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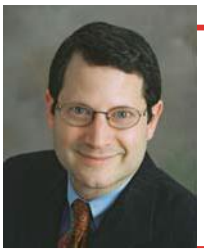

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HECKERLING WRAP-UP SNEAK PEAK

Summary: The 52nd Annual Heckerling Institute on Estate Planning will be held January 22-26, 2018 in Orlando. For info: www.law.miami.edu/Heckerling **or by email:** heckerling@law.miami.edu **. Heckerling is the major estate planning conference of the year. If tax reform is passed that will no doubt be a focus of the conference, but apart from tax reform, 2017 has already been an eventful year in terms of estate planning developments and the evolution of the profession. I will have the honor of presenting the final program of the conference with Jonathan G. Blattmachr, Esq. It will summarize the week's proceedings and present various planning tips. Below are a few of the many developments and trends that will be included in that presentation, barely a Cliff Notes of the 200-page monograph prepared for the session.**

■ Examine DAPTs Options: DAPT (domestic asset protection trust) is a trust which you, the settlor creating the trust, are also named as a beneficiary. A hybrid DAPT is a trust in which you are not named initially as a beneficiary (so it really is not a self-settled trust) but to which someone has the power to add a class of people as additional beneficiaries which includes you. A hybrid-DAPT tries to get the best of both worlds: you can be given access in the future as a beneficiary, but a claimant should not be able to pierce the trust if you have not yet been added as a beneficiary (even if the law does not uphold DAPTs). Some commentators suggest that DAPTs don't work if you live in a non-DAPT state and set up a DAPT in one of the 17 states that permits DAPTs. According to these naysayers if you live in New York and set up an Alaska trust it won't fly. The Uniform Voidable Transfers Act ("UVTA") Section 4, Comment 8, provides that a transfer to a self-settled domestic asset protection trust is voidable if the transferor's home state does not have DAPT legislation. Other folks disagree. What do you do with existing DAPTs? ►Some might say "stay the course" as many smart folks believe there is no reason to abandon DAPTs. ►Another option is evaluate the client's financial status now as compared to when the DAPT was funded. If the DAPT was created in 2012 the stock market growth since then might have increased non-DAPT wealth sufficiently so that you might just renounce your interests as a beneficiary in the DAPT. Assuming a discretionary distribution standard in the hands of an institutional trustee there arguably is no gift of value resulting from your renouncing, but you might nonetheless report the renunciation as a non-gift on a gift tax return. ►If you renounce you might rely on a tax reimbursement clause and loan provisions as a mechanism to get economic value out of the trust without being a beneficiary. ►If you sold assets to the trust you might accelerate note payments to obtain cash, again without needing beneficiary status. ►DAPTs, hybrid DAPT, and the planning noted above may be dramatically more important if pending tax reform proposals are enacted doubling the exemption because many taxpayers will just not be comfortable gifting such large amounts if they can no longer access the gifted funds. But creative application of these and other techniques might entice many more folks to make large transfers to irrevocable trusts even if the amounts are large, and even if they don't see much likelihood of an estate tax. Why so? Because capturing large exemptions might be wise for asset protection, and in case a new administration in 2020 reverses the largess bestowed on the wealthy by the current tax reform.

■ Trust Admin: There have been several asset protection cases this year that have disregarded trusts as alter-egos or nominees of the settlor. Balice, (DC NJ 8/9/2017) 119 AFTR 2d ¶ 2017-5134. Adhering to trust formalities might be important to deflecting such attacks. A possible Achilles Heel to some plans might be trust records. What do your trust statements re-

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CHECKLIST: CANCER PLAN

Summary: 1 in 2 men will develop cancer, and 1 in 3 women will develop cancer. More than 15 million people living in the U.S. today have had cancer. By 2026, the number will be more than 20 million cancer survivors. Planning after receiving a diagnosis of cancer is not a theoretical exercise but a reality. With cancer so prevalent, you will likely have a loved one or colleague affected, or you yourself will be. Following are some points to consider.

√ What cancer diagnosis do you have? What stage? Is it advanced? Is it localized?

√ Speak with your treating team on an ongoing basis to determine treatment plan options, risks of treatment, and to obtain a sense of the prognosis. If you are too ill or uncomfortable to have these conversations and communicate them to your advisers either have a family member or friend attend these meetings with you, or designate someone who has had a long-term relationship with you to have these conversations directly with your physician. Provide the requisite legal documentation (e.g. a HIPAA release) to facilitate this.

√Consider the varied impact a cancer diagnosis might have. The emotional impact can be dramatic and may make it difficult to consider vital planning steps. This is

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...HECKERLING WRAP-UP SNEAK PEAK

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flect regarding private equity, guarantees, sale transactions, and other complex wealth transfers? In some instances, clerical staff at a trust company unfamiliar with the complexity of the underlying transactions input incorrect or incomplete data that can appear unnoticed on statements. Have the advisers review trust statements to assure that the correct number of shares, a realistic value, the correct borrower/lender, etc. are all listed. Make corrections now, not after you get an IRS notice or summons.

■ Wrongful Prolongation of Life: A recent court decision upheld a patient's right to reject lifesaving treatments and recognized a cause of action when clear health care directives are ignored. Koener v. AHS Hospital Corp. (MRS-L-2983-13). Be certain that directives are clear. If you might wish to enforce a claim, review any indemnification language in the document to be certain it only indemnifies medical providers for adhering to your wishes, not in all events. The bigger issue is that only 26% of adults have any type of advanced directive.

■ 529 Plans: Little things, like small tax benefits, can add up. An overlooked yet well-known tax bennie is 529 college savings plans. Only 21% of ultra-high net worth (more than $5 million net worth) investors currently have 529 plans. Only 17% of high net worth ($1-5M net worth) investors have 529 plans. If tax reform zaps some your tax benefits maybe 529 plans are worthy of more attention. You can front-load 5 years of tax-free annual gifts to a 529 plan (in 2018 $15,000 x 5) in one year. But for many, giving even more to 529 plans, even if it uses up some gift tax exemption ($5.6M in 2018), may be a smart tax move.

■ Decanting: Review existing irrevocable trusts to determine whether decanting can provide better results in the event of a future divorce, for tax planning (whatever the future law changes provide), the general asset protection planning, or for other reasons. In the recent Ferri case decanting in the middle of a divorce may have saved trust assets. Unlike the Ferri case, it would be preferable to complete the decanting well in advance of the divorce (or other event) attacking the old trust. Traditional trust drafting commonly relied on techniques and provisions that are less than optimal, such as mandatory income distributions, mandatory principal distributions at specified ages, or as in the Ferri case permissible withdrawal rights of trust principal. Ferri v. Powell-Ferri, 476 Mass. 651 (2017); SC19432-4.

■ Elder Financial Abuse: Abuse is burgeoning. Too often there is no remedy as the victim's capacity or abilities wane preventing pursuit of the culprit. A Massachusetts Appeals Court ordered that real estate and other assets be returned to an elderly infirm woman. In this case the culprit was her son and daughter in-law. Guardian v. Migell, 2016 Mass. App. Unpub. LEXIS 1056 (Nov. 2, 2016).

■ FLPs: The Powell case highlights a host of estate and FLP planning errors. The Tax Court in Powell extended the reasoning of the Strangi case stating that the decedent limited partner retained the power to direct the possession or enjoyment of the property along with her children who were the general partners (GPs) in the FLP. This is the first case where the Tax Court held IRC §2036 (a)(2) applied even though the decedent did not own a GP interest. In dicta, the Tax Court noted the potential for double taxation of both the LP interests and the underlying assets of the partnership. Double taxation is avoided because IRC §2043(a) allows an estate to exclude the consideration received for property included in the gross estate under IRC §2036 or §2035. In Powell, the transfers were made shortly before death so there was no appreciation and the FLP interests equaled the underlying asset value. If there is appreciation, the ruling could result in double taxation. Review powers of attorney and tailor the gift provisions to what is appropriate for the circumstances. Partnership agreements might be amended to prevent the senior generation from having rights to vote on liquidations, distributions or partnership agreement amendments.

For updates on Tax Reform and other Developments: www.Linkedin.com/in/martinshenkman And sign up for e-newsletter at www.shenkmanlaw.com.

■ Same-Sex Couples: Same-sex couples that made prior taxable transfers should recalculate their appropriate gift exemption, DSUE and GST exemption and file amended returns. Windsor over-turned the law governing same-sex marriages by holding that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. After Windsor tax guidance was provided in Rev Rul 2013-17 and Reg. §301.7701-18. These both acknowledged the legal concept of retroactivity. Additional clarification was provided on January 17, 2017 with the issuance of Notice 2017-15. PP

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...Checklist: Cancer Planning

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particularly problematic because the most important time to plan may be at the point of diagnoses. It may become more difficult, because of the side effects of treatment, or lack of time, if you wait.

√ Will your health insurance cover most or only some of the costs? Some treatments are so costly that the phrase "financial toxicity" has been used to describe the consequences. What non-covered treatments might you need or want? How will they be paid for? Might other family members assist? If so to what degree? Your palliative care team should have discussions with you about financial issues.

√ Who will assist you with the many forms, insurance submissions, and other documentation?

√ Can you afford a care manager to coordinate your care plan with medical providers, and to interface with caregivers? How will your loved ones react to a care manager?

√ Will cancer impact your ability to function? Will it impact your ability to work and if so for how long and to what extent? How might that affect you financially?

√Review health insurance options. Is there a cap on overall coverage? What are the deductibles? Exclusions? Employer coverage tends to be more generous than private policies – do you have and can you maintain an employer plan? What type of coverage exists? Is there an HR department or designated person at the employer that can provide information? What if your job is lost? Are there out-of-pocket limits, and what are they? Drug costs vary greatly. What types of drugs, treatments and care will be required by your diagnosis? What will insurance cover?

√Review life insurance policies. If you have term insurance can you convert it to a permanent coverage if advisable? If you might have cash flow issues can you borrow on, or sell, permanent policies?

√ What's the anticipated impact on your life expectancy? However difficult to address, it is vital to do so. For example, pancreatic cancer generally has short term survival, sometimes less than a year. This often presents with advanced disease so the time for planning may be quite limited. Sometimes it is not just the diagnosis but the age or general health of the patient. For example, ovarian cancer in older women may be aggressive and limit planning. Many of these patients cannot tolerate chemotherapy as well as younger patients. The balance can quickly tip from being functional physically and mentally to not. Toxicity of chemotherapy in older patients could put them into a tailspin and they do not respond like a younger person may. Lung cancer in older patients usually presents with advanced disease and often has less than one year survival.

√ Review, revise and update all your estate planning documents as soon as possible. It may prove helpful to have current documents in place. There are ongoing changes in law affecting every aspect of planning and every document, not just the tax law changes that garner the headlines. There is also a practical issue, even if you are changing nothing, resigning documents with a current date to replace documents that are old will make those vital documents more readily accepted. While there is no legal reason a decade old health proxy or power is not valid, third parties often respond more quickly to documents that are more current. For more information, call Tara Lembright of the American Cancer Society at 888-227-6446 x 4550 or email tara.lembright@cancer.org. PP

Recent Developments

■ **The Sommers net gift case, Estate of Sommers v. Commissioner, 149 T.C. No. 8 (August 2017), and a predecessor case, Estate of Sommers v. Commissioner, T.C. Memo. 2013-8, addressed whether gifts of interests in an LLC owning artwork were completed. Most discussions of Sommers ignored this ancillary but interesting point.**

In accordance with the art/LLC/gift plan, the taxpayer transferred artwork to the LLC, Sommers Art Investors, LLC, and executed two sets of gift and acceptance agreements with his nieces, the first dated December 27, 2001, and the second dated January 4, 2002. When decedent and his nieces initially executed the agreements, they left blanks for the number of units included in each transfer, pending completion of an appraisal of the artwork. The commissioned appraisal, when completed in March 2002, assigned a value to the artwork that led decedent's counsel to conclude that dividing the transfers of units across the end of 2001 would not allow for the complete avoidance of gift tax. After the nieces agreed to pay any gift tax resulting from the 2002 transfers, the gift and acceptance agreements were completed by filling in the blanks for the number of units covered by each transfer. The estate asked the court to rule that decedent did not make completed gifts of the units until April 11, 2002, when the gift documents were completed by filling in the number of units covered by each agreement, with the consequence that the units were includible in the value of decedent's gross estate under sections 2035 and 2038. The nieces motion asked the court to rule that decedent had made completed gifts of units to his nieces on December 27, 2001, and January 4, 2002. The court recognized as effective a gift made of LLC interests with the number of units unknown, as effective when signed, and was not deterred by a material re-negotiation or change in the agreement by adding the net gift component months later. This portion of these cases was not mentioned in the literature but might be useful to advisers in both tax and other circumstances if the effectiveness of a gift with blank components, or waiting for a later appraisal, occurs. PP

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PLANNING POTPOURRI

■ **Protective ESBT Election: So, you have a grantor trust owning stock in an S corporation. No problemo as grantor trusts are a permissible S corporation shareholder. But alas, the grantor trust rules are incredibly complex and not all trusts retain full grantor trust status forever. Might it be wise to make a protective ESBT election effectively saying to the IRS that if they nix the grantor trust status in whole or part then the trust will automatically be treated as an ESBT and qualify to hold the S corporation stock? While this sounds good it is not clear that the Regs permit this tactic. Treas. Reg. 1.1361-1(m)(2)(v). Thanks Hal.**

■ **Collaboration-Leader: How do you make collaboration work and who is really the quarterback of the team? How is an interdisciplinary estate planning team best led? You need to buy into the idea of creating a collaborative team. One issue is that every adviser on the team wants to be the quarterback or the "Alpha Dog." Perhaps teams do better with a servant leader who subordinates his/her ego to the overall good of the team, making sure that each participant has the chance to do his or her best work, get credit, and be fairly paid in service to the client's best interests. Phil Cubeta sums it all up with a quote from Lao Tzu: "A leader is best when people barely know he exists, when his work is done, his aim fulfilled, they will say: we did it ourselves."**

■ **Collaboration-Clients: A financial adviser responded to a recent webinar on teaming with this story: "I remember that I was chastised by a client when I sought out his CPA and attorney after receiving his consent. He was verbally abusive when he received their bills. This guy paid $20,000+ a year in investment fees deducted from his account, but objected to being billed about $500 each from his CPA and estate planner because he had to write checks." Clients should appreciate any adviser who has the integrity to seek other team member input. Clients who behave as irrationally as above will likely blame everyone when something goes wrong, even if their conduct prevented proper planning. Educate these clients about the essential nature of collaboration.**

■ **Figures: The fed exemption (apart from tax reform) will be $5.6M in 2018. The annual gift exclusion increases to $15,000. The NJ estate tax is repealed in 2018 (but will that stick?). The NY exemption is $5.25M from 4/1/17 until 1/1/19 when it is supposed to equal the fed exemption. But if tax reform doubles the exemption what might NY do? The NY trap is that if the estate goes over the "cliff" it triggers a tax approaching $500,000.** PP

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