PRACTICAL PLANNER NEWSLETTER
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More Info:

- **Seminars:** **PLIs 42nd Annual Estate Planning Institute September 12 and 13, 2011 in NYC and New Brunswick, NJ and via webcast. Contact Meghan C. Forgione, Esq. via Email mforgione@pli.edu or call 212.824.5839 for info. The program will cover in depth each of the topics in the lead article and more.**

Special Thanks: Thanks to Neil Mendelowitz, Rich Greenberg and Pam Benson for their baseball consultations – they had a tough job all, but they pulled through. Pass the peanuts.

Creative solutions that coordinate all your planning goals:
· Estate · Tax · Business · Personal
·Financial ·Asset Protection

PLANNING POTPOURRI

7th Inning Low Interest Rate Environment: The July AFR is about 2.4% and lower rates can be charged on loans. That's like getting A-Rod for a mere $10M. Current low interest rates and the 2010 Tax Act create opportunity, e.g. sales to a grantor trusts. With low interest rates consider forgiveness of loans and charitable lead trusts. 7th inning stretch get a beer and run back.

8th Inning Post-Death Elections: 6166 election is a great opportunity for clients with real estate or their own businesses. You have to work hard sometimes to get an estate into a structure to qualify to defer estate tax for 14 years. Qualifying also permits paying interest at a low rate of 45% of the then applicable IRS interest rate, although without an estate tax or an income tax deduction for the interest paid. It is a way to avoid the fire sale on businesses or real estate. Section 303 redemptions, disclaimers, and even going to court to reform a will or trust, are all important to consider. Election of fiscal years for estates may provide an opportunity.

9th Inning Top Domestic Partners: New York recently passed a gay marriage act. This is a developing area of the law with fascinating issues. Same sex divorce is a developing area. Domestic partners won't qualify for joint federal income tax returns, the estate tax marital deduction and so on, because of DOMA. The Federal government said it won't pursue DOMA so this raises even more issues. Few states recognize same sex marriages. Some recognize a marital deduction for domestic partners for state estate tax purposes. Caution is in order. It's harder to get out of a marriage then to get out of a non-marital relationship so making a transfer to take advantage of the current $5M gift exemption – you need to think about. Family members are often unhappy about the relationship and the likelihood of will contests and litigation is significantly greater than for married couples.

9th Inning Bottom* Internet Age: When you gave someone rights in your book does it include electronic rights? When you interview a client for an estate plan do you ask them for access codes for computers? Do you know what to do with it? Your client's life is in a machine and you may not get access to it. What is the value of intellectual property? Transferability is also an issue.
***Yeah we needed the bottom of the 9th so readers could experience a walk off win with Sandy's exciting planning ideas.** PP**

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PRACTICAL PLANNER

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD

SCHLESINGER ON PLI 42ND ESTATE PLANNING

Summary: Who wouldn't want to watch CC Sabathia in action! Well, we caught up with Sandy Schlesinger, Esq. in the estate planning bullpen and asked him to pitch a few planning pointers that will be discussed in depth at the upcoming Practicing Law Institute's 42nd Estate Planning Institute. So get your beer and peanuts and enjoy the 9 inning estate planning extravaganza.

1st Inning Recent Developments: The most dramatic changeup in years was the 2010 Tax Act. Its impact over the next 2 years is a wild pitch. This new season requires every estate plan with a substantial amount of wealth to be revisited especially in light of the $5M exemption. Any document with a formula may no longer be appropriate. Assume you signed a will in 2008 and Husband had $8M and Wife had $2M. At the time the unified credit was $2M. A formula clause would have meant $2M in a bypass trust on Husband's death and $6M in a marital trust (QTIP). Assuming no change in assets wife would have $6M in a QTIP + $2M in her estate. If she died in 2011 she would have $5M of exemption and a taxable estate of only $3M (out of $10M). This plan might have been a good plan at the time. But in 2011 this plan could be a foul ball. The formula clause $5M goes into a bypass trust and Wife gets $3M in a QTIP. Wife has $2M of her own and her estate. But what if the bypass trust excluded the spouse? This might have been fine at $2M. But now at $5M the kids from a prior marriage get $5M and the spouse only $3M. This might not have been the game plan. Based on these numbers in some states the wife might have a spousal right of election. These are the hidden issues in the new tax law.

Many estates have GST trusts to take advantage of GST exemption. This has increased for 2 years to $5M. If your will has the formula from 2008 when the GST exemption was only $2M and now it is $5M you might be leaving more to grandchildren than to your children. In fact with the same $10M estate from the above example, you could leave it all to your grandchildren!

Portability is a sham since it's only available in 2011-12. It gives some immediate gratification but not the long term security of a bypass trust. The bypass trust gives you more protection: asset protection depending on how drafted and the jurisdiction. Main advantage is when you carve out bypass trust, no matter how high it grows, it is not taxable. In contrast with portability the amount exempt from tax is fixed on the first death. With portability you can't really control the ultimate disposition of the assets. You could use a will contract but there have been too many cases challenging the enforceability of the contract and what assets are covered. See *Matter of Murray* NYLJ April 27, 2011, 2nd Dept. 2011 which addressed similar issues. There are also issues concerning the survivability of the spouse and the growth of assets. There are a lot of flaws in portability.

2nd Inning Generation Skipping Tax: Finding the sweet spot is tricky with the fluctuations in the GST exemption. The idea of planning for GST with a $1M GST exemption is in a different league then GST planning with a $5M or $10M if a husband and wife team hit double. You don't want to make poor children and rich grandchildren. Consider multigenerational trusts, but include the child not just the grandchild, to avoid triggering immediate GST. In a discretionary trust the goal is to use it for a skip person (grandchild) but if your son

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CHECKLIST: IDIGT DIVORCE

Summary: IDIGT (pronounced: "I dig it") - Intentionally Defective Irrevocable Grantor Trust has become the fav activity of the ultra-wealthy not only cause it makes great talk on the links, but it can provide an incredible array of tax and asset protection benefits. Rather than extol the benefits of this technique, let's look at what happens when Jr. gets divorced and Jr.'s ex wants to Dig It too.

√ Fiduciaries. Who are the fiduciaries of the trust? Some IDIGTs are structured with an institutional trustee. That's a good thing. But many parents insist on naming Jr. as a fiduciary of his own trust. The ex will carefully evaluate what powers Jr. has in endeavoring to share in the IDIGT nectar. If Jr. is an investment adviser making investment decisions that might not provide much of a toe hold. But what if Jr. were a trustee with broader powers? Might that open the door? What if Jr. were given the power to distribute to himself?

√ Distribution Standards. What distributions standards does the trust agreement provide? Having an independent institutional trustee with sole discretion to make distributions is best. Could a court force an institution to make a distribution to Jr. to fund divorce obligations when the

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has financial adversity you may want that money available to help him too. Exemptions went up during a period when net worth declined due to the economy. If people don't review their documents, it could be disastrous.

3rd Inning Elder Law: Medicaid planning should be left to real experts and should not be something to dabble in. The law changes almost every legislative session. It is a combination of not only federal and state law but often county practice. People need to get a local adviser that specializes in this given the intricacies of Medicaid qualification. Do not inadvertently leave a legacy that might disqualify someone for Medicaid or SSI. Grandparents may not know the status of a special needs grandchild, or it may be too painful for them to address.

4th Inning Asset Protection: You generally cannot force a discretionary trustee to distribute. *See In Matter of Escher*, 438 N.Y.S.2d 293 (1981). Asset protection planning is a moving target. You have domestic and offshore planning. The US and in particular the IRS attitude towards offshore accounts is worrisome for asset protection planning. Some people have become concerned about all the filing requirements and that it has cast a negative view. Domestic asset protection – Delaware as an example is comfortable. The state is quick to fix any problems that arise in the law. Domestic asset protection generally requires a corporate trustee, but some clients are uncomfortable. This is a developing area. There's the issue about the enforceability of one state's judgment in another. Andy Pettitte was known for his moves to 1st base which were the closest a pitcher can get to committing a balk without violating the rule. Finessing asset protection planning requires similar precision.

5th Inning Charitable Planning: If anyone says charitable giving will be increased because of the exemptions, they're missing the point. The increased gift and estate exemption has decreased the tax incentive for giving. This has a negative impact on giving, especially testamentary giving. The government has traditionally favored voluntarism and this undermines it. All our usual charitable giving techniques are still there, just used less. The big thing in charitable giving is being able to give up to $100,000 if at least 70 ½ years old from an IRA without any income limit. It is a great technique but right now only applies for one year, 2011. Hopefully it will be extended. IRA donations count toward your required minimum distribution (RMD). You don't get a charitable deduction, but it is not included in income. The donation must be to a public charity. This is not the big number compared to large planned gifts but if you consider the number of people who might take advantage of it overall this could be huge.

6th Inning Distribution Strategies: Fiduciaries face a real issue as to how to invest in such a complex and volatile investment world. In the old days there was an approved or "legal" list. Now you have an endless array of possible investments and under the Prudent Investor Act there is no investment that is per se imprudent. That takes a lot of hand eye coordination. We are seeing a growth of litigation against fiduciaries. They must study the instrument carefully. There are a lot of lawsuits about non-diversified portfolios. Just because the stock came out of a long term family holding is not enough. Another area of interest is a unitrust or power to adjust. These rules vary considerably by state. Because beneficiaries are not getting the income return they need because of low interest rates, we see more people using unitrust payments which are statutorily between 3-5%. But what happens if interest rates spike? They could be getting much less than appropriate years from now. The unitrust approach could prove shortsighted. If you have a power of invasion you should not have to use the unitrust or power to adjust provision since the power to invade was meant to cover this. Transfer tax consequences could be a problem without an independent trustee. If the governing document does not provide for an ascertainable standard, it is a tougher job for the fiduciary. Flexibility in administration often means reliance on a bank that in many cases

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Review: Andrew Wolfe, CPA, Esq.

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...CHECKLIST: IDIGT DIVORCE

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trust agreement itself doesn't obligate the institutional trustee to do anything? On the other end of the rainbow many clients proceed AMA (Against My lawyer's Advice) and insist that the trust give Jr. the right to distribute to himself pursuant to an ascertainable standard (to maintain his lifestyle). Might the Ex get her toe in that door? If Jr. can maintain his lifestyle from the trust, shouldn't that lifestyle include paying for his Ex? Safer trusts continue for life, but some pay out the trust to Jr. at some specified age. According to Murphy's Law that distribution birthday is usually just prior to the Ex filing so she might end up getting some of Jr.'s trust birthday presents.

√ Actual Distributions. What distributions have actually been made? Yes, odd for tax folks to actually consider reality, but what exactly has that trust been paying for? Shocking as it might seem some trusts, especially when Uncle Joe is trustee, pay stuff the trust never authorized. The Ex may ask for trust bank statements and demonstrate that the Trust has been making regular distributions to Jr. for a decade to support his ne'er-do-well habits? Might a court consider that a pattern to justify a result that is more supportive to the Ex?

√ Look Under the Hood. Well what does that IDIGT own anyhow? In many cases mom sells interests in the family business or real estate LLCs to the trust. What does that have to do with divorce? What does the operating agreement for the LLC provide for? Some operating agreements mandate certain minimum distributions (to qualify gifts of LLC interests for the gift tax annual exclusion). Others might contain a mandated distribution approximating state and federal income tax rates to avoid phantom income. This is when a member might have to report income on her tax return but not get a cash distribution sufficient to pay the tax. If the operating agreement mandates distributions and there is a history of cash flow might that create a different result for the Ex's attack? Contrast that with an operating agreement that has no requirements for distributions and has harsh restrictions on transferability. If cash flow has to end up in the trust then Jr. may lose the belt and have to rely only on his trust suspenders (yes, Brooks Brothers sells them in plaid). If the trust has cracks in its armor that could be trouble for Jr.'s matrimonial negotiations.

√ Really Look Under the Hood. Well what does that LLC actually do? What does the tax return and financial data for the LLC show? Does Jr. have a car, cell phone, travel and entertainment and other goodies run through the LLCs books? Might that discovery enable the Ex to torpedo the entire structure on the basis that Jr. was using and abusing it all? What about compensation? Might Jr. have taken no compensation from the family Widget LLC and instead let all profits flow through the LLC to the trust in an attempt to characterize all economic benefits as passive return on immune assets? Might the court believe that Jr. should have been paid a fair wage from the LLC for running the Widget business? Might that fair wage look like something that should be considered for alimony and child support?

√ Smell Test. If Jr. and all involved with the trust disregarded all the formalities might the Ex increase the likelihood of piercing the trust? PP

RECENT DEVELOPMENTS

Florida amended its power of attorney law. Since most folks living in high tax decoupled states (e.g. NY/NJ) claim to be domiciled in Florida this change in law will affect more than just Floridians. Powers must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public. 709.2105. Powers signed before 10/1/11 will be grandfathered. A power executed in another state which does not comply with the new Florida execution requirements is valid if, when the power of attorney was executed, it complied with the law of the state of execution. A third person who is requested to accept such a power may in good faith request, and rely upon, without further investigation, an opinion of counsel as to any matter of law concerning the power of attorney. 709.2106. Might this mean that any bank or person in Florida asked to accept a power prepared in, say NY, will only do so if they are provided a legal opinion that the power was valid in NY? Yep. Might that make the cost and time delays of using a NY power in Florida significant. Yep. Does that mean that if you're a New Yorker wintering in Florida you might want to have a Florida compliant power just in case of an emergency? Yep. Powers signed on or after Oct. 1, 2011 may not be contingent on some future event (e.g., incapacity of the maker). Powers signed prior to 10/1/11 are grandfathered but catch this: a springing power (conditioned on the principal's lack of capacity) is only exercisable upon delivery of an affidavit of a physician that must state: (1) the physician is licensed to practice under chapter 458/459 (what's that mean to a NY doc?); (2) the physician is the "primary physician who has responsibility for the treatment and care of the principal"; and (3) the principal lacks "the capacity to manage property." 709.2108. What doc will be comfortable signing that? How much time will this take? When a Yankee fan hangs out in Marlin territory they might want to get a Florida power to avoid this. Chapter 709, Florida Statutes, ss.