



NAEPC
Journal
of **Estate & Tax Planning**

[Click here to view Issue 34](#)

Don't Leave It All on the Field:

Why Athletes Require Special Planning

Contents

Contents

Introduction.....	1
Athlete Special Circumstances	1
Financial Imprudence of Athletes	4
Risks Faced by Professional Athletes Must Be Addressed	5
Social and Societal Challenges for the Professional Athlete	8
Family	8
Lifestyle	10
Family, Friends and the Entourage	10
Predators, Lawsuits and Other Legal Issues	11
Poor Investments.....	11
No Financial Planning.....	11
Comprehensive Wealth Planning for the Professional Athlete.....	12
Broad Based Planning Essential	12
Athletes Can Be Protected with a Collaborative Team of Independent Advisers	13
Managing the Athlete’s Investments	13
Tax Planning for the Athlete.....	17
Gift Taxes.....	17
Estate Taxes	18
Income Tax Planning Generally	19
State Income Tax Planning	19
Asset Protection Planning for the Athlete.....	20
Insurance Planning for the Athlete	22
Disability Insurance	22
Life Insurance	23
Trust Planning for Athletes.....	24
The ILIT vs. the DAPT	24
Beneficiary Defective Irrevocable Trust.....	25
Trust Drafting and Structuring Considerations.....	27
Timing Transfers.....	28
Other Estate Planning Documents and Steps for the Athlete	28
Pension Plans	28

Domicile.....	29
Revocable Living Trust.....	29
Power of Attorney.....	29
Living Wills/Health Proxies	29
Disability Planning.....	30
Private Foundations	30
Right of Publicity.....	30
Conclusion	30

Don't Leave It All on the Field: Why Athletes Require Special Planning

By: K. Eli Akhavan, Esq., Evan Bloom, Esq., Jonathan Shenkman, MBA, Martin M. Shenkman, Esq. Ben Utecht, and Eido M. Walny, Esq.¹

Introduction

The professional athlete needs the same sound foundation of financial and estate planning that all wealthy clients require. However, the professional athlete typically faces many unique circumstances that must be integrated into the planning process. Movie stars, musicians, entertainers, and others with “star” power encounter some of the challenges common to athletes, so that the applicability of some of the planning ideas discussed here will be broader than merely for athlete clients.

There is potentially an important time pressure to planning for pro athletes that might require quick action. If the political balance of power changes in Washington in 2020, a Democratic administration might enact restrictive estate tax changes similar to that proposed by Senator Bernie Sanders in the Senate and Congressman Jimmy Gomez (CA-34) in the House. These bills reduce the gift tax exemption to \$1 million and the estate tax exemption to \$3.5 million. Discounts, GRATs, grantor trusts and GST planning may all be severely restricted. Thus, for athletes that have already amassed substantial wealth, planning should proceed before those changes might occur.

Athlete Special Circumstances

The professional athlete may face any, or all, of the following circumstances which practitioners need to consider:

- **Early financial peak.** Most clients tend to achieve peak earnings and savings in their 50s, 60s, or later. While there are exceptions, e.g., high tech and other entrepreneurs, the professional athlete trends towards the extreme with many reaching peak earning years at a very young age, perhaps e.g. in their 20s. Peak earnings at a such a youthful stage of life can create significant challenges for retirement, estate, and asset protection planning.
- **Sudden wealth.** The wealth of the professional athlete often comes quickly. Most clients have a build-up of years of increasing financial success that can prepare them for future high income years. Athletes are often thrust into wealth so quickly that there is no period for adjustment. On their rapid, sometimes literally overnight, ascent to wealth, they frequently and incorrectly perceive that they are protected from the vicissitudes of life and are impervious to insolvency, economic downturns, unethical advisers, and more.

¹ K. Eli Akhavan is an attorney at Norton Rose Fulbright in the firm's New York City office, Evan Bloom is an attorney, Martin M. Shenkman, Esq. is an attorney in Fort Lee, NJ, Jonathan I. Shenkman, MBA, is a financial advisor at Oppenheimer & Co., Inc. in New York City, Ben Utecht is a Super Bowl XLI Champion and Chief Performance Officer of Management Essentials, and Eido M. Walny, Esq. is an attorney in Milwaukee, WI.

- **Injuries.** The risk of injury is a paramount concern for the professional athlete. For many, there is a high risk of disabling injuries that can occur anytime during the athlete's career. Those injuries may end what otherwise was an illustrious career trajectory. The average NFL career is only about 2 ½ to 3 ½ years because of injury creating turnover. The potential loss of income often cannot be insured against by the purchase of a disability income replacement policy that protects most clients. So unique planning steps are necessary.
- **Lack of time.** Most clients can meet with their advisors with just a little bit of planning and handiwork on a calendar. The average client can also take time to research people and concepts that are foreign to them so that they feel comfortable. But athletes must constantly deal with incredible time pressure of training and games and worry about a variety of risks including even losing their job and thus their income. Athletes are generally on a rigid, unforgiving schedule. This schedule can include team activities, training, and other required activities. The result is often limited free time that the athlete holds dear thus making meetings to review important planning quite difficult to schedule.
- **Lack of financial literacy.** Many athletes have limited financial and legal background, which adds an extra challenge to their planning. There really is no good educational platform to help athletes get a good understanding of business and finance. While the leagues have made efforts, time and practical experiences are significant limiting factors. The personal values of the athlete may also influence how they respond to financial matters. For example, an athlete that grew up in a Christian household imbued with values of stewardship may view financial matters from a different lens than an athlete that grew up in a different environment. Thus, practitioners who are trying to communicate with the athlete client, and educate that client about financial matters, the first step is to understand the client's knowledge, perspective and views of planning, so that the discussions can be appropriately framed.
- **Variable income sources.** Endorsements and other intangible contractual rights constitute a variable and uncertain, but potentially lucrative, income stream that cannot be ignored. While adding a layer of complexity, these income sources also add potential planning opportunities if recognized and harness properly.
- **Advisor team is broader.** Many clients have an advisory board comprised of an attorney, CPA, and wealth advisor. But for the professional athlete, others are likely to also be involved including a sports agent, manager, or management team. Also, consider adding a "life coach" who can provide coaching, mentorship and guidance to the athlete on a more personal level. Ideally, such an executive coach would ideally understand the financial and legal issues in a broad non-technical sense and support the efforts of the rest of the professional.
- **Friends.** An entourage can become more than mere hangers-on and can actually undermine planning efforts. Some of the athlete's friends are true well-wishers, but many

might be manipulators, or worse. For some athletes, these purported friends turn out to be their most dangerous financial risk.

- **Family and personal relationships.** Too often, the people closest to the athlete may present the most serious financial threat. The high income, high visibility, and star power of an athlete can all lead to a wide range of different relationships, and costs associated with those relationships. Many professional athletes have had children out of wedlock. New York Jets DB Antonio Cromartie is reported to have fathered 8 children by 6 different women. Former NFL running back Travis Henry is reported to have fathered 10 children from 9 different women. Like alimony, child support payments are often calculated based on the athlete's earning power during his career. The child support exposure for these athletes can be tremendous.
- **Spending habits.** Most notably, this includes unrestrained spending habits pushed by teammates and others. Peer pressure on athletes to keep up with extravagant spending patterns of their more successful, established, and wealthier teammates can create a dangerous influence. These teammates themselves often spend without having taken even the minimal financial planning steps. The spending bar is often established at an unsupportable level for the wealthier athlete, and one which can be devastating for the younger athlete.
- **Lockouts.** Having to stop work with little notice and a cut-off of compensation can present a significant financial risk for athletes, especially young athletes that have not amassed any meaningful savings. In a limited duration, high earning career, many athletes earn significant compensation and other sports-related income over a short duration of time. This presents a challenge to save sufficient sums during that brief period to support lifestyle expenses over what might be a long post-career lifetime. For example, the average NFL player's career span is less than four years and the median NFL income is \$750,000.² Lockouts will further compress this high-earning window.
- **Privacy.** Privacy is difficult for all clients in a world of technology and ubiquitous reporting requirements. For the athlete it is even more difficult. There is a greater need for privacy, and a more challenging task of maintaining it as the athlete's success grows.

Each of these common characteristics affects every aspect of the planning, drafting, and plan implementation process. Practitioners need to tailor efforts on behalf of these clients to enable them to achieve the security that the planning process should provide. This article will provide some background on the common characteristics of professional athletes and review modifications to estate planning and drafting. These adjustments range from simple modifications in a living will, to more complex planning techniques such as utilizing a beneficiary defective irrevocable trust ("BDIT") which might have unique benefits for the professional athlete.

² Leigh Steinberg, *5 Reasons Why 80% of Retired NFL Players Go Broke*, Forbes, Feb. 9, 2015. <https://www.forbes.com/sites/leighsteinberg/2015/02/09/5-reasons-why-80-of-retired-nfl-players-go-broke/#127263d178cc>

Financial Imprudence of Athletes

An overwhelming majority of professional athletes are financially destitute within 10 years of retirement from playing professional sports. Nearly 80% of NFL players are near bankruptcy within two years after leaving professional football.³ Almost 60% of former NBA basketball players have limited financial resources within 5 years of retirement.⁴

In the now-famous “LeBron Rise” Nike commercial, LeBron James asks, “What should I do? Should I admit I’ve made mistakes?” Unfortunately, as the statistics show, LeBron James is far from the only professional athlete who has a few financial mistakes to admit.⁵

Not all is dismal, of course. Shaquille O’Neal is an example of an athlete who overcame these terrible statistics. One of the highest earning and best-marketed athletes ever, O’Neal managed to be successful both on and off the basketball court. His philosophy on financial planning, which he shares with rookies, is to set aside 75% of one’s annual earnings.⁶ O’Neal’s advice may seem simplistic to advisors, but it is not to athletes who typically have no background in financial planning and often spend millions on frivolous items. The absurdity of some athlete financial shenanigans can be difficult for even the professional advisor to fathom. For example, former professional basketball player Rod Strickland spent approximately \$4 million on a lifetime supply of grape Kool-Aid. Strickland, however, is not the only one to fall victim to undisciplined spending habits. Financial trouble touches a wide range of athletes. These problems are so endemic that practitioners should assume them to be a risk for every athlete-client, until prudence is demonstrated. Professionals must counsel the athlete client on how to avoid these issues. Consider the estimated career earnings of the following star athletes:⁷

- Mike Tyson (boxing) - \$300 - \$400 million
- Allen Iverson (NBA) - \$160 million
- Michael Vick (NFL) - \$130 million
- Scottie Pippen (NBA) - \$120 million
- Antoine Walker (NBA) - \$110 million
- George Best (soccer) - \$100 million
- Latrell Sprewell (NBA) - \$100 million
- Sergei Fedorov (NHL) - \$95 million
- Terrell Owens (NFL) - \$80 million
- Mike Madano (NHL) - \$78 million
- Mark Brunell (NFL) - \$52 million
- Lawrence Taylor (NFL) - \$50 million

³ Pablo S. Torre, How (and Why) Athletes Go Broke, Sports Illustrated, March 23, 2009.

⁴ *Id.*

⁵ Dan Kadlec, *What You Have in Common With Bankrupt Pro Athletes*, Money, June 10, 2016. <http://time.com/money/4362102/bankrupt-athletes-lessons-for-you/>

⁶ Motez Bishara and Don Riddell, Shaquille O’Neal: ‘I spent \$1M in about 45 minutes...but it was worth it’, CNN Sport, December 4, 2015. <http://edition.cnn.com/2015/12/04/sport/shaquille-oneal-and-charles-barkley-of-the-nba-impart-financial-advice/>.

⁷ Drea Knufken, *25 Rich Athletes Who Went Broke*, Business Pundit, May 18, 2009. <http://www.businesspundit.com/25-rich-athletes-who-went-broke/>.

- Sheryl Swoopes (WNBA) - \$50 million
- Boris Becker (tennis) - \$25 million
- Jack Clark (MLB) - \$20 million

The above named athletes are sports success stories, but all of them have either filed for bankruptcy, or had little left of their fortunes after leaving professional sports. These athletes – and countless others – now have to worry about how they will support themselves and their families when the million-dollar salaries have stopped. Implementing basic planning precautions could have prevented their ruin. But their downfall provides powerful lessons to motivate current athlete clients to proactively plan to avoid similar results. It is often difficult for fans, even astute professional advisor-fans, to comprehend that these All-Stars, All-Pros, Hall of Famers, and worldwide sports icons, could obtain such great fortune yet lose it so quickly.

Risks Faced by Professional Athletes Must Be Addressed

While professional advisors may be tempted to approach the professional athlete with thoughts of sophisticated estate planning, asset protection, and investment allocations, a foundation of fiscal prudence must always be the first step. Without that critical building block there may be little wealth left to protect, invest, or save taxes on. While pro-sports organizations are doing more than ever to educate athletes, there remain many challenges.

A common reaction of many athletes to the stories about penniless former pros is: “that will never happen to me.” Accustomed to their tremendous success on the field, along with the trappings and rewards of star power, it is often difficult for the athlete to accept limitations that they might have in other areas, like financial matters. Guiding the athlete-client must therefore include the following considerations:

- **Start early.** Financial planning and precautions are critical for professional athletes and the best results will be achieved if the process can be started early in their career. With such short career for so many professional athletes, starting early means as close as possible to the point when the athlete began earning significant money. This is very different than for most clients professional advisers serve. A year deal for most clients is insignificant. For a young athlete, it could make achieving financial independence much more difficult.
- **Sudden loss of earning power.** “Retirement” could occur when the athlete is incredibly young, even in his or her 20’s or 30’s, not at a more typically assumed retirement age of 65. Retirement for the professional athlete is often far more traumatic than for typical clients. Earning power can plummet or entirely disappear, and the loss of prestige, that magnetic star power that kept the athlete motivated, may be even more difficult for the athlete to deal with emotionally than the loss of a salary. Even if the athlete pursues a post-professional sports career, it should be assumed for forecasts and planning that post-retirement income will be modest until demonstrated otherwise.
- **Mental Health.** There are a range of mental health issues that can have a significant effect on planning generally, and on serving the professional athlete client. The potential for depression due to an injury or career reversal is significant. With the new knowledge

of the long term effect of brain injuries in contact sports, and the costs of continuing care, advisers should give this issue special attention. If the athlete can invest funds into a long term care policy that may be advisable to address as well. Advisers should be sensitive to the risks of addiction, e.g. drug or alcohol abuse, or other challenges the professional athlete might have. These may affect the athlete's motivation to plan, spending matters, etc. Adding a life coach to the planning team may help address these issues but counseling and other services might be necessary.

- **Predators.** Professional athletes are often targets for a range of predators. What would merely be a fender bender car accident for a "regular" client and likely end with a simple exchange of insurance information, could quickly escalate for the professional athlete. The other party is more likely to assume that there is significant wealth and perhaps has a publicity motive to escalate the case. Thus, the athlete is more likely to find that common social encounters and run-ins have higher potential to lead to costly tort litigation. A "punk" seeking to prove his manhood may pick a fist fight and then sue or sell the story to a tabloid.

In extreme cases, an athlete's entire career and future may be derailed by a predator. Consider the story of former NBA forward Dante Cunningham. Cunningham was a standout player at Villanova and later played for the Minnesota Timberwolves. He grew up in a military family and was well-regarded both as a player and in his personal life. However, his entire life flipped upside down in 2014, when he was falsely accused of domestic violence by his then girlfriend. Despite his adamant denials that any abuse had occurred, his contract was immediately not renewed by the Minnesota Timberwolves and his reputation in the sports world plummeted, jeopardizing the career and goodwill he had worked so hard to build. Four months later, the Minnesota district attorney dropped all charges against Cunningham, citing a lack of any reasonable proof he committed a crime. In fact, the accuser admitted to having made it all up. As professional sports leagues continue to become hyper-sensitive and crackdown on perceived wrongs by athletes, predators seeking a quick pay day will continue to exploit vulnerable athletes. Despite difficult time limitations it behooves the professional athlete to hold at least annual advisor meetings with the athlete and all key advisers involved. If coordinating such a meeting in person is too difficult to accomplish, a web meeting might suffice. Having a frank discussion of investment, business and other offers, current circumstances and involvements, etc. may help one or more advisers pick up on clues of potential issues that can be addressed before they fester into worse problems.

- **False promises.** Athletes, like many other professions, turn to each other for advice and often act based on what peers claim to have done. But what others tell them is often not true. Human nature dictates that the storyteller will play up (or fabricate completely) successes while down-playing (or altogether ignoring) failures. The relationship between former MLB pitchers Tom Candiotti and Todd Stottlemyre serves as a prime example. Stottlemyre successfully transitioned to a position with Merrill Lynch during retirement. Stottlemyre sold Candiotti on the idea that he could afford an \$18 million life insurance policy on a meager broadcasting salary. To convince Candiotti, Stottlemyre assured him that he himself had purchased a similar policy. In the end, the deal that seemed too good to be true ultimately was, and cost Candiotti large sums of money. The lesson from this unfortunate anecdote is that the athlete needs to take the appropriate steps to safeguard

his or her financial wellbeing, and not fall prey to fishing tales, rumor, or innuendo. The professional advisory team is often the best insulation. Athletes should make it a habit to review every significant financial transaction with their professional advisers before signing or committing to anything. What might look like a good opportunity proffered by a fellow athlete, might readily be seen through as a poor deal, or worse, by the professional adviser.

- **Objectivity is key.** For planning to succeed, the athlete must trust the planning process and the advisor team collectively. This is not meaning that the athlete should trust just any one adviser or company. Too often “specialists” have proven to be less than competent or worse. Former players who play themselves up as experts who have succeeded and can “help” (Lenny Dykstra, for example⁸) are also all too common. A team of independent advisors who meet and communicate to create independent checks and balances is critical. Athletes, and all others with star power, should heed the warning that any advisor who does not want their recommendations vetted in the daylight of the entire planning team should not be trusted. Athletes should be educated to always, as a reflex, seek a second and third opinion from their advisors before taking any significant financial action. The objectivity of independent advisers, to minimize the risk of a rouge adviser taking undue advantage, or providing inappropriate advice is critical.
- **Don’t go it alone.** No matter how capable and astute the athlete, even if he or she has a business degree, the forces against him or her are overwhelming and he or she is unlikely to resist without assistance.
- **Pressure-cooker of star power.** The financial and legal pressures that athletes face are incomparable to the pressures almost all other clients (perhaps other than Hollywood or music stars) endure.
- **Divorce.** Divorce is prevalent amongst professional athletes. The athlete’s ex-spouse may continue to reap the benefit of the athlete’s success at a time when the athlete is effectively punished for that very success. Divorce alimony payments may be based upon the athlete’s current financial situation. Modification when the inevitable career changes occur may prove difficult, costly, and insufficient. Thus, the athlete’s ex-spouse continues to reap the benefit of the athlete’s success at a time when the athlete is effectively punished for that very success.

Based on the statistics, it is sadly probable that financial ruin will happen unless an athlete utilizes the proper safeguards and preventative measures to protect their earnings. The summer 2011 labor stoppages in the NBA and NFL provide evidence that significant, negative financial events may strike professional athletes. It is not a coincidence that the NBA and NFL Players’ Associations strongly encouraged athletes to save and protect their money. Indeed, the negotiation process for the players’ unions was severely compromised as a result of many of their players’ cash flow problems. Implementation of prudent financial and ancillary planning may help.

⁸ The plight of Lenny Dykstra is well-documented. In 2008, the former baseball star launched a magazine aimed at giving financial advice to professional athletes. The magazine was widely distributed in clubhouses and locker rooms. A year later, amidst all sorts of unflattering allegations, Mr. Dykstra filed for bankruptcy protection, claiming \$50,000 of assets against tens of millions of dollars in debt.

In many cases, the biggest challenge practitioners face in planning for the professional athlete is not in identifying the optimal tax planning, estate planning or investment options. Rather the practitioner's must often focus on first educating the athlete client to understand the importance of planning for a short career followed by a long retirement. Advisers must endeavor to help the young and financially naïve athlete resist the urge to keep spending up with their teammates and other resist other societal pressures.

Social and Societal Challenges for the Professional Athlete

Athletes face a myriad of risks of financial ruin due to any combination of some of the common issues discussed below.

Family

For a balanced view, many athletes have long term stable marriages. But many do not. So while the following discussion focuses on the financial damage divorce can create, practitioners should be certain to understand the circumstances of the particular athlete and not make assumptions.

Another issue that has arisen in recent years, and which has received considerable media attention, is domestic abuse, whether of a spouse, friend or partner. The litigation and costs, not to mention destructive publicity and possible loss of career, all should be considered as a potential risk to the planning. This is another of the many reasons that adding a life coach to the planning team for some athletes may be invaluable.

As discussed briefly above, no issue causes financial damage for athletes quite like divorce. Even higher than the often cited 50% divorce rate statistic for the general public, some 60-80% of marriages involving professional athletes end in divorce, and most of those divorces occur after retirement when the athlete's income stream has stopped.⁹ An ex-spouse is typically awarded half of the marital assets, including the athlete's salary earned during the marriage.

At the time of marriage, the spouse sees fame, luxury, and excitement. There is also a great deal of freedom and independence when the athlete is away training and competing. However, after the athlete's playing career ends, the spouse may find that the athlete's retirement persona is quite different from that of his playing days. Likewise, marriage at a young age may seem appealing to an athlete. His newfound fame and fortune will undoubtedly attract new potential partners looking to capitalize on his wealth and naïveté. The stability of having a spouse during a career of constant change can be comforting. This symbiotic relationship between athlete and spouse may work during the athlete's career but may not survive past retirement when both spouses' lifestyles dramatically evolve.

⁹ Greg Bishop, *Taking Vows in a League Blindsided by Divorce*, New York Times, August 8, 2009. <http://www.nytimes.com/2009/08/09/sports/football/09marriage.html?_r=1>

An example of an athlete who struggled with marriage and divorce is golf legend Greg Norman. It has been estimated that Norman had to pay his ex-wife, former flight attendant Laura Andrassy, \$103 million in 2008 after the two were divorced.¹⁰

The high divorce rate among athletes leads to additional planning considerations. An athlete's control through limited-power irrevocable trusts, careful use of pre- and post-nuptial agreements, and careful attention to the definition of heirs is particularly important. For example, how should modern reproductive technology be considered? What difference, if any, should there be for a bequest to an heir expressly identified by name in a will or trust versus an heir subsumed under a general definition of "child"? In contrast to many other clients, the athlete may wish to carefully delineate those children whom he or she deems to be his children and others who may be provided for in a different manner.

While the athlete may be aware of prenuptial agreements, too often, as with all clients, if an agreement is actually executed, it is completed too close to the marriage or subject to other defects that make it susceptible to challenge. A preferable approach is to endeavor to:

- Be certain the spouse has independent counsel and other appropriate representation (e.g. a CPA, appraiser, or other disciplines as required). The spouse should pay for his or her own advisers, even if gifts are made. The client athlete should not pay for any of the spouse's advisers directly.
- Consider how the terms of the prenuptial agreement might appear to a court or even the media if a divorce follows. Appearances may be more important for the professional athlete than for other clients. If the athlete is young, healthy and insurable at inexpensive rates, perhaps a larger policy might be offered in the prenuptial agreement than might be offered for a client lacking "star power."
- Full disclosure of all relevant information should be made in the exhibits to the prenuptial agreement. This might include exhibits with team contracts, endorsement agreements, recent tax returns, and more.
- Have the agreement signed as far in advance as possible of the actual marriage, before invitations are sent, etc. While opinions differ and may vary by state, having the agreement fully negotiated and signed at least several months before the wedding date is advisable. Ideally negotiations should have begun well before that and draft agreements, emails and other evidence of the duration of those negotiations in advance of execution may be worthwhile to preserve.
- Assets that can be transferred into an irrevocable trust, such as a self-settled domestic asset protection trust ("DAPT"), or any of the many variations of that technique, should be transferred before the prenuptial agreement is signed and the existence of that DAPT should be disclosed in the prenuptial agreement. There are wide variations in opinions as to how much should be disclosed, but the pros/cons of full disclosure (attaching a copy of

¹⁰ Joe Crankshaw, *Golfer Greg Norman's Ex-Wife Gets \$103 Million in Divorce Signing*, TCPalm, July 11, 2008. <http://archive.tcpalm.com/news/golfer-greg-normans-ex-wife-gets-103-million-in-divorce-signing-ep-402686849-348548261.html>

the trust instrument and trust balance sheet to the prenuptial agreement) might be considered and discussed with the client.¹¹

Lifestyle

Along with the temptation athletes face to overspend because their more-established teammates are also overspending on cars, jewelry, homes, boats, etc., drugs and gambling are also common and expensive vices. Unfortunately, they soon learn that keeping up with the Joneses is expensive and difficult, if not financially ruinous. A multi-million dollar contract will not go far when an athlete spends more money than he or she is earning.

Professional athletes often fail to consider the long-term effects of impulsive purchases on their future financial well-being. The real solution for the athlete would be a paradigm shift to understand that the most luxurious and valuable purchase, the one that should truly draw the admiration and jealousy of his or her peers, with a glimmer brighter than the biggest diamond, is the acquisition of financial security. The most valuable, rewarding and long term luxury is financial security itself. Perhaps demonstrating with financial modeling to the athlete client the current financial scenario, what his or her financial picture might be at ages 40, 50 and 65 under the current savings scenario versus a more robust savings plan. The forecasts should illustrate not just wealth levels using Monte Carlo simulation, but what those wealth levels will realistically mean in terms of spending power at those ages. Rerun the forecasts showing various levels of change in current savings to demonstrate the long term financial benefits of sacrificing some current consumption.

When the athlete intends to make a large purchase, such as a house, rerun the financial models illustrating what a \$2 million, \$5 million and \$10 million (or whatever values are appropriate for the particular athlete) house purchase might look like in the long term. Reflect realistic carrying costs, not just the impact of the purchase price. Again, illustrate to the athlete how the difference between a \$5 million and \$10 million home today, can mean the difference between a livable (even if less than desirable) cash flow at future ages, versus financial failure at a relatively young age.

Family, Friends and the Entourage

Friends and family often expect the athlete to take care of them financially. And since it is easy to spend someone else's money, the standard of care expected by these friends and family can often become exaggerated. The economic support of an entourage can be an insurmountable financial burden to sustain.

The athlete's budget should include line items for these types of expenditures. Empowering the athlete to know, based on a quantitative analysis, how much they can spend on helping family, friends or others without jeopardizing their own future and financial security may enable the athlete to resist a major item of financial quicksand that has sunk so many others. As will be discussed later, consideration should be given to having the athlete engage a buffer between his money and potential predators, thus isolating a certain portion of the athlete's wealth permanently from loss. It is often difficult for the athlete to deal with the social pressures. Saying

¹¹ For a detailed discussion of DAPTs and prenuptial planning see: Glazier, Shenkman & Gassman, "DAPTs & Klbacka: At the Intersection of Estate Planning and Family Law," LISI Asset Protection Planning Newsletter #357 (February 1, 2018) at <http://www.leimbergservices.com>

“no” to requests from family and friends can prove to be impossibly difficult. It is far easier for the pressured athlete to say, “I’d love to, but you’ll have to ask my Trustee.” Even utilizing a funded revocable trust with an institutional co-trustee that the athlete can replace at whim may provide a professional trustee with experience dealing with those looking to take financial advantage. If nothing else, merely the modest delay in time for the institutional trustee to approve a distribution might provide enough “space” for the athlete to consult with advisers or consider the impact of meeting a financial request of a family member, friend or other person.

Predators, Lawsuits and Other Legal Issues¹²

Every one of means should consider some degree of asset protection planning. At the simplest level, a review of liability insurance may suffice. For other clients, especially as the clients move up the wealth and vulnerability spectrums, more significant asset protection should be a standard discussion. For the pro athlete, however, the risks of a lawsuit are exponentially greater than for many other clients. And the risk is not merely the suit itself, but the leverage bad publicity or social media coverage could entail.

Wealth and star power are magnets for legal entanglements. Predatory individuals pursue legal actions against athletes in some instances merely because they believe that the athlete has deep pockets, is a ripe target for litigation, and will have to protect endorsement contract representations. The latter factor may provide the predator significant leverage to force a settlement even if their claims are baseless. It does not take much sleuthing for a predator to identify an athlete target; they simply have to see the billboards while they drive, turn on a television, or follow a social media feed or follow up on viral video clips. Proactive asset protection planning and involvement of trusted advisors in all meaningful decision-making can help keep the athlete aware of the risks and monitor issues. This can facilitate involving litigation counsel earlier in the process than might otherwise occur, which might alone mitigate damages. But this process, just like using an institutional co-trustee to deflect unwise financial pressures, will require an unpleasant and difficult adjustment process for the athlete client, but the results may be financially life-saving.

Poor Investments

Athletes have often invested in business ventures such as restaurants, car dealerships, and various entertainment companies that they did not have the business acumen to properly vet. The results frequently have been a trail of financial disasters. Great sounding business ventures outside the investor’s sphere of knowledge rarely turn profitable. In most instances the athletes would be much better off investing in a more conservative and traditional manner. That might mean a well-diversified securities portfolio with periodic rebalancing. If private equity or other special investments are appropriate, they should be part of the overall asset allocation, limited to a reasonable percentage of the athlete’s investable wealth, and should all be properly vetted by the advisory team. In many cases, if the athlete desires to be involved in a particular industry or asset class, there may be more widely held options that have baked into the transaction reporting, etc.

No Financial Planning

¹² See generally, K. Eli Akhavan, The Best Offense Is a Good Defense - A Primer on Asset Protection Planning for Professional Athletes, 34 Entertainment & Sports Lawyer 19 (2018)

Since athletes often earn substantial money at young ages, they do not have the maturity or experience to know how to spend prudently and plan for their financial future. While the paychecks the athletes receive stop at their retirement, the monthly payments for lifestyle costs and to creditors do not. Many athletes neglect to consider the long-term consequences of their debt obligations, as well as the fact that the money that they earn during their playing career will need to last them (and their family) for the rest of their lives. It is too easy to overlook the fact that a personal guarantee signed at age 27 can very well be called by a creditor at age 47, well after the athlete's prime earning years have ended.

The athlete's retirement stage may well last half a lifetime or more. Athletes, like all wealthy individuals, must take steps to manage their monetary risks, such as safeguarding their fortune where it will be free from various pitfalls. Many athletes simply do not know what they are doing with their money and end up losing it all. NBA star Baron Davis summed it up best when he said, "You get your paycheck, but you don't get any instructions with it."¹³ The end result is that athletes are often forced to sell valuable items that represent priceless memories, such as World Series and Super Bowl rings, Heisman Trophies, homes, cars, and anything of value for the sole purpose of paying creditors. Those sales are highly unlikely to net anything near what was paid to acquire the items but a short few years earlier. These adverse scenarios might be avoided by taking proactive planning measures and putting safeguards on the athlete's fortunes early on.

Comprehensive Wealth Planning for the Professional Athlete

Broad Based Planning Essential

Professional athletes, no different than most clients, require a broad-based approach to wealth management, not merely investment planning or estate planning. But each of these basic areas has to be tailored to the unique attributes of the professional athlete:

- Financial planning and investment management.
- Tax planning which should include state and federal income tax planning as well as transfer tax planning.
- Asset protection which should including protection from divorcing and dissident spouses or significant others, protection from lawsuits and claims, and steps to protect from the predators, sycophants, and others that plague the professional athlete.

Creditor protection is also an essential part of the wealth planning process. However, it is often the least addressed of the components. Creditor protection should be incorporated into all business and estate planning and have an increased importance in the planning for the young and vulnerable professional athlete. Failure to engage in creditor protection could prove to be the undoing of the athlete's seemingly solid wealth planning.

¹³ Paul Wachter, Pro Athletes, and Amateur Money Managers, Real Clear Markets, October 9, 2010. http://www1.realclearmarkets.com/2010/10/09/pro_athletes_and_amateur_money_managers_106516.html

Athletes Can Be Protected with a Collaborative Team of Independent Advisers

The most important step for the professional athlete is quite simple but often the hardest to absorb: he or she needs basic financial planning, especially a budget. This planning does not require star-power advisers that have a stable of other well-known athlete clients. It requires an estate and financial planning team that includes the essentials: an accountant, wealth manager, estate planning attorney, and insurance consultant. The athlete will also need other specialists to review, negotiate, and manage sports and endorsement contracts. Importantly, the independent, non-star powered estate planning team provides the ballast to keep the pro-athlete safe and offer a sounding board and system of checks and balances to help maintain a sound financial foundation. This independent team can evaluate the performance and recommendations of the athlete's manager and other advisers. All of this can provide vital checks and balances and reduce the risk of any renegade adviser being able to inflict material financial harm on the athlete.

Too often athletes rely on a limited group of advisers who do not provide objectivity, independence, and real concern for the athlete client. Given the high risk of predatory investment partners, having an independent check and balance system is essential to the athlete's financial security. Furthermore, proper planning may well enable the athlete to pursue business start-up dreams in a safer manner. If the athlete's contribution to a proposed enterprise is his star power, then others should be willing to invest the funds to get the business off the ground, or at least a disproportionately larger amount of those funds than the athlete. It is not uncommon for a promoter to seek to capitalize on the athlete's star power, while also having the athlete finance the venture. These types of ventures might be predators, and should be viewed with a great degree of skepticism, and the advisory team should carefully scrutinize the proposal.

The added benefit of a strong financial team is that it can help the athlete adhere to the formalities of the estate and business plans. Legal formalities must be adhered to for any plan to succeed. If the athlete does not respect the structure of the estate or business plan, then the IRS, creditors, and other potential predators will also disregard those plans. Athletes are generally less inclined to be financially structured than businessmen who need structure to operate and employ capable staff to maintain that structure. But for the athlete, no matter how well designed an estate or business plan may be, failure to respect the formalities of that planning will result in failure of the plan itself. The athlete must have a team to help him design, implement, and follow-up on all aspects of the planning so that it can perform as intended.

Managing the Athlete's Investments¹⁴

Athletes should begin building a core investment portfolio as early in their careers as possible. This portfolio should be established before diverting funds to start-up businesses and other type of ventures. The athlete should pursue a diversified portfolio of assets managed by an independent institution or wealth management firm as the fiduciary. Regardless of whether leveraging the athlete's name and image into a new business venture may ultimately be worth the risk, the reality is that mortgaging the athlete's financial future by overcommitting to such

¹⁴ See generally, K. Eli Akhavan, Jonathan I. Shenkman, *Don't Drop the Ball, Trusts and Estates*, March 2016.

ventures, or committing before a core investment safety net is developed, or guaranteeing debt to start such a venture, is too likely to end in financial disaster.

If the athlete retains a quality advisory team, he or she can rely on their independence to objectively evaluate options and make recommendations. This planning team of independent advisers will provide a process that is more likely to stand the test of time. The investment plan should address the following components: an appropriate time horizon and risk profile; tax efficiency; liquidity needs; insurance protection, and creating additional streams of cash flow, such as real estate, private equity, and perhaps appropriately vetted annuities for post-retirement years.

- **Time Horizon and Risk Profile.** Practitioners must always consider: what is the appropriate risk profile of the professional athlete's portfolio? An athlete might have a five-year estimated career path, with no assurance of a post-career income, so that he or she might have to begin to draw on the portfolio for lifestyle expenses in year six. Thus, the time horizon for even a young athlete might be much shorter than for the non-athlete of a similar age. Oftentimes, the risk profile may have to be greater to reach the necessary financial targets. The greatest risk might be a significant injury that derails the athlete's career before a sufficient financial safety net is developed. This is why a significant savings rate and a controlled burn rate are so vital.
- **Tax Efficiency.** Athletes are typically in high tax brackets given their high earnings. Their constant traveling for games often causes them to be hit with state taxes targeted at athletes and performers, sometimes referred to as a "jock tax," which further increases their tax liability, discussed briefly below. When planning investments, serious consideration of investments that can provide some tax relief may be warranted. Also, as athletes push to build savings during what might be a limited duration high income career, those savings might warrant being held in trusts to reduce or avoid state income taxation.¹⁵ It is vital for the athlete to have a tax adviser that understands the nuances of advising athletes who often become akin to "entertainment brands." A state and local tax ("SALT") expert is perhaps necessary. Identifying expenses that may be deductible by the athlete that might be missed without adequate attention.
- **Lack of Liquidity.** For many clients, assuring adequate liquidity is an important component of every financial and estate plan. For the athlete, especially during high income career years that should be marked by the accumulation of significant financial reserves for post-career lifestyle costs, avoiding liquidity to safeguard savings from many of the risks (e.g. predators) discussed above, may prove to be an advantage. Liquidity is an issue that is particularly important to athletes who too often spend well beyond their means. If an athlete's investments are illiquid, the likelihood of these assets being depleted very quickly or being used for poor investment decisions is minimized. For the spendthrift athlete, investments to consider for this purpose might include insurance products, annuities, and alternative investments with a long initial holding period. The inherent costs and restrictions on liquidation entailed with these products may provide a forced discipline

¹⁵ See Blattmachr and Shenkman, "State Income Taxation of Trusts: Some Lessons of Kaestner," Estate Planning, October 2019, page 3.

to the athlete. While many investment advisers might express dismay at the above discussion, the point should be to plan in a manner that is most advantageous for the particular client, not merely adhere to standard asset allocation mantra. None of this is to suggest that advisers permit an athlete client to purchase or invest in products that are unreasonably costly or have poor performance. The point is that for the young professional athlete, the suitability of a particular investment may be positively impacted by the difficulty the athlete will have accessing that asset prior to retirement, or even longer. This type of investment planning, however, will have to pass muster under the DOL fiduciary rule.

- **Additional Streams of Income.**¹⁶ While some athletes' careers have flourished after retirement from pro sports, many others struggle to find ways to earn a livelihood. If the advisor can recommend investments that will not only appreciate in value, but can also provide a source of cash flow or even employment, this may be essential to help the athlete maintain the lifestyle to which they have grown accustomed to. Options include real estate, private equity, and annuities. Both areas require hiring an experienced manager but can benefit the athlete for a longer timeframe.
 - **Real Estate.** Real estate has long been an attractive asset class for investors. From a tax perspective, the owner of real estate has a myriad of tax deductions from which to benefit, including expenses such as mortgage interest, property tax, operating expenses, depreciation, and repairs for the rental of a dwelling unit. One can also deduct costs associated with maintaining the property, including advertising, maintenance, utilities, and insurance.¹⁷ Another benefit is the lack of liquidity. Generally, selling real estate can take time, effort, and money. This process gives the athlete more time to reconsider a bad financial decision. Athletes who invest wisely have experienced great success in the real estate market. For example, Hall of Fame basketball player Hakeem Olajuwon made a fortune in his career and even more money in the Houston real estate market. He purchased and flipped several properties, but also invested in several buildings that provided consistent cash flow. Olajuwon is a devout Muslim which has limited him to only using cash for his deals since Muslim law forbids him from charging or paying interest.¹⁸ This has worked to Olajuwon's advantage because it allows him to move quicker than other buyers and he does not have a bank loan hanging over his head pressuring him to make decisions.¹⁹

¹⁶ See generally, K. Eli Akhavan and Jonathan I. Shenkman, *Planning for the Stars: Financial and Investment Planning for Entertainers and Professional Athletes*, Tax Stringer, January 2017 and February 2017.

¹⁷ Tips on Rental Real Estate Income, Deductions, and Recordkeeping. Internal Revenue Service, February 9, 2016. <<https://www.irs.gov/Business/Small-Businesses-&-Self-Employed/Tips-on-Rental-Real-Estate-Income-Deductions-and-Recordkeeping>>.

¹⁸ For a discussion of how alternative structures can be used in real estate and business transactions yet still comply with Sharia law see: Shenkman "Integrating Religious Considerations into Estate and Real Estate Planning," *Probate and Property* March/April 2008, page 34.

¹⁹ Kate Murphy, *A Slam-Dunk in Houston Real Estate*. The New York Times, December 6, 2006. <<http://www.nytimes.com/2006/12/06/realestate/commercial/06houston.html>>.

- **Private Equity.** Private equity (PE) is a type of investment that is made in a company that is not publicly traded. PE professionals will take several years to restructure a company and then eventually sell it or take it public to make a profit for their investors. If the PE firm holds the companies for a number of years, these restructured companies can provide healthy cash flows to the investors. These cash flows can be favorably taxed if the athlete is a partner in the deal because of the “carried interest” tax benefit. Carried interest is profit made by the partnership, which is taxed at approximately 20% versus up to 39.6% for income and wages. Athletes are no strangers to private equity. Steve Young, former Hall of Fame quarterback for the San Francisco 49er’s, joined a private equity firm once he retired from professional football. He then partnered with a former Bain Capital executive to start their own private equity firm.²⁰ Similarly, All-Star NBA center David Robinson founded the private equity firm Admiral Capital, which he runs together with a former Goldman Sachs executive.²¹

- **Annuities.** Another way to supplement an athlete’s savings and income during retirement is the use of annuities. Beneficial features of annuities for athletes include the forced savings aspect, tax-deferred growth, and the ability to offset risk to an insurance company. Lack of liquidity for the annuity funds is an additional benefit. An annuity provides a safeguard to overspending since it ties up the owner’s money for years and is much less accessible than other investments. There are two basic types of annuities:
 - **Deferred Annuity.** This type of annuity requires initial investments from the buyer but does not pay out until a future date and thereby can serve as a savings tool. That savings, in a properly structured product can permit the athlete to save money on a tax-deferred basis. There are no generally income limitations or maximum contribution allowances. Furthermore, the owner can offset the market risk by selecting a fixed rate of return instead of being subject to market fluctuation.

 - **Immediate Annuity.** This type of annuity may be an option for an athlete to guarantee an income stream for the rest of his or her life. Thus, an immediate annuity might make more sense for the athlete client to purchase near retirement with liquid funds that he or she might otherwise be tempted to spend. These types of annuities have many options, including the ability to defer payments for a period of time, extend payouts for the life of both the owner and their spouse, and to have beneficiaries receive payments.

²⁰ Ron Lieber, *Financial Lessons from Sports Stars’ Mistakes*, The New York Times, September 9, 2011. <<http://www.nytimes.com/2011/09/10/your-money/financial-lessons-from-sports-stars-mistakes-your-money.html>>

²¹ Kiel Porter, *David Robinson’s Admiral Capital Group to Acquire Tecmotiv*, Bloomberg News, July 31, 2019. <<https://www.bloomberg.com/news/articles/2019-07-31/david-robinson-s-admiral-capital-group-to-acquire-tecmotiv-corp>>.

One complication of annuities as it relates to athletes is the penalty imposed for withdrawing funds before the owner turns 59 ½. Since professional athletes stop competing at the highest level at young ages, e.g. by their mid-30s, there is a significant gap between an athlete's retirement age and when they can technically start receiving income payments without paying a penalty. Fortunately, there are exceptions allowed which allows early withdrawals from annuities and other types of retirement accounts.²²

One such exception is to receive income as a series of "substantially equal periodic payments." To qualify, the owner must receive a series of income payments that are calculated based on their life expectancy utilizing the Life Expectancy Method, Amortization Method, or Annuitization Method. These payments must continue annually for five years or until the age of 59 ½, whichever is longer. Payments may be stopped after this time if desired.²³

Some permanent high cash value life insurance policies may offer benefits in a similar vein, but these, as with the annuities, must be properly vetted to be certain that they make sense for the athlete's circumstances, have reasonable anticipated performance (which must be monitored in future years) and acceptable cost structures.

Tax Planning for the Athlete

Gift Taxes

The high-earning athlete often faces unexpected gift tax problems. The entertainment and sports news programs routinely have stories of athletes who, shortly after signing a substantial contract, announce that they are buying a home for their mother, cars for friends, and more. Athletes also often give large amounts of cash as gifts.

To the extent that the gift exceeds the annual gift tax exclusion \$15,000 (2019) per person, that gift is taxable and will reduce the athlete's lifetime gift exemption. Proper planning may reduce or eliminate this gift tax problem.

It may behoove the young athlete to take a significant portion of a windfall or other large early payment and immediately gift it to a trust that can provide asset protection, difficulty reaching the asset for current expenditures (e.g. the approval of an institutional trustee's distribution committee), and to safeguard it from the pressure of family members or others wishing to ride the athlete's success. But this might require action prior to the 2020 election. Proposals to change the transfer tax system have included the potential reduction in the annual gift exclusion from the current 2019 amount of \$11.4 million only \$1 million and capping annual gifts at a mere \$20,000 per year per donor. That is a pittance compared to what many taxpayers can gift under the current \$15,000 per year per donee. If the administration changes in 2020 or after these types of changes could be enacted. Thus, many athletes should carefully evaluate making gifts now before such changes might be enacted.²⁴ If, for example, an athlete has a current irrevocable life insurance trust funding that trust might prove problematic if such a law were enacted. It might be

²² Code Sec. 72(q)/72(t).

²³ 72(q) & 72(t) Distributions, Annuity Financial & Insurance Services, Inc., September 23, 2012. <<http://www.annuityadvisors.com/reference/detail/72q--72t-distributions?refid=67>>.

²⁴ Shenkman, Tietz, and Blattmachr, "The Bernie Sanders Tax Proposal – Might it Foreshadow Future Democratic Proposals," Leimberg Information Services, Inc. Estate Planning Newsletter No. 2715, April 4, 2019.

prudent to fund the trust now with sufficient cash and investment assets to cover insurance premiums for many years to come.

The above types of trusts or transfers might be made to a trust that is currently a dynasty trust to benefit a spouse, descendants, perhaps parents, etc. Since the athlete who makes the gifts may need access to the assets given in a future year, the trust might be structured as a dynastic trust that has various provisions that might permit the athlete to access the wealth or benefit from it in the future. These might include:

- A hybrid DAPT provision. This might grant to a persona in a non-fiduciary capacity the right to add descendants of the athlete's grandparents as beneficiaries to the trust. That could include the athlete. Thus, the trust is arguably not characterized as a self-settled trust under current law so that the risks some perceive with that type of technique might be avoided.²⁵
- A special power of appointment trust ("SPAT") provision might be included. This might provide someone in a non-fiduciary capacity the power to direct the trustee to make principal distributions to the athlete. That mechanism arguably also avoids characterization of the trust as a self-settled trust. The SPAT involves the creation of an irrevocable trust for beneficiaries other than the grantor, in which a named individual (or several individuals as a sort of committee, the powerholders), is granted a lifetime limited special power of appointment, an LPOA, held in a non-fiduciary capacity.²⁶
- A loan provision may provide the athlete access to the funds. But note that a loan provision may characterize a trust as a grantor trust and that may be inconsistent with the athlete creating a non-grantor trust that might facilitate saving state income taxes on trust earnings.²⁷

Estate Taxes

Most clients undertaking a comprehensive plan have traditionally focused on minimizing future estate taxes. The considerations facing the athlete present a significant shift in the tax planning mindset. No matter how fiscally savvy the athlete, it is not reasonable to expect a 20-year old client to place much priority on possible estate taxes to be incurred more than a half-century in the future. Rather, the immediate concern for many athletes is running out of money. However, overall asset protection and other planning remains important to their estate tax planning. That being said, the prospect of the estate tax exemption being reduced to \$3.5 million should nonetheless motivate wealth athletes to take some planning steps near term. Also, the funding of appropriate crafted irrevocable trusts, that may permit the athlete to benefit from the trust in future post-retirement years as discussed above, can permit even a young athlete to safeguard assets thereby obtaining important asset protection benefits, retain the potential for access or

²⁵ For a discussion of self-settled trusts see: Blattmachr, Blattmachr, Shenkman and Gassman, "Toni 1 Trust v. Wacker – Reports of the Death of DAPTs for Non-DAPT Residents is Exaggerated," Leimberg Information Services, Inc. Asset Protection Newsletter No. 362, March 19, 2018.

²⁶ O'Connor, Gans & Blattmachr, "SPATs: A Flexible Asset Protection Alternative to DAPTs," 46 Estate Planning 3 (Feb 2019).

²⁷ Lipkind, Shenkman, Blattmachr, "How ING Trusts Can Offset Adverse Effects of the Tax Law – Part 1," Trusts & Estates, September 2018, page 26.

benefit from those assets, all while accomplishing estate tax minimization benefits that may not be currently uppermost in mind.

Income Tax Planning Generally

Minimizing income taxes during the high earning years and protecting those net earnings for the future (the asset protection component of the athlete's plan) should be a primary focus.

Current income tax savings for the athlete will often be the starting point of income tax planning. Minimizing what will undoubtedly be a substantial income tax is often critical. A popular step is to create an entity that will enable the athlete to use a qualified retirement plan. Consider that although the average NBA player's career lasts only 4.8 years, he will earn about \$24.7 million over this span. Advisors have the task of making these few years of earnings last through what will likely be a very long retirement.

State Income Tax Planning

State tax savings is a critical planning issue for the athlete. A pro-athlete's domicile plays an important part in his planning. A pro-athlete can be born in one state, play professional sports in another state, reside in the offseason in yet another state, and finally spend his retirement in a completely different state. Each of these jurisdictions may compete for the athlete's income and estate tax dollars. For example, for income tax purposes, many states impose taxes on athletes for the "duty days" they compete in that state, even if the athlete is not domiciled there. Given a sufficient nexus to a state, the state may claim that the pro-athlete was the domicile of that state.

Accordingly, a pro-athlete's advisor must clearly state the domicile of choice. This requires making sure that the pro-athlete satisfies the different domicile factors specific to that state, such as having a primary residence, filing affidavit of domicile with the appropriate county clerk, and registering to vote. A partial list of factors to consider might include:

- The athlete should maintain a safe deposit box in the intended state of domicile but not elsewhere. However, in light of publicity and other concerns, it might be worth considering creating a home state LLC to own the box instead of the athlete directly.
- Social media postings should not contradict the stated tax position that a particular state is home.
- Religious affiliations should be maintained in the intended home state.
- Consider the impact of the laws of the selected domicile on a spousal right of election and other ancillary factors.
- Tax reporting should be consistent with the legal position taken as to domicile.
- Voter registration and voting in the state of intended domicile. This might be considered even if it requires that the athlete fly back to the home state to vote and fly out the same day to meet training or other commitments.
- Will and estate planning documents should be executed in the state of intended domicile and recite that the athlete is domiciled in that state.

State tax planning must also address in detail how earnings should be allocated to the activities that occur in different states (e.g., games, training time, event appearances, etc.).

Advisors must also be aware of which states have a history of aggressively taxing income from athletes. For example, Nat Moore, a wide receiver for the Miami Dolphins, went to Buffalo, New York for one day to play the Buffalo Bills. New York audited Moore's tax return and took the position that since he played 16 games in a year, his salary should be divided so that 1/16th of his income should be taxable in New York because he played 1/16th of his games there. Needless to say, Moore fought the tax authorities, but a New York court sided with the state. The takeaway less is that while planning may not protect always protect game-day salary, ancillary income can and should be protected.²⁸

Asset Protection Planning for the Athlete

An athlete's planning should be broad based and address a range of goals including: estate tax exposure (whether under current tax rules, or, as discussed above, under future possible changes if there is a change in administrations in Washington), minimizing probate costs and the publicity of a public probate, protecting the client during times of incapacity (which is a substantial risk for the athlete), income and transfer tax planning, and asset protection. All of these goals should be pursued while keeping an eye towards appropriate levels of control and flexibility. The following are considerations athletes might take under advisement in terms of asset protection:

- **Assets protected under home state law.** If the athlete's home state excludes certain assets that might be useful to consider in determining investment decisions. For example, Florida has long been known for its robust homestead exemption. In a recent case a trustee's purchase of annuities resulting in safeguarding all of the trust's assets from creditors when the court pierced the trust.²⁹ If this type of planning is considered, it might be first advisable for the athlete client to endeavor to corroborate that domicile is supported in that particular state. As discussed above, many athletes travel extensively, have property holdings in multiple states, etc. so that the delineation of which of several states is that athlete's domicile, may not be as clear as for other clients.
- **Control the ownership of property.** The ownership structure for the athlete's property must be addressed to achieve asset, tax, and privacy protection (recognizing the limitations and difficulties of achieving privacy in the current environment). Investments should be isolated in separate entities, such as LLCs. For example, if the dollar values justify it, marketable securities may be held in an investment LLC. That should be separated from real estate and private equity transactions which may each be held in a separate LLC. Even if the underlying business or real estate investment is in an LLC, the athlete might prefer to have his or her own LLC own his interest as that might provide additional protection if the underlying business or property entity is not maintained with all appropriate formalities. It might also provide more flexibility to facilitate future asset protection transfers. For example, it may be feasible for the athlete as wealth rises to transfer a private LLC to a family trust without the necessity for a new approval from the underlying property or business entity. While the aforementioned may be common for

²⁸ See generally, K. Eli Akhavan, *Legal Gaga, Trusts and Estates*, February 2012.

²⁹ Gasman, Shenkman, Dickson, "In Re Rensin – How One Man's "Hippo" cracy Might Change Offshore Trust Planning Forever," Leimberg Information Services, Inc. Asset Protection Newsletter No. 390, August 26, 2019.

non-athlete clients of means, endorsements likely represent a category that is more unique to athletes and others with star power. Endorsement arrangements might, if permitted pursuant to the contractual arrangements with the product company or other third parties, be isolated in separate LLCs or other entities. The LLC's interests in turn are owned by various trusts designed to meet different planning objectives. Enhanced protection from creditors may be obtained by domiciling each entity in a state that has superior creditor protection statutes. For example, some states provide only a "charging order" as the exclusive remedy for creditors and insulate single member LLCs from creditor attack.

- **Plan the use of property.** If the athlete heeds the advice above, he or she is likely to have significant assets held in various LLCs, other entities, contractual arrangements, and a variety of trusts. For an asset such as a personal residence, the ownership structure will have to permit use of the property. While tenants by the entirety of a primary residence may provide a measure of protection under some state laws, not every state has such ownership possibilities. Tenants by the entirety is a special form of joint ownership of an assets (some states restrict its use to a residence; other states do not restrict it in that manner). Even if tenants by the entirety is permitted, it may not be the ideal approach. For example, it might be preferable to have an LLC formed in a favorable jurisdiction (see preceding bullet point) using a name that perhaps has the property address in its title rather than using the athlete's name. While that might only provide a modicum of incremental privacy, even that modest additional privacy may be worthwhile. The house LLC, with an appropriately crafted operating agreement that reflects the unique LLC asset, may in-turn be held by one or more irrevocable trusts of which the athlete and/or a spouse are beneficiaries, thereby permitting continued use. That may provide an additional measure of asset protection (especially if tenants by the entirety is not available in that jurisdiction or if the athlete is not married). That same plan can also meet estate tax planning goals.
- **Plan the use of income derived from property.** The typical client tends to focus on having access to the cash flow (different from "income" as most laypeople perceive the term) from their assets. However, the pattern for athletes is different. The initial earnings window has high wealth accumulation and often does not require additional cash flow. Then, when the athlete retires, there will likely be variable needs for cash flow. For example, initially the athlete's endorsement income may be sizeable. As endorsements wane as the athlete gets older, a more significant cash flow may be required. Irrevocable trusts, in trust friendly jurisdictions (e.g. one of the 19 states permitting self-settled trusts), with an institutional trustee having complete distribution discretion, may provide a higher level of asset protection than other trust structures, and also provide the flexibility to meet each athlete's somewhat unique cash flow pattern as described above.
- **Control bequests.** All clients, including athletes, hope to bequeath property to whomever they want, whenever they want, however they want. As noted above in the discussion of tax planning, the relative youth of athletes tends to make bequests a lower priority and the foremost concern must be assuring adequate financial resources for the life of the athlete before even considering bequests to children or heirs. Given the risks of

divorce, potential children out-of-wedlock, uncertain or variable financial situation, etc. the judicious use of lifetime limited powers of appointment and decanting powers in irrevocable trusts may add an important element of flexibility to effectively restructure an irrevocable trust to remain appropriate for the athlete and family as circumstances evolve.

- **Protect assets from lawsuits using trusts.** Professional athletes generally have highly visible public profiles. Their contracts and salaries are often public information, making them attractive targets for lawsuits. Accordingly, pro-athletes should, as much as is practicable, structure their estate so they do not hold direct title to assets.

For example, the athlete may opt for a creative use of life insurance to grow cash value policies inside the protective envelope of an irrevocable life insurance trust. For an athlete who seeks heightened protection from liability but does not wish to relinquish the right to benefit from his hard-earned assets, an advisor may recommend a domestic asset protection trust (DAPT). There are now 19 states that have enacted legislation permitting these self-settled trusts. The athlete can transfer his assets to the DAPT and remain a discretionary beneficiary of the trust, while still protecting the assets from suit by non-exception creditors. Additionally, if the DAPT is structured properly, the DAPT's assets will not be included in the athlete's estate. Practitioners must be fully aware of their respective jurisdiction's approach to DAPTs when considering this kind of planning for the athlete. Several variations or options such as the hybrid DAPT and SPAT were noted above.

Insurance Planning for the Athlete

Disability Insurance

Bo Jackson, a former three-sport athlete in college and all-star in both the NFL and MLB, is living proof that even the most talented athletes can have their careers derailed by an injury. In 1991, a hard tackle dislocated Jackson's hip and he never fully recovered. He was forced to end his football career after only four seasons and played just two more years in MLB before retiring.³⁰ Disability can be devastating for a pro-athlete, whose livelihood is based on being in top physical condition. An injury can cause the athlete's income stream to greatly diminish or evaporate. There are various ways to help protect against the loss of income at different points during the athlete's career.

Before the athlete goes pro, a disability policy should be considered through the "Exceptional Student-Athlete Disability Insurance Program", which was established by the NCAA in 1990. This program is geared towards student athletes that expect to be drafted within the first three rounds of their respective sport. The coverage offers up to \$10 million for a highly touted basketball or football college player. This type of disability insurance protects athletes in the

³⁰ Jack Andrade, *11 Athletes Whose Promising Careers Were Derailed by Injuries*, The Boston Globe, March 6, 2015. <<http://www.boston.com/sports/2015/03/06/athletes-whose-promising-careers-were-derailed-injuries/aedfCzaMyhj4P1uICv3SfP/story.html>>.

event their careers end by injury while still in college. Once a student athlete is approved for this program, they will automatically be eligible for a loan to help pay for the policy.³¹

Another type of income protection is loss-of-value insurance that a college can purchase on behalf of the athlete. This type of insurance is purchased in order to entice the athlete to continue to play for the university and refrain from leaving college early to enter the draft. Should the athlete experience an injury in college, this type of policy will compensate for the likely future earnings that are lost due to the injury.³²

Once the athlete enters the professional level, a specialized high limit disability policy should be considered. Advisors must find specialized high limit coverage, which can protect against both career-ending and temporary disabilities. It is important to evaluate for the athlete an “Own-Occupation” rider on the policy, if available and not cost-prohibitive. This rider may protect the athlete from not being able to perform the duties of his or her sport. For example, the disability policy of a professional football player who can no longer play football, but can still work as a studio commentator, should be triggered to replace some of the injured athlete’s loss of income.

Life Insurance

A life insurance policy should be relatively inexpensive if purchased when the athlete first embarks on their career because of the professional athlete’s young age and superior health. Life insurance, other than term life insurance, has two distinct components: the “death benefit”; and the “inside build-up,” or investment component, which grows in a tax-free manner like a qualified retirement plan. Both elements may provide benefits for the athlete. Without life insurance, if the athlete dies prematurely his or her family may face economic insecurity, especially if they have become dependent on the athlete’s high earning power. In addition, many athletes have outstanding debt obligations, such as a large mortgage, as a result of leveraging their many assets. Typically, those debts generally are not extinguished on death. In fact, death may be a term of default and accelerate the problems faced by the athlete’s heirs. Life insurance can provide the athlete’s loved ones with sufficient funds to satisfy these outstanding debts.

Another key feature of a life insurance policy is giving the athlete a regular “bill” to pay, which can help instill the discipline to set aside money and not spend it all. Well-planned life insurance can play a significant role in mitigating these problems. Additionally, the safety feature of the policy may be a reliable source of funds for the athlete when other investments are losing value.

Careful consideration should be given to the terms of the policy or policies selected. The unusual needs of the athlete client might be better met with several different types of coverage. Perhaps a large term policy can provide extra coverage for young children that might not be needed further into the future. Yet a separate term policy might be purchased to specifically address requirements in a prenuptial or other contractual arrangement. A higher cash value policy may be part of an overall investment/savings plan as that might provide asset protection as well as a lock up of excess cash that might otherwise be spent.

³¹ Student-Athlete Insurance Programs, NCAA.org. <<http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs/>>.

³² Marc Tracy, *Insurance Doesn't Eliminate Risk for Top College Athletes Who Forgo Draft*, The New York Times, May 8, 2015. <<https://www.nytimes.com/2015/05/09/sports/ncaafotball/insurance-doesnt-eliminate-risk-for-top-college-athletes-who-forgo-draft.html>>.

Trust Planning for Athletes

Several important trust planning concepts for the athlete client have been discussed in preceding sections of this article. There many different variations of trusts that can be used to accomplish different financial goals. Many practitioners often seize on the use of a particular type of trust for a particular purpose. However, to protect the athlete, employing a variety of different trusts will often provide a better solution. As with all clients, these trusts should be tailored to the athlete's particular circumstances.

As explained above, athletes typically face unique challenges to their asset protection, tax, and other planning. But the athlete client is not a uniform planning challenge. There are considerable differences in how planning for different athletes should proceed based on the level of wealth already accumulated, the nature of the assets involved, and other factors.

A threshold concept that most athletes will need to have explained is that owning assets in trusts will generally be preferable to owning those assets outright because of the unique challenges the athlete faces. Properly drafted, trusts can be powerful mechanisms to address many of the financial and legal risks facing athletes.

The ILIT vs. the DAPT

One of the common irrevocable trust that estate planners draft is the Irrevocable Life Insurance Trust (ILIT). A well-funded mix of permanent life insurance policies with top quality companies inside an ILIT may be an ideal component of the planning for athletes. This strategy provide the following benefits to the athlete and family. It may safeguard cash that might otherwise be spent; providing a conservative investment return on those funds that compares favorably to what most athletes achieve on their own. It might assure some asset value for the heirs if the athlete spends down his or her entire estate in post-retirement years.

As a strictly defensive tool, the ILIT is often an excellent option for the athlete due to the risks of death due to a sports accident or the other risks fame may bring (consider Steve McNair's unfortunate situation). Be aware that in an industry where the professional athlete is taught that he or she is invincible, compounded by a young age for many, might make life insurance a difficult investment to convince the athlete is appropriate.

As discussed above, another option is a self-settled Domestic Asset Protection Trust (DAPT). DAPT funding can come from the athlete making complete or incomplete gifts. Under a completed gift, the athlete transfers assets to the DAPT using some portion (or all) of the current \$11.4 million gift exemption. Under this transaction, the athlete realizes the statutory benefits afforded by the DAPT and the transferred assets are outside of the athlete's taxable estate.

Conversely, a gift to a DAPT is deemed incomplete if the transferor retains certain interests such as the ability to change the beneficiary of the gift. In this scenario, the athlete could simply transfer assets into the trust and gain the statutory protections offered by it.³³ The most

³³ Athletes, due to the nature of their work, often have contact with numerous jurisdictions. If there is any doubt that the athlete does not have strong connections to a strong DAPT state, it may be advisable to insulate such a trust with one (or even two) LLC's organized in that jurisdiction. In doing so, the athlete gains stronger contacts with that

significant drawback to an incomplete gift is that assets will not be removed from the athlete's taxable estate.

But too often practitioners, athletes or other advisers focus on common trust techniques or title rather than on combining various trust attributes into a trust tailored for the particular athlete. Thus, a hybrid DAPT might be created that also has provisions for life insurance. If the power to add the athlete as a beneficiary in the future is considered, prior to the powerholder exercising that limited power the trust might first be bifurcated into two components. The life insurance may, and all other assets not used in the second trust, might be held in one new trust. Only the investment or other non-life insurance assets that are necessary to provide the needed cash flow to the post-retirement athlete may be segregated in a second trust to which the powerholder adds the athlete as a beneficiary. That might insulate the portion of trust corpus to which any perceived DAPT liability may attach and avoid the insured/athlete being a beneficiary of a trust that owns life insurance. An advantage that might be afforded initially is that the investment assets might generate the cash flow to pay insurance premiums pre-division.

Beneficiary Defective Irrevocable Trust

The beneficiary defective irrevocable trust (BDIT) may prove the optimal technique for some athletes' planning. This trust could enable the trustee to buy gifts for family and friends, without triggering gift tax issues. A BDIT may help the athlete transfer assets outside of the transfer tax system. However, as with each planning tool and technique discussed in this article, modifications to a BDIT may be needed to tailor it to the needs of the athlete. To illustrate how best to structure a BDIT for an athlete, an overview of a more typical BDIT plan will be presented along with modifications and issues to address for athletes.

- **Typical BDIT Plan.** A third-party (most commonly a parent) establishes the BDIT for the benefit of the client. Because the parent is the settlor of the trust, the BDIT provides a greater measure of asset and estate tax protection for the client, because the client is not establishing the trust for himself or herself. Thus, it may be argued that the BDIT is not a self-settled trust. The BDIT grants the client the right to withdraw the gift (commonly called a "Crummey Power"). This withdrawal right results in the client being characterized as the "grantor" of the BDIT for income tax purposes.

The trust should thus be taxed for income tax purposes to the athlete beneficiary while the Crummey power is in effect.³⁴

When the Crummey power lapses the trust should continue to be taxed as a grantor trust as to the beneficiary.³⁵

The trust is funded with a single gift from the parent, friend or other benefactor of \$5,000. In this way, all assets contributed by the parent or other benefactor will lapse under the 5%/\$5,000 lapse limitation of Code Sec. 2514 to avoid characterization as a general power of appointment. Since the lapse is not in excess of the 5/5 rule, it should not be treated as a release of a GPOA, but merely a lapse.

jurisdiction and also benefits from the protections afforded by the LLC, in addition to those afforded by the trust itself.

³⁴ This should occur under Code Sec. 678(a)(1).

³⁵ This may occur, according to some practitioners, under Code Sec. 678(a)(2).

Some commentators suggest that the BDIT include a power to withdraw under a health education maintenance and support (“HEMS”) standard. A power limited by a HEMS limitation cannot be a general power of appointment.³⁶

Therefore, because the BDIT is treated as a grantor trust to the client, the client can sell appreciated assets to the trust without triggering capital gains tax exposure. The BDIT may provide the client a note for the purchase price of the asset. Since the trust has only very modest assets a guarantee would have to be provided to support the trust consummating the purchase. Some commentators have expressed concern that this structure may present risks. Any appreciation in the value of the asset after the initial sale would be outside the client’s estate, thus freezing the value of what can be taxed in the client’s estate.

The income and growth in assets inside the BDIT can benefit the client and all future descendants while never being subject to estate, gift, and GST taxes, simply because the BDIT was funded by someone else. Furthermore, the assets may be beyond the reach of creditors even though the athlete has the substantial use, enjoyment of, and reasonable control over, the trust assets.

Additionally, with a BDIT, the client can be given a limited power of appointment to designate who will ultimately receive the assets in the trust at death. The ability to defer the decision as to who receives the property, and how they receive it (preferably in a continuing trust), is an important benefit for anyone. For an athlete, because of the youth, immaturity, and significant uncertainty as to the family and financial future, this benefit is rather important.

- **Athletes and BDITs.** There are several special considerations regarding athletes. Given the unique social pressures described above, an athlete should not serve as his or her own BDIT trustee. The trustee should be an objective person, independent of the athlete, who can refuse a request for a distribution from a family member or other person. An institutional trustee who will adhere to trust formalities, have distribution requests evaluated by a professional distribution committee, and which may provide situs in a jurisdiction with favorable income tax and legal environments, may be ideal.

In addition, remember that this type of trust must be funded by a third party, and not reimbursed either directly or indirectly by the athlete. The athlete’s family may not have the financial wherewithal independent of the athlete to make the gift to fund the trust and may not understand the planning. If so, perhaps the parent may be legitimately employed in one of the athlete’s businesses, to earn the funds needed to initially fund the trust. Alternatives to funding by a family member may include a caring teammate, or a mentor from college years who may still be operating in a guidance capacity for the athlete.

- **Example of BDIT for an Athlete Client.** The BDIT can be a powerful planning tool for an athlete. Assume that the athlete earns \$6 million in annual salary. Capitalizing on his good reputation, this athlete is earning an additional \$4 million annually through business

³⁶ This HEMS withdrawal power might continue grantor trust status because under Code Sec. 678(a)(1) “such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself.”

ventures. The athlete's total income is \$10 million, but he is trapped in a 40% tax bracket that results in his annual payment of \$4 million in individual income tax.

Assume further that rather than owning his business ventures outright, the athlete owns these business ventures inside a BDIT that was initially seeded with the benevolent gift from his college football coach. The athlete can maintain control of these investments, and can retain broad power to hire and fire those who will manage these investments for him.

In a second BDIT, the trust owns cash value life insurance on the life of the athlete. The trust names an independent trustee, but the athlete is provided the ability to fire that trustee and replace with an independent bank or trust company with a predetermined minimum of assets under management. This policy could be funded by the athlete using a percentage of salary over the course of his career. As explained above, this type of committed routine investment may provide important discipline and assure assets are set aside for the future.

- **Result.** As a result of this planning, the athlete may realize a number of benefits. First, his business ventures will be sheltered from his personal creditors. The taxes from these ventures will be paid from the athlete's otherwise unprotected (from claimants) liquid assets. These assets were also included in the athlete's taxable estate, so paying taxes on trust income will reduce his estate over time. The businesses, however, may hopefully grow without reduction by income taxes. This growth all accrues outside of the wealth transfer system. Eventually, the restaurants, car dealerships, and consulting ventures can be transformed into more traditional investments and passed on to future beneficiaries without the imposition of transfer taxes.

Trust Drafting and Structuring Considerations

The following are drafting tips and structuring ideas that are especially pertinent for athletes:

- **Institutional Trustee.** As discussed above, give consideration to using institutional trustees to increase the likelihood of trust formalities being adhered to, benefiting from trust friendly jurisdictions, and protecting the athlete from predators.
- **DAPT Jurisdiction.** Consider forming the trust in a DAPT jurisdiction if the athlete's home state is not a DAPT jurisdiction, to perhaps provide additional protection.
- **Quiet Trust.** A "quiet" trust is one for which disclosures of information concerning the trust don't have to be made. This is especially appealing for athlete clients, so that potential beneficiaries do not see statements that reflect the many millions of dollars in the trust. Disclosures, even to named beneficiaries, might have adverse consequences. Another option is limited disclosures until a beneficiary attains a specified age. The Uniform Trust Code Sec. 813 requires keeping qualified beneficiaries reasonably informed and Sec. 105(b)(8) prohibits waiving the duty to inform qualified beneficiaries over 25 years of age. States have adopted a myriad of variations of this rule. This entire

area law is evolving in many jurisdictions. The athlete might benefit from establishing all trusts in jurisdictions that permit the trust to limit or prohibit disclosures.

- **Multiple Trusts.** As mentioned above, while many wealthy clients rely primarily on a single type of trust, such as a BDIT, athletes will generally be best served by having a several independent trusts. The risks of lawsuit, media scrutiny, opportunists, and frequency with which athletes' own advisors have taken advantage of them, all suggest that having several independent trusts might insulate each trust's assets from issues that could infect other trusts. Using different trusts in different trust friendly jurisdictions may make the structure more complex, but also may serve the asset protection and other goals and objectives discussed above.
- **Entities.** Consider two tier structures with assets held in LLCs which are then held by various irrevocable trusts, perhaps even with non-controlling interests in each trust to fractionalize ownership for asset protection purposes.
- **Control.** As discussed above, an institutional trustee is recommended, and although some commentators illustrate BDITs with the beneficiary serving a trustee, this may not be prudent for the athlete client to do. A trust protector might be given the power to replace the institutional trustee and to also change situs and governing law to facilitate naming a replace trustee in a different jurisdiction.

Timing Transfers

Many clients delay implementing estate and asset protection planning. For all clients this could be a costly mistake and opportunity lost if an intervening Democratic shift in power in 2020 or a later year results in an unfavorable adverse overhaul of the transfer tax system. Athletes have even more to lose by waiting to plan because their earning potential is high for a very short period of time. There is benefit to capturing this potential at the right time. For example, if it is feasible to transfer the athlete's current and future marketing rights into an irrevocable trust before the athlete's career takes off, that would be more tax efficient than doing so after signing a lucrative contract. Early on, the athlete will have a manageable investment portfolio and reasonable expenses. This stage is where planning is most efficient. All too many athletes wait until divorce is at hand or finances are out of control before taking any action.

Other Estate Planning Documents and Steps for the Athlete³⁷

There are other core planning steps that are important for an athlete to address. These include:

Pension Plans

Many professional sports leagues offer pensions with extremely short vesting periods to their players. The quality and generosity of a league's retirement plan will vary by sport. In the NBA,

³⁷ See generally, K. Eli Akhavan, Jonathan I. Shenkman, *Don't Drop the Ball, Trusts and Estates*, March 2016 and K. Eli Akhavan and Jonathan I. Shenkman, *Planning for the Stars: Financial and Investment Planning for Entertainers and Professional Athletes*, *Tax Stringer*, January 2017 and February 2017.

1% of a players' basketball-related income is invested into an annuity, 5-10% percent of their salaries are automatically deferred into a retirement savings plan (unless they opt out), and, if a player plays for 11 years and retires at age 65, they are guaranteed \$195,000 a year in retirement.³⁸ On the other hand, the Professional Golfers' Association (PGA), does not guarantee retirement benefits; rather, benefits are tied to a player's performance during the season. If a player performs poorly or does not make the cut to play in many tournaments, he may have limited retirement benefits.³⁹

Regardless of the sport and the level of generosity, most league pension plans won't offer enough savings to last an athlete through retirement. Furthermore, most athletes will need access to funds well before the normal retirement age. The advisor must be aware, and should inform the athlete, that the pension plan is simply a supplement to the athlete's earnings and cash flows.

Domicile

The athlete's plan must identify an advantageous domicile, and then support that domicile for state income tax planning. Domicile have a profound effect on the application of rules governing spousal right of election, and a range of other planning considerations.

Revocable Living Trust

The proper use of a living trust can provide some measure of protection for athletes, and may be especially effective if the athlete has a particular person, paramour, or child out of wedlock that he or she wishes to benefit. As an inter-vivos trust, the athlete will have some flexibility in establishing the situs for the trust and should select a jurisdiction with strong non-disclosure laws and plan to have adequate nexus to that state. This might be especially important to minimize disclosure of trust information to those claiming to be heirs or beneficiaries. Consideration should be given to using a separate tax identification number for the revocable trust, using an institutional trustee, and incorporating a trust protector as a further safeguard. Consider assigning a tax identification number to the revocable trust rather using the athlete's Social Security number. That may provide some insulation from identity theft, etc.

Power of Attorney

Determine whether the athlete has already provided powers of attorneys to agents or others and evaluate whether any changes need to be made. The athlete's power of attorney needs to be crafted to suit their unique circumstances. Depending on the situation, the athlete may grant one power of attorney to coordinate endorsements and other agreements, and a separate power of attorney to handle other financial matters. If there are existing powers to, for example, a manager, that might be carved out from a new power. Consider specifying that the financial agent should be named as the guardian for the property if one every has to be appointed.

Living Wills/Health Proxies

Athletes should create, and update as needed, health proxies to avoid the publicity of a court appointed guardian. A health proxy is especially important if there are changes in the athlete's matrimonial or relationship status. Consider specifying that the health care agent should be

³⁸ NBA Benefits Plan Typical...For Millionaire Ballplayers, The CFO Report, The Wall Street Journal, October 11, 2011.

³⁹ Mark Riddix, Top Pro Athlete Pension Plans, Investopedia, January 24, 2019.

<<https://www.investopedia.com/financial-edge/0710/top-pro-athlete-pension-plans.aspx>>.

named as the guardian for the person if one every has to be appointed. For some athletes, there may be unique but very important personal wishes to convey. For example, if the athlete client is a football player, there may be a strong desire to donate brain tissue for research. It has been estimated that 60% of NFL players have suffered at least one concussion during their professional careers, and 26% have experienced three or more concussions.⁴⁰ For boxers the statistics are more shocking -- 90% of boxers sustain a brain injury.⁴¹ An NFL player or boxer might wish to expressly provide for tissue donations to fund research to help others. Different athletes may have other personal objectives that standard forms and planning will ignore.

Disability Planning

While everyone faces disability risk, the likelihood of a disabling injury to an athlete is obviously far greater. Although insurance may help ease the financial burden, simply purchasing a disability policy is unlikely to provide anywhere near adequate protection. Contractual rights and payments from the athlete's team or other sources also are likely to prove inadequate. Advisors need to inform and educate athletes as to the risk and importance of saving significant portions of their salary to assure a viable future in the event of injury. As discussed above, the athlete should purchase insurance products tailored toward this risk and consider use of a living trust, with an institutional trustee and appropriately planned disability clauses.

Private Foundations

Since so many athletes earn tremendous wealth at a very young age, establishing a foundation is an excellent way to safeguard money, create a future opportunity for meaningful involvement following retirement (whether or not compensated), and provide current income tax deductions. For the young athlete, this technique is ideal because it may take years, perhaps decades, for their full charitable desires and objectives to solidify. For example, basketball great Brian Grant certainly never would have imagined being diagnosed with young onset Parkinson's disease himself and establishing his own foundation to find a cure for the disease.

For the athlete client, the flexibility and control a foundation affords are likely worth the fixed costs in terms of professional fees and administration. As a note of caution, athletes must understand that the use of charitable planning tools is technically complex and the penalties for abuse are substantial, so it is a role best suited for a trusted professional.

Right of Publicity

Generally, the right of publicity is the right of an individual to control how his identity is used for commercial purposes. While there is no federal protection for the right of publicity, at least 31 jurisdictions currently recognize this right either by statute or by common law. Additionally, there is a difference among the states as to whether a right of publicity is "descendible" (can be bequeathed) or if it extinguishes upon the individual's death. Advisors should consult the laws of the athlete's state of domicile to determine the appropriate planning for their client.

Conclusion

⁴⁰ http://topics.nytimes.com/top/reference/timetopics/subjects/f/football/head_injuries/index/html.

⁴¹ <http://menshealth.about.com/od/fitness/a/boxing.html>

The key to success for a professional athlete lies within the athlete: in his genes, and in his work ethic. But the key to long-term financial success for a professional athlete is recognizing that the mistakes of others must serve as a lesson. Financially sound planning will allow the athlete to be well-positioned for a secure financial future and avoid the many pitfalls that so many in professional sports have fallen into in the past. In order to protect and preserve hard earned wealth and secure a financially stable future, planning needs to happen in the present. Effectively advising professional athletes requires the collaboration of all their advisors. Specifically, the athlete must engage qualified estate and financial planning team, implement asset protection, tax management, and estate planning steps in order to assure athlete's financial well-being.

CITE AS:

LISI Estate Planning Newsletter #2777 (February 3, 2020)
at <http://www.leimbergservices.com> Copyright 2020 Leimberg Information Services, Inc. (**LISI**). Reproduction in Any Form or Forwarding to Any Person Prohibited – Without Express Permission. This newsletter is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that **LISI** is not engaged in rendering legal, accounting, or other professional advice or services. If such advice is required, the services of a competent professional should be sought. Statements of fact or opinion are the responsibility of the authors and do not represent an opinion on the part of the officers or staff of **LISI**.