong support that the employer would be successful on the merits in its efforts to recover assets from the estate. Moreover, the employer showed that it would suffer irreparable harm without the imposition of a temporary restraining order based on a showing of the executor's (the decedent's surviving spouse) consumption and dissipation of the estate assets, including real estate and tangibles allegedly purchased with the embezzled funds. In particular, the court referred to the executor's sale of the family's second home during the litigation without notice to the court or the employer and directed approximately $500,000 of the proceeds (about 1/3 of the sales price) to be used to pay creditors as the type of consumption that would result in further irreparable harm to the employer.

Ultimately, the court imposed a constructive trust over a significant portion of the decedent's estate and granted a temporary injunction against the estate, preventing the estate from disposing of or otherwise a portion of its assets.

2. <u>*Estate of Kwang Lee v. Commissioner* (TC Memo 2021-92): Executor personally liable for estate taxes because he made distributions of estate assets knowing that the estate owed the taxes.</u>

Kwang Lee died testate on September 30, 2001, and Mr. Frese, a licensed attorney and municipal court judge, was named executor of the estate.

In April 2006, the IRS sent Mr. Frese a notice of deficiency claiming the estate owed over $1,000,000 in estate tax (the "Estate Tax Claim"). Mr. Frese promptly filed a petition in the Tax Court disputing the Estate Tax Claim.

In February 2007, while the Tax Court case was pending, Mr. Frese distributed $640,000 of estate assets to the estate beneficiaries. As a result of the distribution, the estate retained assets of only $183,000, which was not enough to satisfy the Estate Tax Claim.

In March 2010, the Tax Court issued a decision finding that the estate owed $536,151 in estate tax.

In 2013, the IRS sent Mr. Frese a Notice of Federal Tax Lien. In response to the lien notice, Mr. Frese submitted an offer-in-compromise, based on doubt as to collectability, to settle the Estate Tax Claim.

The IRS declined the offer-in-compromise as too low, because it determined that the estate's reasonable collection potential included amounts it could collect from Mr. Frese under the Federal Priority Statute. The Federal Priority Statute states that an executor may be held personally liable for the unpaid estate tax claims to the extent the executor distributes assets from the estate to the beneficiaries before satisfying and paying a claim owed to the government (31 USC sec. 3713).

The Tax Court ruled that Mr. Frese had both knowledge and notice of the Estate Tax Claim in February 2007 when he distributed the estate's assets.

First, the Tax Court found that Mr. Frese had notice of the Estate Tax Claim because in April 2006 he received a deficiency notice from the IRS before the distribution of estate assets.

Second, the Tax Court determined that Mr. Frese had actual knowledge of the Estate Tax Claim because he was a named party in the Tax Court petition the estate filed disputing the deficiency notice it received in April 2006.

The Tax Court also noted that the Executor, a licensed attorney, made the February 2007 distribution knowing that the IRS had determined an estate tax deficiency against the estate, and that an action disputing that deficiency claim was pending before the Tax Court.

Under these circumstances, the Executor "made the February 2007 distribution at his own peril, and any advice he may have received" from a tax professional regarding the distribution did not absolve him from liability.

3. ***Boyle v. Anderson*** **(871 S.E.2d 226): Neither the Virginia Uniform Arbitration Act nor the Federal Arbitration Act applied to a claim by a beneficiary of a Virginia trust against a Trustee because a Trust is not an agreement or contract, and the trust beneficiary is not a party to a trust instrument.**

Mr. Anderson created an *inter vivos* trust for the benefit of his children and grandchildren. After Mr. Anderson died, his daughter, Sarah, became Trustee of the trust. Linda, the administrator of the estate of Mr. Anderson's predeceased son, filed a complaint against Sarah for breach of fiduciary duty.

The trust instrument contains a provision that states that any dispute not amicably resolved, by mediation or otherwise, shall be resolved by arbitration, so Sarah filed a motion to compel arbitration. Linda opposed the requirement of arbitration, arguing that she never agreed to resolve disputes by arbitration. The Circuit Court denied Sarah's motion, so she appealed, arguing that a trust agreement with an arbitration provision could qualify as an agreement under the Virginia Uniform Arbitration Act or a contract under the Virginia Uniform Act or the Federal Arbitration Act.

VIRGINIA UNIFORM ARBITRATION ACT -- CONTRACT	VIRGINIA UNIFORM ARBITRATION ACT -- AGREEMENT	FEDERAL ARBITRATION ACT
A provision in a written **contract** to submit a controversy to arbitration	Written **agreement** to submit any existing controversy to arbitration	A **contract** relating to a transaction involving **commerce** that contains an **arbitration clause** that does not violate contract law

In determining that the Virginia Uniform Arbitration Act did not apply to Linda's claim with respect to Mr. Anderson's trust instrument, the Court emphasized that:

- A trust instrument is not an agreement or a contract.
    - An agreement is a mutual understanding between two or more persons about their relative rights and duties regarding past or future performances or a manifestation of mutual assent by two or more parties.

- A contract is based on mutual asset, but a trust instrument is not based on a beneficiary's knowledge or acquiescence.

- A trust beneficiary is not a party to a trust instrument; therefore, even if a trust instrument has an arbitration provision, the beneficiary has not agreed to it.

- A trustee is held to a higher standard than a party to a contract.

- A party to a contract can act freely for his or her own interests, but a trustee owes a duty of loyalty to a trust beneficiary.

In determining that the Virginia Uniform Arbitration Act did not apply to Linda's claim with respect to Mr. Anderson's trust instrument, the Court emphasized that U.S. Supreme Court precedent requires a plain reading of the statute, and a trust is not a contract.

This case was limited to the applicability of the State and federal statutes discussed above; importantly, the Court did not hold that an arbitration clause in a trust agreement is inherently unenforceable.

4. *In RE: the Omega Trust* (2022 WL 1498499): Emails between attorney and client are capable of evidencing client's intent to amend a trust as long as the trust instrument does not preclude revocation by email.

- Timeline:
  - December 30, 2005: Mark Frank Douglas creates a Revocable Trust called the Omega Trust.
  - June 2015: The Settlor amends the Omega Trust.
  - September 2015: The Settlor amends the Omega Trust.
  - July 2016: The Settlor informs the Trust Protector that he is in poor health and that he needs assistance with preparing a Third Amendment.
  - July 2016: The Settlor tells the Trust Protector about the specific changes that he wants, and the Trust Protector assists the Settlor in drafting an email to his attorney to that effect.
  - July 2016: The Settlor informs the Trustee that he is going to make changes to the trust and that he will work with attorney to do so.
  - August 2016: The Settlor emails his attorney about updating his estate planning documents, including the Omega Trust, and sets forth the specific changes that he wants. Namely, he wants to add some beneficiaries and appoint successor fiduciaries. The Settlor states in the email that he has "significant health issues".

- August 12, 2016: The attorney emails the Settlor with some questions about his desired changes.

- August 16, 2016: The attorney emails the Settlor a summary of the revisions to be made with respect to various estate planning documents, including the Omega Trust. He informs the Settlor that drafts, including an Amendment to the Omega Trust, are in progress.

- August 16, 2016: The Settlor responds to the attorney's email with a few more changes.

- August 16, 2016: The attorney emails the Settlor and confirms that he will incorporate these most recent edits.

- August 18, 2016: Settlor dies.

The relevant provision of the Trust Agreement provides as follows: "The Grantor reserves the right at any time or from time without the consent of any person and without notice to any person other than the Trustee to revoke or modify the trust hereby created, in whole or in part, to change the beneficiaries thereof, or to withdraw the whole or any part of the trust estate by filing notice of such revocation, modification, change or withdrawal with the Trustee." In a separate provision, the Omega Trust provides that any amendments to the Trust Agreement shall be effective when signed by the Settlor.

A petition was brought in the Circuit Court seeking a declaration that the email correspondence detailed above constituted a valid Third Amendment to the Omega Trust. The "Special Trustee" of the Omega Trust filed a motion to dismiss. On appeal, the Supreme Court of New Hampshire analyzed New Hampshire's version of the Uniform Trust Code, which states, in part, that a Settlor can revoke a trust by any method manifesting clear and convincing intent of such revocation, as long as the governing trust instrument does not prohibit revocation by methods other than those set forth in the such trust instrument.

The Court denied the Special Trustee's motion to dismiss because, while the revocation provision in the Trust Agreement provided a method by which the Omega Trust could be revoked, it did not specify that that was the only method by which the Omega Trust could be revoked. The Court found that the email exchanges between the Settlor and his attorney were capable of evidencing the Settlor's intent to amend the Omega Trust. The case was therefore remanded to the lower court for trial.

5. ***Wallace v. Torres-Rodriguez*** **(2022 WL 1481782): The receipt by a third party of gifts from a joint account constitutes unjust enrichment if both owners of the joint assets do not consent to the gift.**

After Milton Wallace was diagnosed with a neurological condition, he and his wife, Patricia Rodriguez, established an irrevocable trust that was designed to hold jointly held assets for Patricia's benefit after Morton's death. In connection with the creation of the trust, they signed a postnuptial agreement that required the survivor to contribute all jointly held assets to the trust shortly after the death of the first of them to die.

Patricia died first, and, shortly after her death, her Personal Representative (their son) discovered that Milton had gifted assets from the joint accounts to another woman, Yanelin Torres-Rodriguez. Both Milton and Yanelin claimed that Patricia knew about the gifts, but the Personal Representative believed otherwise and sued Yanelin. At the time of the lawsuit, Yanelin owned three condos, a large amount of cash and a stock portfolio, all thanks to Milton.

The trial court found that Yanelin was unjustly enriched because she failed to prove that Milton gave her the gifts with Patricia's consent. However, the trial court also found that Yanelin was entitled to keep some of the gifted assets because she detrimentally relied on Milton's generosity and, as a result, chose not to seek employment or attend college.

On appeal, the District Court of Appeal ordered Yanelin to return all of the property resulting from Milton's gifts because a change of position is a defense to unjust enrichment that must be affirmatively raised by a defendant, and Yanelin failed to do so.

6. *Donoghue v. Smith*, 2022 U.S. Dist. LEXIS 76071

This is a shareholder derivative action in which shareholders of Sinclair Broadcast Corporation ("Sinclair") seek disgorgement of approximately $5.5 million in alleged short-swing profits realized by David D. Smith, a corporate insider- officer, director, and beneficial owner of more than 10% of the common stock of Sinclair- from the acquisition and subsequent sale of shares acquired by Smith from certain GRATs that he had established for the benefit of his children. Smith used his power of substitution under the GRATs to reacquire the Sinclair shares and, within six months, sold the shares on the open market, triggering liability under Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). Section 16(b) "imposes strict liability on corporate insiders whose purchases and sales of securities result in short-swing profits" and "compels statutory insiders… to disgorge profits earned on any purchase or sale [of the corporation's securities] made within six months of each other." No showing of actual misuse of inside information or unlawful intent is necessary to state a claim under the statute, which is designed to "prevent the unfair use of information which may have been obtained by reason of the insider's relationship to the issuer." Smith moves to dismiss Plaintiffs' claims based on two main arguments: (1) under applicable regulations, his acquisitions of stock from the GRATs were exempt from Section 16(b) and (2) his acquisitions of stock do not constitute "purchases" within the meaning of Section 16(b).

A. Smith's acquisitions of stock from the GRATs are exempt under SEC Rule 16a-13

Smith argues that his acquisitions of stock from the GRATs are exempt from Section 16(b) under SEC Rule 16a-13, which exempts, in relevant part, "transactions that effect only a change in the form of beneficial ownership without changing a person's pecuniary interest in the subject equity securities" which typically includes changes from indirect to direct ownership or vice versa. The Court denies Smith's argument that his acquisitions of Sinclair stock merely changed the form of his beneficial ownership from indirect to direct because he failed to establish that he maintained beneficial ownership after the shares were transferred to the GRATs. Smith fails to prove that he had "investment control" over the securities held by the trusts in order to maintain the relevant indirect pecuniary interest necessary to be considered a beneficial owner of securities held by a trust. The GRATs explicitly give the Trustees, not the Settlor, the authority to "sell or otherwise dispose of any or all property comprising the Trust Estate" and to otherwise manage, sell, convey, or dispose of any property freely at any time. The GRATs further provide that the Settlor can in no event serve as Trustee. Thus, it is the Trustees who have "investment control" and not Smith. The Court concludes that Smith fails to demonstrate that the Rule 16a-13 exemption applies to the transactions at issue here.

Smith further argues that in the Statements of Changes in Beneficial Ownership of Securities (the "Forms 4") that he filed with the SEC, he "admitted" in these filings that he "remained the beneficial owner of the Sinclair stocks after it was contributed to the GRATs." However, the Court may not rely on Smith's statements in the Forms 4 for their truth, and can only examine the documents to determine what the documents stated, not to prove the truth of their contents.

SEC Rule 16a-1 defines beneficial owner as "any person who, directly or indirectly… has or shares a direct or indirect pecuniary interest in the equity securities." Pecuniary interest is defined as "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities." An indirect pecuniary interest includes "a person's interest in securities held by a trust." SEC Rule 16a-8(b) provides that with respect to settlors, "if the settlor does not exercise or share investment control over the issuer's securities held by the trust, the trust holdings and transactions shall be attributed to the trust instead of the settlor."

B. Smith's acquisitions of stock from the GRATs were not "purchases"

Under the Exchange Act, purchases "includes any contract to buy, purchase, or otherwise acquire" securities, which covers many transactions not ordinarily deemed a sale or purchase. The Court holds that Smith's alleged exchanges of property of an equivalent value for the shares held by the trust falls within the statutory definition of "purchase," given that the value of the property substituted by Smith matched the range of prices at which the Sinclair Class A common stock traded on the open market. The transactions each involved an agreement to exchange property, equal to the current market value of the securities, for those securities. The Court concludes that Smith's acquisitions of stock from the GRATs were "purchases" for purposes of Section 16(b).

Finally, Smith argues that "treating an insider's re-acquisition of shares from a GRAT is highly unlikely to serve the purpose of Section 16 because the insider makes all of the investment decisions for the GRAT, and therefore the insider enjoys no informational advantage over the GRAT." The Court is not convinced, stating that there is nothing in the pleadings to support the assertion that Smith made all of the investment decisions for the GRATs. To the contrary, it is the Trustees who have the authority to exercise investment control over the shares, and as such there is no basis to conclude that Smith and the GRATs were equally informed parties with respect to the acquisitions on the dates alleged in the Complaint, and the Court therefore denies Smith's motion to dismiss.

7. *Betty Amos v. Commissioner*, No. 4331-18, T.C. Memo. 2022-109 (Nov. 10, 2022).

The Tax Court held that a Taxpayer was not entitled to net operating loss (NOL) deductions claimed on her 2014 and 2015 Federal income tax returns where she failed to adequately substantiate that she had incurred such NOLs in the first place (purportedly in 1999 and 2000), or that such NOLs remained available for use in 2014 and 2015. This case serves as a cautionary reminder of the importance of recordkeeping obligations for tax professionals (including attorneys).

In essence, the Taxpayer here failed to maintain or produce adequate records to substantiate her entitlement to the NOL carryover deductions at issue, instead relying primarily on her prior tax returns and worksheets, as well as her own testimony. The Court explained that this type of evidence was insufficient to substantiate the deductions at issue; tax returns and the like merely prove that the Taxpayer claimed the deduction in prior years, not that she was entitled. Furthermore, although the Taxpayer did supply some scattered primary records (e.g., related entity tax returns, business ledgers and loan documents), she apparently did so without any context, explanation or computations that would enable an outside reviewer to understand how such records substantiated the deductions at issue. Although the Court acknowledged that it has the power to "estimate the amount of allowable deductions where there is evidence that deductible expenses were incurred," the Court declined to estimate the Taxpayer's allowable deductions in this case, given the "dearth of evidence" upon which to base any such estimate.

Furthermore, the Court sustained the accuracy-related penalty imposed by the IRS with respect to the Taxpayer's unsubstantiated NOL deductions, finding that the Taxpayer failed to prove she acted with reasonable cause and in good faith. In reaching this conclusion, the Court repeatedly emphasized the fact that the Taxpayer had been a licensed CPA and tax adviser for several decades before the events at issue in the case ("Ms. Amos is a longtime CPA who has worked for high-profile clients, owned her own accounting firm, and been involved with national and state CPA associations . . . . It beggars belief that she would be unaware that each tax year stands alone and that it was her responsibility to demonstrate her entitlement to the deductions she claimed.").

G. PRENUPTIAL AGREEMENTS AND DIVORCE

1. *Alejandro J. Rojas et al. v. Commissioner*, No. 7453-19, T.C. Memo. 2022-77 (July 18, 2022).

The Tax Court ruled that certain payments made by a Taxpayer to his former spouse pursuant to a divorce decree were nondeductible child support payments for Federal tax purposes, despite the fact that the California Superior Court with jurisdiction over the divorce had previously issued an order which expressly stated that such payments were not child support for state law purposes.

The payments at issue were described as "family support" under the Taxpayer's California divorce decree but were subject to a "child-related contingency", in that the Taxpayer's obligation to make such payments would terminate upon the emancipation of both his minor children. On the Taxpayer's 2016 Federal income tax return, he deducted these family support payments as alimony pursuant to I.R.C. 215. Although the IRS did not dispute that the family support payments here would otherwise meet the definitional requirements of alimony, the fact that such payments included a child-related contingency rendered them nondeductible child support payments under I.R.C. 71(c)(2)(A).

The existence of a separate spouse-related contingency here (specifically, that the family support payments would continue until the Taxpayer's former spouse remarried) did nothing to change this outcome, in light of the Tax Court's "well-established caselaw" providing that "section 71(c)(2)(A) is triggered by 'a contingency . . . relating to a child' without regard to the existence of other contingencies."

The Tax Court also rejected the Taxpayer's argument that the Full Faith and Credit Act (28 U.S.C. 1738, which generally provides that orders of state courts are afforded full faith and credit in Federal court proceedings) precluded the Tax Court from characterizing the family support payments as nondeductible child support payments because of the California Superior Court's prior order stating that "there is no current child support order". The Tax Court reasoned that the Full Faith and Credit Act was inapplicable here because: (a) the California Superior Court's prior order merely reflected that the payments at issue were not labeled as "child support" or "spousal support" under divorce decree, but rather as "family support" payments, which represent combined but unallocated child support and spousal support under California law; and (b) more fundamentally, because "federal law rather than state law governs the federal income tax treatment of such payments."

Finally, the Tax Court also rejected the Taxpayer's argument that it would be inequitable to treat the payments at issue as nondeductible child support, given that the California Superior Court previously denied the Taxpayer's request for a reduction of such payments on the ground that they were not child support payments subject to modification. On this issue, the Tax Court simply stated that it is not a court of equity, and that the Taxpayer was, in effect, petitioning the Tax Court to legislate from the bench.

H. SETTLEMENT CONCERNS

1. ***In re Gerald F. Johnson Revocable Trust*, No. 351134, 2021 Mich. App. LEXIS 3732 (Ct. App. June 17, 2021): Unintended Waiver of Ex-Spouse's Creditor Rights**

Barbara Johnson ("Wife") and Gerald F. Johnson ("Husband") divorced in 2008. As part of the divorce they entered into a Settlement Agreement (the "Agreement"), distributing the marital assets, and setting Husband's alimony obligation at $10,000 per month. The Agreement did not terminate alimony automatically at Husband's death, leaving the divorce court with the discretion to continue, modify, or terminate alimony upon his death. Among the assets awarded to Husband in the Agreement was his stock in Novi Springs, Inc. (the "stock"), which was awarded to him "free and clear of any right, claim, title or interest" of Wife. After executing the Agreement, Husband assigned his interest in Novi Springs, Inc. to his revocable trust. He also assigned some portion of his shares to an irrevocable trust for the benefit of his son from a previous marriage.

After Husband's death, his Personal Representative filed a motion to terminate his alimony obligation. While that motion was pending, the trustee of the revocable trust distributed the stock to three employees who were named in the trust as specific devisees of the stock. Wife alleged that the distribution of the stock caused the estate to be insolvent and thus did not have sufficient assets to meet the alimony obligation, and therefore she should be able to reach the stock for continued spousal support after Husband's death. Wife filed a petition in the probate court requesting that the stock be returned to the trust pending the litigation addressing the modification of spousal support. The probate court determined that under the terms of the Agreement the stock was the separate property of Husband and Wife waived any claim she might have against it, and therefore dismissed Wife's petition.

The Appellate Court affirmed the probate court's decision, relying on the plain language of the Agreement, specifically Paragraph 4.D of the Agreement, which provided that Husband was to have as his "sole and separate property, free of any claim thereto by [Wife], except as hereinafter stated to the contrary, the following assets," which included the stock in Novi Springs, Inc. The Court held the Agreement to be unambiguous in deciding that Wife had essentially waived her interest, even as a creditor, to any of the assets separately awarded to Husband under Paragraph 4.D. The Court states that "the word "hereinafter" denotes that there must be contrary provisions after Paragraph 4.D. Yet, there is no exception listed for the stock." Thus, the stock was a separately awarded asset, and Wife could not reach the stock as satisfaction and payment of the alimony obligation.

The Court also considered Paragraph 4.L of the Agreement, which it held to be a "catch-all" that makes it clear that the property retained by each of Husband and Wife was to be within their full individual power and they are free to do with it what they choose. The Court held that Wife's agreement to Paragraph 4 constituted an intentional and express relinquishment of her rights to the stock and her intent to waive claims to the stock. The Court concluded that the plain language of the Agreement awarded the stock as a separate asset to Husband, free and clear and Wife had no valid claim to have the stock returned to the trust, even if no other assets existed to satisfy her alimony obligation.

2. ***In re Marriage of Rene Simon Cruz and Rena Dillon Cruz*** **(Cal. Sup. Ct. 2022)**

A. Background

A. H and W were married from 1992 until 2019. They have two adult children.

B. W inherited mineral rights from her mother.

C. In 2012, W's brother advised her to move the mineral rights into trusts before the possible reduction of the gift tax exemption amount on January 1, 2013.

   a. First, H and W created an LLC called Cruz Mineral Investments, LLC ("CMI"), which was community property because it was formed during marriage.

b. H and W then signed a transmutation agreement transmuting a portion of CMI from community property to each of their separate property.

c. Next, W deeded the mineral rights to CMI and then H and W executed a second transmutation agreement confirming that the CMI membership interests were in fact separate property.

d. H transferred a portion of his separate property CMI membership interests (39% of the interests in CMI) to the "2012 Rene Delaware Trust" – a trust for the benefit of W and the children.

e. W transferred a portion of her separate property CMI membership interests (39% of the interests in CMI) to the "2012 Rena Delaware Trust" – a trust for the sole benefit of the children.

D. In 2014, H and W engaged a second estate planning attorney to engage in additional estate tax planning.

a. At the attorney's recommendation, W settled the "2014 Rena Delaware Trust" for the benefit of H and the children, gifted her remaining 11% of CMI to the new trust, and then the 2012 Rena Delaware Trust sold its interests in CMI to the new trust.

b. H assigned his remaining 11% of CMI to the 2012 Rene Delaware Trust.

c. At this point, a SLAT for H and children owned 50% of CMI and a SLAT for the benefit of W and children owned the other 50%.

E. W claimed to have basically no knowledge of any of the estate planning transactions that she was involved in, though she signed the documents in front of notaries and was present for all meetings and phone calls.

F. W claims that H tricked her into giving up her mineral rights.

B. Court's Analysis

A. The first question was whether the mineral rights were part of the marital estate at the time of the trial. Answer: No.

a. Because of the transactions described above, the LLC interests holding the mineral rights had been transferred to irrevocable trusts and were no longer part of the marital estate.

B. The second question was whether the transmutation agreements were valid. Answer: Yes.

a. The Court notes that the transmutation agreements acknowledge possible conflicts of interest and each spouse's right to independent counsel, and describe the assets being transmuted with sufficient particularity.

C. Finally, the Court asked whether H exerted undue influence on W in order to "trick" her into transmuting the mineral rights. Answer: No.

a. There's a rebuttable presumption of undue influence for transactions between spouses when such undue influence is alleged.

b. The Court looked first at whether W was "disadvantaged" by the estate planning transactions. The Court noted that neither H nor W was very familiar with estate planning, but W was more familiar because she had acted as Trustee of trusts for the benefit of her parents and herself prior to 2012.

c. The Court looked at whether W was under any sort of physical or mental disability or weakness; she was not.

d. The Court asked whether there was unequal bargaining power between H and W; the Court found that, if anything, it was unequal in favor of W, who came from a wealthy family.

e. The Court found W's testimony to be completely unreliable

I. <u>STATE AND LOCAL TAX</u>

1. <u>Measure ULA.</u>

This provision became law and is effective April 1, 2023 – assuming it can survive a challenge to it that has already been filed. Its purpose is to impose increased documentary transfer tax ("DTT") on transfers of real estate in the City of Los Angeles, intending to raise $1,000,000,000/year to fund projects to reduce homelessness in the city.

Currently, Los Angeles imposes a documentary transfer tax on the recordation of deeds transferring real property that are recorded with the County recorder. The tax has been 56 basis points for many years, and when the value of the property is determined for purposes of calculating the tax, any debt against the property could be deducted. In *926 North Ardmore Avenue LLC* v. *City of Los Angeles*, Case #S222329 (Cal. Sup. Ct. 6/29/2017) ("Ardmore"), the City also imposed a documentary transfer tax when an interest in an entity was transferred that caused a "change in ownership" for property tax purposes. There is a long list of transfers that are excluded from the documentary transfer tax (<u>see</u> Documentary Transfer Tax Exemptions | Viva Escrow | Los Angeles, CA for a link to the list). One of the important exceptions relevant to the estate and gift tax area is where there has been a transfer for no consideration.

Measure ULA would impose an additional 4% DTT on transfers of real property in the City of Los Angeles for property worth $5,000,000 and an additional 5.5% DTT on transfers of real property in the City of Los Angeles for property worth more than $10,000,000. (The 56 basis points existing tax is added on as well.) And in calculating the tax, debt against the property is not subtracted out. Ardmore would apply to transfers in excess of those amounts of interests in entities owning City of Los Angeles real property where the transfer causes a change in ownership for property tax purposes.

If someone owns a property worth $7,900,000, it is unclear whether half can be sold in two separate transfers and the application of Measure ULA is avoided in both. For example, if parents established separate trusts for each two children, and sold half of the $7,900,000 property to each trust, each sale would be of $3,950,000 and perhaps the additional DTT could be avoided.

However, the exceptions to the application of the DTT remain. Therefore, transfers for no consideration would avoid the increased DTT. A sale to an IDIT would attract the tax (if the property sold was worth more than $5,000,000 or $10,000,000) – but would a gift to a GRAT attract the tax? The gift is in exchange for an annuity from the GRAT – is that consideration that would make the new law apply? No one knows.

The Howard Jarvis Taxpayers Association is suing to have the law declared invalid because it violates the California constitution. The theory is that tax increases proposed by the legislature can only be enacted by a 2/3 vote. Here, the increase was put on the ballot by outside groups (not the legislature), so it passed by a simple majority. The lawsuit alleges that the 2/3 rule applies here too.

No one knows if the lawsuit will succeed. Therefore, clients who want to pursue sales to IDITs of City of Los Angeles real property are rushing to complete those sales before April 1, 2023.

Valuation experts are starting to work in "discounts" on the value of such properties used in estate planning transactions due to the cost of selling the property in the future that will diminish proceeds from a sale after April 1, 2023.

J. ENTITY DEVELOPMENTS

1. IRS News Release: EIN Holders Must Update Responsible Party Contact Information (IRC §6109).

Entities (businesses and charities) with Employer Identification Numbers ("EINs") are urged to update their applications if there has been a change in the responsible party or contact information. Treasury regulations require EIN holders to update responsible party information within 60 days of any change by filing Form 8822-B, Change of Address or Responsible Party-Business. The IRS is stepping up its awareness efforts aimed at businesses, partnerships, trusts and estates, charities and other entities that are EIN holders. Starting in August, the IRS will begin sending letters to approximately 100,000 EIN holders where it appears the responsible party is outdated.

2. PLR 202247004.

In this PLR, the IRS excused an inadvertent lapse in the Taxpayer's S corporation status caused by an amendment to the Taxpayer's operating agreement which failed to satisfy the requirement under I.R.C. 1361(b) that all outstanding shares of an S corporation must have identical rights to distribution and liquidation proceeds. The Taxpayer subsequently amended the relevant provision in the operating agreement in order to comply with the requirements of I.R.C. 1361(b), and the IRS concluded that the Taxpayer's lapse in compliance caused by the prior amendment was "inadvertent" within the meaning of I.R.C. 1362(f). Consequently, the IRS ruled that the Taxpayer's S corporation status was never terminated by reason of the prior non-conforming amendment.

K. UNIFORM PARTITION OF HEIRS PROPERTY ACT

1. Co-owners of real estate in California have a right to "partition" – so if one wants to sell and the other doesn't, there is a way out. There are a number of ways out, including dividing the property in two (like if there is vacant land, give ½ to one and ½ to the other), buying one party out based on an appraisal, or getting the court to order a sale.

2. What this new law does for people who inherited property is require the appraisal before a sale first (that gets filed with the court, the other party gets to object, and the court determines what the fair appraisal value would be), and gives the one who doesn't want to sell the right to buy out the one who does want to sell. If that person doesn't want to buy, then the court will move towards a public sale.

Effectively, this gives the party that doesn't want to sell a right to buy first before it's put on the market. One has to partition following the new rules:

a. Get the court to determine that it is "heirs property" covered by the statute (the statute defines "heirs property" as real estate where (a) the owners do not have a written agreement addressing partition of the real estate, (b) at least one of the owners received their interest in the real estate from a relative (it does not matter if the relative is living or deceased); and (c) 20% of the interest are held by owners that are relatives; or 20% of interests are held by an owner who received their interest from a relative, or 20% of the owners are relatives – it is important to understand that both (a) and (b) must be satisfied and one of the items in (c) must be satisfied);

b. The court then orders an appraiser to submit an appraisal to the court (unclear whether there is a list of appraisers the court picks from – like the probate referee list – or whether the petitioner gets to submit the name of an appraiser);

c. Give the parties a chance to object to the appraisal;

d. The court then decides the value;

e. The one who doesn't want to sell gets to buy the one who does want to sell at ½ of that value; and

f. If not, then the court can order the sale on the open market and the parties split the net proceeds (appraisal is not relevant there anymore).

These new rules apply to partitions of heirs property after January 1, 2022. The provisions of the new law can be found in Code of Civil Procedure Sections 874.312 – 874.317.