

PRACTICAL PLANNER NEWSLETTER

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PRACTICAL PLANNER

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PLANNING POTPOURRI

Caution When Leaving. You don't have to camp at Crystal Lake to get the ax. But if you do, read the fine print before using any of your old scripts. Review all the documents you signed with an employment attorney: employment agreement, firm manual, non-compete, etc. Have a lawyer review any termination agreement before you sign. Are you subject to a non-compete, non-disclosure, gag order, or other restrictions? What do they mean to your job search? Has your lawyer reviewed the reasonableness and enforceability of the restrictions? Watch out for misappropriation of confidential proprietary information which belongs to your former employer which may have to be returned and not used. This might apply even if you're not subject to a non-compete. This could include: customer contact information, electronic rolodexes,

files, lava lamps, documents, etc. Try to forward a few quick emails to yourself or downloading the boss man's hard drive onto a memory stick, and Jason could be after you. Big Brother can detect these actions with pretty routine steps.

Knowing the parameters cannot only help you evade Jason, but might save the interview with a new employer by showing them you've been careful, responsible, and won't be bringing them new issues. Given the competition in the employment market, you don't want the other candidate to have done their homework better.

In spite of certain restrictions, you may be permitted to contact your customers directly and inform them that you have left your position because of a reduction in force (if appropriate) ra-

ther than letting them surmise that your departure was for more nefarious reasons. You may have to look up customer phone numbers on line rather than using contact information misappropriated you're your former employer. Ask your lawyer what you can say given the restrictions that may apply. You might be limited to explaining your departure, and that you will be in touch and will let them know where you land. If you're subject to non-solicitation restrictions, you might advise customers that you're not allowed to solicit them as customers for X amount of time (the time of the covenant) and that you want to abide by your agreement, but



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in plain English*

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GOLDILOCKS TRUSTS SAVE THE DAY

Summary: Economic volatility can be a boon and bust for your estate plan, and in particular for the trust funded on your death (whether under your will or a revocable trust). So if you're not sure if your porridge, or the markets, will be hot, cold or just right, try the Goldilocks approach. Each bear gets its own trust (bulls too if you remember what they look like). Your estate planner might call this the "double pecuniary", but Goldilocks and the bears seems more apropos.

Impact of Market Changes on Trusts Under Your Will. What happens in a down market (cold porridge) when values decline between the date of death and the date of funding the bequests under the will? Assume you have a will with a pre-residuary pecuniary marital bequest, and the residuary will be the bypass trust. A "pecuniary" bequest is a fixed dollar amount, whether stated as a dollar figure or by formula. If the value of the estate declines between the date of death and date of funding, the entire estate could inure to the marital trust, and there will be no value/assets passing to the residuary to fund the bypass. What will be the impact on bypass trust heirs (e.g., what if bypass includes as beneficiaries children of several prior marriages)? If the market recovered by the time the second spouse dies, all would be includible in the surviving spouse's estate and none would have been sheltered in the bypass trust. How do you preserve some benefits of the bypass amount of the pre-deceasing spouse in light of the uncertainty as to whether the estate will increase or decrease in value post death and prior to funding the testamentary trusts? The double pecuniary approach can provide a possible solution. This approach requires your will to include 3 trusts, kinda like the 3 bears.

The Three Trusts. Just like Goldilocks, you want your trusts not to hot, not to cold, but just right, no matter what the stock market does. The Three (3) trusts would be drafted as follows: (1) A pre-residuary pecuniary marital trust; (2) A pre-residuary pecuniary bypass trust for somewhat less than the applicable exclusion amount (\$3.5M in 2009); and (3) The remainder to the residuary (what's left) bypass trust. Here's the key: As the pre-residuary bequests are both pecuniary bequests, post death changes in the asset values, will be shared pro-rata

between the trusts. This would preserve at least some of the bypass amount in a down market (cold porridge). In an up market (remember that concept?), all of the increase will pass to the residuary bypass trust, thereby sheltering more assets from tax on the second death.

Sample language for your will could include the following for each of the 3 Goldilocks trusts:

Pre-residuary pecuniary Marital trust. "I give, devise and bequeath to Pecuniary

QTIP Trust the smallest amount necessary to reduce my estate tax to zero."

Pre-residuary pecuniary bypass trust. "I give, devise and bequeath to Pecuniary Bypass Trust the amount that equals the applicable exclusion amount available to my estate, reduced by Two Hundred Fifty Thousand Dollars (\$250,000) [or some other amount]"

Residuary Bypass Trust (i.e. everything else). "I give, devise and bequeath the re-

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CHECKLIST: INSURANCE REVIEW

Summary: Insurance is a key safety net for many. If your portfolio is down by 40%, your insurance may be even more vital. The economic meltdown has had profound impact on insurance coverage itself and the companies issuing your policies. NYC based insurance guru Lee Slavutin, of Stern Slavutin 2, Inc., offered the following checklist of ideas to help guide you in reviewing your life insurance.

Risks.

You face at least two important risks relating to your life insurance portfolio in 2009 and beyond:

1. Policy lapses because of investment losses in the stock market. This will be an issue for some variable life policies invested in equity sub-accounts. Variable life is a type of life insurance in which you can select mutual-type funds from those offered by the insurer within your policy. You thus assume the benefits, or lately the risks, of the performance of those funds. If the funds were hammered in the market decline, you policy will have been as well.

2. Insurance company impairments or failures.

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...GOLDILOCKS TRUSTS SAVE THE DAY

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siduary of my estate to the Residuary Bypass Trust.” You could combine this bypass with the above bypass but it would ruin our Goldilocks paradigm.

Using the sample language above here’s how your “new and improved” will plays out. **Up.** In an up market, all the upside goes to residuary share so if values of the estate assets increase above \$250,000 after the date of death, this increase will benefit the Residuary Bypass Trust. **Down.** In a down market, if estate assets decline post-death, the estate will lose the residuary bypass trust. **All Around.** This is a funding formula that might warrant consideration in light of volatility. There is no rigid time as to when the executor must close the estate; so long as there is some basis your executor can keep your estate open. If the markets recover, your executor can capture the upside in the Residuary By-

pass Trust. **The double pecuniary formula attempts to maximize the benefit of the bypass amount in either type of market conditions.**

Example 1 – Typical Estate Plan:

Assume a \$10M estate at death. No post death change in value. In a bypass/marital will: **First part is a pecuniary marital.** The absolute minimum without incurring an estate tax. What is the smallest you can give without estate tax? \$6.5M. **The residuary bypass would be funded with \$3.5M since that is the maximum federal bypass amount.** When actually drafting the document the dollar figure would not be used, rather a reference to the amount that can pass with federal (or perhaps state) estate tax.

Example 2 – Double Pecuniary Format:

Assume a \$10M estate at death, no post death change in value. **First part is the pecuniary marital which would be the same as above: \$6.5 million.** **Bequeath to a pecuniary pre-residuary bypass trust, something less than \$3.5M.** For example, bequeath \$250,000 less than the maximum amount permissible to give to bypass trust. Therefore, \$3.25 million will pass to the pecuniary pre-residuary bypass trust. **The balance is your residuary estate, which is bequeathed to the residuary bypass trust (\$250,000).**

Example 3 – Double Pecuniary in an Up Market:

Estate on death was \$10M, and at time of funding was \$12M. **\$6.5M pecuniary pre-residuary marital trust.** **\$3.25M to pecuniary pre-residuary bypass trust.** **Residuary bypass trust is \$12M-\$6.5M-\$3.25M = \$2.25M.** In an up cycle your estate would fund the excess into a residuary bypass trust and all the growth will be outside the surviving spouse’s estate.

Example 4 – Double Pecuniary in a Down Market:

Estate at death

\$10M and at time of funding was \$6.5M. **In a traditional will.** \$6.5M would pass to the marital trust and there would be nothing for the bypass trust. **In a double pecuniary will the following would occur:** **Residuary Bypass Trust is zero since there are insufficient assets.** **Since**

*Terms in red defined in the
glossary at
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there is less than the \$9.75M required by the two pecuniary formulas to fund both the Pecuniary QTIP Trust and the Pecuniary Bypass Trust it must be determined how the \$3.5M decline in the estate’s value from \$10M to \$6.5M is shared (i.e., allocated between the two trusts). **The two pecuniary trusts have to share ratably in the \$6.5M estate assets since insufficient value remains to fund both.** They share the decline in estate value proportionately. **Pecuniary QTIP Trust:** $\$6.5M / (\$6.5M + \$3.25M) \times \$6.5M$ estate value at funding = \$4,333,333, is allocated to the Pecuniary Marital Trust. **Pecuniary Bypass Trust:** $\$3.25M / (\$6.5M + \$3.25M) \times \$6.5M$ estate value at funding, or \$2,166,667, is allocated to the Pecuniary Bypass Trust. $\$4,333,333 + \$2,166,667 = \$6,500,000$.

Other Considerations. **State estate tax might have to be paid.** **If you use appreciated assets to fund a pecuniary trust you’ll trigger income tax.** **Does the double pecuniary really accomplish your objectives?**

Conclusion. You’d impress your golf buddies on the 7th green dropping your new plan..... But, does it

...CHECKLIST: INSURANCE REVIEW

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Reviewing and Monitoring.

Monitoring your insurance policies will require greater vigilance in 2009. Here are some of the steps you should take:

✓ Evaluate more frequently (e.g., monthly or quarterly) your variable life insurance policy investment accounts and values. What is the performance of the assets supporting the policy cash value. What has been the investment performance been of the policy? How does this compare to the performance of comparable policies?

✓ Re-test your policies. This means obtaining a current “in-force illustration” for each of your policies. This is a projection of where your policy is today and how it will perform based on its current status, not the assumptions used when you first purchased it long ago. Those assumptions, especially in light of the recession, may not be panning out. Use this information to determine if the current premiums you are paying are adequate to maintain the policy.

✓ If you need to goose up your premiums, can you afford to do so? If the policy is held in a trust, consider the need to have additional gifts made to the trust. Have your estate planner determine whether there are adequate demand (Crummey) powers to permit those gifts to qualify for the annual gift exclusion (now \$13,000/year). Can you afford to make maximum gifts? Do you have more importance uses for those gifts?

✓ More frequent checks (e.g., monthly, or even weekly you have reason to be worried) on the ratings for the insurance company that issued your policy. Consider the ratings of all the rating services, not just one. You can obtain ratings by visiting the rating agencies’ web sites. This will requires

you to register, but there is no fee to obtain current ratings. Some companies have already been downgraded, and others have been taken over by state regulators (e.g., Standard Life Insurance Company of Indiana and Penn Treaty Network America Insurance Company). The agencies and their websites are:

AM Best – www.ambest.com

Fitch – www.Fitchratings.com ;

Moodys – www.Moodys.com.

Standard & Poors – www.standardandpoors.com.

✓ Understand the limitations of the

ratings. The rating services are not perfect, but can be a valuable source of information on the financial strength of the insurers. If a company is downgraded and you are thinking of replacing your policy with a new policy from another carrier, review carefully the following “replacement” issues: Is replacement really in your best interest? Are there large surrender charges? Compare the surrender value with the account value to see if there is a penalty. Are you insurable at favorable rates? Never cancel an old policy until you have replacement coverage in place. You can pay a modest initial premium to put the new policy into effect and later get the money from the old policy trans-

RECENT DEVELOPMENTS

Loans on Your Life Insurance. Your back is up against the wall, and you borrowed on your life insurance. Caveat Emptor – the loan can have some nasty tax consequences if the policy contract is terminated. The insured borrowed on the policy and did not pay interest on the loan until the loan balance and accrued interest increased to the point where it exceeded the policy cash value. The policy provided that if the outstanding debt exceeds the cash value that the policy will be cancelled 31 days after a notice is sent to the insured. That cancellation requires recognition of gain. 72(e)(1)(A)(i), (5)(A), and (C). *Reinert v. Commissioner*; T.C. Summ. Op. 2008-163.

Liable For Partner’s Misdeeds. The recession has flushed out lots of bad boys. Unfortunately, you may only have to look down the hall. The fall of the NYC law firm Drier LLP highlights another landmine many people will have to contend with. If you were partners with someone who defrauded customers, stole money or committed other misdeeds as a partner, you may be on the hook regardless of your innocence. You might have to return money you thought you earned from work that was not completed. If you were held out to the public as a partner, even if you had no signature authority over bank accounts and did nothing wrong, you still may have had “apparent authority” to act. You have an obligation to monitor your partners. How far that obligation extends, and the scope of your liability, may turn on the partnership agreement and other terms of your relationship. You could be held liable for your partner’s wrong doing. Bottom line: if the economic turmoil has brought to light misdeeds of one of your partners, don’t assume you can duck the fallout. Get legal counsel and determine the scope of your liability.

Tax Refunds Not Counted in Determining Child Support. Double dips are for ice cream cones, not child support calculations. You can’t count income and tax re-

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

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