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August 2024
Volume 36, Number 8

Supreme Court Overturns *Chevron* Deference, Introducing Greater Judicial Review of Agency Action

By Samuel A. Donaldson

In *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (June 28, 2024), the Supreme Court of the United States voted 6–3 to overrule its decision in *Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deferring to federal agency interpretation of ambiguous statutes. The decision simultaneously broadens the powers of federal courts and curbs the authority of federal agencies, which could have a significant effect on the IRS and the interpretation of the Internal Revenue Code.

The Court consolidated two similar cases, one from the Federal Circuit and the other from the First Circuit. Both cases involved challenges to a rule promulgated by the National Marine Fisheries Service ("NMFS") that sometimes required Atlantic herring fishers to pay the costs of statutorily required "observers" to be onboard during fishing trips for the purpose of collecting data necessary for conservation and management purposes. The fishers argued that the statute required only three specific groups to pay for observers, and since herring fishers were not among those three groups, the NMFS rule requiring them to pay the costs on some occasions was invalid. Both the Federal Circuit and the First Circuit, however, rejected these challenges, finding that the NMFS rule was entitled to so-called "*Chevron* deference."

In simplest terms, *Chevron* deference requires that a court defer to an agency's interpretation of a statute that is either silent or ambiguous as to a particular matter as long as that interpretation "is based on a permissible construction of the statute." In other words, a court may not second-guess or substitute its own, "better" interpretation of a statute as long as the agency's interpretation is a reasonable one. The case was decided in the heyday of the Reagan Administration's deregulation campaign. At the time, it was viewed as a modest victory for conservatives who controlled federal agencies focused on implementing rules that reduced government oversight.

But *Chevron* proved to be a landmark case, having been cited by federal courts more than 18,000 times in its 40-year lifespan. Despite its status, the case has always attracted criticism, primarily on the grounds that it undermines the separation of powers. Critics say that only courts should interpret statutes, not executive branch agencies. By deferring to agency interpretations, courts elevate agencies to the status of quasi-courts. Defenders of *Chevron* deference, on the other hand, claim the doctrine is key to allowing agencies to administer the statutes they are charged with enforcing. They claim agencies have the requisite subject matter expertise to administer congressional acts and that federal judges, as human beings, cannot be expected to have the same level of competence in all fields.

The Majority Opinion

Writing for the majority, Chief Justice Roberts cites The Federalist Papers and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the notion that interpretation of laws belongs to the judiciary and to no other branch of government. He traces the history of judicial review of agency interpretations through the early twentieth century, concluding that "Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes."

He then observes that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"), was enacted in 1946 as a check on administrative zeal, and that it confirms "the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment." The APA, he notes, does not distinguish between ambiguous and unambiguous laws. Instead, it gives deference only to agency factfinding and policymaking. The APA says nothing about deference to agency rulemaking.

Chief Justice Roberts then makes the case for why *Chevron* deference is inconsistent with the APA and therefore must be overturned. Noting it was decided "by a bare quorum of six Justices," he observes that the case made no mention of the APA. Indeed, "It requires a court to *ignore*, not follow, 'the reading the court would have reached' had it exercised its

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independent judgment as required by the APA." (emphasis in original.) But more importantly, says Chief Justice Roberts, *Chevron* deference upsets the separation of powers:

> Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And even *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction-the tools courts use every day-is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power-perhaps the occasion on which abdication in favor of the agency is *least* appropriate.

Loper Bright at 23 (emphasis in original). He challenges the government's position that agencies should resolve statutory ambiguities because they have subject matter expertise, claiming that *Chevron* required deference to agency interpretations of "ambiguities of all stripes," no matter whether the ambiguities relate to the agency's technical subject matter expertise. "The better presumption," he says, "is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."

Chief Justice Roberts also rejects the claim that agency deference leads to greater consistency in statutory interpretation, noting "there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong." Finally, he catalogues "the many refinements" made to the doctrine over the years as proof that "*Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies."

Dismissing *Chevron* as "fundamentally misguided," "unworkable," and "an impediment, rather than an aid" in statutory interpretation, Chief Justice Roberts concludes that the case is not worthy of *stare decisis*:

> *Chevron* was a judicial invention that required judges to disregard their statutory duties. And the only way to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion," *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986), is for us to leave *Chevron* behind.

Id. at 34. He summarizes the new regime as follows:

> *Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Id. at 35.

The Concurring Opinions

In his concurring opinion, Justice Thomas stressed how *Chevron* curbed judicial power while simultaneously expanding agency power beyond

constitutional limits, largely quoting his own opinions in past cases where the doctrine applied. In effect, he argues that it is not enough simply to overrule *Chevron* because it conflicts with the APA. The case should be overturned, he says, because it violates the Constitution. As he concludes:

> Although the Court finally ends our 40-year misadventure with *Chevron* deference, its more profound problems should not be overlooked. Regardless of what a statute says, the type of deference required by *Chevron* violates the Constitution.

Justice Gorsuch issued a concurring opinion that elaborated on the *stare decisis* aspects of overruling *Chevron*. After offering a "quick sketch of traditional common-law understanding of the judge's role and the place of precedent in it," he explains that precedent should not be seen as an "inexorable command," especially where the precedent is mistaken. He notes that the Warren Court and the Burger Court overturned many more cases than the current Court, claiming "we have not approached the pace set by our predecessors, overruling an average of just one or two precedents each Term." In his signature staccato style, Justice Gorsuch then explains how this overview of *stare decisis* leads to the Court's decision to overrule *Chevron*:

> Turning now directly to the question what *stare decisis* effect *Chevron* deference warrants, each of these lessons seem to me to weigh firmly in favor of the course the Court charts today: Lesson 1, because *Chevron* deference contravenes the law Congress prescribed in the Administrative Procedure Act. Lesson 2, because *Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments. And Lesson 3, because to hold otherwise would effectively require us to endow stray statements in *Chevron* with the authority of statutory language, all while ignoring more considered language in that same decision and the teachings of experience.

The Dissent

Justice Kagan penned the dissent, joined by Justice Sotomayor and, in part, by Justice Jackson. (Justice Jackson did not participate in the *Loper Bright* case from the D.C. Circuit but did participate in the case from the First Circuit.) Observing that *Chevron* "has become part of the warp and woof of modern government, supporting regulatory efforts of all kinds," she adds "the rule is right."

> Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court. Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not. And some present policy choices, including trade-offs between competing goods. Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy. And of course Congress has conferred on that expert, experienced, and politically accountable agency the authority to administer-to make rules about and otherwise implement-the statute giving rise to the ambiguity or gap. Put all that together and deference to the agency is the almost obvious choice, based on an implicit congressional

delegation of interpretive authority.

By overruling *Chevron*, Justice Kagan contends, "A rule of judicial humility gives way to a rule of judicial hubris." She says "the majority cannot destroy one doctrine of judicial humility without making a laughing-stock of a second. (If opinions had titles, a good candidate for today's would be Hubris Squared.)" She sees *Chevron* as "supercharged" precedent because "so many governmental and private actors have relied on it for so long" and because Congress never, in 40 years, took any action to overrule the decision. As she says, "A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power."

Observations

The IRS will continue to promulgate regulations, but in light of the Court's decision, it is unclear to what extent courts will defer to those regulations. Before *Chevron*, in *National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472 (1979), the Court announced a multi-factor test to determine the validity of an IRS regulation:

> A regulation may have particular force if it is a **substantially contemporaneous construction** of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the **length of time the regulation has been in effect**, the **reliance placed on it**, the **consistency of the Commissioner's interpretation**, and the **degree of scrutiny Congress has devoted to the regulation** during subsequent reenactments of the statute.

Id. at 477 (emphasis added). This multi-factor test was widely used to assess the validity of regulations, even after *Chevron*, until *Mayo Foundation v. United States*, 562 U.S. 44 (2011), announced that *Chevron* supplanted *National Muffler*. Now that *Chevron* has been repealed, one can logically assume that the *National Muffler* test has been revived, though the Court did not speak to this issue directly.

Certainly one can expect to see more cases challenging the validity of IRS regulations now that *Chevron* deference no longer applies. Indeed, just two weeks after the Court's decision in *Loper Bright*, counsel for the taxpayer in a pending case before the Seventh Circuit, *Tribune Media Co. v. Comm'r*, argued to the court that Treasury Regulation section 1.701-2, the partnership anti-abuse rule, was invalid as an "extraordinarily broad assertion of agency authority" no longer entitled to deference.

Even before *Chevron*'s repeal, federal courts in recent years have been striking down both temporary and permanent IRS regulations. *See, e.g.*, *Liberty Global, Inc. v. United States*, 1:20-cv-03501-RBJ (D. Colo. 2022), *Hewitt v. Comm'r*, 21 F.4th 1336 (11th Cir. 2021). The decision in *Loper Bright* will give judges more confidence in deciding that regulations are contrary to their own, "better" interpretations of statutes.

Probate Report

- **Settlor Not Given Summary Judgment on Issue of Intent to Create Trust**

In *Venezia v. Greenbaum*, 210 N.Y.S.3d 180 (2024), the settlor executed a document in 2017 that appeared to create an irrevocable trust for the benefit of his two daughters. The daughters brought a constructive trust action against the settlor and the trustee named in the document for improperly disbursing trust assets to the settlor and others for the settlor's benefit. The settlor and the trustee contended that no trust was ever created because the settlor misunderstood the documents and did not intend to make an inter vivos gift to the daughters. Finding that the settlor misunderstood the document and did not intend to make an inter vivos gift, the lower court granted summary judgment to the settlor and the trustee.

The appellate court cited applicable law for the propositions that a settlor must intend to create an inter vivos gift, because an attempt to make a gift effective only at death can be accomplished only by a valid will, and that, once created, an irrevocable trust cannot be canceled or revoked absent proof that the settlor misunderstood the document purporting to create the trust.

The appellate court concluded that the settlor and the trustee established a prima facie case as a matter of law by submitting their affidavits supporting their contentions about misunderstanding and intent. However, the daughters created a triable issue of fact by submitting the trust document indicating not only the settlor's intent to create a trust but his understanding that he would no longer have any right to the trust property. Thus, the settlor and the trustee were not entitled to summary judgment and the facts, and eventual result, would have to be resolved by a trial.

Editors' Comment: It is likely that the daughters will have a difficult time prevailing at trial because they will have to overcome the settlor's own testimony about his intent. Typically, a settlor is the best and most reliable source of evidence about intent, but there is precedent refusing to accept a settlor's own rendition about intent.

- **Revocation of Divorce Statute Determined at Time of Death, Not Purchase**

In *Transamerica Life Insurance Company v. Moore*, 105 F.4th 823 (5th Cir. 2024), the decedent-insured purchased a $100,000 policy on his life in 2018, naming his then-fiancee as his primary beneficiary and his father as contingent beneficiary. The couple married later that year but divorced several years later. The divorce decree provided that the ex-wife relinquished all of her interest in any life insurance policies. After the divorce, the decedent retained the policy but failed to change the named beneficiary. He died in 2021. The ex-wife filed a claim for the policy proceeds, which the insurance company denied because she was "not the beneficiary." The decedent's father and ex-wife both asserted claims to the proceeds, which the insurance company interpleaded.

The applicable state revocation-by-divorce statute revoked a beneficiary designation of an "insured's spouse" once that person becomes an ex-spouse. The issue was whether the statute's application to the "insured's spouse" "ex-spouse" were determined at the time the insured purchased the policy or at the time of the divorce. The ex-wife argued that the statute did not apply to her because she was not the "insured's spouse" at the time the decedent purchased the policy. Even though the question was a matter of first impression in the state, the federal district court made an "*Erie* guess" to determine what the applicable state court would rule. The district court found that the text of the state revocation-by-divorce statute did not apply to separate property owned by a

decedent before the marriage and thus ruled for the ex-spouse.

The appellate court held that an insurance policy was not marital or community property and was separate property, as the district court ruled. However, the appellate court reasoned that a "more straightforward reading" of the statute applied at the time of the divorce because the "whole focus [of the statute] is on the divorcing spouses — one, the insured and the other, the named beneficiary — at the time of *rendition* [of the divorce], not at the inception of the policy." The appellate court found nothing in the statute that distinguished between the naming of a beneficiary before or after the marriage.

Continuing to examine the statutory language, the appellate court found additional support for its conclusion. The statute excepted the designation of an ex-spouse as beneficiary or the redesignation after the divorce by the insured of the beneficiary named during the marriage. In either case, the exceptions focused on the status at the time of rendition. The appellate court cited the common rule of construction: whenever a legislature does not include an express provision in a statute, the presumption is that the omission has a purpose.

Editors' Comment: Although the opinion did not particularly focus on policy reasons, the issue could be argued either way from a policy perspective. One argument is that the statute should not apply to a premarital beneficiary designation because the insured cared about the individual, not the marital status. The contrary policy argument would note that the law commonly presumes a heightened standard of love and caring by a person once a marriage occurs, which would supersede any feelings at the time of the premarital beneficiary designation and thus justify the appellate court's application of the statute.

Given the decision by the appellate court on the meaning of the statute, the opinion did not spend much time discussing the divorce decree's waiver of the ex-wife's interest in any life insurance, although one could argue — perhaps not convincingly — that the decedent's failure to change the beneficiary designation post-divorce was his "waiver" of his ex-wife's "waiver." The likely better argument on that issue is the decedent did not believe he needed to change the beneficiary designation because he relied on his ex-wife's waiver in the family court decree.

The opinion noted that the insurance policy did not become marital or community property but, even if it did, the result would remain the same because the ex-wife had no interest as a beneficiary until the decedent died without changing the beneficiary designation, and the revocation-by-divorce statute revoked even that contingent beneficial interest at rendition.

- **Court Concludes State Version of USRAP Does Not Repeal the Common Law Rule Against Perpetuities for Nondonative Transfers**

In *Spring Valley Interests, LLC v. The Best for Last, LLC*, __ S.E.2d __ (S.C. App. 2024) (2024 Westlaw 3351146), a real estate purchaser borrowed $800,000 from a limited partnership and gave the lender an option to purchase an approximately 75 percent interest in the property. The document did not contain an express time limit on the exercise of the option to purchase. Some two years later, the assignee of the lender sent notice to the borrower that it intended to exercise the option. The borrower contended that the option to purchase was void because it violated the common law rule against perpetuities. The trial court granted summary judgment, finding that, even though the state had enacted a version of the Uniform Statutory Rule Against Perpetuities that superseded the common law rule, the state version of USRAP applied only to donative transfers and not to commercial or contractual matters. Consequently, the common law rule applied to the option to purchase and was violated because, measuring from the effective date of the contract, the option was not certain to create a vested right in the optionor within the common law

rule period: 21 years after the death of a life in being. According to the common law rule, a violation of the rule renders the nonvested interest invalid. Thus, the optionor had no option to exercise.

While agreeing with the lower court, the appellate court observed that a number of courts in USRAP states had reached the opposite conclusion. Noting that the state was the first jurisdiction to enact a version of USRAP, the appellate court was unimpressed with the decisions of these other courts. The appellate court based its decision on the rule requiring a strict construction of a statute in derogation of the common law. Because the state version of USRAP expressly applied to donative transfers and not to nondonative transfers, the appellate court declined to presume that the legislature intended to abolish the common law rule against perpetuities for nondonative transfers. The appellate court also cited public policy concerns. "[T]he complete abolition of the CLRAP without some provisions for limitations in commercial transactions risks putting two legal principles at odds: freedom to contract and restrictions on alienability. Generally, parties are free to contract for terms upon which they agree subject to reasonable regulations to protect an overriding public interest." To that end, the appellate court cited the public policy of prohibiting the enforcement of unreasonable restrictions on the alienability of real estate.

Editors' Comment: The opinion confirms the applicability for donative transfers of state versions of USRAP in those jurisdictions that have enacted a version and not yet abolished the common law rule — abolition has occurred in whole or part in about half the states.

But because the *Spring Valley* court preserved the common-law rule for nondonative transfers, the optionor got whipsawed. Although USRAP supersedes the common law rule, it retains that common law rule as one measure of whether a donative transfer timely vests nonvested interests. If the nonvested interest fails the common law test, the USRAP offers another opportunity to pass muster: a 90-year wait-and-see time period. And, even if the nonvested interest fails the second leg of USRAP, that statute requires reformation to satisfy the rule. However, because the state version of USRAP in *Spring Valley* did not apply to nondonative transfers, it could not save the option from violating the common law rule. The result shows the common law rule at its draconion extreme. Because under the common law rule an interest is measured from the date of the nonvested interest's creation, based on the "what-might-happen" analysis, what actually happens does not matter. In this case, the optionor attempted to exercise the option in a little more than two years since the $800,000 loan, but was denied.

- **Posthumously-Conceived Child Not Entitled to Social Security**

In *Steele v. Commission of Social Security*, 385 So.3d 587 (Fla. 2024), a married couple had a son conceived through in vitro fertilization (IVF), after which the husband stored sperm samples with the clinic. With the assistance of an attorney, the husband then prepared a will that "defined his family to encompass his spouse, his living children, and any later-born or adopted children." He devised the residue of his estate to his wife, if she survived him. If she predeceased him, the will provided that "his children 'then living' would inherit his tangible personal property." He died about 18 months later. After he died, his wife conceived a child using his stored sperm samples through IVF. After that child's birth, the wife sought to obtain social security benefits for that child as a child of the deceased husband. The Social Security Administration (SSA) denied the application and was upheld by the administrative law court on review. Citing *Astrue v. Caputo*, 566 U.S. 541 (2012), the administrative law court considered the applicable intestacy statutes of Florida, the state of the deceased husband's domicile, as determinative of the child's right to the social security benefits. The administrative law court concluded that, under Florida

law, the child could inherit only through the deceased husband's will and not by intestacy. The wife then proceeded to the federal district court, which agreed with the administrative law court. She then appealed to the Eleventh Circuit, which certified two "first impression" questions to the Florida Supreme Court:

> (1) Under Florida law, is P.S.S. "provided for" in the decedent's will within the meaning of Fla. Stat. § 742.17(4)?
>
> (2) If the answer is yes, does Florida law authorize a posthumously conceived child who is provided for in the decedent's will to inherit intestate the decedent's property?

The Florida Supreme Court focused on the first question. The applicable Florida statute "speaks to the inheritance rights of '[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body.' . . . . The statute says that such children can only take from a decedent's estate if they are 'provided for' in the decedent's will." The supreme court observed that the term "provided for" was not defined in the statute or elsewhere in that chapter of the state code. Thus, the supreme court concluded that it had to base its finding on "what a reasonable reader would have understood it to mean at the time it was issued."

To conduct its examination, the supreme court stated that dictionaries are often the first resort and concluded that a consensus of dictionary definitions would define "provided for" as conveying "the idea of giving something to someone." The supreme court reinforced its determination by focusing on case precedent dealing with the pretermitted spouse statute, which presumes no pretermitted spouse rights in the event the spouse is "provided for," and found that the case results were consistent with the dictionary consensus. Thus, the supreme court opined that the term "provided for" in the posthumously-conceived child inheritance statute required that the child receive something under the will. Importantly, the supreme court stated that, to meet this requirement, "the will must show that the testator contemplated the possibility of a child being conceived following his or her death." Because the deceased husband's will left his property to his spouse if she survived, or to his "then living children" if she did not, then under no circumstance would any posthumously-conceived child take under the will — the "then-living" condition being applied at the time of the deceased husband's death.

Having answered the first certified question in the negative, the supreme court found no reason to address the second certified question.

Editors' Comment: As discussed in Medlin, *The United States Supreme Court Addresses Social Security Eligibility for Posthumous Children*, in the June 2012 edition of the REPORTER, the United States Supreme Court decision in *Caputo* based a posthumously-conceived child's right to social security benefits on whether that child could take under intestacy in the particular state — thus avoiding uniform treatment of federal rights among the states. Florida's statute added an additional wrinkle by imposing a requirement that a posthumously-conceived child be entitled to take under the deceased parent's will to qualify for taking under intestacy. Probate practitioners should inquire about whether an estate planning client has stored gametic material and, if so, plan accordingly to deal with that material and what rights any posthumously-conceived child may have.

Although cryobanks commonly require contracts or directions for disposition or retention of frozen gametic materials upon the donor's death, which may have the effect of nonprobate transfers, it is still wise to ensure that the disposition of these materials at the donor's death is covered, either by a binding contract or by testamentary disposition. Whether gametic materials can be treated as property for transfer purposes is a policy question in itself — one opinion having recognized that stored gametic material is a

"unique" form of property because it can create life.

- **Omitted Spouse Takes Despite Contracts Not to Revoke from Prior Marriage**

In *Estate of Ward*, __ S.E.2d __ (S.C. App. 2024) (2024 Westlaw 3514748), the testator and his third wife executed wills and trusts in 2005. Essentially, the couple intended for the assets of the first to die to pour-over into a trust controlled by the survivor. Upon the death of the survivor, the assets would pass to their children and heirs. The wills incorporated an agreement entitled Agreement for Mutual Wills and Trusts, which provided that neither would amend their wills and trusts, with the agreement and the survivor's will becoming irrevocable upon the first of the couple to die. The agreement considered the possibility that the survivor might remarry, in which event the survivor promised not to remarry before ensuring that the agreement would remain irrevocable and enforceable, including a requirement that, prior to any such subsequent marriage, the survivor would ratify the existing will and trust and require the subsequent spouse to waive any right to an elective share.

The third wife died in 2011. In 2013, when he was 69, the husband married his fourth wife, who was 88 at the time. The husband died in 2016, survived by his fourth wife, who was represented in the dispute by her conservator. The surviving spouse presented a claim for her statutory omitted spouse's share but did not file for a statutory elective share. If she prevailed on her omitted spouse's claim, the surviving spouse would receive half of the testator's probate estate, which would be her intestate share if the husband had died without a will. The testator's children contested her claim. The probate court and the circuit court on appeal sided with the surviving spouse.

The state intermediate court of appeals focused on the two arguments made by the children: that the testator intended to override the statutory omitted spouse's share and that he provided for his surviving spouse by nonprobate transfers, either of which would preclude an award of the omitted spouse's share.

The appellate court noted the tension between the policy of honoring a testator's intent versus providing for a surviving spouse who was not provided for in the testator's will executed before their marriage. The appellate court referred to case law construing the omitted spouse's statute, discussing two qualifying conditions and two exceptions in the statute. The qualifying conditions were the execution of the will before marriage and the failure of the will to provide for the surviving spouse. The exceptions were that the omission was intentional or that the decedent provided for the surviving spouse by nonprobate transfers.

The appellate court considered testimony from the drafting attorney, who stated that he would not have drafted the documents, including the agreement, unless he was certain the documents conveyed the clear intent of the testator and his third wife. The drafting attorney admitted that the agreement required the testator to ratify his will upon remarriage, which he failed to do, although he clarified that the failure of the testator to ratify his will had nothing to do with the effectiveness of the documents. The children also called a friend of the testator, who asked him if his remarriage would alter his estate plan, to which he replied in the negative.

Other evidence indicated that the testator and his surviving spouse filed joint tax returns but "generally maintained separate finances." The testator apparently made certain nonprobate or inter vivos transfers to the surviving spouse: (1) around $4000 in a joint account; (2) the payment of the surviving spouse's property tax bill for about $1600; (3) approximately $7500 for her medical bills; (4) a jointly-held time share in Las Vegas; (5) a leased Toyota Camry; and (6) a $17,000 interest in a local club membership.

The majority concluded that the surviving spouse was entitled to her omitted spouse's share. It found that the assets transferred during lifetime were not significant enough to qualify for the statutory

exception of making nonprobate transfers in lieu of the statutory share. Moreover, the majority held that the agreement did not satisfy the statutory exception indicating that the testator intended to override the omitted spouse's share. The majority cited what it apparently considered to be applicable precedent: "a spouse has not been 'provided for' within the meaning of the [omitted spouse's statute] unless the decedent considered the surviving spouse *in that capacity* at the time the will was executed (emphasis in original)." For the majority, the bottom line as to the intent exception was that the agreement failed to specifically mention the surviving spouse, for an obvious reason — at the time of the agreement, the testator and his fourth wife did not even know each other. The majority observed that, if the testator had "simply executed the documents required by [the agreement, the children] would be in a better position to challenge this outcome."

A dissent agreed with the majority's conclusion that the nonprobate or inter vivos transfer failed to qualify for the exception of providing nonprobate transfers in lieu of the omitted spouse's share. However, the dissenting judge disagreed with the majority about the intent exception. "We are not here to decide the wisdom or fairness of his wishes — only to discern them."

The dissent noted that to honor "the testator's intent is consistent with the omitted spouse's statute." The purpose of the statute is to ensure that the surviving spouse of a testator who executed the will before marriage will have "what society believes to be his or her likely intent honored." Put another way, the dissent reasoned that "[t]he statute's assumption is that a person *who has shown no contrary intent* likely means to leave their new spouse *something* (emphasis in original)."

The dissent observed that, long before he met his surviving spouse, the testator meant to leave nothing to a surviving spouse, based on the meticulous recitations in the estate planning documents, especially the agreement. The dissenting judge stated that it did not matter that the testator failed to specifically name his surviving spouse, whom he had not even met at the time, but that he clearly intended to exclude any surviving spouse.

The dissent also disagreed with the majority's reliance on the testator's failure to ratify his documents after his subsequent marriage. According to the dissent, this had no effect or bearing on the testator's intent expressed at the time of the execution of his estate planning documents.

The dissent concluded that the intent of the testator and his third wife was clear, which was to provide for the children and heirs upon the survivor's death. According to the dissent, they had every right to do so, and their intent should be honored.

Editors' Comment: Although the opinion did not really focus on the term "contract not to revoke," *Ward* demonstrates a classic dilemma that has perplexed the relatively few appellate courts that have dealt with it: whether a surviving spouse's rights trump a contract not to revoke between a testator's surviving spouse and the contract not to revoke, when that contract was entered into with a prior spouse and the surviving spouse married the testator after the death of the testator's prior spouse. This is really a dispute between two innocent parties — the surviving spouse, who has statutory rights based on the legislature's recognition of the importance of marriage, and typically the children of the testator and the prior spouse, who were the beneficiaries of the contract not to revoke.

The majority follows the result in most of those cases, where the decisions may not be able to sufficiently explain why, but nevertheless weigh in favor of the surviving spouse. Of course, if the spouse takes an omitted spouse's share, the children's share is diminished.

In supporting its conclusion, the majority seemed to conflate case precedent involving two other

omitted spouse issues with the intent exception— that is, whether the testator intended to override the statute. The majority cited case precedent, following the majority view, that a surviving spouse is "provided for" in the premarital will, so that the omitted spouse's share does not apply, only if the devise in the premarital will is made in contemplation of marriage, as well as case precedent considering whether a nonprobate transfer is in lieu of the omitted spouse's share. However, a clear exception to the statute is the expression of the intent of the testator for the statute not to apply, regardless of whether the surviving spouse is provided for in the will or whether there are nonprobate transfers. The dissent focused on this intent exception.

The opinion did not focus on why the surviving spouse did not apply for an elective share, which is mandatory and cannot be unilaterally overridden by a testator, nor any connection with the agreement, which referred to the elective share but not the omitted spouse's share. The opinion noted that there were deadman's statute issues, but nothing that would impact the result. And interestingly, the majority declined to fathom any guess about the value of a time share interest in Las Vegas.

Tax Report

- **Statute of Limitations on Challenging Regulations Starts at Injury, Not Promulgation**

In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 7 (July 1, 2024), a divided Supreme Court of the United States (6–3) held that the six-year statute of limitations for suits against the United States brought under the Administrative Procedure Act (the "APA") starts "when the plaintiff is injured by final agency action." Thus, for example, a taxpayer challenging the validity of an IRS regulation has six years from the date the IRS determines a deficiency pursuant to that regulation, even if the regulation was promulgated decades earlier. This decision, no doubt, will spur many more challenges to regulations promulgated by federal agencies, and given the death of *Chevron* deference one week earlier in *Loper Bright*, *supra*, judges will get the chance to implement their "better" interpretations of statutes with nearly unchecked power.

The case involved a North Dakota truck stop that accepted debit cards from customers for payment. Frustrated at the high interchange fees charged by payment networks on each transaction, in 2021 it joined a lawsuit challenging a rule promulgated by the Federal Reserve Board in 2011 that set high caps for those fees. The lawsuit argued that the Fed's rule was contrary to the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. A similar suit in 2014 failed before the D.C. Circuit, but the plaintiffs in the new suit filed in North Dakota (in the Eighth Circuit).

The district court dismissed the suit as barred by the six-year statute of limitations, and the Eighth Circuit affirmed. Agreeing with the Fourth, Fifth, Ninth, Federal and D.C. Circuits, both the lower and appellate court distinguished between "facial" challenges to a rule (like the one in this suit, arguing that the Fed's rule is facially invalid) and "as-applied" challenges to the application of a valid rule to a particular regulated party. These courts all agree that in the case of facial challenges, the statute of limitations starts to run when the federal agency publishes the rule at issue. Only the Sixth Circuit maintains that the statute of limitations starts to run when the plaintiff "first becomes aggrieved by a regulation that exceeds an agency's statutory authority." That's a 6-1 split among the circuits, leading the Supreme Court to grant review.

The majority, in an opinion by Justice Barrett, agreed with the Sixth Circuit. Justice Barrett reasoned that because "a litigant . . . cannot bring an APA claim unless and until she suffers an injury," it would not make sense that the statute of limitations would start to run upon promulgation. Further, the statute of limitations itself, 28 U.S.C. §2401(a), speaks of starting "after the right of action first accrues." Justice Barrett notes that this language parrots language from an earlier statute, where it was clear that an action "accrues" only "when the plaintiff has a complete and present cause of action." And, as stated, a plaintiff must first suffer injury before having a "complete and present" case and the accompanying standing to sue.

The majority rejected all of the reasons offered by the Fed for treating facial challenges differently from as-applied challenges. It argued that the standard practice in administrative law matters is for the statute of limitations to start when "any proper plaintiff" can challenge agency action. Justice Barrett noted that while this practice is authorized by many other federal statutes, the APA reads differently.

The Fed also argued that the statute tolls when a plaintiff is incapacitated, suggesting that the statute can "accrue" even when a plaintiff is unable to sue. "True enough," says Justice Barrett, but that observation is of no relevance. "The tolling exception applies when the plaintiff *had* a complete and present cause of action" (emphasis in original). She continues: "What matters for accrual is when the plaintiff had 'the *right* to apply to the court for relief,' not whether some external impediment prevented her from doing so" (emphasis in original).

The Fed next argued that two prior Court decisions interpreted the statute of limitations consistent with its position in this case, but the majority concluded that the Fed's reading of one case was "incomplete" and that the Fed "vastly overread—in fact, . . . misread" the other. Finally, the Fed argued that "agencies and regulated parties need the finality of a 6-year cutoff." Challenges that come perhaps decades after a rule's introduction threaten to upset reliance interests of agencies and parties that have long operated under that rule. But the majority noted that pleas of administrative convenience do not justify ignoring the clear text of a statute. Congress could have chosen a different statute of limitations for APA claims, but it did not. Besides, says Justice Barrett, the Fed and other agencies are likely overreacting:

> Moreover, the opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.

Despite the attempted reassurance, Justice Jackson, in a dissent joined by Justices Sotomayor and Kagan, fears something worse is more likely. She summarizes the dissenting viewpoint thusly:

> The flawed reasoning and far-reaching results of the Court's ruling in this case are staggering. First, the reasoning. The text and context of the relevant statutory provisions plainly reveal that, for facial challenges to agency regulations, the 6-year limitations period . . . starts running when the rule is published. The Court says otherwise today, holding that the broad statutory term "accrues" requires us to conclude that the limitations period for Administrative Procedure Act (APA) claims runs from the time of a plaintiff's injury. Never mind that this Court's precedents tell us

that the meaning of "accrues" is context specific. Never mind that, in the administrative-law context, limitations statutes uniformly run from the moment of agency action. Never mind that a plaintiff's injury is utterly irrelevant to a facial APA claim. According to the Court, we must ignore all of this because, for other kinds of claims, accrual begins at the time of a plaintiff's injury.

> Next, the results. The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses. It also allows well-heeled litigants to game the system by creating new entities or finding new plaintiffs whenever they blow past the statutory deadline.

For purposes of completeness, it should be noted Justice Kavanagh chimed in with a concurrence, taking 18 pages to note that the plaintiff here is eligible for relief only because the APA authorizes "vacatur" of agency rules.

Editors' Note. Justice Jackson's dissent concludes by predicting a "tsunami of lawsuits against agencies that the Court's holdings in this case and *Loper Bright* have authorized" that could "devastate the functioning of the Federal Government." It is in stark contrast to Justice Barrett's prediction that agencies and courts will likely just keep on keeping on, as facial challenges to major regulations are often initiated shortly after promulgation. Facial challenges, however, have greater stakes than as-applied challenges. They affect all regulated parties, not just the plaintiff that brings the claim. There is no question that, through these cases, the Court has hung a large "welcome" sign on courthouse doors to regulated parties seeking to overturn agency rulemaking actions.

- **IRS Explains How to Claim Early Withdrawal Penalty Exceptions for Emergencies and Victims of Domestic Abuse**

In *Notice 2024-55*, ___ C.B. ___ (June 21, 2024) (2024 Westlaw 3092262), the IRS provided guidance in question-and-answer format related to two exceptions to the 10-percent penalty under section 72(t)(1) for "emergency personal expense distributions" and "domestic abuse victim distributions." Both exceptions were introduced into the Code by the SECURE 2.0 Act of 2022.

The 10-percent penalty generally applies to any distribution from a qualified retirement plan unless the employee has attained the age of 59-1/2. But the SECURE 2.0 Act of 2022 provided that an individual who has not yet attained age 59-1/2 may withdraw up to $1,000 per year without penalty for any "emergency personal expense distribution," defined as a distribution made "for purposes of meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses." IRC § 72(t)(2)(I)(iv). This exception from the penalty for early withdrawal applies only once every three years unless a distribution is repaid within three years, in which case the participant may make emergency withdrawals every year. IRC § 72(t)(2)(I)(vii).

In addition, a victim of domestic abuse may, as of 2024, withdraw up to $10,000 (or, if less, half of the value of the participant's account) from a retirement plan without penalty. IRC § 72(t)(2)(K). This $10,000 cap will adjust for inflation starting in 2025. IRC § 72(t)(2)(K)(vii). The statute defines "domestic abuse" as:

> physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

IRC § 72(t)(2)(K)(iii)(II). In addition to inviting comments as to the implementation of these new rules, the IRS provides some preliminary guidance in question-and-answer format.

Guidance on Emergency Personal Expense Distributions

The Notice indicates that emergency personal expenses can include medical care (determined without regard to the adjusted gross income limitation applicable to the section 213(a) deduction for medical expenses), accidents and casualty losses, imminent foreclosure or eviction from a primary residence, the need to pay funeral or burial expenses, auto repairs, and "any other necessary emergency personal expenses" as determined by an individual's relevant facts and circumstances. Q&A A-2. For this purpose, a plan administrator may rely on an employee's written certification that the employee is eligible for an emergency personal expense distribution. Q&A A-9.

The Notice also makes clear that an eligible retirement plan is not required to permit emergency personal expense distributions. Q&A A-8. But if the plan permits such distributions, the plan must also accept repayment of an emergency personal expense distribution from the employee Q&A A-12. If the plan does not permit such distributions, an employee can still treat a distribution as an emergency personal expense distribution if it would otherwise qualify, though this will require the employee to make a special statement on the Form 5329, Additional Taxes on Qualified Plans (Including IRAs) and Other Tax-Favored Accounts. Q&A A-15.

Guidance on Domestic Abuse Victim Distributions

The Notice clarifies that an individual may repay a domestic abuse victim distribution within three years. Q&A B-6. It does not, however, indicate whether an individual who repays a distribution could later qualify for another domestic abuse victim distribution. An individual who certifies (by checking a box) that a distribution qualifies for exception will be deemed to have met the requirements for the distribution, no questions asked. Q&A B-9.

Here too, the Notice provides that an eligible retirement plan is not required to permit domestic abuse victim distributions. Q&A B-7. Likewise, if the plan does not permit such distributions, an employee can still treat a distribution as a domestic abuse victim distribution if it would otherwise qualify, though this too will require the employee to make a special statement on the Form 5329. Q&A B-14.

Observations

When the SECURE 2.0 Act unveiled these exceptions, some practitioners wondered how they would be administered, particularly the exception for domestic abuse victim distributions. They worried that an individual invoking the exception could face further abuse if their abuser learned of the distribution. By relying on individual certifications of eligibility instead of making employees prove their abuse, the Notice helpfully errs on the side of safety.

The SECURE 2.0 Act also provided that a terminally ill person may withdraw amounts from a retirement plan as of December 29, 2022, without any penalty and without limitation. For this purpose, a person is terminally ill if the person is expected to die within seven years (not the usual two-year period used for other definitions of "terminally ill"). Although the IRS also solicited comments on the operation of this rule in anticipation of issuing proposed regulations, one hopes that guidance on terminal illness distributions will soon be forthcoming.

- **Tax Court Applies Additional Penalty to Conservation Easement Transaction**

In *Oconee Landing Property, LLC v. Comm'r*, T.C. Memo. 2024-73 (July 17, 2024) (*Oconee II*), the Tax Court, upon a motion for reconsideration by the IRS, re-examined a case from earlier in the year in which the taxpayer lost an income tax charitable

deduction and incurred a substantial understatement penalty. The reconsideration led the court to rule that a negligence penalty could apply, although any single owner of the taxpayer would face liability for either negligence or the substantial understatement, not both.

In the earlier decision, *Oconee Landing Property, LLC v. Comm'r*, T.C. Memo. 2024-25 (*Oconee I*), the Tax Court held that a syndicated conservation easement transaction resulted in no charitable contribution deduction, both because the taxpayer did not attach a qualified appraisal of the contributed property and because the taxpayer did not prove that its basis in the ordinary income property donated to charity exceeded zero. At the same time, the *Oconee I* court upheld the assertion of a substantial understatement penalty. While the IRS also argued that a negligence penalty would apply, the *Oconee I* court did not decide whether the taxpayer was negligent because of its interpretation of the so-called "no-stacking rule." The *Oconee I* court described the rule as follows:

> Only one accuracy-related penalty may be applied with respect to any given portion of an underpayment, even if that portion is penalizable on more than one of the grounds set forth in section 6662(b).

Id. at 75, note 34. This is consistent with Treasury Regulation section 1.6662-2(c). Although the *Oconee I* court declined to address the applicability of a negligence penalty given its imposition of a substantial understatement penalty, the IRS convinced the court to reconsider this approach and decide whether a negligence penalty should apply. The taxpayer objected to reconsideration, arguing that, because there was no change in the law or the facts, there was no basis for reopening the matter to consider the application of an additional penalty.

But the *Oconee II* court disagreed:

> Our decision to forgo determination of the negligence penalty was premised on our understanding that the no-stacking rule prohibited the application of multiple penalties with respect to a given portion of Oconee's underpayment. But Treasury Regulation § 1.6662-2(c) makes clear that the no-stacking rule relates to "the maximum accuracy-related penalty *imposed*." (Emphasis added.) This Court has jurisdiction to determine partnership items and the *applicability* of any penalty that relates to an adjustment to a partnership item. §§ 6221, 6226; *United States v. Woods*, 571 U.S. 31, 39-42 (2013). There is thus no limitation on our ability to determine the *applicability* of more than one accuracy-related penalty at the partnership level.

T. C. Memo. 2024-73 at 3. The *Oconee II* court rejected the taxpayer's claim that the IRS's motion was really a request to reverse a prior ruling on negligence, noting that the court made no ruling on the negligence penalty in the prior case. And while it is true that neither the law nor the facts had changed since the earlier decision, "those are not the only grounds for seeking reconsideration. Another ground is to correct 'substantial errors of law or fact,' and that is the ground respondent urges." *Id.* at 4.

The court agreed with the IRS that there was a substantial error, for the failure to determine the applicability of the negligence penalty at the partnership level would preclude the IRS from imposing that penalty, if appropriate, at the partner level. That could be bad, for an individual owner might not be liable for a substantial understatement penalty attributable to the taxpayer depending on that owner's other tax attributes. It was thus important for the court to make a decision on the application of a negligence penalty. The court then went on to explain how the taxpayer was negligent both in failing to prove its basis in the underlying property and its failure to obtain a qualified appraisal. So while the total penalty applicable to any one owner of the taxpayer would not increase as a result of *Oconee II*,

a negligence penalty will apply if the substantial understatement penalty does not.

- **Final Regulations Implement Ban on Certain Conservation Easements from Partnerships and S Corporations**

In *T.D. 9999* (June 28, 2024), the IRS finalized proposed regulations implementing section 170(h)(7), a provision added as a revenue-raiser to the SECURE 2.0 Act of 2022, P.L. 117-328. Section 170(h)(7) takes direct aim at the so-called "syndicated conservation easement" by preventing an owner of a partnership interest or S corporation stock from claiming a share of the entity's qualified conservation contribution where the claimed amount of the charitable contribution deduction exceeds 2.5 times the owner's basis in the partnership interest or S corporation stock. Section 170(h)(7)(G) directs the IRS to issue interpretive guidance, and these final regulations fulfill that instruction.

Section 170(h)(7)(A) generally denies a partner or S corporation shareholder any conservation easement deduction where the amount of the entity's deduction exceeds 2.5 times the sum of each owner's "relevant basis" in the entity. Section 170(h)(7)(B)(i), in turn, defines an owner's "relevant basis" as the owner's "modified basis" allocable to the portion of the real property to which the conservation easement applies. Under section 170(h)(7)(B)(ii), modified basis means the owner's adjusted basis immediately before the contribution, without regard to an owner's share of entity liabilities, and as determined "after taking into account . . . such other adjustments as the Secretary may provide."

Editors' Comment: Without this "anti-stuffing rule," investors could easily avoid the 2.5 times rule by contributing other investment assets to the pass-through entity in addition to the amounts used to purchase a share of the real property on which the conservation easement will be placed.

The proposed regulations explained how an owner's modified basis should be computed for purposes of this rule. The final rule, Treasury Regulation section 1.170A-14(l)(2), now provides for five adjustments to be made in this order:

- First, increase the owner's adjusted basis for any **contributions** made after the start of the entity's taxable year and ending with the moment immediately prior to the qualified conservation contribution.

- Second, adjust this figure to reflect any **partnership interests acquired or disposed of** between the start of the entity's taxable year to the moment immediately prior to the qualified conservation contribution. For example, if the owner acquired additional interests in the partnership, the amount would be increased by the owner's basis in those additional interests.

- Third, adjust this figure for the owner's **hypothetical distributive share** of entity items from the start of the entity's taxable year to the moment immediately prior to the qualified conservation contribution.

- Fourth, reduce this figure (but not below zero) by the amount of any **distributions** made to the owner from the start of the entity's taxable year to the moment immediately prior to the qualified conservation contribution.

- Finally, in the case of a partnership, reduce this figure by the owner's share of **partnership liabilities**, if any. Although this adjustment may cause the modified basis amount to go negative, the 2.5 times rule is applied to the sum of each owner's relevant basis, and that sum may still be a positive number after the relevant basis of each partner is considered.

The regulations include examples of these adjustments. Treas. Reg. § 1.170A-14(l)(4). In response to comments that the computation of modified basis under the proposed regulations was too complex, the IRS fired back in the preamble to the final regulations:

> Each of the steps from the proposed regulations is necessary to carry out the statutory directive that a partner's modified basis is the partner's adjusted basis in its partnership interest immediately before the time of the qualified conservation contribution, as computed by the partnership, and without regard to section 752 liabilities. Instead of simply repeating the statutory mandate, the proposed regulations provided a clear, administrable, step-by-step approach for taxpayers to reach the result required by the statute. To assist with performing the computations required by this step-by-step approach, the proposed regulations included several illustrative examples.

89 F.R. 54284 at 54289.

The regulations recognize that similar adjustments would not always make sense in the context of an S corporation. For one thing, S corporation shareholders do not get basis credit for entity debt, like partners in a partnership. For another, the subchapter S pass-through rules require that all items pass through to shareholders on the last day of the taxable year. Accordingly, the regulations generally provide that only the first three adjustments apply in the case of an S corporation. See Treas. Reg. § 1.170A-14(l)(3)(i).

The statute provides three exceptions from the application of the 2.5 times rule. The first exception covers contributions of property held at least three years. In the typical syndicated conservation easement scheme, the entity purchases the subject land and immediately places an easement on the property. But under section 170(h)(7)(C), the 2.5 times rule will not apply when the entity donates the easement at least three years after the entity acquired the subject property (or, if later, three years after the date in which any owner acquired any interest in the entity). While the statute does not define the phrase "acquired any interest," the regulations provide that, in the case of an S corporation, it refers to "any transfer, issuance, redemption, or other disposition of stock in the S corporation" except for any proportionate issuance or redemption. Prop. Treas. Reg. § 1.170A-14(n)(2)(iii). In the case of a partnership, any "variation" within the meaning of Treasury Regulation section 1.706-4(a)(1) will suffice. The preamble to the proposed regulations explained that variations include acquisitions, partial dispositions, and complete dispositions. Rather than re-invent the wheel, the IRS found it simpler to incorporate those rules by reference. The final regulations made no change to this approach.

The second exception relates to "family partnerships." Under section 170(h)(7)(D)(i), the disallowance rule in section 170(h)(7)(A) does not apply when "substantially all of the interests in [the entity] are held, directly or indirectly, by an individual and members of the family of such individual." The statute defines "family" as one's spouse and dependents, but it does not define when "substantially all" of the entity interests are held by one family. The regulations fill this gap, stating that "substantially all" means at least 90-percent ownership. Treas. Reg. § 1.170A-14(n)(3)(i). In the case of a partnership, the family must own 90 percent of the interests in capital and profits. Treas. Reg. § 1.170A-14(n)(3)(ii)(A). In the case of an S corporation, the family must own 90 percent of the voting power and value of the stock. Treas. Reg. § 1.170A-14(n)(3)(ii)(B). The regulations include anti-abuse rules under which the family must have held the subject real property for at least one year and the family must be allocated at least 90 percent of the resulting charitable contribution deduction. Treas. Reg. § 1.170A-14(n)(3)(iv)(A). This latter rule prevents a partnership from allocating most of the deduction to a non-family member.

The third exception covers contributions made to preserve any building that is a certified historic structure. On this point, the regulations merely remind taxpayers of the special reporting requirements applicable to donations of conservation easements related to certified historic structures.

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Probate Practice Reporter

Periodicals Postage

PAID

Columbia, SC 29292

Probate Practice Reporter
ISSN 1044-7423
The Law Center
1525 Senate Street
Columbia, SC 29208