Estate Planning Current Developments and Nuggets

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Planning in the Current Environment

Observations About a Few Themes;

Agenda

Planning in the Current Environment

- **Tax Uncertainty –** will the 2017 cuts be extended? Made permanent? Will the estate tax be repealed? Will basis step up remain? What will the next administration do?
- **Loper -** What options to amend returns or challenge Regs? Little discussion seems to have occurred since the case.
- **Litigation** – The estate planning malpractice environment is one of the worst and getting risky Practitioners need to be more cautious.
- **Trust modification** – change by any means may be under attack by the IRS based on a recent CCA. Is the day of easy decanting ending? Practitioners should caution clients about the changing risk environment before modification.
- **Formalities count** – Connelly follows Sorensen, Levine and Smaldino. Will clients ever learn to focus on proper administration?
- **Complexity** continues to spiral out of control: Secure, the Corporate Transparency Act was largely declawed but what a mess and time waste it was, Basis consistency reporting, etc. And its not only tax issues, consider the explosion of IT/cybersecurity complexity, and more.

Planning in the Current Environment

- **Small/closely held businesses** consider the impact of pre-2026 planning, the FTC ban on non-competes (held invalid but on appeal) and the impact on succession plans, Connelly and the impact on redemption arrangements, the CTA burden that was and now isn't, and so much more. How can they cope? Will the law be allowed to remain in force?
- **AI** – this will transform estate planning. Clients will even be more likely to think that they have all the answers before meeting their advisers.
- **Increasing role of financial planners** – financial advisers, aided by increasingly sophisticated AI tools, are taking over more and more of the estate planning conversation. This will transform estate planning. It will likely result in increased lawsuits against financial advisers getting out over their skis.

Republican Tax Proposals Change Planning

Planning Should Proceed, but Differently

Legislation Status

- This may all change.
- The House adopted on April 10, 2025, the budget resolution previously approved by the Senate on April 5 that would allow permanent extension of the expiring provisions in the Tax Cuts and Jobs Act (TCJA).
- Other changes might include:
  - Reducing the Corporate Tax Rate: Lowering the corporate tax rate to 20%, and 15% for companies that manufacture products in the U.S.
  - Eliminating the $10,000 cap on the State and Local Income Tax (SALT).
  - Exempting Tips and Social Security from income taxes.
  - Deduction for Interest Paid on Car Loans.
- House Speaker Johnson indicated he hopes to deliver final tax legislation to President Trump by Memorial Day.

A Few of the Many Changes to Current Planning

- The Trump Victory means no new taxes on the wealthy
  - What does all this mean to estate planning?
  - What should practitioners tell clients to consider now?
  - How is that advice different than the typical pre-2026 planning that has been the focus of so many planning conversations?
- For the ultra-wealth, little will change, even if the exemption is halved
- Common estate planning arrangements, such as GRATs, structuring to obtain discounts, installment sales to grantor trust, ILITs with Crummey Powers and other techniques commonly used in estate planning, will not be adversely affected during a Trump administration.
- Married with a US citizen spouse: QTIPable trust now (and wait till October 2025) or next year (and wait until October 2026). But perhaps divorce risk. Consider non-reciprocal SLATs or, better yet, one SLAT and one SPAT.
- Single (or don't want to include spouse): SPAT
- Build a disclaimer into the trust, naming one principal beneficiary who can disclaim and to the extent the beneficiary does to it all reverts to the donor.

Is a Transfer a Loan or a Gift?

A Common Planning Issue

Is it a Loan?

Was the transfer properly classified as a loan or was it really a gift?

They both signed a simple note calling it a loan. Its term was not to exceed 9 years, and interest was set at the AFR. The note provided for annual payments of interest, with repayment of the principal due at the end of the term: The loan was unsecured and the note lacked provisions necessary to create a legally enforceable right to repayment reasonably comparable to the loans made between unrelated persons.

The court cited Miller v. Commissioner, 71 T.C.M. (CCH) 1674, 1679 (1996).

The Gallis treated this as a loan, not a gift,

Trust Termination PLR

Trust Termination Tax Consequences

- **Facts**: Grandchild, the Current Remaindermen, the Corporate Trustee, and a special representative (Special Representative) appointed by the Court representing the minor and unborn Trust beneficiaries, entered into Agreement terminating the Trust, contingent upon receiving a favorable letter ruling from the IRS.
- **Income Tax**: The termination of Trust and the Proposed Distribution are treated as a sale of Grandchild's and the Successor Remaindermen's interests in Trust to the Current Remaindermen. This will cause Grandchild and the Successor Remaindermen to recognize long-term capital gain on the Proposed Distribution they receive. Rev. Rul. 72-243, 1972-1 C.B. 233, provides that the proceeds received by the life tenant of a trust, in consideration for the transfer of the life tenant's entire interest in the trust to the holder of the remainder interest, are treated as an amount realized from the sale or exchange of a capital asset under § 1222.

Trust Termination Tax Consequences

- **GST**: Trust was irrevocable on September 25, 1985. No additions, actual or constructive, have been made to Trust after that date. The termination of the Trust and the Proposed Distribution will not trigger GST consequences.
- **Gift Tax**: The beneficial interests, rights, and expectancies of the beneficiaries will be substantially the same, both before and after the termination and the Proposed Distribution, as long as the actuarial values of the trust accurately represent the actuarial value of each beneficiary's interest. Therefore, no gift tax consequences will be triggered.
- PLR 202509010, December 04, 2024.

Lawsuit Against Advisor

Be Careful; Practice Defensively

In Cornwell Entertainment, Inc. v. Anchin, Block & Anchin LLP

- Claims were for negligent performance of professional services by a CPA firm, for breach of contract, and breach of fiduciary duty.
- Plaintiffs requested an award of equitable forfeiture in the amount of the full value of all fees they had paid to the defendants over the course of their business relationship.
- Consider the impact of suit against professional firm on that firm's reputation (regardless of outcome).
- The issue of continuous representation is vital for professionals to understand in representation of clients to protect themselves. A practice message for professional advisers is to create new billing/representation matters and distinguish them from other matters. It would seem based on the above that an advisor close a particular matter or transaction, continue representation, but that the continuous representation doctrine would not keep the prior closed matters opened indefinitely.

In Cornwell Entertainment, Inc. v. Anchin, Block & Anchin LLP

- This could be backstopped by sending communications to the client confirming that a work on a particular matter has been concluded and that matter is closed.
- The trial in this case spanned twenty-six days and involved a number of theories of liability. Consider the impact of this lengthy legal matter on the CPA firm. Perhaps listing the case, appeal, etc. 26 days of trial, etc. this is a huge risk to every professional adviser subjected to a malpractice action even if ultimately, they win. The lost billing, the stress, the legal fees (to the extent not covered by malpractice insurance) are huge.

Domestic Asset Protection Trusts

DAPT Jurisdictions
Expand, Again!

Wisconsin Goes DAPT

- Domestic Asset Protection Trusts (DAPT): A DAPT is a trust that you create and which you can be a beneficiary of, yet the assets in the trust may avoid the reach of your creditors, and if it is a completed gift trust, be outside your estate.
- On March 12, 2024, the Wisconsin Senate passed Bill 667 to allow the creation of domestic asset protection trusts under Wisconsin law. Wisconsin is the 22nd state to have such legislation. For the many naysayers who suggest DAPTs don't work, DAPT legislation continues to grow more common. That doesn't mean that caution is not in order if you endeavor to use this technique (it is!), but perhaps when evaluating what planning options you might consider, DAPTs should be on the list.
- This is particularly important for those seeking to gift their entire exemption before the end of 2025 and worrying that they may need access to the assets transferred. It may be a particularly interesting approach for single individuals since so much of the pre-2026 planning talks about spousal lifetime access trusts (SLATs) that married couples create for each other.
- Should clients consider DAPTs instead of SLATs? What about single clients?

AK Court Appears to Uphold DAPT

- The Alaska Supreme Court in a recent that considered child support found that imputing income to a father from a self-settled trust was appropriate due to the approach by which the father structured his assets that resulted in the lowering of his income stream. But in it's holding the Court did not state that the trust should be invaded or that the trustee of the trust should be responsible for satisfying the father's legal obligations.
- Chapman v. Chapman, S-18761 (February 15, 2025).

Case Addressing Settlement Agreements

Address Tax Issues

Tax Consequences of a Settlement Agreement

- In the Conely case the parties disputed receipt of K-1s, which the court upheld as a consequence of the settlement.
- Consider incorporating into any settlement agreement what the anticipated tax consequences are, and also what tax filings will be made to implement the settlement. This might avoid later disputes by one or more parties that did not understand what the tax or compliance results might be.
- This should be done with some specificity so that it is clear to the parties what they are agreeing to, that the attorneys understand what they are drafting, and that the parties CPAs will have a road map of what to file to report the settlement.
- Conley v Conley (In re Conley Trust), ___NW2d___; 2024 Mich. App. LEXIS 5601 (Ct App, July 18, 2024).

Loper and Deference To Treasury

How to Address Changing Deference to Treas. Regulations?

Loper Overrules Chevron Doctrine

- A recent Supreme Court case will change the dynamic of key aspects of tax planning, including estate tax planning: *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024). There was also a companion case, *Relentless v. Department of Commerce*. This could be really big.
- No longer must federal Courts defer to the interpretation set forth in regulations of ambiguous laws by governmental agencies. If Congress enacts a tax law that is ambiguous or unclear (how many tax laws are clear?), the Treasury Department's interpretation of that law in Regulations does not have to be deferred to by the courts. Instead, the courts themselves MUST interpret the ambiguous law.
- Practitioners should review tax reporting positions to determine where a post-Loper change may be warranted and file protective claims for refund. But how can this be done? How can these positions be identified?

Micro-Aggressions

You Cannot Effectively Practice Estate Planning This Way

A Word on Micro-Aggressions

- These comments will not address the inherent bias and problems with the concept of microaggressions.
- A microaggression is a subtle, commonplace, even brief statement or act, e.g., a verbal slight, towards a marginalized group of people, such as those with health challenges or disabilities. A microaggression can be intentional or unintentional. It communicates negative or derogatory attitudes.
- Example: A client is living with multiple sclerosis for which chronic debilitating fatigue is a common symptom. Don't say to them: "Yeah I get it I'm pretty tired too." The tiredness you feel is very different and not comparable.
- Example: Your client is living with multiple sclerosis. At a meeting you remark, intending to be flattering: 'You look so good for someone who has MS.'" Just because you cannot see their challenges and symptoms doesn't mean they don't have tremendous challenges. The real visual for some with MS is to see their MRI and the lesions on their brain and spinal cord. This has been such a common and frustrating slight that the National Multiple Sclerosis Society has a booklet called "But You Look So Good" on its website.

A Word on Micro-Aggressions

- But as an adviser you must ask questions, whether awkward or even inappropriate. Make it clear you are trying to help. It is NOT possible to be expert in every personal issue clients may have (e.g., religion, health, addiction, tax, etc.). Explain to your client that you are there to help and will help but that you need to have an open discussion about their challenges. If you don't have an open discussion, you cannot possibly learn about the client's particular personal struggles.
- Focusing on what may or may not be a microaggression, or that you may inadvertently, while trying to help, say the wrong thing, is not only counterproductive, but it may also well prevent you from properly helping the client.
- One of the purported recommendations to avoid making microaggressions is to "take steps to become more educated and understanding." This is a circular concept as having an open discussion with your client about any personal matter is precisely how you learn.
- If the client is offended by your trying to sincerely provide helpful professional guidance, the client, not you, needs to reassess their viewpoint.

FTC Restriction on Noncompete Agreements

Will It Be Reinstated? Even if Not, What Might Clients Change?

Noncompete Agreements Generally Banned - 1

- As of July 3, 2024, a federal Judge in Texas has delayed implementation of the FTC ban for the Plaintiff in that case only (so everyone else for now appears still subject to the ban). FTC Non-Compete Ban Enjoined Nationwide. On August 20, 2024, a Texas federal judge issued a nationwide injunction prohibiting the FTC from enforcing its ban on non-competes, concluding that the agency “lacks statutory authority” to enact the rule and that the ban is unreasonably. Stay tuned. Judge Ada Brown of the US District Court for the Northern District of Texas re: Ryan LLC
- The FTC estimates that 18% of workers, or 30 million people, are presently restricted by non-compete agreements.
- For the family businesses affected, it could have a critical impact. The rule is effective September 4, 2024.

Noncompete Agreements Generally Banned - 2

- FTC rule creates an all-encompassing ban on new noncompete agreements for all workers. Existing noncompete agreements with employees (not senior executives) will no longer be enforceable after the effective date. The new restrictions will be effective 120 days after the rules are published in the Federal Register. All noncompete agreements, regardless of whether signed decades ago, will no longer be valid for employees who are not senior executives.
- For senior executive" earning more than $151,164 in a "policy-making position" (FTC estimates that fewer than 1% of employees) noncompetes that existed before the effective date of the new rules can remain in force. That may provide family businesses the ability to maintain their succession plans. However, new agreements won't be permitted. So, restrictions won't be permitted if there is a turn-over in senior executives, or new key employees are hired as part of an intended succession plan.

Noncompete Agreements Ban Impacts Succession Planning

- **Example**: A family manufacturing business begins planning its succession and estate planning in mid-2025. Anticipating the reduction in the estate tax exemption the founder of the business wants to make gifts of business interests to an irrevocable trust to avoid future estate taxes that could undermine her ability to bequeath the business to her children and grandchildren. As part of that estate tax planning process her estate planning attorney recommends she formulate a business succession plan. That is vital, as merely avoiding estate taxes if there is no management succession plan is unlikely to facilitate the business's survival. Two of the founder's four children and one grandchild work in the business. The founder does not feel that her children are ready to run the business, and she believes two key employees can help transition the business to her children and serve the long-term needs of the business when she, as the founder, retires, dies or is incapacitated. The founder suggests that the key employees be offered more generous employment agreements, bonus arrangements, and profit sharing if they commit to remain with the business following the death, disability, or retirement of the founder.

Noncompete Agreements Ban Impacts Succession Planning

- **<u>Continued</u>**: Specifically, she would like to entice and bind the key employees to remain with the company for at least five years after she has to cease involvement to help her two children in the business mature and gain business acumen. The Founder is more than willing to offer an above-market compensation package for the security of knowing she can secure the business transition. But if the key employees are going to assume this role, she needs to provide them with extra training and access to critical confidential information.

Noncompete Agreements Ban Impacts Succession Planning

- **Continued**: So, she requests that her attorney include a non-disclosure agreement (NDA) and non-compete provisions so that once that extra training and confidential information is provided neither of the two key employees can use that information to set up a competing business thereby undermining her company and hopes to transition it to the next generation. In the past, the key employees would have hired their own attorney to review and negotiate a bargained-for employment agreement. That would have been a good deal for everyone. However, her attorney informs here that noncomplete agreements, and possibly even the nondisclosure provisions, may not be enforceable because of the new FTC rule. So now the dilemma is how can the founder and employees, all of whom want to enter into a deal to benefit everyone, secure the arrangement for the founder and the business? It may not be possible. It is hard to fathom how highly compensated executives, with independent legal representation, being generously compensated for reasonable and seemingly necessary restrictions should not be allowed. But it appears that the freedom to contract, even in such circumstances, is no longer allowed. Business succession planning, perhaps the key component of an estate plan for many family businesses, will be more difficult to achieve. While it may be feasible to provide some equity to the key employees and leverage the restrictions based on their equity sale, it is unclear whether that exception (discussed below) will suffice. What else will a family business be able to do?

Buy-Out for Closely Held/Family Business

Must Pass Muster under 2703

Buy-Out for Closely Held/Family Business

- The option price for a stock buyout between parents Lloyd and Patricia Huffman and their son Chet of $5M was found not to be a bona fide price. It was deemed a device to transfer stock to a family member and was not comparable to similar arrangements between unrelated parties.
- A transfer for less than adequate and full consideration in money or money's worth is deemed a gift under Code. Sec. 2512(b). The IRS thought the stock was worth over $30M.
- If you have a buy-sell agreement with family, it must meet strict criteria under Code Sec. 2703 to be respected, and failing to do so can unravel your plan. When was the last time your client's buyout arrangements were reviewed?
- Also, consider the impact of Connelly on redemption buy-sells.
- Huffman v. Commissioner, TC Memo 2024-12.

Basis Consistency Regs

Final Regs Issued

Basis Consistency Regs

- Final Regs provide guidance on the requirement in Code Secs. 1014(f) and 6035. 9/16/24.
- A beneficiary tax basis in certain property acquired from a decedent must be consistent with the value of the property as finally determined for federal estate tax purposes.
- The final Regs provide guidance on the requirements that executors and other persons provide basis information to the IRS and to the recipients of certain property.
- The statement which must be provided under Code Sec. 6035 is made on Form 8971, Information Regarding Beneficiaries Acquiring Property From a Decedent, and Schedule A, Information Regarding Beneficiaries Acquiring Property From a Decedent.
- Prop. Reg. Sec.1.1014-10(c)(3)(i)(B) provided that, if the unreported property is not reported before the period of limitations on assessment expires, the final value of that property is zero. The final regs remove this rule.

Basis Consistency Regs

- The proposed Regs required a recipient of property to which Code Sec. 6035 applies to file with the IRS a supplemental Form 8971, and to furnish to a transferee of the property a Schedule A, if the recipient/later transferor transfers property in a transaction in which the later transferee determines its basis by reference to the transferor's tax basis. This was deemed too burdensome on individuals but will apply to transfers by Trustees. This requirement will not apply if the transfer is in a taxable transaction.
- The due date for furnishing a Schedule A to a beneficiary who acquired property on or before the due date or earlier filing of the estate tax return is 30 days after the due date or earlier filing of the estate tax return. The due date for furnishing a Schedule A to a beneficiary who acquires property at a later date is January 31 of the calendar year following the year of acquisition. Reg. Sec. 1.6035-1(c)(4). A beneficiary acquires property when title vests or they have substantial control. Reg. Sec. 1.6035-1(c)(3).
- T.D. 9991.

New GST Regs

Leniency on Elections and Allocations but at What Cost?

New GST Regs

- On May 6, 2024, the Treasury Department published TD 9996, "Relief Provisions Respecting Timely Allocation of GST Exemption and Certain GST Elections." These regulations address the circumstances and procedures under which an extension of time will be granted under Internal Revenue Code ("Code") Section 2642(g) to make three allocations and elections for Generation-Skipping Transfer ("GST") tax purposes.
- In determining whether to grant relief, Code Section 2642(g)(1) directs that all relevant circumstances be considered, including evidence of intent contained in the trust instrument or the instrument of transfer. Given the complexity of GST planning and the likely significant mistakes or oversights in making these complex elections, practitioners should consider making it very clear, perhaps by a statement of intent added to trust documents, whether or not the intent is for the trust to be GST exempt.

New Regs – Allocations/Elections

- (1) An election under Code Section 2632(b)(3) not to have the deemed (automatic) allocation of GST exemption apply to a direct skip. A direct skip is a transfer subject to gift or estate tax made to a person more than one generation below the transferor or a trust that is considered a skip person. An example would be a gift by the client to one of his grandchildren or a trust of which only his grandchildren are the current beneficiaries.
- (2) An election under Code Section 2632(c)(5)(A)(i) not to have the deemed (automatic) allocation of GST exemption apply to an indirect skip or transfers made to a particular trust. An example of an indirect skip is a transfer, such as a gift, to a trust that includes non-skip persons (e.g., a child) and skip persons (e.g., the child's descendants). This is the so-called election of opting out of the automatic GST allocation.
- (3) An election under Code Section 2632(c)(5)(A)(ii) to treat any trust as a GST trust for purposes of Code Section 2632(c). A "GST Trust" is a trust described in Section 2632(c)(2)(B) to which GST exemption would be automatically allocated. Such an election, for example, would ensure that whenever gifts are made to that trust, GST exemptions are automatically allocated to protect transfers from the trust from GST tax.

FBARs

Taxpayers Continue to Get Penalized!

FBAR Filings Should Not Be Ignored

- Foreign Bank and Financial Accounts (FBAR) may require you, under the Bank Secrecy Act, to report every year certain foreign financial accounts (e.g., bank accounts, brokerage accounts, mutual funds) to the Treasury Department and keep certain records of those accounts.
- There is no shortage of cases where people failed to report and tried to get out of the costly penalties. If you have any foreign accounts or assets, check with your CPA and ensure you meet your filing requirements. The penalties can be substantial!
- In United States v. Kelly, 133 AFTR2d 2024-710 the failure to file the FBAR report was willful because no professional advice was sought. Get help from an expert!
- In United States v. Wolin, 133 AFTR2d 2024 the court enforced collection of the FBAR penalty against a US citizen living abroad.
- In United States v. Harrington, 133 AFTR2d 2024, failing to file for 4 years was found to be reckless.
- In United States v. Gaynor, 133 AFTR2d 2024- 716, the holder did not willfully evade FBAR reporting.

Adequate Disclosure on Gift Tax Returns

Taxpayers Got a Break But Don’t Count on It!

Adequate Disclosure - Schlapfer v. Commissioner, T.C. Memo. 2023-65

- Was there disclosure in a manner adequate to apprise the IRS of the nature of the item? This is critical to toll the statute of limitations.
- Taxpayer filed a 2006 gift tax return. IRS requested information on the Panamanian company which he provided. The brokerage statement showed the portfolio valuation. 2 years later IRS assessed deficiency, and the taxpayer said statute had run. Court said Reg is a safe harbor and the requirements are just the requirements to satisfy the safe harbor. These can be satisfied by substantial compliance.
- In this case there were three items that had to be disclosed to satisfy the statute of limitations.
- A description of the transferred property and any consideration received by the transferor – property given was life insurance and all that was described was a gift of the portfolio and Panamanian company shares. What made it a gift was substantially disclosed.
- The identity of, and relationship between, the transferor and each transferee was gift to mother and aunt and uncle. Return indicated mother but not aunt and uncle. Court said it was clear enough that it was family.
- Consider using a planning checklist for the plan and to start the table of contents for gift tax return exhibit.

Adequate Disclosure - Schlapfer v. Commissioner, T.C. Memo. 2023-65

- Except as provided in §301.6501(c)-1(f)(3), a detailed description of the method used to determine the fair market value of property transferred, including any financial data (for example, balance sheets, etc. with explanations of any adjustments) that were utilized in determining the value of the interest, any restrictions on the transferred property that were considered in determining the fair market value of the property, and a description of any discounts, such as discounts for blockage, minority or fractional interests, and lack of marketability, claimed in valuing the property. IRS said taxpayer didn’t disclose. Court said taxpayer gave the brokerage statement that listed all assets. The court said an appraiser would start with the portfolio.
- Do not rely on the case except to defend an audit. Instead, before filing determine what the specific requirements are and meet them. But if you “miss” this case might give you an argument.

Corporate Transparency Act (CTA)

Reporting Now Seems Limited to Foreign Persons

Irrevocable Trust Modifications and Commutations

Tax Consequences More a Concern When Tinkering with Irrevocable Trusts

DE Decanting Void

- Decanting has become ubiquitous in planning. But as a recent case suggests, common usage doesn’t assure that it is permissible.
- An attempted decanting of a 2012 California trust (first converted into a Delaware trust) into a new 2014 Delaware trust was invalid as it violated the Delaware decanting statute. The Delaware decanting statute permits decanting only where the trustee has the power to invade trust corpus, which the trust instrument did not include.
- In the Matter of the Niki and Darren Irrevocable Trust and the N And D Delaware Irrevocable Trust, C.A. No. 2019-0302-SG (Del. Ct. Chanc. February 4, 2020 and July 24, 2024); 12 Del. C. Sec. 3528(a).

Practical Considerations

- When evaluating existing trusts for decanting the old trust instrument needs to be reviewed carefully to determine if it meets the statute (and if not whether moving to a new state may facilitate decanting), what terms in the old trust may not be able to be changed (e.g., beneficiaries, trustee compensation, trustee indemnification, etc.). No one should assume without that analysis that decanting is possible, and even if possible that it will achieve all objectives.
- Encourage client's attorneys to use limited powers of appointment, trust protectors, and give persons in non-fiduciary capacity the power to remove beneficiaries and take other actions.
- Flexible and robust planning may facilitate making changes in the future without having to incur the risks of modifications given what seems to be a change in the environment.

Code Sec. 2519(a) - Anenberg

- Estate of Anenberg, 162 T.C. No. 9 (2024).
- Code Sec. 2519(a) provides that for estate and gift tax purposes, any disposition of all or part of a qualifying income interest for life in any QTIP is treated as a transfer of all interests in such QTIP other than the qualifying income interest. That can trigger a substantial gift tax by even a small dollar transfer.
- H died and W obtained a qualifying income interest for life, and, upon her death, the remainder interests in the principal would pass to trusts for H’s children.
- With the consent of W and deceased H’s children the trusts holding the underlying property were terminated by a state court and all the property held by the trusts was distributed to W putting her in the position she would have been in if all that property had originally passed from H on his death outright to W.
- W later made gifts of and sold different pieces of the underlying property to H’s children and grandchildren. W died.

Code Sec. 2519(a) - 2

- W's estate argued that the above gifts/sales transactions did not result in any gift tax liability for W.
- The IRS argued gift occurred under Code Sec. 2519.
- The Tax Court held no gifts occurred noting that a gratuitous transfer is necessary to impose gift tax. The court found that no gratuitous transfer occurred because W’s deemed transfer of the remainder interests in the QTIP held in trust resulted in her receiving of all the QTIP assets. So, she gave away nothing.
- The children were held to have made gratuitous transfers as they gave up valuable rights, their remainder interests in the QTIP and they received nothing in return.
- The court rejected the argument that they made reciprocal gifts that offset each other.

2519 and Estate of McDougal

- The McDougall case involved the gift tax implications of a commutation of a QTIP marital trust. McDougall v. Commissioner, 163 T.C. No. 5 (September 17, 2024).
- Decedent died in 2011, her residuary estate passed to a QTIP marital trust for her husband. Their two children were the remainder beneficiaries. A QTIP election was made. Then, in 2016, the husband as the surviving spouse and QTIP income beneficiary, and the two children as remainder beneficiaries, agreed to commute the marital trust, distributing all its assets to the surviving spouse. The surviving spouse then sold some of the assets received from the marital trust to other trusts established for the benefit of the children and their children, in exchange for promissory notes. The goal was to facilitate ethe surviving spouse moving assets out of the QTIP that would be taxed on his death to other trusts outside his estate.
- The IRS argued that the commutation of the QTIP triggered gifts from the surviving spouse to the children under Code Sec. 2519, and gifts from the children to the surviving spouse of their remainder interests in the QTIP trust under section 2511.

2519 and Estate of McDougal

- The taxpayers made a novel argument that the termination of the QTIP did result in a deemed gift by the surviving spouse under Code Sec. 2519. However, the children gave an offsetting gift to the husband of all of the trust assets.
- The Tax Court held that the surviving spouse was not liable for gift tax because no gratuitous transfers were made. However, the agreement to commute the marital trust resulted in gifts to the surviving spouse by the children under section 2511. The difference between McDougal and Anenberg is that in Anenberg the IRS failed to raise the issue of the remainder beneficiaries making a gift of their remainder interest to the spouse. The IRS asserted that argument in McDougal. The Court rejected the taxpayer's argument of offsetting gifts. The most difficult question is what value should be attributed to the imputed gift by the children to their father? The Court did not address that issue.

CCA 202353018 - Tax Reimbursement Clauses

- Rev. Rul. 2004-64: when the grantor pays income tax, it is not a gift to the trust. If the trustee is required to reimburse the grantor, that is a retained interest that will cause inclusion in the grantor's estate. If the trustee only has the discretion to reimburse, that will not alone cause inclusion in the settlor's estate, but other factors added to that could result in estate inclusion (e.g., implied agreement). Distinguished the CCA from the Rev. Rul. 2004-64 where the trust included the right to discretionary reimbursements.
- In the CCA, a discretionary trust is to distribute income to the child and, on death, distribute to the child's issue per stirpes. The grantor retained the power to make it a grantor trust. Neither the trust or state law authorized reimbursement.
- Pursuant to state law, the grantor's child and that child's issue consented to the modification. IRS concluded that, as a result, there was a gift.
- The CCA said that the result would be the same in a modification where pursuant to a state statute beneficiaries were permitted to non-object.

CCA 202353018 - Tax Reimbursement Clauses

- CCA did not address how to value the gift. How do you estimate income? How do you estimate tax to be paid? How can you determine whether a discretionary power will be exercised? How do you apportion the value among the various current and future beneficiaries?
- What if the grantor could relinquish the power? What if the grantor relinquishes power to make it a non-grantor trust? What if trustee and beneficiaries agreed to permit a tax reimbursement power in exchange for grantor not relinquishing the power? No clarity.
- Can you move the trust to FL? FL law permits the trustee to reimburse the grantor for taxes regardless of what the trust provides. No clarity on result of what this would be because in this situation there is no beneficairy consent.
- How do you deal with gift tax returns for 2023 that have not been filed? What if you file a gift tax return and guesstimate the value of the purported gift? That puts the onus on the IRS to produce a different value.
- How can you value a discretionary right of the trustee, with unknown tax rates, unknown income, factor in discounting these unknowns to present value? Practitioners should consider cautioning any client that modifies a trust in any manner about the potential risks of a broad reading of the CCA.

Tax Reimbursement and Trust Modifications CCA 202352018

- Many trust companies insist beneficiaries sign off on any action or push the family to instead effectuate a non-judicial modification agreement if feasible to avoid the trustee having to be involved because of concerns about potential liability. Now CCA 202353018 may make the provision of beneficiary approval potentially problematic in that the IRS may argue for an imputed gift (or some other challenge). But will trustees be willing to just proceed without those sign offs?
- If not, if there is a trust protector or other mechanism to change trustees, the family will just change trustees to one that will proceed without a sign off. If that change is accomplished by a trust protector action by an independent trustee there would seem to be no issue. But what if the trust protector is a family member or even a beneficiary? What if the change of trustee mechanism gives the beneficiaries by majority vote the right to change trustees? Will changing trustees in those latter situations be argued by the IRS to be equivalent to the beneficiaries approving the decanting?
- There is another facet to all of this. Let's say that after CCA 202353018 the trustee is willing to decant the trust without any approval or even advance notice to beneficiaries. What about the professionals advising on the decanting? The sign offs by the beneficiaries in the past would also seemed to have negated a beneficiary later objecting after all they had notice and either agreed or did not object. Without that, might this increase the risks of beneficiaries suing the adviser?

Possible Extension of CCA 202353018

- If a client created a DAPT, hybrid DAPT or SPAT, years later they may not feel they need that access and wish to disclaim to avoid the estate inclusion issue.
- Many such trusts have an institutional trustee with discretion over distributions.
- Many advisers had believed that a settlor's disclaimer of their right to receive possible distributions from a discretionary trust with an independent institutional trustee might constitute a gift, but that gift would be difficult, if not impossible, to value.
- However, in the wake of CCA 202353018, might there be a greater risk of the IRS also challenging such disclaimers?
- A better approach post CCA 202353018 might be to give a trust protector the "Power to Eliminate the Grantor as a Beneficiary" as that might enhance the potential to keep trust assets outside Grantor's estate and not trigger a gift.

Decanting to Add POA - Estate of Horvitz

- Estate of Horvitz v. Commissioner, T.C. Dkt. No. 20409-19 (Order dated Feb. 7, 2023; Stipulated Decision entered April 6, 2023).
- A QTIP trust was decanted to add a power of appointment for the surviving spouse. He exercised the power and added $20M bequest to charity. The Ohio statute said decanting is allowed if the trustee has discretion as to distributing principal. That discretion was expressed as “comfort, best interests, etc.” IRS argued that standard was a HEMS standard, not full discretion. The estate filed a motion for partial summary judgement to allow the estate tax charitable deduction. The IRS claimed the decanting was not valid because of the restrictive language on distributions.
- The Court seemed focused on fact that the charity did in fact receive the $20M dollars.
- Decanting existing/old trusts to add powers of appointment is potentially a great way to add flexibility to a plan. Review old trusts to discern this. The case points out that caution should be exercised to carefully evaluate the powers and provisions of the trust in context of the governing state statute under which the decanting will be completed to assure that the decanting can be done.

Modification of an Irrevocable Trust - Ebersole (PA)

- Ebersole v. Commonwealth, 2023 WL 6560103 (Penn. Commw. Ct.).
- Facts. Transferor created a revocable, inter-vivos trust. The trust listed beneficiaries other than just the settlor and that triggered a local property transfer tax under PA law. The PA Department of Revenue assessed property tax triggered by trust provisions authorizing distributions to individuals other than the trust settlors. According to the DOR, having originally transferred the property, the settlors were unable to rectify the issue by a mere amendment of the trust. What was needed was a modification that had retroactive effect to the trust inception.
- Law. The court applied the PA version of UTC Sec. 416 to permit a modification retroactive to the date of formation of a self-settled trust. The trust modification statute allowed "*modification[, which is,] to be distinguished from . . . 'reformation' authorized by [UTC §] 415. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms . . . are not inconsistent with the settlor's probable intent*." UTC §416 Comment: a "court may provide that the modification has retroactive effect." This distinguishes §416 from other UTC provisions, allowing prospective reformation or amendment of trusts, as compared to changes that relate back to original creation of the trust.

Valuation Considerations

Valuations Continue to be a Focus: Connelly and Cecil

Company Value Includes Life Insurance Proceeds

- In *Connelly v. United States*, the Supreme Court held that the company's value includes the proceeds of the life insurance policy that the company had taken out against the decedent's life. There is no offset for the obligation to repurchase a shareholder's shares in a redemption.
- But in footnote 2 the Court seems to leave open the possibility that in other fact patterns, e.g., if an operating asset has to be sold to pay for the redemption there may be some offset or adjustment.
- The approach rejected that which was taken by the Eleventh Circuit in *Estate of Blount v. Commissioner*, 428 F.3d 1338 (2005), which offset the company's obligation to redeem shares against the life insurance proceeds received.

Redemption vs. Cross Purchase

- It is common to have a closely held business own life insurance on the owners (e.g., shareholders if it is a corporation). When an owner dies the business uses the life insurance proceeds on the owner's life to buy the equity interests the owner held at death. Since the corporation, not the other shareholders are purchasing the deceased shareholder's stock it is called a "redemption." This is a simple way to keep the stock or other equity interests in the hands of the remaining active shareholders. But the Court held that the value of insurance used for the buyout had to be included in the shareholder's estate, and the value of the buyout obligation could not reduce the value of the business. The result was that insurance funded redemption agreements may create a "phantom" value in the shareholder's estate increasing estate tax costs.
- The only safe bet may be to use a cross-purchase agreement, and perhaps one with an insurance LLC structure. Costly and complex. Consider that the insurance LLC will also be subject to the Connelly Supreme Court reasoning and a portion of the insurance and LLC value would be included in the deceased shareholder's estate.

Do it Right! Formalities Matter!

- Connelly is also another case stressing the importance of taxpayers adhering to the formalities of the deals they structure. In that way, Connelly echoes the same message as the cases discussed in the lead article.
- The stock-purchase agreement provided two mechanisms for determining the price at which Crown would redeem the shares. The principal mechanism required the brothers to execute a new Certificate of Agreed Value at the end of every tax year, which set the price per share by "mutual agreement." If they failed to do so, the brothers were supposed to obtain two or more appraisals of fair market value. The brothers never executed a Certificate of Agreed Value or obtained appraisals as required by the stock-purchase agreement.

Valuation - Estate of Cecil v. Commissioner

- Estate of Cecil v. Commissioner, T.C. Memo. 2023-24 (Feb. 28, 2023).
- Facts. 2010 taxpayer gave shares of Biltmore to heirs. Each child and trust for grandchildren received stock. Biltmore owns the largest house in the US and operates it as a tourist attraction. It has a hotel, restaurants and other activities. The taxpayers wanted to keep the house in the family. Taxpayers used two valuation approaches. IRS ignored the income approach.
- Note that Hurricane Helene devastated the area where the Biltmore estate is.
- Court holdings. Net asset value can be relevant to determine shares. For Biltmore this would have been a high valuation number. But this is true only if the recipients of the shares can liquidate the company to get the asset value. Biltmore is an operating company, and no donee could liquidate it. Further, it was clear that the donor wanted the property to stay in the family for the long term. [consider that in terms of precatory language in planning documents] So net asset value was irrelevant in determining the value.
- Court found substantial discounts for lack of control and lack of marketability using discounted cash flow method. Court valued the corporate shares given to heirs at values lower than what was reported on gift tax return and dramatically less than the proportionate values of the company.

Valuation - Estate of Cecil v. Commissioner

- If you value S corporation shares by reference to a C corporation, you must adjust the earnings of the S corporation since the Shareholders will have to pay the tax rather than the corporation. So, the values need to be tax adjusted. So, donors of pass-through entities should take the position that tax liability to be paid by owners should be reflected in the valuation decisions.
- Court said it will evaluate on a case-by-case basis.
  - Comment: If you have an appraiser who is valuing a tax effecting a flow through entity should determine if doing so and address in report.

Filing the Wrong Tax Form Matters

Trust Lost Refund Claim

Details Matter on Tax Filings Too

- The trust reported on Form 1041. The trust felt that it was entitled to a refund, so it filed for a refund. Refund claims are supposed to be filed by amending the trust income tax return, Form 1041. Reg. Sec. 301.6402-3(a)(4). The trust filed Form 843 which is a form to make a claim for a refund. The Court determined that the trust failed to take the appropriate action and the refund it sought was lost. While the trust's filing did put the IRS on notice of the claim it was the wrong action. Palermo v. U.S., 2023 PTC 215 (S.D. Fla. 2023).
- The IRS position was that the taxpayer's filing of a Form 843 was insufficient as a formal claim because an amended Form 1041 is the proper form. The Court found that the IRS is authorized to demand information in a particular form and to insist that the form be observed. The instructions to Form 1041 indicate that to claim a refund an amended Form 1041 has to be filed. The Form 843 instructions indicate that the form is for a refund of taxes other than income tax.

INGs Restricted by CA

CA Joins NY – Who is Next?

CA Zaps Traditional INGs

- On July 10, 2023, California Governor Gavin Newsom signed into law S.B. 131, which included a provision targeting the California state income tax treatment of incomplete gift non-grantor trusts ("INGs"). Under the prior law, a Grantor who contributed property to an ING did not report the trust's income on their California state income tax return, unless the Grantor received a distribution of distributable net income ("DNI") from the ING. Under the newly enacted Cal. Rev. & Tax. Code Section 17082, the income of an ING is included in gross income of a Grantor of the ING, as if the ING was a Grantor Trust. The new rules are retroactive to January 1, 2023.
- Will completed gift INGs work in CA? They should still work in NY?
- Another ING issue is the import/implication of the IRS not issuing rulings?
- Splitting non-grantor NV trust for CA income tax planning to keep the smallest trust possible on CA tax radar only once it is needed.

Is Financial Disaster Lurking

What Is the Client's Attitude Toward Money!

Is Financial Disaster Lurking – Consider re: SLAT Wave Coming

- A recent study noted that pre-retirees expect to spend just 58% of their current household income in retirement. Yet 1/3rd of actual retirees who participated in the study are spending at least 75% of their pre-retirement income in retirement.
- In another study participants felt they needed to earn $233,000/year to be financially secure and $483,000/year to feel rich. Yet, median earnings for a full-time, year-round worker in 2021 was $56,473. What's the common theme? People's financial perceptions are dangerous to planning and financial well-being.
- Too many underestimate what they'll need in retirement. Too many set their financial wishes far higher than what they will ever achieve, thereby setting themselves up for disappointment. While these studies did not focus on the wealthiest Americans, the misconceptions may differ, but the mistakes may be similar. Having a realistic budget and financial model and doing one of the hardest things that can be done, reducing your lifestyle, may be what many people really need to do to get on track.
- Clients making this mistake may well spend down their estates leaving little for heirs so that their estate plans may be wishful thinking at best.

Evaluate Options for Existing Credit Shelter (Bypass) Trusts

Many Might Warrant Decanting or Termination

Terminating A Credit Shelter Trusts

- Credit shelter trusts are also sometimes called bypass trusts, since they bypass the surviving spouse's estate. Though your clients might still have them, they are in some instances no longer advantageous. They used to be more common when the estate tax exemptions were much lower and prior to portability, and thus the threat of paying higher estate taxes loomed larger. They were also more popular at a time when portability didn't exist (in other words, before widows could use their deceased spouses' estate tax exemption). The objective of the credit shelter trust back then was to let the surviving spouse benefit from assets when the first spouse died, but to keep those assets out of his or her estate.
- But the past goals of the trust are increasingly irrelevant. Now the federal estate tax exemptions is close to $14M, and $6-7M if the current allowance sunsets on schedule in 2026. Thus, many clients who still have credit shelter trusts don't really end up avoiding any estate taxes with them. Instead, they have costs incurred every year to administer the trusts and to file the trust income tax returns—and all for assets that won't get a step-up in income tax basis when the surviving spouse dies. That could lead to a significant income tax cost.

Terminating A Credit Shelter Trusts

- The solution may be to terminate such trusts entirely if your clients have them and put all the assets back into the spouse's name. The result may be simpler and better tax results.
- However, you also have to make sure there are no liabilities (such as medical costs) that could dissipate those assets if the trust is terminated, and the assets are distributed to the surviving spouse. Review the trust to determine whether it can be terminated, to confirm that there are no legal reasons for keeping it, confirm other beneficiaries are agreeable and then to draft the documents to end the trust.
- This is a great catch for financial advisers to give a value add IF appropriate.

Funding an Ignored Credit Shelter Trust

- There is authority to "reconstruct" and fund a credit shelter trust that was overlooked/ignored in estate administration. When discovered, this should be considered.
- TAM 8746003 delay in funding marital may not cause loss of marital deduction, but appreciation after a reasonable time may be allocated pro rata to marital and non-marital shares.
- See Estate of Olsen v. Commissioner, T.C. Memo. 2014-58 re unfunded credit shelter trust.
- Under Stansbury v. United States, 543 F. Supp. 154 (N.D. Ill. 1982), aff'd, 735 F.2d 1367 (7th Cir. 1984) may treat as if held in a constructive trust.

Reasons to Still Use Credit Shelter Trusts or a Variation

- While portability exists, portability is not for everyone.
- You have to file a 706 to get portability and there is an unlimited Statute of limitations when you file for portability.
- In the event of a blended family, a settlor may want to benefit children from a prior marriage through a credit shelter trust.
- Portability amount is not increased by inflation.
- Portability does not apply to the GST and state death taxes.

Charitable Planning

Planning Ideas and New Developments

Assignment of Income Rule - Hoensheid v. Commissioner, T.C. Memo. 2023-34 (March 15, 2023)

- How far can you go on the continuum from nothing going on to a signed and binding deal without triggering the assignment of income doctrine on a gift to a charity of an asset that is thereafter sold?
- A gift asset to charity and charity has no legally binding obligation to sell it, you don't have any anticipatory income issue.
- Facts. Donor gives stock to a DAF. Donor clearly did not want stock to be given to charity until the donor was 99% sure that the company would be sold. Donor kept telling this to other people when he gave the stock to the DAF. DAF refused to sign documents pertaining to the sale until they actually got the gift. Sale occurred immediately thereafter.
- Court said you must really give the asset away and then it must be the charity disposing of it. The Court said: "*To avoid an anticipatory assignment of income on the contribution of appreciated shares of stock followed by a sale by the donee, a donor must bear at least some risk at the time of contribution that the sale will not close. On the record before us, viewed in the light of the realities and substance of the transaction, we are convinced that petitioners' delay in transferring the …. shares until two days before closing eliminated any such risk…*"

DAF Proposed Regulations.

- Proposed Reg. §§53.4966-1 through -6, REG-142338-07, 88.
- Regulations say they will be effective for the entire year in which they become final.
- 2006 Congress enacted rules directed at Donor Advised Funds (DAFs). It is an account maintained by a sponsoring organization to which taxpayers can make charitable gifts and obtain a contribution and after the gift the donor can make non-enforceable recommendations as to charities to get funds.
- Sec. 4958 – 25% tax on excess benefit transaction engaged in by public charity. Special rule applicable to DAFs excess benefits includes a payment of compensation for services if made to a donor of the fund, or someone with advisory privileges. These persons are called "donor or donor advisor." This is subject to a 25% tax.
  - **Comment**: Say for example a client structured a note sale to a grantor dynasty trust using a spillover to a DAF with a transaction structure based on the Petter, Christiansen, McCord cases. The DAF receives a slice of equity in the business entity used in the deal. Years later the taxpayer, or a taxpayer entity wishes to repurchase the slice of equity held by the DAF to simplify recordkeeping and plan administration. That purchase by the donor/transferor or a related entity or trust (perhaps to avoid a Powell argument) may be subject to an excise tax if there is an excess benefit to that donor/transferor.

DAF Proposed Regulations.

- An investment advisor also provides investment advice to donor as to their own funds is a problem. Any compensation paid to the investment advisor may be an excess benefit under Sec. 4958.
  - Comment: Client sets up a DAF and their general investment advisor at their brokerage firm manages their general assets and so is requested to manage their newly formed DAF. Is that an issue since that advisor will earn compensation?
- Sec. 4946 20% excess tax on taxable distribution which is a distribution to any individual or for a non-charitable purpose. Exception for grants to other charitable organizations.
- Sec. 4967 excise tax of 125% of value of more than an incidental benefit accrues to donor as a result of advice given by them.
- Regulations identify what a DAF is and what a distribution is. Many questions remain unanswered including the use of DAF funds to satisfy a binding pledge agreement.

Documentation Counts For Charitable Deduction

- The tax laws require that a taxpayer to get a contemporaneous written acknowledgment from the donee charity for gifts of $250+. This must describe the amount of cash and give a description of noncash property, confirm whether the charity provided any goods or services to the donor (and if so, provide an estimate of the value of them). Code Section 170(f)(8). The IRS and Courts have gotten tough on this so that anyone donating should really be certain to adhere to all the requirements of the law if they want to protect their deduction.
- In a recent case, the Court affirmed a decision denying the taxpayer a charitable contribution deduction for an airplane because the taxpayer failed to attach a contemporaneous written acknowledgment from the charity to the income tax return. Izen v. Commissioner, 5th Cir, Docket No 21-60679. Foot faults do matter.

Documentation Counts

- In another case the court denied a taxpayer a charitable contribution deduction because the taxpayer also did not have a sufficient contemporaneous written record. The Taxpayer contributed a large number of artifacts to a charity using a gift document to transfer ownership. That gift document indicated that the contribution was unconditional and irrevocable (important to assure that the donor parted with all ownership interests in the property) unless the gift agreement provided otherwise. So, the gift agreement was critical to the determination that the donation was made, but it wasn't attached to the donor's income tax return.
- The IRS challenged the donation as not meeting the requirements and the court agreed. Without the gift agreement it could not be corroborated that the charity did not provide goods or services that would offset the donation. Martha L. Albrecht v. Commissioner, TC Memo 2022-53.

Crypto Donations

- If Taxpayer A donates cryptocurrency for which a charitable contribution deduction of more than $5,000 is claimed, a qualified appraisal is required under section 170(f)(11)(C) to qualify for a deduction under section 170(a).
- A qualified appraisal is not required for donations of certain readily valued property specifically set forth in the Code and regulations, namely: cash, stock in trade, inventory, property primarily held for sale to customers in the ordinary course of business, publicly traded securities, intellectual property, and certain vehicles. See section 170(f)(11)(A)(ii)(I); Treas. Reg. section 1.170A-16(d)(2)(i). Cryptocurrency is none of the items listed in section 165(g)(2), and therefore does not satisfy the definition of a security in section 165(g)(2).
- Chief Counsel Memorandum Number: 202302012 Release Date: 1/13/2023.

Kalikow Case

Taxes and Family Dysfunction

Kalikow Case - Tax Considerations

- A recent Tax Court ruling reaffirmed estate inclusion rules governing qualified terminable interest property (QTIP) trusts and the requirements for valuation of QTIP assets and determination of expenses. It also presents yet another lesson in how estate plans and family challenges can pose difficulties for all.
- In Estate of Kalikow v. Commissioner, T.C. Memo. 2023-21, the court considered the issue of deducting administrative fees from an estate to reduce estate tax due and discussed Sec. 2053.
- Husband died, and some years later his wife died. Husband's will created a QTIP for the surviving wife that included a requirement to pay the surviving wife all income. QTIP status was elected on his estate tax return under Sec. 2056(b)(7). Most of the assets in the trusts were interests in a family limited partnership (FLP) that owned rental real estate. Wife was entitled to income distributions from the trust for life, and on her death, the assets remaining in the QTIP were to be divided and paid to trusts for each of the two children. It was asserted that wife was underpaid income to the extent of almost $17 million.

Kalikow Case - Tax Considerations

- Litigation followed, and a settlement was reached in which the QTIP agreed to pay the wife's estate about $6.5 million of undistributed income and about $2.7 million in fees. The two remaining issues were: (1) whether the value of the trust assets included in the gross estate pursuant IRC Section 2044 should be reduced by the agreed-on undistributed income amount, and (2) whether the estate is entitled to deduct any part of the agreed-on settlement payment as administration expenses pursuant to Section 2053.
- The court determined that the QTIP's settlement payment didn't support a deduction for administrative expenses by the estate under Sec. 2053. In calculating the value of Pearl's gross estate, the value of the QTIP couldn't be reduced by the settlement. The fair market value of the QTIP assets had to be included in Pearl's gross estate at the time of her death under Section 2044. The court held that there was no basis for the trust's liability to affect the date-of-death value of the FLP interests.
- There was also a valuation dispute concerning the value of the FLP interests. The estate reported the 98.5% of FLP interests value at about $42 million, and the IRS argued it was worth about $105 million. They settled on about $54 million.

Kalikow Case – Family Considerations

- The QTIP established on Husband's death left assets, following the death of his surviving wife, in further trust to the two children, a son and a daughter. This appears to have been a nuclear family. However, the wife's will bequeathed the residue of her estate to charity, not to her children. This difference in beneficiaries becomes significant in the context of the litigation. The co-trustees of the trust were a son, the surviving wife, and an independent individual (an accountant) and after the wife's death, the daughter was added as an additional co-trustee. However, the children weren't executors of their mother's estate. Were the children estranged from their mother based on the dispositive scheme she had in her will?
- More than three years after the wife's death, one of her grandchildren petitioned the court to compel the QTIP trustees to render an account of the trust. The son and the independent co-trustee each filed competing accounts of the QTIP trust. This might suggest that the litigation was quite contentious even apart from possible issues as between the wife/mother and her children.

Kalikow Case – Family Considerations

- Consider that wife’s estate plan created a reason for the children and estate to fight. The family, estate and trust endured 10-years of litigation as well as very substantial legal fees and assuredly caused incredible stress for everyone involved.
- The tax issues the family lost might pale in comparison to the legal costs incurred and the personal damage to the family.

Kalikow Case – Fiduciary Considerations

- The accountant was both a co-trustee on the QTIP trust and executor of the wife's estate, and his accounting firm received substantial fees for services. The accountant in his role as executor argued for positions to increase the size of the estate. That position would have increased the bequests to charity under the wife's will but reduced what the children received under the QTIP following her death. Were these overlaps in fiduciaries and professionals beneficial to the family?
- Might having introduced other advisors into the mix, or a professional or corporate fiduciary, mitigated some of the antagonism? Was there a wealth adviser, estate planning attorney, **insurance consultant** on the team? Might it have been possible to have taken steps to address, and perhaps mollify, some of the inherent conflict between wife's dispositive scheme and the very different plan under the QTIP?
- Might provisions incorporated into the FLP governing objective distribution standards have had a positive impact?

Powers of Attorney

Used for Almost All Clients
But Not So Simple

Powers of Attorney Tips - Gifts

- Gift provisions require careful attention, especially with the constantly changing tax environment. Should the agent be authorized to make gifts? This is considered a “hot” power and will not generally be inferred and must be expressly provided for in the document. Also, what was appropriate for a gift provision when the document was signed may not be appropriate now. For example, if the estate tax exemption was only $1 million years ago when the power was signed and in 2025 it will be close to $14 million, perhaps gift provisions are no longer needed or appropriate.
- In contrast, if the estate is modest permitting an agent to gift all of assets away may be useful for Medicaid planning. Is there one (or more) people the client provides financial assistance to? If so, a gift provision permitting gifts to them may be essential if that help is to continue if the client is incapacitated. Should the agent be permitted to make large gifts to use up any remaining estate tax exemption? That might make sense to provide flexibility for estate tax planning before the exemption is cut in half in 2026 but that could be an authorization to move almost $13 million in assets! So, the decision is not standard and must be made to provide appropriate flexibility and appropriate safeguards.

Powers of Attorney Tips - Coordination

- Coordination of gift and other rights under the durable power and other documents can be an issue. If there is also a revocable trust has the planning and documentation of your revocable trust and power of attorney been coordinated?
- Did someone coordinate the person named as a designated representative on long term care coverage, the emergency contact given to a broker, the person authorized to assist with Social Security, etc. with the agent named in the power of attorney? What about people named as agents on bank or brokerage account forms?

Powers of Attorney Tips – Retirement Assets and Life Insurance

- How broad is the authorization given the agent to change beneficiary designations on retirement assets, **life insurance** and other assets?
- Is there a potential conflict between the agent named and other heirs? How broad or limited should that authority be? Have circumstances changed since the power document was signed?
- With many significant changes to the tax rules affecting retirement plans in recent years (Secure Act, and various regulations interpreting it) it might be important to give an agent wide flexibility to update beneficiary designations. But the tricky part is when that authorization is too broad it might give an agent who has ulterior motives an opportunity for nefarious acts. Where to strike the balance is not simple.

Powers of Attorney Tips – Business or Professional Practice

- Businesses and professional practices may require special consideration. It may be advisable to have a separate power of attorney for certain business matters.
- Business planning and documents (shareholder agreements, operating agreements, partnership agreements, etc.) need to be coordinated with the provisions and agents in a power of attorney to address business matters.
- It might not matter who is named as agent or what powers you give them as the documents governing the business may control who can act for you if you are incapacitated. When have those provisions last been reviewed?
- If you operate a solo professional practice the professional ethics may require that you have a separate practice power naming an appropriate licensed professional to act in the event you cannot.
- You might prohibit the agent under your general power from exercising authority over professional practice matters.

Planning for Aging and Infirm Clients

Practical Guidance and Checks and Balances Should be Part of Planning

Romance Scams on the Rise

- Financial scams, including elder abuse and identity theft continue to grow. Americans lost a record $1.3 billion to romance scams in 2022, up 138% from 2021. These scams are sometimes based on cons faking someone being sick, hurt or in jail. Other cons work on investment scams, such as convincing the target that they can be helped to get better investment returns.
- Part of estate and financial planning for aging or infirm clients is to consolidate accounts with reputable institutions or advisers, have period (at least annual) review meetings, and encourage clients to communicate if anything questionable arises. Clients taking steps such as having a co-trustee on a revocable trust, hiring a CPA as a monitor or having a CPA firm pay bills and create monthly statements, may all help avoid these issues.

Conclusion and Additional Information

Plan Carefully

Conclusion

- There are always new developments, and it seems new tax legislation on the horizon with no certainty as to what may pass.
- Practitioners should rethink planning from a defensive and flexible lens.
- Caution clients about known risks and that there are always unknown risks.
- Don’t confine how you structure a plan to only existing case law. There are always lags in law and perhaps planning more proactively and more carefully might be prudent.

Additional information

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