

## PRACTICAL PLANNER NEWSLETTER

MARTIN M. SHENKMAN, PC  
PO Box 1300, Tenafly, NJ 07670  
Phone: 201 845-8400  
Email: newsletter@shenkmanlaw.com  
RETURN SERVICE REQUESTED

First-Class Mail  
US Postage Paid  
Hackensack, NJ  
Permit No. 1121

### More Info:

•Publications: Sign up for an e-version of this newsletter at [www.laweasy.com](http://www.laweasy.com).

•New Book: Funding the Cure: Charitable Giving to Help the Michael J. Fox Foundation for Parkinson's Research Find the Cure for Parkinson's Disease, available through [www.demosmedpub.com](http://www.demosmedpub.com)

For address corrections, or to be removed from this mailing list, email us at [newsletter@shenkmanlaw.com](mailto:newsletter@shenkmanlaw.com) or call 888-LAW-EASY.

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

## PLANNING POTPOURRI

[www.360financialliteracy.org](http://www.360financialliteracy.org) is the American Institute of CPA's financial information site designed for consumers (yes, that means it's written in English!). The site is Chock Full O' resources (not Nuts, that's the coffee) to help you plan thru every stage of your life, which is especially helpful during this economic turmoil. It's time to educate yourself and take control of your financial future instead of obsessing about the Dow going up and down which unfortunately you can't control at all!

Where's Inflation? 2010 Inflation-adjusted tax figures are the same or only modestly different: Dependency exemption \$3,650 (unchanged). Standard deduction \$11,400 MFJ and \$5,700 for singles and MFS (unchanged). Annual gift exclusion \$13,000 (unchanged). News Release IR

-2009-93 and 94. Be wary, the big bad inflation wolf might return.

Final 2053 Regs: T.D. 9468 provides guidance in determining the deductible amount of a claim against an estate. Sec. 20.2053-1(d)(1) provides the general rule that a deduction for a claim or expense described in section 2053 is generally limited to the amount actually paid for the claim or expense. Exceptions are provided. If a claim or expense that would have been deductible if it had been paid is not fully deductible within the limitation period, the estate may file a protective refund claim to preserve its right to claim a refund in the event that it becomes deductible later. Sec. 20.2053-1(d)(5). A protective claim for refund may be filed at any time before the expiration of the period of limitation prescribed in Sec. 6511(a) for the filing of a claim for credit or refund. Even if the IRS can't

assess additional tax it may still reject the claim for refund to the extent the Service determines there is no overpayment of tax. Post Tax Season Follow Up: So you signed and filed your income tax returns. You're not done (not if you want to play it smart!). Contact your CPA and schedule a meeting to sit with him/her for an hour (yes, you'll have to pay). Ask your CPA to review your tax return with you not to address tax filing figures per se, but to identify any type of planning ideas that your return might suggest, and any issues you may have missed. CPAs have a wealth of general tax, investment, business, insurance and other knowledge, but you won't



*Practical legal stuff...  
in plain English*

[www.laweasy.com](http://www.laweasy.com)



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

VOLUME 4, ISSUE 10  
October 2009

# PRACTICAL PLANNER

## STOP HEIR LOSS W/ ESTATE PLANNING PROPECIA-2

**Summary:** Markets down, home values down...counting on that inheritance to fill the gap? Then the heir loss prevention tips from last month, and those below, will help you avoid getting scalped. So if you want to maintain that trust fund baby lifestyle, consider the following:

### Mom's Investment Horizon

So mom has CDs at 50 different banks (and lots of toast-ers). For her, investment risk means a lower CD rate. "While staying conservative might make sense for mom's core portfolio that supports her daily living expenses, it's really not necessary or appropriate for assets she won't spend down," suggests Ted Sarenski, CPA, PFS, DB&B Financial Services, LLC. Maintain the amount needed to assure mom's living expenses to say 95% of life expectancy in conservative investments and invest the excess with a more appropriate asset allocation without jeopardizing her safety, peace of mind, or your Tuesday night meat-loaf dinner. "You can get a pretty good handle on what her life expectancy really is with a **life expectancy analysis** from a number of independent companies," recommends Susan J. Bruno, CPA, Beacon Wealth Consulting, LLC.

### Ownership (Title) to Assets

How do your parents own their assets? This may control the ultimate distribution of assets regardless of what their wills say. Adding "joint tenants" on the name of a bank statement or stock certificate can dramatically change who will receive an account following a parent's death. If personal assets (e.g. jewelry) are held in a safe-deposit box, the legal presumption is that the owner of the box owns the assets. Distinguish "joint tenancy" from "tenants in common," where each person owns an undivided interest in the property. On the death of a joint tenant, the survivor obtains ownership of the entire property. On the death of a tenant in common, the deceased person's will governs how ownership of the decedent's interest in the property will pass.

### Will Challenges

What happens when cousin Sue sues? Planning for a will challenge should begin with your parents' first estate planning meeting, not after a lawsuit has been filed following their deaths. Expect your parents' wills to be challenged if they leave a disproportionate amount to one

beneficiary. Dissuade angry relatives from challenging your parent's will in court by having your parent sign another will a few months later. Each new will revokes the prior will. But if a later will is invalidated (e.g. proven to be signed under duress), the prior will is reinstated and governs. So if relatives feel they were treated unfairly and succeed in challenging the last will, then the prior will, which is identical as to major distributions is reinstated. They'd have to successfully overturn that prior will as well! Each successive will should add some change, e.g.

\$1,000 to a new charity, to demonstrate that they reviewed and reconsidered the will, but did not change the primary distribution provisions. Several similar wills signed over time will show a court that they did not write up new wills or change their intentions on a whim.

### Insure Against Mom's New Spouse

So when mom marries the pool boy, make sure that your inheritance is protected. When mom's new spouse is younger than you, suggest

*(Continued on page 2)*

## CHECKLIST: RUIN YOUR KIDS

**Summary:** Some folks just want to destroy their kids. While Jon and Kate Gosselin of "Jon and Kate Plus 8" fame have raised destroying children to new heights (lows?), too many parents use their estate plans to accomplish similar heartache. Some folks plan their estates in ways that will almost assure a will challenge, estrangement, or that their child will spend the rest of his days bemoaning the evil done unto him. Here's some good ways to plan your estate to accomplish just that.

✓ Do a Leona! Helmsley's dog, Trouble, was bequeathed \$12 M to continue to live an opulent life, and then be buried

alongside Leona in a mausoleum. Designer Puppy Chow? Grandchildren supposedly received nothing.

✓ Use your estate planning documents to formally "dis" a child. The words of your last will, letter of instruction and related documents are viewed by many heirs as your parting words. Including hurtful statements in these documents is almost always harmful and inappropriate. "I leave nothing to my son Joe because he was disrespectful, ungrateful, and married a witch." While you might feel that way, the use of a less harmful phrase like "I leave nothing to my

*(Continued on page 3)*

## ...STOP HEIR LOSS W/ ESTATE PLANNING PROPECIA-2

(Continued from page 1)

(very politely!) that Mom purchase a life insurance policy to fund your inheritance if she wants to leave most of her assets to her new hubby. While advisers often recommend a **QTIP trust** for the new spouse, if the new spouse is younger than you, you'll be using the inheritance (when the QTIP ends) for dentures and Centrum Silver. "Consider a guaranteed universal life insurance policy on mom to insure that you'll get an inheritance on mom's death, not when the young pool boy eventually dies. This also gives mom the ability to plan with no constraints. A simpler solution for all," suggests Susan J. Bruno, CPA, PFS of Beacon Wealth Consulting, LLC.

### Mom's Nuptial Agreement

If mom is going to remarry, encourage her to sign a prenuptial agreement as the first line of defense against future

marital claims. Points Mom should consider: Mom and her prospective spouse should each be represented by independent attorneys. The agreement should be signed in advance of the marriage (not on Mom's way down the aisle, —the longer before the marriage the better). The agreement should be signed, witnessed, and notarized with the same formality used for a deed for real estate. Mom must make full and clear disclosure of what she owns. Attach detailed balance sheets, several prior years' income tax returns (the more the merrier), and other pertinent info to the agreement as exhibits. The agreement should be fair and reasonable. These terms are impossible to define, so Mom should take any steps feasible to demonstrate this. If Mom's new spouse will have adequate income to support himself should divorce occur it will look fairer. Steps should be taken to corroborate that Mom's future spouse was not signing under duress, because of fraud, and that Mom was not over-reaching. The prenup should address all legal, tax, and financial issues that might be relevant: Which state law will govern? What alimony or support rights will Mom's spouse have in the event of divorce? Will Mom be obligated to leave anything to her new spouse in her will? Is her new spouse waiving any rights of a spouse to elect against her estate (spousal right of election)?

What if Mom was too starry eyed to sign a pre-nup but wakes up and smell's the coffee after the honeymoon? While unlikely to provide the same measure of protection as a prenup, a post-nup might be the only choice, assuming new-hubby agrees.

### Your Pre/Post-Nup

So you're getting married and a gangbuster inheritance might come your way. Sign a prenup that expressly addresses gift and inherited assets to shore up the protection. If you've been married for years before

realizing the likelihood of gifts or an inheritance, then even if everything's peachy, have a lawyer draw up a post-nup between you and your spouse confirming that any gifts or inheritance will remain yours alone and will not become a marital asset.

*Get announcements of future seminars, and new articles posted on line, by following martin shenkman on www.twitter.com.*

### Inherit the Best Way Possible

Maximize your inheritance by getting the most dollars and getting them the best way. Best is usually in a lifetime trust structured so that as much of the inheritance as possible will never be subject to a gift, estate, or generation skipping transfer (GST) tax. If the trust is set up in a state with favorable tax laws you might even be able to avoid your state's income tax on trust earnings.

Inheriting in a trust may protect against future creditors, divorce, and other things that go bump in the night. Instead of your parents leaving assets directly to you they should bequeath assets to a trust for your benefit that is structured to achieve the above goals. Your parents can set up this type of trust while they are alive or under their will. You could even arrange for your parents to bequeath assets to a trust that you set up for this purpose. Consider using an independent institutional trustee in a state with laws that are particularly favorable to the goals you're trying to achieve (e.g., Delaware, Alaska and others) and giving that trustee discretion over distributions instead of mandating distributions (e.g., a unitrust or HEMS

## ...CHECKLIST: RUIN UR KIDS R US

(Continued from page 1)

son Joe for reasons known to me," can accomplish the same legal objective of assuring that it wasn't a scrivener's error that Joe was overlooked, without carving nastiness into eternity.

✓ Not leaving the door open. Disinheriting a child completely is often harsher than it needs to be. Leaving a 5% tip to a waitress that wasn't great can get your point across, and might even encourage better service for the next customer. In contrast, a 0- tip might just evoke anger and accomplish little. No one has the right to tell you not to disinherit a child, but consider the consequences and options. However, if you have a \$2 million estate and 4 children might it not be better to leave the wayward son \$50,000 or \$100,000 and state: "I leave \$100,000 to Joe hoping that in time he will make peace with himself and the memories we had," or "I leave \$100,000 to Joe to acknowledge my love and affection for him and to express my sadness that our relationship had not been closer." Many lawyers will balk at this approach as it might provide an opening for a will challenge that may not have existed. However, if it can mend an heir's heart, or prevent an heir from seething in anger, might it not be worthwhile?

✓ Leaving disproportionate bequests to children. Leave your daughter 75% of your estate and your son 25% because you liked your daughter more. While no one can tell you how to divide your estate, what if the will treated the children equally and you made gifts to your daughter while living, or used life insurance that wasn't "in your son's face" to favor your daughter? You don't have to skin the estate distribution cat in the most obvious and offensive way possible. Subtlety can preserve family peace.

✓ Disinherit someone based on who

they marry. Nothing like hating that son-in-law to stir the family pot. Consider instead a bequest to a trust with a close friend who understands your concerns as trustee. Give the trustee discretion over distributions to the beneficiaries, perhaps including a charity. Your wishes might be carried out without the blatant disinheritance or comments about a spouse. If the marriage falls apart from your disappointment, then the trust can be there to help your child move forward.

✓ Ignore the emotional value of tangible property. Your wife, the mother of your children, died. You hold her jewelry and other memorabilia, but on your death your will has a generic clause bequeathing all per-

sonal property to your new wife. Your daughters will not be entitled to their mother's keepsakes, and worse, they will have to watch your new wife wear them.

✓ Ignore the religious preferences of your heirs. One or more of your children have adopted a new faith, or perhaps are more observant in the faith your family shares. Instead of insisting on actions which will morally torment them, try to find a middle ground that is not offensive to anyone. Sure, it is your life and your body and you can do as you wish, but if you can achieve the goals that are really important to you without upsetting surviving heirs, isn't that preferable? **PP**

## RECENT DEVELOPMENTS

**Estate and Divorce:** H died during the pendency of the divorce action (we've been assured it wasn't a result of receiving his lawyer's bill). H's executor sought a constructive trust to prevent the unjust enrichment that would allegedly occur if W retained marital property beneficially belonging to H. The court held that the equities involved require relief from the strict legal effects of defendant's death during the divorce.

When spouses divorce marital property is distributed equitably between them in accordance with state law. But, when one spouse dies during the pendency of the divorce the action is abated and statutory **equitable distribution** is unavailable. Marital property does not lose its essential and distinctive nature as property arising from the joint contributions of both spouses during the marriage because of the death of one spouse during the pendency of divorce proceedings.

Upon a sufficient evidentiary showing, the courts should invoke the equitable remedy of constructive trust, and principles of **quasi-contract**, to avoid the unjust enrichment that would occur if the marital property held by the surviving spouse included a share beneficially belonging to the deceased spouse's estate. When property has been acquired in such circumstances that the holder of legal title should not in good conscience retain the beneficial interest, equity converts the owner into a trustee. Public policy would be disserved if courts were to automatically foreclose equitable claims concerning marital property presented by the estate of a deceased spouse.

The prospect of an estate continuing a battle over marital property that cannot be completed by a spouse who died while the divorce was pending is unpleasant, but precluding an estate from obtaining an equitable remedy is not appropriate.

Kay v. Kay, No.A-93-08, New Jersey Supreme Court, October 13, 2009. **PP**

**Disclaimer to Readers:** Practical Planner provides reasonably accurate information, however, due to space limitations, and other factors, there is no assurance that every item can be relied upon. Facts and circumstances, including but not limited to differences in state law, may make the application of a general planning idea in Practical Planner, inappropriate in your circumstances. This newsletter does not provide estate planning, tax or other legal advice. If such services are required you should seek professional guidance. The Author and publisher do not have liability for any loss or damage resulting from information contained herein. This newsletter constitutes attorney advertising 22 NYCRR 1200.

**Review:** Andrew Wolfe, CPA, JH Cohn LLP, Roseland, NJ.

**IRS Circular 230 Legend:** No information contained herein was intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties. Practical Planner was not written to support the promotion, marketing, or recommendation of any tax planning strategy or action.

**Publisher Information:** Practical Planner is published monthly by Law Made Easy Press, LLC, P.O. Box 1300, Tenafly, New Jersey 07670. Information: newsletter@shenkmanlaw.com, or call 888-LAW-EASY.

**Copyright Statement:** © 2009 Law Made Easy Press, LLC. All rights reserved. No part of this publication may be reproduced, stored, or transmitted without prior written permission of Law Made Easy Press, LLC.