Issue 40 – July, 2022

NAEPC Journal of Estate & Tax Planning

New! Download the **entire issue as one PDF file** for offline reading.

Features

What is Legacy? (PDF)
A thought-provoking piece regarding a concept that can bring meaning and context to our daily lives as well as future generations.
Author: Clémence Scouten

A Boomer at the Crossroads of a Vintage Policy (PDF)
A hypothetical conversation that illustrates the importance and value of having difficult conversations with clients and advisors.
Reproduced courtesy of Trusts and Estates
Author: Charles L. Ratner, JD, CLU®, ChFC®, AEP® (Distinguished)

News Nook: A Compendium of Current Affairs

Bruce Steiner on Rev. Proc. 2022-32 (PDF)
Timely commentary regarding extended time for filing estate tax returns for portability without the need for a Private Letter Ruling.
Reproduced courtesy of Leimberg Information Services, Inc. (LISI)
Author: Bruce D. Steiner, JD

NAEPC Monthly Technical Newsletter
Reproduced courtesy of Leimberg Information Services, Inc. (LISI)

The mission of the National Association of Estate Planners & Councils (NAEPC) is to promote excellence in estate planning by delivering exceptional resources and unsurpassed education to its councils and members. NAEPC's approach to further this mission has been to organize its efforts around the themes of Collaboration, Cultivation and Education.

The Journal, produced under our Publications Committee, which, along with Webinars and the Conference Committee, is an integral part of the educational activities of NAEPC in furtherance of our mission.

This edition of the Journal demonstrates an intentional shift on the part of our Publications Committee to produce original content and thoughtful commentary relevant to all members of NAEPC. This strategy offers the opportunity for new voices to be heard and expanding opportunities for those who wish to publish.

As President -Elect of this organization I applaud these efforts and I am excited to be a small part of the effort to offer these views and approaches to many of the problems we, as estate planners, face. I hope that you will enjoy and appreciate the progress NAEPC and the Publications Committee have made in producing this resource. I can't wait to see what the next editions will bring.

John T. Midgett, J.D., AEP®

President-Elect

I hope this note finds you happy, healthy, and enjoying the summer of 2022.

I am Eido Walny, the editor-in-chief of the NAEPC Journal. I am extremely pleased to present to you the July edition of the Journal. Back in February, I told you about a lot of changes that were in the offing for the Journal and this edition is the first fruit of that effort. Our work is not done, but we have made some incredible strides forward – some things you might notice and somethings you are less likely to be aware of.

In February, I promised to bring more original content to the NAEPC Journal. My goal is for this Journal to be a more valuable resource for our readers and less of an aggregation station. Many of our peers publish fantastic work and great news updates. Occasionally, we may even share some of those with you still. But you will notice that the July issue of the NAEPC contains roughly 75% new, original content. I hope you enjoy the articles and learn a thing or two from them because you won't get them anywhere else.

Effort was also made to diversify the subjects we cover. I know that our readers cover a range of professionals across the estate planning spectrum. I want everyone to find a reason to read our Journal and get a bit of knowledge out of it.

Lastly, I also told you in February that I was re-organizing the staffing at the Journal. It was my first order of business after the February issue went out. While still a work in process, the reorganization has exceeded my expectations. We now have editors at different levels and staff that solicit content. The internal diversification of opinions and viewpoints has already resulted in better content for the Journal.

But our work is not done – not even close. So I want to renew my two requests from February:

First, if ever the Journal does not meet your expectations, or if you think we could do something better, please let me know. The goal of this Journal is to provide value to our readers. Anything we can do to enhance your experience is something I want to know about.

Second, if you are an author or aspire to be an author, consider the NAEPC Journal for publication. It does not matter whether you have a polished article, a rough draft, or a glimmer of an idea, our staff is here to support you. We can provide a home for your writing, help you edit, or connect you with experienced authors who can help show you the ropes.

I hope you enjoy this edition of the NAEPC Journal.

Eido M. Walny
Walny Legal Group LLC

Transformational Charitable Gifts Through Collaboration

By Jennifer Ashley, J.D., CAP®, Paul Caspersen, CFP®, MS, AEP®, Elliot Dole, CFP®, EA, AEP®, Juan Ros, CFP®, AEP®, CSPG, & Martin Shenkman, CPA, MBA, PFS, AEP® (Distinguished), J.D.

Introduction

Philanthropic giving remains a hallmark of American culture. Americans gave away over $484 billion to charity in 2021, a 4% increase over 2020[1]. Although giving is ultimately the donor's decision, a team of professional advisors can serve a vital role in a client's philanthropy. When it comes to charitable giving, many clients underutilize their professional advisors. Maybe it is from a belief that their giving is not that of a "mega-donor," and as such they assume that their advisors would not see it as important enough to discuss. But some clients may not understand the positive impact their advisor team can have on their charitable plans. Whatever the reason, advisors can help their clients and the causes clients hold dear, by initiating the charitable conversation.

The Charitable Conversation That is Not Happening

Ideally, creating a charitable gift is a collaborative journey. Research suggests that most donors do not rely on professionals before making a gift – over 75% of high-net-worth donors, according to one study, did not consult with an advisor regarding their charitable giving[2]. In the same study, only 5.3% of high-net-worth donors reported being approached by an advisor about giving. Why are advisors not more proactive in discussing philanthropy with clients?

A misconception held by many advisors is that unless the client specifically asks for assistance with planning charitable gifts, it is not the advisor's role to suggest it. Some advisors might make a tepid inquiry like "do you have any charitable intent," and then drop the conversation if the client does not pursue it. More is necessary and appropriate. In contrast to charitable discussions, few, if any, estate planning attorneys would prepare core estate planning documents without inquiring about the client's wishes concerning end-of-life treatments. That may well be a topic many clients would not otherwise bring up.

Charitable giving is a foundational discussion topic that all advisors should routinely include in the questionnaires they provide to clients, as well as in their planning discussions with clients. Clients can always say "no," but the ideas discussed below should be on the planning agenda. Seventy-eight percent of advisors are experiencing the impact of philanthropic discussions with their clients on their bottom line. Specifically, having philanthropic conversations has helped advisors to:

- Establish new clients (60 percent) and deepen existing relationships (74 percent).
- Build relationships with clients' extended family (63 percent). [3]

---

[1] Giving USA Foundation, https://givingusa.org/.

[2] 2016 U.S. Trust Study of High-Net-Worth Philanthropy

[3] 2018 U.S. Trust Study of the Philanthropic Conversation

Another limitation affecting some advisors is a narrow view of charitable giving. Some advisors primarily view charitable giving from a tax minimization perspective. If there is no potential for an estate tax reduction, the perceived relevance of charitable planning to some advisors declines. When the gift, estate, and GST exemption was $1 million, there were more instances where advisors discussed the use of charitable lead trusts, as an example. Similarly, when Congress recently considered a 3% and 5% surcharge on trust income more than $200,000 and $500,000, the professional literature reflected an increased awareness of using charitable remainder trusts ("CRT") and other types of planning to use charitable giving to reduce trust income taxation. With the SECURE Act quashing the use of the so-called "stretch IRA," CRTs gained traction in both professional literature and charitable practice to mimic the stretch. But charitable planning may be motivated by a myriad of non-tax objectives and may accomplish important non-tax client goals. Advisors should take a more holistic view to address charitable planning with clients.

By understanding donor motivations, proactively initiating the philanthropic conversation with clients, and working in a more holistic, collaborative manner with each other, advisors may better meet client objectives, and increase client giving beyond that which the client initially considered. This may give clients more satisfaction and have a more significant societal impact.

Understanding Donor Motivation

It might be surprising to some advisors that taxes are not the primary motivation for giving. Belief in the organization's mission is actually the primary motivation, followed by the belief that the gift can make a positive difference[4]. Indeed, when asked how eliminating income tax deductions for charitable giving would impact their charitable giving, 72.1 percent of affluent households indicated their charitable giving would stay the same.[5]

Success in helping clients with their charitable planning is based on understanding their motivation as potential donors. This includes their motivation for giving, as well as reasons the client might choose not to donate. Advisors should not carry into client meetings personal biases and feelings on charitable giving or the chosen charities of the client. Advisors can explore and uncover a client's deepest-held values and beliefs through meaningful conversation and dialogue. Having conversations with clients about what motivates them, leads to better understanding of what is most important to them. Often clients will articulate that doing "something" for the world at large is one of their values.

A challenge with this process of uncovering donor motivation is many advisors may feel uncomfortable discussing these "softer" topics, as opposed to the confidence in discussing more technical topics (tax, legal, financial, etc.). "Softer topic" discussions are fundamental to estate, tax, financial and other planning. There is a simple solution for advisors who feel technically proficient on charitable planning techniques but less confident in discussing the human and emotional aspects of giving: collaborate. When advisors collaborate, each team member will possess unique skills and competencies. A team of advisors will offer more skills than a single advisor. The planned giving officer at the client's favorite

[4] 2021 Bank of America Study of Philanthropy: Charitable Giving by Affluent Households
[5] Id.

chosen charity or charities generally have the "softer topic" conversation skills and can fill that gap if the advisor is not comfortable. That is in fact what many planned giving officers spend considerable time engaged in.

The charitable planning decision is hardly ever just "about the numbers." As Russell James, Professor of Charitable Financial Planning at Texas Tech University writes:

> *"Giving motivation comes from the social emotion system. It comes from story. Introducing math, numbers, and finance can disrupt this process. It can trigger the deliberative, error-detecting logic system. This system can block giving motivation. It can interfere with the social-emotion story processes that drive motivation[6]."*

What are the options for advisors in assisting clients with uncovering the story that drives giving motivation? One way is to be proactive and initiate the philanthropic conversation.

Initiating the Philanthropic Conversation

Starting the charitable conversation at the beginning of a client relationship can be effective in the advisor's contribution to the client's overall planning success and the advisor's involvement in a client's giving. During the onboarding process, asking new clients questions about charitable giving will provide critical insights into a client's motivation for giving (or not giving, as the case may be).

Examples of questions an advisor can ask to help uncover motivation include:
- Would you like to use charitable giving to set an example for your heirs?
- What would you like to do for the world at large if anything?
- Does religion or faith play an essential role in your life?
- How connected are you to the institutions where you went to school?
- What charities do you currently support and why?
- Where do you volunteer today, or would you like to volunteer if you could?
- What would you like to achieve with your money?
- If you did not have to work anymore, what would you do?
- What would you like your legacy to be?
- How would you like to be remembered?

Russell James provides additional probing questions in his book *The Socratic Fundraiser*[7].

Some advisors may not feel comfortable asking the types of questions listed above of a client. Some advisors may not feel sufficiently knowledgeable in the charitable tools, and the soft components of giving, that may be useful in situations revealed by a client. Those advisors may find encouraging the

---

[6] James, R (2022). Solutions in Fundraising Math: Story First, Math Second. https://www.linkedin.com/pulse/solutions-fundraising-math-story-first-second-russell/?trk=public_profile_article_view

[7] James, R (2022). *The Socratic Fundraiser: Using Questions to Advance the Donor's Story*. http://www.encouragegenerosity.com/TheSocraticFundraiser.pdf

words of Orrin Woodward: "Success is on the other side of your comfort zone.[8]" If uncovering donor motivation is crucial to your better serving clients, advisors may need to address topics that are uncomfortable for them as advisors.

Technical knowledge is only one element needed to create a successful plan and a satisfied client. Knowledge of the donor's motivations for giving is primary. Asking meaningful, impactful, open-ended questions will help uncover motivations. Practitioners are often accustomed to asking leading questions, not open-ended ones. Leading questions are necessary to identify names of fiduciaries, distribution standards, and other pertinent information. However, the charitable discussion is qualitatively different and needs to be addressed as such.

One tool to assist clients in creating an overall philanthropic strategy that encompasses values and legacy goals is a charitable mission statement.[9] A mission statement serves as the guiding principle for a client's giving. The statement may be simple or complex. A guide to the development of a charitable mission statement is the Rockefeller Philanthropy Advisors' "Philanthropy Roadmap."[10] The "roadmap" leads clients through a series of questions, the answers to which form the basis of a giving strategy. Practitioners might find this a helpful tool in addressing these broad charitable discussions.

If the answers to the charitable intent questions demonstrate a strong desire to give or continue giving, some clients may still hesitate to give more. Wealthy clients have reasons for not giving more. The top three cited reasons for not giving are: (1) a belief that the gift will not be used wisely, (2) a lack of knowledge or connection to the charity, and (3) a fear of increased donation requests from other charities. These are all topics for which an advisor may alleviate a client's concerns, help clients become more comfortable with their charitable goals, and perhaps motivate additional giving consistent with the client's wishes.

A client may choose not to make charitable gifts (or larger ones) out of concern for running out of assets. For these clients, the worry may be analyzed by the client's wealth advisor constructing financial models reflecting various scenarios of giving. The financial advisor can endeavor to give comfort, when appropriate, that clients have a high probability of outlasting their assets through a given period of retirement. Using Monte Carlo analysis and financial planning software, a wealth advisor may demonstrate to a worried but generous client whether they might afford to part with some of their assets today and whether they can give away assets as part of their estate plan. In either case, the analysis may help demonstrate, under various assumptions, the sustainability of a portfolio of assets. In many instances quantifying the financial results may inspire a client to give, either today or as part of their legacy, or perhaps both.

Working together, the charitable planning team can construct a plan that better meets client goals and may also inspire a client to give more abundantly.

---

[8] Twitter post from Oct 25, 2016, @Orrin_Woodward

[9] For samples and a worksheet, see https://www.fidelitycharitable.org/guidance/smarter-giving/mission-statement.html

[10] See https://www.rockpa.org/wp-content/uploads/2017/08/Your-Philanthropy-Roadmap.pdf

The Giving Team: Comprehensive and Collaborative

The cooperation and coordination of the client's advisors is the leading indicator of a successful charitable journey. Each team member should have an essential purpose for participating in meetings with the client. Individual advisors should avoid directing the team to focus on their specialty. Ultimately the donor is the team "CEO" and all members of the team should be working in alignment to assist clients with fulfilling goals and objectives. When it is helpful for one advisor to serve as the team leader, that role should generally be temporary until the particular purposes of that leadership are accomplished. The mantel of leader should shift to other advisors or the client as appropriate.

Perspectives on a holistic team

When a client is pursuing a major gift for the first time, there are likely to be several personal and planning issues that need attention. However, a functional client advisory team can help address those issues and provide critical guidance throughout the process.

A wealth manager can help identify the donor's financial capacity to give, and in conjunction with the tax members of the team, the ideal assets for the gift. A wealth manager is often key to coordinating the giving, ongoing management, and supporting the administration of charitable vehicles.

An estate planning attorney may address estate tax and other planning implications of a gift or bequest, identify sources for the gift (e.g., which trust) and may help structure the client's donation to maximize impact. The estate planning attorney can also help navigate the complex legalities of charitable tools, i.e., private foundation rules, the use of CLTs or CRTs, etc. The attorney may advise on the options to structure trusts and other gifts. The estate planning attorney can provide counsel on legacy giving through a will or trusts as a potential option.

A philanthropy advisor representing the charitable organization may provide advice on the implications of the gift and help structure the gift to maximize its personal and charitable impact. The philanthropy advisor may have the expertise in specific giving tools, plus the software to run gift examples that clearly illustrate how a gift will benefit both the client and the nonprofit. Helping the client identify a worthy program and ensure that the gift is used ineffectively, according to a gift agreement, falls under the expertise of a philanthropy advisor.

A CPA is a critical team member who may advise on the income tax consequences of a gift or bequest. (e.g., using qualified plan assets for funding donations). The CPA can also help identify the assets that may be preferable to give and the timing for giving the assets. CPAs may advise on the tax consequences of the various ways a planned gift may be structured. They may provide and develop insights on how charitable giving fits into the client's financial goals, complementing what the wealth adviser may do with forecasts as noted above. Clients may perceive a CPA as the most well-positioned to advise on the tax benefits of giving. While tax benefits may not be the primary motivator for a client, wealth clients report that tax benefits do matter to them. A CPA may assist by evaluating illustrations from the wealth adviser, or creating illustrations if there is no wealth adviser doing so, and adding other strategic input.

The executor or trustee of a person's estate is a critical participant in any planned gifts effectuated after the person's death. The executor is responsible for carrying out the deceased person's wishes, and so they play an essential role in making sure that any planned gifts are correctly carried out. Having the client's personal representative, or successor trustee, involved increases the client's confidence that the charity will accurately put the gift in place.

By assembling a team of experts such as, but not limited to, those suggested above, the client can be confident that they are endeavoring on their charitable journey efficiently and effectively.

The Client Gift Agreement Process

Donor gift agreements are contracts. These may be drafted as legally binding documents. However, in many instances they may be drafted as non-binding letters of intent between a donor and a nonprofit organization. In all instances the agreement will state both parties' expectations and obligations, if any. For major gifts, these agreements should be in writing and signed by both the donor and a representative of the nonprofit. The agreement should list in detail the terms of the gift, including any restrictions on the funds' usage and any naming opportunities offered to the donor. The agreement should state the nonprofit's commitment to use the funds for the intended purpose and specify the frequency of reports on the fund's impact. Donor gift agreements may clarify donor and nonprofit roles and responsibilities. Importantly, a strong agreement can help prevent future misunderstandings or disputes.

The following discussion reviews the various persons who have a role in the gift agreement process.

Multi-Disciplinary Approach to the Gift Agreement Process

The philanthropy advisor representing the charitable organization is responsible for communicating the organization's gift acceptance and "naming" policies. For example, if the donor is seeking the naming (e.g., externally on building, internally in building, or permanently naming a department or college), the planned giving representative must communicate the essential requirements for the gift. The planned giving officer will be able to reference the organization's gift acceptance policy to ensure the organization can accept a specific asset type, i.e., cryptocurrency or real estate

An attorney retained by the client, perhaps the estate planning attorney, could review the gift agreement to examine whether the documentation satisfies the client's donative intent. In some states, a gift agreement does not carry any legal authority, and the charity cannot sue the donor unless the charity can claim an extreme detriment because the gift did not occur.[11] If the client is concerned ab out the enforceability of the document counsel should research that to confirm. An enforceable pledge also limits the donors' opportunities for how a donor could pay that pledge. For example, if the donor wants to use her private foundation, and the commitment is binding against the donor personally, the donor cannot use her private foundation to satisfy that pledge. If the client's legal representation is not part of the negotiation process, there is a risk both to the donor and the charity that the gift may not be structured successfully.

The wealth advisor should examine the financial aspects of the gift agreement. Most gift agreements are established with a pledge payment schedule. The wealth advisor should review the donor's capacity to

[11] Whether a pledge is legally enforceable is a matter of state law. To be a binding commitment, the agreement must have one of the following: consideration detrimental reliance or public policy. Detrimental reliance involves charities and possibly even other donors' substantial reliance on the promise to make the gift. The consideration does not have to be of equal value. For example, a University may agree to name a building for the donor because of the pledge, which is sufficient consideration.

fulfill the pledge payments. The wealth advisor should verify the agreement allows for the asset recommended by the planning team, to be used to fulfill the pledge.

Charitable organizations accustomed to major gifts typically have in-house or outsourced legal counsel that draft the gift agreements. The organization will represent its best interests based in the organization's gift acceptance and naming policies. The charitable organization’s agreement may be the starting point of the agreement conversation. The client should feel comfortable supplying their own version of an agreement that has been reviewed by their advisors. There is nothing wrong with negotiating the agreement to achieve a result comfortable for the client and within parameters acceptable by the charity.

The client's input is critical to the final "legacy" terms of the gift agreement. The agreement should convey the client/donor’s ultimate legacy and how that will be conveyed in future generations at the nonprofit. The agreement should be written to facilitate the client's future generations (e.g., great-grandchildren) who may not be privy to direct communications from the donor as to the rationale and intent for the gift, to understand why their great-grandparents made the gift. Often the gift agreement is the best opportunity for the donor to convey "why" they are making this transformational gift for the betterment of humankind.

These conversations can be delicate, especially when the donor desires anonymity. In these cases, it is particularly important for the donor's advisory team to be involved to protect the donor's wishes. The donor's advisory team can help to ensure that the agreement between the donor and the charity is clear and unambiguous, and that all parties understand the donor's desire for anonymity – and how the donor defines “anonymity,” which could mean different things to different donors. In addition, the advisory team can help to monitor the charity's compliance with the agreement and to protect the donor's anonymity.

<u>Donor Case Study</u>

Bart and Mary Martinez are married in their early 60s with two adult children who are in their mid-twenties. Bart and Mary are entrepreneurs with many active and passive investments. In 2008 they acquired Rentals, Inc., a Sub chapter S corporation that rents commercial construction equipment. In late 2021 a larger equipment rental business offered to purchase Rentals, Inc.

Bart and Mary knew they could have a personal taxable event of at least $75 million in 2021. They are philanthropic and had already decided if this deal goes through, they will donate $1 million to State University. They would like to mitigate more income taxes in 2021 but are not motivated to give away more cash outright to charity at this stage of their lives. Bart and Mary plan to leave most of their wealth to their children.

Bart and Mary meet with a Planned Giving officer from State University. The Planned Giving Officer recommends that the Martinez's consider discussing with their advisors the pros and cons of a charitable lead annuity trust (“CLAT”), specifically one which is a grantor trust for income tax purposes and is structured to no longer be significant part of the grantor's (Mary's) estate. Bart and Mary are philanthropic, but they were intrigued that they could earn a substantial income tax deduction in 2021 to offset the sale of Rentals, Inc. and leave the remainder of the trust to their children outside of their gross estate. While they explored the possible use of a charitable remainder trust (“CRT”) to own some interests in the business before the sale (a so-called charitable bail-out) that was not pursued.

The planned giving officer ran an illustration to describe the technique and a follow-up letter better. A copy of such an illustration follows this article.

The first Martinez advisor invited to a second discussion was Bart and Mary's CPA team. They did an outstanding job of familiarizing themselves with the concept. The CPA's role included the following:

1. Help Bart and Mary understand how additional income tax deductions from the CLAT would offset income from their 37% bracket in 2021.
2. The CPAs were the first to evaluate and approve or question the technique suggested by the Planned Giving officer. The CPAs endorsed moving forward with the proposed gift technique.

Another Martinez advisor invited to the discussion was their estate planning attorney, with who they had some recent experience in 2020. They previously met with their attorney to create Spousal Lifetime Access Trusts (SLATs) and used 100% of their federal gift and generation-skipping transfer tax exemptions. ($11,580,000 each in 2020)

The team learned an important piece of information not yet revealed about the SLATs. This meant that "zeroing out" the CLAT – meaning, structuring the CLAT in such a way that any gift or estate tax liability is offset by a charitable deduction – would be essential since the Martinez's used their entire transfer tax exemptions already, although they will have available in future years the inflation adjustment increases to the exemption. This kind of CLAT is referred to as a "grantor CLAT[12] because of the possible income tax benefits of a charitable contribution deduction available because it is structured as a grantor trust.

Bart and Mary's attorney was crucial to the strategy in several ways:

1. The Planned Giving officer knew that the IRS had approved this specific type of CLAT in various Private Letter Rulings (PLR's) which the clients were advised do not constitute precedent binding on them (unless they obtained their own PLR), so it would be up to the donor's attorney how to proceed to best navigate the IRS's historical guidance on this technique.
2. Work with the University to draft the initial trust document.
3. Make recommendations to Bart and Mary on a competent and appropriate trustee.

A well-known corporate trustee was selected. The trust officer, comfortable with the terms of the CLAT and experienced in the nuances of the CLAT, was added to the Martinez team. Bart and Mary always invested in their own companies and real property, so they never previously hired a wealth advisor, but liquidating their closely held business changed their needs. By establishing the relationship with the corporate trustee, the Martinez's were introduced to a wealth advisor (whether with the corporate

[12] A grantor charitable lead trust is a charitable lead trust that has grantor trust characteristics for income tax purposes, but which is a completed gift for transfer tax purposes. This is sometimes referred to as an "intentionally defective" charitable lead trust. The trust distributes its remaining principal, at the end of the lead term, to the donor's heirs when it terminates. However, the donor retains enough rights in the trust for the trust to be considered a grantor trust for income tax purposes but no powers that would make the transfer to the trust incomplete for gift and estate tax purposes. As a result, the donor pays tax on the trust's taxable income, but the trust's assets are outside of the donor's estate. Since the gift is deemed to be "for the use of" the charity, the income tax deduction is subject to IRS 20%/30% limitations

trustee or independent) to help them create and implement a comprehensive wealth management plan that incorporates the financial implications of the CLAT.

The trustee and wealth manager quickly became a vital part of Bart and Mary's team:

1. The gift technique utilized a third-party professional trustee.
2. Additionally, having another set of professional "eyes" on the trust and the technique was a helpful endorsement that the gift technique was structured in a manner that would achieve the Bart and Mary's.
3. For the first time is Bart and Mary's adult lives, they used an overall strategist to help them review their goals at a "macro" level. This is the wealth manager's strength and expertise.
4. Bart and Mary wanted the charitable annuity payments from the CLAT to transfer to a Donor Advised Fund (DAF) and subsequently make grants to State University and other charitable organizations. The trustee was able to accommodate Bart and Mary's request.

Bart and Mary decided to use the annuity payments from their new CLAT to give more than the initial $1 million pledged. However, they also decided that they wanted to receive naming rights for a new building on campus. The University's naming policy requires that the pledge to name a building must be paid in full in no more than 5 years. Because the CLAT was established over 14 years, the University needed to examine the terms of the gift further and get special approval from the Board of Trustees to approve the naming of the new building.

If Bart and Mary's advisory team did not include the Planned Giving officer representing the University, the team would be at a major disadvantage attempting to negotiate with the University to fulfill Bart and Mary's donative intent.

In the end:

- The estate attorney drafted the CLAT in such a way that no material gift tax exemption was required for the transfer (i.e., it was largely a zeroed out CLAT), and Bart and Mary were comfortable with those terms, as was the trustee.
- The CLAT was signed and funded with proceeds from the sale of Rentals, Inc.
- The wealth manager implemented a diversified portfolio of assets for the CLAT designed to generate minimal investment income, knowing that Bart and Mary are taxed on trust income, while also meeting the approval of the trustee. The wealth manager also helped Bart and Mary establish and fund their new donor-advised fund.
- With the help of the Planned Giving officer, Bart and Mary were able to come to an agreement with the university on the terms of the naming opportunity.
- The CPA ran tax projections for Bart and Mary so that they could plan for any capital gains remaining from the sale of Rentals after factoring in the charitable income tax deduction from the CLAT.
- Bart and Mary made an impactful gift to State University and are delighted with the results. They invited their children to participate in the philanthropic process by helping suggest grants from their DAF and named their children as successor advisors to the DAF.

Conclusion

Most transformational charitable gifts do not occur in a vacuum. If advisors are motivated to help their clients make transformational gifts (that will honor their client's legacy and satisfy the charitable mission), both clients and charities will benefit.

Recognizing the interdependence of advisory team members and the charitable client is crucial to effectuate a transformational charitable gift.

Jennifer Ashley, J.D. CAP® is a philanthropic dreamcatcher with over 25 years of experience aiding nonprofits in growing their missions.
Paul Caspersen, CFP®, MS, AEP® brings complex financial thinking to the charitable planning field. As a Certified Financial Planner, Paul has 25 years of financial, estate, and charitable planning experience. Between 2012-2022, Paul served as Assistant Vice President and Sr. Philanthropic Advisor at the University of Florida, where his Gift Planning team closed $1.25 billion (of the campaign's $4 billion total) in deferred gifts and outright gifts of complex assets. Paul is also the Founder of Planned Giving Interactive (PGI), a charitable planning software & consulting organization. PGI provides charities with practical tools to research complex gifts and an industry-leading, extensive suite of document drafting software and consulting to automate donor compliance-related documents.
Elliot Dole, CFP®, MST, EA, CAP, CExP is a Wealth Advisor at Buckingham Strategic Wealth, based in St. Louis, MO. He is a member of the St. Louis Estate Planning Council Board of Directors.
Juan Ros, CFP®, AEP® is a financial advisor with Forum Financial Management, LP in Thousand Oaks, California, specializing in charitable giving for his clients. Prior to his work in wealth management, Juan served as a major gifts and planned giving fundraiser for several non-profit organizations. He is a past president of the Conejo Valley (CA) Estate Planning Council and serves on the NAEPC Council Relations Committee.
Martin M. Shenkman, CPA, PFS, AEP (Distinguished), JD is an estate planner in New York and author of 42 books and more than 1,400 articles. He is a member (Emeritus) of the NAEPC Board of Directors.

Estate of Levine: Intergenerational Split Dollar and More

By

Thomas F. Commito, JD, LL.M, CLU, ChFC, AEP

On February 28, 2022 the Tax Court issued its long-awaited decision in Estate of Marion Levine v. Commissioner [1],the latest in an ongoing saga of Internal Revenue Service challenges in intergenerational split-dollar cases. The result of the case was that the premiums paid for two separate policies with a total face value of approximately $17.25 million was discounted from $6,153,478 to $2,282,195 – a discount of 65%! The parties stipulated that the receivable owed to the estate could be valued at $2,282,195 – if the taxpayer prevailed on the IRS' changes on Internal Revenue Code Sections 2036, 2038 and 2703.The taxpayer prevailed on all these issues.

The decision was a "full" Tax Court Decision meaning all the Tax Court judges could review the final opinion. Previous intergenerational split dollar decisions were all "memorandum" decisions – written by one judge without participation or review by other Tax Court judges. The decision is important because its decision serves as guidance for other estate planning techniques using discounting such as Family Limited Partnerships.

Background on Intergenerational Split Dollar

The facts in the Levine case closely resembled the usual structure of Intergenerational Split Dollar (IGSD):

- The person funding the insurance purchase is usually of advanced age. Marion Levine ('Levine') was born in 1920.
- The funding of the policy occurs with economic benefit split dollar.
- The policy is owned by an irrevocable trust. The premium payer is owed an amount equal to the greater of the cash surrender value or premiums paid. In Levine's case, the receivable was owned by her alter ego, a revocable trust.
- The insurance policy is paid for with a single premium or premiums paid over a brief period e.g., several years as contrasted to a more typical longer period
- The insured is an adult child of the person advancing funds for the policy. The adult child or children are typically middle age, e.g.,40-60. In Levine's case the two insureds were her adult children Nancy and Robert.
- The person advancing the funds, e.g., Levine, often dies within a relatively brief period of time after the plan is implemented.

[1]158 T.C. No. 2

- The key to the plan, and the cause of the valuation dispute is that the estate which owns the split dollar receivable can discount that value. The rationale for the discounting is that the amount owed the estate will be payable at the death of the insureds. Since it may be many years before they die, the current value of the receivable should be discounted for the intervening time.

Issues Before Tax Court

The preceding steps all took place towards the end of 2008. After Levine's death, on January 22, 2009, the IRS challenged her estate tax return and eventually issued a notice of deficiency for a little more than $3 million, plus penalties based on the difference between the value of the receivable listed the estate tax return and the $6.5 million. After stipulations, the Tax Court had to decide the value of the split-dollar receivable in the estate and what the penalties should be if any undervaluation was found. To do this, the court had to decide three key issues:

- Does IRC Section 2036 or 2038 require inclusion of the policies' Cash Surrender Values (CSV) in the gross estate?
- Does IRC Section 2703 and its valuation rules apply to the estate's property interest and, if so, how does that impact the value of the interest?

The Tax Court's Decision

The court's decision provides a clean sweep for the estate, leaving it without a significant deficiency and no penalties.

Code Section 2036(a)(2) states that the estate tax should apply to include in the value of the taxpayer's gross estate the value of all property that the decedent had transferred during lifetime for less than full and adequate consideration in money or money's worth not in a bona fide sale or exchange, over which the decedent retained for life the right, alone or in conjunction with another person, to designate the person or persons who shall possess or enjoy the property or the income therefrom.

This important section is a catchall designed to prevent a taxpayer from avoiding estate tax simply by transferring assets before the taxpayer's death. Pursuant to the related Treasury Regulations, "[a]n interest or right is treated as having been retained or reserved if at the time of the transfer there was an understanding, express or implied, that the interest or right would later be conferred." [2]

Code Section 2038 allows for a "claw-back" into a decedent's estate the value of property that was transferred in which the decedent retained an interest or right—either alone or in conjunction with another—to alter, amend, revoke, or terminate the transferee's enjoyment of the transferred property.

As to Code Sections 2036 and 2038 the Tax Court held that it "…was the Insurance Trust that bought the policies and held them. These policies were never owned by the Revocable Trust, and there was no "transfer" of these policies from the Revocable Trust to the Insurance Trust… The "property" is also not the receivable itself. That property belonged to the Revocable Trust and now it belongs to the Estate. It wasn't 'transferred'; it was retained". Since there was no "transfer", neither Code Section 2036, nor Code Section 2038 could apply and result in estate tax includability. The Court further held:

"We find that the "property" at issue cannot be the life-insurance policies, as these policies have always been owned by the Insurance Trust. The split-dollar transaction was structured so that the $6.5 million was paid by the Revocable Trust in exchange for the split-dollar receivable. It was the Insurance Trust that bought the policies and held them. These policies were never owned by the Revocable Trust, and there was no "transfer" of these policies from the Revocable Trust to the Insurance Trust."

In conclusion, the Court found that Levine retained the split-dollar receivable, and nothing else. The court also found that holding this receivable did not give Levine a right to the CSVs of the policies – only to wait until termination or maturity of the policies and then collect the $6.5 million or the CSV.

<u>The Power to Terminate the Agreement</u>

This issue has been the core of all decisions involving IGSD. The IRS argument has been that an ability to terminate the agreement either alone or in conjunction with the other party to the split dollar agreement. To the IRS this represents the opportunity to "designate enjoyment of the property", thus triggering IRC 2036((a)(2).

On this last point, the court found a very significant difference between Levine on one hand and previous cases on the other:

---

[2] Treas. Reg. § 20.2036-1(c)(1)(i).

In Estate of Morrissette v. Commissioner, the donor and donee could mutually agree to terminate the agreement. In Estate of Cahill, the agreement could be terminated only by written agreement of donor and donee, acting unanimously. In contrast, in Levine, the ILIT, by its investment committee, had the sole right to terminate the arrangement. The investment committee in essence was a special trustee of the trust who had fiduciary duties to the trust, not Mrs. Levine. The trustee was completely independent from her, so she retained no Code Section 2036 rights.

Ability to Surrender Policies

The IRS also argued that Levine stood on both sides of these transactions and therefore could unwind the arrangements at will. The attorneys-in-fact, who were trustees of the ILIT, held power over the revocable trust, agreed the court. However, the ILIT had an independent trustee, and the trustee was directed by the investment committee – which was just one of the trustees of the revocable trust. The court found that the investment committee's sole member had a fiduciary duty to the beneficiaries of the ILIT (which included Levine's grandchildren) that would have prevented him from surrendering the policies. Therefore, the ability to surrender the policies for their CSV couldn't be characterized as a right retained by Levine, and the IRS' efforts to gain Section 2036 inclusion of the policies in the estate failed. Their arguments for inclusion under Section 2038 failed for the same reasons.

Section 2703 Not Applicable

Finally, the IRS argued that the split-dollar arrangement was Levine's way of placing a restriction on her right to control the $6.5 million in cash paid for the policies and, thus, to reduce its value. By disregarding this restriction according to the valuation rules of Section 2703, the IRS also arrived as its preferred value without any discounts.

The court held that the reference to "any property" in Section 2703 refers to the property of an estate, not some other entity's property. And because the property in Levine is the receivable – not the policies – Section 2703 does not apply.

A Better Approach

All of the IGSD cases involve "economic benefit" regime split dollar. But what if the parties were to utilize "loan regime" split dollar, and the technique would be to discount the loan owed to the older generation funder of the policy, utilizing a long term loan to fund the policy. The Treasury regulations clearly recognize the ability to discount promissory notes. Regulation 25.2512-4 in its entirety states:

"The fair market value of notes, secured or unsecured, is presumed to be the amount of unpaid principal, plus accrued interest to the date of the gift, unless the donor establishes a lower value. Unless returned at face value, plus accrued interest, it must be shown by satisfactory evidence that the note is worth less than the unpaid amount (because of the interest rate, or date of maturity, or other cause), or that the note is uncollectible in part (by reason of the insolvency of the party or parties liable, or for other cause), and that the property, if any, pledged or mortgaged as security is insufficient to satisfy it."

Furthermore, the Regulations on loan regime split dollar clearly indicate that it is a true loan. Regulation 1.7872-15(a)(2) states "payment made pursuant to a split-dollar life insurance arrangement is treated as a loan for Federal tax purposes, and the owner and non-owner are treated, respectively, as the borrower and the lender."

Hence, discounting a loan under loan regime split dollar would seem to be the preferred way to go.

<u>Broader Lessons</u>

The Tax Court was effusive in its praise of Mrs. Levine's advisors. These comments have broad application for all estate planning cases, particularly those that involve discounting techniques which are greatly disliked by the IRS (and some members of Congress). These points include:

- The ILIT trustees were independent – not family members. The administrative trustee was an institution (South Dakota Trust Company) and a special trust protector/ investment committee.
- The ILIT had beneficiaries other than the insureds- the five grandchildren of Marion Levine. The trust protector/ investment committee had a fiduciary duty to all of the beneficiaries – not just the insured children.
- The insureds needed the insurance. They both would be subject to estate tax – and neither had done any estate planning.
- The estate planning attorney created a thoughtful plan for the family. He prepared a powerpoint and went over the details with all family members present. He outlined the advantages and the risks. All parties were fully informed.

Planning Opportunities for Inherited IRAs

Kenneth A. Horowitz, CLU, ChFC, RICP,[1] Robert S. Keebler, CPA, and Martin M. Shenkman, Esq.

Why Practitioners Need to Focus on the Secure Act in 2022

The SECURE Act of 2019 created important planning opportunities for inherited IRAs, but many clients still haven't considered these changes because IRA planning has been overshadowed by planning for potential tax changes by the Biden Administration. Practitioners should now remind clients of the need to revisit beneficiary designations to see if they could benefit from changes made by the SECURE Act. For some clients, these changes may require a complete reconsideration of their estate and insurance plans.

Overview of the Secure Act

The SECURE Act requires most beneficiaries of inherited IRAs to withdraw 100% of the IRA account by the end of the 10th year following the death of the plan holder. This can push income into higher tax brackets than distributions over life expectancy. If the beneficiary is a trust, those tax brackets quickly reach the maximum income tax rate at about $13,000 of income. Worse, if the income tax surcharges passed by the House in its version of the Build Back Better Act are eventually enacted, a 3% surtax could apply to trust income over $200,000 and an 8% surtax to trust income over $500,000. The result may be the equivalent of giving back most of the income tax deferral benefits accumulated over the prior 10 years. Additionally, unless an accumulation

[1] Kenneth Horowitz is a Principal of Integrated Benefit Consultants and a Registered Representative and Financial Advisor of Park Avenue Securities LLC (PAS). Securities products and advisory services offered through PAS, member FINRA, SIPC. Financial Representative of The Guardian Life Insurance Company of America® (Guardian), New York, NY. PAS is a wholly owned subsidiary of Guardian. Integrated Benefit Consultants is not an affiliate or subsidiary of PAS or Guardian. CA insurance license # 0C37308. The information in this presentation is designed to be general in nature and for educational purposes only. All scenarios mentioned herein are purely fictional and have been created solely for training purposes. Any resemblance to existing situations, persons or fictional characters is coincidental. The information presented should not be used as the basis for any specific investment advice. The Guardian Life Insurance Company of America, its subsidiaries, agents, and employees do not give tax, legal, or accounting advice. You should consult their own tax, legal, or accounting advisors regarding their individual situations.

Registered Representative and Financial Advisor of Park Avenue Securities LLC (PAS). Securities products and advisory services offered through PAS, member FINRA, SIPC. Financial Representative of The Guardian Life Insurance Company of America® (Guardian), New York, NY. PAS is a wholly owned subsidiary of Guardian. Integrated Benefit Consultants is not an affiliate or subsidiary of PAS or Guardian. CA insurance license # 0C37308. The information in this presentation is designed to be general in nature and for educational purposes only. All scenarios mentioned herein are purely fictional and have been created solely for training purposes. Any resemblance to existing situations, persons or fictional characters is coincidental. The information presented should not be used as the basis for any specific investment advice. The Guardian Life Insurance Company of America, its subsidiaries, agents, and employees do not give tax, legal, or accounting advice. You should consult their own tax, legal, or accounting advisors regarding their individual situations. Submission 2022-139500 Exp. 6/24 trust is used (which exacerbates the income tax problems explained above) post death control and a resulting lack of asset protection is greatly reduced.

Prior to the SECURE Act, inherited IRAs could be distributed over the life expectancy of the designated beneficiary ("DB"). In many cases the beneficiaries were children or grandchildren of the IRA owner which meant distributions, and the income taxes on those distributions, could potentially be spread out over several decades. This strategy was commonly referred to as the "Stretch IRA" technique. No more… Now that stretch out is limited to 10 years unless the beneficiary is an Eligible Designated Beneficiary ("EDB").

<u>Eligible Designated Beneficiaries May Still Stretch</u>

Certain beneficiaries are exempt from the 10-year rule:

- Spouses
- Children until age 21
- Chronically ill beneficiaries
- Disabled beneficiaries
- Beneficiaries no more than 10 years younger than the IRA owner

Practitioners should keep in mind that the definitions of "chronically ill" and "disabled" are rigid and many with significant challenges may not qualify.
The restriction of the stretch to only this limited class of EDBs is a dramatic change that creates a need for alternative planning strategies to transfer retirement plan wealth to future generations on a tax efficient basis. This type of planning can add substantial value for professionals in many different disciplines: estate planning attorneys, CPAs, wealth advisors, and insurance consultants.

Importantly, there is loss of asset protection when beneficiaries take ownership of the IRA assets after ten years. Absent the use of trust beneficiaries, the lack of post-death control means the assets will now be subject to creditors, divorce, and ill-advised decisions of beneficiaries receiving the plan assets outright.

Post-Death control is a high priority for many clients. They want to be sure these assets end up with the intended beneficiaries of their choosing and stay with those beneficiaries (and not be lost to creditors or divorcing spouses of those beneficiaries). Consequently, there is now a need for alternative planning strategies to manage the income tax and asset protection implications of these changes.

<u>Proposed Regulations</u>

The IRS issued Proposed Regulations on February 23, 2022, to reflect the changes to the Internal Revenue Code made by the SECURE Act. The Proposed Regulations are likely to be modified before they are finalized, but they do provide the best window into the IRS's thinking on a variety of issues.
The new Proposed Regulations would split Non-EDBs into two groups, each with its own set of post-death distribution rules. One group would be comprised of Non-EDBs who inherited from retirement account owners who died prior to their RBD. This group of beneficiaries would have

to receive the full balance from the IRA within ten years after the death of the IRA owner but wouldn't be required to take pre-SECURE Act RMDs for the first nine years.

Non-EDBs who inherited from retirement account owners who died on or after their RBDs would comprise the second group. This group of beneficiaries would be subject to both the 10-Year Rule and RBDs for the first nine years. In other words, beneficiaries who inherited retirement accounts from owners who died on or after their RBD would have to comply not only with the 'stretch' distribution rules in place before the SECURE Act was passed for nine years, but they would also have to empty the account by the end of the 10th year after death.

The Proposed Regulations also clarify who can be considered an EDB. They provide that the account owner's children are considered minors until they reach their 21st birthday. This means that minors would use the 'stretch' RMD rules until their 21st birthday, and then be subject to the 10-year rule and potential continued RMDs (if the decedent had died before reaching the RBD).

Revise Client Wills and Trusts

One revision to consider making to an IRA owner's will (or revocable trust if that is the primary dispositive document) would be to change the conduit trust that had been designed to hold IRAs and distribute the RMDs to the beneficiary to an accumulation trust. The problem with a conduit trust is that it requires the trustee to immediately distribute all assets received from the plan to the beneficiary. When a stretch was permitted it protected the plan assets over the life expectancy of the oldest beneficiary. However, with a conduit trust, the plan assets must now be distributed to the trust, and hence out to the beneficiary, at the end of the 10th year following the death of the plan holder. There is no protection from taxation or claimants at that point.

Thus, for some clients, the use of an "accumulation trust" may be preferable to protect assets. An accumulation trust can hold the distributions from the plan, and in particular the large distribution at the end of the 10th year following death for as long as the trust (or governing state law) permits. As discussed above, this creates an income tax problem of bunching income into that year which may result in higher taxes. So, if the accumulation trust is to be used, the client may want to reconsider steps to potentially reduce that taxation. Unfortunately, in some cases, the client may have to accept the tax costs to obtain the protection desired for the beneficiary involved.

But there is another change some IRA owners might want to consider, and that might include an almost complete revamping of the estate plan.

Example: The IRA owner might have had IRA assets held in trust and the remainder of the estate distributed outright without any trust to heirs. The thought might have been that the IRA distributions would be stretched, so why not give the remaining assets outright. Now that the "stretch" is limited to about 10-years, the plan owner might consider keeping a conduit trust to hold IRA assets for that 10-year period and then bequeathing the remaining estate into another trust so that those assets can be held longer in the trustee's discretion. That might amount to a "flip-flop" of the dispositive scheme with all assets previously bequeathed outright now going into trust. The trustee of the non-retirement assets could make discretionary distributions to perhaps approximate what the prior plan might have accomplished. This might require modification of the plan's beneficiary designation to provide for distribution outright to the beneficiaries, elimination of the conduit trust provisions provided for in the client's current revocable trust that had been named beneficiary, and adding a new trust for descendants to which assets of the estate could pour over. Also, beneficiary designations for non-retirement assets would have to be evaluated as those that might have to be changed to leave assets to the estate to pour into the new trust for descendants. Practitioners should bear in mind when evaluating these types of changes that in most instances holding all assets in protective trusts for as long as possible is generally the best answer to protect assets subject to the income tax considerations that trusts, especially for retirement assets, create.

Example: The IRA owner might revise the beneficiary designation for his plan to designate a charitable remainder trust ("CRT") as beneficiary. On the death of the plan holder, the IRA could be paid to the CRT. No current taxable income would be realized. Payments would be made to the intended beneficiary pursuant to the terms of the CRT, but with a minimum 5% payout, and each payment would carry out a portion of the income. This might accomplish something approximating the intended stretch (deferral) before the SECURE Act.

Example: The IRA owner in the above example might also purchase life insurance on himself or herself to replace the estimated assets passing to charity at the end of the CRT term. This amount would have to be at least 10% of the value of the assets under the CRT rules. The insurance might be held by an insurance trust (e.g., as a spousal lifetime access trust or "SLAT" designed to also hold life insurance) to avoid having the insurance included in the plan holder's estate. If the client does not have an existing irrevocable life insurance trust ("ILIT") but does have a SLAT that can hold the insurance that may entice the client to use a trust, as no new trust will need to be created. This is a similar planning concept to the "wealth replacement trust" that has commonly been used to replace the wealth that might pass to charity under a general CRT plan, but now applied in the new post-SECURE Act context to be coupled with a plan to mimic the no-longer-available stretch.

Of course, if a CRT is added to the plan the costs of creating and administering the plan and the life insurance must be considered. But as noted above, if the client already has a well-funded SLAT (e.g., created in the 2020-2021 planning frenzy) there may be little or no additional cost to create or administer a trust and no need to make gifts to the trust to pay for life insurance premiums as the assets contributed to the SLAT to use exemption may be redeployed for this purpose.

What Can Be Done About Old Conduit Trusts if the IRA Owner Dies Before Changing the Trust Terms?

The reality is that most taxpayers ignore warnings and recommendations from the media and even their own advisers. Few enjoy discussing planning for death, and even fewer enjoy the professional fees their advisers will charge to update documents. So, it is likely that many taxpayers will not revise their wills and or trusts to modify pre-SECURE Act conduit trusts, for example, changing them into accumulation trusts to prevent a large lump sum distribution to a beneficiary after about 10 years, or engage in other planning to address the SECURE Act as discussed elsewhere in this article. All may not be lost as even post-death there may be ways to modify the trust and provide a safer result.

- Many states permit a non-judicial modification of a trust by agreement of those involved, but if the plan holder whose will or trust is involved is deceased that may not be a viable option. Practitioners should consider what applicable state law permits, and if state law is not as flexible as desired, determine whether the governing law and situs of trust administration can be moved to a state with more favorable laws.

- Courts might reform an existing conduit trust into an accumulation trust if it can be demonstrated that the SECURE Act changed the result that the testator or trustor intended at the time of executing the instrument creating the conduit trust.

Planning For Young Beneficiaries

The problem for minor children who might inherit an IRA is obvious. Too much money might have to be distributed to the beneficiary at age 31 (age 21 plus ten additional years under SECURE), or earlier if the minor is not a child of the plan holder. The latter rule may apply because only a plan holder's child obtains the deferral to age 21 before the new SECURE Act 10-year rule kicks in. Many plan holders (parents, or other benefactors) will not want that result.
The answer for some plan holders will be to revise their estate planning documents and substitute an accumulation trust in place of the conduit trust. But the result will be that after the 10^{th} year the entire IRA plan balance will have to be distributed to the trust bunching that income into a single high trust tax year. Since trusts face compressed income tax brackets, much of that income may be pushed into the highest tax bracket, as discussed above.

Another option is a variation on what was discussed above. The plan holder may revise his/her estate plan to leave non-retirement assets or life insurance to the minor beneficiary in a long-term trust, and plan assets to beneficiaries for which there may be less concern. This would constitute a complete restructuring of the client's plan.

Strategies to Address the Elimination of the Stretch

ROTH conversions involve paying income tax now in exchange for receiving distributions income tax-free in later years. The assets however will still be owned outright by the beneficiaries without additional planning. They will still be reachable by their claimants or their ex-spouse and will also be included in their estates. This may become more concerning as estate taxes are expected to increase while the estate tax threshold is expected to decrease with a reduction of the exemption by half in 2026.

Example: Modified Roth Conversion

Below is a summary of a study comparing a more traditional approach clients take by deferring growth then taking RMDs at age 72 to life expectancy, passing the remaining balance to their beneficiaries at age 95 with an alternative technique that may be referred to as a "modified Roth conversion." With the modified Roth conversion, the after-tax proceeds are reallocated to an income tax efficient plan using life insurance over a 10-year period. Alternative periods can also be used. The policy is owned inside an irrevocable life insurance trust allowing the proceeds to pass income and estate tax free. Using the ILIT is where this technique can mimic the traditional "stretch" strategy. It is possible with this approach that the following benefits might be realized:

- Over 50% less paid in income taxes;
- Over 25% more assets passed on to next generations outside the estate;
- Additional protection from creditors, divorce, and other potential unexpected wealth eroding events; and
- Some clients might be motivated to reconsider life insurance options given the vagaries of the investment markets

Two Hypothetical Scenarios Based on a $3,000,000 IRA

1. A more traditional approach of taking RMDs from an IRA from age 72 to 95 vs.

2. An IRA paydown over 10 years at age 60, then funding an income tax efficient account through a whole life survivorship insurance policy:

	Scenario #1: Traditional IRA	Scenario #2: IRA Paydown
Total Income Taxes Paid	$3,787,498	$1,600,412
Net Account Value @ age 95	$1,234,888	$4,652,834
Income Received	$3,394,277	-0-
Legacy Value	$1,234,888	$5,867,288

Assumptions: Assets grow @ 4%; 45% tax rate

.

Charitable Remainder Trust Coupled with Wealth Replacement Trust

The CRT technique mentioned above may be of interest to those clients who have charitable intent. This strategy mimics the traditional "stretch" in two ways by using a CRT and a wealth replacement trust.

Using this approach, the donor names a CRT as beneficiary of his IRA, which enables the assets to provide an income stream to the child beneficiary of the CRT for a specified period (the maximum period is 20 years). When the CRT terminates, the assets pass to the charitable remainderman. Then, using an ILIT, the life insurance proceeds replace the assets passing to charity.

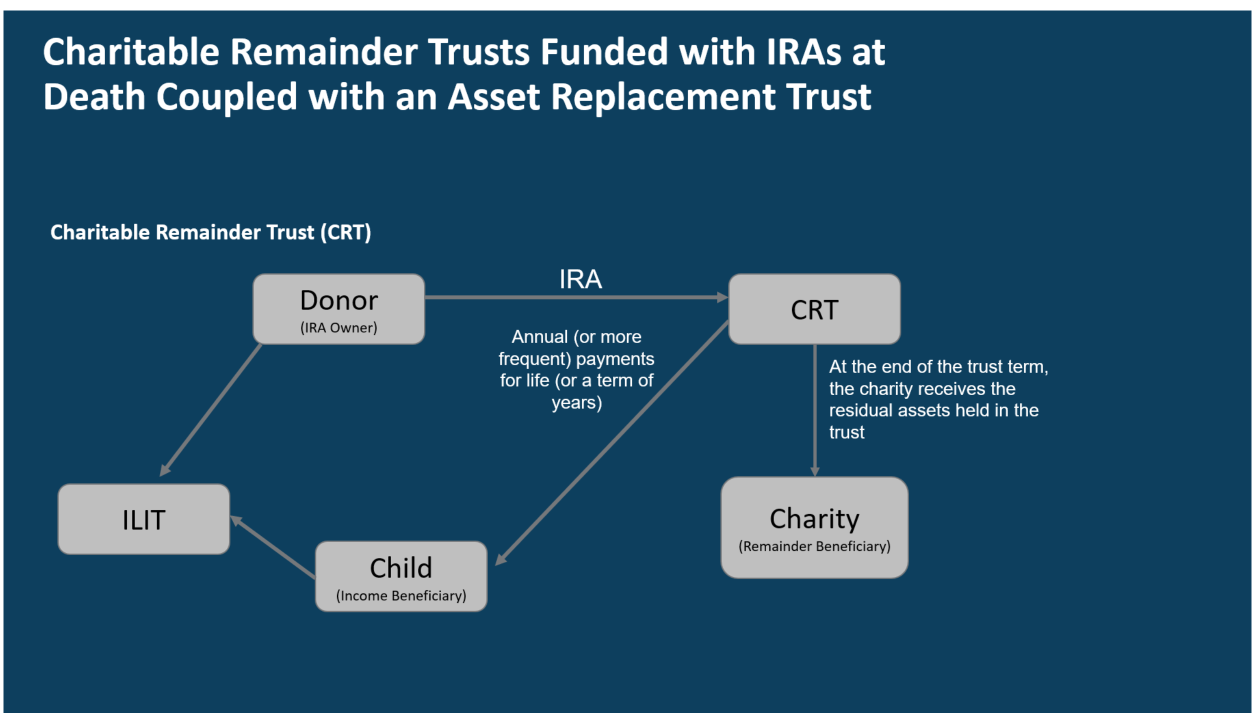
The client may mitigate most of the income taxes typically paid on these assets, other than the CRT distributions, making this potentially a tax efficient strategy to pass assets. In addition, the client receives an estate tax deduction for the remainder interest passing to the charity.

However, the client may be concerned by the projected payment to the charity receiving the remainder of the IRA proceeds upon termination of the CRT if there is no charitable intent. This loss of value to charity may be offset in part by the tax benefits the CRT provides. In addition, as noted above, a "wealth replacement trust" component can be added to the plan if desired. Practitioners might consider recommending that the client at least evaluate the use of a wealth replacement trust technique even if these concerns are not significant. Why? Because the evaluation of the economics of the transaction and potential option of the wealth replacement technique may serve to explain and illustrate the planning better to the client and provide another planning option for the client to consider.

Moreover, all of this may be useful education to the client even if the client does not opt to proceed in this manner. It is also protective of the practitioner regardless as to whether the client opts to use the life insurance and trust approach as it will corroborate that an additional option was provided and that a second adviser (the insurance adviser) reviewed the planning with the client.

While alive, the IRA owner may use some IRA distributions or other assets to fund the ILIT (or as noted above, an existing SLAT if it suffices) to pay the policy premiums. In addition, or alternatively, the child can use some or all of the CRT income stream to fund the irrevocable life insurance trust to pay premiums.

For example, if a donor would normally have left an IRA to grandchildren, which may no longer be available under the SECURE Act due to the 10-year rule and elimination of the "stretch, the donor can leave the IRA to a CRT at death, and the child beneficiary of the CRT can fund an ILIT that owns a life insurance policy on the child which will benefit the grandchildren when the child dies and the remaining assets in the CRT pass to charity.



Conclusion

Revise old wills and trusts – consider replacing conduit trusts with accumulation trusts for greater control and flexibility of IRA assets after the 10-year stretch period ends. Keep in mind, trust income over $13,000 is subject to maximum ordinary income tax rate.

CRYPTOCURRENCY 101 FOR ESTATE PLANNERS

By: Eido M. Walny and Abigail McGowan

On December 9, 2018, Gerry Cotton, the CEO of QuadrigaCX, a major cryptocurrency exchange, died unexpectedly at the age of 30. Cotton's death irrevocably locked 100,000 cryptocurrency holders from their accounts (worth nearly $200 million) because Cotton was the only person known to have the cryptographic keys to the master account. The code, it is believed, was in his memory; and when Cotton died, so did access to the accounts. Although most cryptocurrency owners are not facing the pressures of owning the master account of a major exchange, without proper estate planning, cryptocurrency may not pass to any beneficiaries because of the difficulty in accessing and identifying the assets. Around 34 million United States adults own cryptocurrency.[1] As a result, estate planning attorneys need to be aware of their clients' cryptocurrency ownership and how to plan for cryptocurrency assets to properly pass to beneficiaries without becoming lost or inaccessible.

What is Cryptocurrency?

Cryptocurrency is a digital currency that is used primarily for online payments, investment, or a store of value like gold or silver. It does not exist in a physical form, and users perform all transactions with a computer. The online payment platform for a cryptocurrency is what's known as "the blockchain." The blockchain is a ledger that records cryptocurrency transactions, keeps track of the cryptocurrency in circulation, and is not controlled or overseen by a centralized institution, like a bank. Because of the lack of control or oversight by a centralized entity, blockchains are "decentralized."

Several aspects of cryptocurrency are attractive to investors. The main attractive aspect is complete ownership of assets. With traditional currency held in a bank account, the bank has a level of control over assets. The bank can reject transactions, freeze accounts, sell account holder information, and make transactions with foreign banks tedious and expensive. With cryptocurrency, there is no central authority managing transactions and ownership, meaning that a central authority cannot reject transactions, freeze accounts, or sell information, and international transactions operate in exactly the same way as domestic transactions. Other attractive aspects of cryptocurrency are that blockchains are highly encrypted and nearly impossible to alter, making transactions less susceptible to cyber-attacks, and that, much like stocks, the value of cryptocurrency fluctuates based on the market, making for potentially exponential rates of return.

To illustrate concepts above, we will use Bitcoin as an example (the Bitcoin network uses a capital "B," and the cryptocurrency bitcoin uses a lowercase "b"). Bitcoin is the world's first

---

[1] https://www.insiderintelligence.com/insights/us-adults-cryptocurrency-ownership-stats/#:~:text=Cryptocurrency%20payment%20users%20and%20transaction%20value%20stats&text=This%20year%2C%203.6%20million%20US,up%2068.6%25%20over%20last%20year. Proper citations needed throughout article.

decentralized cryptocurrency. It was introduced in 2009 by a programmer or group of programmers going by the name "Satoshi Nakamoto." Bitcoin is known to be highly volatile, despite it being the highest performing asset of any class (including stocks, commodities, and bonds) in the last decade as it has grown 9,000,000% between 2010 and 2020.[2] Each individual bitcoin is made up of 100 million smaller units, called "satoshis," meaning that anyone can own 0.00000001% of a bitcoin for as little as one U.S. dollar.[3]

When a person purchases bitcoin with traditional money, that person will have to make an account and register their bank account with a cryptocurrency exchange that sells bitcoin. A cryptocurrency exchange is simply a platform that allows the purchase of cryptocurrency with traditional currency. Once purchased on the exchange, the bitcoin is stored in the person's exchange account on the exchange platform until the purchaser creates a more secure cryptocurrency wallet in which to store the bitcoin. A cryptocurrency wallet is a digital storage device for cryptocurrency.

There are several ways to make wallets, one of which is called "cold storage." Cold storage means that the user downloads software onto an SSD drive (a type of computer storage device that works in tandem with a computer's hard drive) that creates a file containing the wallet on the person's personal computer. The user may then transfer the wallet file onto a flash drive and insert the flash drive into their computer when making a transaction. This method is called "cold" storage because the wallet, being stored on a flash drive, is completely offline, which makes it more secure against hackers. Another method of creating a wallet is creating an online wallet with a cryptocurrency wallet service such as Blockchain.com, Coinbase, Electrum, or Exodus. The user will create a wallet account with the online service, and the online service will store the user's cryptocurrency. Online wallets are generally more convenient and user friendly than cold storage methods, but they tend to be more susceptible to cyberattacks because the account and wallet information is stored online. The defining characteristics of a wallet are: (1) an address, which is a string of letters and numbers identifying the specific wallet (much like the IP address of a computer), (2) a password created by the wallet owner to access the wallet, and (3) a private key which is a large, randomly-generated number that must be entered in order to transfer cryptocurrency.

Once a wallet has been created, the user will transfer the bitcoin from the exchange account to their wallet by entering the wallet's address. Now the user can make transactions with the bitcoin stored in the user's wallet. To do this, the user will open the wallet, whether by entering the password to the file on the user's computer or logging into user's online wallet, select the option to send cryptocurrency, enter the address of the wallet that will receive the bitcoin (the recipient of the bitcoin will give this information to the user), enter the user's wallet's private key to authorize the transfer of the user's cryptocurrency, and press send.

Once the bitcoin is sent, the transaction is broadcast to a diversified computer network that validates the transaction and records it on the blockchain. The blockchain, which is an

---

[2] https://www.coindesk.com/price/bitcoin/.
[3] *Id.*

anonymous public ledger, then reflects the transaction, identifying the wallet addresses involved and the amount of the transaction. Another way to think about a cryptocurrency transaction is like an email exchange. The sender of the email enters the recipient's address, includes a message, and sends the email. The email is then broadcasted across the email's server, and the recipient receives the email.

The Need for Estate Planning

Cryptocurrency is a newer and unique asset class. This means that it will be important to update key estate planning documents to include cryptocurrency specific provisions and allow fiduciaries to identify the cryptocurrency. Further, it is not enough to simply identify the cryptocurrency; wallets and exchange accounts must be identified so that fiduciaries know where to look for the cryptocurrency. Additionally, in order to access the cryptocurrency from the wallets, the account information, passwords, and private keys must be provided for. Because of all of the moving parts associated with planning with cryptocurrency, estate planning attorneys must be able to keep up when a client walks in with cryptocurrency in their investment portfolio.

Estate Planning Documents and Fiduciary Access

There is no paper trail when it comes to cryptocurrency ownership. There are just records of public transactions on the blockchain, and the only identifying characteristics of the transactions are wallet addresses and amounts, essentially making the transactions anonymous. Therefore, if a client wants cryptocurrency to pass or be managed for them, the cryptocurrency will need to be identified in estate planning documents. Additionally, because there are layers to accessing cryptocurrency, such as account information, passwords, and private keys, all of those layers will need to be addressed in an estate plan. Estate planning attorneys should first create a section on cryptocurrency ownership on their client intake forms to get an idea of the needs of their client. If the client does own cryptocurrency, the estate planning attorney should (1) list the cryptocurrency in the will and/or testamentary trust, (2) include the types and locations of cryptocurrency wallet(s) in the will and/or testamentary trust, and (3) create a memorandum to the will and/or testamentary trust containing account information, passwords, and a step-by-step guide on how to access the cryptocurrency.[4]

If cryptocurrency is not specifically included in the will, it will fall into the residue of the estate, and it is possible that nobody will know that it exists because there is nothing documenting its existence. Unlisted cryptocurrency will very likely become useless. Therefore, cryptocurrency must be specifically listed in the will and/or testamentary trust. Additionally, the following information about wallets should be included: the type of wallet (whether online, cold, etc.), any devices on which wallets are stored, and the names of online wallet services used. Further, fiduciaries are limited by the Stored Communications Act and the Computer Fraud and Abuse Act in what online accounts they may access and how they may access them. Therefore,

[4] https://www.nolo.com/legal-encyclopedia/leaving-cryptocurrency-in-a-will.html

language that the user consents to and authorizes the fiduciary's access to accounts and retention of account information, passwords, and private keys will be necessary.

SAMPLE WILL/TRUST LANGUAGE:

> I leave all my cryptocurrency investments, crypto-coins, tokens, any other form of digital assets, or anything found in or on my cryptocurrency wallets to [insert name of beneficiary].
>
> My cryptocurrency might be stored on digital wallets, cold wallets, online exchanges, or a combination of wallets and exchanges. The following items or devices might contain a cryptocurrency wallet: _________, _________, and __________. These items should not be distributed to any person until such time as the cryptocurrency, digital assets, or any information related to the access of my cryptocurrency is transferred to [beneficiary named above].
>
> I have created a separate writing from this will that explains how to access my cryptocurrency wallets, and online cryptocurrency accounts. This document needs to be kept private as it contains the passwords, PINs, and private keys needed to access my cryptocurrency. This document will be stored with my other estate planning documents or [insert specified location(s)]. I intend to provide my executor/trustee full authorization to access the contents of any communication under the Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et. seq.) and such executor/trustee shall be an authorized user for purposes of applicable computer fraud and unauthorized computer access laws.[5]

If a client owning cryptocurrency doubts that the intended beneficiary has the technical skills to access cryptocurrency, another option exists. The executor of the estate or the trustee of the testamentary trust may exchange the cryptocurrency for cash and give the beneficiaries the value of the investment. This requires either an executor/trustee or a counseling estate planning attorney to have the technical skills to effect this transaction.

Creating a memorandum explaining the step-by-step process for accessing and using cryptocurrency is incredibly important. The memorandum will contain the security-sensitive information, such as account information and private keys. The probate process is a matter of public record, meaning that this sensitive information should not be included directly within the will. Because trusts do not go through probate, sensitive information may be stored within the trust document if the grantor has confidence in the trustee who will access the information. The memorandum should include a list of wallets and where those wallets are stored (whether on a

[5] https://www.nolo.com/legal-encyclopedia/leaving-cryptocurrency-in-a-will.html

flash drive, online account, or other device), website URLs to exchanges that cryptocurrency may still be stored on, and account information, passwords, and private keys for each wallet. Because account information and passwords can be changed, make sure to update the memorandum accordingly.

When a client becomes incapacitated, and a power of attorney (POA) designates an attorney-in-fact to manage the client's legal and financial affairs, the attorney-in-fact will present the POA to the bank or other entity as proof of the client's consent for the attorney in fact to take over the assets. With cryptocurrency, showing this sort of proof document is not required because there is no central institution to which the POA can be presented. The fiduciary must have access to account information, passwords, and private keys in order to gain control of the wallets and cryptocurrency. Therefore a POA has limited practical use when it comes to cryptocurrency and cryptocurrency related accounts.

A POA may have limited practical use if the cryptocurrency is kept in a traditional financial institution, which may become increasingly common as banks adapt to cryptocurrency industry by offering cryptocurrency services. An additional situation in which POAs have practical use is if the cryptocurrency owner keeps a physical copy of their wallet's private key (such as stored on a flash drive or piece of paper) in a safety deposit box. In that case, a POA may be presented to the entity that holds or oversees the box, and the attorney-in-fact may access the private key and gain control over the wallet and cryptocurrency within. In these cases, the POA document should include provisions for control over the cryptocurrency itself *and* the private key and account information.[6] This allows the attorney-in-fact to control cryptocurrency transactions and to manage the transfer of the private key if needed.

In the more formal sense, POAs may be necessary to show proof that an account holder consented to the attorney-in-fact's control over the cryptocurrency. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) governs access to a person's online accounts when the account owner dies or becomes unable to manage the account and restricts the fiduciary's use of online accounts unless provided for otherwise in a will, trust, power of attorney, or other record. If an attorney-in-fact's use of the account holder's assets is legally challenged, it will be important to have record in the POA of the account holder's consent to the attorney-in-fact's use of the cryptocurrency.

SAMPLE POA LANGUAGE:

> To handle on my behalf any of my digital assets "cryptocurrency," defined for purposes of this durable power of attorney as digital assets that are exchanged electronically and based on a decentralized network or exchange, with such exchanges not requiring a reliable intermediary and managed using distributed ledger [blockchain] technology. I give my attorney-in-fact the power to accept or pay on my behalf any cryptocurrency, digital asset currency, funds, or other value

---

[6] For an example of language to use in a POA document, see James Kane, *Cryptocurrency and Digital Assets*, James M. Kane L. Blog (Aug. 6, 2019), https://jameskanelegalblog.wordpress.com/2019/08/06/cryptocurrency-and-digital-assets/.

> that substitutes for currency from one person to another person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means. The above term "other value that substitutes for currency" encompasses situations in which the transmission does not involve the payment or receipt of cryptocurrency, but does include, yet is not limited to, my private and public keys, blockchain and ledger information, bitcoins, bitcoin addresses, and any other cryptocurrency user or account data or information related to such transactions or to any convertible currency related thereto on my behalf.[7]

Conclusion

Cryptocurrency can be a daunting asset—many find it difficult to grasp the technology behind crypto and how to properly access, use, and protect it. However, because nearly 10% of American adults own cryptocurrency, estate planning attorneys will increasingly face clients who own these assets. When they do, estate planning attorneys will need to adapt their planning strategies around the unique features of cryptocurrency. By simply including cryptocurrency-specific provisions in a client's estate planning documents, estate planning attorneys can ensure that their clients' cryptocurrency properly passes to intended beneficiaries and does not become forever lost or inaccessible.

Eido Walny, JD, AEP, EPLS, is the founder and managing partner of Walny Legal Group LLC, a boutique estate planning firm based in Milwaukee, WI and serving a national clientele.
Abigail McGowan is a recent graduate of Indiana University School of Law and the newest associate at Walny Legal Group LLC.

[7] https://jameskanelegalblog.wordpress.com/2019/08/06/cryptocurrency-and-digital-assets/.

Advisor Collaboration and Intergenerational Split-Dollar Plans

A prime example of a sophisticated strategy where advisors, attorneys and life-insurance professionals can work together to add value. Just don't discount how things could play out in real time.

Charles L. Ratner | Apr 01, 2022

In the January 2022 issue of *Trusts & Estates,* I wrote about how estate planning attorneys and tax advisors can collaborate with life insurance professionals to create comprehensive, client-centered presentations of sophisticated life insurance strategies. In this article, I'll focus on one such strategy that's lately received a lot of attention.

The Plan

Your clients are a wealthy couple who will proudly tell you (an estate planning attorney for the purposes of this example) about their successful children and their beautiful and very smart grandchildren. The clients, whom I'll refer to as "GP," tell you that their insurance professionals have proposed a plan called "Intergenerational Split Dollar" or "IGSD." GP say that the plan involves setting up an irrevocable life insurance trust (ILIT) for the benefit of their grandchildren that would own large life insurance policies on their children (and maybe their children's spouses if both should be insured together). GP would provide the funds for the insurance by way of a split-dollar arrangement with the ILIT. The ILIT would repay GP when the children/insured (C) pass away, presumably several decades from now. Apparently, if the plan is properly structured, it can provide significant tax and wealth transfer benefits for the family.

A Collaborative Effort

GP would like you and the tax advisors to collaborate with the life insurance professionals to give them a realistic assessment of the plan. By “realistic” they mean, “does it work?” Smart, savvy, inquisitive and detail-oriented in their planning, they’re asking you to go way beyond whether the plan holds water taxwise at a high level. They’re talking operationally. They’re talking economics. They’re talking risk-adjusted return. Their talking about not making today’s solution tomorrow’s problem!

You tell the clients that you’re familiar with IGSD and have followed the developments in the case law, including a recent case that was decided favorably for the taxpayer. But you’ve never been involved in one of those transactions. Perhaps the tax advisors have some hands-on experience with IGSD.

You and the tax advisors have a preliminary call with the insurance professionals, with whom you’ve worked well before. They suggest that you put together a set of points that they can seamlessly weave into their usual presentation on IGSD. “Take off the filters. If something is of interest or concern, ask us to address it,” say the insurance professionals. “Got it,” you say, “We’ll get to work.”

After a fresh review of the cases and commentary on IGSD, you and the tax advisors have a good handle on both the opportunities that IGSD can offer as well as the issues it presents. Now the mission is to transcend the tax-oriented commentary on IGSD to get into the practical things that really make it work … or not. In other words, the mission is not just about the discounts that are getting all the press but also about *not* discounting the importance of understanding how the plan would play out in real time over the decades that it could be in force.

Initial Considerations

Here's the current, somewhat annotated version of the list, which you and the tax advisors expect the insurance professionals to help you refine so that everyone can avoid a lot of back and forth that would delay a response to GP.

- Is this going to be a nonequity collateral assignment plan (contributory or noncontributory) under the economic benefit regime, a collateral assignment plan under the loan regime or the former with a switch to the latter at some juncture? These days, do facts and circumstances suggest one regime over the other?
- Describe and, if possible, show by schematic the parties, the structure, the mechanics, the flow of dollars and, of course, any assumptions critical to the success of the plan. Given the C's disparate ages and medical histories, as well as the likelihood that the IGSD plan could be in force for decades, it would be helpful to break the description down into stages or scenarios, perhaps in this order:
    -
        - On Day 1, as implemented.
        - GP dies, survived by C. This is important because the plan would survive the GP and remain in place with GP's successor. We'll need to see (or figure out) what would happen to the "receivable" so we can consider the legal, tax and economic implications of maintaining the plan post GP.
        - C dies while GP is alive. GP would be repaid at that time.
        - Assume that under a nonequity economic benefit plan one of the Cs under a second-to-die policy dies while the GP is still alive.
        - C (or the second insured under a second-to-die policy) dies after the GP passed away.
        - The plan is terminated while everyone is still alive. We realize that this scenario could have several subsets. We'll discuss.
- Note that we understand that, based on the insights on plan design that you've gained from working on these cases with practitioners and

colleagues around the country, we could modify or add to the scenarios listed above.
- Provide policy illustrations, rendered in the key of conservative.
- Sample documents.

Tax Implications

- For each of the above scenarios, set forth your understanding of the operative tax guidance for income, gift, estate and generation-skipping transfer (GST) tax implications. If there's no change from a prior scenario, just tell us. We welcome any insights from the advanced planners at the carriers.
- Address the implications of the ILIT's ceasing to be a grantor trust before the plan is terminated. We're assuming that the ILIT will be a grantor trust to ameliorate GP's tax situation in either a contributory nonequity plan or a loan-based plan.

A Switch in Plans

- So as not to disrupt the flow and symmetry of the discussion, address as a separate topic the midcourse switch from a nonequity collateral assignment plan to a loan regime plan.
- When and why would you recommend the switch? What would be the steps involved in that transaction? Would it matter whether the switch occurred before or after the death of GP? What would be the tax issues as you understand them?

Benefits of Plan

- The tax, economic and estate planning benefits that the plan could provide for the family.

The Risks and the What-Ifs

Because we know the clients will ask:

- For each type of plan, what could go wrong, and how would that occurrence impact each of the parties? For example, what happens if the policy “underperforms?” What happens to the tax economics of a nonequity plan involving a second-to-die policy if one of the two insureds dies early on but the survivor and therefore the plan is very long-lived? What happens if the term loan(s) have to be reissued at much higher interest rates?
- In each case, what can be done if it occurs, from minor tweaks to true exit strategies?
- What if, for whatever reason, the parties just want to get out of the plan before C or both Cs pass away?
  - How would they do that? What would be the tax and economic implications? This could all depend on “when.”
  - What would be the tax implications if the ILIT surrendered the policy and repaid GP or their successor? Grantor trust status would presumably come into play here.
  - What if the ILIT can’t repay GP in full?

You send the list to the insurance professionals who, as expected, ask you to give them a little more context on some of the points and have some suggestions of their own for a more comprehensive presentation. You give a progress report to GP, who appreciate the collaboration because they know that collaboration “works.”

What is Legacy?

Legacy has become an incredibly popular concept. It's often evoked when encouraging donors to give to a cause or in guiding clients through the strategic aspects of their estate planning. I use it to get individuals to tell their stories. But what is legacy? Is it financial? Philanthropic? What else comprises a legacy?

I won't waste time in this publication telling estate planners the importance of discussing legacy with clients. Good advisers already know that a sound estate plan considers more than the money. Surveys* conducted show that when faced with end-of-life planning, Boomers (and older generations) are more concerned about the loss of their values and personal history than the loss of their wealth.

There's no arguing that an inheritance is part of our legacy. But if that's all it was, something would be missing. Think of everything we collect over the course of our lives. Not just the assets but the life experiences, family stories, knowledge, and wisdom. A whole industry exists to preserve our financial assets. Why not preserve the more intangible elements as well? The knowledge we keep in our minds is gone when we pass. There are no second chances, no help desk we can call to recover that data. Why wouldn't we want to invest in memorializing these important assets to avoid such a catastrophic loss?

What we don't realize until it's too late is that our stories, knowledge, and family history are exactly what adds meaning to an inheritance, thus creating a full legacy. Even philanthropic gifts become more meaningful when taking a person's story into account. The gift becomes imbued with the value system of the donor. It is transformed from a sign of generosity or interest in a cause into an inspirational demonstration of what personal experience can generate for the good of others.

An example of legacy

My father died when I was twenty-two years old, just a couple weeks before I graduated from college. He knew he would not live long enough for me to know him as an adult and decided to take the time to write down his life story. He foresaw that I would want an enduring connection to him, perhaps because his own father died at a young age, leaving my father with almost no memories of his dad. That document is not his whole legacy. But it does allow me to understand his actions and see his influence on those around him. My mother ended up writing something about herself too. It's much shorter and takes a different approach to describing her legacy. But it's her, through and through. These two documents are some of my most treasured possessions—and ones I could not purchase today even if I had all the money in the world. Their stories reveal their personalities, value systems, actions, judgements—the elements that formed their parenting and ultimately shaped me as a person.

Now let's take the example of money. My father grew up dirt poor during the Depression. As a kid I grew tired of hearing about the value of money and how I should manage my allowance. In college he would send me copies of bills and expenses so I could see how money was spent on my education. It interested me not in the least. However, when I read the stories of him being raised by a widowed mom with little earning power, of him as a young man working on farms, holding menial jobs to put himself through college, and struggling to support his first wife and child as young university professor, my memories of these money lectures take new meaning. Gone is the judgement I heard in his voice. His stories provided me with a clearer picture of how hard his life was. It explained in an instant his relationship with money and his hopes and dreams for my own future.

Legacy in family business
Family businesses have stories, too, and they can be just as important. Whether it's the company's origin story, discussion of periods of growth and contraction, the impact of having a business in the family—these events are influenced by the family members involved. The same timeless themes that occur in every generation can be documented for the benefit of future family members who will work in that business. I often hear clients say that their family business is almost like having another child. If that's true then it's hard not to count the family business as part of family legacy.

Why is legacy often ignored?
It's not always easy to tell one's story. As my father said in his writings, "the more I thought about the past, the recollection of blunders and bad errors in judgment tended to make the reconsideration of those early periods most unpleasant."

Even if you are willing to confront those embarrassing moments, you may still feel challenged by how to discuss them. What do you do about delicate subjects that show up in every family? Cousins who married, illegitimate children? What if your ancestors enslaved people? What if one of your family members was in prison? This happens all the time. We all have skeletons in our (family's) closets.

There's not doubt it takes courage to write about ourselves and our families. Subject matter aside, it can be easy to self-criticize about word choice, typos, and spelling mistakes. The good news here is that writing skills do not matter. You can hire a proofreader to fix basic mistakes. There is a simple truth in play is that when we write our stories, the narrative will invariably sound like the storyteller. The reader will love it because they love the storyteller. That only adds to the meaning in one's legacy.

Imagine if you had a book one of your grandparents had written. It's not likely you would judge it harshly for the quality of the prose, or think less of the writer if there were bad grammar or spelling mistakes. Instead, that document would be a family heirloom.

How to add meaning to any legacy
There are many ways to create a fuller, richer legacy for your clients or for yourself. Here are some examples:

- Ethical wills/legacy letters – These documents have been around, technically, since biblical times. They tend to be measured in pages rather than chapters. The idea is to succinctly document key elements of one's life. The format itself is a direct, personal message to the recipient, lending itself to messages of advice, hopes, and explanations.
- Memoir/autobiography – Memoirs aren't just for the rich and famous. The goal isn't to get on the *New York Times* best seller list. A memoir gives the narrator room to reminisce about family, growing up, selecting a career, having children, and so on. These are the events that shape us. Sharing that information with others is an act of love, not an act of selfishness or an inflated ego.
- Family history books – These books tend to be historical in nature and incorporate more photos than narrative. They're often brimming full of old documents like genealogy records, photos, letters, etc. How did the family get to this country? Who were the players? Where did they live and what did they do?
- Family business books – Unlike a corporate history developed by the marketing department inside the company, family business books capture the personal stories of the family members involved, which are not always appropriate or interesting to the general public. In these books, you'd expect to see documents relating to the company's formation, photos of the products

sold, of company buildings, and of iconic moments alongside the experience of the family members involved.

The business of capturing one's legacy has steadily been gaining traction and further stretches the meaning of legacy. The genealogy giants like Ancestry.com have played a big role in that. (As a point of reference, Ancestry has over a billion dollars in annual revenue.) The photo management space has also taken off. As trained professionals, photo managers help clients scan those boxes we all have, stuffed with photos and documents and souvenirs. Once scanned, they organize the digital files and find the appropriate cloud sharing software. All these activities are outside the skill set of most Boomers and older generations—even if they had the time to do it.

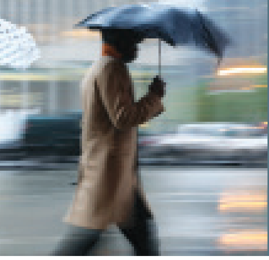
Resources
Opportunities for documenting one's legacy abound. Clients can select inexpensive do-it-yourself tools (such as StoryWorth.com, HeyArtifact.com, MemLife.com, among others) or consider hiring a personal historian/memoir writer to do the heavy lifting. I am often asked which is better. To me, it's the difference between going to the gym yourself vs. engaging with a personal trainer. Or, it's like someone trying to do their own financial planning or using an online will service instead of engaging a specialist. The same is true for genealogy projects and scanning all those photos lurking in the attic.

I hope the idea of legacy continues to take root in people's minds. Thoughtful focus on legacy not only brings meaning and context to our daily lives, it allows us to create and pass down a rich, multi-dimensional view of our lives to future generations.

* Survey reference: Allianz Life Insurance Company of North America, "The Allianz American Legacies Pulse Survey" 2012, page 5. https://www.allianzlife.com/-/media/files/allianz/documents/ent_1371_n.pdf?la=en&hash=BF148299A1A57F5962E51B0F452F699E67295784

<u>About the Author:</u>

Clémence R. Scouten is the founder of Memoirs & More (www.memoirsandmore.com), a service devoted to helping people write their memoirs and publish custom books about their family history.



COMMITTEE REPORT:
INSURANCE

By **Charles L. Ratner**

A Boomer at the Crossroads Of a Vintage Policy

When weaving the options, tax planning should loom large

A hypothetical policyholder is about to get on a call with just as hypothetical an insurance advisor. They're going to discuss the options that the policyholder has for a now-vintage life insurance policy that he bought "when he was a kid." We'll refer to the policyholder, both individually and generically, as Charlie or "C," just to show that there are no bounds to my creativity. We'll refer to the advisor as "A," for the same reason.

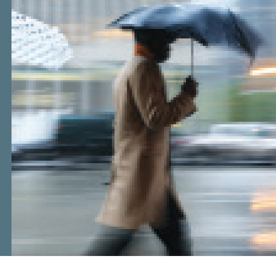
The genesis for the call is that Charlie has finally gotten around to a New Year's resolution (he won't say from what year) to work with his wife to consolidate and simplify their finances. He's about to be pleasantly surprised, albeit a little confused, by all the options he has for the policy. He's also about to find that each and every one of those options involves a learning curve and some trade-offs along the way to an informed decision.

Stipulations

Before we listen in on the conversation, let's stipulate a couple of things. First, any given insurance professional could conduct this conversation differently from the way this advisor will conduct it, perhaps exploring what I'll refer to as "options within the options" that are beyond the scope of this article. And that's fine. The important thing is that the conversation occurs in the first place! Second, life insurance professionals know that the conversation with Charlie would quickly take a different tack to the extent that any of his circumstances, mindset or policy type and condition differ from those in the article. That's why the point of this article is to make five larger points:

1. A vintage, well-funded cash value policy of any stripe can be an exceedingly valuable asset, especially these days.
2. Unless they're remarkably well read for someone not in the insurance business, the typical insured/policyholder doesn't know what they don't know about the policy or the breadth of options for dealing with it. That lack of knowledge could lead to an unfortunate decision that can't be undone.
3. It would be a mistake to think that this kind of interaction between a policyholder and an advisor is just about life insurance policy mechanics and underwriting. It's also an exercise in broad-based personal financial planning and, as always, tax planning. In fact, at this stage in Charlie's life, meaning the financial de-accumulation stage, tax planning is as important and as complicated as it's ever been. Therefore, the tax implications of the options that the advisor will discuss are of paramount importance.
4. It takes a true professional to ask the right questions, gather the right information about both the insured and the policy, listen carefully to really "hear" the individual, see the whole field and not just the goal posts, fashion the right recommendations and create a glide path for informed decisions. Actually, isn't this last point the quintessence of counseling, perhaps any form of counseling?
5. Speaking of tax planning, the insurance advisor isn't the only type of advisor who could add value by broaching this topic with a client. The topic lends itself nicely to being a part of what Charlie refers to

Charles L. Ratner, based in Cleveland, is a member of the *Trusts & Estates* Editorial Advisory Board



later on as a "tax tune-up." It's a great opportunity for collaborative work among advisors.

With that, as duly authorized eavesdroppers, let's listen in to some of the more interesting parts of the conversation. And by the way, I phrased some of Charlie's questions and remarks to reflect the fact that he's a consumer, asking the kind of questions and making the kind of remarks that an insurance professional would expect from a consumer in a wide-ranging conversation like this one. Charlie won't always make sense, but he's learning!

Let's Start With Some Background

A: While we wait for the policy statement and in-force illustration, I have a few questions for background. When did you buy the policy, and what was your underwriting classification?

C: I bought it a little more than 40 years ago. Whatever the best underwriting class was, that's what I got.

A: Just to confirm, do you own the policy, or is it in a trust?

C: I own it. My wife is the primary beneficiary and a trust is secondary.

A: Just curious, why did you buy the policy?

C: I was newly married, we were buying a house and I wanted some life insurance. I bought some term insurance, which is long gone now. But I also bought this policy because it combined the insurance with a systematic way to save that I knew I would stick with. As I look back now, it was one of the smartest things I ever did!

A: You mean buying the policy?

C: No, I mean getting married! But the policy was a smart move too.

Fast Forward to Today

A: What role does the policy now play in your planning? Do you still need the coverage, and even if you don't need it, do you still like to know it's there?

C: I suppose that "technically," meaning if I were to run the numbers, I'd see that I don't need the coverage. But it definitely gives me some peace of mind, just in case. So, yeah, I like knowing it's there. But there's more to it than that. I see the markets are taking a hit today, which is no big deal, but it does remind me how I've always liked the way my cash value grows, regardless of what's happening in the markets. I've always liked that the build-up isn't taxed and, of course, the fact that my wife won't pay taxes on the insurance proceeds is also obviously a big plus. Bottom line, the policy's been a great anchor to windward, I mean, if you get my drift.

A: Are you still paying premiums?

C: Yes and using the dividends to buy paid-up additions. The dividends have exceeded the premium for several years now. In fact, this year's dividend should be at least three times greater than the premium. At least! But I've kept up the premiums, even though the policy should be able to support itself for the duration. Right?

> One variation is where you have the annual dividend pay the premium with the excess dividend paid to you in cash.

A: Yes, that should be right, but we'll take a closer look when we get the illustration and talk about your options.

A: Approximately how much cash value and how much death benefit?

C: According to my last statement, the cash value is \$X, and the death benefit is \$1.5X.

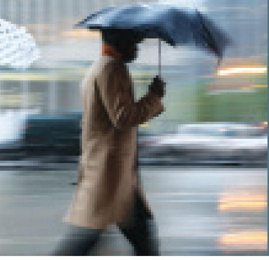
A: Do you know what your basis is in the policy, meaning how much premium you've paid?

C: I think it's around \$.5X.

A: Any policy loan?

C: No.

A: Hey, I see we got the in-force illustration, along with a couple of others. It assumes that you continue to pay premiums and apply the dividends to paid-up additions. This is a nice policy! See how the cash value and death benefit keep rising? We'll use this illustration as our base case. Just a few more questions.



A: The premium is around $750 a year. Is the $750 a burden for you?

C: No. We're cutting back here and there because, you know. But, no, it's not a burden. I don't really even notice it anymore.

A: Are you as healthy as you look?

C: Hey, you're not supposed to be able to see me because this is only a telephone call. But, I'm a healthy 72 year old, today anyway. And a non-smoker, by the way.

A: Assuming on a very preliminary basis, meaning that based on a couple of assumptions it looked like an exchange would have merit, would you then be willing to share your medical information so I could get a more realistic sense of what could be available?

> Newer policies can have some guardrails that mitigate the risk of a policy's lapsing.

C: I guess so. Hey, maybe you could just have someone drive by the house, and I'd look out and wave. Sorry, yeah, I'm okay with sharing that information if, as you say, I can see there's a reason to do that.

A: Do you have long-term care (LTC) insurance?

C: No. Why do you ask?

A: Because one of the options we'll talk about involves exchanging your policy for one that can provide LTC benefits.

C: I think I'm gonna need a bigger notepad!

A: Are you a tax-sensitive investor?

C: Is there any other kind? But seriously, I do take taxes into account as an investor, which is why I appreciate that they don't tax the growth in cash value in my policy. In fact, I'm probably more tax sensitive and more tax aware these days than I ever was, especially after our tax advisor gave us a tutorial about planning for stuff like required minimum distributions, the net investment income tax and the Medicare surtax. Let's just say that she got our attention! So I do have to be sensitive to the tax implications of any move I make with the policy.

Financial Priorities

A: One more question so that I can try to laser focus the discussion. Do you have any other financial priorities or concerns that I should know about before we get into your options for the policy?

C: How much time you got? Actually, we're trying to declutter. We're consolidating our accounts, trying to automate things where we can, challenging the reasons for owning this or that and, basically, trying to simplify and streamline our finances and reduce the number of things we have to keep track of ourselves. Should have done it a few years ago when we retired but, you know. Beyond that, I'm sure that I have a lot of the same concerns that many people you talk to have. In a nutshell, it's whether our money will last at least as long as we do. Some days I feel pretty confident that we're okay. But some other days, I have my doubts. Anyway, that's part of why we're taking a hard look at our investments and all that.

A: I know you didn't mention any concern about legacy or estate taxes, but I should ask just to be thorough.

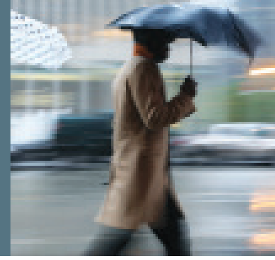
C: Understood. No, we're not concerned about that.

Options

A: Okay, let's go through your options. By the way, I encourage you to run any and all of this by your tax advisor or any advisor that you would like to consult with. Your advisor can call me with any questions or requests for material.

Stay the course. The first option is to stay the course. Give or take a change in the dividend scale, this is how your policy will look in the future if you continue to pay the premiums. I'm glad to see that they included columns for the internal rates of return for the cash value and death benefit, respectively. A lot of people find those columns help them measure the bang for the buck they're getting from the policy under different scenarios. Here are some variations on the theme:

Apply dividends to premiums, excess to paid-up



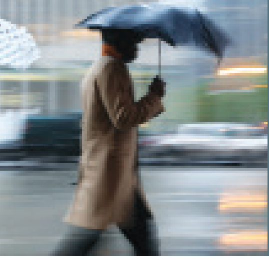
additions. In this illustration, you've changed the dividend option to "dividends to reduce, balance to additions," which means that the dividend is first applied to the premium and the excess dividend buys paid-up additions. No more cash outlay, but you still have all the cash value and insurance coverage. In fact, both continue to increase, just not as rapidly as they would under the base case.

C: Not bad! No more premiums, my capital is intact and I keep the coverage. And the cash value and insurance even increase. I like this!

A: Great. Here's another variation:

Apply dividend to premiums, excess paid in cash. The next variation is where you have the annual dividend pay the premium, with the excess dividend paid to you in cash. So you not only have no further outlay, but also you have an income stream. As a tax-sensitive individual, you'll like that the income stream will be tax free and won't bump up your Medicare income base until you've recovered your basis, which is projected to take 11 years. After that, it's taxable.

C: I like this one too! But now I'm starting to see the trade-offs. Would I rather see the insurance growing or get a check every year that I could invest, maybe help to pay Medicare premiums or just apply to the pursuit of happiness? Anyway, as I look at the first two illustrations and see how the dividends aren't buying a lot of insurance as I get older, it's obvious that there's no obvious conclusion. I'm going to have to run some numbers to figure out where I get the most bang for the buck. Actually, who am I kidding? I can run numbers until the Titanic arrives in New York. It will all depend on the assumptions, and who knows if they're any good. Anyway, I have



a strong sense that the decision won't depend on the numbers, at least not on the numbers alone.

A: By the way, just so I don't forget, I should mention that you could just surrender the policy for its cash value. The difference between the cash value and the premiums you paid would be ordinary income.

C: Ordinary income? Ouch! I don't want to go there. Anyway, I don't want to lose the policy.

> If you prioritize the death benefit for your survivors over the cash value for your own use, a 1035 exchange might enable you to apply the cash value of the current policy as premium for a new policy with a considerably larger death benefit.

A: **Tap policy for more income**. The next variation would be of interest if you want to start tapping the policy for more income than you would get by the "dividends to reduce and balance in cash" option. To be clear, this approach is a marked departure from staying the course, both strategically and emotionally. This illustration shows no further cash outlay. But now look. You see an income stream for, in this example, 10 years. Basically, we asked the insurance company to project the maximum amount of annual income that you can take from the policy for 10 years without: (1) ever having to resume cash premiums and (2) never allowing the policy to lapse. Technically, you're surrendering paid-up additions to the extent of your basis and then taking policy loans. Under current law, the payments for the 10 years would be tax free. Let's walk through the illustration so you can understand the mechanics and, particularly, the impact of the surrenders and loans on the cash value and death benefit. There's a lot more that you'll need to understand before you choose this option, especially about the importance of monitoring the policy and calibrating how much you take out every year so that you never put the policy at risk of lapsing before you do, if you know what I mean. Just for what it's worth, newer policies can have some guardrails that mitigate the risk of the policy's lapsing, but that's not the case with a policy of this vintage.

C: This is interesting. I can definitely see why this option would be attractive for someone looking for cash flow, especially from a tax planning perspective. But, for now at least, it's not the direction that I want to take with the policy. I guess that's what you meant by "strategically or emotionally." But, you know, just seeing this option is really helpful to me. Who knows, maybe I'd do something like this in a couple years. We'll see. Meanwhile, it's another indication of how valuable the policy is and, of course, how smart I was to buy it. It's also validating my thinking about why I own the policy and what I want it to do for us.

A: I understand. I just need to show you options like this so that you can make a well-informed decision.

C: Let's stop for a minute. My coffee is IRR.

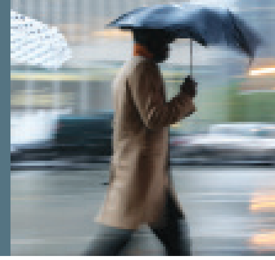
A: IRR?

C: Yeah, it's ready for refill. Can I get you some more?

A: You can't do that. It's a phone call, remember?

C: Okay, I'm back and IRR (ready to roll)! But first, I have an idea. I'm going to create a column on the far left of my notepad so that I can keep track of whether an option that you describe is something I can do at any time with no questions asked or is something that's either time sensitive or contingent on my age or health. Okay?

A: Good idea. I'll let you know as we go along. Sometimes that will be self-evident, sometimes we won't know until you apply. What's more, with the passage of time, some approaches may still be available but no longer attractive or sensible. But sure, we'll note as appropriate as we go along.



1035 Exchange

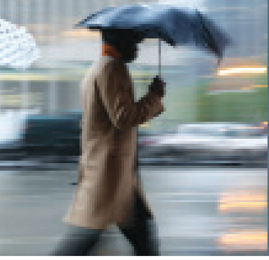
A: Okay, let's move along to a totally different discussion. As I said, this is a very nice policy. A very valuable asset. But let me show you this. Have you ever heard of a 1035 exchange?

C: Is that a street address?

A: No, the 1035 is a reference to a section of the Internal Revenue Code that allows you to exchange your policy for another one without recognizing the gain in your policy as taxable income. The reason I bring it up is that there could be some valid reasons for you to explore an exchange. For starters, if you do prioritize the death benefit for your survivors over the cash value for your own use, an exchange might enable you to apply the cash value of the current policy as premium for a new policy with a considerably larger death benefit. Assuming you don't want to pay any more premiums into any policy, we might look for the largest death benefit that would be supported for the rest of your life with either a guarantee that no further premium would be required or at least strong assurance of that result because of conservative funding assumptions. If you're willing to pay more premiums, then the new policy could support an even larger death benefit. Now, of course, whether an exchange would make sense and even be a better deal for you at life expectancy than your current policy will depend on underwriting and policy selection and design. That's why I asked if you would be willing to be examined.

C: Why wouldn't I look at that? Depending on how my thinking sorts out, that could be a good move. Can you run some numbers based on a good underwriting outcome so I can see if it's worth pursuing?

A: Sure. Let's stay on the topic of the Section 1035



exchange, but with a different or perhaps additional objective, which is to acquire some LTC coverage. Unlike policies of yesteryear, which were one dimensional, today's policies offer features that enable you to apply the insurance towards your LTC needs. Let's just say that the policy enables you to "accelerate" the death benefit for lifetime use. A lot of people like this approach to LTC insurance, if for no other reason than it removes two of the major objections to a traditional LTC policy: (1) pricing uncertainty, and (2) paying a lot of premium but ending up never needing the policy. Again, underwriting has to cooperate.

C: I had no idea about all this! It's IRR. You know, it's really revelatory. Hey, speaking of "accelerate," if I start to run out of gas and need a break, I'll let you know.

A: Got it. Ready for another look at a Section 1035 exchange?

C: Sure.

A: You exchange the policy for an annuity. Once again, you wouldn't recognize the gain in your policy when you do the exchange. The annuity could be an immediate annuity or a deferred annuity. Now, this is a very broad topic, especially because there's been a lot of product innovation over the past few years. So in the limited time we have on this call, we'll keep things at a high level to gauge your interest. Very basically, with an immediate annuity, the cash value from the old policy buys you an income stream for the rest of your life or the rest of the joint lives of you and your spouse. The payments start within a year of the exchange. And by the way, if the concept of the immediate annuity interests you, you should know that an important feature of your own policy is the right to, basically, convert the policy into an annuity for you and, if you choose, your spouse. It's something most policyholders don't realize they can do with these policies. The insurance company can tell you how much the payments would be for each annuity option and how much of each payment would be taxable, which again, is important to you. In any event, if the concept of the immediate annuity interests you, we should explore the various kinds of products and do some comparison shopping.

There can also be an LTC component with some deferred annuities.

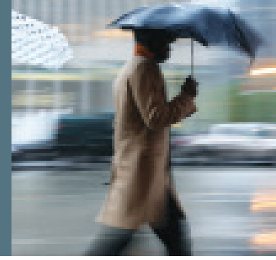
C: I guess I'm like most people and didn't know that either about my policy. As far as the whole immediate annuity concept is concerned, I can understand why some people would like that idea, I mean turning the policy into an income stream that they can't outlive, especially if they don't have a pension. But I'll pass, mainly because I don't want to entirely give up the asset at this juncture. Also, I heard you say something about some of the payment being taxable, so I'd have to go through all that with my tax advisor. What about the deferred kind?

A: The deferred annuity keeps the cash value, your capital, intact, though as a client once said to me about her Section 1035 exchange of

SPOTLIGHT

Heart to Heart

La Conversation by Marcel Mouly sold for $5,355 at Doyle's Fine Art auction on Feb. 23, 2022 in New York City. A French abstract artist, Mouly is known for his boldly colored works. Ironically, Mouly was initially sent to drawing school as a punishment when he was a child. His style was influenced by some of the greats, including Matisse and Picasso (whom he counted as a friend).



a life policy to a deferred annuity, the deferred annuity "reconfigures" the cash value into a different mechanism. It does maintain the tax-deferred build-up, which you like, but you would immediately lose the life insurance in excess of the cash value. Right there, it could be a non-starter, but let's spend a couple minutes. There are different kinds of deferred annuities, and each brings something to the table. And there are a variety of options, and some rules, for taking money from the contract. There can also be an LTC component. There's even a lot of flexibility for a surviving spouse beneficiary of the contract to maintain the deferral. But this is a much longer conversation. We'd have to talk about the structure, features, benefits, charges, contractual provisions, guarantees and economics of the products and more. Of course, given your concern about taxes, we'd have to focus on the significant differences in the way the two products, meaning life insurance and deferred annuities, are taxed, both during your lifetime and on your death. And, of course, you'll want to see the numbers so that you can determine whether the overall packaging is preferable to the packaging represented by your policy.

C: Just so even I sort of understand this, let me ask you a few questions. I keep the deferral, right?

A: Right.

C: Any required minimum distributions like I have with my individual retirement account, my IRA?

A: No. There are no required minimum distributions as you have with your IRA. However, there may be a requirement that you start annuitizing at a certain age, like 90, for example. We'd have to look at each contract.

C: That, I like! Maybe it's kinda the same question, but can I choose to take money out in one year but not in another?

A: Yes, by way of withdrawals, though again, with the caveat about eventual annuitization that I mentioned.

C: That's good! When I do take a withdrawal, how is that taxed?

A: It's ordinary income to the extent of the gain you have in the contract.

C: Okay, or maybe not okay. That's good because it gives me some flexibility to manage taxable income on a yearly basis. I like that too! So, here's what I'm thinking about this. On one hand, my gut is telling me in no uncertain terms that I don't want to lose the life insurance and all the benefits and security of the policy, which I now appreciate more than I did before this phone call. On the other hand, even if I leave my policy alone after all this, give or take a tweak of the dividends, I could consider the deferred annuity for other money. I like the deferral, and I really like the absence of required distributions. So let me see some information and some numbers. I'll run this by my tax advisor too. As a matter of fact, my tax advisor does a "tax tune-up" for us after each year's return is done. I'm going to add this topic to the list!

I have to say that this is good stuff, and I'm glad you're covering it all. Hey, I have to be realistic. Things can change. Maybe a few years from now I'll need to supplement my income. Or, if my wife were to predecease me, my priorities could change, along with the rest of my life, and I'd have a very different take on what to do with the policy. So anyway, it's good to hear all this. Is there anything else I should know about?

A: Well, the last two items on my checklist are life settlements and giving the policy to charity, but neither would apply. Some day, perhaps. Meanwhile, I'll pull together some illustrations and information for the items you indicated that you would like to check out.

C: Sounds good. And thanks for making this so interesting. Very helpful!

A Rewarding Conversation

As noted earlier, this conversation would have taken a very different tack if any of C's circumstances, mindset or policy type and condition differed from C in the article. The point is that this or any C should find that a conversation like this one with a life insurance advisor has its own IRR…it's really rewarding.

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2972

Date:	**08-Jul-22**
From:	**Steve Leimberg's Estate Planning Newsletter**
Subject:	**FLASH: Bruce Steiner on Rev. Proc. 2022-32 - IRS Extends Time to File Portability Return From 2 Years to 5 Years**

"In Revenue Procedure 2022-32, the Internal Revenue Service extended the time for filing an estate tax return to elect portability without a private letter ruling from two years after death to five years after death."

Bruce Steiner provides members with timely commentary on Revenue Procedure 2022-32.

Bruce D. Steiner, of the New York City law firm of **Kleinberg, Kaplan, Wolff & Cohen, P.C.**, and a member of the New York, New Jersey and Florida Bars, is a long time LISI commentator team member and frequent contributor to Estate Planning, Trusts & Estates and other major tax and estate planning publications. He is on the editorial advisory board of Trusts & Estates, a co-author of CCH's *Roth IRA Answer Book*, and a contributing author of Thomson Reuters' *Irrevocable Trusts*. He is a popular seminar presenter at continuing education seminars and for Estate Planning Councils throughout the country. He has served on the professional advisory boards of several major charitable organizations, and was named a New York Super Lawyer each year since 2010 and was selected for Best Lawyers of New York each year since 2018.

Bruce has been quoted in various publications including *Forbes*, the *New York Times*, the *Wall Street Journal*, the *Daily Tax Report*, *Investment News*, *Lawyers Weekly, Bloomberg's Wealth Manager, Financial Planning, Kiplinger's Retirement Report, Medical Economics, Newsday*, the *New York Post*, the *Naples Daily News, Individual Investor*, CNBC, CBS News, Reuters Money, *Fox Business*, Bloomberg, TheStreet.com, Observador, and Dow Jones (formerly CBS) Market Watch.

Here is his commentary:

EXECUTIVE SUMMARY:

In Revenue Procedure 2022-32, the Internal Revenue Service extended the time for filing an estate tax return to elect portability without a private letter ruling from two years after death to five years after death.

FACTS:

The executors of a decedent's estate may elect portability for the decedent's unused spousal exclusion (DSUE) amount.

The election is made on the estate tax return (Form 706).

If the estate is required to file an estate tax return, the election must be made on a timely filed return. This requirement is statutory, so the IRS may not extend it. The estate tax return is due nine months after death. An estate may obtain a six-month extension.

However, if the estate is not required to file an estate tax return, the IRS has discretion to extend the time for filing the return.

In Rev. Proc. 2017-34, the IRS granted a blanket extension until two years after death to file returns to elect portability where an estate was not required to file a return. Beyond that date, the estate had to apply for a private letter ruling to obtain an extension of time to file a return to elect portability.

On July 8, 2022, the IRS issued Rev. Proc. 2022-32, which extends the time to file a portability return to five years from the date of death.

The return must say at the top of page 1 "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A)."

COMMENT:

The IRS was receiving a large number of ruling requests applying for an extension of time to elect portability in estates not required to file a return.

As a result, on June 26, 2017, the IRS issued Rev. Proc. 2017-34, allowing an estate to file an estate tax return within two years of death to elect portability if it were not required to file a return.

The IRS continued to receive a substantial number of ruling requests from estates not required to file returns, applying for an extension of time to file returns to elect portability where more than two years had passed since the decedent's death.

This could happen for various reasons. The surviving spouse or a child might consult different counsel for his or her own estate planning, who might spot the issue. The substantial increase in the stock market in recent years may increase the likelihood that the issue will be spotted. Surviving spouses may be more conscious of the estate tax exclusion amount as the date when it is scheduled to revert to the pre-2018 level (January 1, 2026) draws closer.

The IRS said that the number of these ruling requests continues to place a significant burden on their resources, which indicates a need for further relief.

The IRS has observed that a significant percentage of these ruling requests have been from estates of decedents who died within the previous five years.

Accordingly, the IRS issued Rev. Proc. 2022-32, extending the time for filing portability returns to five years from death for estates not required to file returns.

The IRS will close the file on any pending ruling requests from estates eligible for relief under Rev. Proc. 2022-32, and will refund the user fees.

In the author's view, the best practice is to file a portability return whenever there is any reasonable possibility that the surviving spouse's estate (plus adjusted taxable gifts) might exceed the estate tax exclusion amount at his or her death, taking into account possible future increases in value of assets, the scheduled reversion of the estate tax exclusion amount to pre-2018 levels in 2026, and the possibility that the estate tax exclusion amount could be reduced below that level, as has been proposed.

An estate will likely incur much of the cost of the portability return even if it doesn't file a portability return. The executor has to determine the value of the assets (other than cash or retirement benefits) in order to determine the basis. The executor may have to determine the value of the assets for an inventory, for state estate or inheritance tax returns, or for making distributions.

The cost of not electing portability could be substantial if the surviving spouse's estate (plus adjusted taxable gifts) exceeds the estate tax exclusion amount at the time of his or her death.

Concluding Observation

Even if an estate is not required to file an estate tax return, if the decedent is survived by a spouse, the executors should consider filing a return to elect portability for the DSUE.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Bruce Steiner

CITE AS:

CITE:

Revenue Procedure 2022-32: https://www.irs.gov/pub/irs-drop/rp-22-32.pdf.

Click here to comment on this newsletter.

HELP US HELP OTHERS! TELL A FRIEND ABOUT OUR NEWSLETTERS. JUST CLICK HERE.

Click Here for Steve Leimberg and Bob LeClair's **NumberCruncher** and **Quickview** Software, Books, and Other Resources