

# The Estate Analyst®

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## The Year In Review *Voices of 2014*

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Goodbye, 2014! Be off with you and your Ebola, ISIS, Boko Haram kidnappings, Malaysian airline crashes, and rocket/tunnel warfare in Gaza. In fact, help yourself to as many Kardashians as you like and then hit the road. Here's to a Kimye-free 2015.

Before closing the book on the past year, let's take this opportunity to canvas the estate planning world for developments of significance and, in keeping with our long-standing tradition, a collection of the year's inexplicable, shocking, and notorious stories. Here we go.

### *Real Estate Trusts*

An under-the-radar type of case with potential for broad application was *Aragona Trust v. Commissioner*, 142 T.C. 9 (2014). In a case of first impression, the Tax Court held that a trust could qualify as a real estate professional for purposes of deductions under the passive activity rule of Section 469(c)(7). That rule arrived in 1986 but an exception for real estate professionals was adopted in 1993. In *Aragona*, the Court applied that exception to trusts.

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Significantly, a trust that can qualify as a real estate professional would be able to offset rental income with real estate losses and avoid the 3.8% passive surtax.

To qualify, a trust must meet the two-pronged test applicable to real estate professionals, i.e., having more than half of its activity involved in real estate and having more than 750 hours of personal services. The trust must establish material participation in a particular rental activity, such as having more than 500 hours of personal services. (The trustee's work qualifies toward the personal services.) Many trusts contain real estate and should consider the opportunity provided by *Aragona*.

## The Bobrow 700

After prominent tax attorney Alvan Bobrow was assessed tax penalties for taking distributions from multiple IRAs during a one-year period and attempting to roll them over to new IRAs, 700 of his closest friends from the Board of Regents of the American College of Tax Counsel provided an *amicus curiae* brief. Although the IRS position contradicted *Proposed Regulation §1.408-4(b)(4)(ii)* and *IRS Publication 590*, which indicates rollovers are permitted on an IRA-by-IRA basis, the Tax Court ruled against the petitioner in *Bobrow v. Commissioner, TC Memo 2014-21 (2014)*, and applied the rollover rule on an aggregate basis.

The IRS subsequently withdrew the proposed regulation. However, the IRS also indicated in *Announcement 2014-15* that it would only enforce the Tax Court's ruling prospectively, effective in 2015.

## Inherited IRAs

In, *Clark v. Rameker, 134 S. Ct. 2242 (2014)*, the Supreme Court unanimously ruled that debtors cannot protect an inherited IRA from bankruptcy creditors. The IRA is only a protected "retirement fund" for the original taxpayer who established the IRA. Justice Sotomayor noted that "the entire purpose of traditional and Roth IRAs is to provide tax incentives for account holders to contribute regularly and over time to their retirement savings." Yet, three legal characteristics of inherited IRAs are contrary to that purpose. Inherited IRAs cannot be increased with new contributions; they must commence distributions immediately, regardless of how far the account holder is from retirement; and the holders are not penalized upon distribution of the entire balance.

Planners should note that using alternate beneficiaries or trusts can preserve assets. The fate of inherited IRAs in *Clark v. Rameker* also underscores the larger issue of vast numbers of inherited IRAs for which beneficiaries fail to obtain advice or take full advantage of rollovers or stretch IRA techniques. Good planning should also incorporate communications that will alert those who inherit IRAs about any advantageous options they might employ.

## Living Trust Breached

In, *In re Castellano, 2014 WL 3881338 (Bk.N.D.Ill., Aug. 6, 2014)*, the Bankruptcy Court threw aside spendthrift language in a revocable living trust and seized a debtor's interest in a revocable living trust that had been established by the debtor's deceased parent. The trust was drafted to prevent the assets from going to bankruptcy creditors of the beneficiary, yet the court ruled that the assets vested at the moment of the grantor's death. Our trust protections have been breached. The next generation of trusts will need to defer vesting of assets and maintain trustee discretion to avoid creditors.

## Same-Sex Marriage

Same-sex marriage was recognized in 21 additional states during 2014. Following the Supreme Court's ruling in *United States v. Windsor, 570 U.S. 12, 133 S. Ct. 2675 (2013)*, the IRS issued *Ruling 2013-17, 2013-38 I.R.B. 201*, which treats a same-sex spouse as a spouse for tax purposes if the marriage was valid in the state in which the parties were married. District courts in 23 states and state courts in 6 states have found bans on same-sex marriage to be unconstitutional. There are now 35 states covering two-thirds of the population of the United States that recognize same-sex marriage.

Many planning issues apply to same-sex couples in this transitional period and beyond. Unmarried same-sex couples need wills, powers of attorney, and health proxies to have their rights preserved. Married same-sex couples need these same basic documents in case of law changes or relocations to jurisdictions that don't recognize their marriages. Conflicts within families will continue to challenge estate planning draftsmen to articulate intentions and anticipate issues. Same-sex couples will need to contemplate pre-nuptial agreements, divorce, guardians for children. Adoption and surrogate parenting may affect many plans. Social views of marriage and families have changed and so must estate planning.

## Despicable IRS

Taxpayers moved IRA funds into self-directed accounts, invested badly, and lost all of their money. They received an erroneous 1099 form but ignored it and retained no documentation of their losses. These were big mistakes. The IRS imposed taxes and penalties on "income" that the taxpayers never received. *Steven V. Gist, et ux., v. Comm'r, TC Summary Opinion 2014-1*.

In, *U.S. v. Zwerner, 13-cv-22082, U.S. District Court, Southern District of Florida (Miami)*, a taxpayer with a Swiss bank account with \$1.48 million was hit with IRS penalties of \$2.24 million based on 50% penalties for nondisclosure of assets for three separate years (150% of penalties cumulatively). Unlike Ty Warner, the billionaire creator of

Beanie Babies who pled guilty to tax evasion and paid a \$53 million penalty on foreign bank accounts with \$107 million, Mr. Zwerner was simply trying to comply with the FBAR reporting rules with voluntary disclosures. An appeal based on the excessive fines clause of the Eighth Amendment to the Constitution may prevail under the concept that the fines are punitive and grossly disproportionate to the behavior involved.

## *Cyber Dystopia*

The future is everything George Orwell feared. Not only does Big Brother government know all and see all, but information has been democratized. Everyone, anywhere, anytime, can instantly access everything about you in exhaustive, clinical, digitized detail.

- Great Britain has posted 41 million wills from England and Wales online, covering the period from 1858 through the present. Yes, wills are public documents, but instant access to them for every casual inquiry is disconcerting.
- A life black box that enables people to upload secret photos and messages to be sent to selected recipients in the event of death now has 360,000 Chinese subscribers.
- Thousands of people are setting up online wills in light of recent plane crashes and terrorist attacks.
- China's Wahaven website now has 3 million online memorials for the departed.
- Delaware became the first state to enact legislation to treat digital assets the same way as physical assets, thus allowing testators to bequeath digital accounts to their heirs.
- Karter Yu electronically signed his last will and testament on his iPhone, and it was deemed to be valid by the Supreme Court in Queensland, Australia.

Should we embrace this brave new digitized world? Some of us may find it disquieting to sacrifice privacy. Those born in the 20<sup>th</sup> century understand and prefer a world with tangible paper and ink for selected eyes to see as opposed to 21<sup>st</sup> century clouds where strangers share communal ethers. Perhaps trusts will serve as the last refuge from which older people valuing privacy and reality can say, "get off of my cloud."

## *Proposal Gristmill*

The administration's annual Green Book budget proposals for 2014 and other comments continue to advocate a world in which grantor-retained annuity trusts have minimum terms of 10 years and cannot be "zeroed-out." Another proposal would hamstring intentionally defective grantor trusts by having grantors who pay income tax on assets also include those assets in their estates. The administration would also restore 2009 estate tax limits, i.e., lower the exemption to \$3.5 million and increase the top rate from 40% to 45%.

The political counterpoint from Republicans would repeal the estate tax entirely. If you are old enough, that may sound familiar. We are having the same exact debate that took place during the Clinton administration. As for estate tax repeal, here's a reminder: We've been there and done that.

## *Celebrity Estates*

Ownership and the potential sale of Martin Luther King, Jr.'s Bible and Nobel Peace Prize were the subject of court proceedings involving his estate and heirs throughout 2014. King's three surviving children are shareholders and board members of his estate, but there is disagreement about selling these most-cherished possessions.

There is a serious accusation of elder abuse involving Casey Kasem's death being accelerated when his wife recklessly spirited him away from a nursing facility and took him from one location to another to prevent his children from visiting him. She then showed the world what bat-guano crazy looks like by famously hurling raw meat in her driveway in the name of King Solomon. Posthumous transportation of Kasem's body to Canada and then to Norway, where it was finally buried, appears to have avoided an incriminating autopsy while thwarting Kasem's own clearly stated desire to be buried at Forest Lawn Memorial Park.

Actor Philip Seymour Hoffman left his estate to his ex-companion rather than in trust for his children. It remains to be seen if he placed his trust in the right person or how this choice will play out. A trust could have protected those assets from creditors and named back-up trustees. His death by overdose and his lack of good estate planning were both products of risky choices.

The widow of author Tom Clancy argued in court filings that the portion of the estate left to her was designed to qualify for the marital deduction. Therefore, her representatives argued that two-thirds of the \$83 million estate left to children from Clancy's former marriage should also bear the burden of the estate tax due on that transfer.

Comedian Robin Williams was remembered for his brilliance and kindness. He established trusts for his children that pay out shares at ages 21, 25, and 30. It was the same type of simple, pragmatic, planning that protects families of every type.

## *Miscellaneous*

Brittany Maynard chose to utilize Oregon's euthanasia laws. Her tragic circumstances attracted public attention. In 2014, she chose her own time and departed this life with dignity. Belgium became the first nation to legalize euthanasia for children.

A transgender woman legally changed her name to Jennifer Gable and lived as a female. Yet, upon her death, her family cut her hair, dressed her in a suit in an open casket, excluded her

decade of transitioning from her obituary, and buried her as a man, Geoffrey Gable.

Utah's Supreme Court permitted Janetta Gardiner to be posthumously married to Kenneth Vanderwerff, who died in 2010, based on their unsolemnized common law marriage. A little-known French law enacted during the time of Charles de Gaulle in 1959 allows a posthumous marriage under special circumstances. That law was created after a dam broke and 420 people perished, including the fiancé of a pregnant woman, who lobbied the President for permission to marry. During 2014, a similar circumstance led President Hollande to grant permission for a woman known only as Pascale to marry her fiancé, who died two years ago of a heart attack just weeks before their wedding. More than 300 people have utilized this law.

Former governor (and professional wrestler) Jesse Ventura was awarded \$1.8 million from the estate of Navy Seal Chris Kyle for defaming Ventura in the book *American Sniper*.

The estate of Randy California, a guitarist with the band Spirit, sued Led Zeppelin for royalties for ripping off the music for the song "Stairway to Heaven."

Larry Brown's estate contained a rare gem of a car, a 1969 Shelby Mustang GT500 (one of only 1,000 that were ever made). The car had 8,500 miles on it and had been preserved since 1973. It had never been washed for fear of rust. The car was purchased for \$5,000 but in 2014 it was sold for \$280,000.

Kevin McGroarty, who was described by his friends as "the life of the party," passed away this year but left behind his own obituary, which began, "McGroarty Achieves Room Temperature!" Johanna Scarpitti was such a fan of *The Wizard of Oz* that she insisted that her obituary begin with "Ding dong the witch is dead" and that she be buried wearing her ruby slippers.

A single-family home set a record this year when it was sold at a Christie's auction for \$120 million. The estate, located on 50 acres with nearly a mile of ocean-front property in Connecticut, features a 13,500-square-foot house that was built in 1898 in French Renaissance style. The home has 12 bedrooms, 9 bathrooms, 10 fireplaces, a library, a solarium, a wine cellar, and a servant's wing. The property includes two islands, a tennis court, a swimming pool, and elaborate gardens.

## Voices of 2014

"Education is when you read the fine print. Experience is what you get if you don't."  
—Pete Seeger

"A bird doesn't sing because it has an answer, it sings because it has a song."  
—Maya Angelou

"We live in an era of globalization and the era of the woman. Never in the history of the world have women been more in control of their destiny." —Oscar de la Renta

"It is not true that people stop pursuing dreams because they grow old, they grow old because they stop pursuing dreams."—Gabriel García Márquez

"'Streetcar' is no longer about the moment at all. There is no Blanche DuBois anywhere; south, north, east or west. We don't have Blanche DuBois at the moment. But we have Willy Loman; everywhere we look we see Willy Loman. We are Willy Loman. We're on Facebook; we need to be known; we're selling all the time." —Mike Nichols

"The biggest difference between Kennedy and Nixon, as far as the press is concerned, is simply this: Jack Kennedy really liked newspaper people and he really enjoyed sparring with journalists." —Ben Bradlee

"It is almost always the cover-up rather than the event that causes trouble." —Howard Baker

"I went to California in my car, with a tape under my arm and talked a small record company into putting us out on the label. When they found out my real name was Paul Revere, they said, 'You gotta use that as a gimmick.' And so they came up with Paul Revere and The Raiders." —Paul Revere

"I always end up being the evil one, and I wouldn't hurt a fly." —Eli Wallach

"Some coaches pray for wisdom. I pray for 260-pound tackles. They'll give me plenty of wisdom." —Chuck Noll

"People say that money is not the key to happiness, but I always figured if you have enough money, you can have a key made." —Joan Rivers

"I think you should be serious about what you do because this is it. This is the only life you've got." —Philip Seymour Hoffman

"I stopped believing in Santa Claus when I was six. Mother took me to see him in a department store and he asked for my autograph." —Shirley Temple

"You're only given one little spark of madness. You mustn't lose it." —Robin Williams

"Had I been brighter, the ladies been gentler, the Scotch weaker, the gods kinder, the dice hotter—it might have all ended up in a one-sentence story." —Mickey Rooney

**Who is the tall, dark stranger there?  
Maverick is the name.  
Ridin' the trail to who knows where,  
Luck is his companion,  
Gamblin' is his game.**

*Theme song to the Maverick television show,  
starring the late James Garner.*