

PRACTICAL PLANNER NEWSLETTER

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Free Consumer webinar sponsored by AICPA PFP division: "Estate and Financial Planning for Chronic Illness" Wednesday Oct 6TH 1-2 EST. Register at: <http://www.aicpa.org/InterestAreas/PersonalFinancialPlanning/CPEAndEvents/Pages/PFPWebSeminarsforClients.aspx>

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PLANNING POTPOURRI

■ **Letters of Instruction:** Minimize family issues by writing a clear letter of instruction as to your wishes.

Fights among heirs are often over what each believes what the parent or other benefactor wanted. Was the loan to help sis buy a house really intended to be paid back? Who did mom really want to give that diamond necklace to? Sure, these issues can be addressed (and often should) in a formal legalistic manner to avoid issues. However, the reality is that many family disputes could be avoided if the intent were only clear. Many heirs will respect mom's wishes, if they only really knew what they were. Write a letter and discuss it with your estate planner. Have it held in a manner that assures its privacy until needed (so you can revise it if circumstances change).

■ **Special Needs Considerations:** Undertaking specific planning to protect current/future SSI or Medicaid bene-

fits is often the focus of planning. However, ultra affluent clients might think that they don't have a "need" to protect a special heir from the loss of government assistance. But qualification may not only be about money, but about entry to programs. For affluent clients, especially business owners facing a lack of liquidity, life insurance held in a trust (ILIT) might fund a special needs trust (SNT), but there is an issue of Crummey powers. You can't grant the special heir the right to withdraw gifts since that may jeopardize qualification. Other approaches might include: split-dollar loans to minimize gifts to the trust; judicious use of the lifetime gift exemption for gifts; GRATs and other planning technique that roll into the trust at future dates to unwind the split-dollar arrangement and fund other premiums; using the ILIT to guarantee other family loan and sale transactions for a fee; and so on. Thanks to Cath-

erine G. Turner, CFP, Atlanta, Georgia.

■ **Estate Tax—Beneficiaries Liable as Transferees:** Don't think estate taxes are only the executor's headache. The IRS determined that heirs were liable under IRC Sec. 6901(a) for the estate tax deficiency as transferees of the assets of the Estate of Judith Upchurch. After holding that the two were liable as transferees of estate property under state (Illinois) equity principles, the Tax Court found that they were individually liable up to the value of the property transferred to each of them — the full amount of their settlement payments. Carl Upchurch, TC Memo 2010-169 (Tax Ct.). PP



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PRACTICAL PLANNER

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LIVING WILL AND HEALTH PROXY RAMBLINGS

Summary: Living wills and health proxies are essential documents for every adult. Issues abound! Recent articles in the media raise some interesting questions about health care decision making that should be considered.

Basics and Definitions

While everyone knows what these 3 documents are, let's define them quickly before exploring some of the issues that can arise. A living will is a statement of your health care wishes. What do you believe, how do you view end of life decisions from a religious, philosophical and personal perspective? Although not recognized in some states signing a personalized (not boilerplate got it off the internet cheap) living will can serve as a wonderful tool for communicating in clear written terms what you do and don't want done. A health care proxy is a document in which you appoint an agent to make medical decisions for you. You should also name several successors and be certain to enumerate in some detail powers or rights you do, or don't, want your agent to have. A HIPAA release is an authorization that can be used to authorize medical providers to release private health information. While all this sounds simple the complexities and potential for problems are huge. Let's explore some of these.

Communicate!

How important is specifying your wishes in these documents and discussing your feelings with loved ones? Plenty! A recent blurb in *Bottom Line Personal* newsletter noted that hospital delirium is common. 25%-50% of older adults admitted to general medical wards are affected and 68-80% of those on surgical floors or in intensive care experience delirium. The delirium includes reduced ability to focus, disorientation, agitation, etc.

Religious Differences

Religious considerations can be very important to consider when preparing your living will, in selecting an agent for your health proxy, and in delineating the authority granted to that agent. Too often people rely on standard forms and never address religious issues. That's a problem. If there is no mention of religion in the documents your wishes cannot realistically be interpreted. If coupled with unclear appointment of agents and family differences concerning religion, it could be a tinderbox. But does specifying your religious preferences in these documents avoid any conflict? Unfortunately not. It is a good start but differences between the religious views of family and loved ones may need to be addressed to minimize

conflict. Grandson is quite devout, while mother is barely observant. How might this play out? Do religious undercurrents exist? Great care should be taken to be very specific in mom's living will and health proxy about any matters pertaining to religion, and issues that might raise religious differences. Generic statements as to religious observance can sometimes be more difficult to interpret and apply than documents that don't address the issue. The health proxy should be very clear about the appointment of agents: Who is to serve? Is a single agent instead

of multiple agents? Is there consistency in your religious views and those of the agents? If your living will violates the family's overall religious beliefs tremendous conflict may follow. Can you mitigate this by discussing these issues in advance? Can you slightly modify your statements so that you remain generally true to your feelings while creating less offense to others?

No Religious Adherence

If you do not wish your faith's restrictions and rituals to apply, can you address this in a

(Continued on page 2)

CHECKLIST: 2010 PROBATE CB

Summary: Carryover basis is law in 2010. The tax picture doesn't stop with the "No Estate Tax Party" kids are hosting. The CPAs for these lucky heirs have a lot of work and the deadline clock is ticking.

✓ The tax basis of assets inherited from a decedent is the lower of the decedent's adjusted basis (cost, less depreciation, plus improvements) or the fair market value (FMV) on the date of death. To figure this out you need: (1) Appraisals of all assets to demonstrate FMV at death; and (2) Decedent's basis. This requires a lot of work! A challenge will be convincing heirs to spend to do the necessary work, after all there is no tax in 2010! True, but

complex tax filings and calculations are required. If capital gains rates rise this homework will be really important. Tax filings are due 4/15/11 and the allocation of basis is due 5/15/11.

✓ The tax basis in a 2010 decedent's assets may qualify to be increased to eliminate unrecognized gain of up to \$1.3M on property passing to anyone, and up to \$3M for property passing outright to a spouse or in a trust (Qualified Spousal Property).

✓ If the estate has less appreciation than the available adjustments (\$1.3M + \$3M + others) then the incentive

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...LIVING WILL AND HEALTH PROXY RAMBLINGS

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manner to at least limit the collateral damage? Consider: "I am of the X faith and wish to expressly state that I do not wish X faith religious law to apply in the determination of end of life medical and related decisions. Those decisions shall be made in accordance with the provisions of this Living Will regardless of the impact of X faith law. I do not lightly make this statement, and I am aware that this statement may offend the religious perspectives of some of my descendants. It is not my intent to offend or hurt anyone in any manner, but merely to carry out my personal beliefs in what I believe to be very private matters. If any particular agent is unable to carry out the wishes I have set forth because they view them as inappropriate, I respect that decision and merely request that they resign as agent." **Whacky Personal Provisions** Tailoring your documents to reflect

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your personal wishes can be a good thing. But too often attorneys will seemingly put anything a client suggests in a document with little discussion of the impact. Tailor yes, but don't suspend reason. The following provision was found in an existing health proxy. While this one might make the Guinness Book for the worst provision the issues raised are instructive in a broader context: "Therefore, at the onset of a disease such as Alzheimer's, and if it doesn't entail undue legal risk, I request that my health care providers or health care attorney-in-fact assist me in the termination my life in a painless, dignified and private manner." Whoa! At what point does the "onset" of a disease occur? A recent New York Times article discussed a possible genetic test to determine 10 years in advance of symptoms that a person has Alzheimer's disease. Would that be "onset"? Alzheimer's is a chronic illness that progresses over time. It progresses at different rates for different people. Research studies have shown that the level of care that a person receives impacts life expectancy. The average life expectancy for someone diagnosed with Alzheimer's disease is approximately 4.5 years. Apart from possible religious principals, would anyone willingly give up 4.5+ years of life? Aricept, as an example, a drug currently indicated for mild to moderate Alzheimer's, may be effective for moderate to severe disease. Other drugs are also in development. Should current and future drug therapies be left out of the equation? What is a disease "such as Alzheimer's"? Every chronic illness has a different disease course. Is Parkinson's disease sufficiently similar to Alzheimer's? What of vascular dementia? The terminology is so vague as to be impossible to appropriately interpret. What is undue legal risk? Should your agent first relocate your domicile to a state like Washington, or a country like Holland,

were assisted suicide is permitted under certain conditions?

Of Nutrition and Feeding Tubes

Ask almost anyone if they want to be kept alive on feeding tubes and you'll hear a definite "No!" But it is far from simple. Just what is a "feeding tube?" Is the reference to the feeding

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tube you don't want a temporary naso-gastric tube inserted through the nose into the stomach while you are awake? Or is it a PEG (Percutaneous Endoscopic Gastric) tube which is inserted in a more invasive procedure? Were you aware of these when you made a generic objection? Under what circumstances would you really not want or not wish one or the other? If you are conscious and aware, would you really turn down measures that would prolong your life? Most people when asked the questions assume, erroneously, that they are in a vegetative state when a feeding tube would be administered. Details are important. Many faiths have issues with not providing nutrition. There was recently an article in the New York Times about palliative feeding that might change this entire analysis. The article concluded that feeding tubes do not in fact prolong life. Instead, careful hand feeding, to the extent the patient will take food, a tedious but perhaps loving process, can maintain life for just as long. Should living wills from a humane and religious perspective suggest the use of palliative feeding in lieu of more invasive procedures? **PP**

...CHECKLIST: 2010 PROBATE—CARRYOVER BASIS

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might be to value assets as high as possible to obtain the maximum basis step up to minimize future capital gains. That might be tempered if there is a state level estate tax. If the appreciation is greater than the available basis adjustments, then the fun really begins. Which assets do you allocate the adjustment to? If the assets are distributed disproportionately to different heirs (e.g., business to one heir, house to another) fireworks might follow!

✓ What is the expected holding period for the property? If property, such as a farm, is intended to remain for generations in the family it is less in need of an allocation to increase basis than are other assets.

✓ Are other avenues to avoid, defer or minimize the potential future capital gains tax available and how does their availability compare to other assets in the estate if the maximum basis adjustment has to be rationed to the various assets?

✓ Will a CRT defer the tax so long that basis adjustment should be allocated elsewhere? If the estate holds raw land that is likely to be donated to the local church for an expansion project the basis adjustment is less important as compared to other assets if a charitable remainder trust or outright donation is used.

✓ Might a 1031 tax free exchange change the analysis? If the estate owns a shopping center and rather than sell it, if a tax deferred Code Section 1031 exchange is possible, the allocation of basis to the center may be less advantageous.

✓ Exchange funds might be part of the plan. Appreciated securities could be contributed to an exchange fund to diversify without incurring capital gains then these assets would be less in need of a basis allocation. ✓ If the decedent's principal residence can be sold and exclude gain under the home sale exclusion rules then basis adjustment should not favor the residence.

✓ What will the capital gains tax rates be when the assets are sold in the future? Get out your crystal ball and your abacus and guess which rates apply at which income levels, how the Medicare tax on investment income factors into the calculus, etc. ✓ What will the tax bracket of the beneficiaries receiving property be? ✓ Many states have enacted laws that provide that formula clauses under a will (e.g., give the largest amount that won't create a federal estate tax to a bypass trust) should be based on 2009 estate tax rules. Executors may have to apply and interpret state statutes enacted to deal with formula clauses to determine who receives which assets even before they evaluate options for allocating the \$1.3 million or \$3 million basis adjust-

ment.

✓ The estate's CPA should prepare a worksheet identifying every asset and listing: Tax basis Corroboration or estimates of how tax basis was determined (there will be some fancy footwork to come up with these numbers) Fair market value of each asset with a reference to the appraisal or other source of the determination of value Classification of the asset (e.g., certain assets such as IRD won't qualify for basis step up), whether the asset qualifies for the general basis adjustment of \$1.3M and/or the spousal \$3M Other adjustments (NOLs, homes, etc.) Factors considered in allocating the basis adjustment to each asset The actual allocated basis adjustment Final tax basis. **PP**

RECENT DEVELOPMENTS

■ **Bad Bad Sinbad! Comedian Sinbad Liable for Unpaid Taxes:** The IRS can seize assets held by a third party to satisfy a taxpayer's tax debt if the third party is an alter ego or nominee of the taxpayer. For example, a California District Court recently found that comedian Sinbad Adkins (aka David Adkins) had unpaid income tax liabilities exceeding \$8 million (including interest, penalties, fees, and collection costs) for tax years 1998–2006. It also found that Michael Adkins held bare legal title to real property in Hidden Hills, California as nominee for Sinbad. The court held that a lien for Sinbad Adkins' unpaid tax liabilities attached to the property as of the dates of assessment. It then allocated proceeds of a future sale of the property to various parties (which may explain why the IRS filed suit instead of exercising its administrative lien and levy collection powers), including the mortgage holder, the IRS and California Franchise Board, and the local homeowner's association. *U.S. v. Adkins*, 106 AFTR 2d 2010-XXXX (D.C. Cent. Cal.).

■ **Estate Tax—Executor's Reliance on Adviser:** Sometimes taxpayers can blame a bad adviser (but wouldn't it just be easier to start with a capable professional in the first place?). Decedent's estate conceded it owed a \$380,514 estate tax deficiency, but argued that it was not liable for a \$76,103 Section 6662 accuracy-related penalty for negligence or disregard of rules or regulations. In waiving the penalty because the estate's executor acted with reasonable cause and good faith in relying on the Form 706 preparer, the Tax Court found that the executor (1) was unsophisticated in tax matters; (2) believed that the preparer was competent in estate planning because his business card included the words "Estate Planning," and he was an enrolled agent who knew how to file "every return the IRS has;" and (3) provided the preparer with "all relevant financial data in his possession needed to determine the correct amount of estate tax." *Estate of Ralph Robinson*, TC Memo 2010-168 (Tax Ct.). **PP**