Resolving Unfairness in a Fair Way: How the Grantor Trust Rules Should Be Reformed

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Introduction

Many affluent taxpayers use grantor trusts to secure significant estate and income tax savings.[1] Grantor trusts treat the grantor of the trust as the owner of trust property for income tax purposes (instead of the trust itself).[2] The current grantor trust rules, found in sections 671–679 of the Internal Revenue Code (IRC), were put in place to deter taxpayers from abusing the progressivity of the U.S. federal income tax system.[3] However, because trust income tax brackets

were compressed in 1986, many commentators believe that the grantor trust rules are no longer needed and argue that "mismatches" between the income and estate tax systems incentivize wealthy taxpayers to use the grantor trust rules as a mechanism to minimize their overall tax burden.[4]

Proposals to reform the current grantor trust rules come in three main forms: (1) repeal the grantor trust rules in their entirety, (2) eliminate only the most "abused" rules, and (3) harmonize the estate and income tax systems.[5] This Note analyzes each of these three types of proposals and argues that harmonization is the best method of reform because it would achieve underlying fairness and ensure consistent results across the currently discrete tax systems.

Furthermore, this Note analyzes certain proposed, but ultimately withdrawn, provisions of the original version of the Build Back Better Act (BBBA) that would have significantly changed the grantor trust rules.[6] While this version of the BBBA (the Original BBBA) included some grandfathering provisions for grantor trusts in existence at the time of proposed enactment, this Note explains that those grandfathering provisions were not sufficiently fair to taxpayers who rely on the current grantor trust rules, and it also proposes additional grandfathering provisions that should be enacted in any future reform of the grantor trust rules.

This Note does not make any normative assertions about the fairness of the current grantor trust rules. This Note only suggests a proposal to reform the grantor trust rules with the underlying assumption that the existing grantor trust rules *will* be repealed or reformed in some manner in the future.[7]

This Note proceeds in three parts. Part I provides a background and history of the grantor trust rules. Part II analyzes alternatives that have been considered for reforming the grantor trust rules, including the BBBA. Finally, Part III proposes specific provisions that should be included

in a grantor trusts reform bill to ensure fairness to taxpayers who have relied on existing grantor trust rules.

I. Background

This Part provides a history of the grantor trust rules, a summary of the current grantor trust rules, and a brief explanation about the manner in which grantor trusts are used in estate planning.

A. Grantor Trust Defined

A grantor trust is a trust in which the grantor is treated as the owner of the trust property for U.S. federal income tax purposes.[8] Thus, a grantor trust is disregarded for income tax purposes, meaning the trust does not exist as a separate taxpaying entity for income tax purposes from the perspective of the Internal Revenue Service (IRS).[9] Transactions between the grantor and the grantor trust are also disregarded and not recognized for income tax purposes.[10] Therefore, all items of income, deductions, and credits of the trust are reported on the grantor's individual income tax return.[11]

In general, grantor trusts are created when a grantor "has left so many strings attached to a trust, enjoys benefits of the trust, or has retained so much control over the trust that it is fair that the grantor be treated as the true owner of the trust property for income tax purposes."[12]

B. History of the Grantor Trust Rules

The modern individual income tax system was enacted in 1913.[13] The income tax system is progressive, meaning a taxpayer's marginal, or incremental, tax rate increases as the taxpayer's income increases. Thus, in a progressive system, high-income taxpayers pay a higher effective, or average, tax rate on their income compared to those with relatively lower income. As a result, high-income taxpayers have historically sought to shift their income to relatives who have lower income to decrease the overall tax burden of the combined parties.[14]

Consequently, the IRS attempted to nullify such arrangements. For example, in the seminal case *Lucas v. Earl*, a husband and wife entered a contract whereby all the income of the husband would be treated as owned together by the husband and wife as joint-tenants, resulting in half the income of the husband being treated as earned by his wife.[15] The husband correspondingly reported only half of his income on his individual income tax return; however, the Bureau of Internal Revenue (the IRS's predecessor) imposed a tax on all of the husband's income on his own personal tax return. The U.S. Supreme Court held in favor of the Bureau of Internal Revenue and created the "assignment of income" doctrine, which prohibits taxpayers from assigning income to other parties unless the taxpayers also give up the underlying property or contract which produces the income.[16] Thus, the husband was required to include all his income on his individual tax return.

Additionally, some taxpayers attempted to shift income via trusts. At the time the individual income tax system was enacted, individuals and trusts had similar tax rate schedules.[17] Thus, a taxpayer with a high marginal tax rate—the rate at which any additional income to the taxpayer would be taxed—could fund trusts with income-producing property to shift income from the taxpayer's high marginal tax rate to the trust's lower marginal tax rate, effectively decreasing the taxpayer's overall income tax burden.[18] For illustrative purposes, the chart below uses the highest and lowest marginal individual income tax rates in 1923—the year before the first grantor trust rules were enacted—to show the tax savings a taxpayer could historically obtain by shifting income to a trust.

Individual Taxpayer		**Trust**	
Marginal Rate of 46%	$4,000 in Marginal Income Not Shifted to a Trust	Marginal Rate of 2%	$4,000 in Marginal Income Shifted to a Trust
Total Income Tax	**$1,840**	**Total Income Tax**	**$80**

In response to this income-shifting technique, Congress in 1924 enacted the first grantor trust rules.[19] Under then-section 219(g), Congress sought to address the abuse resulting from revocable trusts.[20] Revocable trusts allow a grantor to remove or access the trust property whenever the grantor chooses.[21] Before section 219(g), taxpayers could transfer property to a revocable trust to take advantage of the low marginal tax rates of the trust without losing any actual control over the property.[22] Because a grantor effectively could use the property for his or her benefit whenever the grantor chose to by revoking the trust, Congress enacted a law that revocable trust income was to be included in the grantor's individual income.[23] As a result of this first grantor trust statute, "a mere title change could not provide a means for tax avoidance."[24]

However, taxpayers still attempted to obtain income-shifting tax benefits by using irrevocable trusts. *Helvering v. Clifford*, which the modern-day grantor trust rules "are the direct descendants" of, illustrates this.[25] In *Clifford*, the grantor created an irrevocable, five-year-term trust with his wife as the beneficiary of the trust.[26] The grantor retained significant powers over the trust income and property, including the ability to determine if and how much trust income would be paid to his wife. Additionally, the grantor retained a reversionary interest in the trust property. The Court held that the grantor's "dominion and control" over the trust property had not "substantial[ly] change[d]" because of the trust, and therefore the income of the trust was taxable to the grantor individually.[27] Notably, the Court did not create a bright-line rule in *Clifford*; rather, the Court indicated that "all considerations and circumstances" would govern whether the grantor had maintained sufficient dominion and control over a trust to cause trust income to be included in the grantor's individual income.[28]

After *Clifford*, "the floodgates of litigation opened wide" because of the uncertainty of what facts and circumstances would cause a grantor to retain substantial dominion and control

over trust property—and thus require trust income to be included in the grantor's income. [29] Finally, in 1945, the "*Clifford* regulations" were adopted, providing taxpayers a collection of nonjudicial rules outlining the circumstances that would cause a grantor to be treated as the owner of trust property for income tax purposes.[30] These regulations serve as the substantive foundation for today's grantor trust rules.[31] The *Clifford* regulations were ultimately codified in 1954 as sections 671–678 of the IRC, which remain in existence today in mostly the same form.[32]

C. Powers Causing Grantor Trust Status

The current grantor trust rules are found in sections 671–679 of the IRC, also known as Subpart E.[33]

Section 671 provides the foundational grantor trust rule that when a "grantor . . . shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor . . . those items of income, deductions, and credits against tax of the trust."[34] Thus, section 671 effectively shifts trust income to the grantor by treating the grantor as the owner of the trust property when the grantor trust rules apply to the trust.[35]

Section 672 lists definitions and general rules for Subpart E.[36] Notably, section 672(e) provides that grantors are treated as holding any power or interest held by their spouse for purposes of the grantor trust rules.[37]

Under section 673, a grantor having a reversionary interest in the trust property will cause the trust to be a grantor trust.[38]

Section 674 provides that a grantor or other nonadverse person who holds a power of distribution to control beneficial enjoyment of the corpus or income of the trust without approval from an adverse party will be treated as the owner of the trust.[39] This general rule would cause most trusts to become grantor trusts because most trustees are able to control beneficial enjoyment

of trust property without approval from the beneficiaries of the trust (who are almost always adverse parties).[40] To prevent this result, section 674 applies several exceptions to this rule.[41]

Section 675 describes certain administrative powers that, if held by the grantor, will cause grantor trust status.[42] These powers include (1) the power to deal with the trust for less than adequate and full consideration,[43] (2) the power to borrow trust corpus or income without adequate interest or security,[44] (3) the power to borrow the trust funds (unless repaid before the close of the taxable year and the borrowing has adequate interest and security),[45] and (4) general powers of administration, including the power to vote or direct the vote of a corporation owned by the trust,[46] the power to control the investments of the trust,[47] and the power to reacquire the trust corpus by substituting other property of an equivalent value.[48]

Section 676 provides that if the grantor retains the power to revoke title to trust property, the trust will be a grantor trust.[49]

Under section 677, a trust will be a grantor trust if the income of the trust may be distributed (or accumulated to be distributed in the future) to the grantor or the grantor's spouse.[50] Additionally, grantor trust status will occur if income from the trust is used to pay premiums on a life insurance policy on the life of the grantor or the grantor's spouse.[51]

Section 678 specifies situations in which the grantor status of a trust will apply for persons other than the grantor.[52] However, a person other than the grantor will not be treated as the owner of the trust property if the grantor also qualifies as the owner of the trust property under the grantor trust rules.[53]

Section 679 lists the rules for when a non-U.S. trust will be treated as a grantor trust.[54] Rather than specifying any powers the grantor retains over trust property, this section treats a non-U.S. trust, or a portion thereof, as a grantor trust if the trust has a U.S. beneficiary.[55]

D. The Incentive for Grantor Trust Status

At the time the modern-day grantor trust rules were enacted in 1954, individual income tax rates were "steeply progressive," with the highest marginal individual income rate being 91%.[56] Individual income tax rates and brackets were similar to trust income tax rates and brackets.[57] Taxpayers funded multiple trusts to take advantage of the progressive tax system.[58] However, with the passage of the grantor trust rules, taxpayers and their advisers who created trusts for legitimate *nontax* reasons "were careful to avoid the grantor trust 'trap'" to ensure trust income would *not* be taxed at the individual's high marginal tax rate.[59]

Then, Congress passed the Tax Reform Act of 1986 (Tax Reform Act), which "is almost certainly the most far-reaching single change it has ever made in the taxation of trusts and estates."[60] As part of the Tax Reform Act, Congress significantly compressed the tax rate schedule for trusts.[61] As a result, trust income reached the highest marginal income tax rate at substantially lower income amounts than individual income did,[62] which remains true today (as shown in the following table).[63]

Type	**2023 Income Level Needed to Achieve Highest Individual Tax Rate of 37%**[64]
Single	$578,125
Married Couple Filing Jointly	$693,750
Trust	$14,451

The compressed trust income tax rates reversed the incentives for taxpayers. Instead of avoiding grantor trust status for income tax purposes, taxpayers *sought* grantor trust status to avoid the compressed trust income tax brackets and to thus pay lower taxes under the uncompressed individual income tax brackets.[65] Since the compression of the trust tax brackets, commentators

have argued that the grantor trust rules are no longer serving their initial purpose—to deter taxpayers from using trusts to avoid income tax.[66] One professor has stated that "[t]he rate compression for trusts, by itself, has defeated the purpose of the grantor trust rules and rendered them obsolete."[67] Another professor has remarked that "taxpayers use as a shield what was once a sword of the Internal Revenue Service."[68] Tellingly, the IRS has not invoked the grantor trust rules in a case since 1991.[69]

E. A Summary of the Unified Estate and Gift Tax System

To understand how the grantor trust rules are used by taxpayers, a cursory understanding of the estate and gift tax system is essential. This Subpart will provide a summary of the basic rules and principles of that system.

The estate and gift tax system imposes a tax on the total combined value of property a taxpayer gratuitously transfers via gifts at life and via bequests at death. The tax is levied on the transferor; the taxpayer who receives the gift or bequest is not taxed. Estate and gift taxes are a "unified tax," meaning that property transferred during life and property transferred at death are combined to be subject to a single tax rate schedule. Often, gift and estate taxes are collectively called "transfer taxes."[70]

As of 2023, Congress gives each taxpayer a "lifetime exemption" amount, which exempts from taxation the first $12,920,000 of property that is transferred by the taxpayer (at life or at death).[71] Thus, a married couple would generally not be subject to gift or estate taxation until they collectively transfer more than $25,840,000 in property. Furthermore, as of 2023, each taxpayer is allowed to gift $17,000 per recipient annually without reducing his or her lifetime exemption; gifts below this amount are known as annual exclusion gifts.[72] Taxpayers who transfer property during life or at death that collectively exceeds the lifetime exemption amount are subject to a 40% tax

rate on the fair market value of the gifts and bequests transferred in excess of the lifetime exemption amount.

Against the backdrop of rules described above, taxpayers who have, or expect to have, total property valued at an amount above the lifetime exemption amount must make decisions about the timing of their gratuitous transfers to reduce their combined income and transfer tax burden. "[T]axpayers traditionally have two alternatives: (1) transfer the property today and save estate taxes on the appreciation, or (2) transfer the property at death and save income taxes on the appreciation."[73]

First, taxpayers may transfer property during their lifetime as gifts. When a taxpayer makes a gift above the annual exclusion amount, the taxpayer must file a gift tax return and either pay gift tax on the gift or reduce his or her lifetime exemption, if any remains. Because the property is no longer in the control of the taxpayer, he or she generally will not have to pay estate tax on its value upon death.[74] Thus, by gifting the property during life, the donor shifts the value of the property, and any future income and appreciation of the property, out of the donor's taxable estate. The donee of the gift receives a "carryover" basis in the property received.[75] This means that if the donee ultimately sells the property, he or she will have to pay income taxes on any appreciation that accrued on the property from the time the *donor* originally acquired the property.[76]

Second, taxpayers may transfer property at death. When a taxpayer transfers property at death, and his or her total lifetime gifts and bequests at death are over the taxpayer's lifetime exemption amount, the taxpayer's estate must file an estate tax return.[77] If the taxpayer's total gifts and bequests are over the lifetime exemption, any amount of value over the lifetime exemption will be subject to estate tax at a 40% tax rate.[78] The value of property transferred at death over the taxpayer's lifetime exemption amount is taxed at its fair market value as of the time of death.[79]

Thus, the full appreciated value of property will be taxed to the estate of the deceased taxpayer.[80] Those who inherit property at death receive a "stepped-up" basis in the property received.[81] Thus, persons who immediately sell inherited property after receipt will recognize no gain on the sale.[82] Therefore, by holding property until death, a taxpayer will avoid income tax on any pre-death appreciation of the property. A summary of these consequences is below:

Type of Transfer	Income Tax	Transfer Tax
Gift During Life	Donees receive carry-over basis in property received. Donees must pay income tax on any appreciation if they sell property.	Transfer tax is based on fair market value at the time of the transfer.
Bequest at Death	Transferor avoids income tax on pre-death appreciation by holding until death. Inheritors receive stepped-up basis in property received and will pay no income tax on appreciated property (if sold immediately after death).	Transferor's estate pays estate tax upon death on the full appreciated value of property.

To avoid the 40% tax rate on the value of gifted property, taxpayers with estate values exceeding the lifetime exemption amount will often transfer property to irrevocable trusts during their lifetime, which allows the taxpayer to avoid being taxed on that property's future income and appreciation upon his or her death. For example, a married couple who owns a business worth $25 million (roughly their combined lifetime exemption amount), and who expects the value of their business to increase to $40 million by the time they die, can transfer their ownership interests in the business when they are alive to an irrevocable trust. By doing so, the couple "freezes" the value of their gift at $25 million. Because of the lifetime exemption amount, the couple would pay no

gift tax on the transfer (assuming no other taxable gifts were made previously). If the business were to actually increase to $40 million in value at the time of their deaths, the couple effectively shielded approximately $15 million of value of the business from being subject to estate tax, saving $6 million in estate tax.[83] While the same tax savings could be accomplished using outright gifts, taxpayers use irrevocable trusts to obtain greater control over the distribution of their property, ensure the property will not be included in their children's estates, and protect the property from their children's creditors.

F. How Grantor Trusts Leverage the Incongruence of the Estate and Income Tax Systems

"In the vast majority of cases, the grantor trust rules and the estate tax inclusion rules function in unison."[84] Yet the income and estate tax systems are governed by different subtitles of the IRC.[85] As a result, the systems have nuanced differences which govern whether a taxpayer has made a completed transfer of property.[86]

The grantor trust income tax rules take a "sweeping approach," meaning that if a grantor retains almost any power over property transferred to a trust, the transfer will be considered incomplete, and the grantor will be required to pay income tax on trust income.[87] On the other hand, the estate tax rules are narrower and require taxpayers to retain greater power over trust property to be included in the taxpayer's estate for estate tax purposes.[88]

The "mismatch"[89] between the estate and income tax rules allows property to be moved out of a taxpayer's estate for estate tax purposes but still be considered as owned by the taxpayer for income tax purposes.[90] Estate planners can create a grantor trust by bestowing upon the grantor a relatively "benign" power that causes the trust to be a grantor trust for income tax purposes but gives no powers to the grantor that would cause the trust property to be included in the grantor's estate.[91]

As a result, taxpayers can avoid the compressed income tax brackets of trusts while minimizing the property that is included in their estates for estate tax purposes. Because of this incongruence, taxpayers work with estate planners to design trusts that ensure the grantor is *not* treated as the owner of the trust property for estate tax purposes but *is* treated as the owner of the trust property for income tax purposes.

The most pervasive type of trust estate planners use to minimize income and estate taxes for the affluent is known as an intentionally defective grantor trust (IDGT).[92] An IDGT is an "irrevocable trust which is structured to be a grantor trust for income tax purposes, [but] which . . . is deemed a complete transfer for estate and gift tax purposes."[93] Because taxpayers historically sought to avoid grantor trust status (after the passage of the *Clifford* regulations), "intentionally defective" refers to the taxpayer purposely triggering grantor trust status.[94]

The primary benefit of an IDGT compared to other irrevocable nongrantor trusts (which also move property values and any future income and appreciation of the property out of a taxpayer's estate) is that the income taxes paid by the grantor on trust income are not subject to gift and estate taxation.[95] Because the grantor pays the income taxes on the grantor trust income, three benefits arise. First, the income tax payments by the grantor decrease the value of the grantor's taxable estate.[96] Second, the tax payments are essentially gifts to the trust because the trust does not have to use its own assets to pay the tax liability.[97] This is significant because the income tax liability of a trust, taxed at a 40% rate, can be substantial. Furthermore, the tax payment by the grantor on grantor trust income is not subject to gift tax.[98] In Revenue Ruling 2004-64, the IRS held that tax payments made for grantor trusts are not taxable gifts because the trust is not viewed as a separate income tax-paying entity.[99] Third, because the trust property does not have to be used to pay the trust's income tax, the value of the property in the grantor trust is able to

appreciate more quickly than if the income tax had to be paid out of trust property.[100] These three benefits of an IDGT make its use extremely powerful.

Because the grantor trust is not viewed as a separate taxpayer for income tax purposes, another benefit of the IDGT is the ability of the grantor to engage in transactions with the grantor trust and not recognize income tax.[101] For example, a grantor can transfer property with built-in capital gains to the grantor trust for nothing in return without paying tax on the capital gains.[102] If the taxpayer received no consideration on the transfer, however, the taxpayer must pay gift tax or reduce his or her lifetime exemption amount because a transfer from the grantor to the grantor trust without consideration is considered a gift.

A common transaction between the grantor and the grantor trust is a sale (as opposed to a gift) of property.[103] When the grantor trust purchases property from the grantor at the property's fair market value, there are no gift and estate consequences because the transaction is treated as if it was an arm's length transaction between two unrelated parties.[104] Thus, through a sale of property from the grantor to the grantor trust, property can be transferred to a grantor trust without being subject to income or gift tax.[105] And all future income and appreciation of the transferred property will not be subject to estate tax because the property is out of the taxpayer's estate.

Additionally, instead of the grantor trust paying cash (which it may not have) for the grantor's property in a sale between the grantor and the grantor trust, the grantor trust will often engage in an installment sale with the grantor.[106] In exchange for property from the grantor, the grantor trust will issue the grantor an installment note. In this arrangement, the payment for property generally occurs over multiple years. Through this structure, the grantor is able to swap his or her appreciating property for a fixed-value installment note.[107] An installment sale is respected by the IRS as an arm's length transaction as long as the grantor trust pays an interest

charge equal to the applicable federal rate (AFR) to the grantor on the installment note.[108] Thus, as long as the property transferred to the grantor trust appreciates at a higher rate than the AFR, all appreciation (less the interest payments) is removed from the grantor's estate without being subject to gift or estate tax.[109] Additionally, because the grantor trust is disregarded for income tax purposes, the grantor does not need to pay income tax on the interest payment received from the grantor trust.[110]

Therefore, a sale to an IDGT allows taxpayers to shift property appreciation out of their estate without incurring any estate or gift tax consequences, reduce the value of their estate by paying income taxes on the trust's income, and allow grantor trust property to more quickly appreciate by having the grantor pay the trust income tax. Thus, the IDGT is an effective tool for affluent taxpayers to minimize income, gift, and estate taxes in ways that were not intended by Congress when the grantor rules were established in 1954.

II. ANALYSIS

For years, commentators have argued that the grantor trust rules should be repealed or reformed.[111] Legislators have also toyed with the idea of repealing or reforming them.[112] This Part analyzes the three primary proposals that have been put forward to reform the grantor trust rules and discusses the grantor trust provisions of the BBBA.

A. Repeal the Grantor Trust Rules Entirely

One possible solution to the grantor trust rules' perceived unfairness is to repeal the grantor trust rules (sections 671–679 of the IRC) in their entirety. However, this approach would cause substantial uncertainty. Full repeal of the grantor trust rules would likely revert the determination of grantor trust status back to the pre-1945 era, when deemed ownership of a trust was based on facts and circumstances. Case law would again determine if a grantor had retained substantial

dominion and control to be treated as the deemed owner of the trust for income tax purposes. As a result, the litigation that the grantor trust rules were originally enacted to resolve would likely return.

Additionally, the mismatches in the estate and income tax rules that affluent taxpayers use to minimize tax would likely not be resolved. Taxpayers could hire attorneys and play the litigation game to develop methods to achieve grantor status while still moving assets out of their estate. Thus, unless the courts eliminated the mismatches entirely, taxpayers would still be able to take advantage of the incongruence of the discrete systems.

Furthermore, if the rules were fully repealed, taxpayers would be placed in a precarious position because of the uncertainties of case law. Taxpayers would have two options: 1) take the risk that the dominion and control they retained over the trust was substantial enough to achieve grantor trust status, or 2) treat the trust as a taxpaying entity, subjecting trust income to the compressed trust tax brackets. In other words, taxpayers would have to choose between uncertainty or higher taxes.

It is also possible that a full repeal of the grantor trust rules could cause confusion for individuals with revocable trusts. Taxpayers of all economic conditions use revocable trusts for many nontax purposes, including avoiding probate at death and avoiding the need for a court-supervised conservatorship in the event of incapacity. While a revocable trust surely would meet the substantial dominion and control requirement, repeal of grantor trust rules could cause concern for taxpayers who are unfamiliar with trust rules.

Because of the uncertainties that would result from repealing the grantor trust rules in their entirety, full repeal "is not the answer."[113]

B. Ad Hoc Approach

At the other end of the spectrum, another possible solution to the problems with the grantor trust rules is to take an "ad hoc" approach. This approach refers to eliminating some of the most "abused" rules that allow trusts to achieve grantor trust status.[114] Specifically, this approach suggests eliminating from the grantor trust rules some of the relatively minor powers that grantors retain to obtain grantor trust status.[115]

The most widely used mismatch between the estate and income tax regimes is the "power to reacquire the trust corpus by substituting other property of an equivalent value" (the swap power) found in section 675(4)(C).[116] By retaining a swap power (and no other powers), grantors achieve grantor trust status while still moving trust property out of their estates. One commentator believes that "Congress could cripple most grantor trust abuse by simply striking" the "old reliable" swap power from the rules, which would "deal a crippling blow" to IDGT strategies.[117]

There are benefits to an ad hoc strategy. This approach is relatively simpler and more straightforward compared to the other approaches for grantor trust reform. And it is a targeted method that does not require comprehensive tax law changes.

However, the ad hoc method has weaknesses. First, striking solely the swap power from the grantor trust rules will not likely lead to such a dramatic result as has been suggested. Estate planners have other relatively "harmless" powers that can be leveraged to unlock grantor trust status, including the power to add charitable beneficiaries under section 674(b)(4)[118] and the power to lend trust property to the grantor under section 675(2).[119] Additionally, other powers that can be leveraged to obtain grantor trust status in certain circumstances include the power to control discretionary distributions under section 674(c)[120] and the designation of a spouse as trust beneficiary under sections 676 and 677.[121]

Second, even if all the readily apparent powers taxpayers use to achieve grantor trust status were repealed, it is likely that creative attorneys will still find ways to achieve grantor trust status by using the powers that were not struck to exploit the remaining mismatches between the two systems.

Third, even after ad hoc changes are made, "[i]t might then appear that further tinkering would be desirable, . . . the process could go on resulting in ever increasing statutory complexity."[122] Thus, by retaining some of the grantor rules but striking others, taxpayers would still be required to navigate discrete, ever-changing tax systems, instead of being able to follow one set of unified rules. An ad hoc approach simply "kicks the can down the road" instead of implementing full reform.

C. Harmonization

A final proposal is harmonization of the income, gift, and estate tax systems.[123] "A harmonized system would employ one single definition of completed transfer for income tax, gift tax, and estate tax purposes."[124] This Note argues that harmonization is the best method for reforming the grantor trust rules because it simplifies and unifies the currently discrete and nuanced tax systems and provides taxpayers with certainty. Unlike a full repeal of the grantor trust rules, harmonization gives taxpayers specific statutory guidance on which they can rely. And unlike an ad hoc approach that does not necessarily solve the underlying mismatch problem between the systems, harmonization ensures that no "loopholes" exist between the different tax systems.

Harmonization could occur in three primary ways. First, Congress could adopt the income tax definition of completed transfer for gift and estate tax purposes.[125] The grantor trust rules are broader than the estate tax inclusion rules, allowing even small powers to cause grantor trust

status.[126] Thus, under this method, retained powers such as the swap power would cause trust property to be included in the grantor's estate. Therefore, many grantor trusts that previously escaped estate tax would become subject to estate tax on the value of the property in the trust.

This Note argues against such an approach to harmonization. The estate tax rules should not require grantors to include in their estate property over which they have so few powers. In *Estate of Farrel v. United States*, the U.S. Court of Claims stated that "Congress' over-all purpose [was] to gather into the estate tax all transfers which remain *significantly incomplete*—on which the transferor still holds a string—during his lifetime" by enacting the estate tax rules.[127] Thus, it is likely that Congress did not intend to require grantors to include property in their estates over which they only "ha[ve] [a] vestige of retained dominion and control . . . ."[128] A grantor who holds only a swap power, or a power to change charitable beneficiaries, does not make the gift "significantly incomplete." Even though a grantor has retained those types of powers, the grantor gave up economic value via a gift which he or she will never get back. Therefore, using the grantor trust rules as the definition of what is included in a taxpayer's estate would be too "sweeping" and require the grantor's estate to pay estate tax on property over which the grantor had little control.[129]

Moreover, the grantor trust rules were created as a mechanism to deter taxpayers from shifting income to trusts.[130] "Some fifty years ago, the progressive rate structure of the income tax system *required* that grantor trust status be defined broadly."[131] Thus, achieving grantor status by retaining even small, administrative powers was likely an attempt to prevent taxpayers from abusing the progressive tax system. However, now that trust brackets are compressed, that deterrence is no longer needed. As a result, Congress should only require property to be included in the taxpayer's estate if the taxpayer retains significant control of the property up until death.

Additionally, the grantor trust rules deem a grantor to have any powers that the grantor's

spouse has over the grantor trust.[132] Yet, the estate tax rules only look at the grantor individually to determine if property should be included in an estate.[133] Therefore, if the grantor trust definition applies to estate inclusion, it is possible that a grantor who personally retained no powers over trust property would be required to include the property in his or her estate upon death solely because a spouse held a power over the trust.

The second harmonization option is that a new definition of completed transfer would be created that would apply to all systems of taxation. This Note argues against such a transformative approach. The estate, gift, and income tax rules relating to property distributions have existed for decades and are well understood by the estate planning community. Creating a new definition of control would require taxpayers and their advisers to learn new rules. Significant confusion and ambiguity likely would result as taxpayers attempt to apply the new rules. It would also require Congress to agree on what the specific rules should be, a feat that would likely be harder to achieve than simply adopting a set of rules already in place.

A third harmonization option is that Congress could adopt the estate tax definition of completed transfer for income tax purposes.[134] Under this approach, many grantor trusts, as they exist now, would be treated as separate taxpaying entities and become subject to the compressed trust income tax brackets. Currently, many grantors only retain minimal powers over trusts that do not cause property in the trust to be included in the grantor's estate. By imposing this definition, trust income would be taxed on a grantor's individual income tax return only if the grantor retained powers that would also cause estate tax inclusion.

This Note recommends this third harmonization option. This method would require grantors to retain significant powers, or at least the same level of powers that the estate tax rules require, for grantors to be treated as the owners of trust property for income tax purposes. No

longer would a grantor be able to retain a relatively minor power and achieve the tax benefits that IDGTs provide.

Additionally, unlike the first harmonization approach, this third approach would ensure that only trust property over which the grantor has substantial dominion and control would be included in the taxpayer's estate instead of also including property over which the grantor only has a relatively minor administrative power.

There are some challenges to this approach. Trusts that currently retain only small, administrative powers would no longer be treated as a grantor trust, and thus would be required to file a separate trust income tax return. Trust income tax rules are complex and can require significant income tax planning. Specifically, taxpayers would need to determine if, and how much, trust income to distribute to beneficiaries to avoid the impact of the compressed trust income tax rate schedule. Thus, tax complexity to taxpayers may arise because of this option. Nonetheless, taxpayers would be able to mitigate this complexity with the advice of tax advisors.

D. Build Back Better Act

A recent attempt to reform the grantor rules was included in the Original BBBA. The House Budget Committee Report (Committee Report) on the Original BBBA specifically discussed the use of grantor trusts.[135] The Committee Report highlighted IDGTs and how taxpayers achieve grantor trust status by having grantors retain the swap power.[136]

The Original BBBA proposed two primary changes to the grantor trust rules: 1) require property in grantor trusts to be included in the grantor's estate and 2) recognize transactions between the grantor and the grantor trust from an income tax perspective.[137] The Committee Report explained that the provisions of the BBBA "generally [are] intended to more closely align the income tax and transfer tax (Federal estate and gift tax) rules for grantor trusts by imposing

transfer tax consequences on certain property held or distributed from a grantor trust."[138]

Interestingly, the Original BBBA did not take any of the three common approaches to reform described above. Instead, it would have created two new sections of the IRC that would have required grantor trust property to be included in the grantor's estate and caused transactions between the grantor and the grantor trust to be taxable. The grantor trust rules themselves were left untouched.

First, under what would have been new section 2901, the Original BBBA stated that for "any portion of a trust with respect to which the grantor is the deemed owner . . . the value of the gross estate of the deceased deemed owner of such portion shall include all assets attributable to that portion at the time of the death of such owner."[139] This provision required property over which the grantor is deemed the owner for income tax purposes under the grantor trust rules to be included in the grantor's estate.

Second, proposed section 2901 would have provided that any distribution, other than to the grantor or the grantor's spouse, to the trust's beneficiaries would be treated as a gift and be subject to gift tax.[140] The section also provided that an adjustment would be made for amounts previously subject to gift tax.[141] Thus, any appreciation of trust property that was not subject to gift tax previously would have been subject to gift tax on a distribution of property to beneficiaries.

Third, proposed section 2901 stated that "if at any time during the life of the deemed owner of such portion, such owner ceases to be treated as the owner" of the trust, all property will be treated as a gift.[142] Therefore, property in grantor trusts that have a specified term, which convert to a nongrantor trust at the end of the trust term, would be subject to gift tax upon termination of the grantor trust's term.

Notably, proposed section 2901 specified that the new rules would apply only to grantor

trusts that would not have been includible in the estate of the grantor except for the rules.[143] Therefore, the Original BBBA appears to have been specifically targeting trusts that were irrevocable grantor trusts, trusts treated as outside of the grantor's estate for estate tax purposes but treated as owned by the grantor for income tax purposes.

The Original BBBA also proposed to add new section 1062.[144] Section 1062 provided that transfers of property between grantors and grantors trusts, except for revocable trusts, would no longer be disregarded but instead would receive sale or exchange treatment.[145] A note in the Committee Report also affirms that Rev. Rul. 85-13, which held that no gain or loss is recognized on transfers between a grantor and a grantor trust, would be nullified.[146]

Other than problems with the Original BBBA's proposed grandfathering provisions, which will be discussed in Part III, the biggest weakness of the Original BBBA was that it did not address the grantor trust rules directly. Instead of simplifying and unifying the separate tax systems, the Original BBBA would have simply added another layer of complexity. For example, under section 671, a grantor is treated as the owner of the trust property for income tax purposes. Yet, under new section 1062, that would not have held true for transactions between the grantor and the grantor trust itself, unless the trust is revocable.[147] Thus, an additional statute would have had to be referenced by taxpayers and their advisers to determine the taxpayer's tax obligations. This Note argues that if Congress reforms the grantor trust rules, it should do so in a way that simplifies the tax system, not in a way that creates additional complexity.

Professor Griswold has argued that having discrete income, gift, and estate systems as they relate to transfers of property will cause efficiency concerns. He stated: "The law as it now stands is fully beyond the comprehension of any but experts, and the most that they can do in many situations is to express doubts" and added that "[i]t would seem clear that certainty to the taxpayer,

and efficiency in the administration of the tax laws, would be greatly improved if the statute could be changed so as to minimize the present problems."[148] This Note agrees. While the Original BBBA was a sharp attack at the use of grantor trusts as an abusive tool, it attempted to solve the problem in the wrong way.

* * *

As explained in the Introduction, this Note does *not* argue that grantor trust rules should be reformed; rather, it analyzes *how* they should be reformed if reform is inevitable. Harmonization via the adoption of the transfer tax definition of a completed transfer for all tax systems is the best way to accomplish reform because it aligns with Congress's intent in passing the estate tax rules and provides clarity and certainty to taxpayers.

III. GRANDFATHER PROVISION PROPOSALS

Surprisingly, most of the commentary discussing reform of the grantor trust rules does not discuss what to do with existing trusts if the grantor trust rules were to be reformed. And the commentators that do discuss it do so cursorily.[149]

Professor Ascher has argued that it would not be unfair to reform the grantor trust rules because the rules "are . . . plainly obsolete and counterproductive" and that "it is hard to believe that those who have deliberately and knowingly exploited them in the interim would have any legitimate basis for complaint when they are, at long last, repealed."[150] Professor Ascher also argues that "many in the estate-planning community have long understood that their dalliances with the grantor trust rules were on borrowed time."[151]

While it is clear that some in the estate planning community know that there is a possibility that the grantor trust rules could be changed, this Note argues that what is most relevant is that the grantor trust rules have remained virtually the same since 1954. Even after the compression of the

trust income tax rates in 1986, Congress has done little to nothing to limit the use of the grantor trust rules. Thus, for approximately thirty-five years in the modern tax era, there was no legitimate threat to the users of grantor trusts until the BBBA.

Although they may be aware of potential changes, taxpayers and estate planners usually engage in planning techniques for what the law currently is, not what the law could or should be. This Note argues that it is unreasonable to believe that estate planners should have implemented estate planning changes with their clients because of a potential change to the grantor trust rules, especially because the grantor trust rules have not substantially changed for almost seventy years.

As a result of Congress and the IRS consistently "blessing" the IDGT structure for decades, [152] there should be robust grandfathering provisions to be fair to those who have relied on the current grantor trust rules. The Original BBBA contained some grandfathering provisions related to grantor trusts. These provisions would have applied to "trusts created on or after the date of enactment of" the Original BBBA.[153] The new rules would have also applied "to any portion of a trust established before the date of the enactment of [the BBBA] which is attributable to a contribution on or after" enactment.[154]

Many in the estate planning community were concerned about the grandfathering provisions of the bill. Specifically, the text of the Original BBBA itself did not address the tax results of sales or exchanges between a grantor and a grantor trust already in existence at the time of enactment of the Original BBBA. However, the Committee Report, released after the proposed bill, indicated that the Original BBBA was intended to make taxable any transactions between a grantor and an already existing grantor trust. A footnote in the Committee Report addressing post-enactment sales and exchanges simply stated: "A technical correction may be necessary to reflect this intent."[155] After the Committee Report was released, one attorney stated the change was "some

real ground-shaking news" and "[i]t's worse than it looks."[156]

The remainder of this Part analyzes the Original BBBA's would-be impacts on certain trusts and explains why two additional grandfathering provisions should have been included in the Original BBBA to prevent unfairness to taxpayers who were relying on the current grantor trust rules.

A. Irrevocable Life Insurance Trusts

An irrevocable life insurance trust (ILIT) is an irrevocable inter vivos trust created to own a life insurance policy on the life of the grantor or the grantor's spouse.[157] The grantor trust rules specifically provide for ILITs in section 677(a)(3).[158] If the grantor retains no incidents of ownership over the life insurance policy, the policy will not be included in the grantor's estate.[159]

Commonly, grantors enable the ILIT to pay the policy's premiums with annual exclusion gifts ($17,000 per donee per year as of 2023).[160] The Original BBBA provided that contributions to a grantor trust after the date of enactment will cause a prorated portion of the trust property to be included in the grantor's estate.[161] Therefore, grantors who set up ILITs prior to BBBA enactment and that rely on annual exclusion gifts to make premium payments would have been required to include a prorated portion of the life insurance proceeds in the taxpayer's estate. With respect to this provision, one attorney stated: "I find it hard to imagine that the draftsmen intended this provision to be that broad."[162]

Additionally, because the Original BBBA would have eliminated the nonrecognition status of transactions between the grantor and grantor trust and provided that the "the owner of the trust shall be disregarded in determining whether [a] transfer is a sale or exchange[,]"[163] another complication arises. Currently, the "transfer-for-value" rules govern the taxability of life insurance proceeds. Taxpayers often sell a life insurance policy on their lives to avoid the policy proceeds to

be included in their estate. Under section 101(a)(2), when a life insurance policy is sold to another party, the value excluded from tax by the buyer of the policy is limited to the sales price plus any premiums paid.[164] However, an exception currently exists in which a sale from the grantor to the grantor trust will exempt the entire proceeds from tax.[165] Because a grantor would be disregarded as the owner of the trust property in a sale or exchange under the Original BBBA, it is possible that ILITs would not have been deemed to be the owner of the life insurance policy, effectively ensuring that much of the life insurance proceeds would have been taxable to the grantor's estate.

To cure these two potential problems with ILITs, this Note proposes that any act reforming the grantor trust rules carve out an exception for ILITs. The specific proposal is listed in Subpart C of this Part.

B. Grantor Retained Annuity Trusts

A grantor retained annuity trust (GRAT) is created when a grantor transfers property to a trust in exchange for an annuity stream over a fixed term of years.[166] A GRAT is a statutory creation subject to strict requirements under section 2702.[167] In general, the initial transfer from the grantor to the GRAT is subject to gift tax, calculated as the fair market value transferred to the GRAT less the grantor's retained interest using IRS tables and the AFR.[168] However, taxpayers commonly structure the GRAT to be "zeroed-out" or "*Walton*" GRAT.[169] In this arrangement, the grantor sets the annuity payment such that the present value of the annuity stream is equal to the value of the property transferred into the trust, resulting in a valuation of zero on the transfer to the GRAT for gift tax purposes. Thus, any appreciation above the AFR will pass to the GRAT's beneficiaries free of gift and estate tax. However, if the requirements of a GRAT are not met (e.g., an annuity payment is missed), the entire value of the GRAT, including any appreciation, will be treated as a taxable gift.[170]

Importantly, the annuity from the GRAT to the grantor is often paid with noncash property.[171] Because the Original BBBA would have required sales and exchanges between the grantor and the grantor trust to be recognized for income tax purposes, the grantor would have been required to recognize tax on any appreciation of the property constituting the annuity. Thus, even though the GRAT could have been set up years prior to enactment, the grantor would have to recognize tax on annuity payments, payments that were statutorily required. As one attorney stated: "It's pretty harsh to say that if you set up something way before the presidential election . . . that you should now be caught by a change in the law."[172]

Because GRATs have a statutory basis and have certain transfer requirements to maintain their status as a GRAT, transfers of property after enactment between a grantor and a GRAT that existed before enactment should be grandfathered in.

C. Specific Proposals

Using the Original BBBA text as an illustrative reform proposal, this Note recommends the following grandfathering provision proposals to ensure fairness to taxpayers who have relied on the current grantor trust rules. The text of the Original BBBA is in nonitalicized font,[173] and this Note's proposals are in italicized font.

(c) Effective Date. The amendments made by this section shall apply

(1) to trusts created on or after the date of the enactment of this Act, and

(2) to any portion of a trust established before the date of the enactment of this Act which is attributable to a contribution made on or after such date.

(3) Exceptions:

(i): In the case of any transfer of property from the deemed owner to any portion of a trust with respect to which the grantor is the deemed owner that is used to pay premiums

of a life insurance policy on the life of the deemed owner or the deemed owner's spouse, such transfer will not be a contribution, sale, or exchange for purposes of this chapter.

(ii): In the case of any transfer of property from any portion of a trust with respect to which the grantor is the deemed owner to the deemed owner that is used to pay annuity payments required under section 2702, and such trust existed before the date of enactment of this Act, such transfer will not be a contribution, sale, or exchange for purposes of this chapter.

Similar grandfathering provisions should be included in any reform of the grantor trust rules. Implementing such grandfathering provisions will ensure that taxpayers who established ILITs and GRATs before reform will not be penalized.

CONCLUSION

There is a growing possibility that the grantor trust rules will be reformed in the near future. Among the many alternatives for reform, harmonization of the various tax rules using the estate tax definition for a completed transfer best reflects Congressional intent and will ensure the greatest certainty for taxpayers going forward, creating an efficient, unified system related to gratuitous transfers. In any case, reform of the grantor trust rules should have robust grandfathering provisions to ensure that taxpayers who have relied on current grantor trust rules are not penalized. Additionally, any grantor trust reform proposal should ensure that grantor retained annuity trusts established before reform, and irrevocable life insurance trusts generally, are grandfathered in. By doing so, the grantor trust rules, long perceived as unfair, will be reformed in a fair way.

1. Jonathan Curry, *W&M Bill 'Strikes at the Heart' of Estate Tax Planning*, TAXNOTES (Sept. 20, 2021), https://www.taxnotes.com/tax-notes-today-federal/estate-gift-and-inheritance-taxes/wm-bill-strikes-heart-estate-tax-planning/2021/09/20/784xw.

2. I.R.C. § 671.

3. Jesse Hubers, *The Grantor Trust Rules: An Exploited Mismatch*, TAX ADVISER (Nov. 1, 2021), https://www.thetaxadviser.com/issues/2021/nov/grantor-trust-rules-exploited-mismatch.html.

4. *See, e.g.*, Mark L. Ascher, *The Grantor Trust Rules Should Be Repealed*, 96 IOWA L. REV. 885 (2010); Hubers, *supra* note 3.

5. Hubers, *supra* note 3.

6. H.R. 5376, 117th Cong. (2021). The BBBA was signed into law by President Joe Biden on August 16, 2022. This Note analyzes the first version of the BBBA that was introduced on September 27, 2021.

7. *See, e.g.*, Ascher, *supra* note 4, at 937 ("[M]any in the estate-planning community have long understood that their dalliances with the grantor trust rules were on borrowed time.").

8. I.R.C. § 671. This Note only analyzes and discusses U.S. federal tax laws. Any references to tax laws going forward refer solely to U.S. federal tax laws under Title 26 of the Internal Revenue Code (Code).

9. Ascher, *supra* note 4, at 902–03.

10. Rev. Rul. 85-13, 1985-1 C.B. 184.

11. I.R.C. § 671.

12. Arielle M. Prangner, *Implications of Termination of Grantor Trust Status*, 13 EST. PLAN. & CMTY. PROP. L. J. 443, 446 (2021).

13. *IRS History Timeline*, IRS, https://www.irs.gov/irs-history-timeline (last updated Jan. 28, 2023).

14. Hubers, *supra* note 3.

15. Lucas v. Earl, 281 U.S. 111, 113–14 (1930).

16. *Id.* at 114–15 ("[T]he fruits [must not be] attributed to a different tree from that on which they grew.").

17. *See* Hubers, s*upra* note 3.

18. *Id.*

19. Ascher, *supra* note 4, at 889.

20. *See* Revenue Act of 1924, ch. 234, § 219(g).

21. *Id.*

22. *See* Ascher, *supra* note 4, at 889.

23. *See id.*

24. Hubers, s*upra* note 3.

25. Helvering v. Clifford, 309 U.S. 331 (1940); Ascher, *supra* note 4, at 889.

26. *Clifford*, 309 U.S. at 332.

27. *Id.* at 335.

28. *Id.* at 336.

29. Ascher, *supra* note 4, at 893.

30. *Id.* at 894.
31. *See id.*
32. *Id.* at 895.
33. I.R.C. §§ 671–79.
34. I.R.C. § 671.
35. *See id.*
36. I.R.C. § 672.
37. I.R.C. § 672(e).
38. I.R.C. § 673.
39. I.R.C. § 674.
40. *See* Soled, *Reforming the Grantor Trust Rules*, 76 NOTRE DAME L. REV. 375, 393 (2001); Prangner, *supra* note 12, at 448.
41. *See* I.R.C. § 674(b) (providing exceptions for powers (1) to apply income to support of a dependent, (2) affecting beneficial enjoyment only after occurrence of an event, (3) exercisable only by will, (4) to allocate among charitable beneficiaries, (5) to distribute corpus, (6) to withhold income temporarily, (7) to withhold income during disability of a beneficiary, and (8) to allocate between corpus and income).
42. I.R.C. § 675.
43. I.R.C. § 675(1).
44. I.R.C. § 675(2).
45. *See* I.R.C. § 675(3).
46. I.R.C. § 675(1)(A).
47. I.R.C. § 675(1)(B).
48. I.R.C. § 675(1)(C).
49. I.R.C. § 676.
50. I.R.C. § 677(a)(1)–(2).
51. I.R.C. § 677(a)(3).
52. I.R.C. § 678 (e.g., when a person other than the grantor has sole power to vest the corpus or the income of the trust in the person's own self).
53. I.R.C. § 678(b).
54. I.R.C. § 679.
55. I.R.C. § 679(a)(1).
56. *See* Hubers, s*upra* note 3.
57. *Id.*
58. *See infra* Section I.B.
59. *See* Hubers, s*upra* note 3.
60. Ascher, *supra* note 4 at 899.
61. *Id.*
62. *Id.*
63. Eric Reed, *Trust Tax Rates and Exemptions for 2023*, SMARTASSET (Mar. 10, 2023), https://smartasset.com/taxes/trust-tax-rates.
64. *Id.*; Kemberley Washington & Doug Whiteman, *2022-2023 Tax Brackets & Federal Income Tax Rates*, FORBES ADVISOR (Mar. 14, 2023), https://www.forbes.com/advisor/taxes/taxes-federal-income-tax-bracket.
65. Soled, *supra* note 40, at 397.
66. *See, e.g.*, *id*.

67. *See* Hubers, s*upra* note 3.
68. Soled, *supra* note 400, at 377.
69. *Id.* at 397.
70. *See How Do the Estate, Gift, and Generation-skipping Transfer Taxes Work*?, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/how-do-estate-gift-and-generation-skipping-transfer-taxes-work (last updated May 2020).
71. *What's New - Estate and Gift Tax*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax (last updated Dec. 20, 2022).
72. *Id.*
73. Hubers, s*upra* note 3.
74. Some exceptions exist. *See, e.g.*, I.R.C. § 2036.
75. *See* I.R.C. § 1015.
76. *See id.*
77. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, INSTRUCTIONS FOR FORM 706, 2 (2021).
78. *See id.*
79. *See id.*
80. *Id.*
81. *Step-Up In Basis*, TAX FOUND., https://taxfoundation.org/tax-basics/step-up-in-basis/ (last visited Mar. 29, 2023).
82. *See id.* If appreciation occurs after the death of decedent, those who receive inherited property would only be taxed on that appreciation.
83. $15 million multiplied by 40% tax rate.
84. Soled, *supra* note 40, at 406.
85. *See* Hubers, s*upra* note 3.
86. *Id.*
87. Soled, *supra* note 40, at 407.
88. *Id.*
89. *See* Hubers, s*upra* note 3.
90. Ascher, *supra* note 4, at 905–06.
91. Soled, *supra* note 40, at 408.
92. *See* Ascher, *supra* note 4, at 888–89.
93. Daniel L. Ricks, *I Dig It, But Congress Shouldn't Let Me: Closing the IDGT Loophole*, 36 ACTEC L.J. 641, 644–45 (2010).
94. *Id.* at 644.
95. *Id.* at 646.
96. Prangner, *supra* note 122, at 458.
97. *See id.*
98. Rev. Rul. 2004-64, 2004-2 C.B. 7.
99. *Id.*
100. Prangner, *supra* note 12, at 458.
101. *Id.*
102. Ricks, *supra* note 93, at 649.
103. *See* Ascher, *supra* note 4, at 919.

104. *See id.*
105. *See id.*
106. *Id.*
107. Prangner, *supra* note 122, at 458.
108. Ricks, *supra* note 9393, at 648.
109. *Id.*
110. Prangner, *supra* note 122, at 458.
111. *See, e.g.*, Ascher, *supra* note 4; Soled, *supra* note 40; Ricks, *supra* note 93.
112. *See, e.g.*, Reed W. Easton, *For the 99.5% Act: End of Traditional Planning Techniques*, 48 EST. PLAN. 26 (2021).
113. Soled, *supra* note 400, at 414.
114. Hubers, s*upra* note 3.
115. *See id.*
116. *Id.*; I.R.C. § 675(4)(C).
117. Hubers, s*upra* note 3.
118. I.R.C. § 674(b)(4).
119. Prangner, *supra* note 122, at 459; I.R.C. § 675(2).
120. I.R.C. § 674(c).
121. Soled, *supra* note 40, at 411–12; I.R.C. §§ 676–677.
122. Ricks, *supra* note 93, at 661 (quoting Erwin N. Griswold, *A Plan for the Coordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337, 342 (1942)).
123. *See* Soled, *supra* note 400, at 398–99 n.142.
124. Ricks, *supra* note 93, at 658.
125. Hubers, s*upra* note 3. Although the gift and estate completed transfer rules are not identical, it will be assumed that they are for purposes of this analysis.
126. *See* Soled, *supra* note 400, at 407.
127. Estate of Farrel v. United States, 553 F.2d 637, 640 (Ct. Cl. 1977) (emphasis added).
128. *See* Soled, *supra* note 400, at 407.
129. *Id.*
130. *See id.* at 378.
131. *Id.* (emphasis added).
132. I.R.C. § 672(e)(1).
133. *See* Soled, *supra* note 40, at 407.
134. Hubers, s*upra* note 3.
135. H.R. REP. NO. 117-130, pt. 1, at 1274 (2021).
136. *Id.* at 1276.
137. *See* JANE G. GRAVELLE, CONG. RSCH. SERV., IF11954, TAX CHANGES FOR ESTATES AND TRUSTS IN THE BUILD BACK BETTER ACT (BBBA) (2021).
138. H.R. REP. NO. 117-130, pt. 1, at 1277.
139. H.R. 5376, 117th Cong. § 2901 (1st Sess. 2021).
140. *Id.*
141. *Id.*
142. *Id.*

143. *Id.* at § 1062.

144. *Id.*

145. *Id.*

146. H.R. REP. NO. 117-130, pt. 1, at 1277 n.934 (2021).

147. H.R. 5376, 117th Cong. § 1062 (1st Sess. 2021).

148. Erwin N. Griswold, *A Plan for the Coordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers*, 56 HARV. L. REV. 337, 339 (1942).

149. *See, e.g.*, Ascher, *supra* note 4, at 936–37.

150. *Id.*

151. *Id.* at 937.

152. *See, e.g.*, Rev. Rul. 85-13, 1985-1 C.B. 184; Rev. Rul. 2004-64, 2004-2 C.B. 7; Rev. Rul. 2008-22, 2008-16 I.R.B. 796; I.R.S. Priv. Ltr. Rul. 200944002 (Oct. 30, 2009).

153. H.R. 5376, 117th Cong. § 1062 (1st Sess. 2021).

154. *Id.*

155. H.R. REP. NO. 117-130, pt. 1, at 1278 n.935 (2021).

156. Jonathan Curry, *'Ground-Shaking' Grantor Trust Tweak Threatens Last-Minute Plans*, TAXNOTES (Oct. 4, 2021), https://www.taxnotes.com/tax-notes-today-federal/trusts-and-estates-taxation/ground-shaking-grantor-trust-tweak-threatens-last-minute-plans/2021/10/04/79h8j.

157. Prangner, *supra* note 122, at 457.

158. I.R.C. § 677(a)(3).

159. *See id.*

160. Curry, *supra* note 1.

161. H.R. 5376, 117th Cong. § 1062 (1st Sess. 2021).

162. Curry, *supra* note 1.

163. H.R. 5376, 117th Cong. § 1062 (1st Sess. 2021).

164. I.R.C. § 101(a)(2).

165. *See* § 101(a)(2)(B).

166. Megan M. Burke, *Great Time For a GRAT*, J. ACCT. (Oct. 1, 2019), https://www.journalofaccountancy.com/issues/2019/oct/wealth-transfer-grantor-retained-annuity-trusts.html.

167. *See* I.R.C. § 2702.

168. Burke, *supra* note 166.

169. *Id.*

170. *Id.*

171. Curry, *supra* note 156.

172. *Id.*

173. H.R. 5376, 117th Cong. § 1062 (1st Sess. 2021).