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COLLABORATION

Summary: Collaboration of your advisers is vital. Collaboration is when your advisers play together like an orchestra, so you can enjoy the music of planning success. Legal, tax, estate and other facets of planning are each so volatile and complex that no adviser can optimally help you without coordinating with your other advisers. So, if collaboration is the hot fudge on the top of your low-cal frozen yogurt sundae why don't more advisers get it?

■ Why collaboration is so vital: If your estate planning attorney crafts irrevocable trusts to protect assets and save taxes (estate, state income, etc.) the determination of which assets are held in those trusts will have a significant impact on the net of tax overall results. ► If these assets are largely marketable securities that is a decision that needs to be made primarily (never entirely) by your wealth adviser. No matter how good looking your estate planning attorney is, he or she is unlikely to have the investment expertise to make those decisions. Your wealth manager must be involved for your estate plan to shine. ► The decision should "not entirely" be made by your wealth manger either. Your wealth adviser must understand the nuances of the trusts to optimize planning. The mere fact that your wealth manager's firm has expensive wood paneling in their conference rooms doesn't assure they have the expertise to understand sophisticated estate planning (if there is a rich green carpet with the paneling it might). Some do, some don't. ► Some wealth managers have legions of estate planning attorneys that rival many major law firms. Others might have a so-so attorney on staff that can be a helpful part of your planning team, but who does not have the expertise to understand sophisticated planning. Best generic advice is protect yourself by having both your attorney and wealth manager collaborate. ► Your CPA needs to be involved to address state income tax planning, coordinating grantor trust gain/loss harvesting with your personal tax status, etc. You should also have your CPA vet the financial modeling that should precede the investment and planning decisions. ► If your estate is quite large, and/or your planning complex, you need a team not a hot-shot, lone wolf, non-collaborator. High end estate planning is as risky, uncertain and exotic as a beer at The Mos Eisley cantina (if you don't know this Star War's watering hole Go directly to Jail. Do not pass Go. Do not collect $200). ► When you're out there on the edge of the estate planning galaxy you want collaboration because, despite what many planning gurus assure you, there are no guarantees. How much risk does a note sale transaction entail? What type of receptacle should catch excess value under a defined value clause? Some like a zeroed out GRAT, others swear an incomplete gift trust is the cat's meow. If you're the client you want the Brainiac's from your law firm, CPA firm and wealth manager putting their heads together on these issues. ► Sophisticated planning often is a multi-disciplinary effort. Which state should a trust be taxed in? Which assets should be held in which trust? What powers should a trustee or trust protector be given? These and other questions are often best answered with the combined insight of the attorney, trust officer, wealth manager and so forth. ► Many clients share different information with various advisers. There may be a comfort level or "personality fit" with one adviser so the client opens up more. Some might feel more comfortable chatting with a wealth manager who does not bill for her time, then having a fuzzy conversation with an adviser who has a clock ticking. Advisers, no matter how objective, interpret client comments through their own lens. Collaboration enhances the quality of information every adviser has.

■ Who's the Team: While an estate planning attorney, CPA and wealth manager are vital components to most teams, the composition of your team will vary over time as your needs and circumstances change. ► If you have busi-

(Continued on page 2)

CHECKLIST: GUMBY TRUST

Summary: Now you see it, now you don't! One never knows what the tax magicians in Washington might do. And whatever the current magicians pull out of their legislative hats, the next act of magicians might swap hats and pull out different rabbits. The only certainty in the tax laws has been and is likely to remain, uncertainty. So, plan now. Like the Nike estate planner says, "Just Do It!" But do it with flexibility so your irrevocable trusts can have a better shot at adjusting to future circumstances.

√ Asset Protection. Continue to use limited liability companies ("LLCs") to hold assets, e.g. any real estate property or business venture generally should be held in a separate LLC. Set up irrevocable trusts (or use existing trusts) and transfer assets to them to use up your current estate tax exemption. For larger estates, sales and other techniques can be used to shift value into protective trust structures. If there are existing/potential future claims you may not be able to transfer assets without it being viewed as hindering, delaying or defrauding the claimant (a fraudulent conveyance). The time to plan is when you don't need to plan. So regardless of the status of the gift, estate or GST taxes, planning now is better than waiting.

√ Flexibility. Gumby-like ir-

(Continued on page 3)

…COLLABORATION

(Continued from page 1)

ness/real estate interests you must have corporate/real estate counsel on the team. You shouldn't transfer valuable LLC or S corporation interests to a trust without their input. ►A common trust structure is a spousal lifetime access trust. Husband sets up a trust for wife and descendants, and vice versa. This gives the couple access to all assets that are transferred out of their estates (and out of the reach of creditors). But inherent in this plan is mortality risk. If wife thereafter dies, husband won't indirectly have benefit to the assets in his trust since wife, who was a beneficiary, has passed. Insurance can answer this mortality risk (and financial forecast can quantify that need – wealth manager involvement). In this and many other plans your insurance consultant is vital. ►As you age or as health issues worsen involving a care manager to create a care plan, quantify the costs of that plan, etc. may be a critical player. ►Many donors prefer to be actively involved in their giving to accomplish specific social or charitable goals. A charitable giving professional, e.g. gifts officer from a charity you wish to benefit, should be part of the team when appropriate. ►Your team should reflect your needs.

■ Not Tom Brady: ►Ask any member of your team who the quarterback of the team is and they will likely tell you they are. ►The mantle of quarterback should pass to various advisers as your planning evolves. ►Your estate planning attorney may have to captain the planning ship while she is creating the structure. ►Your wealth manager may assume the quarterback mantle when she creates forecasts to drive the planning, and guides asset allocation and location decisions, etc. ►At some point insurance may be the focal point and the insurance consultant dons the jersey with the number 12. ►If an adviser is particularly weak he or she may never don the quarterback mantle. ►While your investment manager may focus on beta, effective collaboration requires team play, not one adviser being so alpha that she dominates the pack.

■ Why Some Advisers Don't Play Nicely in the Collaboration Sandbox: ►Ego, control, money. ►"Of course I'm the smartest pencil in the box, all those other advisers should follow my lead." You want knowledgeable advisers, so self-confidence is inevitable. But the advisers job is to do what is best for you, the client, even if that means not being the big cheese. ► "If I involve those other advisers I will lose control." Yep, and you should. Any adviser who does their job right should make control a team matter. If your planning team (CPA, wealth manager, insurance consultant) understand your estate plan and have access to all documents, etc. it should be even easier to replace your estate planning attorney. Some advisers don't want the rest of the team to have that level of involvement for fear of being replaced. But that is exactly a function the team should serve. Advisers retire or die, firms dissolve, stuff happens. Having the team knowledgeable of the entire plan gives you better results. It assures smoother transitions. It should be about benefiting you, not assuring control in one adviser's hands. Some wealth managers like to handle everything they can with in-house staff. They might do this under the guise of saving the client money because they don't bill for their time, but is that benefiting the client or about that adviser wanting to maximize control under some theory that control will keep them business. ► "If that bank gets involved they'll do all the planning and I won't have anything to bill for." Well the bank should not do all the planning, The team should. And the team should, even if a lawyer or CPA gets less billable hours had the bank not been involved. ►Collaboration should be amount maximizing your wealth, not the wealth of your advisers.

■ Making Collaboration Happen: ►While a United team is the only way to fly, if everyone doesn't make a concerted effort to make it happen, it won't. ►Clients should authorize and direct advisers to collaborate. Stop whining that it will cost more. Better planning, and administration of that plan, will cost less than a disjointed plan. ►For advisers that just won't do it -- replace 'em. ►There are simple steps that foster collaboration. ►Advisers could circulate a summary memo following any meeting or phone conference in draft form to the team before sending it to the client. That gives everyone a chance for input and keeps all advisers in the loop. ►Invite other advisers to meetings you organize. Even participation by phone reinforces the message to the client and other advisers that there is a team. ►Have an annual adviser web conference without the client. These can be quick but get everyone on the team up to speed inexpensively. PP

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…Checklist: Gumby Trust

(Continued from page 1)

revocable trusts are the way to go. Uncertainty should not be used as an excuse not to plan, but rather as a reason to plan with more flexibility. Pokey says use modern trust drafting bells and whistles to create more options for future changes in the tax and other laws. Shifting assets now into robust irrevocable trusts may provide asset protection benefits and may provide more tax planning opportunities as tax laws change and change again (and again….).

√ Trust protectors. This position has become more common in irrevocable trusts. Giving a fiduciary power to change trustees, governing law, situs, and more, infuses flexibility to respond to future changes.

√ Charitable Designator. Before swap powers became de-rigueur trusts sometimes included a right for a person, acting in a non-fiduciary capacity, to add a charitable beneficiary. This right, during the grantor's lifetime, characterizes the trust as a grantor trust. With all the uncertainty over income and estate tax law changes, consider adding a broader charitable designator provision. If the estate tax is repealed there may be no downside to making charitable gifts of trust assets. If the income tax rules for charitable contribution deductions become more restrictive perhaps it will be advantageous from an income tax perspective to make the gifts out of a trust instead of by the individual. Don't have the power end on the grantor's death, permit it to continue in perpetuity since the purpose is not merely to trigger grantor trust status, but to add flexibility to planning. If the estate plan is successful, significant wealth will be shifted out of your estate to long term irrevocable trusts. What resources will future generations direct to charity if their inherited wealth is in trust with no charitable beneficiaries?

√ Swap Power. This power can be used to create grantor trust status (income of the trust is taxed to you). But it also is an incredible tool to build in flexibility. You can transfer family business interests to an irrevocable trust, locking in valuation discounts available under current law. But if you later want to return those assets to your name, you can swap in an equivalent amount of cash and get the business back. This could be useful to obtain a basis step up on death. It could enable you to change your dispositive scheme and transfer the business to another heir. If a capital gains tax on death is enacted, you could reverse swap. Shift appreciated assets into the trust (the opposite of what most folks do under current law) to avoid a cap gains on death. Trust Claymation is flexible!

√ Loan Director. Just like the charitable designator, it had been common to include a power to a person acting in a non-fiduciary capacity to make loans to the settlor of the trust. Adequate interest should be charged but adequate security is not necessary. This too would have characterized the trust as a grantor trust. While grantor trust status can be assured with a swap power, perhaps a loan provision should still be included, but now more for providing a means for the settlor to access trust principal than for grantor trust characterization. If the estate tax is repealed you might be happier with the planning knowing that there is a means to provide you access to trust funds, even if that is as a loan.

√ Powers of Appointment. Include powers of appointment (someone who can re-direct how trust property will be distributed and to whom). This can provide flexibility. Granting someone else the power to transmute limited powers of appointment into general ones can be used to cause some or all the trust assets to be included in a beneficiary's estate for a basis step-up on death should that prove advantageous. CONT'D

Recent Developments

■ When your marriage splits, so can your charitable planning! Charitable Remainder Trusts ("CRTs") can be divided into two separate trusts in connection with your divorce. PLR 201648007.

■ Trust re-do. As kids if you didn't like the game you called "Do-over." Sometimes you can call a do-over to fix an estate plan boo-boo. The IRS determined that a court reformation of a bad grantor retained annuity trust ("GRAT) sufficed to correct the scrivener's omission of a required provision in a series of trusts permitting them to meet GRATs requirements. PLR 201652002.

■ Lien on Me (not by Bill Withers) is the new IRS tune affecting many estates. If an estate owns realty it must file Form 4422 (Application for Certificate Discharging Property Subject to Estate Tax Lien) with the IRS if the estate wants to transfer realty before filing an estate tax return, Form 706. The IRS had required that all the proceeds of a sale be held subject to an estate tax lien under Code Sec. 6324. The IRS has recently backed off a bit from the harsh new rules and if there is no estate tax (e.g., because of a marital deduction) it may waive the withholding requirement.

■ Splitting trusts can also help solve other family and planning challenges. The IRS held that dividing a trust did not cause negative gift, estate, income or generation-skipping tax consequences. PLR 201702006.

■ Michigan and Utah enacted the Uniform Voidable Transactions Act (UVTA) joining other states that have enacted UVTA: California, Georgia, Idaho, Iowa, Kentucky, Minnesota, New Mexico, North Carolina and North Dakota.

■ Colorado voters recently passed Proposition 106, the End of Life Options Act. Now, CO, CA, OR, VT, and WA have death with dignity laws (or as some call it, legal suicide laws). These laws allow competent, terminally-ill, adults to obtain medications so they can die in a peaceful, humane manner. Montana does not have a statute, but its Supreme Court has permitted such actions. While emotions no doubt are strong on both sides of this issue, there are now six states permitting this option. If you have been diagnosed with a terminal illness, and may wish to avail yourself of this option, plan to relocate to one of these states to establish residency so that you can meet their requirements. PP

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Planning Potpourri

Gumby Trust (Continued)

√ 2038 Power. The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant the settlor the right to control the beneficial enjoyment of trust assets. This would cause estate tax inclusion in the settlor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power so it may be advisable to grant the power to an individual. Consider giving the power to a non-fiduciary. This can provide a mechanism to cause estate inclusion and obtain a basis step up on the settlor's death if that proves advantageous. It might be advantageous to divide the trust so the power can be exercised over some assets. If an asset has declined in value, it may be preferable to avoid changing the basis at death. Caution, if the estate tax is repealed, there will presumably be no Section 2038, so how the step up in basis would be effected under a repeal regime is uncertain.

√ Perpetual Trusts. Have the trust last a long time or forever. If you leverage wealth out of your estate, why not keep it out of whatever transfer tax system the future might bring. Long term trusts protect your heirs from law suits, divorce, and more.

√ Decanting Powers. Give the trustee the power to merge the trust into a new and improved trust so administrative provisions can be modified to address future circumstances. Decanting can be used to add or remove a swap power, add an insurance trustee provision so life insurance can be added to a trust that did not provide for it, and so much more. Even if you are able to accomplish the desired modifications with a trust protector action, or non-judicial modification by beneficiaries, including broad decanting powers is like chicken soup, "It can't hurt."

√ Hybrid DAPT. If your trust is formed in one of the 16 states that permit self-settled trusts (DAPTs), you can be a beneficiary of your own trust. However, if you reside in a state that does not permit these trusts, some advisers view it as risky to create a DAPT in a state that does. But there is a hybrid solution that might reduce the risk some experts perceive, yet leave open the possibility of you benefiting from that trust. Don't be named initially as a beneficiary. Instead give someone the right to add as beneficiaries of the trust the descendants of your grandparents (hint…that includes you). So, if you are not a beneficiary now, the trust should not face that risk. But you'll have the possibility of becoming a beneficiary if you need access to trust property in the future. PP