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# Foreword: The Supreme Court's Estate Planning Jurisprudence

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## Foreword – The Supreme Court’s Estate Planning Jurisprudence

*Bridget J. Crawford\**

Sophisticated trust and estate counsel must keep up with near-daily developments in the substantive state law of wills, trusts and estates, as well as state and federal laws of wealth transfer taxation. Because of the sheer volume of statutory law and administrative regulations that estate planners must master, it is easy to lose sight of the important role that federal courts play in shaping the field of estate planning. Federal tax cases are routinely heard by the United States Tax Court, the Federal District Courts, the Court of Federal Claims and appellate courts in all circuits. Yet very few tax cases make it all the way to the Supreme Court of the United States. For this reason, the role of the nation’s highest court in the development of estate planning jurisprudence may be under-theorized. This issue of the *ACTEC Law Journal* considers the role of the United States Supreme Court in interpreting income, estate and gift tax laws and how those interpretations have shaped the development of contemporary estate planning practice.

This issue is the result of an open call for participation that went out to all ACTEC Fellows in the spring of 2016. The call listed fourteen Supreme Court cases and asked for volunteers to write short (2,000 word) commentaries on each case describing why the case is important to estate planners. The list of cases in the call was developed by me, in consultation with *ACTEC Law Journal* Associate Editor Jeffrey Cooper (Professor of Law at Quinnipiac University School of Law) and Academic Editor Mitchell Gans (Rivkin Radler Distinguished Professor of Law at Hofstra University School of Law). Within twenty-four hours, all of the cases were spoken for and assigned on the first-come, first-served basis advertised in the call. Three more cases were added at the suggestion of Fellows who found important gaps in the initial list I had developed. The overwhelmingly positive (and rapid) response to the call suggests that the ACTEC membership is willing and eager to contribute to the *ACTEC Law Journal*, and that similar open calls might fruitfully solicit contributions in the future. Although the *ACTEC Law Journal* accepts articles year-round on a wide range of estate planning topics, any of us who has experience juggling multiple professional and

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personal priorities can also appreciate a writing project with an assigned topic, a specific (short) word count and a concrete deadline, too.

The contributors to this volume represent the rich range of experience that one can find among the ACTEC membership. Our contributors include seasoned ACTEC veterans as well as new Fellows. They are partners at national law firms as well as regional experts and solo practitioners. Our contributors include full-time faculty members and many practicing attorneys, some of whom teach as adjuncts at their local law schools. Some of the authors in this issue have published frequently in the *ACTEC Law Journal*. For others, this represents their first contribution. Several authors took the opportunity to work with a non-ACTEC co-author, recognizing the important role that mentoring plays in developing the next generation of trust and estate counsel leaders. I am pleased and proud of the range of backgrounds, practice settings and levels of professional expertise represented by the contributors to this volume.

In preparing their case commentaries, authors were invited to include a critique of what the United States Supreme Court got “right” or “wrong,” and how the author would have resolved the question differently. After all, Justice Robert Jackson famously described the work of the Supreme Court by saying, “We are not final because we are infallible, but we are infallible only because we are final.”<sup>1</sup> The authors introduce the reader to the case, explain how law in effect at the time of the decision is different, if at all, from existing law, and evaluate the importance of the Court’s decision in the development of contemporary estate planning jurisprudence. This issue of the *ACTEC Law Journal* thus provides a short and readable substantive introduction to many of the major issues that estate planners face in daily practice.

We are honored to include in this issue two invited essays from distinguished experts. Professor Thomas Gallanis of the University of Iowa offers reflections based on his experience as someone involved in the law reform movement. Professor Gallanis considers how two decisions by the United States Supreme Court, *Egelhoff v. Egelhoff*<sup>2</sup> and *Hillman v. Maretta*,<sup>3</sup> represent an unwelcome move away from a harmonization of default rules governing probate and nonprobate transfers. These decisions might understandably leave an estate planning attorney with the sense that the Supreme Court perhaps did not consider the basic aims of the law of succession and the myriad problems that would arise from these decisions (my words, not Professor Gallanis’s). Jasper Cummings, Jr., of Alston & Bird LLP, provides an historical perspec-

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<sup>1</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>2</sup> 532 U.S. 141 (2001).

<sup>3</sup> 133 S. Ct. 1943 (2013).

tive, informed by his extensive scholarship on the Supreme Court's federal tax jurisprudence.<sup>4</sup> He considers the principled basis for a series of decisions between 1927 and 1932 that found particular estate or gift tax rules to be unconstitutional. Both of these introductory essays encourage larger consideration of the role of the Supreme Court in shaping the complex law of trusts and estates.

We hope that you enjoy this issue of the *ACTEC Law Journal*.

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<sup>4</sup> See, e.g., JASPER L. CUMMINGS, JR., *THE SUPREME COURT, FEDERAL TAXATION, AND THE CONSTITUTION* (Am. Bar Ass'n 2013), JASPER L. CUMMINGS, JR., *THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE: AN ANALYSIS OF FACT FINDING METHODS AND STATUTORY INTERPRETATION OF THE SUPREME COURT'S TAX OPINIONS, 1801 - PRESENT* (Am. Bar Ass'n 2010).