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PRACTICAL PLANNER® NEWSLETTER
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PLANNING POTPOURRI

■ **Gifts under Amanuensis Rule**: Say you want mom to make gifts to save estate tax but her power of attorney doesn't contain a gift provision. The tax authorities may disregard the gifts and bring them back into the estate. There may be an option. If you sign documents in your mom's presence, at her direction, your act of signing may be characterized as a ministerial act permitted under the "amanuensis rule," rather than an act by you as an agent. Restatement Third of Agency Sec. 3.02 (comment c). If your signature is a mere mechanical act for mom, and not an exercise of your judgment as an agent, it is a gift by her. Your mom's directions to you to act on her behalf should suffice to make the action hers, such as a gift by her, rather than a gift by you as agent on her behalf. See In re Estate of Stephens, 2002 CA 6749 (CA 2002). For a detailed discussion see http://www.amazon.com/Powers-Attorney-Martin-Shenkman-ebook/dp/B00TWDZZ4M

■ **Doc Knows Best**: So before a recent surgical procedure I had to sign a "General Consent" at the hospital. I LOVED the following phrase: "I understand that no guarantees have been made to me about the outcome of this care. I understand that if I leave the hospital against the advice of the physician and/or fail to carry out the suggested follow-up medical care I do so at my own risk and release my physicians and their employees an agents from all responsibility." Every estate planning client should sign a similar release. There is rarely, if ever, sufficient certainty for most estate planning to provide any type of guarantee. And it seems that most clients don't heed the advice of their advisers as to annual reviews, following up with ancillary professionals, like having life insurance reviewed every few years, rebalancing portfolios quarterly, holding annual meetings for entities, and more. That's similar to failing to carry out the suggested follow-up estate planning steps. At your own risk!

■ **Springing Powers**: A springing power of attorney is one that becomes effective when you become incapacitated. Some states don't recognize them, but even if your state does, is it prudent? How will your agent demonstrate incapacity? What about the gray shades in between capacity and incapacity? Should your agent really have to wait until you are incapacitated to act? Review your existing power and consider what might be practical? Perhaps a power effective immediately will be a safer bet. Choose agents carefully.PP

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PRACTICAL PLANNER®

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PLANNING FOR THE SINGLE SENIOR

Summary: Cleaver-like families (Mom, Dad, 2 kids, and apple pie) comprise only about 20% of families. An increasingly common scenario is the very single individual no spouse/partner, no kids, and no siblings. Planning for someone without the usual cast of characters that can be fiduciaries presents unique challenges. How do you protect and safeguard someone who really doesn't have people to name as fiduciaries?

■ **Goal**: A primary focus of singles planning is to provide protection to you for the elder years, or decades, remaining of your life. In light of the fact that your safety net is limited, planning must create mechanisms for protecting you should a health issue, disability or other problem, arise. Ideally this type of planning should be done well in advance of a need so that you have opportunities to "kick the tires" before the measures are really needed. For the Single Senior internet forms won't cut the mustard.

■ **Institutional Trustee Relationship**: If you have a long time relationship with a bank or trust company that has the full array of fiduciary services, an expanded version of that relationship can serve as the keystone of your safety net. The gist of the planning will be to create a structure so that should you become incapacitated a reputable bank or trust company will be in a position to assist you with many aspects of your finances from bill paying, credit cards, your home, and more.

■ **Power of Attorney**: You name an agent to manage your financial, legal and tax affairs if you are incapacitated. To make this vital document viable it must be "durable" (remains valid even if you become incapacitated.) The practical issue is who can be an agent for a Single Senior? Naming a long-time friend might be dangerous if their age puts them at risk. The real issue of naming a friend, or more distant family member, is the risk that their loyalty might prove to be more towards their pocket than to your needs. It is no secret that elder financial abuse is spreading like Tribbles (if you don't know what a Tribble is, ask a Trekkie.) Abusing powers of attorney is a favorite tool of scammers. So what might the Single Senior do? Change the typical estate plan by relying primarily on a funded revocable trust for managing your affairs during incapacity instead of a durable power of attorney. You can name a bank or trust company as co -trustee or successor trustee of your revocable trust. While banks generally won't serve as agents under a power of attorney, if that same bank is the trustee under your revocable trust, they might be willing to serve as agent under your power of attorney for the limited purpose of transferring assets to your revocable trust. Restructure the typical power of attorney by carefully crafting a limited set of powers that your chosen institutional trustee finds agreeable. This can provide an incredible backstop should you need it, and it certainly trumps having a court appoint a guardian for your property to address issues because of a gap in your planning. This is an important part of your safety net because you can never be assured that all assets are in your trust. Retirement assets are not transferred to revocable trusts to avoid the risk of triggering income tax. If a lawsuit arises after you are incapacitated you won't be able to handle it, and the trustee won't have authority if it is a claim outside your trust. Other loose ends can pop up that make having a power of attorney a necessity even with a fully funded revocable trust.

■ **Power of Attorney Implementation**: Everyone thinks once you sign your documents

(Continued on page 2)

CHECKLIST: WORRIES

Summary: Alfred E. Neumann, Esq.'s famous quote "What me worry?" proves that he might have been as Mad as a tax adviser! Here's a few items Alfred is worrying about today.

√ **Valuation Adjustment Clauses**: Some use a defined value clause, to avoid gift tax surprises, with the excess passing to a GRAT. One sharp cookie suggests that the initial value that passes to a GRAT is ultimately returned to the donor/seller (that's the way a GRAT works economically) and that "feels" like a "Procter" issue. Procter was a landmark case that said you cannot transfer something (e.g. to a trust by gift) and said that if the IRS increases the value above what you intended to make as a gift, that excess value is returned to you thereby rendering the IRS audit superfluous. One pundit indicated that he is aware of at least one audit in which the IRS is making this argument. If you already structured a sale with a valuation adjustment clause spilling into a GRAT there is not much you can do. If you are planning a new note sale with an excess valuation spillover charities are the best option but the reality is most folks are not comfortable with that. Using a spillover to a marital trust might be better (might) but if

(Continued on page 3)

...PLANNING FOR THE SINGLE SENIOR

(Continued from page 1)

you're good to go! Nope. Your planning should include simplifying all your financial matters to minimize the need for actions to be taken by the bank under your power of attorney. Further, the more assets you consolidate at that same institution, the easier it will be for that bank to step up to the plate to help. Transfer checking and other accounts, and all non-retirement accounts, to your revocable trust and with the same bank. In this way it will be much easier for the bank to step in to assist in an emergency. If the same bank issues credit cards, consider switching to credit cards issued by that bank in the name of your trust for the same reason. Each of these steps should make it easier for the bank to assist you in an emergency and to assume the role of successor trustee.

■ Involve a CPA Firm: Single Seniors need a CPA more than most others. The CPA industry promotes CPAs as the "trusted adviser," and they really can be. Establish a relationship with a CPA firm even if for now they provide no more than tax return preparation. Should you ever become incapacitated, having an independent adviser to serve as a monitor of the work done by the bank could be quite important. CPAs have the training and experience to serve as a monitor, and if you have no one else to rely on, creating checks and balances with different advisers is a key to your security. Have the CPA monitor the bank investment and payment activities. Begin developing the relationship now, well before you require it. Have an independent CPA maintain books and records of your entire financial life. That should not be costly or difficult, but can prove to be an invaluable safeguard.

■ Home Sweet Home: If you own a home, the bank may be uncomfortable holding it in the trust, especially if the bank is based in a different state than where your home or vacation home is. A single member limited liability company (LLC) could be formed to own your home so that it is deemed an intangible asset, rather than real property subject to the laws of a state other than where the bank is based. Since a single member LLC is disregarded for tax purposes this will have no negative income tax impact (but check with your local property tax authorities as it might disqualify you for senior citizen property tax breaks.)

■ Just Do It: That famous Nike slogan was actually part of trust lexicon for nearly a century. Some folks when they set up a revocable trust list assets on the last page of the trust. That page has been required since biblical times to be labeled "Schedule A." If you have specific assets to list on Schedule A of the revocable trust (brokerage account, house, etc.) list them. However, what you should really do is property transfer those assets into the trust and not just rely on the mystical powers of "Schedule A." Filling in Schedule A is not a substitute for properly retitling each asset to the trust. This will require a deed for your home, etc. Just do it!

■ POLST: This acronym stands for a Physician Ordered Life Sustaining Treatment. This is a medical order prepared by your physician addressing end of life treatments. An advantage that it affords is that it is an actual medical order included in your patient chart. It is also binding on emergency medical workers, such as ambulance personnel, which a lawyer prepared living will is not. For the Single Senior this document affords the important advantage that it is effective once done and does not require the decision making of an agent you might not feel comfortable designating.

■ Living Will: This is a statement of your health care wishes which can provide insights as to your wishes.

■ Professional Health Care Surrogate: If your state law permits you could contractually designate a professional paid health care agent to act on your behalf. If you do this, your revocable trust could direct the successor trustee to pay for the professional health care surrogate.

■ Care Manager: Mandate that the trustee of your revocable trust engage an independent care manager conduct an evaluation and report to the trustee and perhaps another independent person. This is a great way to have a skilled professional spot issues that a trust company can't observe. PP

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...CHECKLIST: MAD: WHAT ME WORRY?

(Continued from page 1)

you're single then the only option might be a GRAT. Many pundits believe the spillover to a GRAT is fine. What me worry?

√ Note Sale Danger: In the Estate of Woelbing the taxpayers consummated a note sale to a grantor trust. Sold $60M of stock for a note to a grantor trust. The trust has many hallmarks of good planning: seed assets in excess of 10% of the value of the note and a guarantee. The IRS is arguing that the value of the shares transferred was $116M not $60M, it was not a sale, but a transfer to a trust with a retained interest and that was not a "qualified retained interest" so it was deemed a transfer of the entire interest, the value definition clause should be disregarded and the shares should be included in the gross estate. If the transfer is included by IRC Sec. 2702 and 2036 it could be a double whammy. Other than keeping your fingers crossed if you've done these deals review every nuance to be sure all formalities are shipshape. The fact remains, however, that zillions (I counted them all) of estate planners have done oodles of these deals. What me worry?

√ Maximizing Basis: Ricky Henderson certainly has some record on maximizing bases. But when estate planners grant general powers of appointment to say elderly not-so-wealthy family members to have trust assets included in their estates to garner an estate-tax-free step up in income tax basis, do they really know the infield isn't a minefield? Does the person holding a general power have creditors that might access the assets? Might the powerholder exercise the power in a manner that circumvents the trustor's intent? Might the powerholder take on debts creating "creditors of the estate"? What me worry?

√ Transfer to a Terminally Ill Spouse: If one spouse is terminally ill the other spouse could transfer all appreciated assets to the ill spouse. If the ill spouse survives for a year and the assets are bequeathed back to the well spouse, they will obtain a full basis step up on the death of the ill spouse. IRC Sec. 1014(e). If the ill spouse does not survive for a year, then the basis step-up won't be realized. But might it be worse? Might an agent under the ill spouse's durable power of attorney be able to exercise the power in favor of someone other than the intended transferor? What if the ill spouse's will bequeaths assets to children from another marriage instead of back to the transferor well spouse? What if the ill spouse revises his or her will? Might the ill spouse have creditors? What me worry?

√ Trust Distributions: So give an independent trustee the right to distribute appreciated assets out of a bypass trust to the surviving spouse so that they will be included in that spouse's estate and be stepped-up on death. Who will actually make the distribution? How can he make sure to act before the death of the surviving spouse? Can he verify that there are no creditors of the surviving spouse? Can he obtain the information as to the exact exemption remaining? Can he be certain that the surviving spouse won't give or bequeath the assets to others? What me worry?

√ Swap Powers: So your estate planner drafted a great trust giving you a swap power to pull appreciated assets back into your estate for a basis step up. Whose watching your trust assets? What me worry? PP

RECENT DEVELOPMENTS

■ Passive vs. Active: Whether an activity is characterized as passive or active can have significant income tax implications. Losses from a passive activity cannot be used to offset ordinary income earned from an active endeavor in which you materially participate. IRC Sec. 469. All these rules have new importance in light of the 3.8% tax on net investment income. IRC Sec. 1411. In a recent Chief Counsel Advice the IRS explained that a real property broker/agent who brings together buyers and sellers of real property can be a real estate professional who is engaged in a real property brokerage business under IRC Sec. 469(c)(7)(C) of the passive activity loss (PAL) rules. CCA 201504010.

■ Settlement Agreement: The New Jersey transfer inheritance tax must be calculated pursuant to the terms of the decedent's will, not based on the terms of a later settlement agreement. 35-5-5621 De Rosa v. Dir., Div. of Taxation, Tax Ct. (Bianco, J.T.C.). Review your estate plan regularly since trying to correct it after the fact with a private agreement might not be a winner.

■ Trust Sale: The sale of a farm owned by two trusts to a partnership owned by a beneficiary won't result in a loss of a GST tax exemption. It will also not be treated as a transfer subject to gift tax for the trust beneficiaries. Private Letter Ruling 201509002.

■ Insurance Trust: The Court held that a trustee has a duty to act in good faith and in the best interests of the beneficiaries concerning trust owned life insurance. This may include maintaining that life insurance. That duty cannot be waived by a provision in the trust agreement absolving the trustee of responsibility. Rafert v. Meyer, ___ N.W.2d ____, 290 Neb. 219, 2015 WL 832590 (Neb. Feb. 27, 2015). The moral of this story is clear and is consistent with warnings many insurance professionals have been sounding for years. Laypersons serving as trustees of insurance trusts should take their duties seriously and should consult with insurance experts about insurance decisions and with counsel concerning trust matters. PP