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Shenkman PRACTICAL PLANNER®

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NEW YEAR: NEW PLAN

Summary: What should you be thinking about now? Yeah, that New Year's party is more fun than thinking about estate planning, but perhaps it is really time to get your planning in order. New Year's is a great time to not only commit to going to the gym, but cleaning up your planning. Whatever your situation, there are likely really important steps to take. This newsletter will focus on many of them. And please don't use the common excuse "nothing has changed." What in the world remains the same as only a few years ago?

■ **Inflation Adjustments for 2024 Require Action**: The amount you can gift increases every year based on inflation. Inflation over the past few years has been significant, so you may have bandwidth to now top off trusts and other planning steps. If you haven't reviewed and updated your plan in recent years, doing so is prudent before making new gifts. The estate, gift and generation-skipping transfer (GST) tax basic exclusion is $13,610,000 in 2024. IRC Sec. 2010. If you made gifts to an irrevocable trust plan, say in 2012, you might be able to make large additional transfers. But review those trusts first, as so much has changed that upgrading those trusts (yes, you might be able to improve and modify even irrevocable trusts) should be step 1. The annual exclusion for gifts, how much you can gift each year per person is $18,000 in 2024. Sec. 2503. For many people annual gifts, long the foundation of estate planning, are passé. Unless your estate is so large that you have or will use up all exemption amounts, and unless your family is large enough that the annual gifts are material to your plan, you might just skip them, or just gift to heirs what you want to give them outside of trusts and the plan. For example, consider making a one-time large gift to an insurance trust using exemption and skip the annual gifts and Crummey notices in the future. Non-citizen spouses don't qualify for the unlimited estate tax marital deduction but you can gift $185,000 without a tax cost. While that may not be enough to accomplish estate planning goals, a regular plan of annual gifts to a non-citizen spouse over many years (and other planning too) can move the needle. Rev Proc 2023-34.

■ **Consider 65 Day Rule**: A non-grantor trust can distribute income to a beneficiary within 65-days of year end and treat the distribution as if made in the prior year. That might facilitate shifting income to beneficiaries at a lower tax rate then what the trust might pay. The top income tax bracket of 37% for married people filing jointly is $731,200. A non-grantor trust hits the maximum bracket at $15,201. So monitor trusts (and plan new trusts) to be able to shift income to human beneficiaries who may pay lower tax. Distributions may also avoid the 3.8% net investment income tax (NIIT). Consider the non-tax goals of the trust and beneficiaries. While you don't want to distribute out trust cash (which may flow the taxable income to the recipient) if the beneficiary is in the midst of a problem, many are not, and the tax savings can be substantial. This should be a standard post-New Year's step.

■ **Trust Makes Charitable Gifts**: Your non-grantor trust might get a better tax deduction for charity than if you made the donation personally. But consider the requirements: the donation has to be paid from trust gross income (the trust must realize the gain not ACAT appreciated stock), it has to be paid pursuant to the governing document (the trust must allow donations), and paid for reasons listed in Code Sec. 170(c). Unlike people, a trust has no adjusted gross income limits on donations and trusts don't have a standard deduction hurdle.

■ **Plan for Retirement**: Too many people have not prepared realistic budgets and had financial plans/forecasts completed. Even if you are wealthy your spending has to be in sync with your cash flow. When did you last up-

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CHECKLIST: CTA REPORTS

Summary: The Corporate Transparency Act (CTA) will require 32 million business entities, and perhaps 100 million or more people, to file new and invasive reports with the Financial Crimes Enforcement Network (FinCEN). Penalties for non-compliance can get very costly and jail time is a risk. Everyone who might be affected should act now to address the CTA.

√ **DIY**: Do it yourself may be an option for most people involved in simple entities. Many entity filings may be simple. Example, you own a simple LLC 50/50 with your brother that owns a rental property. Either of you as members can file on behalf of the entity and disclose the relevant information. There really are no complications, so why pay someone for work you might do in less time and with less effort than it would take you if you hired someone? Also, CTA is new so likely advisers will consider the more complicated filings when they price their services. On the flip side, if you have a complex entity (officers, key employees with control and profits interests), or a complex trust owning entities (investment trustees, powerholders, loan director, etc.) you probably should get professional help. If you want to DIY on a complex situation and can get everyone named in any relevant document to

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…New Year: New Plan

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date your plan? Have you factored in what your lifestyle might be in the future? Some planners assume less expenditures in later decades, but some may opt to kick it up a notch with a luxurious 3-year cruise. What are the assumptions in your plan and do they work for you? Have you considered longevity? If you dodge accidents and key health issues how long might you realistically live? Consider that there is a correlation with wealth and longevity, so using standard tables may significantly understate how long you live. Have you insisted that your financial adviser discuss all this with your estate planner so that your estate plan realistically factors in your likely future finances? Many have not and that could really torpedo your planning.

■ Plan for Loss of Capacity: Not something anyone wants to think about but a reality with potential health issues and aging most of us will face the reality of waning capacity. Get real and address this eventuality. Consolidate accounts, communicate key information, organize all your records, have current estate planning documents that name appropriate people to step in to help. If you want to maximize angst and legal fees, just keep ignoring this.

■ Who Are Your "Descendants": Most trusts and estate plans have language defining descendants, if they even have language, based on the laws of long ago, or default to state law definitions. The world has changed. Concepts like assisted reproductive technology (ART), posthumous conception, etc. did not exist until recently. Societal norms have changed and will continue to. Whatever your wishes and values, be sure to revisit every will and trust and be certain that they comport with your wishes and address these new realities. Some state laws provide that the definitions when the will/trust was created must be used. Determine whether and how you might modify the language to reflect what you now want.

■ Talk to Heirs: Have you discussed with heirs and others who you might rely on the roles you have given them in your estate plan (trustees, trust protector, etc.)? How will they know what to do? Have you spoken to heirs even in broad general terms about your dispositive plan? Beginning to address these matters, as appropriate to those involved, might reduce future discord. Have you written letters of instruction guiding fiduciaries as to what they should do? Consider writing letters to heirs about what your hopes and wishes are.

■ Divorce is Real: Divorce is a real issue that is rarely addressed when couples engage in estate planning. After all the assumption is that the couple will remain married. But the divorce rate for first marriages could be 40-50%. About 35% of those getting divorced were aged 55+. The divorce rate for those 50+ is double the rate of 20 years ago. Some predict gray divorces will triple by 2030. Those with or contemplating estate plans to use exemption before 2026 when it will be halved should consider the implication of divorce. Many do not. Revisit those plans now and address this tough topic when planning. The differences in trusts and the implication of retitling assets can have a substantial impact if there is a later divorce.

■ Residency: Do you have homes in multiple states and split your time? Where are you a resident for tax purposes? Just because your friends say they're residents of a no tax state despite owning their historic family home in their old high tax state, doesn't mean they'll succeed on audit. See Matter of Obus et al., v New York State Tax Appeals Tribunal. Have you really documented and understood the steps to take? Income and estate tax rules on residency/domicile can differ. Have you parsed those? Have you tracked days in each state using the rules each state has? Many states require you to prove you terminated your tax residency by clear and convincing evidence. Getting a new driver's license in the low tax state and spending more time there may not suffice. That is a tough standard. About 17 states have an estate tax and the rate in many hits 16%, some higher. Revisit these issues with your tax team.

■ Entities: Most limited liability companies (LLCs), corporations and other entities were created, at least in part, to protect assets from liability claims. But if you ignore entity formalities (signing documents inappropriately, not having properly transferred assets to the entity), or commingled funds (e.g. paying personal expenses like your 1040 or estate planning fees from an entity), you might taint the protection that was fundamental to why you created the entity. Get a check up with your advisers to review entity documentation, operations, payments, and what can be done to shore up the formalities so the entity will be respected. PP

> ***Martin M. Shenkman filed Form ADV-W and is no longer a Registered Investment Adviser effective December 12, 2023***

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…Checklist: CTA Reports.

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file, you might still do it on your own. Consider that much of the complexity and cost professionals will charge is figuring out who has to report as a beneficial owner. If you get everyone to file there may be no need for a professional analysis of who has to file. But many situations won't be that easy or simple. The trick is correctly differentiating the DIY filing from those needing the A team.

√ Whose Helping: Do not assume that any particular adviser is handling your filing if you don't have that commitment in writing. A major mistake folks will make is assuming the corporate attorney who created an entity, the estate planner who transferred the entity to a trust, or the CPA filing entity tax returns, is handling the CTA filing for that entity. Few if any advisers will be able to do that or will want to. DON'T assume. In the end the penalties and potential jail time will be on you, so you should be certain every entity you are involved with has a person handling the filing for the entity and its beneficial owners or that they have hired a pro in a written agreement confirming who will file. Who you hire may not be the only expert you'll need. If your CPA will file, they may come back to you and say you need counsel involved to make legal decisions. Your corporate attorney may need the help of an estate planner. Costly!

√ You Want My License And Home Address! Are You Kidding Me! CTA filings in some cases will get nasty and combative. Expect it, start preparing now, and be ready to make costly changes. Yep, this will be a huge and costly mess for many people. How so? Here's an example that might become all too common. You set up non-reciprocal spousal lifetime access trusts ("SLATs") in 2012 to use exemption. Likely millions of taxpayers did this. You named your college roomy as the trust protector but oops you never told her then nor since as nothing has come up requiring her involvement. But your lawyer tells you it really seems like the trust protector under your trusts is deemed a beneficial owner under the CTA rules. Turns out you have not spoken to her in many years. Now you call her up: "Jane long time no speak. I listed you as the trust protector of my trust in 2012 and now I need your home address, Social Security Number and a copy of your driver's license so a company the trust you never heard about owns can file under the CTA. Plus the law isn't really clear but if you willfully don't cooperate you might face a $500/day penalty and jail time." How well is this going to go? So, you might have to call your estate planner and have Jane and others named in the trust changed. Then your lawyer might say "Your trust is more than a decade old and we really should review the whole thing to see if it is still what you want (it won't be) and still reflects state of the art provisions (it won't). So, your lawyer recommends that the better way to address changing so many people you named and fixing up the old trust is to decant (merge) the old trust into a new trust, changing the name of the trust protector and many other positions. That might be $10,000++ of work to create a new trust, decanting documents and more. Will you be game?

√ Costly: The CTA "stuff" is complicated: 312 pages of regs and preamble, FAQs, small business guide and more. And that volume of info barely clarifies most of the questions professionals have about various trust positions, etc. Consider the time to review an 85 page trust and 40 page operating agreement and other documents. This work will be pricey in many instances. There is no escaping this work as entity documents and trusts probably should be modified to address the CTA. PP

Recent Developments

■ Billionaire's Tax: Senator Wyden has proposed new taxes on the wealthy. The wealthy can buy assets that grow in value. Rather than selling them and paying tax on the gain, they borrow against them to pay lifestyle costs. On death the value of the assets is increased to fair value. They could lose this ability to step up the tax basis (amount on which taxable gain is determined). That could cost inheritors. (The discussion didn't acknowledge that assets in the estate are subject to estate tax.) This would apply to taxpayers with more than $100 million in income, or more than $1 billion in assets for 3-years. Marketable assets like stocks would be marked to market trigging annual gain. When a closely held business or other non-tradable asset is sold they would pay, in addition to the regular tax interest on the amount of tax that had been deferred before the sale as if the gain was realized equally in each year since the purchase. With the need for revenue, never say never.

■ Conflicts: A conflict is when the interests of your attorney, and a different client, or a third-party, conflict with your interests. Your representation may be in issue. Conflicts may limit your attorney's ability to recommend steps for you as they may be restricted as a result of responsibilities to others. You need to care about this so you can be assured of proper representation of your interests. For example, a lawyer may not represent you and your partner in drafting an LLC operating agreement if your interests are adverse. You each should instead hire your own lawyer to represent each of your respective interests. In estate planning, conflicts may not be identifiable until well into the relationship. In a recent case (a complaint was filed) there were claimed conflicts that the attorney represented both spouses yet the plaintiff wife could be removed as a beneficiary of large trusts upon either her or her husband commencing a divorce. She claims she wasn't advised of the potential impact to her of the plan in the event of divorce. Overdeck v. Steyer and Seward 7 Kissel LLP, Superior Court of New Jersey Law Division, Essex County (10/26/23). No prediction on how the case may resolve, but if you don't understand a possible conflict ask your attorney. Most couples prefer the lower cost and better coordination of having a single firm help. But that might not always be best. PP

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Planning Potpourri

■ Will Contract: You and your spouse sign wills and other estate planning documents. Pretty standard. You die leaving all assets to your surviving spouse. Your spouse remarries Darth Vader who manipulates her into changing her will leaving assets to him instead of to your kids. Not what you would have wanted. If you not only sign a will but a contract in which you both commit not to change the dispositive plan, that might protect your intended heirs. Better yet, do a will contract and bequeath assets to an irrevocable trust with an independent trustee for more protection. A will contract is a binding agreement that provides that neither of your or your spouse can change your will or trust during their respective lifetimes even after the first death. So why do so few couples use will contracts? Many couples are sure these issues won't affect them. These agreements also add to the cost and complexity of the plan, using independent lawyers might be advisable, and after all that they often raise issues and can be tough to enforce. Also, consider if you have a binding prenuptial or postnuptial agreement that might mandate what you must do with your estate plan. If you do, be sure to address any differences between the various agreements to avoid further complications.

■ Pre-Mortem Probate: When you die, if you have a will, the will is "probated," which means filed with the Surrogate's court for your county (often known by other names). The will is a public document and notice is typically given to not only people named in the will but certain close family members, alerting them to the will. That can sometimes lead to disputes as to who got what, whether the will was valid, etc. A problem with those suits is that the key witness, you, are no longer alive to testify as to what you meant. A possible solution is to probate your will before you die, which is referred to as pre-mortem probate. That might make it easier for you to testify and confirm your intent. But it also might mean that ugly dispute you hoped to avoid occurs and you're now stuck in the middle of the storm. Pre-mortem probate highlights any issues or mistakes in your will so you can fix them. That is not possible after the fact. But if new people are born, or others die, if the right people were not given notice of the pre-mortem probate, you might still have issues. What if you move to a different state after completing the probate and that state's rules differ?

■ Cybersecurity: Get your own private domain for email and hire an IT firm to install the same caliber of cybersecurity protections you have at your business. PP

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