PRACTICAL PLANNER NEWSLETTER
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More Info:

◦**Seminars-Chronic Illness Planning:** 4/23 **Kansas City**: ▶KC Bar 12 noon Call: Jen Kiper 816-474-4322; ▶NMSS 5:30 Judy Oberheu 913-432-3926; 4/30 **Las Vegas**: ▶Estate Planning Council noon call Kristen Simmons 702-734-1122 **Denver**: 5/2 ▶NMSS 5:30pm Call Carrie H. Nolan 303-698-7410; 5/3 ▶Estate Planning Council South Eastern Denver 8 am Call Arlene Barringer 303-757-4342; ▶Women's Estate Planning Council 5:30 pm Call Nora Roth 303-864-7219; 5/4 ▶NMSS 9:30 am Call Cathy Castor 303.698.6100 ext. 15264; ▶AAA-CPA 12 pm call Bev Sandoval 303-741-1111 x 136 **St. Louis**: 5/8 ▶BAMSL 8 am CallSteve Campbell 314-421-4134▶AAA-CPA 12 pm call Joe Cordell (314) 587-3684.

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

Planning Potpourri

2012 — Act Now Continued….

There may be better approaches. If you and your spouse/partner both set up trusts, the trusts need to be sufficiently different to avoid the IRS arguing what is called the "reciprocal trust doctrine" -- that they are so identical that they should be "uncrossed" so that the trusts are taxable in each of your estates. That would entirely negate the planning. Differentiate the trusts using different powers, different distribution standards, set them up in different states, sign them on different dates, use different assets, print them on different color paper (just kidding on that one), etc. If you own all the assets to be given can you set up a trust and gift $10.24 million and have your spouse treat the gift as if it is ½ his thereby using up his exemption? While spouses can gift split, if your spouse is a beneficiary of the trust which is the recipient of the gift, that is a no-no.

What if you gift $5.12 million to your spouse, and he then gifts it to his trust to avoid the gift splitting issue? Nice try but maybe no cigar. The IRS could attack using the "step transaction doctrine." If the IRS wins they might treat your gift to your spouse, and his gift to the trust, as an indirect gift by you to his trust. Thus, you'd be treated as making two $5.12 million gifts and owe about $1.8 million in gift tax. Ouch! There has never been a time in history when so many taxpayers may feel so compelled to make so many large transfers in such a short time period. Big brother will be watching so more caution and planning then ever before should be exercised. You want to fund a FLP or LLC with appreciating assets, make gifts and secure discounts. If the assets are not inside the entity long enough the IRS will argue that the gifts were of the underlying assets – no discount.

Point 7: Operate the Plan and Trusts Right. Administer the plan and trust properly, and monitor it by meeting not less than annually with all your advisers to make sure all formalities are adhered to. Be sure the CPA is in the loop to monitor the gift and income tax returns so they all properly reflect the reality of the transfers. Revise asset allocations to coordinate asset location decisions.

Bottom Line: Just Do It! Time is fleeting. Everyone should review planning options for themselves and their family/loved ones to ascertain what might be beneficial and how to expedite the process so planning is completed in advance of year end, preferably before the election. PP

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PRACTICAL PLANNER

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

2012—Act Now!

Summary: Unless you're hiding under a rock, you've been bombarded with email newsletters, mailings and more from your CPA, investment adviser, the 100s of people who want to be your investment adviser and more, cajoling you to make gifts before the end of 2012. Well this article is one more of 'em. And you should pay heed. While the main drift of this message is clear: "make gifts before the law changes in 2013." There are a number of important nuances to the message that the media blitz has not addressed: Lot's of people, not just the ultra-high net worth folks, should be doing this. So if you've tuned out these messages because you're not a zillionaire, tune back in! So, "I'll bet you think this song is about you. Don't you? Don't you?" Well Carly, it is! No one should just make a gift, the gifts should be in trust (your lawyer won't make any money on the deal if it's just a simple gift!). These trusts raise a host of issues, many of which have special implication to 2012 planning. So, we're going to try to convey these key points in a really succinct amount of space, but hopefully enough can be conveyed to motivate you to act now, and act prudently.

Point 1: Uncertainty shouldn't be an excuse for inaction. If the weatherman says 20% chance of a horrible storm, you'd carry an umbrella. Uncertainty may also mean opportunity. If you don't act now 2013 is scheduled to bring a $1 million exemption and 55% rate. President Obama has continued to propose estate and gift tax changes that will undermine much of the planning arsenal, making his proposed 45% rate and $3.5 million exemption far more costly than most imagine. Consider that the left end of the tax continuum. True, the future is uncertain. Perhaps the Republicans will sweep the election and repeal the estate tax. Consider that the right end of the tax continuum. If you don't act now and the left end materializes you (not only your heirs) may lose out big time. If the right happens worst case you've wasted the cost of the planning, but have you? The trust planning that will serve your estate planning needs will also provide asset protection benefits, including divorce protection for heirs, and better control and management of your assets. So the planning in the best tax case scenario won't be for naught, you'll just have one less benefit. And by the way, even if the estate tax is repealed (and ya shouldn't hold your breath hoping for that one) the gift tax may remain intact with a $1 million exemption even under Republican control. Most folks forget that the gift tax is an integral backstop for the income tax, not only for the estate tax. Look at what happened in 2010 with the gift tax.

Point 2: Planning is not only for Richie Rich. If you have a non-married partner a $1 million gift exemption in 2013 may make it costly to shuffle ownership of assets between you and your partner. Everyone, not just surgeons, should be concerned about asset protection. Nothing anyone in Washington does will change the litigious nature of our society. About a score of states have decoupled from the federal estate tax system so that lower amounts of wealth may trigger state death tax. A simple gift today might be all it takes in many situations to reduce or eliminate state estate tax. Use the current favorable tax environment to shift assets into protective structures before the party ends. A $1 million gift exemption will render much of this planning costly, impractical, or impossible. Remember at midnight 12/31/12 the carriage turns back into a pumpkin and the ride is over.

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Checklist: Capacity

Summary: By 2030 it is estimated that 1/5th of all Americans will be age 65 or older. Age brings challenges, that are often compounded by more health challenges. These make confirming that you have adequate ability, called "testamentary capacity," to sign a will more important. But even if you're sufficiently competent, were you unduly influenced to leave your son/caretaker double what his siblings get? Consider:

√ Many chronic illnesses, in addition to physical or other symptoms, are coexistent with depression. Depression can be part of the symptoms of the illness itself, or as the result of the impact of the illness on the client's quality of life, or a consequence of medication used to treat the illness, or a combination of all three factors. Depression may affect your objectives, capacity, and risk for being unduly influenced. With depression sleep may be impaired, you may see the world through dark colored classes, you may have little energy and no ability to concentrate, etc. Depression may make you more susceptible to undue influence. If concentration is significantly impacted, your cognitive function may also be affected.

√ Consider who is making the

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...2012— Act Now!

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Point 3: **Start with a Financial Plan.** While your estate planner might think he or she holds the keys to the planning kingdom, this kinda planning should have at its foundation a well thought out financial plan. Does this suggest your wealth manager should be driving the bus? Nah, but they should be a co-pilot. How much can you afford to give away and be really assured that you won't be asking the kids for a loan? Which assets can or should you give away? Do you need additional life insurance for coverage in light of components of the plan? Do you need access to the money you give away and if so how much? This analysis is meant to insure that you're left with more than adequate assets to maintain your lifestyle after the transfers. This can deflect an IRS challenge that you had also an implied understanding with the trustees (or managers of an LLC) to get money back because you left yourself with insufficient resources. It can make it harder for a creditor to prove later that your transfers constituted a fraudulent conveyance.

Point 4: **Make Gifts in Trust.** Whatever amount you determine to give away, give it to one or more trusts, not outright to an heir. Trusts provide asset protection, divorce protection, preserve generation skipping transfer tax benefits (in English they can keep the assets out of the transfer tax system forever). Trusts can be structured as "grantor trusts" so you can sell assets to them without triggering capital gains tax and you can pay the tax on trust income and gains thereby growing the value of the assets inside the trust faster while shrinking the assets left in your name, thus reducing assets reachable by creditors or subject to estate tax. Both of these bennies are on President Obama's hit list, so get 'em while you can. Perhaps the biggest vig of gifting to a trust is you can retain the ability to benefit from the assets in trust. Say you set up a trust for your spouse/partner and all future descendants. So long as your spouse/partner is a beneficiary you can indirectly benefit. Alternatively, you can set up a Domestic Asset Protection Trust (DAPT) and be a beneficiary of your own trust. Even if you're mega rich, but much of your wealth is concentrated in a business, be very cautious about cutting off your access to trust assets. Don't forget the harsh economic lessons of 2008-10+.

Point 5: **Sell Assets to Trusts.** While gifts can take advantage of the current law, sales of assets to trusts can also provide a huge benefit now, that may also disappear when the ball drops in Times Square. If you sell 45% of your interest in a family business valued with a 40% non-marketability and lack of control discount, that's huge leverage. Discounts may head the way of the Dodo bird. Since few trusts will have sufficient cash to pay for the purchase these sales are structured as note sales. Interest rates remain at historic lows. So transfers well beyond the $5.12 million are "can do." For many folks the better approach is a technique described in prior newsletters called a Beneficiary Defective Irrevocable Trust (BDIT) that will depend on this sale technique. Sell 'em while you can!

Chronic Illness Planning Speaking Tour
April 19 to May 13: presentations for ,
NAEPC estate planning councils, AAA-CPA ,etc. in Kansas City, Albuquerque, Las Vegas, Denver, St. Louis and more.
See Www.ChronicIllnessPlanning.org and www.RV4TheCause.org For details.
Follow our facebook page
www.facebook.com/rv4thecause

Point 6: **Design the Trusts Right.** The trust or trusts you'll use should not be off the rack. This is the time to step up to the custom tailored suit. Navigating Scylla and Charybdis is child's play by comparison. Some of the issues to consider include:

Should you be a beneficiary or not? If yes, there are precautions to take and only certain states in which the trust can be established. Is there any reason the trust should not be a grantor trust? Unlikely, but ask. If it is a grantor trust what happens if there is a big capital gain? Example – you transfer your family business to the trust and 5 years from now sell out to a public company for big bucks. You have to pay the gain but the bucks are in the trust. Some practitioners use a tax reimbursement clause but caution is in order. These clauses have to be handled correctly and the trust must be in a state with appropriate laws. Also, worrisome is that if the trustee just so happens to reimburse you, the IRS might argue that you had an implied agreement with the trustee to reimburse you for the capital gains tax on

Review: Andrew Wolfe, CPA, Esq.

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...Checklist: Testamentary Capacity

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assessment of your competency (capacity). Many primary care physicians don't have the expertise to make these diagnosis, yet often lawyers rely on reports from primary care physicians to support their ultimate legal determination as to capacity. For patients with known depression, less than 25% were documented as being depressed in their primary physicians' charts. Less than 10% were taking medication for depression. The statistics concerning the diagnosis of cognitive impairment are similarly weak. For a proper diagnosis, a number of different disciplines might be tapped. The basic analysis should include a bio-psycho-social framework. It is important to look at the entire person and not just a part. Evaluating medical records might be a good start, but when a full picture, including the patient's social environment, is obtained, everything is put in context.

√ The testing process itself may yield a false positive. If someone age 85 is put through a 6 hour neuropsychological test, at the end of the test his performance could be affected as a result of the fatigue caused by the testing process itself!

√ How at risk are you to undue influence? What can be done to ascertain or corroborate you true wishes? Even if there is a strong risk of undue influence, if you've been consistent for decades (e.g., your will has always left your son a double portion), your wishes may be clear. The real challenge is in assessing the reality of undue influence if you're living with moderate dementia. While changes in your historical pattern of disposition of assets might suggest an issue, is it?

√ A court might find that you had sufficient capacity to make a will, but then disqualify the will because of undue influence. In re Estate of H. Earl Hoover, no. 73519, Illinois, 6/17/93. Since capacity is a continuum, even if capacity is diminished, it may prove easier to challenge the will by demonstrating undue influence.

√ In early stages of even Alzheimer's disease no one should assume that sufficient capacity does, or does not, exist. If the diagnosis was made by a primary care physician, what reliance is reasonable to place on the conclusion? What precautions should your lawyer take? The fact that you were prescribed a drug, such as Aricept, does not necessarily prove your cognitive status.

√ Competency is also situational. You may lack competence at one point in time, but you may be competent at another point in time. For example, you might feel so anxious in your attorney's office that you cannot adequately respond to the queries your attorney believes essential to the demonstration of adequate capacity. Perhaps your lawyer should have a therapy dog present and serve lots of great snacks to put you at ease! Documenting the situational impact on competency presents another type of challenge.

Thanks to Sanford I. F, MD, Clinical Professor of Psychiatry at the University of Chicago Medical School and William Andrews, Esq. of Santa Rosa, California. PP

Recent Developments

Obama Greenbook proposal: This calls for the reduction of the gift exemption to $1 million instead of the current $5 million. GRATs may require 10 year terms. GST tax will be imposed every 90-years limiting the dynastic trust planning so many are pursuing. Discounts, the nectar of gift tax leveraging, may be eliminated on transfers between family members. This would overrule Rev. Rul. 93-12 which states that fair value is a "willing buyer, willing seller" test for related parties. This may come about by new regulations under IRC Sec. 2704. Grantor trusts, the cornerstone of much of today's planning, are proposed to be hammered. This had not been proposed before. The law would provide that the assets of a trust that is a grantor trust for income tax purposes, would be included in your estate. This would Zap Zow Blam! *!*# (think Batman) many transactions including sales to IDIGITs. If you make a distribution from the trust it will be a deemed a completed gift at that time. The effective date for this provision is trusts created after the date of enactment, or for gifts made to such a trust after the date of enactment. So everyone should consider making large gifts now to grantor trusts to avoid this. While there is no assurance how grandfathering will work, and there is no way to guesstimate the likelihood of this even being enacted, acting now sure seems the best option. This change will zap Rev. Rul. 2004-64 which had held that the payment of the tax on income earned by a grantor trust is not an additional gift by the grantor. That will relegate one of the hottest tax burns to the dustbin.

Non-Married Couples the unfairness grows. So you can't get a marital deduction for gift/estate tax purposes, but now you cannot treat mortgage interest like you're separate! Home mortgage interests is only deductible for the first $1M mortgage and on $100,000 of home equity line debt. The Tax Court just ruled that unmarried co-owners can't each get a $1M/$100,000 amount since the limit