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PRACTICAL PLANNER

ESTATE PLANNER COCKTAIL PARTY CHATTER

Summary: Have you tried a “Nerdz” - 1/3 oz Three Olives® grape vodka, 1/3 oz sweet and sour mix 1/3 oz DeKuyper® Watermelon Pucker schnapps. Pour, shake and strain.....enjoy at, where else but a cocktail party of estate planners (yawwwwn)! If you worked the floor with drink in hand, you’d hear exciting talk like:

■ **Clever Family Harmony:** While the folks might believe (perhaps justifiably so) that one child has greater financial needs than the others, leaving more to that child, however justified, might just leave a legacy of anger for all. Another approach would be to have a family meeting, with or without advisers, and discuss the issues and concerns openly. Things are often different than the folks perceive. And surprisingly, if given the opportunity, some siblings may step up to the plate to help another if asked to do so. That can be a far better result than a surreptitious unequal distribution plan. If the focus can be shifted from something being an individual’s issue, to a collective family matter, more harmonious solutions may become feasible. Thanks to David Schechner, Esq. West Orange, NJ.

■ **“Talk to Lori”:** Instead of “Talking to Chuck” try “Talking to Lori.” Sometimes it’s the simple ideas that have so much impact on getting planning going. “Change the perspective and conversation at life transition points” and “Plan proactively not only defensively.” Example: Before marriage, a prenuptial agreement is common. But the focus of the conversation is usually negative, i.e., on the marriage not working out. Reframe the talk to a positive perspective of how overall planning during their marriage will be handled, gift tax planning to benefit both parties, integrating asset protection considerations into the prenu, and planning for your new life; and so forth. Change the conversation and enhance the result. Thanks to Lori Sackler of Morgan Stanley-Smith Barney, Paramus, NJ.

■ **Deed Transfers:** In spite of portability many spouses still should re-title assets to fund a bypass trust on the first death. Can the lender call the mortgage? Depends on state law. Section 341 of the Garn-St. Germain Act of 1982 prohibits a lender from exercising its option pursuant to a due-on-sale clause upon a transfer where the spouse of the borrower becomes an owner of the property. Thanks to James Costello, Esq. Bridgewater NJ.

■ **Better ILIT:** You remember new and improved Tide, well why not new and improved ILITs (irrevocable life insurance trust)? Why set up an ILIT in a boring state like NJ or NY for example, when you can set it up in a zippy state like Delaware, Alaska, etc.? If you can get the cost of using an institutional trustee down to a modest enough level, taking advantage of better state law might be well worthwhile. Consider the following advantages an Alaska ILIT might afford: ☐ Very low life insurance premium tax (10bps); ☐ The trust can be a self-settled

trust that includes the grantor as a discretionary beneficiary PLR 200944002; ☐ No rule against perpetuities so the trust can last forever; ☐ No state income tax. This may be academic today, but if the insured dies and the trust holds substantial funds to invest, it can be big. Thanks to Matthew Blattmachr, Alaska Trust Company.

■ **Clawback:** If you make a \$5.12M gift today and in 2013 we end up with a \$1M exemption, will the \$4.12M excess gift be clawed back into your

(Continued on page 2)

CHECKLIST: SHAFT-ED

Summary: Elder financial abuse is a misnomer. It is a much broader issue. Seems that a growing number of people, especially anyone with any type of vulnerability (age, health, other stress, lack of sophistication) are being taken advantage of. Here’s what Isaac Hayes sang about not getting the Shaft:

✓ **Team Effort:** Who’s the cat that won’t cop out when there’s danger all about? SHAFT! Have a coordinated estate planning team. If your CPA, attorney, insurance consultant and wealth manager are from independent firms and all look over each other’s shoulders, there is a much

lower likelihood of you getting the shaft. Can you dig it?

✓ **Understand:** You don’t need to understand the esoteric nuances of a GST allocation but you do need to understand the big picture of all your planning and documents. Even the most exotic planning idea can be explained in broad terms. If the stuff is complicated, get other advisers or family involved. No shame in getting help. Big risk in someone drafting something you sign that you truly don’t understand. Example: Most good wealth managers have some knowledge in their shops about estate planning. Similarly, most

(Continued on page 3)

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(Continued from page 1)

estate triggering an estate tax? Bright estate tax minds take opposite views as to whether this is “to be or not to be.” Bottom line, that is not the question. In most conceivable cases, gift planning should still be pursued ‘cause lifetime gifts may outweigh the risks of claw-back: ☐ lock in discounts that may be repealed, ☐ remove post-gift appreciation from your estate, ☐ grandfather grantor trust and GST allocations to a completed gift trust, etc. Nevertheless work the numbers, consider the risks, try to evaluate who will bear the claw-back tax if it happens (not easy!). State tax apportionment laws may not address this if the will is silent. Will taxpayers really pay their lawyers to draft more complex clauses? They should. But they should also floss daily.

■ **Death Bed Planning:** ☐ If you have highly appreciated assets in a grantor trust (an irrevocable trust you give

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Review: Andrew Wolfe, CPA, Esq.

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assets to but on which you continue to pay the income tax), and the trust uses a power of substitution to achieve grantor trust status, this permits you to repurchase for cash appreciated assets inside the trust. This technique can bring those low basis assets back into your estate and let them get a basis step up on death. Help your heirs avoid the higher capital gains tax the folks in Washington keep threatening. ☐ If there is no swap power in the irrevocable trust you set up (but it is a grantor trust using other mechanisms) there is another way to skin the cat (isn’t that an awful saying!). Buy the appreciated assets from the trust. This purchase will similarly be ignored for income tax purposes. Rev. Rul. 85-13. ☐ If you live in a decoupled state (e.g., NY, NJ) you can make a death bed gift and save state estate tax. But Goldilocks, check the gift provision in your durable power of attorney – some are too cold and prohibit gifts, some are too hot and limit gifts to the annual gift exemption, but some have a power that is just right. ☐ What if you only have appreciated assets in your name (gee I wish my portfolio looked like that!) and worry that a death bed gift will saddle your kids with a bigger capital gains tax than the state estate tax saving you’ll realize? Take a smarter route - margin your securities account and gift the borrowed cash (but make sure the check clears before death). The debt should reduce the size of your estate, but the appreciated securities will remain in your name and get the step up in tax basis to reduce the capital gains your heirs would otherwise pay.

■ **Power Roth’ing Your IRA** – Make sure your durable power of attorney affords your agent the right to convert your IRA to a Roth. If you’re on your death bed a conversion will trigger income tax due the payment of which might reduce your estate for estate tax purposes, and may

even push your estate below the threshold to file a return (but lots of estates should file a federal estate tax return anyway to secure portability for their surviving spouse). If you recover, you can recharacterize your Roth back to a regular IRA and avoid the tax. But if your power of



attorney doesn’t expressly permit Roth’ing and recharacterization, the general language might not suffice.

■ **Home Sweet Home:** Home ownership use to be a given. Now planners are evaluating the pros/cons and helping clients determine if renting is a better economic deal than owning. Just ‘cause appreciation may not be likely doesn’t mean renting wins the day. Consider other benefits of owning: ☐ You can improve your home for medical reasons and deduct all costs as a medical expense. ☐ If you’re wealthy you can use a Qualified Personal Residence Trust (QPRT) to shift value in a very advantageous way to kids. ☐ \$250,000/\$500,000 home sale exclusion. ☐ Meet the home office requirements and you can use a room as an office and take a tax deduction. ☐ Home ownership in many states benefits from special laws that afford valuable asset protection that is cheaply and simply obtained. Example: If a husband and wife own a home together as tenants by the entirety a claimant of one spouse cannot force the sale. ☐ The legal, tax and other benefits of home ownership can be significant. **PP**

...CHECKLIST: DON'T GET SHAFT-ED

(Continued from page 1)

CPAs have some background as well, while many have considerable expertise. Include them in the estate planning discussions to assure that your wishes are really being implemented.

✓ **Oversight:** Checks and balances are critical. There's lots of ways to build them into your planning. Have duplicate monthly statements sent to a trusted family member or better yet your CPA. Ideally have the recipient log information into a computer bookkeeping program to generate reports that can be reviewed to identify unusual items. Use an institutional co-trustee on trusts.

✓ **Be a Detective:** Private eye John Shaft asked lots of questions. So should you. Be alert for anything out of the ordinary. Often when something doesn't seem right, it isn't! Is one of your advisers being unusually solicitous? Are there inconsistencies in recommendations a particular adviser is making? Has a niece or nephew that you haven't heard from in years suddenly resurfaced without logical reason? Has an "investment" adviser made recommendations without looking at your overall financial situation? Does someone selling you a product get uncomfortable if you ask how they are compensated, or if you request that another adviser review the proposal? When a planning technique or product has a unique or trademarked name, or combines several different products or techniques into one, especially if it is complicated to decipher the component parts, be wary. It's a bit like dieting, gotta eat less and exercise more, most of the rest is fluff. Financial and estate planning requires a budget, estate planning documents, strategic investment allocation, appropriate insurance coverage, etc. Anyone recommending esoteric slick sounding stuff before the basics are in place, is not looking out for you. The investment product with a high guaranteed return is as real as the muffin with no fat, sugar or calories.

✓ **But That's What the Client**

Wanted: Perhaps the biggest excuse professionals use for taking actions that may be inappropriate. Professionals should make sure that the steps a client requests are rational and reasonable and not blindly follow requests made under stress or when in emotional pain. Clients should encourage their advisers to challenge them. A "yes man" might be good for the ego but not for much else. Encourage your advisory team to engage in discussions and to advocate for different options. Meaningful evaluation of different views will lead to better decisions. If you tell your attorney to disinherit your son, she might simply do so. A better attorney will engage you to understand the underlying reasons and propose

possible alternative solutions that may better meet your objectives.

✓ **Simplify and Organize:** Get bills on auto-pay and deposits made automatically. Not only is it harder to miss something, but the more automatic the less opportunity for the bad guys to dig in. Consolidate accounts, less is more. The less accounts the easier to keep track of your assets. Use a P.O. box to minimize the risks of someone snagging your mail. Get credit reports from the major bureaus and review them for anomalies.

✓ **Checks and Balances:** Have a care manager meet you in your home and complete an independent evaluation periodically. Abuse of those who are elderly or vulnerable is common, growing and usually undetected. **PP**

RECENT DEVELOPMENTS

■ **Florida Trust Change:** For non-probate and non-trust assets of divorced couples (e.g. insurance, annuities, retirement plans passing by beneficiary designation, and transfer on death accounts), a final judgment of dissolution (i.e., the divorce) will treat the ex-spouse as predeceased if the client failed to change the beneficiary designation after the divorce. Anyone who is divorced in Florida must carefully evaluate the ownership (title) to accounts and beneficiary designations post divorce. If an ex-spouse was to remain a beneficiary of a particular account or asset, be certain to review with Florida counsel what steps to take to secure that result in light of the new law. Thanks to Jeffrey A. Baskies, Boca Raton, FL. An important lesson of this development is for those living in states that don't have this Florida type of law. If you divorce and don't revise your beneficiary designations, your ex-spouse may remain your heir regardless of what you agreed in the divorce agreement. So the real lesson of this Florida law change is a reminder to everyone to be sure your planners periodically review all of your beneficiary designations and title to your accounts to make sure they are consistent with your goals.

■ **Same Sex Couples:** A surviving same-sex spouse won a constitutional challenge to Section 3 of the Defense of Marriage Act (DOMA), which denies recognition of same-sex marriages for purposes of Federal law. The court found the provision violated the Constitution's Equal Protection clause and allowed a marital deduction. *Edith Schlain Windsor v. U.S.* (DC NY 6/6/2012).

■ **Basis Adjustment:** A partnership was granted a 120-day extension of time in which to file a basis election under Code Sec. 754 to adjust basis. When an FLP or LLC interest is sold or a member/partner dies be sure your CPA looks into filing a timely election. While the IRS was lenient in this case it's not the position you want to be in. The IRS found that the failure to file the election resulted from "inadvertence" and that the partnership acted reasonably and in good faith. *PLR 201222012*. **PP**

PRACTICAL PLANNER NEWSLETTER

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PLANNING POTPOURRI

■ **Post-Death LLC Planning:** A sale of a minority member's interest, or the death of a member, will close the partnership (or LLC) tax year as to the transferor but not terminate the partnership. Allocations to the transferor member can be determined by: ■ an interim closing of the partnership books; ■ by the proration of annual income; ■ or any other "reasonable" method. If the partnership agreement specifies an approach, it must be used. If not, have a CPA evaluate the tax impact of each alternative and see which nets the best tax result for the family. In 2013 if we get a 3.9% Medicaid tax the spread from higher to lower bracket family members (including say a deceased parent's estate) may net a few tax dividends. Without a provision in the governing agreement there could be abuse. A departing member could be allocated much more income than expected. Example: There is a tax-

able loss from operations up to the date of death. The remainder of the year is very profitable. Using the days allocation method can have an adverse result for the deceased (selling) partner/member. Most taxpayers would opt for a closing of the books to avoid surprises but in the family context there could be creative post-mortem advantages. Not addressing this in the governing agreement and instead leaving it to the family to pick the optimal approach after the fact may permit planning flexibility. But, it could backfire on certain beneficiaries. Thanks to Ira Herman, CPA – JH Cohn, Roseland, NJ.

■ **2012 Two-Step:** As the 2012 year draws to a close folks will be coming out of the woodwork realizing gee maybe they should do something. As the end of the year approaches it will present unique planning issues. What will there still be time to do? What if there is no time for an appraisal? Do

you really want to wing it on a guesstimate relying on defined value clause? What if the trust company cannot open a new trust account in time? What do time constraints do to how you would structure funding an LLC and gifts to a trust? Would you, or must you, opt for non-trust gifts (e.g., gifts of LLC interest direct to a child) thereby losing any GST benefits and the trust asset protection? What happens if you try to set up a trust in NY and later shift it to Delaware? What issues does that create? How should everyone try to protect themselves from the added risk and complexity near last minute year-end transactions may present? Act now!

PP



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