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PRACTICAL PLANNER®

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ESTATE PLANNING IS A NEW BALLGAME!

Summary: Estate planning is evolving and if you have not updated your planning and documents for the new game your planning will likely NOT (caps intended) work. The 2017 Tax Act dramatically changed how you should handle tax planning (not just estate tax planning). The time devoted to analyzing this new law resulting in my missing the first quarter 2018 newsletter. But lots of material is posted to www.shenkmanlaw.com. More than ever your estate planning is intertwined with your income tax planning. Many old wills and trusts might not be optimal in the new tax environment. They might even be costly! But estate planning is so much more, and focusing on just taxes (or thinking you don't have to address your estate plan because you don't have a tax problem), will almost assure a mess. This topic really requires a book (and that is in process) but the tips following will try to highlight key points to get you back on track.

■ **Dr. Phil Estate Planning: Dr. Phil doesn't stay busy 'cause people are simple and families get along. Most of us are pretty complicated, and families are often dysfunctional (and worse). Bottom line - if you don't deal with the human elements of estate planning your plan is useless and your goals won't be accomplished. So, whether the tax laws are new or old, most people can reduce the potential for estate spats with intelligent planning. But that requires confronting family demons and dealing with them proactively. Ignoring these issues might work since you may not be around to witness your family implode. But is that really what you want?**

■ **Bourdain and Spade: The recent deaths of two remarkable and incredibly talented people, Kate Spade and Anthony Bourdain, highlights the incredible pain and challenges so many people have, but which we as a society just don't seem to want to talk about. Suicide is the 10th leading cause of death in the U.S. 1 in 5 adults experiences mental illness each year. You can make estate planning about sterile legal documents (most folks prefer this ruse). But unless you really try to address the challenges you and your loved ones have, and we all have "something," your planning (or more accurately your lack of real planning) won't help or protect you or those you care about most. As a society we hardly seem able to talk about depression and mental health issues, the debilitating consequences of aging and chronic disease, family dysfunction, real diversity, and so much more. These considerations should be integrated into most plans. Addressing these tough issues is what can make an estate plan your estate plan. We, as well as our children, might choose different religions and life styles, go through ugly divorces, spend with abandon, have cognitive issues, develop major health issues, … While difficult, that is the fabric of which we are made and which makes us human. Planning should be human, compassionate, and realistic.**

■ **Humanistic Estate Planning: You may have to tackle a budget and adjust your lifestyle accordingly, face the financial, physical, cognitive, or other limitations you or your heirs have, create a trust structure tailored to address bipolar disorder, gambling, or drinking, or whatever else your circumstances might suggest. The first question so many people ask of an estate planner is "What will it cost?" Estimating the cost for a sterile plan might be easy, but what's the point of signing documents that are not based on a plan tailored to your needs and the needs of those you seek to help? The first question should really be "Can you help?" And the answer to that question is "Yes, but only if you are willing to work with your planning team." No adviser can help address these issues unless you are a proactive part of the process. A recent email from a colleague included the following sentence (slightly modified), that sets the right tone: "Particularly in this time when we are assaulted almost daily by stories of people acting with shameless selfishness,**

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CHECKLIST: TRUST FIX

Summary: How can you improve old trusts for the new tax laws and other changes?

■ **Why change existing/old trusts:**

√ **Tax rationale no longer relevant and perhaps detrimental. Example: A credit shelter trust was created when your spouse died to avoid estate tax on your later death. But the exemption then was $1M now its $11.18M and assets in the trust won't get a basis step-up on your death. Stock purchased for $100 is worth $100,000. If the stock was owned by you then on your death the tax basis is increased to the fair value of $100,000 eliminating any capital gains. You could just zap the trust and take the assets so they would be included in your estate and get that tax bennie. But do you have the right to? What if you get sued after pulling assets out? You could lose it all. A better solution might be to coordinate the location of assets, harvest gains and losses and perhaps control the appreciation inside that trust with your wealth manager.**

√ **Economics have changed (market has risen changing family economics, or worse, business decline and need assets). Example: The Rush University, Huber, Mortensen and Wacker cases all challenged self-settled domestic asset protection trusts ("DAPTs") after yours was created. You are still a bene-**

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...Estate Planning is a New Ballgame!

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seemingly without regard for or care about the often-grievous harm their actions cause others, we need to act out of intelligence and diligence…and in a manner not severed from kindness and compassion…"

■ **Modern Estate Planning: Modern estate planning seeks to address a wide array of personal, financial, income tax, estate tax, asset protection and other goals in a flexible and robust manner. If your planning or documents are old they may not incorporate these new concepts. So, regardless of the tax law changes (see below), your planning may need a facelift.**

■ **Planning by Wealth Level: While planning generalizations are always fuzzy and potentially misleading, it might help you to consider how planning might differ based on wealth.**

■ **Ultra-high net worth (UHNW) folks are planning like all get-out. The last great chance to repeal the estate tax failed with Trump's efforts that culminated in the Act. The current environment (no restrictions on valuation discounts, high exemptions, etc.) may just be the best its going to ever get. Fear the unknown! What might the 2020 election bring? Might the tax and other winds in Washington shift? Not worth the risk. Plan now and shift wealth before that process becomes more costly and difficult. My Ouija board is busted so be sure the plans you use are flexible enough to deal with whatever might happen in Washington. Planning at this wealth level is always complex, and always risky (if you move assets out of your estate you might lose a basis adjustment on death). You just can't move zillions without tax and legal risks few of which can be accurately quantified. But most UHNW seem to believe that these negatives pale by comparison to the risk of waiting for Washington to once again change the tax rules.**

■ **Lower wealth folks need to address the fact that all their existing planning may be useless or worse considering the new law. Just because the exemptions are high doesn't mean you don't need to update documents—formula clauses in wills should be redone, old trusts examined, etc. Too many cats in this category are just zapping old trusts with nary a thought. Often not the right move. You might have an old insurance trust holding insurance bought to pay an estate tax you might have owed when the exemption was $1M not $11.18M. But killing a good trust and cashing in a policy may be the worst move. That policy might be a good ballast to your stock portfolio, might be exchanged into a product that serve your current needs, and that trust might be decanted (merged) into a new improved trust that can accomplish a range of goals. Deep-sixing an old trust might sound simple and if you do-it-yourself it might be cheap too. But it may be the worst option.**

■ **Moderate wealth may now be a wide spectrum from $5M to $40M given the new exemptions. Those in this wealth range may benefit significantly from both the income tax and estate planning benefits of estate planning. New types of trusts might save significant income taxes too. But planning today is more complicated than ever (and you thought with high exemptions you didn't need to still love your tax attorney!). OK, complicated means costly too. Why? You should use some of the high exemptions before they sunset in 2026 (or a new administration in Washington changes them). Because the new exemptions (the amount you transfer without a tax) are so high ($11.18M per person in 2018) you may only transfer assets to trusts you can still benefit from (even if only indirectly). You might also benefit from using non-grantor trusts (those that pay their own tax, in contrast to grantor trusts on which you pay the income tax on trust income). You moderate wealth folks may need to achieve three conflicting planning objectives: (1) move assets out of your estate to lock in today's high exemption; (2) use trusts to retain access to those bucks since it is too much to give up; (3) make that trust a non-grantor trust for income tax purposes. You can thread that planning needle but it takes more than an off-the-rack-trust and you have to coordinate your estate planner, CPA and wealth adviser to make these MacGyver-Trusts work! While planning at this wealth level can be the most complex the best news is your planners will introduce you to a gaggle of new planning acronyms: SALTy-SLATs (or SLANTs) which are non-grantor variations of the spousal lifetime access trust), and un-INGs (a completed gift variant of the traditional intentionally non-grantor trust). But you may still need your traditional SLATs (grantor spousal lifetime access trusts), DAPTs (domestic asset protection trusts), and more. Impress your golf buddies with a new tax acronym for every hole!** PP

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...Checklist: Fix Old Trusts

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ficiary of a DAPT which some advisers view as riskier than years ago when you created it. But if your wealth has grown sufficiently so that perhaps you can renounce any rights as a beneficiary and negate the issue.

√ Changes in the law. Example: State and local taxes ("SALT") deductions were limited to $10,000 in the 2017 Tax Act and you live in a high tax state. Convert your existing spousal lifetime access trusts ("SLATs") to non-grantor trusts ("SLANTs") that pay their own tax. Transfer your home to an LLC and 49% LLC interest to each trust. Each trust can pay and deduct $10,000 of property tax. You've just added $20,000 of deductions to your tax return.

√ Better drafting and planning techniques now available. Example: You have an old trust done when trust planning was less sophisticated. The old trust distributes assets to your children outright when they reach age 35. Modern trust planning tends to hold assets in trust long-term to protect the assets from estate tax, divorce and lawsuits. Decant into a new trust that lasts for a lifetime.

■ How to change existing/old trusts:

√ Changing asset composition. Example: Family business assets are held in an irrevocable trust that distributes the business to your oldest daughter who was running the business when the trust was created. Now you want to split the business between both your daughters, as your younger daughter has entered the business. Swap personal assets (e.g. cash or stocks) into the trust for the business. Then have the business pass under your will to the heirs in the manner you now wish. Swap powers are typically thought of to bring appreciated assets back into your estate to get a basis step-up, but they don't have to be limited only to tax use. Another way to change assets may be to create a new trust that is grantor as to the old trust and sell discountable appreciating assets to the new trust. That may freeze values in an old less beneficial trust.

√ Using protector powers. Example: Have the trust protector use powers in the trust to change trustees, situs, and governing law to a no tax state.

√ Decanting. Example: Have the trustee exercise the power in the trust, or provided under state law, or in the laws of a new state after moving the trust there, to merge (decant) the old trust into a new improved trust. While decanting has grown in popularity and use be mindful that there are lots of tax uncertainties and little guidance as to the tax implications. Be particularly careful to scrutinize any potential change in beneficiaries. Decanting can be used to bolster trust protections for a beneficiary that might be sued or divorced.

√ Non-judicial modification. Example: Have everyone by agreement change the terms of the trust. In Delaware (Sec. 3342) if the settlor is alive and all parties agree by written consent or written non-objection you can change almost anything in an irrevocable trust (watch tax and other legal issues).

√ Powers of appointment in the instrument. Example: Some trusts give lifetime rights, others give testamentary rights (e.g. by will), some do both, for a designated person or persons to direct where trust assets should be distributed. Exercising these powers can transform an old unworkable trust into a new plan.

√ Code Sec. 2519. Example: Mom died and dad is beneficiary of a marital trust ("QTIP"). Dad doesn't need all the money and wants to use up some of mom's estate tax exemption (the deceased spouse unused exemption or "DSUE") before he remarries. Split the old QTIP into several trusts. PLR 201426016. For one of the post-split QTIPs dad can disclaim his income interest resulting in a deemed gift of the entire QTIP corpus using up the DSUE. PP

Recent Developments

■ Beginning in 2018, the standard mileage rates are: ■54.5 cents/mile for business travel. ■18 cents/mile for medical travel. ■14 cents/mile for charity travel. You can't use these after claiming a Section 179 deduction for the vehicle. Rev. Proc. 2010-51.

■ The 2017 Tax Act uses a new "chained" CPI to calculate inflation adjustments which reduces increases. ■The revised $10 million inflation-indexed Federal gift, estate and GST tax exemption is $11.18M in 2018. ■The $10,000 annual gift exclusion as indexed for inflation is $15,000 in 2018. ■The annual exclusion for gifts to a non-citizen spouse of $100,00 as indexed for inflation is $152,000. Rev. Proc. 2018-18,

■ 2017 Tax Act changed a myriad of tax rules. Hardly any aspect of planning was not affected. If you have not met with all your planning team (CPA, estate planner, wealth adviser, etc.) the odds are your planning will fall short. ■Matrimonial planning was substantially changed. If you in the process of divorcing and don't complete the divorce by end of 2018 alimony won't be deductible. ■Many pass-through businesses and real estate rentals may qualify for the new Code Sec. 199A 20% deduction of qualified business income. But the rules are insanely complex and IRS guidance is supposed to be issued this summer. You might be able to use non-grantor trusts, restructure your business and more to optimize this deduction. ■Charitable giving for most donors won't generate any tax benefit. But there are creative ways to plan donations to still secure deductions. ■Vacation home economics should be reconsidered. ■Home office deductions that may have been ignored in the past might make sense to use now. ■Some states have tried to counter the limitations on state and local tax ("SALT") deductions but be careful as the IRS may not permit these end-runs. ■Electing Small Business Trusts, special trusts that can hold S corporation stock were the subject of several technical changes. ■Life insurance basis and transfer for value rules were modified. ■The corporate alternative minimum tax has been repealed. ■Trust income taxation has been significantly affected by the repeal of miscellaneous itemized deductions. See what might still be deductible and whether changes might still salvage a deduction.

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■ **S Corporation Stock in Trust: Only certain trusts can hold S corp stock: grantor trusts whose income is taxed to the grantor, Electing Small Business Trusts ("ESBTs") which pay tax at the highest rate, and Qualified Subchapter S Trusts ("QSSTs") which must pass income to the beneficiary. If a grantor trust turns out after audit not to be wholly grantor, S corp status could be jeopardized. Although one cannot make a conditional ESBT election, one can make an unconditional ESBT election that is in effect superseded by the grantor trust rules under Reg. §1.641(c)-1(c); Reg. § 1.1361-1(m)(2)(v). Thus, the ESBT election protects against any flaws in grantor trust status without changing the annual income taxation. Acknowledgements to Steven B. Gorin, Esq.**

■ **Careful What You Post: Kim Kardashian West was robbed in a Paris hotel. The thieves spotted the loot on an Instagram post and planned the attack to nab it. Posting vacation pics on Facebook could let the bad guys know you're gone.**

■ **New Professionals Planning Tips: So, you're a new associate at a law/CPA/med practice: ■Don't try to keep up with the senior partner's lifestyle— you cannot afford it (and often they can't either). ■The ultimate luxury is financial independence not cool bling. Most of your peers do not have the ultimate luxury, but you can. ■The little things really do add up. But those small splurges add up over the course of a year and can derail your early savings goals. ■Take time to plan and to sharpen the saw (if you're not sure about that phrase read Stephen Covey's The 7 Habits of Highly Effective People) – no matter how busy you are you have to plan for you, and your loved ones' (if any yet) future. ■ Get life insurance (with conversion features if you are not buying permanent coverage), disability insurance, an IRA (whether or not deductible it is a good and cheap asset protection tool), max out on any firm offered retirement plans. ■Hire a financial adviser. Save, save, save (repetition intentional). ■You're not invincible so plan for disability. The stats are scary. ■Get real about the odds of making partner at your firm? SAVE in case you move to a smaller firm or start your own practice. If you spend your bonus on bling instead of banking it you won't have the cushion to fall back on when that statistically likely move comes. ■Think asset protection. You may not need to worry about getting sued until you're a partner but by then it will be more difficult to plan . Grow your IRA now (if your state law provides for this), be sure significant life insurance is owned in a trust, and consider permanent coverage.** PP

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