Planning Tips and Nuggets

By: Martin M. Shenkman, CPA, MBA, JD, PFS, AEP

Law Easy

General Disclaimer

- The information and/or the materials provided as part of this program are intended and provided solely for informational and educational purposes. None of the information and/or materials provided as part of this power point or ancillary materials are intended to be, nor should they be construed to be the basis of any investment, legal, tax or other professional advice. Under no circumstances should the audio, power point or other materials be considered to be, or used as independent legal, tax, investment or other professional advice. The discussions are general in nature and not person specific. Laws vary by state and are subject to constant change. Economic developments could dramatically alter the illustrations or recommendations offered in the program or materials.

Should You Use a NIMCRUT for your IRA?

Which Clients are Potential Candidates for a IRA/NIMCRUT Approach?

- The IRA owner is willing to incur the cost and endure the complexity of this Plan bearing in mind that the Plan owner will have no benefit from the approach, only the heirs of the Plan owner.
- Costs will include professional fees, the .1% of the LLC that may be given away and the remainder interest to charity.
- IRA assets have to be valuable enough to warrant the costs of creating a NIMCRUT, the LLC, and administering the complexity of the plan.
- The heirs who will be named non-charitable beneficiaries of the IRA/NIMCRUT have to be able to forgo any distributions for 20-years to maximize the wealth accumulation that the approach might provide.
- The heirs will have to incur the costs and endure the complexity of the administration of the approach.

Which Clients are Potential Candidates for a IRA/NIMCRUT Approach?

- The IRA owner and her heirs will have to accept the risk of the plan. These risks might include:
  - The failure to properly operate the plan.
  - A challenge by the IRS that the underlying LLC should not be respected as a blocker of FAI. If the same non-charitable beneficiaries control the .1% and are managers of the LLC, or directly or indirectly can control the LLC, or if the person who does control the LLC acts as the alter-ego of the non-charitable beneficiaries, the approach may implode.
  - The non-charitable beneficiaries have to be willing to stick with the terms of the approach and not receive withdrawal potentially for two decades.

Steps in an IRA/NIMCRUT Plan

Acknowledgements to Jonathan G. Blattmachr, Esq. for the IRA/NIMCRUT idea. The following slides are based on an article we have in process.

1. Create a NIMCRUT during lifetime but make it revocable. The trust instrument would not require any special tailoring as compared to any other NIMCRUT.
2. Form an LLC to be owned 99.9% by the NIMCRUT and .1% by the person who will be the manager of the LLC. On account of Rev. Proc. 97-23, the manager should not be the trustee or a beneficiary of the CRT or anyone related or subordinate to either of them. This could be the attorney or CPA for the client, or an independent corporate fiduciary such as a bank.
3. Name the LLC as a beneficiary of the Plan. You do not name the NIMCRUT as the beneficiary, as the NIMCRUT owns 99.9% of the LLC.

Steps in an IRA/NIMCRUT Plan

1. On death of the IRA owner, the IRA assets pass to the LLC by the beneficiary designation and the income from the IRA will be attributed to the NIMCRUT which will report the income but pay no income tax because it is income tax exempt. The NIMCRUT will have no FAI to distribute to its beneficiaries. Since all income on the IRA is triggered at this time the NIMCRUT will have realized 99.9% of the value of the IRA as taxable income, but none of that will be subject to income tax by reason of the income tax exemption of the CRT.
2. In any year in which the LLC does not make an actual cash distribution to the NIMCRUT, the NIMCRUT will have no FAI, the NIMCRUT will not have to make a distribution to the non-charitable beneficiaries, and any tax on the income realized on the NIMCRUTs receipt of the Plan assets, will continue to be deferred.

Steps in an IRA/NIMCRUT Plan

1. If the non-charitable beneficiaries needed or wanted distributions the LLC could distribute FAI to the NIMCRUT. Properly structured that distribution would be FAI and then that amount would have to be distributed to the non-charitable beneficiaries. They would then realize income tax, based on the four tier tax system of CRTs. Thus, ordinary income would be deemed distributed first. Since the full value of the IRA would be deemed ordinary income in the year of the Plan owner's death, there would almost assuredly be a substantial amount of ordinary income for each distribution. Capital gain income could only be realized by the non-charitable beneficiaries of the NIMCRUT after the income o entire value of the Plan on the Plan owner's death were distributed to them.
2. At the end of the 20th year of the NIMCRUT all assets would have to be distributed and all income recognized. That is the maximum deferral period.

Steps in an IRA/NIMCRUT Plan

1. Note that this would "buy" generally speaking an additional ten years of deferral versus merely accepting the 10-year payout of the Plan under general post-SECURE Act rules. Recognize that the Proposed Regulations that clarified that RMDs must be paid during the intervening ten years before the final payout could provide a further advantage to the IRA/NIMCRUT approach as that could be avoided.
2. Rev. Proc. 97-23 does not prohibit having a CRT own an LLC but provides the IRS may not rule favorably on the CRT status of the trust if the grantor, trustee, or beneficiary, or anyone related or subordinate to one of them is the manager of the LLC owned 99.9% by the NIMCRUT.

INGs Restricted by CA

CA Joins NY – Who is Next?

CA Zaps Traditional INGs

- On July 10, 2023, California Governor Gavin Newsom signed into law S.B. 131, which included a provision targeting the California state income tax treatment of incomplete gift non-grantor trusts ("INGs"). Under the prior law, a Grantor who contributed property to an ING did not report the trust's income on their California state income tax return, unless the Grantor received a distribution of distributable net income ("DNI") from the ING. Under the newly enacted Cal. Rev. & Tax. Code Section 17082, the income of an ING is included in gross income of a Grantor of the ING, as if the ING was a Grantor Trust. The new rules are retroactive to January 1, 2023.
- Will completed gift INGs work in CA? They should still work in NY?
- Another ING issue is the import/implication of the IRS not issuing rulings?

Is Financial Disaster Lurking

Is Financial Disaster Lurking

- **A recent study noted that pre-retirees expect to spend just 58% of their current household income in retirement. Yet 1/3rd of actual retirees who participated in the study are spending at least 75% of their pre-retirement income in retirement. In another study participants felt they needed to earn $233,000/year to be financially secure and $483,000/year to feel rich. Yet, median earnings for a full-time, year-round worker in 2021 was $56,473. What's the common theme? People's financial perceptions are dangerous to planning and financial well-being. Too many underestimate what they'll need in retirement. Too many set their financial wishes far higher than what they will ever achieve, thereby setting themselves up for disappointment. While these studies did not focus on the wealthiest Americans, the misconceptions may differ, but the mistakes may be similar. Having a realistic budget and financial model and doing one of the hardest things that can be done, reducing your lifestyle, may be what many people really need to do to get on track. Folks making this mistake may well spend down their estates leaving little for heirs so that their estate plans may be wishful thinking at best. Is your financial adviser really giving you the tough news you really need to hear? Or is she sugar-coating the bad news to keep you happy?**

Life Insurance Proceeds Add to Estate Tax Value

Connelly v. United States

Company Value Includes Life Insurance Proceeds

- In *Connelly v. United States*, a three-judge panel held that the company's value included the proceeds of the life insurance policy that the company had taken out against the decedent's life.
- The approach rejected that which was taken by the Eleventh Circuit in *Estate of Blount v. Commissioner*, 428 F.3d 1338 (2005), which offset the company's obligation to redeem shares against the life insurance proceeds received.
- Court applied "hypothetical sale of the company between willing and unrelated parties."
- The court noted that the life insurance proceeds "were simply an asset that increased shareholders' equity…."

Redemption vs. Cross Purchase

- **It is common to have a closely held business own life insurance on the owners (e.g., shareholders if it is a corporation). When an owner dies the business uses the life insurance proceeds on the owner's life to buy the equity interests the owner held at death. Since the corporation, not the other shareholders are purchasing the deceased shareholder's stock it is called a "redemption." This is a simple way to keep the stock or other equity interests in the hands of the remaining active shareholders. But the Court held that the value of insurance used for the buyout had to be included in the shareholder's estate, and the value of the buyout obligation could not reduce the value of the business. The result was that insurance funded redemption agreements may create a "phantom" value in the shareholder's estate increasing estate tax costs. Connelly v. IRS, No. 21-3683 (8th Cir. 2023). Some suggest expressly stating in the buyout contract that the insurance won't be included in the business value, but it is not at all clear that will suffice to avoid estate inclusion. The only safe bet may be to use a cross-purchase agreement, and perhaps one with an insurance LLC structure. Costly and complex.**

Do it Right! Formalities Matter!

- **Connelly is also another case stressing the importance of taxpayers adhering to the formalities of the deals they structure. In that way, Connelly echoes the same message as the cases discussed in the lead article. The stock-purchase agreement provided two mechanisms for determining the price at which Crown would redeem the shares. The principal mechanism required the brothers to execute a new Certificate of Agreed Value at the end of every tax year, which set the price per share by "mutual agreement." If they failed to do so, the brothers were supposed to obtain two or more appraisals of fair market value. The brothers never executed a Certificate of Agreed Value or obtained appraisals as required by the stock-purchase agreement.**

Revenue Ruling 2023-2

What Can You Do?

Letter to Treasury

- On March 20, 2023, Senators Elizabeth Warren, Bernard Sanders, Chris Van Hollen and Sheldon Whitehouse wrote a letter to Janet Yellen Secretary of the Department of the Treasury encouraging her to "…use your existing authority to limit the ultra-wealthy's abuse of trusts to avoid paying taxes. Billionaires and multi-millionaires use trusts to shift wealth to their heirs tax-free, dodging federal estate and gift taxes." The letter goes on to detail various loopholes and abuses that they believed should be acted upon. Shortly after the sending of the above letter, Revenue Ruling 2023-02 below was issued.
- So, while many may dismiss any possibility of restrictive estate tax legislation as fanciful with a Republican controlled House, there really is no assurance that change may not occur.
- And….change is already happening, see the next slide.

Revenue Ruling 2023-2

- One of the issues raised in many estate tax proposals by the Democrats has been the concern about the perceived abuse of practitioners taking the position that assets in an irrevocable grantor trust can obtain a step-up in income tax basis at the grantor's death even though those assets are not included in the taxpayer's taxable estate.
- Revenue Ruling 2023-2 makes the IRS position now clear that there's no step-up in basis, according to the IRS, for such assets being stepped up.
- Some advisers believe the IRS is wrong. If you do take a contrary position disclose it clearly on the returns affected.
- What can be done? Swap assets out for a step-up. That should be part of an annual review.
- Another question is how many more perceived loopholes addressed in the Biden Greenbook may be resolved by Treasury department action even without legislative change? Might we see the 2704 Regulations restricting discounts resurface?

Wandry Clause May Create Estate Inclusion Under Powell

Plain Vanilla Wandry Might Not be the Ideal

Secondary Stock Purchase Agreement

- Many practitioners structure transactions using Wandry formula transfer clauses. Example: I transfer $10M worth of LLC interests, which based on an appraisal is estimated to be 40% of the LLC. The idea is that if the IRS values the LLC interests at $20M only 20% would be transferred and gift tax would be avoided. The planning conversation often ends there, but that may not be the optimal end of the planning discussion. If 10% of the LLC remains in the transferor's estate under a successful Wandry mechanism might the IRS then assert under the Powell case that the decedent "in conjunction with" others still controlled the LLC and that therefore all LLC interests are included in the estate. Might there be a solution? Consider the Secondary sale agreement.
- Wandry v. Comm'r , T.C. Memo. 2012-88. Estate of Powell v. Commissioner, 148 T.C. No. 18 (May 18, 2017) June, 2017.
- What does this suggested technique do? It has the client sell any interests that might remain under the Wandry clause to the same and/or a different trust effective as of the date of the first transfer.

Secondary Stock Purchase Agreement

- Let's illustrate the use of a secondary sale agreement in a stock sale. This concept might be referred to as a "Double Wandry" transaction. The transaction documents reflects that nothing is initially being sold under the secondary sale agreement, but that if there is a valuation adjustment under the primary transfer documents, then and only then interests will be sold pursuant to the secondary sale document, effective as of the signature date.
- Consideration might be given to including a second trust or party to purchase a portion of the "retained" (i.e., under the Wandry transfer) shares. This might be a differentiation of the secondary sale agreement from the primary purchase agreement to deflect certain possible challenges to the transaction. If this complexity is not desired, only include the language regarding the trust which is the transferee in the primary transfer documents (gift or sale).
- The sample language following is for a hypothetical sale of Class A and Class B voting and non-voting shares of an S corporation to a non-grantor trust.

Secondary Stock Sale Agreement Selected Sample Clauses for Sale of S Corporation Stock to Non-Grantor Trust - 1

- WHEREAS, the Seller, prior to the closing contemplated under an agreement entitled the Children GRAT Primary Stock Purchase Agreement of even date herewith (the “Primary Stock Purchase Agreement”)# owns # (#) shares of Class A Voting Common Stock of the Corporation (the “Class A Shares”) and # (#) shares of Class B Non-Voting Common Stock of the Corporation (the “Class B Shares” and, collectively with the Class A Shares, the “Shares”);
- WHEREAS, #pursuant to the Primary Stock Purchase Agreement,# the Seller is selling to the #DEFINED-TRUST-BUYER-FROM-PRIMARY-SALE Class A Shares having a value of # Dollars ($#), and Class B Shares having a value of # Dollars ($#), #it being understood that any of the Class A Shares or Class B Shares not sold for such values pursuant to the Primary Stock Purchase Agreement remain with the Seller;#
- WHEREAS, Seller intends to sell to the Buyers, and the Buyers intend to purchase from the Seller, #under this Agreement, effective as of the *TRANSACTION-DATE execution of this Agreement but formalized only upon consummation of the closing provided for hereunder (the “Secondary Closing”), subject to the terms and conditions set forth herein, as follows.
- (i) The #DEFINED-TRUST-BUYER-FROM-PRIMARY-SALE shall purchase all of the Actual Class A Retained Shares (as defined in the Primary Stock Purchase Agreement) at the Class A Finally Determined Per Share Amount (as defined herein), and all of the Actual

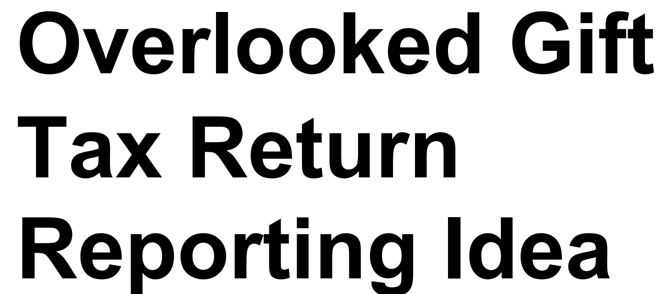
Secondary Stock Sale Agreement Selected Sample Clauses for Sale of S Corporation Stock to Non-Grantor Trust - 2

- Class B Retained Shares (as defined in the Primary Stock Purchase Agreement) at the Class B Finally Determined Per Share Amount (as defined herein) #as of the *TRANSACTION-DATE execution of this Agreement. The total of both such amounts shall be evidenced in a secured promissory note maturing on the Fourteenth (14th) anniversary date of the date hereof with interest at the applicable federal long-term rate with annual compounding (the "#DEFINED-TRUST-BUYER-FROM-PRIMARY-SALE Secondary Note"); and
- WHEREAS, the Parties' expressly intend under this Agreement, and, to the extent that they are parties to the Primary Stock Purchase Agreement, under the Primary Stock Purchase Agreement, for the Seller to sell to the Buyers, in the aggregate, all of the Class A Shares and Class B Shares owned by the Seller, all effective as of the date hereof, and to avoid any ambiguity as to the Seller's status as an Electing Small Business Trust and the date of the termination of said status;
- WHEREAS, pending determination of the Class A Finally Determined Per Share Amount and the Class B Finally Determined Per Share Amount, #the Parties shall treat for all purposes the ownership of the Class A Shares and Class B Shares owned by the Seller as if no sales were made under this Agreement;
- WHEREAS, as a result of the treatment described in the immediately preceding recital, for administrative convenience only, to determine voting rights and rights to dividends or other

Secondary Stock Sale Agreement Selected Sample Clauses for Sale of S Corporation Stock to Non-Grantor Trust - 3

- economic consequences pending any later adjustments as provided for herein, it shall be assumed that prior to the determination under the Primary Stock Purchase Agreement of the Class A Finally Determined Per Share Amount and the Class B Finally Determined Per Share Amount, no sales were consummated hereunder; provided that should Class A Shares or Class B Shares be sold pursuant to this Secondary Purchase Agreement, then adjustments shall be made to account for such fact as provided for below;
- WHEREAS, when the Class A Finally Determined Per Share Amount and the Class B Finally Determined Per Share Amount are determined pursuant to the Primary Stock Purchase Agreement, and all of the adjustments provided for hereinbelow are concluded, the actual number of Class A Shares purchased by the Buyers hereunder shall be the Actual Class A Retained Shares determined pursuant to the Primary Stock Purchase Agreement and the actual number of Class B Shares purchased by the Buyers hereunder shall be the Actual Class B Retained Shares determined pursuant to the Primary Stock Purchase Agreement (such Actual Class A Retained Shares and Actual Class B Retained Shares, collectively, the “Actual Retained Shares”);
- WHEREAS, [IF S CORP, MAKE SURE THIS IS IN BOTH PRIMARY AND SECONDARY AGREEMENTS] it is the express intent of the Parties that none of the arrangements herein or in the other transaction documents relating hereto be interpreted or applied in a manner that could jeopardize the Corporation’s status as an S corporation and, as result, the Parties hereto intend to grant to one of their advisors CPA, LLP, the full right, power and authority to make any equitable adjustments or modifications necessary to accomplish same and to fully indemnify CPA, LLP for any action or failure to act under this power;

Prioritizing Allocation Of GST Exemption On Gift Tax Returns For Multiple Trusts



Affirmation Allocation §2632(a)

- GST can be allocated:
  - Anytime prior to due of 706
  - Timely filed gift tax return

- Allocation must (i) clearly identify trust to which allocation is being made, (ii) disclose amount of GST exemption allocated to it and (iii) if allocation is late or if an inclusion other than zero is claimed, list the value of trust principal at time of allocation; allocation also should state inclusion ratio of trust after allocation. Treas. Reg. §26.2632-1(b)(2)(i).

Automatic Allocation to Direct Skips

- Automatic Allocation to Indirect Skips – §2632(c)
  - Transferor can elect in or out of automatic allocation of GST exemption for lifetime transfers (after 2000)
  - Election made on timely-filed gift tax return for year in which transfer was made
  - GST exemption automatically applied to future transfers to the trust
  - Can opt out for future transfers, if desired

9100 Relief

- Section 9100 relief permits extension of time to make certain elections late as if they were made timely.
- Under §2642(g)(1), applies to extensions of time to:
  - Make affirmative allocation of GST exemption for lifetime gifts or gifts at death
  - Make elections out of deemed allocations to direct skips
  - Make elections in and out of automatic allocations to indirect skips
- Benefit of 9100 relief: original gift value of transfer to trust is used in determining allocation of GST exemption instead of value of trust at time a late allocation would be made.
- In making determination, IRS considers all relevant circumstances including evidence of intent to be exempt from GST tax in trust instrument. §2642(g)(1)(B)

Planning Pointers

- Always make an election.
- Generally, opt in – if trust is intended to be GST exempt with an inclusion ratio of zero.
- Revise election if needed.
- At death, don't rely on automatic allocations. Consider an affirmative election (Schedule R Form 706)
- See next section regarding prioritizing.

Waterfall GST Language Might Be Used in Form 709

- GST allocations or prioritizations between various trusts of the taxpayer. When GST is allocated to two or more trusts, if the GST exemption can potentially be exhausted, e.g., as a result of a valuation adjustment on the transfers to one or more of the trusts. Consider attaching an affirmative statement of how GST will be allocated between the various trusts. Most GST allocations merely use a formula allocating the least amount of GST exemption to each trust necessary to make that trust have an inclusion ratio of zero. While that is conceptually correct, it might not suffice. What if the client made gift transfers to two different trusts of ½ of the exemption amount. If the IRS adjusts the valuation of that transferred property upward by say 20% both trusts will under the typical formula allocation have inclusion ratios of more than zero. That may not be an ideal result. A better result might be to provide that if there is inadequate GST allocation to make transfers to both trusts zero then one trust shall first be allocated the limited GST exemption in the smallest amount necessary for one of the trusts, which should be designated, to have a zero-inclusion ratio, and only thereafter allocate the remaining GST exemption to the second trust (which should be designated).

Waterfall GST Language Might Be Used in Form 709

- The point is it may well be better to have one trust that is fully GST exempt and another trust that is not, then to have two trusts with partial inclusion ratios.
- Suggested language may be as follows:
- In the event that the value of any assets transferred by the Taxpayer to the Trusts reported on Schedule A, Part 3 as referenced below is re-determined for federal gift tax purposes, the formula allocation of the Taxpayer's GST exemption should be allocated in the following order:
- The smallest amount of the Taxpayer's GST exemption shall be allocated to the value of the assets as finally determined for federal gift tax purposes to have been so transferred to the #Trust1-Name as may be necessary to produce an inclusion ratio for GST purposes, as defined in the Internal Revenue Code Section 2642(a), which is closest to, or if possible, equal to zero.
- To the extent that the Taxpayer has any GST exemption then remaining after the specific allocation of GST exemption as set forth in the preceding paragraph above, the Taxpayer directs that the smallest amount of the Taxpayer's GST exemption shall be allocated to the value of the assets as…

Waterfall GST Language Might Be Used in Form 709

- …finally determined for federal gift tax purposes to have been so transferred to the Trust2-Name as may be necessary to produce an inclusion ratio for GST purposes, as defined in the Internal Revenue Code Section 2642(a), which is closest to, or if possible, equal to zero.
- To the extent that the Taxpayer has any GST exemption remaining after the specific allocation of GST exemption as set forth in the preceding two paragraphs above, the Taxpayer directs that the smallest amount of the Taxpayer's GST exemption shall be allocated to the value of the assets as finally determined for federal gift tax purposes to have been so transferred to the Trust3-Name as may be necessary to produce an inclusion ratio for GST purposes, as defined in the Internal Revenue Code Section 2642(a), which is closest to, or if possible, equal to zero.
- [Add additional entries as needed to account for each GST allocation].

Can FLP/LLC Interests Avoid Estate Inclusion Under A Powell Challenge

Removing All Interests From the Client's Estate May not Suffice

FLP/LLC Interests Avoid Estate Inclusion Under Powell

- In the Powell case FLP assets were included in decedent's estate under Code Sec.2036(a)(2) even though the taxpayer only owned LP interests (i.e., the taxpayer did not own any GP interests that would have clearly provided him control). The decedent, the Court reasoned, retained right in conjunction with other person to designate who could enjoy the property or its income under Code Sec. 2036. Also, under Code Sec. 2038 the taxpayer/decedent had retained the power to alter, amend, revoke, or terminate the transfer. The court reasoned that the decedent as owner of 99% of the FLP interests "in conjunction with" all the other partners could dissolve the partnership at any time. Even though some argue that Powell was a bad fact case many practitioners are concerned to try to avoid its reach by having the decedent divested of any rights to control distributions from the entity, liquidation of the entity, or the right to change the provisions of the governing instrument that pertain to those two rights.
- Estate of Powell v. Commissioner, 148 T.C. No. 18 (May 18, 2017) June, 2017.

FLP/LLC Interests Avoid Estate Inclusion Under Powell

- There are various approaches commentators have suggested to negate a Powell argument. One approach is to create a special voting membership interest and have the taxpayer/transferor divest him or herself of all those interests.
- The goal of this approach is for the company to segregate specific powers and voting rights governing decisions as to distributions, dissolution and amending provisions governing those matters in its operating agreement in and as a voting membership interest as provided for in the operating agreement.

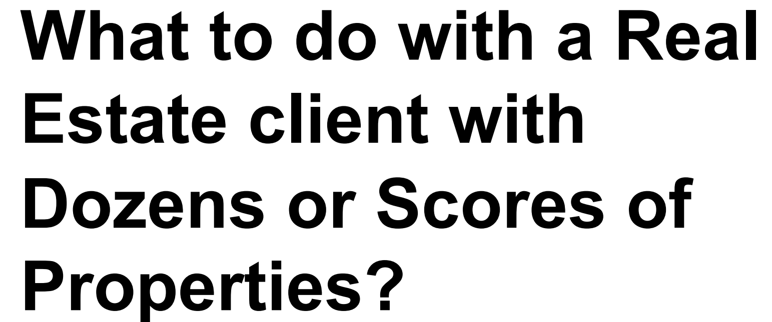
Sample Clauses

- The term “Voting Membership Interest” may refer to a .1% Voting Membership Interest which will have exclusive voting rights as a Member and shall be transferrable and identifiable by any Member who receives all or a portion thereof. Notwithstanding any provision herein to the contrary, any language under this Agreement referring to a vote of the Membership Interests shall refer to a majority vote, in interest, of the Voting Members. Any vote of the Voting Members shall be based upon a majority in interest of the Voting Membership Interests, unless otherwise specifically set forth in this Agreement.
- A Voting Member has the sole and exclusive right to determine if there should be distributions from the Company, a termination or liquidation of the Company, or a dissolution of the Company, or to modify the provisions of this Operating Agreement governing these matters.
- Only a Voting Member, shall have the ability to require or permit an amendment of this Operating Agreement as to provisions governing dissolution of the Company, distributions from the Company, or provisions of the Operating Agreement governing same.
- Notwithstanding any provision under this Operating Agreement to the contrary, for so long as a member of the Company is a Voting Member under this Operating Agreement, such member shall have the sole power, and voting rights to determine if when there should be distributions from the Company, a termination or liquidation of the Company, or a dissolution of the Company or amendments made to the Operating Agreement of the Company governing any of these rights.

Sample Clauses

- Notwithstanding any provision under this Agreement, in no event shall any Impermissible Person or any assignees thereof, have any right to own a Voting Membership Interest or to vote or participate in decision making with respect to when or whether there shall be any distributions from the Company, a termination or liquidation of the Company, a dissolution of the Company, or an amendment to the Operating Agreement of the Company. Further, no individual who is an Impermissible Person may own a Voting Membership Interest or act to vote or participate in decision making as described above, even if such individual would otherwise have the power to do so as Trustee of a Trust that such individual is serving under, until after the death of [name of transferor].

Master Governing Document For Client with Scores of Entities



Master Operating Agreement

- Some clients have a tremendous number of entities. For example, a real estate developer would be advised to set up a separate LLC for each deal/property. But that might result in dozens, even scores of entities. How can documentation be created for governing this many entities without the cost and complexity of a separate document for each LLC? An answer might be to create a single master or aggregate operating agreement for all entities and have each entity sign one agreement. That would greatly reduce the paperwork and costs of a transfer where you might need to only amend and restate one agreement for each phase of the transaction rather than scores of documents.

Master Operating Agreement Selected Provisions

- **WHEREAS,** the intent of this Operating Agreement is to provide a “master” or umbrella operating agreement which the real estate entities owned primarily by a member of the Client-Name family, and trusts for such family members, can be bound to simplify the administration of all such real property limited liability companies, provide uniformity of the governing provisions and documentation for such entities, and thereby reduce legal and administrative costs and complexity.
- **WHEREAS,** it is the express intent of each Party hereto that this Operating Agreement, in conjunction with any joinder or adoption agreement, be equivalent to a separate operating agreement signed by each individual Company, the members of that Company, and the Manager of each Company. By way of example and not limitation, each Party hereto covenants and agrees to execute any further documentation, such as a variation of this Operating Agreement reflecting only information pertinent to that particular Company, its members and the Manager and redacting any information pertinent to any other Company and their Managers.
- **WHEREAS**, any reference to a “Member” or “Membership Interest” or any other term relevant to any member, Company, etc. shall only refer to a Member or Membership Interest or any other such term in a particular Company and in no manner shall provide any Member or Membership Interest in any one Company any rights or obligations in any other Company.

Evaluate Options for Existing Credit Shelter (Bypass) Trusts

Many Might Warrant Decanting or Termination

Credit Shelter Trusts

- Credit shelter trusts are also sometimes called bypass trusts, since they bypass the surviving spouse's estate. Though your clients might still have them, they are in some instances no longer advantageous: They used to be more common when the estate tax exemptions were much lower and prior to portability, and thus the threat of paying higher estate taxes loomed larger. They were also more popular at a time when portability didn't exist (in other words, before widows could use their deceased spouses' estate tax exemption). The objective of the credit shelter trust back then was to let the surviving spouse benefit from assets when the first spouse died, but to keep those assets out of his or her estate.
- But the past goals of the trust are increasingly irrelevant. Now the federal estate tax exemptions is close to $13M, and $6-7M if the current allowance sunsets on schedule in 2026). Thus, many clients who still have credit shelter trusts don't really end up avoiding any estate taxes with them. Instead they have costs incurred every year to administer the trusts and to file the trust income tax returns—and all for assets that won't get a step-up in income tax basis when the surviving spouse dies. That could lead to a significant income tax cost.

Credit Shelter Trusts

- The solution may be to terminate such trusts entirely if your clients have them, and put all the assets back into the spouse's name. The result may be simpler, better tax results.
- However, you also have to make sure there are no liabilities (such as medical costs) that could dissipate those assets if the trust is terminated, and the assets are distributed to the surviving spouse. Review the trust to determine whether it can be terminated, to confirm that there are no legal reasons for keeping it, confirm other beneficiaries are agreeable and then to draft the documents to end the trust.

Reasons to Still Use Credit Shelter Trusts or a Variation

- While portability exists, portability is not for everyone.
- You have to file a 706 to get portability and there is an unlimited SOL when you file for portability.
- In the event of a blended family, a settlor may want to benefit children from a prior marriage through a credit shelter trust.
- Portability amount is not increased by inflation.
- Portability does not apply to the GST and state death taxes.

Creative use of a multipurpose ILIT

Practical and Cost-Effective Trust Plan for Moderate Wealth Client

Multi-Purpose Trusts

- Creative use of a multipurpose ILIT to accomplish a range of goals in a cost-effective manner for smaller clients.
- Clients might wish several of the following types of trusts:
  - Dynasty trust.
  - Children's trust.
  - Asset protection trust.
  - Life insurance trust.
  - Business trust to own closely held business interests.
- Often multiple trusts are created but that creates additional costs to draft the document as well as to administer the trust. With creative planning a single trust might accomplish all the above goals/types of trusts.

Every 1041 Job Should Evaluate Decanting

Evaluate Decanting Old Trusts

- Some trusts terminate at specified dates, and clients might now prefer a trust to last as long as possible. Why extend a trust? Things have changed. In the past, trusts often paid out assets to beneficiaries who had reached a certain age, say 30. But now donors have to contend with new problems. The divorce rate is 50%, and we live in a litigious society. It might be better to keep shielding the assets.
- One way you can do that is by merging old trust into a new one (decanting). The new trust can then be better crafted and serve the same beneficiaries for as long as state law permits. That protects the clients and their beneficiaries (no client wants their child's inheritance lost in a divorce settlement). Maybe the parents trust the child (or whoever else is the beneficiary) and are happy to give him or her control of the assets at age 30 (or any age). But they might still want those assets to be protected as they appreciate, something the long-term trust affords.

Decanting versus Other Strategies

- Many states allow for non-judicial settlement agreements and judicial modifications.
- Some trusts allow Trust Protectors or Special Trustees to make certain changes.
- Consider which strategy will be the best for a particular situation.
- Consider the possibility of moving a trust!

Plan only for Excess Capital

Plan only for Excess Capital

- How much of one's wealth can be transferred in an estate plan? Too often insufficient thought is given to this analysis. Many clients transfer too little fearing, without any quantitative forecasting, that they will have insufficient funds. Other clients might transfer too much wealth and thereby find themselves fiscally challenged in their later years. But there is another perspective on this. Transferring only assets above what you require to maintain your lifestyle, and corroborating that amount, may support a favorable outcome if your planning is challenged.
- In the recent Levine decision, the Court noted: "From the beginning, Larson [the independent trustee of the ILIT] and Levine's children made it clear to Swanson [the estate planning attorney] that Levine wanted enough money to maintain her lifestyle until her death. This meant that any estate planning needed to be done with Levine's excess capital—i.e., assets that she would not likely need during her lifetime." Estate of Marion Levine v. Commr,. 158 T.C. -- No. 2, February 28, 2022.

Plan only for Excess Capital

- Preserving adequate resources for the taxpayer engaging in planning is important to deflect a challenge of, for example, an implied agreement with the trustee of a trust, etc. Here, the taxpayers considered this important fact. In too many plans, clients do not have advisers prepare forecasts corroborating their financial comfort after proposed transfers are made. This concept is particularly important to consider as taxpayers may move large portions of their wealth to secure exemption before 2026. Have the wealth advisor **and insurance consultant** on the planning team create forecasts to demonstrate that only excess capital is used. Important, when that analysis is done it may not be necessary to achieve a 95% confidence of not running out of money by age 100. It might suffice to have an 80% confidence to age 90, or some other parameter, especially if the clients will have access to the funds in the trust in some manner, such as a SLAT.
- **Get an insurance analysis of how disability (if applicable), life (if feasible and cost effective) and long-term care coverages can fill financial gaps in the plan.** This will help support that only excess capital is being used, inform the client of the nature of the plan and inherent financial risks, and perhaps even help deflect a claim that a transfer was a fraudulent conveyance or subject to an implied agreement.

Formula Valuation Clauses in Estate Transfers Can Be Structured and Administered Better

Caution is in Order

Use an Economic Adjustment Mechanism

- All advisers should be actively involved in both the structuring and administration of such mechanisms.
- If the Greenbook is enacted the use of these techniques may have a short half-life. Consider incorporating Use an economic adjustment mechanism into the transfer documents. For example, taxpayer sells assets to a grantor trust (another technique that may have a short life-expectancy in light of the Greenbook) if there is a gift tax valuation adjustment some of the shares may remain with the taxpayer/seller and not be transferred to the trust if a Wandry mechanism is used. If a Petter or Christenson type mechanism is used, then the trust may have a lower than anticipated interest in the asset and a spillover trusts or receptacle may in fact hold more than what was anticipated. Not only do the asset interests (e.g., membership interests in an LLC that was sold to the grantor trust) have to be adjusted to be properly reflected as to who owns them.

Use an Economic Adjustment Mechanism

- Importantly, the economics that accrued during the period of time from the initial transfer (by gift or sale) to the trust, until the date that the gift tax valuation is finally determined, need to be adjusted. For example, if distributions were made to the grantor trust/buyer or donee during the intervening period, those distributions would belong to the grantor/transferor if a Wandry clause were used, or to a spillover receptacle (e.g., a charity or an incomplete gift trust) if a Petter or Christenson type mechanism were used. That needs to be addressed. See the discussion in Sorensen below.

Partial Excerpt Of A Sample Clause To Illustrate

- *"Should the Appraisal change any of the Estimated Membership Interests then the CPA for each Schedule A Entity shall provide a report to the Parties hereto (the "CPA Calculation Report") which shall determine the amount of distributions, and/or other economic benefits that inured to the Transferor or the Buyer as the case may be from the Closing through and including the Appraisal (including the arbitration provisions relating thereto as described above) on the change in the Estimated Membership Interests, and which adjustment amounts shall be due and payable to the Transferor (the "Gross Calculation Adjustment").*
- *Should a final determination be made that the Estimated Membership Interests (adjusted for the Appraisal, if applicable) exceed the Final Membership Interests for any Schedule A Entity, then the CPA for each Schedule A Entity shall provide a report to the Parties hereto (the "CPA Final Determination Report") which shall determine the amount of distributions, and/or other economic benefits that inured to the Transferor (and not the Buyer) from the Closing (or such later adjustment for the Appraisal) through and including the Determination Date on such excess, and which adjustment amounts shall be due and payable to the Transferor (the "Gross Final Determination Adjustment").*
- *The CPA Calculation Report and the CPA Final Determination Report are collectively referred to as the "CPA Report." The "Gross Calculation Adjustment" and the "Gross Final Determination Adjustment" are collectively referred to as the "Gross Adjustment".*
- *The CPA Report shall also determine the amount of interest due on the Gross Adjustment as calculated by the CPA, from the actual payment event(s) through and including the Determination Date and using the interest rate as stated in the Note (i.e., the stated rate, not a default rate) (the "Interest Adjustment")."*

Update Formula Data After Statute Runs

- Another often overlooked formality with formula defined value transfers is updating records when the gift tax statute of limitations has tolled. These transfers are techniques where you transfer by gift or sale a dollar value of interests (see lead article). When the gift tax statute of limitations runs the reporting of the asset should change. This should be 3 years after the filing of the gift tax return if adequate info was disclosed on the return. So, if you gifted or sold say $10 million of LLC interests the trust, your financial statements, tax returns all should show that the trust owns $10 million of LLC interests. Once the period for audit is over that reporting must change to show the now fixed percentage of interests in the LLC that the trust owns. It is important to show this respect for the formalities of the transaction if you want the IRS and creditors to be bound by the mechanism.

Update Formula Data After Statute Runs

- Consider the following items that might be adjusted:
- The trustee books and records must be changed. If they were properly handled initially, they indicated a dollar value of the interests not a fixed number of shares or percentage interest.
- Income tax reporting should change, e.g., Form K-1 should, after the tolling of the gift tax statute of limitations, to reflect the correct percentage interest in the entity.
- Entity records and governing instruments should be updated. For example, if shares in an S corporation were sold subject to a Wandry mechanism when the gift tax statute of limitations runs should reflect on its stock ledger the correct number of shares and no longer reflect the fixed dollar value. The shareholders' agreement should be amended and restated to correct the ownership interests of the trust and transferor involved. The transferor should no longer be indicated as owning a contingent interest.
- Personal and business financial statements should be updated to reflect the finalization of the determination of the equity interests owned.

Observe Formalities: Recent Cases Demonstrate a Theme to IRS Audit Challenges

The Message is Clear and Requires a Team

Introduction to Formalities

- Some of the comments following are based on a webinar presented with Paul Hood.
- Every practitioner knows that you must observe formalities of entities and trusts. Everyone knows that if a client is president of a corporation she should sign in that capacity when signing on behalf of the corporation. Similarly, it is common knowledge that if a taxpayer is a shareholder in an S corporation that taxpayer should be issued a Form K-1 covering the number of days shares were owned during the year. And so on. Yet, how often do clients give their advisers the latitude to guide them to observe formalities? Not often enough. In the context of complex estate plans, adhering to formalities, including the economic adjustment mechanism and updating reporting when the gift tax statute of limitations period ends, as discussed above, is even more important. A theme of several recent cases is that when taxpayers respect formalities, their transactions may succeed, and when they do not, their plans will likely fail. These cases are a good reminder of the importance of observing formalities.

Related Party Transactions Are Closely Looked At

- “Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception and should be subject to close scrutiny.” Kuney v. Frank, 308 F.2d 719, 721 (9th Cir. 1962).’ (quoting H.R. Rept. No. 82-586, at 33 (1951), 1951-2 C.B. 357, 381)).
- “A transaction between family members is * * * subjected to heightened scrutiny to ensure that it is not a sham or disguised gift.” Estate of Bongard v. Commissioner, 124 T.C. 95, 119 (2005).

Cases Remind us to Observe Form of Transactions

- There have been several recent important decisions out of the United States Tax Court, ***Levine Est. v. Comr.*, 158 T.C. No. 2 (February 28, 2022), a taxpayer victory in an intergenerational family split-dollar estate tax case**, and *Smaldino v. Comr.,* T.C. Memo. 2021-127 (November 10, 2021), a taxpayer loss in an indirect gift case. Most recently the Sorensen v. Commissioner, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022) highlighted the importance of proper documentation and implementation of planning.
- While both cases present a plethora of substantive law issues worthy of our discussion, today, we're going to focus instead on the rich lessons for estate planning professionals of all stripes.
- Understanding what was done right or wrong provides valuable guidance on how to better structure and implement estate plans.

Smaldino v. Comr., T.C. Memo. 2021-127 (November 10, 2021)

- From a planning perspective, the IRS and the Tax Court recast a gift by husband to wife and then almost immediately by wife to an irrevocable trust for the benefit of the husband's descendants (who were not descendants of the donor wife in their blended family) as a gift by the husband/father to a trust for the benefit of his descendants. The wife was viewed as a mere conduit for the husband's gift transfer.
- Mr. Smaldino "purportedly" transferred about 41% of LLC membership interests in a family real estate business to his wife on April 14, 2013. Mrs. Smaldino "purportedly" then gifted those same interests to a dynasty trust the very next day. The Tax Court had little difficulty recharacterizing the claimed gift Mr. Smaldino made to Mrs. Smaldino, followed by her gift to the dynasty trust, as if Mr. Smaldino himself had made the gift directly to the trust. Mrs. Smaldino held the interests possibly only for a day.
- She transferred the same exact interests she received from her husband as a gift to her, as her gift to the Dynasty Trust, and the family and their advisers skipped numerous steps that should have been followed to corroborate that they respected the transaction. Avoid circular transactions where identical assets, interests or values.

Smaldino v. Comr., T.C. Memo. 2021-127 (November 10, 2021)

- Issues with the above plan also include that Mrs. Smaldino only held the interests in the LLC for one day. But that one day ownership was not respected by the Smaldino’s. The transfers did not follow the requirements of the operating agreement. Adhering to the formalities of the operating agreement restrictions would not have taken much effort, Mr. Smaldino as trustee of the trust, and as manager of the LLC, could have easily given written consent for the admission of Mrs. Smaldino as a member, showing adherence to the formalities required by the operating agreement of the entity.

- Further disregard was evidenced in the tax reporting. On the Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., attached to the Form 1065, the LLC listed Mr. Smaldino as a 51% partner, and the dynasty trust as a 49% partner for the entire tax year. Mrs. Smaldino was not listed as a partner for any part of the tax year. Thus, the income tax returns did not reflect a partial year ownership (1 day) for Mrs. Smaldino, which was contradictory to the position the taxpayers’ tried to argue.

- The gift by Mr. Smaldino to Mrs. Smaldino didn’t have to be included on the gift tax return. IRC Sec. 6019(2). But should it have been notwithstanding IRC Sec. 6019(2)? Notwithstanding IRC Sec. 6019(2), practitioners might consider disclosing all spousal gifts on the Form 709.

Levine Est. v. Comr., 158 T.C. No. 2 (February 28, 2022)

- A recent Tax Court case decision provided a resounding victory (at least for now) to the taxpayer who had pursued what some might view as an aggressive **split-dollar life insurance plan** to minimize estate taxes. The following comments will not address the split-dollar issues the case is known for, but rather the general lessons that can be gleaned from the case about better planning that is more likely to succeed.
- The *Levine Est.* court noted "estate planners as skilled as the ones the family retained." The *Levine* Court seems impressed throughout the opinion with the professionalism of how matters were handled. The Court noted positively how the estate planner analyzed the pros, cons and implications of the planning for the client, even preparing a PowerPoint presentation to explain the plan to her. Perhaps practitioners should educate clients that preparing a memorandum explaining the transactions planned may not only help the client understand better but might help the transaction succeed.

Levine Est. v. Comr., 158 T.C. No. 2 (February 28, 2022)

- Fiduciary duty is an important factor in the Court's analysis in *Levine Est*., as it was to the United States Supreme Court in *Byrum v. U.S.*, 408 U.S. 125 (1972). The Insurance director/trustee (under the title of Investment Committee) had a fiduciary obligation to the beneficiaries to make reasonable decisions. Is this a *Byrum* type of argument? The Court noted above the independence of the person named (he was not family), and his business and financial acumen. The Court also noted positively the naming of an institutional trustee, South Dakota Trust Company as general trustee. Practitioners should inform clients that insist on naming family trustees, usually out of concern for paying trustee fees, that having truly independent trustees, and corporate trustees, may well help their plan succeed.

Sorensen v. Commissioner, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022)

- The donors relinquished dominion and control of all the shares in 2014 so that the gift of the full amount of shares, not the $5 million worth of shares contemplated under the Wandry fixed dollar transfer. Similar to the Smaldino case above, the taxpayers failed to respect the formalities of the transaction they created, so that the IRS and then the Court did not respect it either.
- The reporting by the entity did not comport with the purported defined value transfer. The company reported that each trust owned 9,385 shares on its stock ledgers and on income tax returns instead of the fixed dollar value that was intended to be transferred. The stock ledger and tax returns should have included an "asterisk" referencing an explanation of the intended transaction. Practitioners might provide clients, the entities and trustees, with recommended language to the effect that $5 million of shares were transferred.
- In Sorensen, the trusts received pro rata distributions based on the ownership of estimated number of 9,385 shares. Distributions should be based on the initially determined amount of shares, which could be adjusted to be based on finally determined gift tax values.

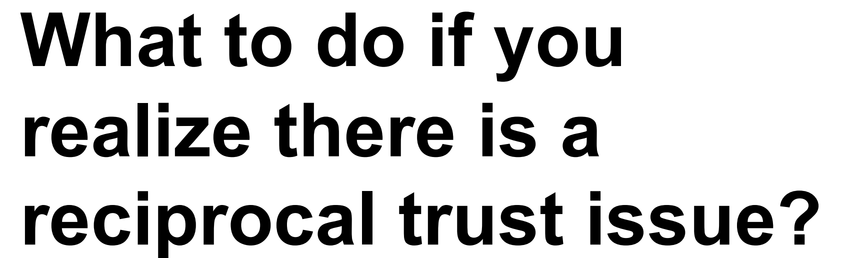
Sorensen v. Commissioner, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022)

- The transferors and their trusts would make appropriate adjustments between themselves if the shares were changed. Incorporate into the transfer documents an economic adjustment mechanism to assure that if there is a gift tax valuation adjustment the economics of the transaction are properly adjusted as between the parties and charge a CPA with this task. See the discussion above of an economic adjustment clause.
- In Sorensen, the IRS argued that the defined value mechanism should not be respected as there was no agreement with the recipient trust as to the adjustment for prior distributions or on the later sale of shares to acknowledge the supposed existence of a defined value mechanism. The trusts have agreed to transfer shares in accordance with the defined value formula, and should have countersigned the stock powers, which should have described the transfers as defined value formula transfers. The trusts should have countersigned the stock powers to specifically acknowledge the conditions under which they were receiving the stock transfers.

Sorensen v. Commissioner, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022)

- A preferable approach might be to not have the equity interests pass to the donee trust in the case of a gift (or purchasing trusts in the case of a note sale) but rather be held in escrow with an independent escrow agent pending resolution of the contingency of the gift tax value as finally determined. The use of an escrow arrangement was not suggested in the case and may exceed what commentators of the case have recommended, but it would introduce a higher level of respect for the transaction. So, practitioners should consider, especially in larger transactions, using an independent escrow agent to hold documents of title to assure adjustments are made to reflect gift tax value as finally determined.
- Be certain that every record of the transaction reports it in a manner consistent with the actual valuation adjustment mechanism used. Adhering to formalities in all transactions is vital to enhancing the likelihood of success.

Can You Fix a Bad SLAT?



Can You Fix a Bad SLAT?

- What might some of the considerations with questionable SLATs be?
- Analyze carefully the two trusts involved and all aspects of the plan to identify what differences may exist. There may be differences that can be identified that might suffice to argue that the trusts involved are not reciprocal. Remember that in the Levy case trusts were deemed non-reciprocal on the basis of a broad limited inter-vivos power of appointment in one trust but not the other. Estate of Levy v. Comm'r, TCM 1983-453. While some practitioners recommend not relying on Levy when planning SLATs (i.e., include more differences than just Levy) that may be an argument that the trusts are not reciprocal.
- Consider the implications if the reciprocal trust doctrine was asserted successfully by the IRS. The husband's trust created for wife would be deemed as if wife created it for herself and vice versa for the other trust.

Can You Fix a Bad SLAT?

- If the trusts are uncrossed, it would result in two self-settled trusts. If the trusts have situs in DAPT jurisdictions the fallback argument may be that each trust would then be a self-settled trust under state law.
- If the trusts are not in DAPT jurisdictions, perhaps they can be moved to such jurisdictions now.
- Perhaps steps that might be required under that new state DAPT law can be integrated into the plan. For example, having the settlor sign a solvency affidavit, decant the trust and add necessary or advisable statutory language, etc.
- If the value of the trust and client's estate is modest compared to the current high exemption, perhaps another approach illustrated below might be considered.

Can You Fix a Bad SLAT - Reporting

- Assume a new client comes to you who funded SLATs in the crush of 2020-2021 planning when everyone feared the tax laws would change drastically any day. You review the SLATs and determine that the trusts are so similar that you are concerned that the reciprocal trust doctrine might be a problem. What might be done? Assume further that the clients have used $5 million of each of their exemptions so that they have approximately $8 million remaining. The value of each SLAT has grown to $7.5 million.
- Consider decanting each SLAT into a new trust each of which is substantially more differentiated then the other. Report the decanting on a gift tax return as a non-gift transaction.
- Make a "protective" GST allocation indicating that while you believe the trusts were GST Trusts which received automatic allocation when the gifts were initially made in 2020 if those gifts are deemed incomplete by virtue of the reciprocal trust doctrine, then make an affirmative late allocation of GST today to assure that the trusts are GST exempt. That may assure that if the gifts were not complete when initially made, that they are made complete now with an appropriate GST allocation.

Risks to Consider in SPATs, DAPTs and Similar SLAT Techniques?

Risks to Consider in SPATs, DAPTs and Similar SLAT Techniques?

- Portions of the following discussion were adapted from a webinar with Edwin P. Morrow, III and Jonathan G. Blattmachr.
- Introduction
- Spousal lifetime access trusts ("SLATs") have become ubiquitous in estate planning. The key benefits are that, if successful, are removing assets from the taxpayer's gross estate and the reach of creditors, while providing one or more means to access the funds in that trust. While obvious, the more points of access, the greater the risk of estate inclusion or creditor access.

Beware of the Implied Agreement

- This can occur even if the settlor is never a beneficiary of the trust. Estate of McCabe v. United States, 475 F.2d 1142 (Fed. Cir. 1973) - Husband established trust with longtime friend and business associate as trustee. Income plus principal for illness or emergency to wife, remainder to children. 20 years later, wife sent trustee letters requesting distributions be made to her husband the grantor. Four payments were made to him before his death. Court found IRC 2036 retained interest even though he was never added as a beneficiary. This probably was sloppy administration of the trust as the husband had no right to distributions.
- "The facts of the instant case however show as clearly as in those cases a retained life interest. Decedent was not a detached settlor, and the trustee (to all intents the individual trustee was the sole trustee) did not act exclusively for the benefit of the ostensible beneficiary, Mrs. McCabe. The dealings among the three of them — decedent, trustee and wife — in my opinion raise an inference of a prearrangement that decedent should retain control **<u>for his benefit</u>** so long as he lived. In these dealings, Mrs. McCabe and the trustee recognized and surrendered to the decedent's interests, throughout." (Emphasis added.)

Access To SLATs and Issues That May Be A Concern - Loan

- Loan – the settlor might be able to receive a loan under general loan powers the trustee has. Alternatively, a provision may be added to the trust instrument to permit a person acting in a non-fiduciary capacity to loan the settlor trust funds without adequate security. That could characterize the trust as a grantor trust but also provides access. The issue with any loans is are they handled as real loans? Is there a written instrument signed by the borrower with arm's length terms? Is there a payment of interest? Is there an expectation of repayment of the loan? Do the parties involved record the transaction as a loan and treat it as such? Practitioners are well aware of how frequently clients fail to handle loan transactions properly. Failing to handle loans properly may be proffered as evidence of a retained interest or implied agreement.

Access To SLATs and Issues That May Be A Concern – Spousal Beneficiary

- Spousal beneficiary – the spouse of the settlor can be named a beneficairy of the trust. That is often presented as an argument that they settlor/spouse can indirectly benefit from the trust. There is certainly some law to support this. For example, the husband can live in a residence owned by a trust benefiting wife as a guest of the wife. Estate of Gutchess v. Comm., 46 T.C. 554 (1966), acq. 1967-1 C.B. 2. But how far can this concept be extended? If the trust distributes funds to wife that are used for expenses that are purely those of the husband, is that an issue? If the wife deposits the SLAT distribution into a joint checking account and husband pays all bills including his personal bills from that account, is that still a permissible indirect benefit? How many clients with SLATs close all joint accounts to avoid that issue?

Access To SLATs and Issues That May Be A Concern – Tax Reimbursement

- Tax reimbursement – the law appear to permit a settlor to be reimbursed by the trust for income taxes paid on trust income. But if that power is exercised regularly, does it create the optics of an implied agreement with the trustee? If the tax reimbursement is not supported by an analysis by a CPA of the tax amount to be reimbursed, will it be respected? Rev. Rul. 2004-64 concluded that grantor trust income tax reimbursement clauses do not cause a gift or § 2036 inclusion if they are discretionary, not mandatory or subject to any side agreement, and if they do not subject the trust to the grantor's creditors under state law. See more detailed discussion below.

Access To SLATs and Issues That May Be A Concern – Charitable distributions

- Charitable distributions – the trust can pay charitable donations that the settlor might have otherwise made. That may provide an indirect benefit as the settlor does not then have to pay those donations personally. If the settlor had a binding pledge to a charity that the trust paid that would seem to be clearly inappropriate. But between these two polar situations where on the continuum and donations be made without exceeding what is appropriate to cause estate inclusion.

Access To SLATs and Issues That May Be A Concern – Settlor Beneficiary

- Adding the Settlor as a Beneficiary – If the settlor is named a beneficiary and the trust has situs in a DAPT jurisdiction will the plan succeed? Perhaps. Consider, however the limited law on the respect to be afforded to DAPTs. Also, DAPT cases would be quite fact specific. Would a DAPT formed in AK by a NY domiciliary be respected? Perhaps, but how much capital is held in AK versus NY? What if the DAPT owns NY real estate? Will it suffice if that NY real estate is held in an LLC so it is an intangible asset? What if the trust protector were a NY resident? The potential points of contacts can range from none to substantial but where on that continuum would the scales tip to the level of constituting a problem causing the application of NY law and the inclusion in the client's estate? The respect and care in administering the DAPT would perhaps weigh in on this determination as well. Would the result be different if the settlor were not named a beneficiary now but a person acting in a non-fiduciary capacity could add the settlor as a beneficiary? Would the result be different if the powerholder could add any descendants of the settlor's maternal grandmother thereby obfuscating somewhat the ability to add just the settlor? Does that matter? What if the settlor's rights to be a beneficiary had a delayed fuse so that she could only be added after ten years from funding of the trust? Would the result change if the settlor could only be added if not married?

Access To SLATs and Issues That May Be A Concern – Business Holdings

- Business holdings – there is little discussion of business holdings in a SLAT. Say wife created a SLAT for husband and a key SLAT asset was a family business interest. What if wife drew a salary from that business asset? If the compensation package were arm's length would that avoid any issue? What if it were not? What if the family business made the wife loans? What if the wife, as so many clients do, had potentially personal expenses paid for by the business (personal estate planning legal fees, travel, a car that was not purely used for business, etc.)? What combination of factors might create an issue?

What Might a Creditor Reach?

- The Uniform Trust Code (UTC) Sec. 505(a)(2) provides: "With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit." This does not limit the reach to what is "distributed by the trustee." Thus, a creditor might arguably reach whatever a distribution advisor, trust protector or powerholder of a lifetime limited power of appointment (e.g., a SPAT) may cause distribution of trust assets to the settlor, unless state law specifically provides otherwise. But even in such instances, that does not assure that if the trust crosses state lines as is often the case (e.g. a CA resident creates a trust in SD with a NY trust protector), which state law will govern?
- The common law has always had some rule against self-settled trusts. The Restatement of Trusts (3d Sec. 58(2), 2d Sec. 156), however, focuses only on the power of the trustee, permitting creditors of the settlor to access the maximum amount that can be distributed by a trustee for the settlor's benefit as beneficiary. Some might reason that this does not cover a trust wherein a lifetime limited power of appointment includes the settlor as a mere potential appointee.

What Might a Creditor Reach?

- Is there a substantive difference when a non-trustee is given such a power? Might it make a difference if the powerholder is acting in a fiduciary capacity? Might the common law rule against self-settled trusts be triggered because the trustee may be viewed as holding the power, only with the prerequisite of another person (powerholder, protector, etc.) directing the distribution?
- Statutes in some states have modified the UTC provision to clarify that the self-settled trust rule does not apply when someone other than a trustee holds the power.
- Practitioners need to be cautions in permitting various powers unless the trust has situs in a DAPT jurisdiction, or a state where such a power does not create a self-settled trust issue. Otherwise, the power to distribute funds to the settlor, may cause the SLAT to be accessible to creditors, and thus an incomplete gift, or a retained interest included in the settlor's estate.

Tax Reimbursement Clauses

No Reimbursement Clause

- What if your grantor trust does not have a tax reimbursement clause? If you have an irrevocable grantor trust that does not have a tax reimbursement clause, and you've grown tired of paying income taxes on trust income, all may not be lost. It may be feasible according to some pundits to decant (merge) the trust into a new trust and add a tax reimbursement clause. No doubt many would say that is just not possible as it would be akin to adding a new beneficiary. But there may be a way. Another option might be to have a powerholder exercise a power of appointment appointing the existing trust to a new trust that contains a tax reimbursement provision. Say you created an irrevocable grantor trust without a tax reimbursement clause and now want one. Say in the trust agreement you gave a person (the powerholder) the right (power) to pour (appoint) the existing trust into any new trust that benefits anyone other than her creditors, her estate or herself. She might be able to exercise the power of appointment and direct that the current trust be poured into a new trust that is identical to the current trust but which also magically has a tax reimbursement clause. Bango presto your problem solved!
- Another approach might be to turn off grantor trust status. If the trust is no longer a grantor trust then you don't have to pay the income tax on trust income. Problem solved.

Should Your Tax Reimbursement Clause Be Used?

- The bottom line will depend on your current and future circumstances. Reimbursing you for paying income taxes on trust income may be a lousy tax result as it defeats the point of your having created the trust plan in the first place. So, perhaps the general rule is to avoid having a tax reimbursement clause triggered even if you have one in your trust. But if you really must use the tax reimbursement clause really evaluate that first and use as infrequently and to the least degree possible.

How To Do Tax Reimbursement Right

- There are lots of requirements or suggestions on how to have tax reimbursement clauses used in a manner that might avoid causing the entire trust to be included back in your estate or enabling your creditors to reach the trust. See Revenue Ruling 2004-64, issued July 6, 2004 (2004-27 IRB 7). The pundits that suggest not using tax reimbursement clauses might be concerned about the fact that taxpayers often trip up over one or more of these rules or recommendations. Perhaps those saying that tax reimbursement clauses should always be included in trusts presume that folks will handle a tax reimbursement mechanism properly.
- It is essential that if a tax reimbursement clause is included in a trust that the trustee not be mandated by the trust to reimburse the settlor for taxes paid on trust income. The action of reimbursing must be discretionary in the trustee.
- State law cannot enable a creditor of the settlor to reach trust assets as a result of the reimbursement. While many, perhaps all, states have enacted legislation permitting reimbursement without subject trust assets to the settlor’s creditor’s claims, you should confirm that before setting up such a trust (or set up the trust in a state that has favorable law on this point).

How To Do Tax Reimbursement Right

- When selecting the trustee of a trust consider who will be the trustee if a tax reimbursement is going to be acted upon. If Uncle Joe is named as trustee, perhaps he should be replaced by an independent person, and ideally a professional trustee, before a tax reimbursement is made. Perhaps using a corporate trustee is even safer.
- There should never be a pattern of a tax reimbursement being made. If a tax reimbursement is made on a regular or periodic basis that may look as if there was an implied agreement between the settlor and the trustee to fund tax reimbursements. That could be problematic. This suggestion is also consistent with the suggestion earlier that each exercise of a tax reimbursement mechanism reduces the assets removed from the settlor's estate which may be contrary to the intent for the trust plan.

Charitable Planning

What can you Afford To Donate

- How much can you give to charity? The answer is often more than you might have thought. Some donors worry whether they will run out of money if they donate too much each year. Fears of financial insecurity are often an impediment to making larger donations. Many prospective donors, especially those living with a health challenge such as multiple sclerosis, are concerned about maintaining adequate assets to deal with future financial uncertainties. Making bequests or gifts of retirement assets on death assures resource are available during your lifetime because testamentary gifts are made in the future on your death. But if access to funds for the future is a concern, there is another way to get financial comfort that may permit accelerating some of those gifts now.
- Many people who value the wonderful work their favorite charity does but are worried about making large donations today that may create financial uncertainty in future years. But there is a way many people can get comfortable making larger gifts today, and thereby accelerate the great work your favorite charitable cause does. You can use the approach recommended to determine how much you can donate or gift (e.g. to charities or your children or other donees) the maximum you can right now. Start with a discussion with your wealth adviser (or use online resources) and determine a reasonable target that you want maintain for your financial security.

What can you Afford To Donate

- For example, you might wish to have an 85% likelihood of not running out of money by age 95. Some people use 100, others much lower ages. A lower age (e.g. 85) might be worrisome in light of increasing longevity, unless there is a specific known medical reason for doing so. Also, determine a confidence level that you would like to have of not running out of money by that age. For example, you might feel that an 85% level is a reasonably secure target. Some people might want a higher figure, but if you review the analysis regularly 85% or perhaps a lower figure might be adequate. Remember, if you review the analysis periodically you can always adjust in the future if you get off the financial track.

- With your target set, you can have your wealth adviser **and insurance consultant** forecast future financial results through age 95 (or whatever age you've selected). Next, your wealth adviser (or online tools) can adjust your budget numbers to determine what is the most money you can give away now, every year, in additional gifts (i.e., what was not reflected in your budget) to children and charities without pushing you below your financial goal of maintaining an 85% likelihood of not running out of money by age 95 (or whatever other targets you've settled on). **Consider how long-term care coverage, etc. may impact this**. That provides you with an estimated amount that you can gift each year (to be adjusted as you periodically revisit the numbers) without undermining your financial security. If you haven't gone through that exercise, it is well worthwhile.

Documentation Counts

- The tax laws require that a taxpayer to get a contemporaneous written acknowledgment from the donee charity for gifts of $250+. This must describe the amount of cash and give a description of noncash property, confirm whether the charity provided any goods or services to the donor (and if so, provide an estimate of the value of them). Code Section 170(f)(8). The IRS and Courts have gotten tough on this so that anyone donating should really be certain to adhere to all the requirements of the law if they want to protect their deduction.

- In a recent case, the Court affirmed a decision denying the taxpayer a charitable contribution deduction for an airplane because the taxpayer failed to attach a contemporaneous written acknowledgment from the charity to the income tax return. Izen v. Commissioner, 5th Cir, Docket No 21-60679. Foot faults do matter.

Documentation Counts

- In another case the court denied a taxpayer a charitable contribution deduction because the taxpayer also did not have a sufficient contemporaneous written record. The Taxpayer contributed a large number of artifacts to a charity using a gift document to transfer ownership. That gift document indicated that the contribution was unconditional and irrevocable (important to assure that the donor parted with all ownership interests in the property) unless the gift agreement provided otherwise. So, the gift agreement was critical to the determination that the donation was made, but it wasn't attached to the donor's income tax return. The IRS challenged the donation as not meeting the requirements and the court agreed. Without the gift agreement it could not be corroborated that the charity did not provide goods or services that would offset the donation. Martha L. Albrecht v. Commissioner, TC Memo 2022-53.

Qualified Charitable Distributions (QCDs)

- Secure 2.0 Act of 2022 became law on December 29, 2022, as part of the Consolidated Appropriations Act, 2023. One provision, however, does the opposite of encouraging saving for retirement, it tries to encourage giving IRA accounts away. These are changes to the qualified charitable distribution ("QCD") provisions (IRC Section 408(d)(8)) that encourage QCDs from IRAs to certain charities.

- Someone over age 70 ½ to make distributions from an IRA directly to qualifying charities. This threshold has not increased to age 72, nor age 73 or 75 as other RMD provisions have. Qualifying sources include inherited IRAs, but does not include a 401(k), 403(b), 457 or other similar accounts. Distributions to private operating foundations are acceptable, but not distributions to donor advised funds (DAF), supporting organizations or other private foundations. Distributions can count towards someone's required minimum distribution (RMD) as well (if they are old enough to have one).

Qualified Charitable Distributions (QCDs)

- While a donor does not get a charitable income tax deduction, a QCD is not included in adjusted gross income (AGI), which is often better for both state and federal income tax purposes.
- You can use a QCD to fund a charitable gift annuity (CGA) with the taxpayer (and/or spouse) as a recipient, with a one-time election of up to $50,000. But you probably can just buy a commercial annuity with an insurance company and get a better deal financially.
- Enabling QCDs to fund a charitable remainder trust (these being limited to a one-time election capped at $50,000, adjusted for inflation).
- The current limit of $100,000 per year will be indexed for inflation (rounded to nearest thousand) starting next year. For example, if there is an inflation adjustment of 4.8% for next year, the limit may be $105,000 in 2024.

Crypto Donations

- If Taxpayer A donates cryptocurrency for which a charitable contribution deduction of more than $5,000 is claimed, a qualified appraisal is required under section 170(f)(11)(C) to qualify for a deduction under section 170(a).
- A qualified appraisal is not required for donations of certain readily valued property specifically set forth in the Code and regulations, namely: cash, stock in trade, inventory, property primarily held for sale to customers in the ordinary course of business, publicly traded securities, intellectual property, and certain vehicles. See section 170(f)(11)(A)(ii)(I); Treas. Reg. section 1.170A-16(d)(2)(i). Cryptocurrency is none of the items listed in section 165(g)(2), and therefore does not satisfy the definition of a security in section 165(g)(2).
- Chief Counsel Memorandum Number: 202302012 Release Date: 1/13/2023.

Kalikow Case

Taxes and Family Dysfunction

Kalikow Case - Tax Considerations

- A recent Tax Court ruling reaffirms estate inclusion rules governing qualified terminable interest property (QTIP) trusts and the requirements for valuation of QTIP assets and determination of expenses. It also presents yet another lesson in how estate plans and family challenges can pose difficulties for all.
- In Estate of Kalikow v. Commissioner, T.C. Memo. 2023-21, the court considered the issue of deducting administrative fees from an estate to reduce estate tax due and discussed Sec. 2053.
- Husband died, and some years later his wife died. Husband's will created a QTIP for the surviving wife that included a requirement to pay the surviving wife all income. QTIP status was elected on his estate tax return under Sec. 2056(b)(7). Most of the assets in the trusts were interests in a family limited partnership (FLP) that owned rental real estate. Wife was entitled to income distributions from the trust for life, and on her death, the assets remaining in the QTIP were to be divided and paid to trusts for each of the two children. It was asserted that wife was underpaid income to the extent of almost $17 million.

Kalikow Case - Tax Considerations

- Litigation followed, and a settlement was reached in which the QTIP agreed to pay the wife’s estate about $6.5 million of undistributed income and about $2.7 million in fees. The two remaining issues were: (1) whether the value of the trust assets included in the gross estate pursuant IRC Section 2044 should be reduced by the agreed-on undistributed income amount, and (2) whether the estate is entitled to deduct any part of the agreed-on settlement payment as administration expenses pursuant to Section 2053.
- The court determined that the QTIP's settlement payment didn’t support a deduction for administrative expenses by the estate under Sec. 2053. In calculating the value of Pearl’s gross estate, the value of the QTIP couldn’t be reduced by the settlement. The fair market value of the QTIP assets had to be included in Pearl’s gross estate at the time of her death under Section 2044. The court held that there was no basis for the trust’s liability to affect the date-of-death value of the FLP interests.
- There was also a valuation dispute concerning the value of the FLP interests. The estate reported the 98.5% of FLP interests value at about $42 million, and the IRS argued it was worth about $105 million. They settled on about $54 million.

Kalikow Case – Family Considerations

- The QTIP established on Husband's death left assets, following the death of his surviving wife, in further trust to the two children, a son and a daughter. This appears to have been a nuclear family. However, the wife's will bequeathed the residue of her estate to charity, not to her children. This difference in beneficiaries becomes significant in the context of the litigation. The co-trustees of the trust were a son, the surviving wife, and an independent individual (an accountant) and after the wife's death, the daughter was added as an additional co-trustee. However, the children weren't executors of their mother's estate. Were the children estranged from their mother based on the dispositive scheme she had in her will?
- More than three years after the wife's death, one of her grandchildren petitioned the court to compel the QTIP trustees to render an account of the trust. The son and the independent co-trustee each filed competing accounts of the QTIP trust. This might suggest that the litigation was quite contentious even apart from possible issues as between the wife/mother and her children.

Kalikow Case – Family Considerations

- Consider that wife's estate plan created a reason for the children and estate to fight. The family, estate and trust endured 10-years of litigation as well as very substantial legal fees and assuredly caused incredible stress for everyone involved. The tax issues the family lost might pale in comparison to the legal costs incurred and the personal damage to the family.

Kalikow Case – Fiduciary Considerations

- The accountant was both a co-trustee on the QTIP trust and executor of the wife's estate, and his accounting firm received substantial fees for services. The accountant in his role as executor argued for positions to increase the size of the estate. That position would have increased the bequests to charity under the wife's will but reduced what the children received under the QTIP following her death. Were these overlaps in fiduciaries and professionals beneficial to the family?
- Might having introduced other advisors into the mix, or a professional or corporate fiduciary, mitigated some of the antagonism? Was there a wealth adviser, estate planning attorney, **insurance consultant** on the team? Might it have been possible to have taken steps to address, and perhaps mollify, some of the inherent conflict between wife's dispositive scheme and the very different plan under the QTIP?
- Might provisions incorporated into the FLP governing objective distribution standards have had a positive impact?

Valuation Cases

The IRS Is Focusing on Valuation Issues

CCA 202152018 Release Date: 12/30/2021

- Taxpayer valued an asset gifted based on old appraisal that was done before 5 offers to buy the company were received. The IRS not only nixed the valuation but said that it would not respect the valuation adjustment mechanism permitted to the GRAT, the gift was made to. CCA 202152018 Release Date: 12/30/2021.
- The GRAT itself seemed to be properly structured, but the appraisal was 7 months old. How bad is 7 months? Given that between the date of the appraisal and the funding of the GRAT the company received many offers to purchase it, key facts were apparently intentionally ignored by the taxpayer. The CEO/Taxpayer knew at the time the company was being shopped, something the appraiser did not know. The appraisal was also prepared for Section 409A purposes.
- The IRS argued that the retained interest in the GRAT was not a qualified annuity interest under § 2702 of the Code because the Donor used an outdated appraisal that did not take into account all the facts and circumstances of a pending merger.

CCA 202152018 Release Date: 12/30/2021

- "…. intentionally basing the fixed amount required by § 2702(b)(1) and § 25.2702-3(b)(1)(i) on an undervalued appraisal causes the retained interest to fail to function exclusively as a qualified interest from the creation of the trust. The trustee's failure to satisfy the "fixed amount" requirement under § 2702 and § 25.2702-3(b)(1)(ii)(B) is an operational failure because the trustee paid an amount that had no relation to the initial fair market value of the property transferred to the trust; instead, the amount was based on an outdated and misleading appraisal of Company, at a time when Company had received offers in the multi-billion-dollar range." It is not clear that this is a proper reading of the Regulations, but it certainly is cause for pause.
- GRATs are the "original" formula clause. The Regs contain an adjustment mechanism if the annuity payment is specified as a percentage of the value of the asset not a fixed dollar amount.
- Under Atkinson - Atkinson v. Commissioner, 115 T.C. 26 (2000), aff'd, 309 F.3d 1290 (11th Cir. 2002) a CRT was challenged for not complying with the terms of the Regs. GRAT Regs are similar to CRT Regs. Based on an application of Atkinson, the GRAT failed. The GRAT annuity treated as not being a qualified interest under Section 2702 because of undervalued appraisal (by analogy to Atkinson).

CCA 202152018 Release Date: 12/30/2021

- Some have read the CCA as suggesting that a valuation that is 7 months old is not acceptable. That may be, but the real issue in the CCA was that the taxpayer was playing games. The taxpayer knew that there was a significant development subsequent to the appraisal and he hid that. So, while practitioners might question the validity of a stale appraisal, the bigger issue is proper disclosure.
- Be sure if you have an asset appraised disclose all relevant facts to the appraiser and perhaps the appraiser should disclose those facts in its report. Even if the harsh result of this CCA is overturned, it is a clear warning from the IRS not to use egregious knowingly wrong valuations and rely on a valuation adjustment mechanism to keep you out of tax hot water if you're audited. Should practitioners get a rep or comfort letter from the client as to no material change from date of appraisal to date of transfer?
- Another consideration is should GRATs continue to be used as receptacles in Petter or Christenson type spillover adjustment mechanisms?
- Perhaps a belt and suspenders should be used on funding GRATs with a defined value mechanism on the assets gifted to the GRAT so that the adjustment occurs outside the GRAT mechanism. Another consideration for planners is whether GRATs should continued to be used in valuation adjustment spillover mechanisms as a receptacle. Might a DAF or incomplete gift trust now be better options than a GRAT?

Daniel R. Baty v. Comm'r, Docket No. 12216-21

- Taxpayer was a key executive who knew the public company had offers to merge. He disregarded those circumstances and valued the stock at the mean between the high and low value for the day which is how the tax Regulations say stock should be valued. The executive believed that his gift of publicly traded stock was required to be valued following the average high/low value rule set out in Treas. Reg. §25.2512-2(b)(1). The IRS objected but it appears that the case was settled.
- The IRS seems wrong on this one but notice the pattern of valuation challenges.

Dematteo v. Comm'r, Tax Ct. Dkt. No. 3634-21 (July 21, 2022)

- Taxpayers made a gift of life insurance and had a well-known appraisal firm value the policies which was done based on the secondary market for life insurance. But the tax Regs require use of the interpolated terminal reserve value plus unexpired premiums. Reg. § 25.2512-6(a). This is not a simple one. The Regs are old, don't contemplate the policy type involved. But the policy involved was also outside the parameters of the typically policies sold in the secondary market. Was that expressly addressed in the appraisal?
- Insurance valuations should probably include a Form 712 and an analysis of those numbers by an insurance expert.

Powers of Attorney

Used for Almost All Clients But no so Simple

Powers of attorney Tips - Gifts

- Gift provisions require careful attention, especially with the constantly changing tax environment. Should the agent be authorized to make gifts? This is considered a "hot" power and will not generally be inferred and must be expressly provided for in the document. Also, what was appropriate for a gift provision when the document was signed may not be appropriate now. For example, if the estate tax exemption was only $1 million years ago when the power was signed and in 2023 it is close to $13 million perhaps gift provisions are no longer needed or appropriate.
- In contrast, if the estate is modest permitting an agent to gift all of assets away may be useful for Medicaid planning. Is there one (or more) people the principle provides financial assistance to? If so a gift provision permitting gifts to them may be essential if that help is to continue if the principle is incapacitated. Should the agent be permitted to make large gifts to use up any remaining estate tax exemption? That might make sense to provide flexibility for estate tax planning before the exemption is cut in half in 2026 but that could be an authorization to move almost $13 million in assets! So, the decision is not standard and must be made to provide appropriate flexibility and appropriate safeguards.

Powers of attorney Tips - Coordination

- Coordination of gift and other rights under the durable power and other documents can be an issue. If there is also a revocable trust has the planning and documentation of your revocable trust and power of attorney been coordinated? Did someone coordinate the person named as a designated representative on long term care coverage, the emergency contact given to a broker, the person authorized to assist with Social Security, etc. with the agent named in the power of attorney? What about people named as agents on bank or brokerage account forms?

Powers of attorney Tips – Retirement Assets and Life Insurance

- Retirement assets and life insurance: How broad is the authorization given the agent to change beneficiary designations on retirement assets, **life insurance** and other assets? Is there a potential conflict between the agent named and other heirs? How broad or limited should that authority be? Have circumstances changed since the power document was signed? With many significant changes to the tax rules affecting retirement plans in recent years (Secure Act, and various regulations interpreting it) it might be important to give an agent wide flexibility to update beneficiary designations. But the tricky part is when that authorization is too broad it might give an agent who has ulterior motives an opportunity for nefarious acts. Where to strike the balance is not simple.

Powers of attorney Tips – Business or Professional Practice

- Businesses and professional practices may require special consideration. It may be advisable to have a separate power of attorney for certain business matters. Business planning and documents (shareholder agreements, operating agreements, partnership agreements, etc.) need to be coordinated with the provisions and agents in a power of attorney to address business matters. It might not matter who is named as agent or what powers you give them as the documents governing the business may control who can act for you if you are incapacitated. When have those provisions last been reviewed? If you operate a solo professional practice the professional ethics may require that you have a separate practice power naming an appropriate licensed professional to act in the event you cannot. You might prohibit the agent under your general power from exercising authority over professional practice matters.

Planning for Aging and Infirm Clients

Practical Guidance and Checks and Balances Should be Part of Planning

Romance Scams on the Rise

- Financial scams, including elder abuse and identity theft continue to grow. Americans lost a record $1.3 billion to romance scams in 2022, up 138% from 2021. These scams are sometimes based on cons faking someone being sick, hurt or in jail. Other cons work on investment scams, such as convincing the target that they can be helped to get better investment returns.
- Part of estate and financial planning for aging or infirm clients is to consolidate accounts and reputable institutions or advisers, have period (at least annual) review meetings, and encourage clients to communicate if anything questionable arises. Having a co-trustee on a revocable trust, hiring a CPA as a monitor or having a CPA firm pay bills and create monthly statements, may all help avoid these issues.

Annual Gifts

Do annual gifts make sense anymore?

1. While classic estate planning advice is to consider annual exclusion gifting, for many it may not make sense. The exclusion amount is $17,000 per person per year tax free for 2023. In addition, a donor can pay donee's health and education expenses if paid directly to the provider. It is also permitted to accelerate gifts by making 5-years worth of 529 gifts.
2. Do annual exclusion gifts really make sense for most taxpayers given the high exemption? Might it be better to make one larger gift and forgo future annual gifts? Perhaps taxpayers should revisit whether or not to continue annual gifts to trusts as for many it may not be optimal.
3. If the Greenbook has even a modest likelihood of passage, perhaps maximizing annual gifts and exemption gifts now, before a possible restriction on the annual gift rules is enacted, may be prudent.
4. **Consider the impact of the Green Book $50,000 cap on total annual gifts to robust ILIT plans**.

Conclusion and Additional Information

Plan Carefully

Conclusion

- There are always new developments, and it seems new tax legislation on the horizon with no certainty as to what may pass.
- Practitioners should rethink planning from a defensive and flexible lens.
- Caution clients about known risks and that there are always unknown risks.
- Don’t confine how you structure a plan to only existing case law. There are always lags in law and perhaps planning more proactively and more carefully might be prudent.

Additional information

- Martin M. Shenkman
  shenkman@shenkmanlaw.com

A KEY ESTATE PLANNING GUIDE

Law Easy

ChronicIllnessPlanning.org