

PRACTICAL PLANNER NEWSLETTER

MARTIN M. SHENKMAN, PC
PO Box 1300, Tenafly, NJ 07670
Email: newsletter@shenkmanlaw.com

RETURN SERVICE REQUESTED

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

VOLUME 6, ISSUE 6
NOV-DEC 2011



PRACTICAL PLANNER

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

More Info:

◦Seminars: A series of phone conferences for estate planners is planned for 2012 hosted by the Ultimate Estate Planner. See <http://ultimateestateplanner.com/> to register. Sign up for email announcements for each program at www.laweasy.com. 1/23/12 – 2:00 p.m. EST Foxmoor Continuing Education (formerly PESI) sponsors “Estate Planning for Chronic Illness: Estate, Financial and Related Planning” webinar. Register at www.foxmoor-ce.com. Use code: 20Shenkman for a \$20 discount.

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

PLANNING POTPOURRI

Competency: For a complex estate plan to be respected you have to be competent when you sign all those legal documents. Importantly, competency is a legal matter, not a medical decision. When assessing competency some use the Folstein Mini Mental exam. That might not really be optimal for more highly educated consumers. Instead the St. Louis University Mental Status Exam (SLOMS) which evaluates cognitive decline in individuals with a higher education, may be better barometer to test cognitive status.

When trusts are too costly: Trusts are the default answer for how to structure any gift or inheritance. But sometimes, trusts are just too costly or cumbersome for the amounts involved or objectives. For younger donees/heirs transfers can be made to what are referred to as custodian accounts. These include a Uniform Gifts to Mi-

nors Act (UGMA) and its kid sister, a Uniform Transfers to Minors Act (UTMA) account. While limited in scope and far from perfect there is no cost and they permit assets to be held at least until the age of majority. In some instances, a bequest might mandate that the executor purchase an immediate non-cancellable annuity. This can be structured to provide a beneficiary with a consistent cash flow for life and achieve other goals without the administrative costs and burdens of a trust. This is practical for dollar bequests (or gifts) that are too small to interest an institutional trustee, or too small to justify the costs of even a family trustee, or if no one is willing to serve as trustee (e.g. when the beneficiary is particularly difficult).

Safer Checks: If Junior needs a raise in his allowance, he can rub the dollar amount on his allowance check with a nickel, then use Scotch brand

tape to take off the numbers. Neato Presto he can then type in the allowance figure he needs to buy Justin Bieber's Under The Mistletoe Ultimate Gift Box. Need a cool stocking stuffer? New checks are available that have valuable security features, like a treasury approved bond paper with fibers (similar to paper money), multi-prismatic ink (which cannot be copied), and more absorbent (no, they're not printed on Bounty). The ink absorbs into the paper and cannot be easily removed. The combination of paper, ink and other features makes it tough for the bad guys to alter checks. See Intuit (Quicken) website: www.intuitmarket.com. PP



Practical legal stuff...
in plain English

www.laweasy.com

FAMILY FEUD

Summary: Estate litigation can be ugly! Nobody wants their kids to fight over their estate, but estate battles are more common than Republican Primary debates! You can lessen the risk of antagonism and these mud hurling brawls (were talkin' about estate litigation not the debates). But you have to use the Dr. Phil approach and start by getting “real.” Stop using estate taxes, legal fees, complexity, or other excuses to avoid dealing with the tough personal issues.

Team Up: If only your hair dresser knows for sure, that won't really help minimize the carnage. Here's another reality check. If you just hired a new estate planner, or only meet your planner every five years (once a year is vital), how can he or she realistically get sufficient perspective on your family's dynamics (or dysfunction)? If you've worked with the same CPA for decades, or have met with the same wealth manager quarterly for many years, they each will have different and often deeper insights to add to your estate planner's own observations. Including all key advisers at one estate planning meeting a year will greatly increase the likelihood that flashpoint issues will be identified and dealt with.

Ultimate Fighting Championship: Will your supposedly loving kids play their version of Family Feud when you're not here to referee? Does “UFC” stand for Ultimate Family Carnage? Will contests can become quite acrimonious and generate significant legal and other fees. Surprisingly, airing family squabbles in the public forum of a courtroom doesn't seem to dissuade irate heirs. Most estate fights never make it to court because it is just so costly. But these battles can be bloodier than a UFC challenge even without formal court proceedings.

Minimizing Battles: There are lots of steps to reduce the likelihood of battles. While these will vary depending on family circumstances, use these as discussion points with your advisers:

Keep your planning and documents current. Outdated dispositive schemes, formula clauses that don't work, fiduciaries that are no longer advisable, can increase the likelihood of estate administration Armageddon. It's not only outdated tax and legal matters that can torpedo your plan, its failing to address ever-changing family dynamics.

Economic changes must be addressed. A real problem for many heirs is the toll the recession and tepid recovery have taken on their inheritance. If this is coupled with a

poorly designed will, havoc may ensue. If the will leaves large specific bequests, and asset values have declined, what happens? “Abatement” is the mechanism of adjusting certain bequests in a will (and the order and proportion of the reduction or elimination) when the bequests under the will are greater than the assets in the estate. For example, if you provide a large list of specific dollar bequests, but the value of your home and vacation home are only about half what they were 5 years earlier when you signed the will, problems could follow. Drafting a

will to deal clearly and fairly with the impact of the economic rollercoaster can minimize or avoid will contests. You can cap certain tiers of bequests, use percentages so relative distributions remain the same regardless of values, etc.

Keep your planning consistent. If there are inconsistencies, explain them especially if they were intentional. Example: Your will bequeaths your estate to your 3 children equally. But only your daughter Jane is listed as beneficiary on your large

(Continued on page 2)

CHECKLIST: 2011 LESSONS

Summary: What lessons can we dredge from 2011?

✓ **Basketball Lock Out:** 2011 brought the 4th lockout in the National Basketball Association (NBA) history. The work stoppage ran from July 1, 2011, through December 15. For young players who haven't accumulated much wealth, or older ones who've been imprudent (Scottie Pippen had lifetime earnings of \$120 million and ended up broke, and sadly that's common), that's a long dry period. If NBA players need a budget and financial plan, don't you? Many people who view themselves as “wealthy” think they're immune from

budget drudgery, but in reality have burn rates that will wipe them out financially while they may live much longer. Finding wealthy retirees spending almost 10% of their capital each year is not rare. Budgeting mistakes are common. Many people don't factor in large periodic costs. If you own a home, every say 10 years they'll need new appliances, perhaps an updated kitchen, etc. Too often people budget the costs of maintaining a car, but not the cost of purchasing a new car. Don't use rules of thumb when budgeting, unless it's your thumb. Common as-

(Continued on page 3)

...FAMILY FEUDS

(Continued from page 1)

IRA. Your other two kids, David and Sam, are listed as contingent beneficiaries. Well, was it really your intent to benefit Jane more than your sons? Was it because she lived nearby, was your caregiver, and she is the child with the least secure financial standing? Or was it an oversight and you had really meant to list all three children but the beneficiary designation form from the mutual fund was a bit confusing and you mistakenly listed your sons as contingent beneficiaries (only to receive an inheritance if your daughter pre-deceased) instead of as primary to share equally with Jane? Which was it? Mistake? Intentional? A recitation in your will, re-execution periodically of the beneficiary designation, and a letter of instruction might all help confirm your real intent.

Patterns are good for more than knitting. Let's say executed a will leaving assets 60% to one child and 40% to

your other child. A year later you execute a new will adding \$10,000 to a charity, but retaining the same percentage distributions to your children. You have created a pattern that demonstrates consistent intent as to the primary dispositive provisions for your estate. That reinforces what you intended.

Will contracts can be used to bolster your intent. If you and your spouse/partner have a specific dispositive approach, both of you can sign a will contract agreeing not to change the provisions of your will. This prevents one spouse, following the other's death, from changing his or her will and thereby undermining the agreed plan. The will contract will also serve as another means of corroborating your intent for anyone else as well.

In *Terrorem* clauses are provisions included in wills that provide that anyone who challenges your will should be disinherited. If the person considering the challenge could face the loss of a significant bequest the *In Terrorem* clause will give them pause. The validity of these provisions, and requirements for them, vary by state so be certain to review them with your local estate planning attorney. But even if state law won't respect such a provision, many lawyers still include them, since they certainly make your feelings known. **Living Trusts:** Contrary to the hype that living trusts solve every estate planning problem, and eliminate cellulite too, living trusts can be problematic. When a will or living trust is challenged, it's often for lack of capacity or undue influence. A living trust, however, faces a tougher standard. The law generally permits low competency to sign a will to facilitate ones' right to make a will even when ailing and frail. Many people simply don't address their final planning until the end is staring them in the face. But a revocable trust is a contract, not a will. You must have "contractual capacity" which is a

higher standard of competency than testamentary capacity required for a will. Example: Someone recently diagnosed with Alzheimer's may have sufficient capacity to sign a will, but questionable capacity to sign a complex trust. If a revocable trust would be helpful in the circumstances,

For seminar announcements follow
"martinshenkman on www.twitter.com
and www.Linkedin.com/in/
martinshenkman
≈
For e-newsletter sign up at
www.laweasy.com.

the pour-over will that accompanies the trust (transfers all assets of the estate to the trust) should also recite the identical dispositive provisions as the trust. For a more complex trust, care should be taken to corroborate sufficient competency.

Beneficiary Designations (BD): How do IRAs fit into the will challenge UFC? Beneficiary designations (BDs) can be challenged too. But they can be slippery. If Mom named her latest home health aid, Snidely Whiplash, as sole beneficiary of her IRA, the IRA passes by operation of law. With a death certificate and proper ID Snidely can probably get the IRA and roll it over very quickly into an account in his name, pull the money from the account and gift it to his 2nd cousin who lives in Russia and is best known as Peggy in the Capital One commercial. Snidely can then move far away from Frostbite Falls, Minnesota. Will Dudley Do-Right find Snidely? Even if Dudley succeeds, Snidely may already be judgment proof. The cost of finding his cousin Peggy and pursuing him overseas could be prohibitive. Proper planning, documentation and monitoring, is vital to avoid having Peggy as your heir. **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, reviewer, publisher and NAEPC 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, Esq.

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 bi-monthly by Law Made Easy Press, LLC, P.O. Box 1300, Tenafly, New Jersey 07670. Information: news letter@shenkmanlaw.com, or call 888-LAW-EASY.

Copyright Statement: © 2011 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.

...CHECKLIST: 2011 LESSONS

(Continued from page 1)

assumptions can be a great simplifier, but if they don't reflect your actual lifestyle they can be more misleading than even a bad estimate of your real expenses. Do the homework and figure out what is real for you. When many people analyze their finances they err on the side of dying too young, say life expectancy. Life expectancy is the average number of years some is expected to live at a given age. 1/2 live longer! When pushed to do estate planning they defer planning as if they'll live forever. The disjointed assumptions can be quite damaging. Few people address alternative plan "B" and plan "C." If your main plan doesn't work, what is your fallback position? What is your fall-fallback position?

✓ **Stuntmen Really Do Get Hurt:** While filming a scene with an explosion on a rubber boat for the movie "The Expendables" one stuntman was killed, and another was left in critical condition. These are pros folks and with all the precautions they take, accidents happen. The odds of disability are really high. An illness or accident will keep 1 in 5 workers out of work for at least a year before the age of 65. 1 in 7 workers can expect to be disabled for five years or more before retirement. Yet disability planning is often a 3rd stringer in most estate and financial plans. Evaluate disability income replacement insurance, overhead interruption insurance for your closely held business, disability provisions in employee and shareholder agreements, etc. Watch the lingo. Many clauses have short fuses before you're tossed. Others ignore the entire concept of partial disability.

✓ **Demi and Ashton ooooh!** Moore says she's ending her marriage "with great sadness and a heavy heart." A heavy wallet too at a purported \$290M to haggle over. Prenuptial

agreements, BDITs and other planning should be the rage in Hollywood and for you too! Parents leaving money should leave it in a lifetime trust designed to protect it from the kiddie's divorce. If you're getting married, especially for the 2nd or later time (the divorce rate for second marriages is 67% for third marriages it's 74%), backstop a prenup by transferring wealth to a domestic asset protection trust (DAPT) before the marriage, or a beneficiary defective irrevocable trust (BDIT) after.

✓ **Marathon Estate Plans** ✓ Mary Keitany of Kenya seemingly defied history and logic in the 2011 NYC Marathon, until she learned the age old adage about the tortoise and hare. Pace yourself. If you want to

create and implement a complex financial and estate plan and attempt to do it all at one time, you'll likely burn out like Mary. Do a few steps at a time. Persistence, not speed gets you to the estate planning finish line.

✓ **9/9/9** ✓ Yes, sometimes you really do have to say no! Nein, Nein, Nein.

✓ **Terminator Heirs** How do you define who is an heir in your will? Is your definition as broad as Arnold Schwarzenegger's? Most wills continue to use archaic definitions of heirs. Should children out of wedlock be treated as heirs? Up to what age should an adopted child be permitted to be an heir? What about a child born after your natural heir dies? How

RECENT DEVELOPMENTS

Intercompany Management Fees: You may have scores of entities that own separate retail operations or rental properties, management or holding companies, and other ancillary entities. Often these entities pay management fees to assure outside owners fair economic treatment, or simply to comport with arm's length commercial practices. Sometimes, the fees are instead based on achieving personal goals or benefiting a particular child. In a recent case, the taxpayer's business consisted of 5 operating corporations and a limited liability company (LLC) that leased trucks to the operating entities. The leasing LLC paid management fees of \$9,000 per month to the operating entities for accounting, management, and safety and driver relations. The Tax Court denied half of the management fees because the taxpayer could not demonstrate how the fees were determined and whether they were at arm's length. The taxpayer could not convince the court that the management fees were ordinary and necessary trade or business expenses under Code Section 162. Daniel Fuhrman, TC Memo 2011-236 (Tax Ct.). This taxpayer might have gotten off easy. What if interests in the various entities were owned by GRATs, or other tax oriented trusts? Would the payment of an excessive non-arm's length management fee be tantamount to an impermissible additional contribution that could torpedo the GRAT? The interconnectedness of your entities and tax oriented trusts should be protected. Have your CPA corroborate the reasonableness of the fees.

Passive Loss Rules: The tax laws often use a limited partnership paradigm to ascertain limited liability company (LLC) results. Sometimes the model works, but often it's not good. The Regulations had generally used a number of factors including the presence of limited liability for determining whether a member of an LLC "materially participated." Temp. Reg. 1.469-5T(e). If so, losses from the LLC would be deemed active and could be used to offset other active income, such as wages. The IRS has realized that the right to participate in management is a