Leimberg Information Services, Inc.

Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2841

Date:01-Dec-20

Subject: Joy Matak, Sandra D. Glazier & Martin M. Shenkman: Estate Planning Six-Part Series for Late 2020, Part 2: Year-End Planning for Married Taxpayers

“Time may be of the essence for married taxpayers who want to protect their assets and preserve their estates. The result of the January 5th Georgia runoff election for two hotly contested US Senate seats could severely limit opportunities for married taxpayers, regardless of the outcome.

As COVID cases rise throughout the country, the plunging economy and rising deficit may force federal and state governments to consider additional tax legislation. Practitioners need to be alert to possible broad changes to the wealth transfer laws and factor them into any planning that might still be completed before the end of the year.

Forewarned is forearmed. Therefore, it might be helpful for practitioners to advise clients how these uncertainties might impact them, their finances and their estate plans. The uncertainty over what, if any, regulatory actions and/or tax legislation might be enacted and the possible effective dates may also create adverse consequences. As a result, current planning efforts may be for naught and could even leave them in a position that is less favorable, depending on political developments and future regulations and legislation, than had they done nothing.

Flexibility is helpful in attempting to minimize the potential for unhappy clients who transfer substantial wealth to irrevocable trusts and then regret planning that cannot be undone or modified later.

In these times of economic uncertainty, permitting the possibility of access to assets transferred often is an important factor. There are a myriad of ways to accomplish flexibility and possible access, particularly for our married clients. Some of the important considerations addressed in this second installment of our six-part series, are as follows:

1. *The merits of having only one and not both spouses using lifetime exemptions before the end of the year;*
2. *Variations on spousal lifetime access trust strategies to preserve maximum flexibility for married clients;*
3. *Additional considerations when naming a spouse as a beneficiary;*
4. *Creating non-grantor trusts for the benefit of a spouse – without tainting non-grantor trust status; and*
5. *Discussion about community property trusts and basis step-up considerations.*

This newsletter will be followed by the third installment in this series which will discuss other opportunities for planning before year-end."

Joy Matak, JD, LLM, Sandra D. Glazier, Esq. and **Martin M. Shenkman, Esq.** provide members with important and timely commentary in the form of a six-part series, Part 2 of which is a discussion of year-end planning for married taxpayers.[i]

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Joy presents at numerous events on topics relevant to wealth transfer strategists including engagements for the ABA Real Property, Trust and Estate Law Section; Wealth Management Magazine; the Estate Planning Council of Northern New Jersey; and the Society of Financial Service Professionals. Joy has authored and co-authored articles for the Tax Management Estates, Gifts and Trusts (BNA) Journal; Leimberg Information Services, Inc. (LISI); and Estate Planning Review The CCH Journal, among others, on a variety of topics including wealth transfer

strategies, income taxation of trusts and estates, and business succession planning. Joy recently co-authored a book on the new tax reform law entitled Estate Planning: Estate, Tax and Other Planning after the Tax Cuts and Jobs Act of 2017.

Sandra D. Glazier, Esq., is an equity shareholder at **Lipson Neilson, P.C.**, in its Bloomfield Hills, MI office. She was also the 2019 recipient of Bloomberg Tax's Estates, Gifts and Trusts Tax Contributor of the Year Award and Trusts & Estates Magazines Authors Thought Leadership Award and has been awarded an AEP designation by the National Association of Estate Planners and Councils. Sandra concentrates her practice in the areas of estate planning and administration, probate litigation and family law.

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Here is their commentary:

EXECUTIVE SUMMARY:

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5. Discussion about community property trusts and basis step-up considerations.

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COMMENT:

Contrasting 2012 versus 2020 SLATs

A common planning technique, especially beginning in 2012 when taxpayers sought to use exemptions before they would purportedly decline from $5 million to $1 million, is the use of non-reciprocal spousal lifetime access trusts (“SLATs”). In this technique each spouse creates a trust for

the other spouse and descendants. The trusts are crafted to be non-reciprocal. Therefore, they need to have sufficient differences in order to limit the ability of the IRS or a creditor "uncrossing" the trusts to undermine the planning. The benefit of the SLAT technique is that a couple can use exemptions and retain (through his or her spouse) access to assets transferred, while engaging in efforts to protect assets and reduce estate taxes. Planning in the current environment has important similarities and differences from the SLAT planning of 2012. The following highlights how planning might optimally be structured now:

- Like 2012, current wealth transfers might seek to secure the high estate and generation skipping transfer tax exemptions before they sunset or are reduced sooner by legislation.
- Like 2012, but even more pronounced, is the need for most taxpayers using current exemptions to have the possibility of access to the assets transferred. The reason access is more important is obvious, the exemptions are larger, and more wealth can be transferred.

2020 Spousal Lifetime Access Trusts ("SLATs")

SLATs are viewed by some as the "go-to" planning tool for married clients in late 2020. While clearly a valuable planning device, SLATs raise a host of issues (especially in the compressed time frame of late 2020 planning) and over-reliance on typical SLAT planning may not be optimal.

SLATs can be a useful tool in late 2020 planning to use exemption and preserve possible access. This technique can be used for a wide range of client wealth levels. Moderate wealth clients can use SLATs to preserve some exemption, obtain asset protection planning and preserve possible access. At high wealth levels, SLATs can be used to fractionalize control positions in a family business (and thereby produce valuation discounts) and as the participants in very large note sale transactions (that is a sale to a grantor trust in exchange for an AFR note from the trust). All of this might be advantageous to complete before year-end in light of the many restrictions changes in the law might bring.

SLATs might work as follows. Each spouse creates a trust for the other spouse, but this must be done in a way that avoids the state law creditor and tax reciprocal trust doctrines.[ii] This might be accomplished by making the trusts sufficiently different so the doctrines will not apply. The trusts

should preferably be created at different times. In addition, the trusts should be funded with different assets and have different trustees and very different terms (e.g. different powers of appointment, different distribution standards, etc.). In one trust, the beneficiary spouse might be entitled to have a lifetime broad special power of appointment, the power to change trustees,[iii] and/or receive annual income distributions or distributions limited to HEMS[iv]. In the other trust, the beneficiary spouse would have no entitlement to distributions (perhaps, is not even a current beneficiary), no power to change trustees, and no power of appointment, but could become eligible to receive a distribution only upon exercise by a trusted child with a power to add beneficiaries.

Sample Lifetime Power of Appointment that could be added to a SLAT for one spouse in order to differentiate it from a trust for the other spouse: "The Trustee shall distribute such income and/or principal of the trust to such one or more persons out of a class composed of the Grantor's descendants and surviving spouses of the Grantor's descendants on such terms as the Grantor's Wife may appoint, by a signed writing that, is: (i) acknowledged before a notary public or otherwise meets the execution formalities of a deed, (ii) specifically refers to this power of appointment and (iii) is delivered to the Trustee. Provided, however, that any such appointment by the Grantor's Wife shall only be effective if a trustee who is non adverse within the meaning of Reg. § 25.2511-2(e) consents to the appointment in an acknowledged written instrument. Further, in the event of Grantor's Wife's incapacity, this power of appointment may be exercised on the Grantor's Wife's behalf by a guardian or attorney-in-fact appointed to represent the Grantor's Wife who is expressly authorized to do so."[v]

Note that in the time of Covid practitioners may try to draft in a way that creates greater flexibility and ease of execution. Some documents that generally are signed with a notary (which can be electronic in many states) or two witnesses may be signed with less formality.[vi]

Reciprocal Trust Doctrine Checklist

The following checklist provides some of the ways each SLAT might be differentiated from the other:[vii]

- Draft the trusts pursuant to fundamentally different plans. The planner should draft a separate memorandum or portions of a memorandum

to describe the distinct objectives and purposes for each trust and set forth the planning relative to each such trust. Best practice would be to have the planning for each trust laid out in a separate memorandum. The plans for each trust should not be interrelated.

- Don't put a husband and wife in the same economic position following the establishment of the two trusts. For example, the husband could create a trust for the benefit of his wife and issue, and the wife could create a trust for the benefit of her issue, in which her husband isn't a beneficiary. Or one spouse could be a beneficiary of the trust he creates, if the trust is formed in an asset protection jurisdiction such as Alaska, Delaware, Nevada, Michigan or South Dakota, and the other spouse could create a trust in which he isn't a beneficiary (that is, a trust that's not a domestic asset protection trust).

- Use different distribution standards in each trust. For example, one trust could limit distributions to an ascertainable standard, while the other trust could be fully discretionary. However, limiting distributions to an ascertainable standard reduces flexibility and may prevent decanting, in some but not all states, and may expose the trust assets to a beneficiary's creditors.

- Use different trustees or co-trustees. If each spouse is a trustee of the trust the other spouse creates, add another trustee to one or both trusts.[viii] If adding another trustee to each trust, consider adding a different trustee for each trust and using different institutional trustees.

- Give one spouse a noncumulative "5 and 5" power, but not the other. This power permits the holder to withdraw up to the greater of $5,000 or 5 percent of the trust principal each year. The amount the powerholder could have withdrawn at the time of death is includible in his estate. The lapse of the power, not in excess of the greater of $5,000 or 5 percent of the trust assets each calendar year, isn't considered under Section 2514 a release of the power includible in the powerholder's estate or a taxable gift. However, this power may expose assets of the trust to the powerholder's creditors.[ix]

- As in *Levy*,[x] give one spouse a special power of appointment, but not the other. However, the absence of a power of appointment reduces the flexibility of the trust. This might be viewed as particularly significant in light of the continued estate tax uncertainty. Note that the power might be added later by a decanting.[xi]

- Give one spouse the broadest possible special power of appointment and the other spouse a special power of appointment exercisable only in favor of a narrower class of permissible appointees, such as issue, or issue and their spouses and, perhaps, only with the consent of a non-adverse trustee.

- Give one spouse a power of appointment exercisable both during lifetime and by will and the other spouse a power of appointment exercisable only by will.

- In the case of insurance trusts, include a marital deduction savings clause in one trust, but not the other. A marital deduction savings clause provides that if any property is included in the grantor's estate (because the grantor dies within three years after transferring a policy on his life to the trust thereby causing the proceeds to be included in the insured's estate or for any other reason) some or all of the proceeds of the policy is held in a qualified terminable interest property trust or is payable to the surviving spouse outright.[xii] Alternatively, if each trust has a marital deduction savings clause, the provisions of the two trusts could still be different.

- Create different vesting provisions for each trust. For example, the two trusts could mandate distributions at different ages, or in a state that has repealed or allows a transferor to elect out of the rule against perpetuities; one trust could be a perpetual dynasty trust. However, mandating distributions severely reduces the flexibility of the trust, throws the trust assets into the beneficiary's estate for estate tax purposes and exposes the assets to the beneficiary's creditors and spouses.

- Instead of mandating distributions, give the beneficiaries control or a different degree of control, at different ages. For example, the ages at which each child can become a trustee, have the right to remove and

replace his co-trustee, and have a special power of appointment could be different in each trust.

- Vary the beneficiaries. For example, one spouse could create a trust for the spouse and issue, and the other spouse could create a trust just for the issue. Note that if, for example, the husband creates a trust for his wife and their first child, and the wife creates a trust for her husband and their second child, the gifts could still be viewed as reciprocal.

- Create the trusts at different times. In *Lueders' Estate*,[xiii] a husband and wife each created a trust and gave the other the power to withdraw any or all of the trust assets. Inasmuch as the trusts were created 15 months apart, the Third Circuit, in applying the *Lehman doctrine*,[xiv] held that there was no consideration or quid pro quo for the transfers. However, it should be noted that *Lueders* preceded *Grace*,[xv] in which, while the trusts were created two weeks apart, the Supreme Court held that the motive for creating the trusts wasn't relevant. If the difference in time is a factor post-*Grace*, a short time might be sufficient in light of *Holman*,[xvi] in which a gift of partnership interests six days after the formation of the partnership wasn't a step transaction. The closer we get to the end of 2020 and the possible reduction of the $11.58 million gift tax exemption amount[xvii], the more difficult it will be to interpose any meaningful time difference between the formation of the two trusts. Practitioners should also bear in mind that if the same transaction includes funding an LLC, then in making gifts to the trusts that are to qualify for fractional interest or other discounts, they will be dealing with the challenge of two dating issues: the difference between the trusts and the maturation period of assets in the LLC prior to gift or sale.

- Contribute different assets to each trust, either as to the nature or the value of the assets. However, if the purpose is to use the full exemption for transfers to the trust, it may not be feasible to contribute assets of different value, and in any event varying the value of the trust only serves to reduce the amount to which the reciprocal trust doctrine may apply. Contributing different assets may not negate the application of the reciprocal trust doctrine, since the assets in a trust may be susceptible to change over time. However, if one trust is funded with non-liquid assets or assets subject to

contractual restrictions on sale (e.g., operating agreement restrictions on transfer of interests in an LLC), it may be viewed as a more meaningful difference in assets that may not be susceptible to ready modification.

Perhaps, Only One (Not Both) Spouses Should Make Gifts to a SLAT

The preliminary presumption in crafting a late 2020 SLAT plan might be to have each spouse create a SLAT for the other. However, apart from the reciprocal trust doctrine discussed above, it may not be ideal or even feasible for many married couples to have both spouses create SLATs.

Having only one spouse make irrevocable transfers may mitigate 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. While some clients might have regretted 2012 planning because the exemption did not decline to $1 million as feared, it may well have been the lack of access to assets transferred that was the primary source for complaint.

In the current trust planning environment, assuring access to assets can prove much more difficult than in the 2012 environment for two reasons. First, in 2012 any transfer of more than $1 million preserved exemption. In 2020, transfers might need to be quite substantial before any benefit of the temporarily higher exemption is preserved. The reason is that, if (and when) the exemption drops to $5 million (adjusted for inflation) in 2026 (or earlier in the event of legislative action), the prior use of the exemption may not allow the new (lower) exemption to be used. For example, a client makes a taxable gift in 2020 of $5 million and dies after a reduction in the exemption to $5 million, no benefit will have been gained from the 2020 gift. They could have simply waited.

Practitioners may, therefore, consider having one spouse, not both, use the exemption thereby preserving more exemption for moderate wealth clients that cannot use all their exemptions.

<u>Example</u>: Husband and wife have a combined estate of $16 million and are willing to make a total of $10 million in transfers to irrevocable trusts to

secure a portion of the current exemptions. If each of husband and wife transfers $5 million to a non-reciprocal spousal lifetime access trust ("SLAT") in 2020, then, in 2026 (or earlier) when the exemption declines to $5 million, neither spouse would be left with exemption. If, instead, husband alone transferred $10 million to a trust for wife and descendants, wife would still have her entire $5 million exemption left. That step could preserve an additional $5 million of exemption for the couple going forward.

Using a Floating Spouse Clause in an Irrevocable Trust May Provide More Access

One way to provide flexibility for possible access may be to include a "floating spouse" provision. In that way, if the current spouse divorces or dies, the new spouse can be a beneficiary, thereby permitting the grantor access indirectly through that new spouse.[xviii]

Sample Floating Spouse Provision: "Definition of 'My Wife.' For purposes of this Agreement, any reference to my Wife shall mean Jane Doe, or, if she dies before I die, or she and I become divorced, or our marriage is annulled, the person to whom I am married at any given time."

Divorce Considerations of Naming a Spouse as Beneficiary to Gain Access

A floating spouse clause provides that whoever is married to the grantor at any particular point in time shall be a beneficiary. So, if the client is married at the time an irrevocable trust is created, that spouse would be a beneficiary. If there is a later death or divorce that spouse would no longer be a beneficiary. If the client thereafter remarries, the new spouse would become a beneficiary. This could permit the client to indirectly benefit from the irrevocable trust through each successive spouse.

Practitioners may also consider the impact of the repeal of Code Section 682 and the potential for the trust to remain a grantor trust even in the event of a later divorce. If the spouse was a beneficiary at the time of the creation of such power or interest, the later death or divorce of that spouse does not impact the result that the settlor-spouse who created the trust will still be treated as the grantor for income tax purposes. This may suggest considering a provision that would provide the trustee or a trust protector with the authority to eliminate the spouse as a beneficiary of the trust in the

event of separation or divorce or, alternatively, provide that, in the case of separation or divorce, distributions to the beneficiary spouse may be made only with the consent of an adverse party as that will foreclose grantor trust status by reason of Section 676 or 677. It may be prudent to draft the trust with other provisions that would cause grantor trust status (e.g., a power to substitute property of equivalent value described in Section 675(4)(C)) should another provision causing grantor trust status otherwise become inoperative.

Loan Provision Can Provide Not Only Grantor Trust Status but another Means to Access Trust Assets

Another way to provide access may be to include a loan provision. While this has traditionally been done to cause the trust to be treated as a grantor trust pursuant to Code Sec. 675 for income tax purposes, the right to receive a loan without adequate security may provide important additional access to the trust.

Sample Loan Provision: "I appoint Mary Doe as the Loan Director. During my lifetime, the Loan Director shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity (within the meaning of Code Sec. 675) without the approval or consent of any person in a fiduciary capacity within the meaning of that section, to compel the Trustee to loan some or all of the trust property to me without adequate security within the meaning of Code Sec. 675(2) although with adequate interest within the meaning of that section. I direct that this power is not assignable. In the event that Mary Doe dies before I die, the successor Loan Director shall be such individual (other than me, any person acting as a Trustee under this instrument or anyone who is an adverse party within the meaning of Code Sec. 672) whom Mary Doe shall have designated by instrument in writing. Any person other than Mary Doe acting as a Loan Director hereunder shall also have the power to name a successor Loan Director by an instrument in writing. In the event that no one else is acting as a Loan Director hereunder, the oldest individual acting as a Trustee hereunder (or if none, the corporation or other entity acting as Trustee hereunder) shall be the Loan Director but acting only in a non-fiduciary capacity."[xix]

Non-Grantor Trust Considerations

Non-Grantor Trusts with Spousal Access Without Tainting Non-Grantor Status

SLATs are often structured as grantor trusts. A grantor trust could be structured to permit the spouse to have access, without the approval mechanism required of a non-grantor trust. Also, the grantor could be permitted to borrow trust funds without adequate security, which would trigger grantor trust status pursuant to Section 675. That cannot be permitted in a non-grantor trust.

While often irrevocable trusts created to hold gifts and other transfers are structured as grantor trusts (that is, a trust where the income generated by assets of the trust is attributed under Section 671 to the grantor), a non-grantor trust might warrant consideration. In the current 2020 planning environment, it may be advantageous to structure some trusts receiving gifts as non-grantor trusts (although the potential benefit of having more than one such trust may be curbed on account of the multiple trust rule under Section 672(f), under which two or more trusts may be treated as one for income tax purposes). his may require more complex planning to achieve goals that may be contradictory.

In some instances a trust may be structured as non-grantor trust to potentially garner a number of different tax benefits (even considering §199A, but that may be restricted under a Biden administration). Use of a non-grantor trust for one of two SLATs is perhaps a material differentiation of the two SLATs for purposes of the non-reciprocal trust doctrine.

Threading the tax and trust “needle” to meet the differing objectives may require a different type of trust, and different planning and drafting than has been historically common. A new variant of a spousal trust may be advisable. One such trust has been referred to as a “SALTy-SLAT” by virtue of the non-grantor SLAT being able to facilitate planning to salvage some of the state and local tax (“SALT”) deductions. Others have referred to it as a Spousal Lifetime Access Non-Grantor Trust (“SLANT”). Drafting non-grantor, completed gift, trusts that may be accessible, is a technique to consider for some clients in the current planning environment.

If the trust is properly structured (no grantor powers to the grantor spouse) and the beneficiary spouse can only receive distributions with the consent of an adverse party, the trust may achieve all objectives: completed gift to

use the current high temporary exemptions that may be lowered in a Biden administration, non-grantor trust for any or all of the planning benefits of non-grantor trust, and the potential for access.

Community Property Trusts for Basis Step-up on First Death – Impact of Possible Law Changes

Planning to use community property rules to obtain a full basis step-up on the death of the first spouse to die (subject to the normal exceptions, such as for income in respect of a decedent) has grown in popularity in recent years. It remains to be seen what will become of this technique. However, clients should be cautioned that if a Biden administration succeeds in eliminating a basis step-up on death this planning technique will be of limited or no benefit.

If the Democrats gain control of the Senate, Biden has proposed eliminating the step-up in income tax basis on death. Should that occur the use of community property trusts to gain a basis step-up will no longer be relevant. Practitioners might then have to evaluate what to do with existing community property trusts that were set up before a law change unless they are grandfathered.

While there are 11 states with community property laws, three of the states provide elective community property laws that anyone can avail themselves of: Alaska, Tennessee and South Dakota, with others contemplating adding such provisions to their statutes.[xx] Some commentators have different views as to the effectiveness of these statutes for non-residents of those states, but that discussion is beyond the scope of this newsletter. Residents of non-community property states, for example, might create a community property trust in Alaska in an attempt to obtain a full basis step-up on the first spouse's death on all assets held in that community property trust. In reality, it is not a step-up but more akin to a mark to market regime as basis can be stepped down as well. This technique can be valuable for many client situations. In addition, later estate tax minimization planning might proceed without being hindered by low basis issues on those assets.

If a highly appreciated rental property or business interest is transferred to an Alaska community property trust by a domiciliary of a non-community property state, e.g. New York, on the death of the

first spouse the entirety of that asset might then benefit from a basis step-up.

For a non-resident of Alaska to create an Alaska community property trust as discussed in the above illustration, a requirement to benefit from the Alaskan law is to name a qualified trustee as an administrative trustee (e.g. an Alaskan trust company).

Conclusion

Practitioners can add value to their client representations by informing and educating clients regarding the unique nuances of the current late 2020 planning environment, and the changes that may be in the offing (or not). The potential for massive tax changes is unpredictable but yet vital for many clients to consider, and perhaps take proactive steps now. In this environment there are a range of planning considerations that might affect estate tax minimization planning, income tax planning and more.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Joy Matak

Sandra Glazier

Martin Shenkman

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CITATIONS:

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[i] This newsletter is an adaption of a portion of a paper submitted to the Notre Dame Tax and Estate Planning Institute, which was an adaption of Martin M. Shenkman, Jonathan G. Blattmachr, Joy Matak, & Sandra D. Glazier, Steve Leimberg's Estate Planning Email Newsletter #2745, 03-Sep-19, "Estate and Tax Planning Roadmap for 2019-2020."

[ii] Steiner and Shenkman, "Beware of the Reciprocal Trust Doctrine," Trusts & Estates Magazine, April 2012.

[iii] Within Rev. Rul. 95-58, 1995-2 CB 191 safe harbor.

[iv] HEMS is considered an ascertainable standard under the Internal Revenue Code which permits a trustee to make distributions in order to address a beneficiary's health, education, maintenance and support without creating estate tax inclusion in the trustee or powerholder's estate. See § 2041(b)(1)(A).

[v] Provision provided by Interactive Legal.

[vi] Martin Shenkman, Jonathan Blattmachr, Andrew Wolfe & Thomas Tietz: "Different Approaches to Signing/Executing Estate Planning Documents," Steve Leimberg's Estate Planning Email Newsletter #2803, 01-Jul-20.

[vii] Steiner and Shenkman, "Beware of the Reciprocal Trust Doctrine," Trusts & Estates Magazine, April 2012, pg. 14.

[viii] Preferably at least one trustee should be an independent trustee and considered a resident or authorized to act as a trustee in the state of the DAPT's creation.

[ix] The existence of a 5 and 5 power may have income tax consequences to the beneficiary. A discussion of these potential consequences is, however, beyond the scope of this newsletter.

[x] Estate of Herbert Levy, TC Memo 1983-453. In *Levy*, Isle Levy had the power to appoint the income and corpus of the Herbert Levy Trust whereas Herbert Levy had no such power. As a result, the court concluded that the decedent and his wife had "markedly different interests in, and control over, the trusts created by each other."

[xi] See, generally, Zeydel & Blattmachr, "Tax Effects of Decanting - Obtaining and Preserving the Benefits," Journal of Taxation, Vol. 111, p. 288 (November 2009).

[xii] Note that great flexibility will be available if a QTIP trust is used. The estate of the insured spouse would have up to fifteen months to decide the extent to which the marital deduction should be claimed.

[xiii] In re Lueders' Estate, City Bank Farmers Trust Co., et al. v. Commission of Internal Revenue, 164 F.2d 128 (1947).

[xiv] The so-called Lehman doctrine applies "where the decedent by paying a quid pro quo has caused another to make a transfer of property with enjoyment subject to change by exercise of such power by the decedent." Lehman v. Commissioner, 109 F.2d 99, 100 *cert. denied* (1940).

[xv] See U.S. v. Grace, 395 U.S. 316 (1969).

[xvi] See Holman v. Commissioner, 130 T.C. 170 (2008).

[xvii] The exemption amount is presently scheduled to increase to $11.7 effective January 1, 2021 barring a legislative change in 2021, which could be made retroactively effective to January 1, 2021.

[xviii] Use of a "floating spouse" provision will require the practitioner to consider and evaluate his or her ethical duties when a joint estate planning engagement exists. Those considerations are beyond the scope of this newsletter. Moreover, if a spouse will continue to have rights following divorce, the income tax implications of such a provision should be discussed with the grantor in light of the 2017 Tax Act and the resulting provisions of Internal Revenue Code §677(a)(1), because it is the spouse's

status at the time the trust is created that will determine grantor trust status for income tax purposes.

[xix] Provision provided by Interactive Legal.

[xx] In Alaska, Tennessee, and South Dakota, an individual need not be a resident of the state in order to avail herself of the benefits of a community property laws in such state.