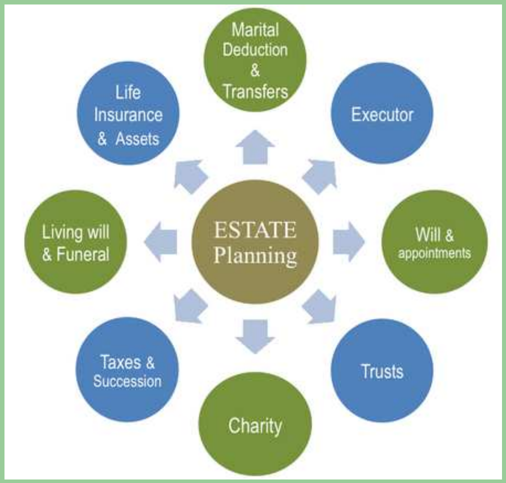
NAEPC

Journal of Estate & Tax Planning

Click here to view Issue 23

Review Heckerling Institute of Estate Planning 2016



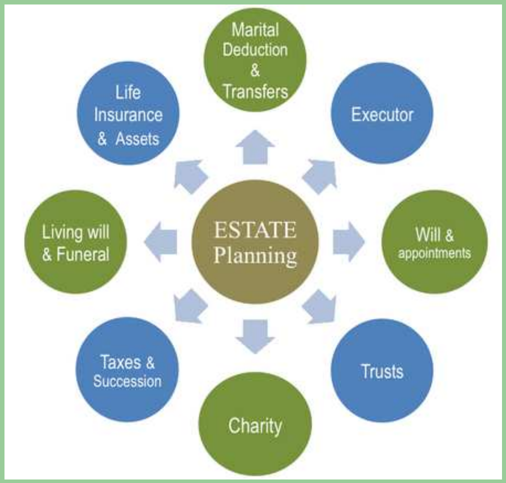
Planning

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

General Disclaimer

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

Review Heckerling Institute of Estate Planning 2016



Overview and Themes of Institute

Trends in Estate Planning Themes of this Year's Institute

- Most sessions about non-estate tax considerations.
- Estate planning is so much more in terms of topics and issues than it historically has been. This will make practice more challenging.
- Trust administration a significant area of practice focus. Trust litigation is and will continue to grow. All advisers should endeavor to reach out to individual trustees and encourage them to meet with an advisor team to address planning.
- Income tax planning, especially maximizing income tax basis, more important than estate tax for most clients. But income tax planning is so much more than just basis maximization.
- Planning is more complex, and must address a wider array of issues, then ever before. This requires a collaborative effort of the entire estate and financial planning team.

Trusts & Estates Survey

Practice area that best describes practice focus

- 97% trusts and estates.
  - No surprise here.
- 45% general practice.
  - This might suggest that many estate planners have expanded the scope of their practices to make up for revenue losses resulting from the increased exemption (but see T&E survey below).
- 42% asset protection.
  - All advisers should encourage clients to address asset protection concerns.
  - Lifetime QTIPs, FLPs and LLCs regardless of discounts, divorce planning such as the recent Pfannenstiehl trust matrimonial case.
- 39% business succession planning and 35% business law.
  - These suggests the expansion of many practices to other areas in light of the demise of the estate tax, the significant importance of closely held businesses to estate planning and that a substantial portion of the wealthy have their wealth in closely held business interests. This is vital to insurance and related planning.

Trusts & Estates Survey
New services offered by practitioners

- 43% have not changed services offered since ATRA.
  - How could any estate planning practice survive doing what it did before ATRA?
  - It seems inconceivable that offering the same services as in the past could possibly serve clients optimally. Modern trust drafting has evolved significantly, case law has changed in many areas, the aging of the population requires different planning and services, the tax environment has evolved dramatically.
- 25% trust administration.
  - Most trusts remain administered by individual trustees who do not understand or address their fiduciary duties. All advisers should pursue this opportunity to help clients, grow their practices, minimize the likelihood of future litigation and more.

Trusts & Estates Survey
New services offered by practitioners

- 25% trust administration.
  - The constant stream of new fiduciary cases each year makes it advisable for every trustee, even the professional, to reconsider steps to take in the proper administration of trusts.
- 22% elder law.
  - The population is aging. The needs of aging clients are significant and growing. This type of planning entails so much more than just Medicaid type planning and requires the involvement of the entire planning team.
- 14% income tax.
  - Note how low income tax is in terms of estate planners addressing it, and that it did not even make the list of what clients want from estate planners presented below.
  - Too often income tax planning is discussed in terms of basis maximization. While important that is but one small component of tax planning.

Trusts & Estates Survey
Top concerns of clients seeking services

- 67% avoid probate.
  - This is likely the result of the advertising campaigns of those hawking probate avoidance products. It is incongruous with the real needs of clients and all advisers, regardless of discipline, should proactively educate clients as to the real goals of estate planning.
  - This should really give way to Boomers concerns of cash flow for decades of post-retirement life and worries about Alzheimer's and dementia. These are the two primary concerns of most clients.
- 65% minimize discord among beneficiaries and 38% prevent heirs from mismanaging inheritance.
  - The above two client objectives are significant and align perfectly with the theme of planners transforming from estate tax planners to estate counselors and advisers and the use of a collaborative team approach to planning.

Trusts & Estates Survey
Top concerns of clients seeking services

- 65% minimize discord among beneficiaries and 38% prevent heirs from mismanaging inheritance.
  - All advisers should engage clients in the “conversation.” Next gen planning is optimal.
  - Consider a new approach to gift planning to engage next gen and give them skin in the planning game.
- 25% asset protection.
  - Comparing the services and practices of estate planners to what clients want, asset protection is much more of a concern to clients than what many planners seem to acknowledge. Asset protection planning can encompass a wide range of steps, far broader than what many realize.

Change is Ever Present

- Frequent changes in tax, conflict of law, and other laws.
- Concentration of wealth has continued to increase.
- Political upheaval seems ubiquitous.
- Social change, changing views of family (e.g., adult adoption and posthumous conception), marriage (same sex marriage), etc.
- Safety concerns.
- Emotional problems for the wealthy. No sympathy from others. Whatever problems society perceives that they have they have enough money to solve whatever problem they have. This changing perception has had a profound impact on wealthy clients.
- Secrecy is pretty much dead. Global tax enforcement and information sharing have become common. Common Reporting System (CRS) has expanded so that now 42 countries have signed on. The US is the only major country that has not signed on to this. Tax laws from country to country will become more uniform since disparity creates loopholes. There is no reasonable expectation of privacy with cyber breaches, etc.
- Trusts have grown more complex, divers in purpose, provide greater input and controls by settlors, and continue to evolve at a dizzying pace.

Family is not the Traditional "Family"

- 40% of children in US born to unmarried parents.
- 50% of households headed by single person.
- Clients are marrying later and more often.
- 90% of people eventually marry but 40% of the marriages in any given year are not first marriages.
- Deferral of marriage and single again phenomena makes planning for singles more important.

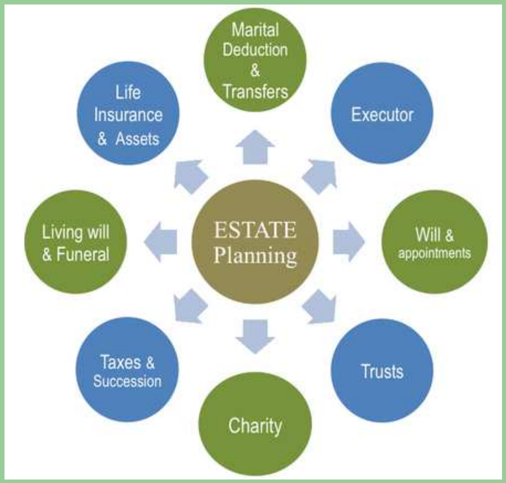
Estate and Trust Litigation is Exploding

- Many lawyers are taking matters on a contingency fee so there are no fees unless the plaintiff wins. This has encouraged significant litigation.
- Aging population. People are living longer. Clients are living to 100 so many “children” inherit in their 80s. Not only are people inheriting later, but because of economic issues, they are inheriting less. The result of these and other factors is that estate litigation is growing more common.
- Heirs rarely appreciate inheriting in a dynastic trust. Although the client and the client’s lawyers understood the benefits of trusts, many heirs do not and view the entire process negatively.
- Large divorce rates, blended families, same-sex marriage, adult adoption, posthumous conception, and other factors have all changed the nature of what constitutes a “family.” For example you might adopt your partner instead of marrying your partner so that your partner as you child can inherit from a family trust.
- Older estate planning documents, traditional planning, and the way many continue to plan and draft does not address this dynamic.

Josh Rubenstein’s Tips

- You have to plan for change.
- You have to plan for controversy.
- Once size does not fit all. Use customized solutions and a variety of approaches to better address each client’s particular goals and needs.
- It costs more to plan better. All advisers must educate clients of this.
- Don’t use structures for purpose for which they were not intended.
- Keep drafting and planning flexible. You cannot anticipate where change will come from, only that it will occur.
- Don’t put every bell and whistle on every structure. Keep things simple when you can.
- If people knew what you had in store for them they would be more likely not to sue. Don’t let people be surprised. Tell heirs. This again suggests involving next gen.

Review
Heckerling Institute of Estate Planning 2016



Domicile Planning

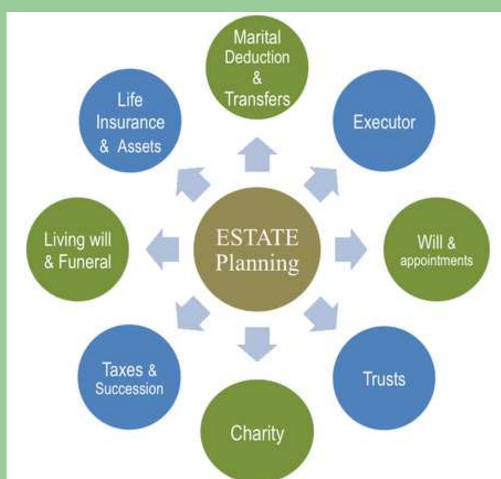
Can Agents Change and Incompetent's Domicile?

- Should agents be authorized expressly to change principal's domicile and can they?
- Domicile has significant planning consequences. Where a client is domiciled can affect tax nexus for income and estate taxes. Domicile may affect the client's access to different types of pain management, medical decision making and for some, assisted suicide due to the significant differences in state law on medical marijuana, end of life decision making and more. For example, Brittany Maynard was a brave 29 year old woman suffering from incurable brain cancer. She changed her domicile from California to Oregon, because Oregon was one of only five states where death with dignity is authorized.

Can Agents Change and Incompetent's Domicile?

- With some people living for decades with dementia or other debilitating conditions the economics of moving a client and changing his or her domicile to minimize the impact of high tax and/or high cost locations (e.g., New York City) to a lower cost low tax location (e.g., Clearwater, Florida), may be essential to financial survival.
- The courts are split on whether a guardian can change a ward's domicile and cases have held that agents under a financial power of attorney cannot. Should drafting be changed to address this in light of the aging population? Should this be expressly authorized in powers of attorney and health care proxies?
- Brittany Maynard, "My right to death with dignity at 29," November 2, 2014, CNN http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/

Review
Heckerling Institute of Estate Planning 2016



Asset Protection Planning

Disclaimer as Asset Protection Tool

- Typically viewed as an estate tax planning tool but can be effectively used as an asset protection tool.
- Parent bequeaths assets outright to son and if son predeceases to son's descendants. Father dies and son is subject to large judgement. If does not disclaim creditors will take all so son disclaims to avoid creditors receiving property and property passes to sons children.
- Disclaimant has right to disclaim and it is legally as though that disclaimant predeceased (relation back doctrine under common law) so creditors lien cannot attach and it is deemed as if property transferred from father to grandchildren above. Property passes as if never received by disclaimant.
- Exceptions. Some states preclude use of disclaimer if would be disclaimant is solvent. Other states prohibit disclaimers for Medicaid.

Powers of Appointment as Asset Protection Tools

- When, however, you hold a GPOA, the property subject to the power **<u>may</u>** be subject to the power/reach of the donee of the powers creditors.
- Historic doctrine no title in donee until exercises power. So until actually exercised it is not available to creditors. Many states have changed this rule, e.g. NY 10-7.2 EPTL
- Bankruptcy Code provides that GPOA, since can be exercised for benefit of debtor, is included in bankruptcy estate.
- Mother, instead of bequeathing outright instead gives heir a GPOA which will be exercised only if no creditors. If you live in jurisdiction that has modified the historic rule then you have mom give LPOA or give to another person, example daughter in law LPOA with power to appoint to a class of persons that include son. Daughter in law can appoint property to son as he wants to use it and if no creditors at that time. It is not reachable by wife's creditors since she only holds a LPOA.
- Why go through this instead of giving outright to daughter in law? She may have her own creditors.

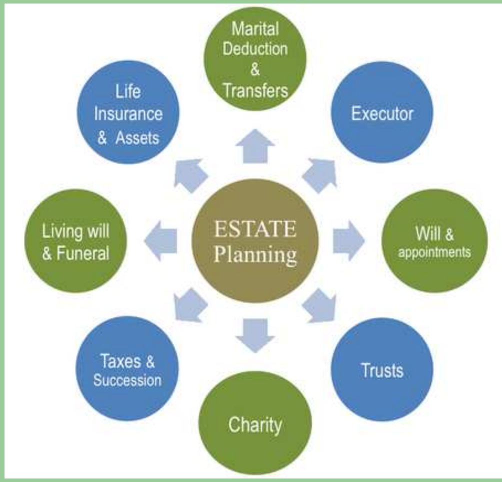
Tenants by Entirety Protection

- Tenants by entirety ("TbyE") is unique as a form of joint ownership only available to married couples.
- 5 unities required to create tenants by entirety: Time, title (same instrument), interest (must be same in property), possession and marriage.
- Spouses must join together to sever interests in property. Neither spouse can do this unilaterally – cannot unilaterally alienate property. So creditor of one but not the other cannot reach property.
- Alaska has abrogated this rule so TbyE won't protect.
- Illinois provides TbyE asset protection
- 522 of Bankruptcy code provides that property held TbyE before commencement of case may be protected in bankruptcy.

SLATs for Asset Protection

- Third party spendthrift trust is protected from creditors.
- If trust is a discretionary trust creditor cannot force trustee to make distribution.
- Donor spouse might have indirect access to assets in SLAT if distributions to beneficiary spouse are used for mutual benefit.
- This is a third party trust that should be protected from creditors.
- Risks are of divorce, or that beneficiary spouse pre-deceasing.
- Address divorce by using a floating spouse clause.
- Give a disinterested third party a LPOA to appoint property back to donor spouse.
- Death can be addressed with LPOA to spouse or third party to appoint back to donor's spouse or have life insurance to compensate for loss of access.

Review
Heckerling Institute of Estate Planning 2016



Trust Planning- Crummey Powers

Crummey Powers

- The IRS attacked the Crummey powers in Mikel based on in-terrorem clause and binding arbitration which together they argued made beneficiary right of withdrawal illusory.
- The court looked at language in in-terrorem provision and said it only applies if the beneficiary challenges discretionary distribution not the trustee's actions concerning the Crummey powers. The court did not see that a beneficiary had to be able to go before a state court to enforce rights. The court stated that it did not see that a beneficiary would suffer harm by having to submit a claim to a Jewish arbitration panel, a Bet Din.
- In NY binding arbitration provision is not enforceable.
- See Mikel v. Comr., TC Memo 2015-64 (April 6, 2015) and ILM 201208026.

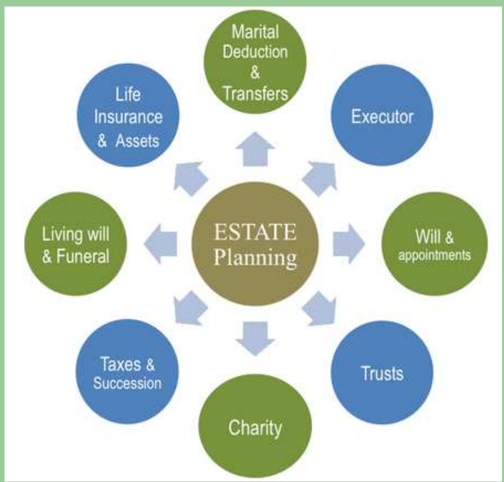
Crummey Powers

- Mikel Case (just as the Estate of Cristofani) has reinforced the perception of abuse by the wealthy of annual demand powers and gifts to trusts. Crummey powers in the Mikel case were substantial. The taxpayer claimed 60 annual exclusions as did his spouse, or 120 annual exclusion gifts. The Greenbook proposal is designed to end this planning by capping total Crummey powers at $50,000 per year per donor.
- Exceptions may be provided from the proposed new restrictions for annual exclusion gifts outright, to a tax vested trusts under IRC Sec. 2642(c), and 2503(e) gifts for education and medical expenses paid directly to providers.
- The proposal is one of the more likely changes to be enacted (be wary, see 1014(f) that was pushed through as part of the Surface Transportation Act).
- Implications - An old ILIT may be subject to this rule for future gifts. Practitioners might consider, for new irrevocable trusts that are drafted, adding more flexibility in this regards, or perhaps a provision to amend the Crummey power included in the irrevocable trust. Perhaps trust protector can be given powers.

More Crummey Powers

- For existing ILIT/insurance plans that require many Crummey powers to finance premiums if the limitations are enacted other irrevocable trusts (e.g., newer SLATs, a DAPT) could enter into split-dollar arrangements with the ILIT to finance insurance premiums.
- Notice is not required for Crummey powers to be valid under any authority. The perception that notice is required to qualify is a misperception of existing authorities. There is a PLR, which is not authority, indicating a notice requirement. In contrast to that, there are 3 cases Crummey, Holland and Turner which do not require notice. Thus, there is substantial authority that no notice is required. There is a revenue ruling saying that if there was no notice AND there was an unreasonably short withdrawal period of only 4 days the power was illusory. Both no notice and a short withdrawal were required.
- Since written notice isn't required, for moderate wealth estates under the federal exemption, written notice should not be included in trust instruments. This could greatly simplify administration of these trusts. This could make insurance trusts more palatable to protect insurance proceeds even if the client cannot anticipate any federal estate tax savings since no annual ritual and the commensurate cost and complexity can be avoided.

Review
Heckerling Institute of Estate Planning 2016



Trust Planning- Inter-vivos QTIPs

W wants to use H's exemption as soon as possible

- W wants to use H's exemption as soon as possible and want grantor trust as to W.
- Use inter-vivos QTIP. W funds gift to QTIP for H. H releases income interest in trust which under IRC Sec. 2519 is treated as a transfer of all corpus. Assets drop into continuing trust for W's kids (or not). The continuing trust can be grantor trust as to W. H becomes transferor of assets for gift, estate and GST when he releases his income interest in the QTIP. However, Reg. Sec. 1.671-2(e) defines transferor for income tax purposes. It is W since she funded trust. When does this transferor status change?
- If W gave H assets outright to make these gifts W would not be grantor.
- H must be able to release his power. Spendthrift clause could inhibit this release.
- Step-transaction doctrine issue. If W creates QTIP and H releases income interest IRS could argue W was really transferor to trust for descendants. Let time lapse.

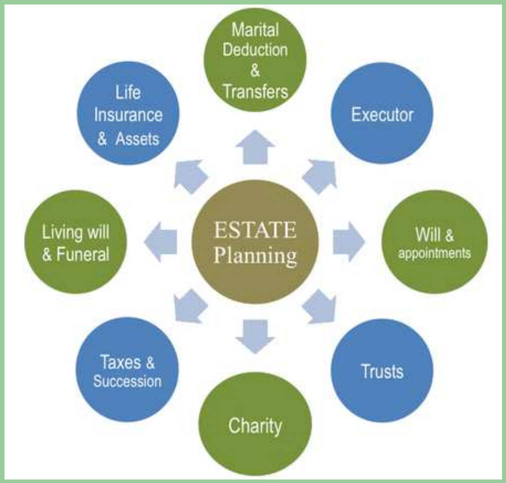
Inter-Vivos QTIP Disclaimer in Lieu of Defined Value Mechanism

- Use lifetime QTIP to minimize risk associated with transfer of hard to value assets.
- Election can be made on formula basis.
- Petter/Wandry no regulatory authority for formula approach but QTIP does have.
- In estate tax QTIP regulations have formula approach. I treat portion of property necessary to reduce gift tax to zero. This should apply in gift tax as well.
- Use disclaimer. Any portion of transfer disclaimed by H will drop into bypass trust for spouse and descendants as 2518 disclaimer regulation example of formula disclaimer. Any portion of transfer not disclaimed will be QTIP. Note that 2518(b)(4)(A) property passing to surviving spouse so doesn't contemplate a lifetime disclaimer but same rules should apply.

Inter-Vivos QTIP Mitigates 2036 Risk

- Use QTIP to Address 2036 Issues.
- W creates lifetime QTIP and transfers $3M. QTIP loans cash to SLAT for promissory note.
- SLAT buys asset from W.
- 2036 and 2702 cannot apply because there is no retained interest between W and SLAT that purchased asset.
- What if W transferred asset to QTIP and later QTIP sells some of asset to SLAT for a note.
- In the above variations of the transactions the note is between the trusts not the client.

Review
Heckerling Institute of Estate Planning 2016



Trust Planning-
Trustee Duties

Diversification: Every Precaution Might not be Enough to Avoid Suit

- Corporate trustee was sued for failing to diversify holding of family business.
- Distribution of income only no corpus.
- Members of every generation of family worked in company.
- Bank had experience and process to handle company and had multiple levels of review and spoke to family about diversification.
- Board heavily weighted with family members and trustee backed off.
- Trustee stayed engaged and recruited independent board members.
- Reported on impending doom of publishing industry. Some of beneficiaries sued the trustee and found that in spite of all the processes etc. the trustee did not document some of the key factors, such as tax costs of selling stock. Ultimately court found in favor of the trustee. Beneficiary hypothetical model earned less than what company actually earned. Failed to prove that company earned less then what a diversified.
- Moss v. Northern Trust Company, No. 07 CH 24749 (Cook County, Illinois, Circuit Court 2015).

Trustee Responsibility to Furnish Data

- 35% concentration in JP Morgan stock.
- Took daughter a year to get new trustee a year to get basis information so that delayed plan to divest.
- Sold ½ then eventually sold more in 2009.
- Most of sales were for a gain.
- Sister surcharged because delay in investment plan was due to her delays in getting basis data to the successor trustee.
- Matter of Mary Moder, 2015 Ind. App. LEXIS 131 (2015).

Indemnifications In Trust Won't Protect Bad Trustee

- $8.5M life insurance policy.
- Lawyer named as trustee and waives every duty in the document and gave insurance company false address and policies lapse.
- Beneficiaries sue trustee. Court held for trustee because of waivers but on appeal held that there is a non-waivable duty to act in good faith.
- Rafert v. Meyer, 290 Neb. 219 (215).

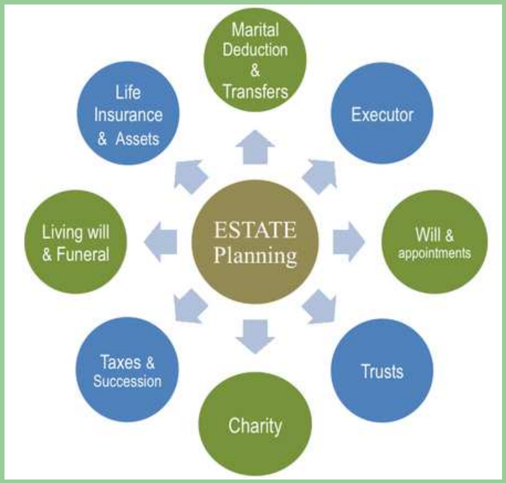
Good Process Can Protect Trustee

- Old trust. Methods of investing are different now.
- Bank informed beneficiaries of fee changes. Process protected bank form later suit.
- Accountings were filed.
- Bank had sent consent letters to beneficiaries and all approved the fee increase.
- In re Trust under Deeds of Luise E. W. Jones 2015 Phila. Ct. Com. Pl. LEXIS 110 (2015).

Sending Statements to Beneficiaries

- What is enough of a report (disclosure) for a trustee to send out to the beneficiaries in order to get out of a longer statute of limitations and trigger a shorter statute of limitations? (1 year under UTC).
- Trustee wants to get out disclosure and "get short clocks running."
- Bank trustee statements are detailed with all relevant facts. Would a court find a bank statement to be adequate to start statute of limitations? Court held yes.
- CRAT with 7.5% annuity payment. Sued because financial professional that set up CRAT claimed that bank by taking the trust "guaranteed" the payout rate forever. CRAT payment failed after 11 years.
- Court threw out case and found bank statements constituted adequate disclosure.
- Wells Fargo Bank v. Cook, 332 Ga. App. 834 (2015).

Review
Heckerling Institute of Estate Planning 2016



Trust Planning-
Trust Protectors

Trust Protectors – SEC v. Wyly

- SEC sought penalties, injunctive relief and tax savings. 3 protectors for each of 17 inter-vivos trusts. None were related or subordinate but followed all investment recommendations made, including purchase of collectibles, etc.
- There were additional IRS investigations. Charles Wyly died. Another Wyly testified recently in bankruptcy.
- Conduct of protectors and settlors is that all actions of protectors imputed to settlors since there was a pattern of action.
- Operate trust powers using powers sparingly and not to fine tune.
- Protector should have his or her own counsel.
- Comment: While the Wyly case might be a bit extreme, the concept of a pattern of conduct is problematic in so many situations (pattern of distributions from a trust that is then attacked in divorce). Clients so often do not understand the need to meet annually with legal counsel. Identifying inadvisable (or inappropriate) patterns of payments, investments, etc. is something that may well come up with periodic reviews.

Case Interpreting Protector Provisions

- Trust protectors are becoming a common feature of modern trust drafting but the law remains sparse.
- The Florida court upheld the decedent/testator's second wife appointing a protector under the terms of the instrument to amend the trust thereby clarifying that the children from a prior marriage were not beneficiaries of the current trust but of a trust to be formed on the death of the surviving second spouse/beneficiary.
- Wife withdrew substantial principal from non-marital trust. Children sued widow for accounting. Widow objects saying children lack standing. Protector clarified trust provisions. Speakers believe children had standing. But district court wanted drafter/protector. Court let protector due this.
- If children cannot challenge what spouse did, who can?
- Minassian v. Rachins, 152 So. 3d 719 (Fla. Dist. Ct) App., 2014).

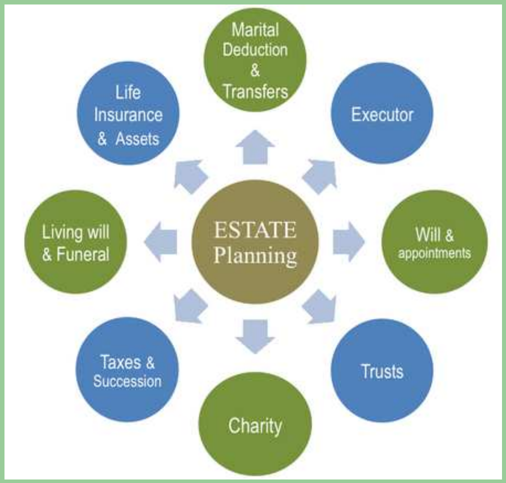
Protector Powers Limited and Respected

- Did children as fiduciaries breach their fiduciary duties?
- Drafting lawyer named himself trust protector. Court said he did not have enough standing to sue Trustees even though trust gave him that right.
- Protector could name an additional trustee, so the protector named a new trustee, who as a co-trustee had standing, sued.
- Father died and under trust document as original drafted children could remove protector and they put in a new trust protector. The new protector tried to get rid of the new trustee. But before this happened the old protector used his powers to amend the trust to remove the power of the children to remove the protector.
- Court respected power of protector to do that.
- Schwartz v. Wellin, 2014 US Dist LEXIS 143644 (Charleston South Carolina Oct 9, 2014).

Protector Position Does Not Violate Public Policy

- Trust protectors do not inherently violate public policy of LA.
- Drafting lawyer named as protector and injected himself into active dispute in document that he drafted.
- In re Eleanor Pierce Marshall Stevens Living Trust, 2015 La. App. LEXIS 284 (2015).

Review
Heckerling Institute of Estate Planning 2016



Trust Planning- Decanting and Restructuring

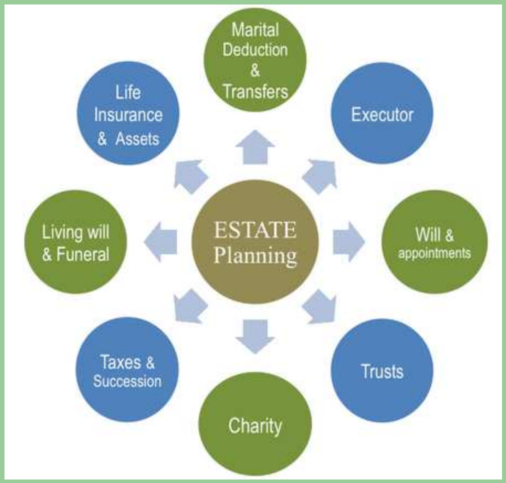
Decanting

- **No New Beneficiaries**: Beneficiaries of the new trust can only include beneficiaries of the decanted or old trust. Harrell v. Badger, 171 So. 3d 764 (Fla. Dist. Ct. App. 2015).
- **Direction Trust**: Flint case in DE raised additional concerns over decanting. It also made clear that a trust friendly jurisdiction won't approve everything brought before it. Wanted to reform trust. Corporate trustee did not want liability so wanted to change trust to permit direction trust. Court said if settlor wanted direction trust it would have said so and there is no evidence of this. In re Trust Under Will of Flint, 118 A. 3d 182 (Del. Ch. Ct. 2015). Was it a material purpose of the trust to prohibit direction trust structure? Was this inferred by court? If a trustee violates material purpose of trust with decanting it won't work. Should draftspersons consider adding a statement of material purpose statement?

Shift Assets from Old Bad Trust to New Better Trust

- Fiduciary issues must be addressed first. If you want to move wealth into a new trust and use the old trust to make a newer trust more valuable, you must first address fiduciary issues.
- Under state law may have rules on transactions between trusts that have the same trustee. Likely need different trustees for each trust involved in this type of planning.
- Who is involved? Trustees of old and new trusts, beneficiaries and first tier remaindermen. Consider the people in the final takers type provision.
- Consider creditors of trust and other third parties.
- Can lawyer be disinterested if on both sides of the transaction? Complicated.
- Can trustee be disinterested if on both sides of the transaction? Complicated.
- Duty of impartiality. Even if trust gives broad discretion that may mean can favor a beneficiary but it is not a "you can do whatever you want."
- Duty of care. Buying, selling, exchanging, loaning, etc. UPIA applies unless trust provides otherwise.

Review Heckerling Institute of Estate Planning 2016



Trust Planning- Revocable Trusts

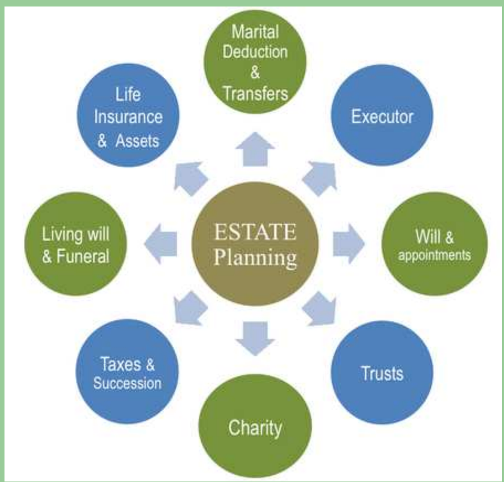
Challenging Revocable Trust

- UTC Sec. 603. Treat revocable trust as will substitute. As a result remainder beneficiaries cannot obtain an accounting or otherwise question use of revocable trust assets. remainder beneficiaries under a revocable trust have right to challenge what you do with wealth before you die. UTC, and many cases, provide that while settlor is alive trustee has no obligation to report to remainder beneficiaries.
- Tseng v. Tseng, 352 P.3d 74 (Or. Ct. App. 2015). Cannot get information while alive but may later.
- What if grantor is incompetent? Could perhaps get guardian appointed to raise issues on behalf of settlor but this is cumbersome and will take a long time. Consider the issues that this raises in terms of protecting the aging or ailing settlor.
- Proactive steps should be taken to assure that while a settlor/beneficiary is alive but "fading" that protection is in place. Consider perhaps an institutional co-trustee, CPA as monitor, trust protector, etc.

Revocable Trust Challenge

- Do remainder beneficiaries of revocable trust have rights to get information during lifetime of settlor?
- Abuse will move to funded revocable trust as abuser is often named as executor of estate and will not sue themselves.
- Courts seem anxious to find ways to help victims.
- While remainder beneficiaries should not have information or get anything courts will not rigidly adhere to this when there is abuse.
- Allowed challenge to amendment to revocable trust because of risk of potential abuse.
- Trzop v. Hudson, 2015 IL App. (1st) 150419 (2015).

Review
Heckerling Institute of Estate Planning 2016



Trust Planning-NIIT

NIIT

- Short term income tax planning versus long term wealth transfer planning. Tension in administering trust to minimize NIIT while having assets grow long term for wealth transfer. It is a balancing act.
- 3.8% tax is not small when aggregated over decades of trust income.
- Most strategies involve distribution out of trust to reduce NIIT. But what can and should a trustee do? Avoid or minimize NIIT or keep wealth in trust to maximize wealth accumulation inside the trust.
- Complexity of addressing rules and costs militate against planning for it for many clients.
- However, to minimize exposure to NIIT you may have more planning flexibility with a pot trust with many beneficiaries over many generations. With many beneficiaries chances are greater that one of the beneficiaries won't be subject to NIIT in any year.
- Kiddie tax taxes income of minors or college students under 24. This prevents having income shifted taxed at a lower bracket but each child will nonetheless have his or her own NIIT bucket. So while the Kiddie Tax may tax that income at the same rate as the trust but until $200,000 of income no NIIT.

NIIT

- Consider when broadening a class of trust beneficiaries to facilitate more income tax and NIIT planning the implications of the broader class on disclosure requirements, especially with an institutional trustee who may insist on informing every beneficiary above some age, e.g., UTC, of the trust. These disclosures could be upsetting to some clients. This might be addressed by moving the trust to a jurisdiction that permits silent trusts, or perhaps be drafting provisions that permit notice to a designated representative. But with each additional layer consider the practical comment in the outline above about balancing the costs and complexity versus the tax savings.
- What is the distribution standard in a trust? What if it is HEMS? Is a distribution from a trust to avoid NIIT within that standard? Will the HEMS standard inhibit that tax-desired distribution?

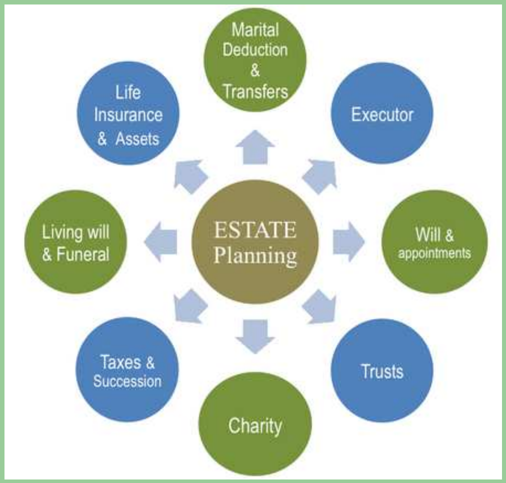
NIIT

- Draft so grantor trust status can be toggled off. What about providing in the trust a right, e.g., perhaps held by a trust protector, to prohibit the use of trust income to pay premiums on life insurance on the settlor to assure that aspect of grantor status can be shut off.
- Capital gains are included in net investment income but absent authority under trust agreement or applicable state law capital gains are typically not pushed out with a distribution. Treas. Reg. Sec. 1.643(b)-1. Include provision in governing instrument to allow trustee to adopt a practice of including capital gains in DNI. If you don’t want to decant of modify the document convey the assets to an LLC and if don’t come out of LLC will be treated as trust accounting income.

NIIT

- What if trust includes interests in a family business? What is impact of NIIT on family business? NIIT has changed drafting and kids in the family business. Might it be sufficiently beneficial for child not working who is beneficiary of a trust to go back to work in the business to save NIIT as a material participant?
- S Corporation held in trust.
  - Material participation depends on tax status.
  - ESBT - look to trustee.
  - QSST - look to activity of deemed owner who is beneficiary of QSST until year stock is sold. When stock is sold in that year the trust becomes a second taxpayer. If relying on QSST status to avoid NIIT you may have a problem in year of sale as the trustee not the beneficiary will be the litmus test.

Review
Heckerling Institute of Estate Planning 2016



Trust Planning- Trust Miscellaneous Expenses 67(e)

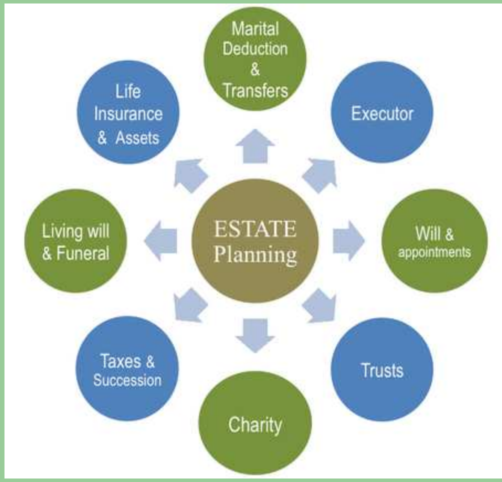
Trust Miscellaneous Expenses 67(e)

- 2% floor and miscellaneous itemized deduction and investment expenses for trusts Regulations are final. Apply to fiduciary income tax return for years that begins after 2014.
- IRS may focus on unbundling. If fiduciary fee is a consolidated fee for all services performed then must unbundle. The one item stressed in regulations is that you must segregate the portion attributable to investment advice.
- If fiduciary owns assets being invested and perform investment services they are not rendering advice to anyone and an argument according to one commentator is that all of the fees in such a case are for being a trustee. Under this theory none of the fee is for rending investment advice. Others disagree and believe that the above argument is not viable.
- If you have a separate fiduciary fee you must identify the portion attributable to investment advice. If the fiduciary fee is not computed on an hourly basis you must unbundle. May consider the way individual trusts are invested and estimate the fee based on different assets.
- These rules apply to legal and accounting fees.

Trust Miscellaneous Expenses 67(e)

- One fiduciary looks at nature of investments in trust. Example bonds might have 50 basis points of fee, bond funds 10 basis points, etc. and apportion fees based on this type of analysis.
- Others have said that some fiduciaries are simply picking a percentage.
- Regulations state that any reasonable method might be used.
- Do you have to use what you charge for investments? Can you consider the number of hours you worked?
- Fiduciary should be safe to go below cost of investment since there is a different profit margin on trust and that there is a lot more work on a trust. There should be analysis done.

Review
Heckerling Institute of Estate Planning 2016



State Planning

Decoupled States Tougher on Domicile and Non-Residents

- **Decoupled**: About a score of decoupled states have a state death tax or inheritance tax (2 have both). NJ has lowest exemption at $675,000. TN will phase out in 2016.Some domiciliaries attempt to move to a lower cost state. Non-domiciliaries try to avoid estate tax in a decoupled state where they might own a pied-à-terre by restructuring ownership. Both are in for tougher times.
- **NY Condo**: A non-NY domiciliary with a condo in NYS could have transferred the residence into an LLC, thereby transmuting it into an intangible property interest, and avoiding NYS estate tax. NYS Tax Department has issued an advisory opinion saying owning real estate in a single member LLC will not avoid situs in NY and will not convert realty into a non-taxable intangible asset. TSB-A-15(1)M (May 29, 2015). Also see TSB-A-08(1)M (Oct. 24 2008) regarding an S corporation owning a house.
- **IN QPRT**: Indiana looked through a QPRT to continue to find that a client has owned a home in and remained taxable as a resident in IN. Indiana Letter of Findings 01-20140470, posted 04/29/2015.
- **Washington**: Tax form instructions say LLC cannot be formed for improper business purpose or it will be disregarded. What is improper?
- **Caution**: States have become more astute and aggressive on a host of these and similar issues.

State Income Taxation of Trusts

- States are being more aggressive. Beneficiaries and trustees are more mobile. This has resulted in more cases.
- What is a sufficient nexus for a state to have jurisdiction to tax? If you have state law apply to the governance of the trust will that suffice to create tax nexus? If a trust is created under a will in a particular jurisdiction but no trustees or beneficiaries reside in that state, some states will tax on this limited connection.
- Many clients name family members as trustees without considering the tax implications of this. Consider when you are including other “people” or positions in the trust instrument, e.g., investment trustee, trust protector, etc., the tax implication. If it is a directed trust with an administrative trustee in a trust friendly state will that suffice to avoid tax in another higher tax jurisdiction that has nexus?
- Consider that if the trustee does not file a state income tax on the presumption that the trust is not subject to taxation in a particular jurisdiction, the statute of limitations on the state auditing the return will never run.

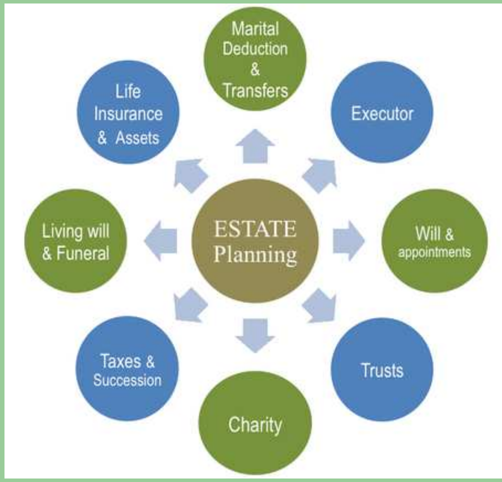
State Income Taxation of Trusts

- NC could not tax a trust merely because a trust beneficiary was a NC resident. If the income was distributed to a resident than the state could tax that income. But undistributed income still held in a discretionary trust could not be taxed. Taxation of wholly discretionary trust solely based on the residence of the beneficiary, without other contacts was held unconstitutional. To tax such a trust with such limited contacts to the state was held to violate the Due Process and Commerce Clauses of the Constitution. Connections that might be adequate include: The settlor residing in the state when the trust was established, trust administration being conducted in the state, etc. The trust in question loaned funds to the beneficiary in state but those loans were respected and no state income tax occurred as a result of them. Also, the trust was decanted into a new trust to avoid a provision mandating distribution at age 40. Had the trust corpus been distributed to the in-state beneficiary upon attaining that age the income would have been taxable to that beneficiary. This highlights several proactive steps that can be taken to minimize an unfavorable state tax environment. Kaestner Family Trust v. North Carolina, 2015 WL 1880607 (NC Super. Ct).

State Income Taxation of Trusts

- Undistributed out of state income of a New Jersey testamentary trust formed under the will of a New Jersey domiciliary was not taxable in New Jersey because it had an out of state trustee and was administered out of state.
- The Court noted that listing a New Jersey address on a state income tax return does not create contact to support taxation by New Jersey. Also, the fact that the trust was created under New Jersey law, and that jurisdiction of the New Jersey courts does not create sufficient contacts for taxation. Although the Court did not hold these factors against the taxpayer it would certainly seem prudent to use the address of an out of state trustee if one is serving. Further, had the trusts been formed under a revocable trust rather than a will the involvement of the New Jersey courts may have been avoided.
- Kassner v. Division of Taxation, 2013 N.J. Tax LEXIS 1 (January 3, 2013); 2015 N.J.Tax LEXIS 11 (2015).

Review
Heckerling Institute of Estate Planning 2016



Estate Planning

Savings Clauses Don't Always Provide Salvation

- Belk case involved a savings clause re: of a conservation easement. The transaction involved a conversation easement subject to a contribution agreement that permitted the substitution of a property. The IRS disallowed the deduction on the basis that the substitution right violated a principal requirement of qualifying for a conservation easement. The taxpayer asserted a clause in the agreement that purportedly cured any tax defect so that the easement involved would qualify for a deduction. This raises similar issues as Procter.
- The court felt that the savings clause endeavored to have the court re-write the easement based on the court's decision and it would not do so under the rationale of Procter. Belk v. Comr., 774 F.3d 221 (4th Cir. Dec 16, 2014).

Same-Sex Marriages

- A myriad of tax and legal benefits are impacted by the recognition of same-sex marriages. If clients have not revised their planning they should do so. Consider:
  - Marital deduction.
  - Gift-splitting.
  - Same-sex spouse is “family” for Chapter 14 purposes.
  - Intestacy laws.
  - Spousal right of election.
  - Tenants by the entirety depending on state law.
- Review beneficiary designations, pre-“nuptial” and other marital agreements, and more.
- Consider the status of those who are not married but rather are domestic partners. Marriage may be a better option.
- Obergefell v. Hodges, 576 US ___, 135 S. Ct. 2584 (June 26, 2015).

Valuation – Aggregation of Real Estate Parcels

- Real estate valuation case. 3 parcels plus interest in entity that owned adjacent parcels.
- Auditor valued all parcels together (i.e., considering them as one unit so that the ingress/egress issues on some parcels were obviated by aggregating them with the adjacent parcels).
- Executor said to value parcels owned by entity separately from the 3 owned directly. Values were much lower because of access issues. Tax Court said valuing individual parcels from entity parcels was valid.
- IRS tried to aggregate interests of spouses for a control interest in the Bright v US 658 F.2d 999 and Court held no family aggregation. Note also, Rev. Rul. 93-12 holding that family aggregation should not be argued.
- Pulling v. Comr., TC Memo 2015-134 (July 23, 2015).
- For non-taxable estates might taxpayer's advocate the arguments of the IRS to increase the value and hence basis step up?

Valuation – Family LLC Respected

- LLC with 5 separate investment accounts and 3 investment advisers, and an undivided fractional interest in a commercial real estate. Taxpayer died. IRS argued valuation discounts not applicable.
- Issue was whether the transfer was for adequate and full consideration. Was it a bona fide sale for adequate and full consideration? This depends on whether there were legitimate non-tax reasons? The court held favorably for the taxpayer.
- Court identified significant non-tax reasons to respect FLLC:
  - Significant purpose to consolidate investments to meet minimum investment requirements.
  - Withheld enough assets outside entities so not dependent on distributions.
  - No commingling of outside and inside assets.
  - Formalities of entity respected.
  - All assets properly and formally transferred to entity.
  - Husband and wife of family were in good health when planning.
- Purdue Tax Court Memo 2015-249.

Private Derivatives

- What if clients have assets that are “bad” to transfer? What can be done to facilitate some type of wealth transfer in these situations? Examples:
  - Client may have low growth assets, e.g. T-bills.
  - May have issues in transferring the types of assets client owns.
  - Difficult to plan for assets such as race horses.
  - Some assets don’t generate cash flow, e.g., unimproved real estate or art collection. Cannot fund GRAT as nothing to pay annuity and cannot sell for note since cannot pay interest.

Private Derivatives

- Client only owns T bills and horses and doesn't want stock market risk.
- Set up a private contract that looks like Apple stock. Say Apple is $100/share for 1,000 shares. Trust pays grantor for this contract. If Apple pays dividend grantor pays that amount. If Apple has a split you adjust the contract. Did not actually buy Apple just created a private contract to mimic Appel.
- You could give trust a piece of artwork that does not generate cash flow.
- If stock goes down then trust paid grantor and lost. Or if Apple increases grantor pays trust. You could buy a virtual portfolio.
- This could be done in conjunction with a sale to a grantor trust.
- You could have a time limit, e.g., 5 years, on the contract.
- Example: Client has negative basis real estate and want to hold for step up. So did derivative contract with trust that measures difference in value of the property today and at the end of 5 years and the trust is owed money based on that value change. Must also factor in cash flow and distributions.

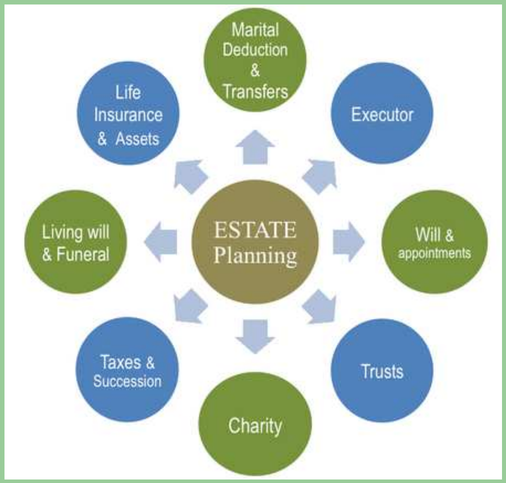
2036 and Manager of LLC

- Safer is not to have the parent be the manager. But no one said you couldn't.
- Depends on rights parents has in the position as manager.
- Not a lot of case law on this since Strangi. Is here business purpose?
- Using ascertainable standard analysis does not make sense in an LLC context.
- Consider using multiple managers. Having co-power holders does not solve problem.
- Operating agreement should follow state law and not take away fiduciary obligation to members.
- Make pro-rata distributions of profits.
- Appears not to have been raised on audit.

Coordinate Entity Documents and Estate Planning

- Be certain that the estate planning documents don’t violate entity documents.
- Paramours were excluded in LLC governing documents and he gave LLC interests to a trust to benefit his Paramour then on her death to children. Effectively he gave his paramour a vested income interest in trust, but that transfer violated the express provisions of the operating agreement governing the entity and in particular the transfer restrictions in that agreement.
- Court held entire gift void.
- Blechman v. Blechman, 2015 Fla. App. LEXIS 4808 (2015).

Review
Heckerling Institute of Estate Planning 2016



Gift Planning

Net Net Gift Technique Approved

- Net net gift. There were two distinct obligations which the donees assumed in this case. First is the actual gift tax on the gift to 4 daughters. The second is that the daughters also agreed to pay any estate tax if donor died within 3 years of the transfer and the gift is included in the donor's estate for federal or state estate tax purposes.
- Under Sachs case it doesn't matter who paid the gift tax, it is deemed paid by donor. This is why it was a net net gift.
- The agreement was negotiated. One daughter had been cut out in a prior will and could have been cut out again. Assumption of liability is a significant legal difference from mother holding assets and paying tax.
- IRS initially challenged notion that the value of the gift tax included in the estate.
- Net gifts can be useful if donor wants to part with a specific amount.
- Steinberg case (2^{nd} case), 145 TC No. 7 (Sept. 16, 2015).

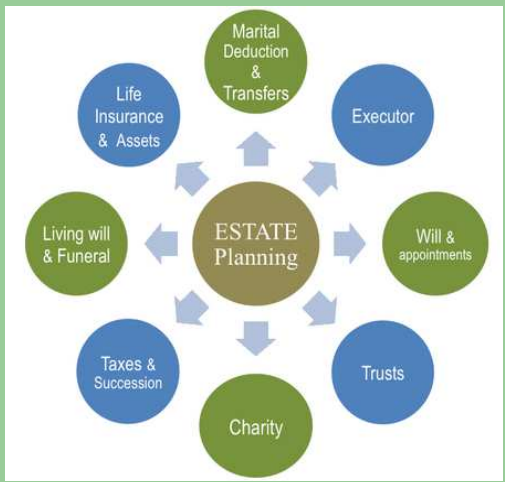
New Model for Gifting

- For most clients a new endowment-type model of gift planning may be superior than the traditional transfer tax oriented model.
- For the vast majority of clients the estate tax is irrelevant and hence the $14,000 annual gift limit has become arbitrary.
- Most gifting, and virtually every power of attorney gift provision, approaches gifts from a purely tax planning perspective. The $14,000 is irrelevant economically. From an economic perspective, the $14,000 annual gift exclusion (and for wealthier clients the remaining federal estate tax exemption which might be each year's inflation adjustment of the exemption) are simply arbitrary figures.

New Model for Gifting

- For wealthier clients, gifting strategies certainly remain tax driven (but in those cases, except for unusual situations such as the Mikel case, the annual gift tax exclusions are not that significant), but aside from the tax driver for the ultra-high net worth client, what model should be used for giving?
- The economic component of the plan, when appropriate, might entail the distribution from existing irrevocable trusts, to which the grantor/donor has potential access, to descendants or other beneficiaries, thereby cutting off the access the grantor might have to the assets distributed.
- Incorporating a line item for gifts (whether charitable, to heirs or for additional luxury purchases) into the financial projections/Monte Carlo simulations it is suggested is a better threshold analysis for determining appropriate gifts from an economic perspective, e.g. what can be given in any year without undermining long term financial objectives. This approach could free more wealth for transfer at earlier dates.

Review
Heckerling Institute of Estate Planning 2016

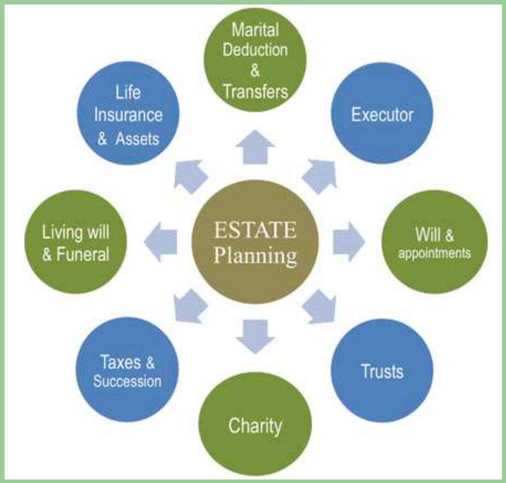


Probate Planning

No Estate Tax Closing Letters

- Estate tax closing letters.
  - Not being issued unless affirmatively requested.
  - As an option you may ask electronically for a transcript. You must be registered as a professional tax preparer. Must set up e-file as e-filer and use a different number, not PTIN. IRS will send you a code to use.
  - Call or write requesting.
  - Taxpayers would want this to show that the return has been filed and you can firm the tax paid so that executor will know and can distribute assets. Title examiner for real estate might ask for closing letter to show that tax has been paid.

Review
Heckerling Institute of Estate Planning 2016



Entity Planning Generally

C Corporation Planning

- Avoiding double taxation of C corporation earnings may be achieved by paying reasonable increased compensation, interest and/or rent.
- C Corporation gets a deduction for expenses (in contrast to dividend which does not provide a deduction). While these are taxable to the shareholder as ordinary income these payment eliminate corporation tax on these dollars. So this might net more after tax dollars to the shareholder.
- Caution - interest received on a loan to a C corporation may be net investment income subject to NIIT. Employment taxes may apply to wages paid to the shareholder/employee, etc.
- There can be a significant positive difference in net after tax income form the above planning. But, these payments must be reasonable or the IRS may argue that they are disguised distributions. How do you draw the line between generous rent and “obscene” rent?

S Corporations & Compensation

- Distributions are tax free to extent of basis. This can present a planning opportunity by paying less since distributions from an S corporation are not subject to employment taxes. Caution is in order because if no compensation is paid and shareholder is working the IRS could recharacterize the distribution as compensation. Mike J. Graham Trucking, Inc. v. Comr., T.C. Memo 2003-49.
- So the goal should be to pay a “reasonable” compensation but as limited as feasible so that the excess over that amount can be paid as a distribution. Compensation abuse by S corporations is on the IRS radar. On average 41-47% of profits are taken out as salary. But this data may not be the appropriate touchstone. The real litmus test is what the shareholder could earn if he or she worked for an unrelated employer.
- Has the client taken and optimal position and documented it?
- Under the check the box regulations an election can be made to treat a partnership as an S corporation. It might be advantages to use the compensation planning strategy discussed above for an S corporation for a partnership.

S Corporation Basis Planning

- An S corporation shareholder can only deduct losses up to basis. In most close corporations there is not a lot of stock basis. How can you get basis to deduct losses?
- You could contribute dollars to the corporation, or the shareholder can loan dollars. While either of these steps may support the deduction as a result of the increase in basis but they are usually not practicable.
- If the S corporation has borrowed from a bank that won't provide basis. In most cases of a closely held S corporation the shareholders likely have to sign a personal guarantee when the corporation borrows. If instead, the loan was made directly to the shareholder and then re-loaned or invested into the S corporation the shareholder should obtain tax basis. Miller v. Comr. TC Memo 2006-125.
- If instead the shareholder can borrow from bank based on shareholder will get basis. Crane case. Debt must have commercially reasonable terms and there should be some payment of interest.
- Considering buying stock on a deferred basis. With a note you defer the payment of the priced and the tax advantage of the up-front deduction of the flow through losses may make the planning worthwhile.
- Cannot have Shareholder A buy stock from B and B buy stock from A to achieve basis. US vs. Grace.

S Corporation Debt NIIT Planning

- If a shareholder borrows money from lender to purchase S corporation stock this would seem to give rise to investment interest subject to the investment interest limitation. However, S corporations are subject to a favorable rule. It is treated as if it is debt was incurred to purchase the underlying S corporation assets. Reg. Sec. 1.163-8T.
- Thus, if the S corporation is involved in an active business, then the interest expense will not be subject to the investment interest limitation. This benefit is not available with a C corporation stock.

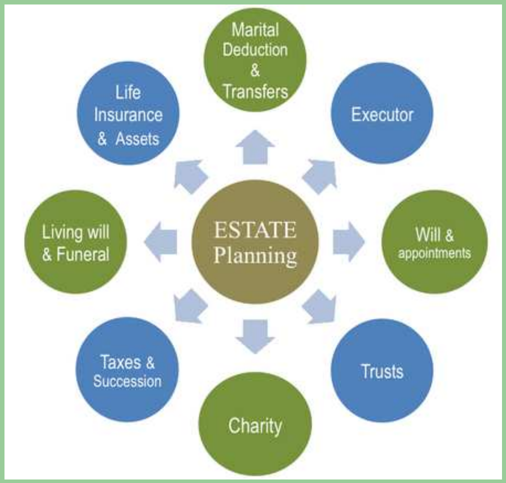
Avoiding BIG Tax With Donation

- A C corporation that elects S status may face a tax on built in gain (“BIG”). IRC Sec. 1374. If an S corporation sells BIG property during the recognition period there will be a corporate level tax at the max corp. 35% rate on net recognized built in gain. The recognition period had been 10 years but it had been temporarily reduced.
- Under the 2015 PATH Act the recognition period has been permanently reduced to 5 years.
- Having an S corporation donate built in gain property to charity. If donate no recognized built in gain and 1374 only applies to a recognized gain so there is no BIG tax since there is no recognized gain if the asset is given to charity.
- If the property donated is long term capital gain property it should generate a full fair market value deduction, and that deduction will flow through to shareholders pro-rata.
- Shareholders generally reduce value of stock basis by the distribution made. However, since 2006 S corporation shareholders only have had to reduce stock basis by the adjusted basis of the property donated to charity and not for its fair market value. So the reduction in stock basis might be $10,000 on a $100,000 FMV property but yet the shareholder will obtain a $100,000 deduction. The PATH act of 2015 made this benefit permanent.
- Donating appreciated S corporation property, especially property subject to the BIG tax, may provide substantial tax benefits.

Death of Partner/S Corporation Shareholder

- S corporations and partnerships can benefit from selecting from the two options for how to handle allocations when an equity owner dies.
- Example: 3 partners A, B and C. Partner A dies ½ way through the year. Assume the partnership only has income items March $900 and November $300.
- If the partnership takes no action the default result is a pro-rata allocation of all gain. Partner A will be allocated 1/3rd x ½ (portion of year he lived). This would be even though $300 of gain was incurred after death. Partner C and B would get $375 and Partner A would get $125 of the November gain.
- Can elect to close the books and end the taxable year at the date of death of Partner A. This gives a short tax year. Each get 1/3rd of gain for March gain. The November gain is allocated solely to Partner B and C at $300/2 = $150/each. Which approach is preferable depends?
- Many partnership agreements mandate one of these approaches. This locks the entity into that options. Why? It may be preferable to leave the determination open until the end of the tax year and determine which the preferable result is and then make the determination?

Review
Heckerling Institute of Estate Planning 2016



Privilege

Attorney client privilege

- Purpose of privilege is to insure clients can have frank communications with attorney so counsel can offer legal advice. Purpose is to encourage complete exchange of all sensitive information.
- What does the privilege cover?
  - A communication
  - Made in confidence.
  - For purpose of securing legal advice
  - From a legal adviser
- Example client cannot call you the attorney, and have you as the attorney get the client's broker on phone to talk to the client and thereby make the discussion/comments from the client to the broker covered.
- The privilege is for the client to waive, not for the attorney.
- There can be an inadvertent waiver by client or by attorney.
- Lawyer as counselor or planner can be legal adviser.

Attorney client privilege

- A secretary, CPA, financial adviser or other third party may be covered only if the communications are made for purpose of the lawyer rendering legal advice to the client. Example lawyer calls CPA and asks for information so can render legal advice that might be privileged. If client calls secretary of lawyer and says tell lawyer “such and such” that is likely privilege. If client asks the lawyer to keep CPA in the loop that is likely not privileged. The key to privilege is a lawyer rendering advice to client.
- If a client with waning capacity’s children are brought into meetings to help the lawyer serve the client those conversations with the children are privileged.
- Even discussions with prospective clients are covered by the privilege (e.g., before you run conflict check client “spills the beans,” that is likely covered).
- Be careful when client shows up with someone not on engagement letter. The privilege may not cover non-client family member. Consider what to do. There is a risk of waiving attorney client privilege. Attorney could have client sign letter acknowledging that privilege may be undermined if others are in meeting.

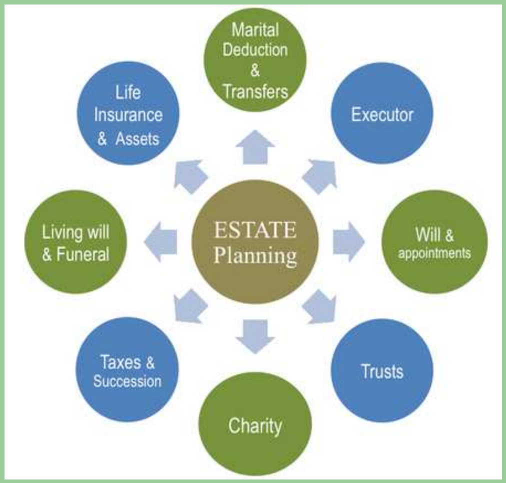
Attorney client privilege

- Bills and invoices are generally not privileged.
  - Form 4421 sworn statement that the estate has or will pay the people listed. IRS can ask for further substantiation.
  - In some instances IRS has asked for more detail. Give checks, dates and amounts.
  - In some instances IRS asks for invoices so they may have to be redacted, e.g., “Telephone conference with [black mark out details].”

Attorney client privilege

- Voicemail.
  - If you have a phone system or cell phone there is Voice Over IP (VOIP). It has turned deletion into non-deletion.
  - IRS will define “documents and information” to include “ESI” which includes all electronically stored information which includes voicemails, etc. which are all discoverable.
  - How can you talk to client? In person. While oral communications are perhaps discoverable, a few years later the oral communication will be less dependable in trial than a written email.

Review
Heckerling Institute of Estate Planning 2016



Charitable Planning

Non-Profit Boards

- Baby Boomers are remaking charitable giving to be, in many instances, more about active participation than merely writing a check. Issues of board service, will become more common.
- 3 Duties if serve on board.
  - Fiduciary role. Must act with good faith and candor. High duty of care. Duty to manage assets. The assets are not ours.
  - Generative role of board. Ask right questions. Framing work of the organization. Good discussion of who you are and where you are going and how you will get there.
  - Strategic role.
- Board responsibility.
  - If your name is on board you should be engaged.
  - If you do not participate you might be at greater risk.

Non-Profit Boards

- Actions.
  - Do you review policies?
  - Do you ask questions when issues come to board?
  - Did your review 990?
  - Monitor programs and services.
  - Insure adequate resources.
  - Is board prepared and active?
  - Showing that you have engaged in these activities will show that you have engaged in the appropriate standard of care.
- Duty of loyalty.
  - Disclose any interests that may conflict.
  - Keep information at meetings confidential. See state statute for guidance.
  - Legal and ethical integrity.
  - Urban institute found in 20% of organizations there were contracts between board members for professional services.

Non-Profit Boards

- 7 Best practices.
  - Ask questions before and after appointed to board.
  - Know applicable laws. Know type of entity.
  - Focus on having a role that protects the charities reputation. Assume everything you do will become public.
  - Adopt policies that govern all aspects from financial accounting, data management, donor data protection, etc. Be certain board is following.
  - Know non-profit liability laws in state.
  - Keep records.

“U” Shaped Giving Curve

- What does the “U” shaped contribution curve mean to charitable planning. A recent study suggests that the assumptions that advisors make about client charitable giving may be misplaced and hence the planning emphasis incorrect.
- The existence of a “U” shaped charitable giving profile has been discussed in research literature. Some had speculated that the larger giving at higher income levels was based on high income earners being able to afford to make charitable gifts. The high levels of giving on the lower income levels had been attributed to some as due to religious motivations, e.g. poorer consumers tithing, etc.
- Current research suggests that this prior assumption is mistaken and that high levels of charitable giving at lower income levels may in fact be due to a wealth effect. Those with lower income may be retired, have lower income, but significant wealth, and hence their charitable giving is a result of both the desire to give and the wealth to fund such gifts even in the absence of higher income levels.

“U” Shaped Giving Curve

- This suggests that for many consumers making charitable gifts tax planning and the related benefits is unlikely to be particularly relevant since the benefit of a charitable income tax deduction at lower income levels might not be significant.
- With the high estate and gift tax exemptions, might some of these relatively wealthy but lower income consumers be better served by making gifts to higher income family members so they can make the charitable gifts instead? Might this also suggest that planners may need to refocus on non-tax aspects of charitable giving (e.g., donor agreements, naming rights, etc.)?
- Russell N. James III and Deanna L. Sharpe, “The Nature and Causes of the U-Shaped Charitable Giving Profile”, Nonprofit and Voluntary Sector Quarterly 2007 36: 218, http://nvs.sagepub.com/content/36/2/218.

Review
Heckerling Institute of Estate Planning 2016

Planning For Aging, Incapacity, and Special Needs

Aging Statistics

- Adult disability is on the rise. An individual with mental or physical impairment that substantially limits one or more major activities of the individual. Disabilities increase with age. Of 40.7 million people age 65 and older, 38.7% had one or more disabilities. Those 85+ have greater problems. Disability included physical as well as mental disability. So it could include cognitive issues. 28.8% have some cognitive disability up to 39.9% for 85+.

Representing Client with Waning Capacity

- If you have serious concern over clients disability can you continue represent them? You can represent client so long as can have attorney client relationship.
- ABA 1.14 Model Rule on professional conduct. Your role transforms to protector. The lawyer shall as far as reasonably possible maintain lawyer client relationship. As much as you can proceed forward. If client has diminished capacity and is at risk of substantial harm the lawyer may take reasonably necessary protective action including consulting with those who can help. The duty of confidentiality is limited in favor of protecting the client. The rationale is that it is in the client's best interest that his or her lawyer continue to protect him or her.
- Lawyer can be impliedly authorized to reveal information about the client but only to the extent reasonably necessary to protect the client.
- Rules give lawyer latitude to work with client.
- You may ask for assistance from family members if necessary to repetition. Those conversations remain privileged because children are now necessary to representation.

SNT Planning

- Inter-vivos.
  - If set up inter-vivos SNT can inform family that they can make gifts to it as well.
  - Must coordinate with other relatives planning (don’t want outright gifts to special child).
- Disinherit.
  - Disinheriting will protect special child’s benefits.
  - Some parents believe they can leave special child’s share to siblings who will take care of special child but this rarely works. Well-meaning siblings might get married and new spouse won’t permit use of funds for special needs sibling. Divorce or lawsuits could jeopardize the funds.

SNT Planning

- Crummey powers.
  - Caution beneficiary on government benefits right of withdrawal may be considered an asset for public benefit purposes could disqualify.
  - Failure to exercise could be a transfer to other beneficiaries.
  - Recommendation don’t use special beneficiary as Crummey power. Use other beneficiaries to hold Crummey powers.
  - If you have trust with bad Crummey powers see if it can be fixed or if not perhaps you can decant.

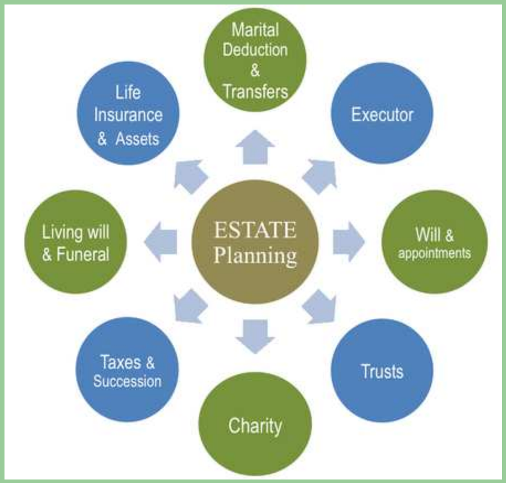
SNTs – Trust Protectors

- SNT beneficiary may not have capacity to oversee trustee. Using a protector can provide a safeguard over the trustee (see bad cases of institutional trustees).
- Protector might be given power to amend to comply with changes in Medicaid or other applicable laws.
- Powers can be limited or broad.
  - State law.
  - Trust instrument.
- Trust amendment without court order.
- Some state Medicaid agencies may not permit.
- Is trust protector a fiduciary? Some commentators say always. Others suggest it depends on powers given.
- Does protector have affirmative duty to act/
- What about paying protector?

ABLE Act – 529A

- 12/19/14 Achieving a Better Life Experience (ABLE) Act.
- Money in ABLE account accrues tax free.
- Can take money out of ABLE for qualified disability expenses and wont' count as income (states can interpret) nor will it disqualify beneficiary for benefits.
- Contributions are not deductible.
- Onset of disability must occur prior to age 26.
- On death subject to Medicaid payback rules similar to a 1st party SNT.
- Entitled to only one ABLE account per person (cannot have multiple accounts) – take the first one.
- Can only contribute $14,000/year. Aggregate contributions from all donors are capped at one $14,000 gift.
- Cannot have more than $100,000 in ABLE or lose Medicaid but not SSI.
- Could only be set up in residence of state where special needs beneficiary lives but changed this rule in 12/15 Act.
- Each estate needs to enact legislation.

Review
Heckerling Institute
of Estate Planning 2016



Conclusion

Conclusion

- Estate tax planners should continue to transform into Estate counselors, assuming the historic role of lawyers as family counselors.
- Planning is more complex, tax benefits, while they can be significant are require more careful and often more sophisticated planning.
- The scope of issues estate planning will focus on has grown wide as the tax elephant no longer occupies so much of the room.
- More information/comments: shenkman@shenkmanlaw.com