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Planning Potpourri

■ <u>Trust: Home State versus Delaware</u>: Most folks (and lawyers) tend to set up trusts in the state where they live and their lawyer practices. While it's what has been done for a zillion years, it may not be the grooviest approach. Compare NJ to Delaware.
■ DE has a directed trust statute, NJ does not. So in DE the trust document can name an adviser to direct the trustee on investments. DE has had this for over 100 years. This can be critical to holding a closely held business in a trust and still securing a top tier institutional trustee.
■ DAPTs (self-settled trusts — you set up and you're a beneficiary) have been permitted in DE since 1997. NJ doesn't recognize them.
■ Silent trusts are not sanctioned by statute in NJ (so if you're a trustee in NJ, have you been providing adequate disclosure to the beneficiaries?) In DE if the trust says that trustee does not have to notify beneficiaries of interests in the trust the trustee can honor that. If the document is silent then DE trustees have to provide notice under the McNeil case which requires notice to current beneficiaries.
■ Perpetual trusts are allowed in DE. NJ also allows perpetual trusts. Score one for the Garden State! But has your state jumped on the perpetuities bandwagon? NY hasn't.
■ Pre-mortem validation of a trust is available in DE. NJ doesn't have a statute. In DE the trustee can send notice as to what the trust says to a beneficiary and then the beneficiary has 180 days to contest. If she does not do so that beneficiary is precluded from challenging it later. The more substantial the planning done in advance of the notice the better. So if the trust is not funded, e.g., trust only had $100, then after death $100M pours into it, the courts might not uphold it.
■ If you fund an irrevocable DAPT in DE during lifetime then your estate won't pay the NJ estate tax. Think of the savings with a DAPT!
■ DE offers more flexibility in drafting. You can set up a trust that directs a trustee not to diversify.
■ DE updates trust laws more often.
■ Income taxation of trusts is more favorable in DE. If a NJ resident sets up DE irrevocable non-grantor (DING) trust it may avoid NJ capital gains tax on certain assets (not NY).
■ NJ is one of only 3 states to tax charitable remainder trusts (CRTs) at the trust level. So set up CRTs in DE not in NJ. ♥Home may be where the heart is, but Delaware (AK, NV, SD) should be where the trust is. Thanks to Dick Nenno, Esq. of Wilmington Trust. PP

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PRACTICAL PLANNER®

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Trust Don't Ask Don't Tell

<u>Shhhhh! Is your Trust Quiet</u>: A "quiet" trust is one for which disclosure of info concerning the trust doesn't have to be made. Why might you want a trust to be quiet? You might not want your Millennial kids seeing a statement that reflects the millions of dollars you have in a trust for them while you are hoping that they begin saving for their retirement. Seeing big numbers might well dissuade them from getting on the financial path in their best interest. But just like the three bears, you want the porridge to be just right, not too hot and not too cold. Many states have enacted laws permitting silent trusts. Some states limit disclosures until a beneficiary attains a specified age. The Uniform Trust Code Sec. 813 requires keeping qualified beneficiaries reasonably informed and Sec. 105(b)(8) prohibits waiving the duty to inform qualified beneficiaries over 25 years old.
■ <u>Individual Trustee Warning</u>: The biggest issue is what liability the legions of individual trustees may have to beneficiaries they've kept in the dark without a basis for doing so. ■ <u>Institutional Trustee Warning</u>: Trustees who simply send every possible person info on the trust may be going overboard. In their zealous pursuit of less liability exposure they might actually be increasing it. The Restatement Third Sec. 82 provides: "*…because differences in trust and beneficiary circumstances preclude imposing precise, universal rules in all of these matters, the trustee's duty is to exercise reasonable judgment in deciding when, about what, and to whom information is required to be provided.*" Professional trustees should not blindly ignore beneficiary circumstances and the totality of the trust instrument in favor of mass mailings.
<u>Which Beneficiaries Might Get Notice</u>: While the concept of a quiet trust sounds great in theory, too much of a good thing may be rather dangerous. If no one who has an interest in the trust is getting disclosures, who will be watching the cookie jar? That trust porridge is too cold. On the opposite extreme, some institutional trustees take the position that, unless the trust provides limitations and state law permits it, they will send a statement of all trust assets to every beneficiary and every person named in the trust. Who might that include? Potentially a lot of people. Modern trust drafting favors listing all descendants as beneficiaries in many types of trusts. A broad pool of beneficiaries gives the trustee wider latitude to distribute trust funds for whoever might be in need, and it gives the trustee more options to spray income to beneficiaries in lower income tax brackets. But every one of those beneficiaries may not be on the list to receive a copy of the trust info.
<u>Who Else Might Get Notice</u>: But, just like those great late night TV infomercials, there's more! Many modern trusts will include provisions to assure that the trust is a grantor trust for income tax purposes. Common provisions give a person the power to loan the settlor (the person who set up the trust) money from the trust without adequate security. Another common technique is to give a person the right to add a charity to the class of beneficiaries of the trust. Many modern trusts appoint a trust protector. This is a person often granted a limited but important list of powers, such as the right to replace an institutional trustee, change the situs and governing law of the trust, etc. All these persons may also be on the trust company list for receiving full disclosure. That trust porridge is not only un-quiet, but way too hot for some folks!
<u>Middle Ground</u>: The best approach, so the trust porridge is "just right" seems to be to find a workable middle

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Checklist: Save $ on Fees

Summary: So you want to save money on your estate plan. That's a reasonable goal, but most folks go about it the wrong way. There are smart ways to keep costs down, and there are ways that might appear reasonable but may not be. There are ways you can save money but only to the detriment of yourself or those you are trying to protect.
√ <u>Ways to Save Money That Won't Adversely Affect Your Plan</u>: ■ Prepare ahead of time. Put together all the background information your advisers need before anyone turns a clock on. You can easily assemble lists of family members and other key people and their contact data, copies of beneficiary designations, and so forth. The more organized your data not only the less costly the process, but the better the result. ■ Web meetings. While nothing can substitute for a face to face meeting to establish a relationship, or to address really tough decisions, some meetings, such as reviewing a draft document can be most efficiently handled by web conference. This will be quicker than an in person meeting since so many of the social conventions aren't necessary. ■ Ask the planner you hire what steps might be reasonable to save money without jeopardizing your results. Most will

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...Trust Don't Ask Don't Tell

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ground that meets a trustee's reasonable desire for protection, does not mandate disclosures that might actually harm a beneficiary, but nonetheless assures that responsible and interested persons have information necessary to monitor trust performance.

Delaware: McNeil v. McNeil, 798 A.2d 503 (Del. 2002) surcharged the trustee for failing to inform a current beneficiary of his status. In McNeil a beneficiary sought but was denied information even as to his status as a beneficiary. The McNeil court seems to mandate disclosure but there was a clear bias and damage to that beneficiary. The Court found a "pattern of deception and neglect over the span of many years." McNeil does not require disclosures to non-beneficiaries. The Delaware statute was amended following McNeil. § 3303 Effect of provisions of instrument "(a) Notwithstanding any other provision of...law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of...trust administration, including, but not limited to, any such laws pertaining to: (1) The rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time."

Steps You Might Take: What if your trust is not quiet enough for your comfort? What might you be able to do? ■Might an institutional trustee be comfortable making disclosures to an individual trustee and/or trust protector? If the trust protector is acting in a fiduciary capacity might that be viewed as a reasonable means of protecting beneficiary interests? Even if the trustee won't accept that as a blanket basis not to disclose, if there is a beneficiary in difficult circumstances, might disclosure to a trust protector in a fiduciary capacity during that crisis suffice? Might a trustee be taken to task in such a situation for making disclosures that cause harm to a beneficiary instead of relying on a reasonable alternative? ■ The trustee may have the power to amend the administrative provisions of the trust instrument to achieve the desired level of disclosure. ■ The trust protector may have sufficient power under the current document to take an action to modify the trust administrative provisions to clarify the trustee's duties to disclose. ■ If there is no mechanism under the trust it may be possible to decant the trust into a new trust that addresses the disclosure issues and that is formed under a state whose laws permit non-disclosure. ■ If the trustee has to take a role in the modification or decanting of the trust provisions concerning disclosures that trustee might be less inclined to accept the limitations imposed by the process. After all, if the trustee consents to a decanting, that gives it the power not to disclose, the beneficiary not receiving disclosure might well argue that the trustee created the non-disclosure situation so that no protection should be afforded.

Possible Mechanism: Grant the trust protector the power to direct the trustee as to which beneficiaries, fiduciaries or other persons holding powers (whether or not in a fiduciary capacity) shall be entitled to receive info concerning the trust, including statements. While the Grantor is living, and not disabled, no such notifications shall be given to any persons other than the grantor and the trust protector unless the authorized by the trust protector. No trustee shall be liable for notifications following grantor's disability until the trustee has actual knowledge, or receives written notice from the trust protector, of grantor's disability. The objective of this sample mechanism is to provide some limitations on disclosures but to endeavor to assure that someone interested in the trust is receiving info. Caution: conditioning disclosure on standards such as the beneficiary "not using drugs" can be difficult to administer.

> *Individual Trustees who have not met with professional advisers on a regular basis face tremendous liability exposure*

Education: For those concerned about beneficiaries learning of wealth held in trust, a better answer in some cases will be to proactively educate the beneficiaries about financial matters, and as they gain knowledge and maturity, increasingly disclose information about the trust. Many institutional trustees have great programs designed specifically to do just this. Consider that if one sibling gets info and distributions others will find out. PP

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Review: Andrew Wolfe, CPA, Esq.

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...Checklist: Save Money on Your Estate Plan

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be pleased to make recommendations. ■ Meet regularly. Boy that sounds like a sales pitch. But keeping planning current and cleaning up the inevitable loose-ends will save money in the long run, maybe even in the short run. Small problems are much easier to correct before they become big problems spanning many years. ■ Make up your mind. Changing the name of your executor or guardian at every meeting adds up to extra costs that can be avoided if you evaluate key personal decisions before and after your introductory meeting.

√ Ways that Might be Worthwhile to Save Money but Evaluate Them Carefully:■ Not having all your advisers at a meeting. Some complex situations require having your CPA, trust officer, wealth manager, estate attorney, and others at a sit down. It will be costly, but essential to achieving the results you want. However, in many cases having your estate planner call your CPA and wealth manager might suffice. Another cost effective approach is to let your advisers have a web or phone conference without your involvement. That way they can talk in technical terminology that is the most efficient. ■ Use less comprehensive or less tailored documents. This can be disastrous in some situations, but might be palatable in others. A young couple with a modest estate likely can use more standard documents than someone much older with a larger estate. But it is important to bear in mind that in some cases it is well worth the extra cost to have a document tailored to your specific needs. For example, when you are young with a smaller estate you might use a standard power of attorney form. When your estate grows and circumstances become more complex you might instead rely on a form tailored to your circumstances by an attorney. As you get older or health issues develop you may choose to rely on a fully funded tailored revocable living trust that is merely backstopped by the power of attorney. Saving money is good, but picking the level of planning and cost appropriate to meet your goals is much better. ■ Ask if there is a simpler less costly way to achieve close to the result you want. Frequently, unusual bequests or other specialized provisions that sound simple are actually quite costly to translate into formal language in a document that will be effective. Many times using a simpler approach can get you 90% of what you want for lots less. Ask!

√ Ways that Will Save Money to Your Detriment: ■ Hiring the least costly adviser (attorney, CPA, etc.) is never the way to go. That doesn't mean you have to hire the most costly either. Try to find the adviser best suited for your needs. Most people handle this by asking what the hourly rates are. That is not particularly informative. A smarter approach would be to ask prospective advisers if you can briefly describe your circumstances so that they can tell you if you and the adviser are a match. For example, some planners will prepare documents with a modicum of planning as their standard level of service. Other advisers may charge substantially more but their standard level of service may include a much longer more comprehensive meeting, a detailed memorandum, and more. Picking the right advisers will get you the best result for the least cost. Ask "How often do you handle estates my size? How often do you deal with [explain] issues? PP

Recent Developments

■ Succession Planning: If you really implement a succession plan and bring Junior into the family widget business, can you still be viewed as being actively involved? This has a wide range of important tax implications. If you can still be "active" after turning over much control to Junior your estate may qualify to defer estate taxes over 14 years under IRC Sec. 6166. If you are sufficiently active, you may be deemed to still "materially participate." That can have a profound impact on how earnings or losses you realize from business operations are treated for purposes of the passive loss rules under IRC Sec. 469. If you are still deemed to be active you may avoid the dreaded (and insanely complicated) 3.8% Medicare tax on passive income. In a recent case the Tax Court found that even though the parent turned over many management responsibilities in the family business to his son, the father remained an active and material participant in the business. Wade, TC Memo 2014-169. See also Treas. Reg. Sec. 1.469-5T(f).

■ Bailout While you Can: A great planning technique may be to donate stock in a closely held business to a charitable remainder trust (CRT). You can get a juicy tax write off. Later when the business is sold the portion of the capital gain realized by the trust is not taxed immediately. Rather it passes out to you as part of the annuity or unitrust distributions made from the CRT to you over time. This might help you avoid the Medicare Surtax of 3.8% if in those future years your income is under the Surtax limbo bar. This cool technique is affectionately called a "charitable bailout." Proposals would prevent you from deducting the fair market value of capital gain property like a closely held business (a few exceptions are provided for, e.g. publicly traded stock). The proposal would limit your deduction to your adjusted basis in the stock. For most closely held businesses that is zippo. Moral of this tax tail, bailout while you can! PP