HOT topics for a HOT summer Johns Hopkins All Children's Foundation

August 29, 2018

Jonathan Blattmachr, Esq.

Jerome Hesch, Esq.

Martin Shenkman, Esq.

A KEY ESTATE PLANNING GUIDE

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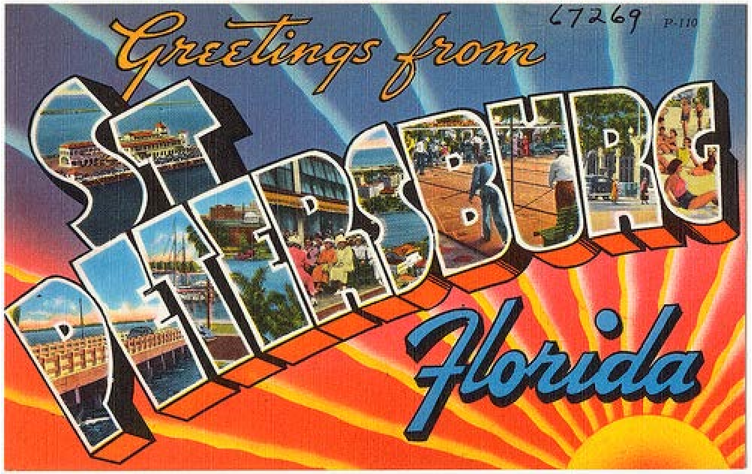
Today's Agenda (sort of….)

- 5-Introduction by Alan including upcoming seminar.
- 5- Planning for new Large Standard Deduction.
- 15- CRTs.
- 5-Florida Developments.
- 15-199A.
- 15-Asset protection.
- 10-Estate and Gift Developments.
- 15-Planning with Non-Grantor Trust.
- 5-Conclusion and wrap up comments by Alan.

Upcoming Seminar

Alan Gassman, Esq.

21st Annual Estate, Tax, Legal & Financial Planning Seminar
February 7, 2019 | St. Petersburg, FL



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The Dali Museum

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Join us at the brand new John Hopkins All Children's Research and Education Building and hear from some of the country's best speakers.

Jonathan Blattmachr, J.D.
Planning With Section 199A, Multiple Trusts, and Other Hot Topics

Sandra D. Glazier, Esq.
Trust and Estate Litigation; Planning Ahead for the Inevitable – a Primer for the Planner

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Jerome M. "Jerry" Hesch, Esq.
The Mathematics of Estate Planning

Christopher R. Hoyt
Retirement Asset Planning, Including for First and Second Marriages: Let the Fun Begin

Paul S. Lee, J.D., LL.M.
Five Planning Opportunities that do not Relate to Partnership Tax

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Ed Slott, CPA
2019 IRA and Retirement Planning Update

Lee-Ford Tritt, J.D., LL.M.
Recent and Not So Recent Tax Issues Regarding Family LLC's and Limited Partnerships

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Wednesday, February 6, 2019
VIP Reception with Ed Slott, CPA, at
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(limited seating available)

Thursday, February 7, 2019
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Printed Seminar materials
Breakfast and lunch

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Planning after the Tax Cuts and Jobs Act of 2017

Planning for new Large Standard Deduction

Planning for new Large Standard Deduction - 1

- Doubled standard deduction, SALT cap, elimination of many itemized deductions, affect planning.
- Sunset – will these changes disappear in 2026?
- New Regs prevent circumventing SALT with a donation.
  - Not entitled to Chevron deference.
- Charity and 642(c).

Planning for new Large Standard Deduction - 2

- State and local tax deduction.
  - SALT Planning (see use of irrevocable trusts below).
- When do you take standard deduction?
- Bunching.

Charitable Remainder Trust Planning Ideas

Jerome Hesch, Esq.

Facts

- Family is selling a warehouse that has a fair market value of $100,000,000

- The warehouse is fully depreciated and has zero basis.

- One option is to simply sell the warehouse and invest the proceeds, or enter into a Section 1031 exchange, but what if the warehouse is contributed to a Charitable Remainder Trust? Is the Family better off?

Charitable Remainder Trusts (CRTs)

- The objective of using a CRT is to defer the reporting of the capital gain realized upon the sale of the asset contributed to the CRT over the life of the individual who is receiving the annuity distribution or the unitrust distribution.
- If an individual age 59 lives to age 95, using the assumed facts in the illustrations, then 92% of the capital gain realized upon the sale by the CRT is reported over a 36-year period and only 8% of that gain passes to charity.
- Since appreciated real estate has a charitable deduction limited to basis, there is no charitable income tax deduction upon creation of the CRT.

Comparison of Sale vs. Charitable Remainder Trust

After Tax Cashflow Based on $100 Million Investment		
	Sale of Poperty for $100 Million and Take After Tax Income Each Year ($2,990,000)	Charitable Remainder Trust Take Matching Income Payment Each Year ($2,990,000) and Invest Remainder in Side Fund
Average Annual Return	8%	8%
Yearly Payout to Family	$2,990,000	$2,990,000
Term	22 Years	22 Years
Total of Annual Payments	$65,780,000	$65,780,000
Amount Left Over	$65,000,000	$86,079,247
Money to Charity		$21,793,038
Unrealized Gains	UNKNOWN	ZERO
Total Cash	**$130,780,000**	**$173,652,284**
Footnotes		
Charitable Remainder Trust Amount Passing to Charity		***$21,793,038***
Net Funds Outside of Charity		***$151,859,247***

Sale of Warehouse

Assumptions		
Sales Proceeds	$	100,000,000
Taxes	$	(35,000,000)
Initial Principal to Invest	$	65,000,000
Rate of Return		8.00%
% of Ordinary Income		50%
% of Capital Gain Income		50%

NET CASH RECEIVED AFTER SALE AND TAKING ONLY THE 8% INCOME EACH YEAR

Year	Market Value	Earnings	Ordinary Income Taxes	Capital Gain Taxes	Net Cash After Taxes
1	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
2	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
3	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
4	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
5	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
6	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
7	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
8	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
9	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
10	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
11	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
12	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
13	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
14	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
15	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
16	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
17	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
18	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
19	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
20	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
21	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
22	$ 65,000,000	5,200,000	(1,300,000)	(910,000)	2,990,000
		Total Payments Received			**65,780,000**
		Remaining Principal			**65,000,000**
					$ 130,780,000

Charitable Remainder Trust Alternative (Part 1 of 3)

Charitable Remainder Trust					
Year	Beginning Principal of Charitable Remainder Trust	Income Rec'd/Accr'd (8%)	Distribution (14.69%)	Remainder	Capital Gain Distributed From Trust
1	$ 100,000,000	$ 8,000,000	$ 14,691,000	$ 93,309,000	$ 6,691,000
2	$ 93,309,000	$ 7,464,720	$ 13,708,025	$ 87,065,695	$ 6,243,305
3	$ 87,065,695	$ 6,965,256	$ 12,790,821	$ 81,240,129	$ 5,825,566
4	$ 81,240,129	$ 6,499,210	$ 11,934,987	$ 75,804,352	$ 5,435,777
5	$ 75,804,352	$ 6,064,348	$ 11,136,417	$ 70,732,283	$ 5,072,069
6	$ 70,732,283	$ 5,658,583	$ 10,391,280	$ 65,999,586	$ 4,732,697
7	$ 65,999,586	$ 5,279,967	$ 9,695,999	$ 61,583,554	$ 4,416,032
8	$ 61,583,554	$ 4,926,684	$ 9,047,240	$ 57,462,998	$ 4,120,556
9	$ 57,462,998	$ 4,597,040	$ 8,441,889	$ 53,618,149	$ 3,844,849
10	$ 53,618,149	$ 4,289,452	$ 7,877,042	$ 50,030,558	$ 3,587,590
11	$ 50,030,558	$ 4,002,445	$ 7,349,989	$ 46,683,014	$ 3,347,545
12	$ 46,683,014	$ 3,734,641	$ 6,858,202	$ 43,559,453	$ 3,123,560
13	$ 43,559,453	$ 3,484,756	$ 6,399,319	$ 40,644,890	$ 2,914,563
14	$ 40,644,890	$ 3,251,591	$ 5,971,141	$ 37,925,341	$ 2,719,550
15	$ 37,925,341	$ 3,034,027	$ 5,571,612	$ 35,387,756	$ 2,537,585
16	$ 35,387,756	$ 2,831,020	$ 5,198,815	$ 33,019,961	$ 2,367,795
17	$ 33,019,961	$ 2,641,597	$ 4,850,963	$ 30,810,596	$ 2,209,366
18	$ 30,810,596	$ 2,464,848	$ 4,526,385	$ 28,749,059	$ 2,061,537
19	$ 28,749,059	$ 2,299,925	$ 4,223,524	$ 26,825,459	$ 1,923,600
20	$ 26,825,459	$ 2,146,037	$ 3,940,928	$ 25,030,568	$ 1,794,891
21	$ 25,030,568	$ 2,002,445	$ 3,677,241	$ 23,355,773	$ 1,674,795
22	$ 23,355,773	$ 1,868,462	$ 3,431,197	$ 21,793,038	$ 1,562,735
	$ 100,000,000	**$ 93,507,054**	**$ 171,714,016**	**$ 21,793,038**	**$ 78,206,962**

Amount to Foundation at End of CRT Term - $21,793,038

Charitable Remainder Trust Alternative (Part 2 of 3)

Charitable Remainder Trust - Calculation of Net Distribution After Taxes						
Year	**Ordinary Taxes on Income of Trust**	**Capital Gain Taxes on Income of Trust**	**Capital Gain Taxes on Gain Distributed From Trust**	**Net Cash After Taxes**	**Annual Payment**	**Amount to Reinvest**
1	$ (2,000,000)	$ (1,400,000)	$ (2,341,850)	$ 8,949,150	$ 2,990,000	$ 5,959,150
2	$ (1,866,180)	$ (1,306,326)	$ (2,185,157)	$ 8,350,362	$ 2,990,000	$ 5,360,362
3	$ (1,741,314)	$ (1,218,920)	$ (2,038,948)	$ 7,791,640	$ 2,990,000	$ 4,801,640
4	$ (1,624,803)	$ (1,137,362)	$ (1,902,522)	$ 7,270,301	$ 2,990,000	$ 4,280,301
5	$ (1,516,087)	$ (1,061,261)	$ (1,775,224)	$ 6,783,845	$ 2,990,000	$ 3,793,845
6	$ (1,414,646)	$ (990,252)	$ (1,656,444)	$ 6,329,938	$ 2,990,000	$ 3,339,938
7	$ (1,319,992)	$ (923,994)	$ (1,545,611)	$ 5,906,402	$ 2,990,000	$ 2,916,402
8	$ (1,231,671)	$ (862,170)	$ (1,442,194)	$ 5,511,205	$ 2,990,000	$ 2,521,205
9	$ (1,149,260)	$ (804,482)	$ (1,345,697)	$ 5,142,450	$ 2,990,000	$ 2,152,450
10	$ (1,072,363)	$ (750,654)	$ (1,255,657)	$ 4,798,369	$ 2,990,000	$ 1,808,369
11	$ (1,000,611)	$ (700,428)	$ (1,171,641)	$ 4,477,310	$ 2,990,000	$ 1,487,310
12	$ (933,660)	$ (653,562)	$ (1,093,246)	$ 4,177,733	$ 2,990,000	$ 1,187,733
13	$ (871,189)	$ (609,832)	$ (1,020,097)	$ 3,898,201	$ 2,990,000	$ 908,201
14	$ (812,898)	$ (569,028)	$ (951,842)	$ 3,637,372	$ 2,990,000	$ 647,372
15	$ (758,507)	$ (530,955)	$ (888,155)	$ 3,393,996	$ 2,990,000	$ 403,996
16	$ (707,755)	$ (495,429)	$ (828,728)	$ 3,166,903	$ 2,990,000	$ 176,903
17	$ (660,399)	$ (462,279)	$ (773,278)	$ 2,955,006	$ 2,990,000	$ (34,994)
18	$ (616,212)	$ (431,348)	$ (721,538)	$ 2,757,286	$ 2,990,000	$ (232,714)
19	$ (574,981)	$ (402,487)	$ (673,260)	$ 2,572,796	$ 2,990,000	$ (417,204)
20	$ (536,509)	$ (375,556)	$ (628,212)	$ 2,400,651	$ 2,990,000	$ (589,349)
21	$ (500,611)	$ (350,428)	$ (586,178)	$ 2,240,023	$ 2,990,000	$ (749,977)
22	$ (467,115)	$ (326,981)	$ (546,957)	$ 2,090,143	$ 2,990,000	$ (899,857)
	$ (23,376,763)	**$ (16,363,734)**	**$ (27,372,437)**	**$ 104,601,081**	**$ 65,780,000**	**$ 38,821,081**

Charitable Remainder Trust Alternative (Part 3 of 3)

Charitable Remainder Trust - Reinvestment of Distributions in Side Fund					
Year	Market Value	Earnings	Ordinary Income Taxes	Capital Gain Taxes	Net Cash
1					
2	$ 5,959,150.00	476,732	(119,183)	(83,428)	274,121
3	$ 11,593,633.27	927,491	(231,873)	(162,311)	533,307
4	$ 16,928,580.03	1,354,286	(338,572)	(237,000)	778,715
5	$ 21,987,595.73	1,759,008	(439,752)	(307,826)	1,011,429
6	$ 26,792,870.31	2,143,430	(535,857)	(375,100)	1,232,472
7	$ 31,365,280.45	2,509,222	(627,306)	(439,114)	1,442,803
8	$ 35,724,485.29	2,857,959	(714,490)	(500,143)	1,643,326
9	$ 39,889,016.20	3,191,121	(797,780)	(558,446)	1,834,895
10	$ 43,876,360.83	3,510,109	(877,527)	(614,269)	2,018,313
11	$ 47,703,041.99	3,816,243	(954,061)	(667,843)	2,194,340
12	$ 51,384,691.65	4,110,775	(1,027,694)	(719,386)	2,363,696
13	$ 54,936,120.39	4,394,890	(1,098,722)	(769,106)	2,527,062
14	$ 58,371,382.75	4,669,711	(1,167,428)	(817,199)	2,685,084
15	$ 61,703,838.56	4,936,307	(1,234,077)	(863,854)	2,838,377
16	$ 64,946,210.76	5,195,697	(1,298,924)	(909,247)	2,987,526
17	$ 68,110,639.84	5,448,851	(1,362,213)	(953,549)	3,133,089
18	$ 71,208,735.15	5,696,699	(1,424,175)	(996,922)	3,275,602
19	$ 74,251,623.40	5,940,130	(1,485,032)	(1,039,523)	3,415,575
20	$ 77,249,994.47	6,180,000	(1,545,000)	(1,081,500)	3,553,500
21	$ 80,214,144.81	6,417,132	(1,604,283)	(1,122,998)	3,689,851
22	$ 83,154,018.53	6,652,321	(1,663,080)	(1,164,156)	3,825,085
	$ 86,079,246.50				47,258,165

Florida Developments

Jerry Hesch

Planning after the Tax Cuts and Jobs Act of 2017

Planning by Wealth Level

UHNW Business Owners: Planning with the New Exemptions

- For large estates, the increased exemption should be used, likely in leveraged transactions to maximize the wealth transfers from the increased exemption. For example, if as some commentators suggest a 10:1 ratio (others suggest a 9:1 and many disagree with this concept entirety) leverage is appropriate on a sale of assets to a trust an additional $10 million of exemption for a married couple might support a $100 million sale of assets to irrevocable trusts.
- Further, since the IRC Sec. 2704 Regulations have been withdrawn, that sale may be of discounted assets leveraging the wealth transfer upwards of perhaps $130 million of assets on the new exemption amount.
- NOW is the time to plan before a new administration adversely changes the estate tax rules (yet again!).

UHNW Business Owners: GST: Planning

- For larger estates, more sophisticated planning may be advisable to shift value from non-GST exempt trusts to GST exempt trusts.
- Example: If exemption has been used and GRATs are employed have the back end be an existing non-GST exempt trust that will have a vested remainder which it can then sell to an older existing GST exempt trust.
- Example: A family member may create a new irrevocable trust that is a 678 grantor trust as to the existing non-GST exempt trust, funding that new trust using a portion of her new gift and GST exemption. That new trust might then engage in a transaction with the old non-GST exempt trust to shift value into a more optimal transfer tax structure.

UHNW Clients: Special Considerations

- Non-grantor trust planning for the UHNW client may also be easier than for the moderate wealth client in that the UHNW client, in contrast to a moderate wealth client, may not need access to the assets transferred to the non-grantor trusts. That can avoid several complex tax issues on structuring a non-grantor trust to permit access, as discussed below.

Moderate Wealth Business Owners/Clients

- "Moderate" wealth may be a wide range from perhaps $5M to as much as $40M relative to the new high exemption amounts.
- High temporary exemptions $22M/couple, mean plan now. Reduced by ½ in 2026 but could be adversely affected by a new administration before then.
- Income tax considerations and SALT deductions change the face and goals of planning.
- Access to assets transferred is more critical than ever with the large dollars that have to be transferred to use exemption currently. This is critical to avoid the so-called buyer's remorse that affected many 2012 last minute estate planning transactions. In many of those plans the transferor/donor made large wealth transfers in the rush of the December 31, 2012 anticipated deadline, and thereafter could not access those funds. In 2018 transfers might need to exceed the $5.6M that the exemption may decline to in 2026 before any exemption benefit is preserved. Second, in 2012 the most irrevocable trusts created to hold gifts and other transfers were structured as grantor trusts. This permitted the spouse to have access and the settlor to borrow trust funds without adequate security. In the current 2018 planning environment it will be advantageous to structure many of the trusts to receive gifts as non-grantor trusts. This will require more complex planning to achieve goals that will appear contradictory. This is explained at greater length below.
- Consider having one spouse not both use exemption thereby preserving more exemption.

Moderate Wealth Business Owners/Clients: Simplify/Enhance Existing Transactions –

- Note sale transactions (sale of a minority interest in a business or real estate entity to a grantor trust for a note).
- For more moderate wealth clients who have previously consummated note sale transactions, consideration should be given to immediately funding additional gifts to the purchasing trusts to shore up the economics of those sale transactions. On those transactions, consideration might be given to evaluating the need for the existing guarantees. On much larger transactions, the additional trust "capital" might be supportive, but have no meaningful impact on guarantees.
- On smaller note sale transactions, that additional $5 million gift might be used to pay off a portion or all of a note, thereby eliminating the IRS IRC Sec. 2036 string argument as to the note.

Moderate Wealth Clients: GST - Late Allocations

- For taxpayers with estates of a size that there is no need to preserve the new GST exemption, it might be prudent to make late allocations of GST exemptions to existing trusts so that if a future administration rolls back the Act's benefits, those trusts will already be exempt (barring some type of claw back). Some advisers suggest that it may not be feasible to allocate new GST exemption to prior gifts. Others disagree.
- **Example**: Late allocations of GST to life insurance trusts (ILITs) that were not initially intended to be GST exempt. Should trust be decanted (see below) to enhance protection/benefits? ILITs have and will remain common planning tools for those with valuable and illiquid business interests.
- **Example**: Gift tax returns were not filed, or not filed properly for past gifts. Even though the current large exemption provides no cover for prior gifts it may be advisable to address the clean up in the current environment, e.g. filing returns that were not filed and confirming the belief that GST was automatically allocated to prior transfers.

Planning: Using Low Wealth Family Member Exemptions - 1

- Capture unneeded transfer tax exemptions of family members or others with modest wealth. Great way to eliminate appreciation/gain that could be taxed on sale of a business or gain new depreciation deductions. Not clear whether the step-up will add to the 199A tangible property 2.5% calculation.
- The taxpayer could make a gift of highly appreciated assets to a close family member living in a non-decoupled state who has a modest estate of her own, who could bequeath those assets to the descendants of the taxpayer in a GST exempt long term trust. An obvious drawback of this is loss of control over the assets.
- Create an irrevocable trust with a general power of appointment (GPOA) to a person living in a non-decoupled state who has a modest estate of her own. The presence of that GPOA will cause estate inclusion of trust assets in that person's estate generating no estate tax but an adjustment of basis on her death. The exercise of the GPOA could be conditioned upon the consent of a non-adverse party providing a measure of protection. Alternatively, a limited power of appointment ("LPOA") could be provided to that person and another person can be given the power to convert the LPOA into a GPOA before the power holder's death. If the trust is formed in a jurisdiction that permits silent trusts, is there a need to even inform the power holder of the existence of the GPOA?
- **Caution**: If poor relative/parent gets a GPOA that might expose assets subject to the GPOA to the reach of Medicare.

Planning: Using Low Wealth Family Member Exemptions - 2

- An upstream GRAT could also be used. Acknowledgement to Turney Berry.
- **Example**: Clients have a net worth substantially in excess of the $22 million consisting primarily of fully depreciated rental building LLCS. The client's parents have a net worth combined of only $2 million. So, the clients create a GRAT that is calculated to vest in each parent somewhat less than the maximum amount which, when added to their other assets, would not exceed each parent's exemption at the time that each parent dies. The parents bequeath the remainder interest to a trust for the benefit of the client and the client's descendants. This transfer will not only use up the parent's estate tax exemption, but it can utilize each parent's GST exemption (because there is no ETIP with respect to the parent). The IRS should have no objection to this planning because it actually uses exemption, rather than being an assignment on day one (or two) of a nominally valued remainder interest.

Lower Wealth Business Owners/Clients: Planning

- For lower wealth clients, existing documents and planning will have to be reviewed. Many clients in this wealth strata will be inclined to unravel prior planning under the premise of “Why do I need this now?”
- Practitioners will have to educate these clients as to the value of retaining (whether modified or otherwise) existing planning from a number of perspectives.
- Many estate planning steps provide asset protection benefits and the transfer tax changes do not minimize the need for that. Business owners in particular should take steps to assure protection of non-business assets, separate passive (e.g. real estate) from active (e.g. manufacturing) interests. For some clients if the planning is already in place the modest cost of continuing to maintain that planning may be insignificant relative to the cost of unraveling the planning, and then having to reconstruct it in the future if the law changes yet again (e.g. a reduction in the exemption amount by a future administration).

Lower Wealth Business Owners/Clients: Planning

- Creative applications of non-grantor trusts to garner income tax deductions. For lower wealth clients this might be useful.
- Lower wealth clients are often inclined to merely terminate prior planning as irrelevant to them. Practitioners should advise these clients as to the benefits of retaining prior planning, e.g. a life insurance trust to protect the proceeds for intended heirs or the liquidity needs of a family business, as well as the costs and potential problems of simply terminating existing planning.

Post-TCJA Trust Planning

- The bottom line is that planning is more complex than ever. Practitioners and clients/business owners need a wider variety of trust planning techniques in their tool kits than ever before = More trust and planning acronyms.
- All this occurs at a time when most even wealthy clients and in particular business owners tune out planning recommendations because they view the transfer tax system as irrelevant given the current high exemptions. That will likely prove a mistake for clients who do nothing and miss out on income tax, asset protection, and estate planning that may well prove with hindsight to have been advisable.

Planning after the Tax Cuts and Jobs Act of 2017

199A SSTB Considerations

Prop. Regs. Nix Planning of Dividing SSB and Non-SSB

- **Example of What We Thought We Could Do:** A physician operates a practice.
- An FLP, separate from the practice entity, owns the buildings where the practice operates and leases the facilities to the practice entity.
- Another FLP, independent from the practice and the real estate entity, was created by various family trusts and hired a graphics designer and marketing firm. Those contractors created a practice name, logo, slogan, consumer facing website (i.e., one without client data), and related marketing materials that were licensed to the practice. The practice operates under the licensed name, uses the licensed logo and marketing materials on all letterhead, advertisements, signage, website and more.
- Equipment was purchased and held in a third FLP. The equipment FLP leased equipment to the practice.
- These ancillary entities would all seem to be non-SSB's independent of the medical practice. Further, so long as the prices are arm's length for the rents and license fees the earnings in those entities should qualify for the IRC Sec. 199A deduction.
- Consider gifting ownership interests to irrevocable trusts non-grantor trusts each of which has its own threshold amount.

Prop. Regs. Nix Planning – Definitions of SSTBs broad

- Prop. Regs. Broadly define medical.
- Aggregation and common ownership tests prevent aggregation.
- Defines health care: “The provision of medical services by physicians, pharmacists, nurses, dentists, veterinarians, physical therapists, psychologists, and other similar healthcare professionals who provide medical services directly to the patient.”
- Defines law: “…the performance of services in the field of law means the performance of services by individuals such as lawyers, paralegals, legal arbitrators, mediators, and similar professionals performing services in their capacity as such. The performance of services in the field of law does not include the provision of services that do not require skills unique to the field of law, for example, the provision of services in the field of law does not include the provision of services by printers, delivery services, or stenography services. ”

Prop. Regs. Nix Planning – Tough Aggregation Rules

- Aggregation and common ownership tests prevent aggregation.
- “” An SSTB includes any trade or business that provides 80 percent or more of its property or services to an SSTB if there is 50 percent or more common ownership of the trades or businesses.
- (ii) Less than substantially all of property or services provided. If a trade or business provides less than 80 percent of its property or services to an SSTB within the meaning of this section and there is 50 percent or more common ownership of the trades or businesses, that portion of the trade or business of providing property or services to the 50 percent or more commonly-owned SSTB is treated as a part of the SSTB.
- (iii) 50 percent or more common ownership. For purposes of paragraphs (c)(2)(i) and (ii) of this section, 50 percent or more common ownership includes direct or indirect ownership by related parties within the meaning of sections 267(b) or 707(b).

Planning after the Tax Cuts and Jobs Act of 2017

199A Multiple Trust Rule

Prop. Regs. Multiple Trust Rule

- The proposed regulations also contain an anti-avoidance rule under section 643 of the Code to treat multiple trusts as a single trust in certain cases.
- Section 643(f) grants the Secretary authority to treat two or more trusts as a single trust for purposes of subchapter J if (1) the trusts have substantially the same grantors and substantially the same primary beneficiaries and (2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1 of the Code. Section 643(f) further provides that, for these purposes, spouses are treated as a single person.

Prop. Regs. Multiple Trust Rule

- While practitioners speculated about the use of multiple trusts to enhance 199A deductions the Treasury clearly read the same articles and has incorporated 643 into the proposed regulations.
- Clearly, the mere use of non-grantor trusts will not provide the planning panacea some anticipated.
- Note the “and” requirements in the statute: Two or more trusts have substantially the same grantor or grantors, **and** substantially the same primary beneficiary or beneficiaries, **and** a principal purpose for establishing such trusts or contributing additional cash or other property to such trusts is the avoidance of Federal income tax.

Prop. Regs. Multiple Trust Rule

- Language in last example in Prop. Regs. On multiple trusts contains the following language: "Under these facts, there are significant non-tax differences between the substantive terms of the two trusts, so tax avoidance will not be presumed to be a principal purpose for the establishment or funding of the separate trusts. Accordingly, in the absence of other facts or circumstances that would indicate that a principal purpose for creating the two separate trusts was income tax avoidance, the two trusts will not be aggregated and treated as a single trust for Federal income tax purposes under this section. "
- The Prop. Regs. Ignore the "and" requirement of the statute and if tax avoidance is a "principal purpose" can apply the multiple trust rule.

Prop. Regs. Multiple Trust Rule

- As to "principal purpose" the Prop. Regs. State: "A principal purpose for establishing or funding a trust will be presumed if it results in a significant income tax benefit unless there is a significant non-tax (or non-income tax) purpose that could not have been achieved without the creation of these separate trusts."
- Will using temporary estate tax exemption and providing asset protection suffice to negate this?

Prop. Regs. Multiple Trust Rule

- The language in the Proposed Regulations might not facilitate using powers of appointment, different distribution standards, and other differences that had been used to break the reciprocal trust doctrine, may not suffice to differentiate trusts as some may have done before. Thus, the reciprocal trust doctrine may be avoided for several trusts but those trusts may still be ensnared by this language.
- The broad language in the Prop. Regs. may also ensnare using multiple trusts for SALT or property tax deduction and one SALT limitation may be applied.

199A and Non-Grantor Trusts – What’s Left?

- There seems to be no issue that using one-non-grantor trust works.
- The Prop. Regs. Appear to exceed the statutory authority and perhaps are not valid and perhaps might be changed before final.
- Differentiation of trusts using different beneficiaries seems feasible that should suffice to avoid the multiple trust trap if the statute “and” is adhered to.
- Can asset protection and estate tax planning suffice to negate the “principal purpose” test?

Asset Protection

DAPTs more Important For Temp. Exemption?

Asset Protection and Using the New Temporary Exemption

- Large use it or lose it exemptions will encourage gifting larger portions of wealth to secure temporary exemptions.
- Loosen old rules of thumb on percentage of wealth that can be transferred?
- Solvency affidavits and other due diligence - use more with greater portions of wealth transferred?
- Access to transferred assets if more of wealth transferred is critical. Reconsider: long term care and life insurance to protect transferors.
- For business owners the calculus might be different in that salaries and perquisites might still be earned from a business transferred to trust but caution is in order.

Planning with the New Exemptions – Why DAPTs are More Important

- If asset protection may be worthwhile, the new exemption should be used as soon as feasible.
- The transfer tax laws are still in flux as a result of the exemption increase, sunset and the uncertainty of what future administrations might do. Infuse flexibility into plans. Married clients should consider forming non-reciprocal, spousal lifetime access trusts ("SLATs") to which gifts or sales transfers might be made. Single clients might consider self-settled domestic asset protection trusts ("DAPTs") or hybrid DAPTs (a dynastic trust that has a mechanism to add the settlor back as a beneficiary so that the trust at inception is not a DAPT).
- Providing flexibility and access to transfers to trusts is critical. DAPTs may be critical for many clients to be comfortable.

DAPT Cases: Bad Facts Make Bad Law?

- Are Bad FLP cases Viewed Differently than Bad DAPT Cases?
- Rush University Case. (Available on LISI)
- Wacker: The court did not hold that Alaska law would allow the creditors of the grantor access to the trust's assets. And that is the key. If the trust is located in a jurisdiction, such as Alaska, Nevada or Delaware, which does not automatically and permanently subject trust assets to the claims of the grantor's creditors, it may well be upheld.
- It depends upon many factors as discussed in detail in Rothschild, Rubin & Blattmachr, "Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch:" 32 Vanderbilt J. Transnational Law 1549 (1999).
- Governing Law (Restatement (second) Conflict of Laws, Sec. 270/273 on Governing Law vs. Sec. 6 on Validity.

Distinction to Fraudulent Transfers

- All states basically void, or make voidable, fraudulent transfers. The identity of the transferee does not matter (family member, friend, trust, LLC). It is the intention of the transferor that counts (whether to hinder, delay or defraud creditors).
- And even though most fraudulent transfer claims are made under state law, the US Bankruptcy Code was amended in 2005 to add additional restrictions. US Bankruptcy Code Section 548(e) provides that a transfer to a self-settled trust (or similar device) may be set aside if it occurred within ten years of the filing of the petition for bankruptcy and was made "with an actual intent to hinder, delay or defraud" a creditor.

Fraudulent Transfer Acts

- Uniform Fraudulent Conveyance Act (Alaska).
- Uniform Fraudulent Transfers Act (Most States).
- The Uniform Voidable Transfers Act ("UVTA") at Section 4, Comment 8, makes mention that a transfer to a self-settled domestic asset protection trust (DAPT) is voidable if the transferor's home state does not have DAPT legislation. (Nine states have adopted the UVTA).

Legitimate Reasons for a Self-Settled Trust

- Good estate planning especially in light of the temporary increase in the wealth transfer exemptions. Use of large temp. exemptions requires ability to access wealth transferred by most taxpayers.
- The magic of compounding.
- What if the settlor wants access to the gifted/sold assets?
- Self-settled trusts? Should single taxpayers be discriminated against?
- Non-reciprocal slats? Single taxpayers cannot use this.

Estate Taxation and Self-Settled Trusts

- Irrevocable trust include in settlor’s estate if applicable local law allows settlor’s creditor’s access to the trust. Rev. Rul. 76-103.
- But not if creditors cannot attach under applicable local law. Rev. Rul. 76-103, rev. Rul. 2004-64, German, 7 ct. Cl. 641 (1985) PLR 9332006 and PLR 200944002 (not precedent).
- What if home state allows creditor to attach (uniform voidable transfers act)?
- Key: can settlor merely “relegate” the creditors to the trust per rev. Rul. 76-103?

Avoid Being a Self-Settled Trust

- Restatement (second) of trusts, section 156(2) (1959) provides in relevant part “[w]here a person creates for his own benefit, a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.” (Emphasis added).
- What about a hybrid DAPT? (Allow class of beneficiaries including the grantor to be added as a beneficiary.
- Settlor becomes beneficiary only after 10 years.
- What if the grantor cannot be added unless facts of independent significance occur? e.g. Only if no spouse, assets/net worth under $2M?
- What about a trust where distributions to the settlor can only be made by the exercise of a special power of appointment held by a non-fiduciary? (A collateral power of appointment).

Planning after the Tax Cuts and Jobs Act of 2017

Split-Dollar, Cahill, and Morrissette – Powell implications

Cahill and Morrissette

- Intergenerational split-dollar attacks.
- Estate of Cahill v. Commissioner, T.C. Memo. 2018-84 (June 18, 2018).
- Bad fact case?
- Settlement just reached. Appears that most of face value of note is included in estate.
- The court made a broad application of IRC Sec. 2703(a) to the economic benefit split dollar agreement.

“In Conjunction With”

- IRS has argued for the application of Sections 2036, 2038 and 2703 to negate the discount.
- How far can the Court extend the “in conjunction with” concept, put forth in Estate of Powell to IRC Sec. 2036(a)(2) and 2038?

2036 “In Conjunction with”

- Code Sec. 2036 can apply to include in the value of the gross estate the value of:
- All property that the decedent had transferred during lifetime [The Cahill Court viewed the transfer of the premium payments from the Survivor’s trust (the decedent’s revocable trust) to the ILIT as constituting the property transferred],
- Over which the decedent retained for life the right, alone or in conjunction with another person, to designate the person or persons who shall possess or enjoy the property or the income therefrom. The Cahill Court viewed the right of the Survivor’s Trust and the ILIT together to terminate the IGSD agreement as the right “in conjunction with another” to designate who would enjoy the property, i.e. the cash value resulting from the premiums paid.

Cahill Quotes Powell

- The Cahill court quoted the Powell FLP case on the requirement of “in conjunction with” :xiii (“Decedent’s ability to dissolve * * * [her limited partnership] with the cooperation of her sons constituted a ‘right * * * in conjunction with * * * [others], to designate the persons who shall possess or enjoy the property [she transferred to the partnership] or the income therefrom’, within the meaning of section 2036(a)(2).” The estate tax notice quoted in the Powell case included the following three paragraphs addressing “in conjunction with:”

Planning after the Tax Cuts and Jobs Act of 2017

Non-Grantor Trust Planning: un-INGs, New and SALTy SLATs

Trusts Structuring Post Act

- Another variation in planning may occur because of the SALT changes. The doubled estate tax exemption and the costlier SALT situation may drive practitioners to thread a new trust tax needle.
- Most trust planning, with one major exception, generally relied upon the creation of grantor trusts. The taxation of trust income to the grantor was an effective tool to burn or reduce the client/grantor's estate, facilitate further tax oriented planning (e.g. swaps of trust assets for personal cash to obtain a basis step up on highly appreciated trust assets), etc. For ultra-wealthy clients (wealthy relative to the new exemption amounts) that planning may continue.
- For many moderate wealth business owners in particular (perhaps $5M-$40M) non-grantor trusts may be critical to 199A benefit planning.

Trusts Structuring- SALTy SLATs

- Might these clients be able to structure completed gift (unlike the ING trusts), non-grantor (like the ING trusts) trusts to achieve multiple goals use temporary exemptions, access assets, and save SALT?
- Trust may distribute income to the client/settlor’s spouse, or accumulate for future distribution to the settlor’s spouse, all subject to the required consent of adverse party, and not be characterized as a grantor trust. IRC Sec. 672(a).
- An adverse party is a person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power. This might include trust beneficiaries, such as an adult child (Consideration must be given, of course, to whether an adverse party consenting to the gift would be making a gift.). 2514 default remainder beneficiary is an adverse party. ING strategy provides concepts.

SALTy SLATs – Drafting Tips

- Start with a form for a BDT.
- Trust should intentionally omit the swap power and other powers that might make it grantor as to the settlor.
- Delete the Crummey power included to make the trust grantor as to the beneficiary.
- Add requirement for approval or provide veto to non-adverse party on distributions to spouse.
- Form in trust friendly jurisdiction.

Trusts Structuring- Traditional INGs Post TCJA

- UHNW clients used incomplete non-grantor trusts to shift income out of the reach of state tax authorities. These trusts were funded with incomplete gift transfers and were structured to avoid grantor trust status. Large capital gain on the sale of stock earned inside ING avoids high SALT in a high tax state.
- NY Legislated against INGs – incomplete gift deemed grantor trust.
- Pending New York legislation, real estate tax could be deducted without limit and even if the taxpayer took a standard deduction on the federal return. Thus, using an ING in New York: non-grantor trust would be treated as a separate entity for federal purposes; and it would be treated as a grantor trust for New York purposes, which would result in the real estate tax deduction flowing through to the grantor's return for New York purposes (without limit).
- Post TCJA the ING is a great tool for ultra-wealthy clients that have used all of their exemptions and do not need to access assets in irrevocable trusts. For a large swath of clients it will not be the optimal trust structure.

Trusts Structuring- The Completed Gift "ING"

- Another variation in planning may occur because of the SALT changes and the doubled estate tax exemption.
- Clients with moderate (relative to the new high exemption amounts) wealth, who reside in high tax states, a different variation of all the above planning might be preferable if feasible to achieve. These clients, perhaps in a wealth strata of $5-$40 million may be sufficiently wealthy that estate tax planning should continue because the higher doubled exemptions may be rolled back in the future.
- These taxpayers are not be so wealthy that they can afford to give up access to those trusts.
- With the SALT deduction restrictions or elimination it may be prudent to shift investment income to a different no tax jurisdiction.
- Strip out powers given to grantor in ING trust that make it incomplete. Article forthcoming to describe which and why.

Planning after the Tax Cuts and Jobs Act of 2017

Should Every Trust be a Non-Grantor Trust?

Non-Grantor Trusts are Not the Assured Answer for Many

- Certainly, every trust cannot and should not be structured, or restructured, to be a non-grantor trust. Planners will likely find that there will be a more diverse array of trusts in many client’s plans. Given the enhanced benefits of using non-grantor trusts post-Act it is no surprise that many articles and webinars focused on the new benefits of using non-grantor trusts. The purpose of the following discussion is to provide a broader and more balanced view of the decision process as to whether a grantor or non-grantor trust should be used.
- If the individual income tax changes sunset in 2026 and could be modified by future legislation is the cost and hassle of complex planning worthwhile?
- How effective will state efforts be to circumvent SALT limitations? Does this obviate the need to plan or should planning be pursued as it may provide tax savings with greater certainty?
- Will the client accept the steps necessary to make a trust a non-grantor trust? For SALTy-SLATs is the client comfortable having a child/beneficiary as an adverse party approve distributions?

Non-Grantor Trusts are Not the Assured Answer for Many

- Will a child remainder beneficiary suffice to constitute an “adverse party” for these purposes to assure non-grantor status? The Regulations require that the adverse party have a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power. There is, unfortunately, little clarity on the delineation of what is “substantial.” Thus, there may be more risk into the use of the adverse party mechanism to preserve or achieve non-grantor trust status then many realize. Is instead of using this technique giving a person in a non-fiduciary capacity a special or limited power to appoint to the spouse a better option? That technique might also be subject to a potential challenge based of an implied agreement between the power holder and settlor (or spouse).
- Is an ING model a safer approach to addressing the need for an adverse party as contrasted with the non-grantor SLAT approach? Will the complexity of making it a completed gift outweigh the advantages? Will the ING characteristic of a Distribution committee (see below) add too much cost, complexity or administrative burden?

Non-Grantor Trusts are Not the Assured Answer for Many

- If life insurance is involved with the non-grantor trust raise transfer for value issues? Can the use of income be to pay premiums on life insurance on the grantor's life be drafted around to avoid tainting the trust as a grantor trust? Perhaps grantor-SLATs/MILITs or traditional ILITs should remain.
- If the trust owns S corporation stock conversion from a grantor trust to a non-grantor trust will require conforming to the qualified Subchapter S trust ("QSST") or electing small business trust ("ESBT") requirements.
- Another issue might arise on conversion. Could it create a claim by a beneficiary against the trustee now that the trust or beneficiaries, not the grantor, have to bear the income tax burden?
- It may not be sufficient to craft the trust instrument as a non-grantor trust, or to convert a grantor to non-grantor trust properly. The trust must also be administered in a manner that conforms to the non-grantor trust requirements. For example, if the trustee unbeknownst to the practitioner purchases life insurance on the grantor's life, and pays a premium, that might characterize the trust in whole or part as a grantor trust.

Non-Grantor Trusts are Not the Assured Answer for Many

- Should loans be prohibited? Even if prohibited by the instrument the trustee's authorized action of making a loan might undermine the intended non-grantor status. If the instrument prohibits distributions to the settlor's spouse without the consent of an adverse party, what if the trustee makes a distribution without such consent?
- What if the trustee or a protector acts in a manner that suggests and implied agreement to benefit the grantor thereby undermining non-grantor status? SEC v. Wyly, 56 F. Supp. 3d 394 (SDNY, 2014).
- Perhaps new types of savings language should be added to non-grantor trust instruments? In all events, as the complexity and variety of trusts in a client's plan expand the importance of annual reviews with counsel and the rest of the planning team becomes more essential. It will be more difficult for clients, and even some of the client's non-tax advisers, to differentiate grantor from non-grantor trusts, and to use the appropriate trust administration techniques for the right trust.
- The multiple trust rules should be considered although they do not appear to be an issue. Nonetheless, trusts can and should be differentiated.

Conclusion and Additional Information

Planning Options Remain

Conclusion

- The Tax Cuts and Jobs Act, P.L. 115-97, is a massive change to estate planning and a myriad of other Code provisions.
- Many traditional planning constructs will have to be rethought. Now, non-grantor trusts will offer some clients better benefits then the more traditional grantor trust structure, however the Proposed Regs have certainly restricted if not eliminated some of the planning ideas we thought viable.
- The temporarily doubled transfer tax exemption provides a valuable planning opportunity, but will moderate wealth clients proceed?
- Planning for ultra-high net worth clients is likely to proceed similar to past practices, although greater use of ING trusts might be warranted.

Additional information

- Jonathan Blattmachr, Esq.
  jblattmachr@Hotmail.com

- Jerry Hesch, Esq.
  jhesch62644@gmail.com

- Martin M. Shenkman
  shenkman@shenkmanlaw.com.

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Jonathan Blattmachr, Esq.
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