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◦ "Matrimonial Considerations in Estate and Trust Planning" Teleconference ● Thursday, October 22, 2009 ● 1:00 PM - 2:30 PM EST Sign up at www.lorman.com using the Seminar Teleconference ID: 384833.

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PLANNING POTPOURRI

Trust Protects Against Later Divorce Suit: A Florida resident (Grantor) established a Trust. On her death Trust divided among her children and Son was the lifetime beneficiary of a Trust which provided the following which can serve as a checklist of how to draft a trust: The Trustee may, in the Trustee's sole and absolute discretion, distribute to or for the direct or indirect benefit of Son so much of the net income and/or principal from Son's Trust, up to the whole, during his lifetime, as Trustee deems advisable. Neither Son nor any other person or entity shall have any right to require or compel Trustee to make any distribution for any purpose. No share or interest of son shall vest until actually paid or delivered to him by the Trustee. No share or interest of Son shall be liable for his debts, or be subject to the process or seizure of any court, or be an asset in bankruptcy of Son. Son shall not have the power to anticipate, pledge, assign, sell, transfer, alienate or otherwise encumber his interest in the trust in any way, or in the income.

No interest in the trust shall be liable in any manner for, or subject to, the debts, liabilities or obligations of Son, or claims of any sort against Son.

The NJ court entered a judgment against Son for his unpaid child support. The lower court held that child support is the most important obligation that a person has — to support their children. However, on appeal the Court noted that the Trust was a non-self-settled trust, established by a Florida resident, and comprised solely of the Grantor's property. Neither trustee was a resident of NJ. Other than the trustees subjecting the Trust to a voluntary appearance to contest NJ jurisdiction, the Trust has had no other contact with NJ. Pursuant to its own terms, the Trust is governed by Florida law which recognizes spendthrift trusts. The right of a third party to garnish assets of a beneficiary of a spendthrift trust is limited to disbursements from the trust and if disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. The validity of spendthrift trusts is also recognized by New Jersey. In re Estate of Bonardi, 376 N.J. Super. 508, 516 (App. Div. 2005). Accordingly, even if the trial court had jurisdiction, the court could not have ordered the trustees to disperse funds

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PRACTICAL PLANNER

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GOLF TALK—BACK 9

Summary: Last month gave you exciting tidbits for each of the front nine. To assure you have talking points for the rest of the course, here's 9 more for the back nine.

Hole #10 Start the back 9 with a cool acronym "BDIT" a Beneficiary Defective Inheritor's Trust, the creation of Las Vegas estate planning maven Richard Oshins, Esq. So your golf buddies have all set up self-settled grantor dynasty trusts and you wanna one up them. The BDIT is the answer. Have a 3rd party, say mom, set up a dynasty trust to benefit you. You never make a gift to the trust. The trust is characterized as a grantor trust to you, so all income is taxed to you and you can sell assets to the trust without gain. The mechanism to accomplish this feat is having your BDIT include an annual demand or Crummey power for you to withdraw gifts mom makes to the trust. If you can vest all of the principal of the trust in yourself, you'll be treated as the owner of the trust for income tax purposes so long as the trust is not a grantor trust as to mom. So if mom gives $13,000 annual gifts to the trust and you don't exercise the Crummey power, the trust will be a grantor trust to you. Because you didn't set up the BDIT, you can be given more control over the trust then your golf buds can over their plain vanilla dynasty trusts with less tax and asset protection risk. You sell substantial assets to the trust and remove future appreciation from your estate and reach of your creditors. Cool!

Hole #11 UTMA, Uniform Transfer to Minors Act, accounts were common for kids' savings. But they are risky since at the age of majority Junior can spend the money on a beer instead of tuition. Solution: Have the UTMA invest in a family partnership or LLC so that when Junior attains majority he'll have to convince the local beer depot to take FLP interests. Many banks object to encumbering Junior's money more than the UTMA account would. Solution – Give Junior the right to cash in his FLP interest within 30 days of attaining the age of majority! For you Code Section geeks this is similar to the 2503(c) trust right to withdraw at age 21.

Hole #12 Lots of trusts are structured as directed trusts with an investment adviser directing the trustees how to invest and the trustee is absolved of most liability for investment decisions. Many trusts can benefit from the Doublemint gum approach — 2 investment advisers in one! An investment adviser may be selected to hold a family business. But a trust comprised of a close business may become liquid from a sale of the business. Does the same adviser have expertise to invest in marketable securities? Unlikely. Name an institution for securities. This dual approach can provide better investment results. If funds from a business are to be reinvested, have an independent fiduciary, e.g., the trust protector, authorized to allocate liquid assets between the marketable and the business investment adviser.

Hole #13 When a partnership, or an LLC taxed as an partnership (LLC), must close its taxable year (e.g., on the death/termination of a partner/member during the year), the economic results must be

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CHECKLIST: DEATH PANELS

Summary: Instead of addressing the real issues, folks are throwing fake punches on a urgently important topic. Death panels are a low blow fake, even for a moose hunter. But get real. Granny isn't getting unplugged, but granny should be responsible to address these issues while she can, but most don't. Here's a reality check – checklist on the non-existent death panels.

√ Rumors that bureaucrats will pull the plug on the sick and elderly are just static to avoid dealing with real issues. But are you dealing with the real issues?

√ Only 29% of people have signed living wills! Folks are kicking up a ruckus about non-existent death panels when they haven't taken the most basic step to address what they can control about their own end of life decisions and treatments. Be responsible. Sign appropriate documents: a living will to make your wishes known (even if you reside in a state that doesn't recognize it); a health proxy authorizing someone as your agent to make those decisions, and successors.

√ Few people take the time to understand what end of life decisions are really about.

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...GOLF TALK — BACK 9

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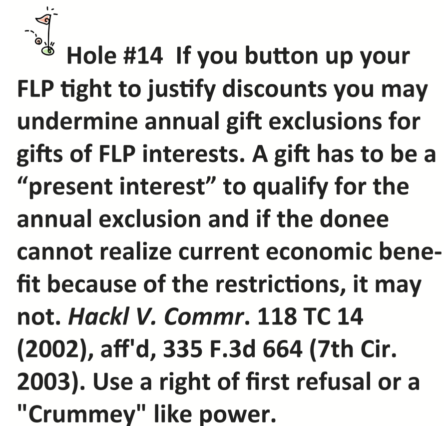
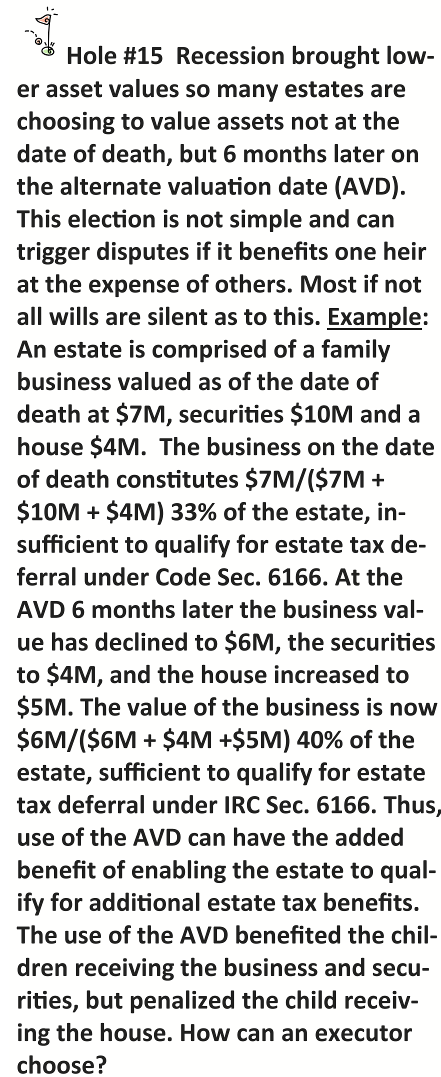
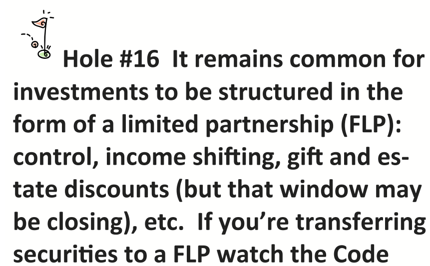
allocated for that partner to the time period prior to the closing of the LLC books, and to the period after the closing. There are two methods which can be used to make this allocation: (1) the interim closing of the LLC books; or (2) the pro-ration method. Treas. Reg. Sec. 1.706-1(c)(2)(ii). If the executor has discretion to choose the assets to fund a bequest under the will with these rules and that discretion can impact the estate's tax results. If a pecuniary bypass trust (i.e., funded with a dollar figure) is funded with the interests in an LLC, the tax year of the LLC closes, and the bypass trust would be allocated the pro rata portion of the gain for the portion of the year in which it holds the interests in the LLC. If the executor uses the discretion granted under the will to distribute the deceased partner's interests in the LLC under the residuary clause of the will to a residuary trust, instead of to the pecuniary bypass trust (assuming that the will was so constructed), the tax year of the LLC may not close.



Hole #14 If you button up your FLP tight to justify discounts you may undermine annual gift exclusions for gifts of FLP interests. A gift has to be a "present interest" to qualify for the annual exclusion and if the donee cannot realize current economic benefit because of the restrictions, it may not. *Hackl V. Commr*. 118 TC 14 (2002), aff'd, 335 F.3d 664 (7th Cir. 2003). Use a right of first refusal or a "Crummey" like power.



Hole #15 Recession brought lower asset values so many estates are choosing to value assets not at the date of death, but 6 months later on the alternate valuation date (AVD). This election is not simple and can trigger disputes if it benefits one heir at the expense of others. Most if not all wills are silent as to this. Example: An estate is comprised of a family business valued as of the date of death at $7M, securities $10M and a house $4M. The business on the date of death constitutes $7M/($7M + $10M + $4M) 33% of the estate, insufficient to qualify for estate tax deferral under Code Sec. 6166. At the AVD 6 months later the business value has declined to $6M, the securities to $4M, and the house increased to $5M. The value of the business is now $6M/($6M + $4M +$5M) 40% of the estate, sufficient to qualify for estate tax deferral under IRC Sec. 6166. Thus, use of the AVD can have the added benefit of enabling the estate to qualify for additional estate tax benefits. The use of the AVD benefited the children receiving the business and securities, but penalized the child receiving the house. How can an executor choose?



Hole #16 It remains common for investments to be structured in the form of a limited partnership (FLP): control, income shifting, gift and estate discounts (but that window may be closing), etc. If you're transferring securities to a FLP watch the Code Sec. 721 investment rules. Many folks forgot about these because capital gains kinda disappeared. But with the run up in the equity markets and other investments these rules could easily ensnare you. If you form an FLP consisting primarily of securities there generally is no income tax consequence, but if the FLP is characterized as an "investment company" and partners "diversify" their securities by forming that FLP, then the gain on all assets contributed to the FLP will be triggered . Ouch!

New downloadable e-book:
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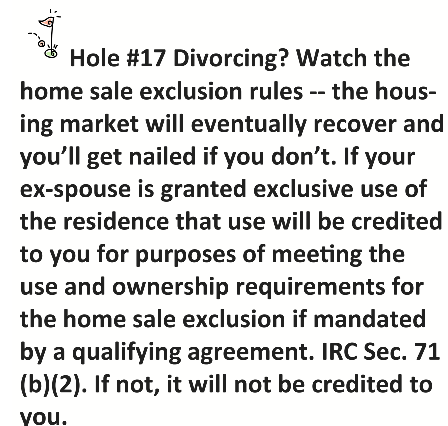
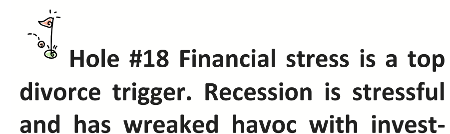


Hole #17 Divorcing? Watch the home sale exclusion rules -- the housing market will eventually recover and you'll get nailed if you don't. If your ex-spouse is granted exclusive use of the residence that use will be credited to you for purposes of meeting the use and ownership requirements for the home sale exclusion if mandated by a qualifying agreement. IRC Sec. 71 (b)(2). If not, it will not be credited to you.



Hole #18 Financial stress is a top divorce trigger. Recession is stressful and has wreaked havoc with invest-

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Review: Andrew Wolfe, CPA, JH Cohn LLP, Roseland, NJ.

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...CHECKLIST: DEATH PANELS

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Jane Brody in her recent book Guide to the Great Beyond (a must read) notes that there is no significant survival benefit for pursuing aggressive medical options over hospice! In some instances, hospice can provide a more dignified and peaceful death, chance to address religious and spiritual issues, and save a fortune in cost. One of the studies she cites found that those receiving aggressive end of life intervention survived 33 days while those receiving hospice instead survived 31 days. While any such studies are subject to wide interpretation and variation, and so much depends on the facts of the specific patient, there are some really important lessons and questions. Many religions view it as inappropriate to "pull the plug" on someone, even if in a vegetative state. If your wishes, whether for religious or philosophical reasons, are not to be removed from a ventilator or not to have mechanical feeding cease, even if you are in a persistent vegetative state, make these wishes clearly known. They should be respected, health care reform or not. However, broad generalizations are dangerously inappropriate. If you face days of invasive medical procedures and what might be at most statistically insignificant longer life, or you can spend statistically about the same time in hospice, with the warmth of family, the guidance of your spiritual adviser, etc., even for someone with a strict fundamental faith what is preferable? Too often the decision is reduced to black and white inaccuracies, just like the death panel hyperbole. Consultations with appropriate advisers (medical, religious and other) is the only way to make informed decisions. Everyone should endeavor to address known issues and likely scenarios in advance. If the unforeseen occurs, that is why you should have a signed health proxy (medical directive) appointing someone to undertake this analysis on your behalf.

√ Of the meager 29% who have living wills, too often the family disregards a parent's end of life wishes and doesn't disclose the documents. Instead, sometimes out of guilt, they opt for aggressive end of life treatments the parent didn't want, or they pursue what they believe to be religiously correct regardless of the parent's religious beliefs. While tough to document or estimate the incidences of family members intentionally not disclosing living wills seems tragically significant.

√ Almost no families hold the recommended meeting with their advisers to discuss what often are widely divergent religious issues of their children (or other loved ones) and the impact on end of life decision making. While unpleasant and difficult, it will always prove easier to deal with then the explosions that too often occur when a parent or other family member is near death.

√ Bottom line: People are creating a frenzy over a non-existent threat, when they have the power to address the real issue, few bother too, and of those that do, even fewer understand the implications, or act to honor the decisions ultimately made. There is an issue here, but not what the media is focused on. Personal responsibility is at the heart of this matter. Every adult should prepare the appropriate documents, make their wishes known, and make the effort to understand the personal, medical, religious, and other implications. PP

RECENT DEVELOPMENTS

Proper Prenup Protects Estate: W and H signed a prenup agreement. Both were represented by counsel, engaged in discovery, and schedules of assets, liabilities and income tax return were attached to the agreement. H and W married July 8, 2003. H died March 9, 2008. On March 31, 2008 W filed a caveat to H's will. A caveat is a challenge that the will should not be admitted to probate. Issue – should the caveat be rejected and the will accepted, or should the prenuptial agreement be rejected and W be permitted to take a surviving spouse's elective share under N.J.S.A. 3B:8-1 to -19. An elective share is a minimum inheritance a surviving spouse is entitled to by law, regardless of a will, if this right was not properly waived. W claimed, among other things that the agreed payments were made to her under a trust instead of under the will as required. The court found no practical difference. The court noted that the law, N.J.S.A. 37:2-38, places the burden of proof to set aside a prenup on the party alleging the agreement to be unenforceable and that burden must be met by clear and convincing evidence. A challenge can succeed on equitable considerations, such as unconscionability, failure to disclose, etc. In the matter of the estate of Donald Towbin, Deceased, Sup Ct NJ, App Div, Docket No. A-0161-08T30161-08T3, March 16, 2009.

Real Estate Tax Audits: The IRS Estate and Gift Tax Program recently started working with state and county authorities in several states to determine if real estate transfers reported to them also constitute unreported gifts for federal tax purposes. Although a tax may not be due, a gift tax return may be required for real estate transfers above the annual exclusion amount. Penalties will be considered on all delinquent taxable gift returns filed. If you're contemplating a gift of your home to your children, or a strip shopping center or other commercial property to a family trust, expect an audit if you don't file. PP