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- Seminars: "Divorce and Trusts", Teaneck, NJ 9/19/06 at 8:30 a.m. 201-837-1400. "Choice of Entity" at Business Law 101 ICLE, New Brunswick, NJ 9/20/06 9 a.m. 732-249-5100. "Accountant's Role in Reviews of LLCs" at AICPA Sophisticated Tax Planning for Your Wealthy Clients, NYC 9/28/06 11:20 a.m. 888-777-7077. Use code "PEER" for a \$100 discount.

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PLANNING POTPOURRI

◦ **Guardians for Your Children:** It's tough enough to name a guardian for your children in your will, but what if your trust is misplaced? Everyone worries about who will be raising their child. What if the guardian develops a drug habit? Fails to care adequately for your children? Most people set up trusts for minor children in their wills. Name a trustee independent of the guardian. Consider requiring that the trustee pay for a social worker to interview the children at the guardians' home where they live every quarter to keep tabs on the situation. This could provide invaluable information to the trustee and an independent safeguard for your children.

◦ **Irrevocable Trusts for A Partner:** If you set up an insurance trust for the benefit of your partner what happens if the relationship ends? Can you use a definition of "partner" to be akin to

the "floating spouse" definition some married people use in their trusts? A "floating spouse" provision in a trust provides whoever you happen to be married to at the time is the beneficiary of the trust. This gives considerable flexibility in irrevocable trusts. Can you use a similar concept for a "floating partner"? One concern is that the phrase is hard to define. When is someone your "partner" and when aren't they? The vagueness of the term might create a risk of the trust assets being included in your estate for tax purposes and within reach of your creditors. One solution might be to define your "partner" as a partner registered under, for example, the NJ Domestic Partnership Act, or a similar law in another state. Another approach might be to have a trust protector appointed who may designate a partner.

◦ **Business Payment Caps:** For a close-

ly held business or professional practice you need limitations (caps) on the maximum amounts which are to be paid to retired or disabled partners, to the heirs of deceased partners, and others. If not, the portion of working partners supporting no-longer-working partners could become unreasonable. The entire business could be jeopardized by excessive payments. The solution might be for your shareholders' agreement to provide that all payments in aggregate shall not exceed 20% of gross revenue and if they do, they will be deferred until the next year. Payments can be pro-rated to those who are due payments. PP



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PRACTICAL PLANNER

POWER OF ATTORNEY-MORE THAN JUST A FORM

Power of attorney is a legal document in which you name a person (agent) to handle financial, legal and tax matters if you can't. Call a general practice attorney and they'll likely quote you a price of \$100-350 for such a document. But what are you really getting? In some cases a typed version of a standard pre-printed form with a few modified paragraphs. Not the planning you want or need. A poorly drafted power can be a financial disaster for you and your heirs. If you have a power, take a look and see how (if) these matters are dealt with. Even as a layperson, you will probably quickly discern significant issues.

◦ **Springing Power:** Can your agent sign your checks today, or does the power require that you first be disabled before your agent's rights become effective (spring)? This prevents your agent from having any authority until you are actually disabled and need assistance. Many people prefer this approach. What does your power say about this? If the mechanism that springs your power into effect isn't clearly delineated in the document, your agent might need significant legal involvement to convince a bank that your agent has the authority to act. Not exactly the quick intervention you intended when you signed the power. Some powers might provide that a letter signed by your attending physician stating you are unable to handle your affairs will suffice. An improvement, but you're not home yet. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC 130d and 45 CFR 160-164, includes significant restrictions on any physician disclosing your private health information without your approval. So, your power should include an express waiver of these restrictions. If it doesn't, get it revised! You might also indemnify the physician for issuing any such letter in good faith. Fear of a lawsuit can make a letter difficult to obtain.

◦ **To Gift or Not To Gift:** That would have been Shakespeare's question if he'd been a tax attorney. A key clause in your power is the right to make gifts. If your power doesn't expressly authorize your agent to give away your assets, they probably can't. Do you always want a gift provision? No. So on one end of the planning spectrum your power could expressly state that your agent doesn't have the authority to make gifts to minimize the risks of abuse. Many standard powers permit gifts without limit! The right to make unlimited gifts

makes your power more significant than your will! Yet you probably treat your will with great deliberation, and your power as a mere formality. In other cases the right to make gifts could be crucial to your planning. On the opposite end of the planning spectrum your power could authorize your agent to give away all of your assets. Why no limit? To facilitate elder law planning, tax minimization and probate avoidance. There's lots of ground in between no gifts and unlimited gifts.

◦ **How Much to Gift:** If your power authorizes your agent to

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CHECKLIST: RETIREMENT MATH

You're planning your retirement and estate. Your financial planner develops a budget and plan. The budget results will determine cash flow needs upon which investment strategies may be based. These strategies then need to be coordinated with your overall estate, asset protection, and other planning. Too often projections are flawed and lead to inappropriate product sales, a false sense of security, or an overly simplistic investment plan. Many investors are overwhelmed by 100+ page computer generated plans. The volume of pages and charts can give the calculations an appearance of reliability.

Expense Patterns: Your budget reflects anticipated future expenses for which your planners then determine the best way to generate adequate cash flows (e.g., an asset allocation model that reaches your goals while minimizing investment risk). Expense projections may use your current expenses as an assumption. Will your future expenditures mimic current outlays? If not, projecting historical costs might be meaningless. Are you planning to downsize your current home, or instead to purchase a vacation home? The swing in annual costs can be huge. You must evaluate your future expenses or your

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...POWER OF ATTORNEY

(Continued from page 1) tate planning. Code Section 2503(b) and 2503. The power should authorize your agent to split gifts with your spouse. That permits your spouse to gift \$24,000 to one person (**donee**) and treat it as if half were from you to avoid gift tax implications. Does your power permit this? Many forms don't include the right to make gifts to **Section 529 college savings plans**. To assure that these plans can be funded under your power an express clause should be included.

o Gift Equalization: You have 3 kids: 1 single, the 2nd married with no children, and the 3rd has rabbit genes: a spouse, 6 kids (all married), and 21 grandchildren. \$12,000 per person annual gifts will create a huge imbalance. Do you limit the gifts? Do you give the agent the right to make \$12,000 annual gifts since it costs more to raise and care for all those children?

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Do you include a make up bequest in your will to equalize your two children who don't have descendants? Do you simply leave it up to the children to make it right on their own? You have to evaluate what is appropriate for you and your family and be sure your power provides accordingly. The odds of a standard form having exactly what is appropriate for your family is pretty slim. Read the gift provision in your existing power and see what it says.

o Divorce: Some say the divorce rate for first marriages is 50-60%+, and for second marriages 75%+, but few people address this issue in their powers. Might your soon-to-be ex-spouse use your power without your knowing to transfer all of your accounts out of your name? If the marriage gets rocky, destroy all original powers and consult your attorney about formally cancelling them.

o Business Document Coordination: Be sure your power has detailed provisions giving your agent the authority to deal with a wide array of business and investment issues. When using a power to plan for disability, don't overlook coordination of appropriate business documents. If you have a professional practice or business corporation draft the necessary minutes to assure at least a second signatory on business bank accounts. Shareholder, partnership and operating agreements should address disability planning to assure that successor officers, directors and managers can serve. Even a one member LLC can create a succession plan through a one-member operating agreement designating you as current manager, and naming a replacement if you are disabled.

Powers of attorney are almost always treated as a footnote to most estate and financial plans. To the contrary, a power can be your most important planning tool. Great care must be taken to appropriately address vital provisions in a manner that accomplishes your goals. Relying on standard documents might be cheap and quick, but you wouldn't go to the Golden Arches for your child's wedding, so don't use a form power for what might be your most important legal document.

o Cooperation with Professionals: A major reason for your signing a power is to assure someone can handle matters when you're disabled. Often the first call an agent makes is to

your attorney to ask for guidance and financial information. Attorney ethics and in particular the duty of confidentiality your attorney has to you may inhibit your attorney from fully cooperating with your agent. To address this your power could include an express provision authoriz-

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at the updated website
www.laweasy.com*

ing your attorney (and other professionals) to discuss any matters with your agent, and provide otherwise confidential financial and legal information to your agent. If your power doesn't, an update might be in order.

o Make it Practical: Your agent will need your Social Security number and key financial, tax and other data. Be sure its available. Have you spoken to your agent about the appointment and responsibilities? The best document is of limited use if the agent is uncertain as to what to do, and lacks key information.

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...CHECKLIST: RETIREMENT MATH.

(Continued from page 1) planning will be based on misleading assumptions.

Inflation: Inflation of your expenses has to be considered. Many projections assume a 3% inflation of expenditures. 3% may be a reasonable historical average for inflation, but is it sufficient for your particular situation? If your retirement expenditures will focus on medical expenses, luxury travel, and grandchildren's tuition, not only might these expenditure patterns differ significantly from what you've spent in the past, but they might inflate at far faster rates than the market basket of goods on which the average 3% data is based. A 1% difference in inflation rates over a 20+ year retirement can wreak havoc with your plan. Evaluate the rate. Stress test the plan. What if your expenditures inflate at 5% instead of 3%? If you invest solely in muni-bonds, CDs, and other "income" investments for "safety", stress test your projected cash flow versus realistic costs. Including inflation may undermine expectations.

Gifts: Did you budget for gifts? You may wish, during your retirement to step up gift programs to family. This is not only done to address estate tax, but to help children at ages when they are buying houses or launching businesses, etc. Too often these potentially significant transfers are ignored in the projections.

Age: Most people tend to underestimate their life expectancy when planning for their financial issues in retirement (a lot of people outlive "life expectancy"), but over estimate their life expectancy when putting off estate planning decisions. Get realistic about both.

Reverse Compounding: Every investor knows compound interest is the 8th wonder of the world. But when the above issues compound over the

potential decades of your future retirement the number swings are potentially devastating. Caution now may mean a pinch in your budget. Unrealistic assumptions now might mean selling your home in 15-20 years to pay for living expenses.

Investment Allocations: Your investment asset allocation plan should, according to many, differentiate between taxable and non-taxable accounts. Tax inefficient assets could be held in non-taxable (retirement) accounts. These might include REITs (high dividends), taxable bonds (high interest), and small cap stocks (high turnover). Tax efficient asset classes could be held in taxable accounts. These might include muni-bonds (tax free interest) and large cap stocks

(less turnover). This approach is too simplistic if it ignores the trusts and entities many high net worth investors have. A bypass trust created by your late spouse for your benefit could favor asset classes most likely to appreciate since the growth will be outside your taxable estate. If you use **grantor retained annuity trusts** (GRATs) to leverage gifts of assets out of your estate, the most volatile asset classes could be held in such trusts since short term GRATs remove the appreciation (upside volatility).

A budget and financial plan can be the foundation for much of your planning. But if they're based on faulty assumptions, your future could be tough. PP

RECENT DEVELOPMENTS

o NJ Tax Increase: On July 8, 2006 NJ Governor Corzine signed tax bills including Act L. 2006, A4706 adding a 4% surcharge on corporation business tax for years ending in fiscal 2007, 2008 and 2009, and increases minimum tax under the corporation business tax. The law also added a 1% tax on the purchase of commercial property valued at more than \$1M. L. 2006, A4701. The tax is 1% on the total value, not just the value in excess of \$1M. C.46:15-7.2 8.a.(b) The tax also applies to a "...transfer for consideration in excess of \$1,000,000 of a controlling interest in an entity which possesses...a controlling interest in classified real property..." C.54:15C-1 3.a.(1). What if you sell a \$5M warehouse to a family trust in exchange for a note? This is a common estate planning technique referred to as a note sale to an **intentionally defective grantor trust** ("IDIGIT")? Might this plan now be subjected to a 1% tax?

o Cutting IRS Estate Tax Auditors: The IRS is cutting 157 of its 345 attorneys that audit gift and estate tax returns. Could George be attempting to repeal the estate tax through the back door by undermining audit enforcement? The claim is that fewer returns are being filed because of the increase in the exclusion from \$600,000 a few years ago to \$2 million today. Obviously true, but the reality is that only selected returns logically are the focus of audit attention: those for decedent's without a surviving spouse (so the marital deduction doesn't eliminate any tax), and those with hard to value assets like real estate and businesses, especially those claiming discounts. While it's hard to believe that enforcement won't be reduced, remaining agents will obviously continue to focus their efforts on the returns most likely to yield big audit dollars. So a **grantor retained annuity trust** (GRAT) transaction that can include a self adjusting mechanism to avoid an audit adjustment may receive less attention than defective note sale to a grantor dynasty trust that could potentially generate significant estate and **GST tax**. Plan accordingly. PP