

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #3259

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From: Steve Leimberg's Estate Planning Newsletter

Subject: Martin M. Shenkman & Alan S. Gassman: A Potpourri of Ideas, Techniques and Things That Are on Our Mind as We Approach the End of 2025

“The technical landscape for estate, tax, and charitable planning is shifting rapidly. Practitioners must stay abreast of regulatory changes, compliance risks, and technological advances. By implementing the strategies and compliance reminders outlined in this newsletter, advisers can better serve clients and mitigate risk in an increasingly complex environment.”

Martin M. Shenkman and **Alan S. Gassman** provide members with commentary that reviews a potpourri of ideas and planning techniques advisers should consider as we approach the end of 2025.

Martin M. Shenkman is an attorney in private practice in New Jersey and New York who concentrates on estate planning. He is the author of over 40 books and more than 1,400 articles, and has won many professional awards.

Alan S. Gassman, J.D., LL.M., is a partner at the Clearwater, Florida law firm of **Gassman, Crotty & Denicolo, P.A.** He is a frequent LISI commentator. Mr. Gassman practices in the areas of Estate Tax and Trust Planning, Taxation, Physician Representation, and Corporate and Business Law, and was accepted to the Estate Planners Hall of Fame of the National Association of Estate Planning Councils in 2021. Mr. Gassman is the primary creator and developer of EstateView software, which allows for the design, illustration and analysis of estate tax, estate planning and charitable strategies. Jerry Hesch, Jonathan Blattmachr, Robert Keebler and Mr. Gassman serve as the Creative Team that continues to develop this software. You can read the newsletter written by Eido Walny, Joey Kleiner, and Jason McCosby on EstateView Estate Planning Software #3114. He is a member of the Board of Advisors for the Notre Dame Tax and Estate Planning Institute which will be in South Bend, Indiana on September 25th - 27th, 2025. His e-mail address is alan@gassmanpa.com.

Alan S. Gassman, J.D., LL.M., is a partner at the Clearwater, Florida law firm of **Gassman,**

Crotty & Denicolo, P.A. He is a frequent LSI commentator. Mr. Gassman practices in the areas of Estate Tax and Trust Planning, Taxation, Physician Representation, and Corporate and Business Law, and was accepted to the Estate Planners Hall of Fame of the National Association of Estate Planning Councils in 2021. Mr. Gassman is the primary creator and developer of EstateView software, which has AI analysis, a streamlined client intake system and calculators which allow for the design, illustration and analysis of estate tax, estate planning and charitable strategies (Estateview.com) Marty Shenkman, Jerry Hesch, Jonathan Blattmachr, Robert Keebler and Mr. Gassman serve as the Creative Team that continues to develop this software. You can read the newsletter written by Eido Walny, Joey Kleiner, and Jason McCosby on EstateView Estate Planning Software #3114. He is also a member of the Board of Advisors for the Notre Dame Tax and Estate Planning Institute. His e-mail address is alan@gassmanpa.com.

Here is their commentary:

COMMENT:

As 2025 draws to a close, estate planners, tax professionals, and advisers face a rapidly evolving landscape shaped by legislative changes, regulatory uncertainty, and technological innovation. This article distills a wide range of ideas highlighting actionable strategies, compliance risks, and nuanced technical issues that should inform year-end.

I. Charitable Giving: Timing, Deduction Complexity, and Vehicles

- Complete charitable gifts in 2025 to maximize deductions and avoid next year's complexity.

Charitable Contributions

It could be important to complete charitable gifts before year-end due to anticipated deduction limitations in 2026, including a new 0.5% AGI cutback and a 2/37th percent reduction for high-income bracket taxpayers. Use donor-advised funds for last-minute giving; these can be set up online and are suitable for appreciated securities.

For future years, the above changes, combined with phase-outs and inflation adjustments, make deduction forecasting increasingly complex. In 2026 and beyond it is recommended that practitioners using software to model charitable planning outcomes, as manual calculations may not be practical with the different reductions, phase outs, inflation adjustments, etc. make knowing the figures each year difficult if not impossible.

A possible exception to accelerating charitable deductions would be for a client who will soon reach age 70-1/2 and be able to transfer up to \$108,000 per year (inflation adjusted) directly from an IRA to charity. If that client already has enough set aside in a donor

advised fund or other discretionary charitable arrangement, then it might be best to wait before making further contributions.

Family Foundations Should Be Considered More Frequently

Contrary to popular belief, establishing a private foundation in many situations is neither prohibitively expensive nor administratively burdensome. IRS Form 1023 and Form 990 filings are more straightforward than some practitioners anticipate, and minimum distribution requirements can often be easily managed. Practitioners might bring up the private foundation option to clients with charitable intent more than perhaps had been done.

Non-Grantor Trusts: Income Tax Planning and Drafting Nuances

- **Property Tax Deduction Strategy** - Placing high-property-tax assets (e.g., vacation homes) in a non-grantor trust funded with bonds allows the trust to deduct property taxes of up to \$40,000, and direct excess income to charity, yielding immediate income tax savings. This strategy is particularly effective for moderate wealth clients seeking both estate and income tax benefits.
- **Adverse Party Approval and Documentation** - Including a spouse as beneficiary in a non-grantor trust requires adverse party approval of distributions to the spouse to avoid grantor trust status. Proper documentation of adverse party consent is critical for both IRS and creditor protection. Practitioners should ensure that consent is documented, e.g., by a signed statement, to withstand potential challenges. Also, caution is in order in determining who is an adverse party. If the intended adverse party is not in a position to say no, are they really adverse?
- **Non-Grantor Trusts and Charitable Planning** - Irrevocable non-grantor trusts funded with bonds can direct income to charity, potentially allowing for full deductions under some interpretations. However, the application of the 2/37ths percentage reduction to trusts remains unsettled, and IRS guidance is pending.

Valuation Adjustment Mechanisms: Wandry, King, Petter, Christensen

- **Defined Benefit Transfer Clauses and Compliance** - Defined benefit transfer clauses, such as Wandry transfer clauses are based on transferring entity interests of a sufficient percentage or number of shares that are based upon an appraisal at the time of transfer. These are now commonly used to attempt to avoid the risk of making a taxable gift. After the gift tax statute of limitations tolls (three years), practitioners should update entity records to reflect fixed percentages and remove adjustment caveats. Failure to do so can complicate audits and may create unnecessary risk.

- **King Clause and Powell/Moore Risks** - The King clause involves a transaction in which the donor sells interests for a promissory note with a value adjustment mechanism. If the IRS adjusts the value of the asset sold the face value of the note is increased upwards to match that and the argument is that there no gift has occurred. The use of a King note may avoid some Wandry-related risks, including Powell/Moore estate inclusion arguments. In those cases, the IRS argued that the decedent in conjunction with others could control the entity so that under Code Section 2036(a)(2) the interests would be included in the estate. If the client gifts or sells equity interests subject to a Wandry clause and the clause is effective, then some portion of the interests would have never left the donor/seller's hands, making the donor/seller a co-owner, causing the risk of a Powell/Moore attack. In contrast, in a King approach the note face is adjusted rather than equity interests remaining with the transferor. Some view the King approach as having greater risk as it is an 11th Circuit case whereas Wandry is a Tax Court case. Mathematically, a family may come out much better having a taxable gift while getting the entire ownership interest out of the donor/seller's estate.
- **Mixing techniques** – Combining different approaches, e.g. Wandry, King, Petter, Christensen (e.g., one transaction using a Wandry approach, one a spill over first to charity up to some dollar amount and the balance to a GRAT, a third perhaps a spill over first to charity up to a different dollar amount, a King note sale, and the balance to an incomplete gift trust) in large transactions may hedge against adverse IRS positions and provide greater defensibility.
- **References** - Wandry v. Commissioner, T.C. Memo 2012-88; King v. United States, 11th Cir. 2000; Powell v. Commissioner, 49 T.C. 890 (1968); Moore v. Commissioner, 39 T.C. 665 (1963); Petter v. Commissioner, T.C. Memo 2009-280; Christensen v. Commissioner, 130 T.C. 1 (2008).

FTC/Hart-Scott-Rodino Compliance for Large Transactions

Transactions exceeding ~\$126 million may trigger FTC/Hart-Scott-Rodino filing requirements. Penalties for non-compliance are severe >\$50,000/day, and more. Estate planners should consult FTC counsel before large estate planning transactions are consummated to determine applicability. There is an estate planning exception, but it is limited. The Hart-Scott-Rodino Act is often overlooked in estate planning, but its requirements can have significant consequences.

References - Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. §18a

Basis Step-Up Planning

- **GPOA Trusts and Family Tree Diligence** - Granting a general power of appointment (GPOA) to elderly relatives over a trust may achieve a basis adjustment (step-up) for highly appreciated trust assets. But practitioners must carefully draft the GPOA to avoid exceeding the powerholder's exemption, etc.
- **Joint Trusts** - The use of joint trusts in non-community property states requires precise drafting to avoid loss of step-up and unintended tax consequences.
- **JEST** - The "JEST" (Joint Exempt Step-Up Trust) technique can be used to maximize basis step-up but must be purposefully and carefully drafted.

Crypto Asset Transfers

Completed gifts of crypto require careful handling of wallet keys and the transaction to enhance the likelihood that the intended transfer will be respected as a completed gift. Is there an issue if the transferor still holds the private keys to the wallet and purports to make a completed transfer to an LLC owned by a trust? The planning may be supported by a Nominee Agreement to confirm that the transferor only holds any rights as a nominee for LLC, for example. Perhaps a multi-signature wallet could be used with a trust protector, LLC manager and perhaps a trust investment adviser each hold 1/3rd of the key. Caution is in order as this is a new and still evolving area. Might bearer bonds provide an apt analogy? With bearer bonds whoever holds the physical bond owns the bond. With cryptocurrency is it whoever holds the keys, controls the asset? Or will the documentation of the relationship, such as a nominee, suffice? Practitioners should endeavor to ensure that control is truly transferred to the trust or LLC. Another approach may be to consider a private derivative approach such as discussed by David Handler, Esq. This is a contractual arrangement whereby a trust acquires rights to future appreciation of an asset (e.g., carried interest but perhaps crypto) above a specified amount, without actually owning the asset because of transfer restrictions. "Derivative Contracts and Trust Planning"

Trust Structure and Access: Health and Long-Term Care Risks

- **SLATs, Hybrid DAPTs, SPATs** - When structuring trusts, consider future health uncertainties and the potential need for greater access. Loan provisions, SPATs (Special Power of Appointment Trusts), and hybrid DAPTs (Domestic Asset Protection Trusts) can provide flexibility for unforeseen medical or care expenses. Avoid rigid dynasty trusts unless client circumstances warrant and the "what ifs" have been considered. Planning for significant financial uncertainties of chronic disease and long-term care costs, which can be substantial even for wealthy clients might suggest that plans in some instances should lean towards more access even if that may mean a greater risk of estate inclusion.

- **A Roth IRA Danger** – Any Roth IRA conversion analysis should take into account that 92.5% of IRA assets may be used to pay tax-deductible nursing costs – would the client rather have \$1,000,000 in a Roth IRA that comes out tax-free to pay nursing costs, or \$1,450,000 in a taxable IRA that can pay nursing costs and be 92.5% tax-deductible? If the conversion of the IRA to a Roth IRA causes the family to run out of money because of nursing home costs, who will they blame?

Technology and Practice Management

- **Leveraging AI and Drafting Software** - AI and cloud-based tools can dramatically improve efficiency and accuracy in document review, client summaries, and compliance tracking. Practitioners should embrace technology but remain vigilant about the limitations and risks of automated advice. AI can quickly summarize client files and generate draft documents, but human oversight remains essential.

Conclusion

The technical landscape for estate, tax, and charitable planning is shifting rapidly. Practitioners must stay abreast of regulatory changes, compliance risks, and technological advances. By implementing the strategies and compliance reminders outlined above, advisers can better serve clients and mitigate risk in an increasingly complex environment. We are fortunate to practice in an interesting and challenging arena where we can help clients and others live better lives, have better economics and manage their families, business and professions in a better way while staying out of harm's way as best possible with our help empathy, especially during the holiday season. We thank LISI and the LISI family for helping to make this happen.

HOPE THIS HELPS YOU HELP OTHER MAKE A *POSITIVE* DIFFERENCE!

Martin M. Shenkman

Alan S. Gassman

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