Year-End Estate and Tax Planning 2022

By: Martin M. Shenkman, Esq.
and Jonathan G. Blattmachr, Esq.

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A Key Estate Planning Guide

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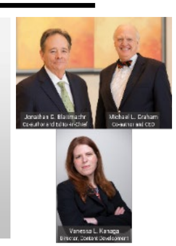
- InterActive Legal
  - Vanessa Kanaga
  - (321) 252-0100
  - sales@interactivelegal.com



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- Peak Trust Company
  - Nichole King
  - (888) 544-6775
  - bcintula@peaktrust.com

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#1 Smaldino and Levine: Lessons On How To Do Estate Planning

Step Transaction, Good Practices, and More

Introduction to Smaldino

- Smaldino V. Commissioner Of Internal Revenue, T.C. Memo. 2021-127, November 10, 2021.
- There are two broad aspects to the Smaldino case. One deals with appraisal issues which we will not discuss, and the other deals with planning considerations, which we will delve into in depth.
- From a planning perspective a gift by husband to wife and then wife to an irrevocable trust was recast. Implementation and administration failed or was mishandled from several perspectives. That's the case in a nutshell.
- Some have dismissed it as a "bad facts, bad law" case. The case has many bad facts but dismissing as nothing more ignores a great opportunity to learn about how to do estate
- Provides important lessons for practitioners to consider about how to approach structuring and implementing estate plans for certain clients, especially for clients that practitioners did planning for during the rush throughout 2020 and 2021.

Bad Planning; No Follow Through

1. Mr. Smaldino was certified public accountant (CPA) and even had worked as a CPA. Mrs. Smaldino had a master's degree in economics, so she too should have had the sophistication to have some understanding of the planning they pursued. In addition, the family's real estate portfolio was worth about $80 million, so the family operated a sophisticated and large real estate empire.
2. As a CPA, Mr. Smaldino should have well-understood the need for legal and tax formalities and Mrs. Smaldino should have understood the business/economic shortcomings of the plan. Also, with wealth of the level involved in this case, the family can and should have had a collaborative team of capable advisers (lawyers, accountants, wealth advisers, etc.) that worked together to assure that their estate plan was properly planned, drafted and implemented.

- **LESSON**: Practitioners should be careful in gauging clients and their ability to complete planning, and offer options based upon their discussions with the clients.

Facts - LLC

- Mr. Smaldino owned and operated numerous rental properties. He established an LLC, as well as a revocable trust called the Smaldino Family Trust. Mr. Smaldino transferred entity interests in 10 different parcels of real estate into the LLC. The LLC's ownership structure was restated so that there was 10 Class A Voting units and 990 Class B Non-Voting units, all of which were initially held under the Smaldino Family Trust.
- **LESSON**: Planning conceived or completed under pressure should be followed up upon later to see if any portion of the planning was either missed or not implemented correctly.

LLC – Ancillary Comments

- In Smaldino it seems that multiple rental properties were held in a single LLC. The structure of having multiple rental properties owned in separate LLCs is a prudent way to endeavor to minimize a client's personal liability so if a tenant or anyone else, for example, sues the client for harm arising from the property owned by the LLC, the tenant (or other creditor) should only be able, as a general matter, to reach the assets held in the LLCs, not the client's other personal assets. Having each property held in a separate LLC to prevent a "domino" effect of a judgment against one property being able to reach the assets of the other properties held in the LLC. That way, if there is a lawsuit against one property, the others might remain "untouched."
- If the plan included establishing a trust in a trust "friendly" state (e.g., Alaska, Nevada, South Dakota) consider establishing the LLC in the state that the trust will be governed under, and then have the LLC authorized to do business in, the state where the real property assets are located. This may help provide additional nexus, to the trust-friendly jurisdiction.

Gifts by Mr. Smaldino to Mrs. Smaldino

- Mr. Smaldino "purportedly" transferred about 41% of the LLC membership interests to his wife on April 14, 2013. Mrs. Smaldino "purportedly" gifted those same interests to the Dynasty Trust the next day.
- The Court recharacterized the claimed gift Mr. Smaldino made to his wife, followed by her gift to the Dynasty Trust, as if Mr. Smaldino himself had made the gift directly to the Dynasty Trust.
- Mrs. Smaldino held the interests only for a day.
- She transferred the same exact interests she received from her husband as a gift to her, as her gift to the Dynasty Trust, and the family and their advisers skipped numerous steps that should have been followed to corroborate that they respected the transaction.

LESSON: How Long Must Assets Be Held?

- How long is long enough to hold on to an asset before retransferring it? What should practitioners recommend to clients, or discuss with them regarding the timing between phases of a transaction? Practitioners will need to carefully communicate with clients the various concerns, advantages and disadvantages to how long to hold assets in spouses' names to defray the various challenges the IRS can argue to collapse transactions. Practitioners may need to consider providing different suggestions to clients based on the facts of the case, as the kind of assets being transferred could affect what is a sufficient amount of time between phases.

- In the Holman case, the Court accepted six days as sufficient time between phases of a plan. In *Holman*, the IRS also argued that the gift should be viewed as an indirect gift, applying the step transaction doctrine in that instance. Holman v. Commissioner, (2008) 130 TC 170 (2008). aff'd, 601 F.3d 763 (8th Cir. 2010). This should have already been done

Formalities Must Get Respect

- **<u>LESSON</u>**: Respecting the formalities of entities and trusts is essential.
- It is fundamental for much of legal and tax planning that, in order for creditors, the IRS, or others to respect legal structures clients establish as real, the clients themselves should first respect the formalities and maintenance of their separate legal entities. The Smaldino's, even with their formal training (CPA; economics), ignored most formalities.
- Perhaps, the **classic example** is that of clients establishing corporations or limited liability companies in which to operate their businesses. A traditional purpose of doing so is to insulate personal assets from business creditors. Yet, if clients ignore the formalities and reality of the entities (for example, by commingling personal and business funds, using business assets personally such as by having the clients' spouses' personal use cars owned by the businesses, and so forth), the courts and IRS will be loath to respect the entity. This is such a common issue that the phrase "piercing the corporate veil" is used to describe the legal theory of breaking through entities form to reach the clients personal assets as if the entities did not exist.

Formalities Must Get Respect - LLC

- Then evaluating the actions taken by the Smaldino's, they did not do well respecting the formalities of their entity, regarding the gift Mr. Smaldino tried to claim he made to his wife. Adhering to the **formalities of the operating agreement restrictions** would not have taken much effort, Mr. Smaldino as trustee of the Dynasty Trust and as manager of the LLC could have given written consent for the admission of Mrs. Smaldino as a member, showing adherence to the formalities required by the operating agreement of the entity.
- The Court further notes that "*The LLC's operating agreement was never amended to account for any transfer of units to Mrs. Smaldino. However, exhibit A of the operating agreement was amended 'as of April 15, 2013' to show the Dynasty Trust as holding a 49% ownership interest in the LLC.*" Practitioners should consider whether the failure to adhere to formalities for the gift to Mrs. Smaldino, and then adherence to the formalities for the transfer to the Dynasty Trust, may have hurt the Smaldinos case.

Formalities Must Get Respect – Dates on Legal Documents

- The problem with dates of legal documents in the Smaldino case was significant. The Court felt that the taxpayers were **disingenuous** regarding the dates of the documents. The Court noted that the appraisal report that valued the LLC was dated August 22, 2013. The Court believed that the **documents were signed after the appraisal, months after their effective dates**.
- The legal document used to transfer the LLC interests from Mr. Smaldino to Mrs. Smaldino said that it was "Effective: April 14, 2013" but it did not include a section for each individual signing the document to indicate when that individual actually signed it.
- **LESSON**: There is nothing inherently wrong with indicating a date a document should be effective (as long as the effective date is not contradictory to the facts). However, legal documents could indicate the date they were actually signed even if there is a different effective date. Having a transaction present a clear timeline of how steps proceeded may help prevent an alternative, and adverse to the client, sequence of events being asserted during an audit or other challenge.

Formalities Must Get Respect – Create and Sign Essential Documents

- After each transfer of LLC membership interests there should have had been a signing of updated governing documents (e.g., operating agreement or perhaps a joinder agreement) to reflect the changes in membership interests. Pro-rata distributions from the LLC to each of the members could have been made during even a short period that Mrs. Smaldino held interests.
- Having properly drafted and executed legal documentation is critical for clients to enhance the likelihood of their plans succeeding, but it may not suffice to win a challenge by the IRS. Mr. Smaldino did in fact sign a certificate of assignment transferring interests in the LLC to Mrs. Smaldino. The courts don't consider legal papers as controlling for tax purposes when the objective economic realities are to contrary to the content of those documents The Court said that this was "*a factor to be considered, [but it] is not controlling.*
- **LESSON**: Practitioners should recommend that all the formalities that they would recommend to third party transactions be followed in family/estate planning transactions. A client buying into an LLC with an unrelated party would certainly be advised to execute appropriate governing documents.

Formalities Must Get Respect – Tax Reporting – Partnership Reporting

- In Smaldino, the LLC filed its initial partnership income tax return (Form 1065), U.S. Return of Partnership Income. On the Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., attached to the Form 1065, the LLC listed Mr. Smaldino as a 51% partner, and the Dynasty Trust as a 49% partner for the entire tax year. Mrs. Smaldino was not listed as a partner for any part of the tax year. Thus, the income tax returns did not reflect a partial year ownership (1 day) for Mrs. Smaldino, which was contradictory to the position the taxpayers' tried to argue .

Gifts by Mr. Smaldino to Mrs. Smaldino – Gift Tax Reporting

- While a gift to a US citizen spouse is not a taxable event (to the extent qualifying for the gift tax marital deduction), and the client therefore does not need to report such a gift on a Form 709.

- The instructions to Form 709 provide: "Gifts to your spouse. You must file a gift tax return if you made any gift to your spouse of a terminable interest that does not meet the exception described in Life estate with power of appointment, later, or if your spouse is not a U.S. citizen and the total gifts you made to your spouse during the year exceed $157,000. You must also file a gift tax return to make the qualified terminable interest property (QTIP) election described under Line 12. Election Out of QTIP Treatment of Annuities, later. Except as described earlier, you do not have to file a gift tax return to report gifts to your spouse regardless of the amount of these gifts and regardless of whether the gifts are present or future interests."
- **<u>LESSON</u>**: perhaps, as in the Smaldino case, practitioners should discuss the pros and cons of reporting a spousal gift anyway on the Form 709. Reporting that gift could potentially provide additional evidence of respecting the transfer and the process of the planning.

Substance Over Form

- In the *Smaldino* case, the court applied the doctrine of substance over form to disregard petitioner's purported transfer of the LLC member interests to Mrs. Smaldino and her purported retransfer of those same interests to the Dynasty Trust a day later because the court found their actions were part of a prearranged plan between all the parties involved to effectuate the transfer of the ownership of the LLC from Mr. Smaldino to the Dynasty Trust.
- **LESSON**: The substance of transactions, rather than the form in which they have been cast, can determine the tax consequences from those transactions. This is an important touchstone for practitioners to evaluate all planning against. The courts have used substance over form principles to recharacterize multistep property transfers among related parties as indirect gifts between the persons who were determined to be, in substance, the actual donors and donees.

Related Party Transactions

- The court notes that heightened scrutiny is appropriate for cases, such as in *Smaldino*, where all the parties to the transactions in question are related.
- **LESSON**: The courts have viewed family transactions as affording much opportunity for deception and that therefore those transactions should be subject to close scrutiny. Estate planning transactions are invariably between related parties, so communicating to clients that greater caution and care in assuring that the substance of the transaction does not compromise the intended results, specifically through the steps taken (and implemented properly) and the documentation prepared is important.
- The court quotes several cases for this doctrine: "*See…Kuney v. Frank, 308 F.2d 719, 721 (9th Cir. 1962) ('Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception and should be subject to close scrutiny.' (quoting H.R. Rept. No. 82-586, at 33 (1951), 1951-2 C.B. 357, 381)); Estate of Bongard v. Commissioner*, 124 T.C. 95, *119 (2005) ('A transaction between family members is * * * subjected to heightened scrutiny to ensure that it is not a sham or disguised gift.')*"

Introduction to Levine Case Focusing on General Planning Lessons (Not on Split-Dollar)

- A recent Tax Court case decision provided a resounding victory to the taxpayer who had pursued what some might view as an aggressive split-dollar life insurance plan to minimize estate taxes. Estate of Marion Levine v. Commr,. 158 T.C. -- No. 2, February 28, 2022.
- This follows prior cases that indicated problems for held pretty strongly against other taxpayers who had implemented somewhat similar split-dollar arrangements, using somewhat similar arrangements. Understanding what the taxpayer did right in the Levine case, and how that contrasts to what taxpayers did wrong in a prior case, Estate of Cahill v. Commr, T.C. Memo 2018-84, may provide guidance to can be used to guide taxpayers contemplating such planning or other planning, including the use of FLPs.
- But even better guidance may be possible. A careful reading of the Levine case to identify steps the Levine Court found favorable, might be used to craft a roadmap of how to implement a similar plan.
- Importantly, the points in the roadmap below should be considered by taxpayers undertaking almost any type of estate planning.

Be Meticulous in Attention to Detail

- The Levine court recounts in detail the sophistication of the family, the attention to details in all matters not only estate planning, the legitimate and substantial business operations and investments involved (not merely a passive securities portfolio as in some bad fact cases), etc. This care and diligence seemed to impress the Levine Court and appears to have given legitimacy and respect to the overall plan. This was significant and is not what occurs in many plans.
- The Levine court noted “estate planners as skilled as the ones the family retained.” The Levine Court seems impressed throughout the opinion with the professionalism of how matters were handled. Perhaps this is an indication of how important doing the opposite of what was done in so many bad fact cases is to succeeding in a challenge – be thorough, adhere to formalities, etc.

Deliberate Careful Planning

- "*Swanson [the estate planning attorney] spent a good deal of time thinking through all the advantages and disadvantages, conditions and qualifiers. He put together a PowerPoint presentation for the family in late 2007 or early 2008. Then in January 2008 he sent a letter to Larson and the children in which he described the transaction and its legal and tax implications*."
- Deliberate careful planning, well explained to the client. Too often this degree of care does not happen, primarily in many cases because clients do not wish to incur the additional fees to permit their advisers to operate in this manner. Perhaps this is all a caution to such clients that being "penny wise and pound foolish" is not the way to handle tax planning. Perhaps advisers should inform clients of the tone and comments in the Levine case to support why deliberate, documented, and thoughtful planning is worthwhile. This type of well documented planning assures the client understands the planning and may protect the practitioner from later claims that the plan or its risks were not explained.

Financial Security for Taxpayer

- The Levine Court noted: “From the beginning, Larson [the independent trustee of the ILIT] and Levine’s children made it clear to Swanson [the estate planning attorney] that Levine wanted enough money to maintain her lifestyle until her death. This meant that any estate planning needed to be done with Levine’s excess capital—i.e., assets that she would not likely need during her lifetime.”
- Preserving adequate resources for the taxpayer engaging in planning is important to deflect a challenge of, for example, an implied agreement with the trustee of a trust, etc. Here, the taxpayers considered this important fact. In too many plans, clients do not have advisers prepare forecasts corroborating their financial comfort after proposed transfers are made

Decedent Had No Rights

- As of the date of her death, Marion Levine, the decedent, possessed only a receivable created by the split-dollar arrangements. This was only the right to receive the greater of premiums paid or the cash surrender values of the policies when they are terminated.
- She had no rights on her death or at any time prior to her death, in the life insurance policies held by the ILIT.
- She never had any rights to modify or terminate the split-dollar agreement (that power was vested solely in the ILIT investment committee (insurance trustee).
- The decedent did not have any right, whether by herself or in conjunction with anyone else, to terminate the policies because only the ILIT had that right.
- Contrast in Cahill v. Commr. 115 T.C.M. (CCH) 1463 (2018), the split dollar plan could be terminated during the insured's lifetime by agreement between Survivor Trust and ILIT. This effectively had the son and primary beneficiary of the plan, and his cousin/business partner controlling the decision.

Be Careful that Only the ILIT Ever Owns the Insurance

- The Levine Court stated: "*We find that the "property" at issue cannot be the life-insurance policies, as these policies have always been owned by the Insurance Trust. The split-dollar transaction was structured so that the $6.5 million was paid by the Revocable Trust in exchange for the split-dollar receivable. It was the Insurance Trust that bought the policies and held them. These policies were never owned by the Revocable Trust, and there was no "transfer" of these policies from the Revocable Trust to the Insurance Trust*."

ILIT Decisions By Independent Person

- Larson was the sole member of the investment committee that managed the irrevocable trust.
- Only Larson, the independent insurance trustee (investment committee) had the right to prematurely terminate the life-insurance policies. These arrangements gave the other two attorneys-in-fact for decedent no rights to terminate the policies or the arrangement itself.
- Note: This differs from Cahill where decedent/decedent’s agents had the right to agree along with an independent trustee of the ILIT to a termination of the split-dollar agreement. This was a critical element of the case that supported the taxpayer victory. But how different in reality was it if Larson was a co-agent and the insurance trustee?

Better Practice: Name Independent Trustees

- Larson was under a fiduciary duty to exercise his power to direct the Insurance Trust's investments prudently, and he faced possible liability to its beneficiaries if he breached that duty.
- Fiduciary duty is an important factor in the Court's analysis in Levine. The Insurance director/trustee (under the title here of Investment Committee) had a fiduciary obligation to the beneficiaries to make reasonable decisions. Is this a Byrum type of argument? The Court noted above the independence of the person named (he was not family), and his business and financial acumen.
- But in Cahill, even though the ILIT trustee was a cousin and business partner of the son, he still had a fiduciary responsibility to act appropriately for the beneficiaries of the trust. If that fiduciary responsibility required that he not terminate the split-dollar agreement, then could he be assumed to do so? What quantum of independence might be necessary for that fiduciary responsibility to be relevant? Would the Cahill Court opt to disregard the fiduciary responsibility in all situations? Can it? How different is a cousin/business partner in Cahill versus a 50-year employee/business partner who was not a relative in Levine? Would a second cousin be viewed differently? How can the facts in the two cases be reconciled to an understandable framework from which to plan?

Independent Institutional General Trustee

- South Dakota Trust Company was the general trustee of the trust and was an independent institutional trustee.
- The use of not just an independent trustee but an independent institutional trustee seemed favorable in the Court's view of the case. The cost relative to most plans of naming an institutional trustee is quite modest yet many clients resist because of the cost. Again, the Levine case provides confirmation that this step may well be worth the cost involved.
- Many clients prefer the use of family trustees because they will not charge and will accommodate any request. But the latter is exactly what using an institutional trustee may infuse more independence, reality and respect for any transaction. Again, another take home lesson from Levine

Caution: IRS Argument

- In Levine the Court Stated: "…*Commissioner makes his thrust. He contends that Levine—through her attorneys-in-fact—stood on both sides of these transactions and therefore could unwind the split-dollar transactions at will. This meant that she—again through the attorneys-in-fact—had the power to surrender the policies at any time for their cash-surrender values*."
- In Levine there was an identity of fiduciaries Larson was an agent and trustee of the ILIT. If possible, structure the transaction with independent and different fiduciaries. Why not make the agent under the power of attorney/successor trustee under the revocable trust, different then the person named as ILIT trustee (investment committee in this instance).

Different Beneficiaries Under ILIT and Estate, etc.

- The Levine Court noted the: "…*fiduciary obligations Larson owes to the beneficiaries of the Insurance Trust—obligations that would prevent him from surrendering the policies*. " Be certain the facts comport with that requirement.
- Decedent's children and grandchildren were the beneficiaries of the irrevocable trust.
- The Court noted: "The Insurance Trust's beneficiaries were Robert, Nancy, and Levine's grandchildren— the grandchildren that Levine naturally wanted to take care of."
- The different/distinct beneficiaries should be persons the decedent wants to benefit and that should be documented.

Insurance On Lives of Children Made Sense

- The attorney for the decedent identified the "…*children's situation and learned that they themselves also had large real-estate holdings and completely lacked any estate plans. So, he suggested to them and Larson that there just might be a way for Levine to invest her excess capital to provide her with a good return, while at the same time meshing with the Levine children's needs for estate plans of their own*…who themselves have a sufficient net worth to qualify for large life-insurance policies."
- In Footnote 11: the Court said: "…we find him [Swanson the attorney] credible when he said that he also viewed the Insurance Trust as something Nancy and Robert could use in their own eventual estate planning.
- This suggests that there was a logical reason to have life insurance on the children's life. Contrast this with the facts in other cases where the purpose of the life insurance may have been viewed as providing a tax savings primarily or even only.
- Unrelated to Levine, insurance consultants should review their client lists and proactively contact G-2 for planning.

#2 Monitor Trust Income

Watch compressed Tax Rates

Trust Income

- Trusts reach the maximum income tax rate at a mere $13,450 in 2022 (and $14,450 in 2023). Consider making distributions to lower bracket beneficiaries to reduce overall income tax burdens.
- If this cannot be achieved by year end the trust can make a distribution during the first 65 days of 2023 and elect to have it treated as if it was paid in 2022. IRC 663(b).

#3 Shore Up Valuation Adjustment Clauses

More Care Might be In Order on pre-2026 Planning

Add Economic Adjustment Provisions

- Should the Appraisal change any of the Estimated Membership Interests then the CPA for each Schedule A Entity shall provide a report to the Parties hereto (the “CPA Calculation Report”) which shall determine the amount of distributions, and/or other economic benefits that inured to the Transferor or the Buyer as the case may be from the Closing through and including the Appraisal (including the arbitration provisions relating thereto as described above) on the change in the Estimated Membership Interests, and which adjustment amounts shall be due and payable to the Transferor (the “Gross Calculation Adjustment”).
- Should a final determination be made that the Estimated Membership Interests (adjusted for the Appraisal, if applicable) exceed the Final Membership Interests for any Schedule A Entity, then the CPA for each Schedule A Entity shall provide a report to the Parties hereto (the “CPA Final Determination Report”) which shall determine the amount of distributions, and/or other economic benefits that inured to the Transferor (and not the Buyer) from the Closing (or such later adjustment for the Appraisal) through and including the Determination Date on such excess, and which adjustment amounts shall be due and payable to the Transferor (the “Gross Final Determination Adjustment”).
- The CPA Calculation Report and the CPA Final Determination Report are collectively referred to as the “CPA Report.” The “Gross Calculation Adjustment” and the “Gross Final Determination Adjustment” are collectively referred to as the “Gross Adjustment”.
- The CPA Report shall also determine the amount of interest due on the Gross Adjustment as calculated by the CPA, from the actual payment event(s) through and including the Determination Date and using the interest rate as stated in the Note (i.e., the stated rate, not a default rate) (the “Interest Adjustment”).

Adjustment - Nelson v. Commissioner, 128 AFTR 2d 2021-6532 (5th Cir. Nov. 3, 2021), aff’g T.C. Memo. 2020-81.

- 5th Circuit affirming tax court.
- Formula clause-based value of gift on appraised value.
- Defined value transfer did not work because incorrect language used (not because the mechanism was faulty).
- Mrs. Nelson owned 94% interest in a partnership. The IRS didn’t agree with valuation done by appraiser and argued on the split gift that $7 million tax owed. Nelsons relied on formula clause based on appraisal and said they should not owe any tax. They lost, not because formula gifts don’t work, but because they used the wrong formula. Their formula was keyed to what the appraiser said - not to what the IRS said.
- Discussion in Court of Appeals and Tax Court implicitly approved use of formula clauses when used properly.
- When using a formula clause, refer to values as finally determined for gift or estate tax purposes. If the incorrect language was used might it be possible to correct that language as a scrivener’s error? If a retroactive correction is made will it be effective?

#4 Valuation Issues GRAT CCA and Batty

Valuation Considerations that Affect Many Plans

GRAT PLR

- CCA 202152018 Release Date: 12/30/2021.
- The gift value of the shares of Company was determined based on an appraisal of Company approximately seven months prior to the transfer to Trust and that value did not reflect a pending merger.
- Under the fair market value standard, the hypothetical willing buyer and willing seller of a company would consider a pending merger when valuing stock for gift tax purposes.
- The retained interest in a GRAT was not a qualified annuity interest under § 2702 of the Code because the Donor used an outdated appraisal that did not take into account all the facts and circumstances of a pending merger.
- "…. intentionally basing the fixed amount required by § 2702(b)(1) and § 25.2702-3(b)(1)(i) on an undervalued appraisal causes the retained interest to fail to function exclusively as a qualified interest from the creation of the trust. The trustee's failure to satisfy the "fixed amount" requirement under § 2702 and § 25.2702-3(b)(1)(ii)(B) is an operational failure because the trustee paid an amount that had no relation to the initial fair market value of the property transferred to the trust; instead, the amount was based on an outdated and misleading appraisal of Company, at a time when Company had received offers in the multi-billion-dollar range."

Valuation

- GRATs are the “original” formula clause. The Regs contain an adjustment mechanism if the annuity payment is specified as a percentage of the value of the asset not a fixed dollar amount.
- Keep percentage of initial contribution that based on the end of the term there is something left you can determine in advance. If the value put into GRAT is much more if you have a formula annuity payment it should not matter.
- GRAT was reasonably structured, but appraisal was 7 months old. How bad is 7 months? Appraisal was prepared for Section 409A purposes. But CEO/Taxpayer knew at the time the company was being shopped, something the appraiser did not know.
- Company was sold for 3 x the appraised value.
- IRS might have said well the annuity should be greater as the value was wrong and the GRAT adjustment mechanism should be triggered. But the IRS took a more radical approach because they viewed the appraisal as egregious, or perhaps more so that the taxpayer was not ethical using an old appraisal when he knew the company was being sold for much more. There was an intervening appraisal and gift to a charity with an inconsistent value and the IRS concluded that the taxpayer was trying to game the system.

Valuation – Atkinson and Lessons

- Under Atkinson - Atkinson v. Commissioner, 115 T.C. 26 (2000), aff'd, 309 F.3d 1290 (11th Cir. 2002) a CRT was challenged for not complying with the terms of the Regs. GRAT Regs are similar to CRT Regs. Based on an application of Atkinson, the GRAT failed.
- Valuation should take into consideration a pending merger.
- GRAT annuity treated as not being a qualified interest under Section 2702 because of undervalued appraisal (by analogy to Atkinson).
- Some have read the CCA as suggesting that a valuation that is 7 months old is not acceptable. That may be, but the real issue in the CCA was that the taxpayer was playing games. The taxpayer knew that there was a significant development subsequent to the appraisal and he hid that. So, while practitioners might question the validity of a stale appraisal, the bigger issue is proper disclosure.
- Perhaps a belt and suspenders should be used on funding GRATs with a defined value mechanism on the assets gifted to the GRAT so that the adjustment occurs outside the GRAT mechanism. Another consideration for planners is whether GRATs should continued to be used in valuation adjustment spillover mechanisms as a receptacle. Might a DAF or incomplete gift trust now be better options than a GRAT?

Baty Case

- Daniel R. Baty v. Comm’r, Docket No. 12216-21.
- Emeritus shares were actively traded on the New York Stock Exchange.
- As Emeritus’ Chairman of the Board, Petitioner was aware of (and participated in) the ongoing merger negotiations with Brookdale. Pursuant to the securities laws, Petitioner and other insiders with knowledge of the merger negotiations were barred from trading during the pendency of the negotiations or disclosing such information to third parties.
- Petitioner was advised by his professional advisors and genuinely believed that his 2014 gift of publicly traded stock was required to be valued following the average high/low value rule set out in Treas. Reg. §25.2512-2(b)(1).
- During the audit, the IRS sought Chief Counsel’s Advice with respect to whether the IRS could take the position that the NYSE market price on the date of contribution to the GRAT was not controlling. The Office of Chief Counsel responded affirmatively, placing significant reliance on “assignment of income” cases. See CCA 201939002. As the issues involved in this case are complex and the IRS is advancing a novel position, the conclusion that Petitioner had reasonable cause with respect to the valuation issue is inescapable.

Baty Case

- Even the Estate of Kollsman court did not take the position that being “reasonably well informed” meant that the hypothetical buyer would uncover all of the facts.
- For the hypothetical buyer to ascertain the existence of the merger negotiations, Respondent’s position requires that someone close to the transaction not only violate his or her fiduciary duty and disseminate non-public information, but also expose themselves to the very real prospect of civil penalty and/or criminal conviction. Respondent’s assertion that a reasonably informed hypothetical purchaser would have learned about the merger talks in the purchaser’s negotiations for the purchase of the asset (Emeritus shares) is implausible and unsupportable.

#5 Recission

Evaluate Unwinding Transactions Before Year End

Build in Recission to Protect Clients from Unintended Law Changes

- Recission, the concept of treating a transaction as *void ab initio*, may have been first discussed as being used for tax purposes in the United States Court of Appeals decision of *Penn v. Robertson*, but it was in 1980 with Rev. Rul. 80-58 that the IRS provided formal steps to be taken to effectuate a recission for income tax purposes, stating that a recission must:

1. Take actions that would end with "*restoring the parties to the relative positions that they would have occupied had no contract been made.*"
2. The actions must be taken within the same tax year in which the transaction initially took place.

- One does not need the consent of all involved parties to have an effective recission.
- Penn involved a rescission due to action taken by a third party and Rev. Rul. 80-58 involved a situation where the parties agreed that, if certain events did not occur, the transaction would be rescinded.

Recission Must be in Same Tax Year

- Recissions will be respected if effected in the same year that the underlying transaction took place.
- Penn v. Robertson, 115 F.2d 167 (4th Cir. 1940).
- Rev. Rul. 80-58; 1980-1 C.B. 181; 1980 IRB LEXIS 502.
- Rev. Rul. 80-58 states "*the annual accounting period principle requires the determination of income at the close of the taxable year without regard to subsequent events*."
- Specifically, Rev. Rul. 80-58 comments "*A rescission may be effected by mutual agreement of the parties, by one of the parties declaring a rescission of the contract without the consent of the other if sufficient grounds exist, or by applying to the court for a decree of rescission.*"

Disclaimer vs. Recission or Both?

- One issue to consider is whether a recission provision in a document renders the transfer incomplete for gift tax purposes.
- The most “direct” way to have a transaction ignored for gift tax purposes is by a qualified disclaimer defined in Section 2518. But the provision is limited to wealth transfer (e.g., gift and estate) tax purposes, not income tax purposes.

Does Recission Make Gift Incomplete?

- Treas. Reg. 25.2511-2(b) ….A gift is … incomplete if and to the extent that a reserved power gives the donor the power [without the consent of an adverse party] to name new beneficiaries or to change the interests of the beneficiaries as between themselves….”
- Perhaps, there is “no harm” in providing that the parties can rescind a transaction including for wealth transfer tax purposes, but the provision might render the transfer at the time it is made incomplete.
- Allowing only one party (e.g., the donor) to rescind the transaction might, therefore, render the gift incomplete. Although it is arguable that the donee would be adverse to that, the fact that the donee agreed to allow the donor to rescind might be held to render the donee non-adverse.

#6 Wellin Malpractice Case

Dysfunctional Families; Importance of Putting it in Writing

Wellin Malpractice Case

- $100M+ of Berkshire Hathaway. Put into LP and sold LP units to a grantor trust. Wellin did that and children controlled the partnership and sold the partnership assets. When Wellin did the sale, the underlying stock was $150M and note was $50M. That appears to be a tremendous estate tax result. Turns out that Mr. Wellin was not happy with the arrangement and sued to have it undone. Sued lawyer for negligence and more. Taxpayer claimed lawyer never advised him of the risk. And trust was partner in partnership and partnership sold BH Stock and gain was attributed and passed gain back to Mr. Wellin of a huge gain. Taxpayer claimed he was unhappy about this. Why was client upset with such a great estate tax result and the tax burn which is the best attribute of a grantor trust under 2004-64 grantor gets tax bill and trust can grow free of income tax "the most powerful factor in all of financial planning."
- Trial in upstate NY and 4th Circuit US Court of Appeals decided that his claim against lawyer had not run by the statute of limitations. Lawyers wanted case dismissed for running of statute of limitations. Court's narrow holding was that statute had not run.
- Planners speaking to clients should advise clients that income earned in the trust will trigger tax on which the grantor is liable. Rev. Rul. 2004-64 can use tax reimbursement but it can possibly cause estate inclusion.

Wellin Malpractice Case - Lessons

- Whenever doing a transaction, tell the client all the consequences that could happen. Warn them. Send them a letter or written memo – that explains the transactions in non-legalese, outline the reasons for doing the transaction, and also outline the potential risks and consequences.
- Create a template disclaimer that could be placed on the top of every memorandum that highlights the general risks of all estate tax planning, the requirements or expectations from the client, etc. This is no different than the standard disclaimers every financial firm appends to any analysis. Why aren't more lawyers using similar precautions?
- Consider including or expanding language in retainer agreements signed by clients stating that there are no guarantees to any planning and any possible positive result will almost always have an offsetting negative implication. Another step some may consider is developing a risk factor checklist, akin to the risk factors section in a private placement memorandum, that alerts clients to a range of common risks in any estate plan. Better yet that risk factors might be tailored to reflect the particular transaction involved.

Wellin Malpractice Case - Lessons

- If clients are going to claim (whether factually correct or not) that they were not informed of risks, perhaps the message is that we as practitioners should be certain that they cannot say that they were not warned of risks. And when that is done in writing it is even more difficult for the client to deny such disclosures were made.
- Practitioners should also be alert to family dynamics. It is not possible to know in Wellin what the attorney could have known about family dynamics but from the case itself it appears that there were significant issues amongst family members. Caution should be exercised in identifying and addressing conflicts of interest in any family representation. Perhaps a standard conflict disclosure can be added to all retainer agreements and tailored to address each family's situation.
- Again, we cannot know what actually happened in *Wellin* from the limited discussion in the case but using it as a warning to be even more careful in protecting ourselves is likely a prudent take-away.

#7 Start 2026 Planning Now (Before Year End)

Clients Should Use Bonus Exemption Before 2026

Start 2026 Planning Now

- With the exemption to be cut in half in 2026 many taxpayers should evaluate using large portions or all of their exemption before that date. Risks/issues with most estate plans are the possible application of the reciprocal trust doctrine to unravel spousal lifetime access trusts ("SLATs") or similar trusts spouses create naming each other and the general application of the step-transaction doctrine to undermine transactions (e.g. the Smaldino case).
- If a couple is contemplating SLATs or similar trusts create one trust in 2022 before year end and the other trust later in 2023 or even 2024 to separate them significantly in time. Even if the trust cannot be fully funded in 2022 by year end it "ages" the first of the two SLATs. That may help deflect a reciprocal trust challenge.
- Many couples own assets in joint name or in primarily in one spouse's name and those assets need to be retitled into separate spousal names or from one spouse to the other. If the division of assets can be done before year end that makes the initial transfer in the 2022 year and may make it safer to divide assets in a different year then the year (2023 or even better 2024) when the gifts might be made.

Start 2026 Planning Now

- Evaluate the pros/cons of creating documentation (e.g. even a simple gift letter) corroborating the retitling of assets.
- Evaluate the pros/cons of reporting inter-spousal gifts on gift tax returns even if not required.
- Don’t stop with just putting different tax years and more time between retitle of assets and possible future transfers. Have substantive economic events occur after the retitle. For example, if husband has most assets and re-titles $10M to wife have wife sign a new investment policy statement and change the asset allocation corroborating her control over the assets while she owned them. If the assets is a family business or real estate LLC make a distribution and sign a new operating agreement reflecting ownership.
- Too many taxpayers may put off 2026 planning on the basis that they have several years to address that planning, but by starting now that same planning can be done with potentially less risk and greater likelihood of success.

Can’t Get an Appraisal by Year End?

- Use a “double” King.
- A King price adjustment feature increases the face amount of a note to the “gift tax value as finally determined.”
- If you cannot get an appraisal in time to complete the transaction, use a double King.
- The first adjustment shall be up or down to the appraised value as determined by a third-party appraisal.
- The second adjustment would be a traditional King adjustment.

Other Shortcuts

- Home state trusts.
- Joinder agreements.
- Rely on further assurance clauses.

SLATs

- SLATs had become the planning acronym of the times but there are a number of considerations.
- The Reciprocal Trust Doctrine remains a concern. For 2020-21 plans review SLAT plans with clients and consider the differences in the timing (likely little or none), assets, trust terms, etc. Will remedial efforts in 2022 for trusts that were a bit too similar in 2020-21 be helpful?
- Consider funding implications of the recent Smaldino case.
- Consider Different life insurance in each SLAT that can change the economics of each trust post-plan and help break the reciprocal trust doctrine.
- These may be valuable tools regardless of current changes to the estate tax. They may use exemption before the 2026 decline, save state estate taxes, and provide asset protection.
- Consider divorce. The 2017 Tax Act repealed Sec. 682 so that post-divorce the trust remains grantor taxable to the donor spouse.
- For 2022 planning consider variations such as one SLAT and one SPAT or hybrid DAPT. More access and more difference.

Why You Might Consider a Domestic Asset Protection Trust (DAPT)?

- You might want to use and safeguard exemption in case future changes reduce the exemption from current high levels. It is scheduled to be reduced by ½ in 2026.
- A self-settled trust (DAPT) may permit your client to be a beneficiary of the trust yet arguably remove those assets from your client's estate. There is some risk with this technique especially by those resident in states that do not permit these trusts.
- Some advisers are uncomfortable with DAPTs in all instances and prefer hybrid-DAPTs or SPATs.

DAPTs: Some More Background

- Alaska was the first state to create DAPT legislation providing complete asset protection for a self-settled trust if the Grantor was not trying to defraud a known creditor (plus other requirements).
- Now 19 states protect self-settled trusts from claims of the Grantor's creditors, although some are more limited than others
- Does this work in other states like NY and NJ? It's not certain, but likely if all "Ps and Qs" are followed—e.g., all persons and assets involved are in a "DAPT" state the risk should be less. CT now permits these trusts.
- The DAPT state trust should be excluded from the Grantor's gross estate if the gift to the trust is complete. This may provide a valuable non-asset protection reason for creating the trust.

DAPT Planning and Drafting Options

- Have assets held in underlying LLC that DAPT holds only a non-controlling interest in.
- Perform lien and judgement searches, have a balance sheet, and have you sign a solvency affidavit regardless of whether state law requires.
- Consider changing domicile to DAPT jurisdiction if feasible. With 19 states having DAPT legislation there may be a nearby state.
- Prohibit distributions for 10 years plus 1 day to avoid 548(e) of the Bankruptcy code.
- Prohibit distributions if grantor is married as spouse can receive distributions.
- Prohibit distributions if grantor’s net worth is in excess of some stated amount.
- Provide a non-fiduciary the power to remove the grantor as a beneficiary.

Hybrid DAPTs as an Option to DAPTs

- A Hybrid DAPT is a DAPT created for other family members (e.g., Grantor's spouse and descendants) but with some ability to add the Grantor back in as a beneficiary.
- The power to add can be made conditional by time (e.g., only after 10 years to endeavor to avoid the reach of the Bankruptcy Code, or when grantor is not married and is not living with another as the Grantor's spouse).
- Does it work? Many believe it should, but there is little or no law on point, so caution is in order.

DAPT and Hybrid DAPT Limitations Suggest SPATs

- DAPTs are self-settled trusts and, therefore, potentially subject to claims of the Grantor's creditors, foiling asset protection and estate tax avoidance
- So why not avoid using a self-settled trust? A self-settled trust is one in which the trustee can make a distribution to the Grantor. So don't permit that.
- Instead create a trust for the Grantor's family that prohibits the Trustee from ever making a distribution to the grantor or "decanting" into a trust of which the grantor is a beneficiary.

SPATs: Safer for Asset Protection and Estate Tax Exclusion

- You can give one individual the power to mandate that the trustee must pay funds to you. That technique might be enhanced as illustrated in the following variations.
- One or more individuals, who are not beneficiaries, are granted special “collateral” lifetime powers of appointment, which can be exercised in favor of members of a class that includes the Grantor (such as descendants of the Grantor’s mother).
- Make the power exercisable only with the consent of a trusted third party (e.g., your lawyer or cousin).
- Exercise should be made outright only and exercised only if the Grantor has a need.

Mix and Match Acronyms

- It should not only be about SLATs.
- Why not use a SLAT and DAPT.
- Or a SPAT and Hybrid DAPT.
- Or SPAT and a DAPT.
- This further differentiates the trust for reciprocal trust doctrine purposes and also provides greater access.

Other Steps to Consider with Trust Plans to Enhance Access

- Include a loan provision in grantor trusts for more access.
- Use life insurance to address mortality risk.
  - If the trust has no insurance provisions a decanting may add them to permit adding insurance. Once a SLAT with significant assets has insurance provisions
- Consider implications of divorce.
- Have the trust permitted to own personal use assets.
- Include a trust protector provision.
- Give a person in a non-fiduciary capacity the power to turn off grantor trust status.
- Include charitable beneficiaries. Even if those provides no current income tax benefit it can be essential to encourage and even to permit future generations to support important causes.

#8 Exceptions to the Anti-Clawback Regs

What to do about the new Proposed Regs

What To Do?

- Inform clients who have undertaken targeted transactions that if the Proposed Regs are finalized their plan will fail and exemption will be lost.
- Evaluate if there is an exception (e.g. paying the promise gift 18 months before death).
- If cure is not possible and Proposed Regs are finalized, consider suggesting life insurance in an ILIT to address the estate tax.

Proposed Regs Attack Artificial or Painless Gifts

- Promise gifts illustrates the types of “gifts” that the Treasury was particularly concerned about. These were gifts which some have referred to as “artificial” or “painless” in that the taxpayer could retain an interest in or control over the assets involved, lock in exemption (at least that is what some practitioners had hoped), and in short have their tax cake and eat it too.”
- Other such artificial gift transfers may have included funding a grantor retained interest trust (“GRIT”) to a family member so that the gift would be deemed made of the entire amount transferred with no reduction for the interest retained because, under Internal Revenue Code (“Code”) Section 2702 the value of the retained remainder would be valued at zero.

Proposed Regs Attack Artificial or Painless Gifts

- Similarly, a preferred partnership could be structured that intentionally violated the requirements under Code Section 2701 so that the equity received by the donor in the entity would be valued at zero. The taxpayer could have retained a preferred interest structured so the entire value of the entity would be treated as a gift when certain family members acquired the common interests, thereby securing the use of the gift exemption (and permitting the allocation of GST exemption to the gift). The preferred partnership interest would be included in the taxpayer's estate but the exemption, it was thought, would be preserved. The recently issued Proposed Regulations target these type of transactions and endeavor to exclude them from the anti-clawback rule.
- 1% gift of a QTIP life estate by surviving spouse. What if entire income interests is relinquished? Is that a different result? Unlike other techniques the IRS issued several PLRs approving division of QTIPs followed by 2519 disclaimers. Does that matter?

Transactions Targeted in the Proposed Regs

1. Gifts that are includible in the taxpayer's gross estate Under Code Sections 2035, 2036, 2037, 2038, or 2042. The anti-clawback rule will not apply so that only the exclusion available at the taxpayer's death, not the exclusion that was believed to have been used when the transfer was consummated, will be available.
2. Unsatisfied enforceable promise gifts.
3. Gifts subject to the special Code Sec. 2701 valuation rules. These generally related to the valuation of intra-family transfers of entity equity interests when the parent (senior generation) retains certain preferred rights. If the taxpayer dies holding a Code Section 2701 applicable retained interest, they cannot take advantage of the anti-clawback rule.
4. Transfers like a GRIT where property is pulled back into gross estate under, for example, Code Section 2036. If the taxable portion was 5% or less (see exceptions below) the taxpayer will still be able to take advantage of the general anti-clawback rule to the extent of the gift (but not the whole amount transferred).
5. Certain transfers to GRATs and Qualified Personal Residence Trusts ("QPRTs") under Code Sec. 2702 if either technique used the bonus temporary exclusion amount.

Transactions Targeted in the Proposed Regs

1. The relinquishment or elimination of an interest in any one of the above transactions within 18-months of the decedent's death. Any of the foregoing transfers if the interest that was transferred was relinquished or eliminated within 18 months of death. For example, you created a GRIT with an income interests that lasts for your lifetime. If a third party eliminates your income interest it is not clear that the property would still be included in your estate under Code Section 2035. Generally, Code Section 2035(a) would include in the taxpayer's gross estate the value of the interest if the taxpayer relinquished his or her rights within three-years of death. However, Code Section 2035(a) does not apply if it is eliminated by something other than a voluntary act by the taxpayer. So, some might argue that Code Section 2035 alone is not sufficient to address the above. The Proposed Regulation provides that if you have a Code Section 2701 retained interest, and you transfer or have eliminated it within 18-months of death, you will still not qualify for the benefits of the anti-clawback rules even if the underlying property is not included in your estate.

Exceptions to the Exceptions

- The anti-clawback rule exception won't be applied to:
- Certain nominal transfers. That is, the 2019 anti-clawback rules will apply to certain transfers that would otherwise be excepted. Specifically, transfers which are 5% or less of the value of the transfer.
- Transfers more than 18-months of death, which are described in the original interest by death or a certain time period

#9 Exemption and Annual Gifts

What to Do Before Year End (or Not!)

Annual Gifts (or Not!)

- Consider annual exclusion gifting
  - $16,000 per person per year tax free
  - $17,000 for 2023
- Eligible to pay donee's health and education expenses if paid directly to the provider.
- Accelerate gifts by making 5 years worth of 529 gifts.
- Do annual exclusion gifts really make sense for most taxpayers given the high exemption? Might it be better to make one larger gift and forgo future annual gifts? Perhaps taxpayers should revisit with their advisers whether or not to continue annual gifts to trusts as for many it may not be optimal.
  - Issues of taxpayers not tracking maximum gifts to trusts with other gifts made during the year

Exemption

- 2022 Exemption is $12.06 million per person ($24.12 mil per couple) 2023: $12.92 million ($25.84 mil per couple).
- Under current law, this exemption will be automatically cut in half in 2026
- Taxpayers who have used up all their exemption with prior planning might “top-off” gift plans by using the 2022 and 2023 exemption amounts.
- Consider waiting until 2023 for some gifts using up exemption so that only one 2023 gift tax return has to be filed to use up the 2022 and 2023 inflation adjusted exemption amounts rather than making gifts in 2022 and again in 2023 to use the inflation adjustment amounts and avoid the need for a second gift tax return.
- The opposite planning from that noted above may be preferable for some taxpayers. For example, assume that the taxpayer is quite concerned about asset protection issues. It may be safer to make gifts spread over multiple years and reported on separate gift tax returns to corroborate the transfers made. Making a gift in 2022 of the remaining exemption and again another gift in 2023 of the new inflation adjustment exemption available in that year as two discrete transactions may be safer from the perspective of avoiding a fraudulent conveyance attack. The aggregate gift in each tax year when made separately may be a smaller percentage of overall wealth than if the gifts for 2022 and 2023 are aggregated into 2023 to minimize filing and paperwork. That may be a safer approach.

Review Existing ILITs

- Evaluate life insurance that your client or an ILIT might own:
  - Make sure it is owned in a trust and not outright (separately when was the last time an insurance consultant reviewed the policy status and performance)
  - While reviewing life insurance valuate coverage in light of the prospective reduction of the exemption in 2026 it may be advantageous not to cancel insurance that is no longer believed to be needed (it may be useful in 2026 and later), evaluate the possible exercise of conversion options on term coverage for the same reason, etc.
  - Many ILITs are not GST exempt or in old-style trusts that probably should be decanted. Making a late allocation of GST to the old ILIT or trust may be a good use of GST exemption that might otherwise expire in 2026 unused.

#10 Charitable Planning

Some Planning Thoughts

What Can You Afford to Donate?

- How much can you give to charity? The answer is often more than you might have thought. Some donors worry whether they will run out of money if they donate too much each year. Fears of financial insecurity are often an impediment to making larger donations. Many prospective donors, especially those living with a health challenge such as multiple sclerosis, are concerned about maintaining adequate assets to deal with future financial uncertainties. Making bequests or gifts of retirement assets on death assures resource are available during your lifetime because testamentary gifts are made in the future on your death. But if access to funds for the future is a concern, there is another way to get financial comfort that may permit accelerating some of those gifts now.
- Many people who value the wonderful work their favorite charity does but are worried about making large donations today that may create financial uncertainty in future years. But there is a way many people can get comfortable making larger gifts today, and thereby accelerate the great work your favorite charitable cause does. You can use the approach recommended to determine how much you can donate or gift (e.g. to charities or your children or other donees) the maximum you can right now. Start with a discussion with your wealth adviser (or use online resources) and determine a reasonable target that you want maintain for your financial security.

What Can You Afford to Donate?

- For example, you might wish to have an 85% likelihood of not running out of money by age 95. Some people use 100, others much lower ages. A lower age (e.g. 85) might be worrisome in light of increasing longevity, unless there is a specific known medical reason for doing so. Also, determine a confidence level that you would like to have of not running out of money by that age. For example, you might feel that an 85% level is a reasonably secure target. Some people might want a higher figure, but if you review the analysis regularly 85% or perhaps a lower figure might be adequate. Remember, if you review the analysis periodically you can always adjust in the future if you get off the financial track.
- With your target set you can have our wealth adviser forecast future financial results through age 95 (or whatever age you've selected). Next, your wealth adviser (or online tools) can adjust your budget numbers to determine what is the most money you can give away now, every year, in additional gifts (i.e. what was not reflected in your budget) to children and charities without pushing you below your financial goal of maintaining an 85% likelihood of not running out of money by age 95 (or whatever other targets you've settled on). That provides you with an estimated amount that you can gift each year (to be adjusted as you periodically revisit the numbers) without undermining your financial security. If you haven't gone through that exercise it is well worthwhile.

Documentation Counts

- The tax laws require that a taxpayer to get a contemporaneous written acknowledgment from the donee charity for gifts of $250+. This must describe the amount of cash and give a description of noncash property, confirm whether the charity provided any goods or services to the donor (and if so provide an estimate of the value of them). Code Section 170(f)(8). The IRS and Courts have gotten really tough on this so that anyone making a donation should really be certain to adhere to all the requirements of the law if they want to protect their deduction.
- In a recent case, the Court affirmed a decision denying the taxpayer a charitable contribution deduction for an airplane because the taxpayer failed to attach a contemporaneous written acknowledgment from the charity to the income tax return. Izen v. Commissioner, 5th Cir, Docket No 21-60679. Foot faults do matter.

Documentation Counts

- In another case the court denied a taxpayer a charitable contribution deduction because the taxpayer also did not have a sufficient contemporaneous written record. The Taxpayer contributed a large number of artifacts to a charity using a gift document to transfer ownership. That gift document indicated that the contribution was unconditional and irrevocable (important to assure that the donor parted with all ownership interests in the property) unless the gift agreement provided otherwise. So, the gift agreement was critical to the determination that the donation was made, but it wasn't attached to the donor's income tax return. The IRS challenged the donation as not meeting the requirements and the court agreed. Without the gift agreement it could not be corroborated that the charity did not provide goods or services that would offset the donation. Martha L. Albrecht v. Commissioner, TC Memo 2022-53.

#11 Non-Deductible IRAs

Perhaps Not as Bad as Some Think

IRAs As an Asset Protection Tool

- IRAs are not automatically protected from claimants but state law in many states will protect IRA balances. This may justify setting up and growing IRA accounts, even where no tax deduction is feasible. It is a simple, no cost way to create a separate “bucket” of funds that may be asset protected.

Additional information

- Jonathan G. Blattmachr
  jblattmachr@hotmail.com
- Martin M. Shenkman
  shenkman@shenkmanlaw.com
- Interactive Legal sales@interactivelegal.com
- Peak Trust Company
  bcintula@peaktrust.com

CLE Credits

- For more information about earning CLE credit for Martin Shenkman programs please contact Simcha Dornbush at NACLE. 212-776-4943 Ext. 110 or email sdornbush@nacle.com