

MSBA

SECTION OF ESTATE AND TRUST

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Newsletter

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Notes From The Chair

Matthew A. Mace
OBER KALER

This has been another busy legislative season. Each year, the Section gets very involved with the legislative process, most notably as a sponsor to a legislative agenda that is begun in the prior summer. In addition, the Section reviews and comments on legislation provided by other parties including the Orphans' Court Judges, the Registers of Wills, other Sections of the MSBA, members of the Bar in general and the public.

This year's legislative session was very active. The Section sponsored several pieces of legislation, including the new Maryland Trust Act, which will be reviewed in summer study by the legislature. The Section will participate in that process to educate and review the purpose of that legislation with the legislature. Ultimately, the Section Council hopes the legislature will adopt this legislation to confirm and improve Maryland's Trust law.

It was the second year that the Section addressed an exemption from transfer and recordation tax for transfers to and from an estate and certain non-business trusts. The Section's objective was to bring in line all of the Maryland Counties and confirm that transactions involving estates would be treated in a

similar fashion. In addition, this legislation addresses certain transfers that take place to and from trusts such that those which are without consideration and paramount to an estate planning transfer are also exempt from transfer and recordation tax.

The Section sought this year to make changes to Trust and Estate Section 14-113 to clarify the treatment of certain transfers of property held by tenants by the entirety to one or more revocable trusts. Legislation sought to confirm the treatment of property that had been previously transferred as well as confirm that the transfer

could be to one or more trusts. **When advising clients as to the application of this revised statute, take note of the specific effective date provisions that are important in determining the treatment of transactions.**

The Section also participated in the revision of the Maryland Power of Attorney Act, working closely with the delegates on the House Judiciary Committee. Several changes were made to the Maryland Statutory Power to clean up some of the definitions and powers granted to agents. **The corrections**

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2010 Advanced Tax Institute Conference

Estate Panning Issues

By *L. Laurel Lea*
Furey, Doolan & Abell, LLP

On November 3, 2010, MSBA and MACPA presented a day of topics on estate planning issues. Four nationally recognized estate planning and other professionals presented to those gathered on a diverse range of topics. Jeffrey J. Radowich, a partner at Venable LLP in Baltimore, began the day with a discussion of models of business succession planning, from the basic to the complex. Radowich was followed by Turney P. Berry, of Wyatt, Tarrant & Combs, LLP in Louisville, Kentucky, who entertained with his take on recent developments in the law and prognostications for the future. After lunch, Elizabeth Morgan Schurig, of Schurig Jetel Beckett Tackett in Austin, Texas, provided an overview of international estate planning issues. The day ended with Lee Slavutin, of Stern Slavutin-2, Inc. in New York, New York, who discussed the use and management of life insurance in today's political and economic climate.

Models of Successful Business Succession Planning: From the Basic to the Complex

Jeffrey Radowich examined four models of business succession planning. He organized his talk by describing four real world situations and applying the various models to a particular planning situation. Radowich noted that all four of these models were quite practical and had been applied to his clients' situations.

Radowich began with what he called the "Red Truck Plan." Every business owner needs to have an emergency plan in place to deal with the issues of management control and equity ownership if the business owner dies suddenly and prematurely—by getting hit by a red truck. This plan is typically employed for the closely-held business owner who has never given much thought to the continuation of the business after his or her death.

The basic elements of the plan consist of (1) naming a control group who will serve as a stand-by Board of Directors to function immediately upon the death of the business owner and (2) drafting a business plan memorandum, which the business owner will update every six months to provide initial business guidance to the control group. The control group is not intended to run the business permanently upon the business owner's sudden death, but rather until either a younger member of the family can take over the business or the business is sold or liquidated.

The control group is established by the business owner's will

or revocable trust. Among other duties, the control group must instruct any trustees who hold title to the company stock on how to vote that stock, and they in turn are instructed by the testator or grantor to vote for themselves as the Board of Directors. Radowich pointed out that the mechanism must also be included in the business owner's durable general power of attorney, so that provision for the management of the business can be made in the event of his or her incapacitation or disability.

Radowich said that a typical control group will be made up of an odd number of individuals, a majority of whom are non-family members. A typical five-member control group could include the surviving spouse and a child, and three non-family members, including a key employee, a professional advisor, and an outside business person. Sometimes the plan will name successors for the first or second vacancies in the control group, but having successive members of the control group come from the various categories, e.g., family members, key employees, advisors, is a necessary aspect of the plan's effectiveness.

The control group always retains the right to sell or liquidate the business prior to the end of the control group term, but the control group should be designed to terminate after a term of years or until a younger family member is old enough to run the business.

The next plan, known as the "Semi-Permanent Joint Venture," involves a situation where (1) a business-owner parent is ready to retire but still needs to receive payment from the business - currently organized as a C corporation; (2) a child or children are ready to take over control; and (3) a key employee or employees would like to have some form of equitable ownership in the business and for their family to be taken care of in the event that something were to happen to that key employee. Radowich's proposed model for this scenario involved setting up a semi-permanent joint venture between a new business entity, "Newco," and the existing business, "Oldco." Newco is owned in part by Oldco, by the child, and by the key employee, with a transition plan in place for Oldco's interest in Newco to the child after the parent's economic goals are met.

Radowich explained that this technique had a wide application in both family and non-family contexts and has been

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Editor's Note

Our goal is for the *Estate and Trust Law Section Newsletter* to provide current, useful information on areas of interest to Section members. The Newsletter can be better tailored to suit members' needs with input from you. If you would like to suggest a future topic, change of format, or submit an article, please contact the Editors at:

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Got News?

MEMBER NEWS

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made in this legislative session will be deemed to have been incorporated into all statutory powers executed after June 2, 2010. In the upcoming legislative cycle, the Section Council will continue to review the statute to address issues which have been raised by those practitioners concerned with the use and scope of these new Maryland statutory powers. The new revised forms are found on the MSBA's website for your review.

A number of other legislative items were supported by the Council and your Council members provided testimony to both the House and Senate committees as to the scope and

application of these bills. It was a very active session with many pieces of legislation that were reviewed, supported and in some cases, modified.

Finally, the members of the Section should review the Section's web page on the MSBA website to get an idea of the many additional areas in which the Section provides benefits to its members. With the transitioning of the continuing educational program from MICPEL to the MSBA, the Section was very involved in the production of a number of high quality educational programs that were extremely well attended and beneficial to all those involved.

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used with increasing frequency. Some of the power of the technique lies in the recognition that business succession planning should not just be about carrying on with the past, but providing a structure for the new ownership and management group to share in the future. As a bonus, the Newco/Oldco arrangement provides a mechanism for the parents to make gifts of business interests to children who are not active in the business. Some of the techniques involved in implementing the plan include (1) creating the semi-permanent joint venture between Oldco and Newco, (2) converting the C corporation to an S corporation, (3) using a valuation discount for the gift of the S corporation, (4) setting up Newco such that the parent/Oldco receives distribution of profit over a number of years via a consulting agreement, (5) locking in the key employee with comprehensive protection of his family, and (6) entering into buy-sell agreements within the Newco Operating Agreement.

Additional considerations include the fact that the plan should achieve an estate freeze for the parent business owner's business, and the business owner will gradually liquefy his or her entire interest in the business. Radowich noted that the freeze will leak to the extent that the consulting agreement represents extra payment to the business owner. Also, Oldco will become a personal holding company as a result of the transaction, and planning should be done to address this.

Radowich described several variations on the basic joint venture theme. In one version, the parent retains control of the business either by structuring Newco as an S corporation with Class A voting common stock and Class B non-voting common stock, or as an LLC where the parent is in control of the Management Committee with power to name successor members of the Management Committee and to specify their voting power. The transfer will occur when the business owner bequeaths or sells the Class A voting stock to a key employee or to a family member who is ready to take over the business. This can be done either at the discretion of the parent or at a date certain. In another variation, a more permanent joint venture will be set up, and Oldco and Newco will form an LLC which takes in all new business. The LLC Operating Agreement will then outline the relationship between the two entities, including provisions for the buy-out of Oldco over time.

Third, Radowich briefly examined succession planning in the context of "Transferring the New Business Opportunity." In this scenario, a wealthy business owner has two adult children who are both active in the business but the owner has not yet concluded who should be the real successor. In addition, the owner has a young child from a second marriage whom he or she would like to have the opportunity

to join the business if the child should be so inclined. At some point, a national organization approaches the business owner with an opportunity to turn around a failing business for the mutual profit of the organization and the owner. The business is an S corporation and the business owner already has a sizable estate.

The owner wants to structure the acquisition of the failing business in such a way that generation-skipping transfer ("GST") tax savings are achieved for any children who succeed to the business, but that for a child who does not succeed to the business, his or her share will be distributed during life; thus obviating the need for GST planning.

Radowich's proposed solution in this context is for the business owner to form a new company to acquire the old company to be held in a qualified subchapter S trust. The new company would be controlled by the business owner but be owned in large part by a GST exempt trust. The terms of the trust would take into account the uncertain business succession dynamic. The planning techniques used in this scenario include shifting the opportunity to the younger generation, the use of voting and non-voting stock, a discounted gift to a perpetual trust, which would also have business succession planning built into its terms, as well as GST and S corporation planning.

Finally, Radowich described the planning involved in achieving the "Grand Bargain" for multi-generational business succession planning. This complex scenario concerns a grandparent who still owns the business, who has significant wealth at age 75 but still wishes to receive a cash flow from the business; two sons, both of whom are involved in the business but who have not worked out how they would want to share control of the business between each other; the grandparent has not decided who should be the actual successor; and some grandchildren, children of both children, are already involved in the business. One child seems more suited to management of the business than the other, and, while the other agrees, he does not wish for his own children to be left out were the grandparent to give control completely to his sibling.

Radowich's solution to this complex situation involved coming to a grand bargain involving some compromise on the part of all family members so that everyone's needs could be addressed. The elements of that grand bargain include (1) grandparent's relinquishment of absolute control and agreement to a regime where he shares control with his two children; (2) grandparent's agreement to give up cash

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flow at the end of a term of years; (3) an agreement between the two children that one will have operational control but that strategic decisions will be shared between them, plus the non-operational child's position will be protected by a permanent employment agreement extending to his normal retirement age; (4) each child will be able to pass on his or her interest in the business to his or her respective children, possibly repeating the division of operational and strategic control in future generations; and (5) the grandchildren will enter into permanent employment agreements as well, protecting their employment until normal retirement age. Finally, the grandparent will cooperate with estate tax planning by selling his Class B stock to an intentionally defective grantor trust, with one trust share established for each of his two children. These two trust shares will be exempt from GST tax, and will not be taxed in the two children's respective estates.

Notable Developments of Interest to Estate Planners

Turney Berry began his portion of the day's program by talking through some of the issues raised by the current state of the estate, gift, and GST tax laws in 2010 and by the imminent return in 2011 to the pre-2001 Act transfer tax regime. Although Berry did not think Congress would do much to change the law as 2010 came to a close, and much of the earlier part of his discussion was based on this assumption, as he said, one can never predict what Congress is going to do, and substantial changes to the law were enacted in December that are set to last through 2012. As an aside, Berry noted that one advantage to Congress in keeping the estate tax regime uncertain is to provide an excellent fundraising tool for many politicians. Among Berry's complaints was the failure of the IRS to provide the form for allocating basis under the new limited carry-over basis regime of 2010 (which will still be required for the estates of those dying in 2010 who elect to have no estate tax imposed on their estates, and the release of whose final form, and subsequent filing deadline, has been delayed well into 2011).

Berry referred to the complications of a late allocation of GST exemption in 2011, since there was no GST tax, and presumably therefore no GST exemption to allocate, in 2010. Berry also noted that making large gifts in 2010 to take advantage of the lower gift tax rate needed to be made outright rather than to a trust because of the possibility that GST taxable distributions could be made after 2010 from such a trust, and GST exemption could not be allocated at the time of the gift. Finally, Berry noted that if Congress enacted a higher exemption (as in fact happened), the need for a greater carry-over basis will override the efficacy of obtaining a partial interest discount on a gift.

One planning technique that Berry urged those in attendance to consider was up-streaming assets to poorer relatives in generations higher than the grantor to take advantage of those elders' unused exemptions. He noted that planners often do not consider using upstream grantor retained annuity trusts ("GRATs"), for example, with a vested remainder interest in a parent, so that the assets at the end of the GRAT term are paid to the parent or parent's estate. The value of that remainder will then be included in the parent's estate and pass according to his or her estate plan, which could mean that the assets are passed to the grantor's children, and the grandparent can allocate GST exemption to the remainder interest.

Berry noted that not much in the law had yet happened in 2010, including no meaningful Treasury Regulations having been issued, but that there had been some case law developments to note. While his two hundred plus page outline was too extensive to go through in detail, he took the audience through some highlights.

In Newton J. Friedman et ux. v. Commissioner, T.C. Memo 2010-45, Berry noted the court's displeasure with the inability of the taxpayers to substantiate the contribution of equipment to charity. The taxpayers were hit with substantial penalties, and Berry advised everyone to get their paperwork in order. Berry then noted additional cases cited in a Chief Counsel memorandum, ECC 201014056, on the question of substantial compliance. The memorandum dealt with appraisal requirements for a conservation easement, which led Berry to point out that conservation easements are always audited.

He also noted that the IRS came close to confirming that the treatment of a sale from a grantor to a grantor trust when elements of the sale are outstanding on the grantor's death is not an income taxable event in ILM 200923024, by determining that the conversion of a non-grantor trust to a grantor trust was a non-recognition event.

Berry spent some time reviewing the case of Estate of Litchfield v. Commissioner, T.C. Memo 2009-21, which gave guidance on the valuation of C corporation gains and discounts. He referred the attendees to the portion of his materials discussing the application of IRC § 2036 to family limited partnerships ("FLPs"), and began that discussion by reminding the audience of the seminal case of Estate of Bongard v. Commissioner, 124 T.C. No. 8 (2005). Berry pointed out that cases decided since Bongard, including Estate of Jorgensen v. Commissioner, T.C. Memo 2009-66, and Estate of Miller v. Commissioner, T.C. Memo 2009-119, described at length in his materials, continued to be very clear

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on both the need to document and to have non-tax reasons for forming FLPs.

Berry concluded his case-law overview by referring to his discussion of the materials on transfers by formula, including the case of *Estate of Petter v. Commissioner*, T.C. Memo 2009-280, dealing with the approval of a charitable allocation clause. Finally, Berry spoke about the case of *Holman v. Commissioner*, 601 F.3d 763 (8th Cir. 2010), where the court held that various family partnership restrictions were not a bona fide business arrangement. As always, restrictions on the sale or use of property that reduce its value must have a bona fide business purpose, and be similar to arms-length arrangements, and not merely wealth transfer vehicles.

International Estate Planning Issues Affecting U.S. Persons or Non-U.S. Persons with U.S. Sitused Assets.

After lunch, Elizabeth Schurig provided the attendees with an overview of issues that arise in the context of estate planning and international trade and investment for both U.S. and non-U.S. persons. At the outset, she noted that international trade and investment affords opportunities, including access to assets that are unavailable in the individual's home country but also to the business and legal structures that exist in other countries. These opportunities, however, are balanced by the need to coordinate between the various taxing regimes in each country and the applicable tax treaties that address double estate and income tax issues. Schurig noted that the application of treaties often depends upon the citizenship or resident status of the individual involved or the situs and character of the property subject to taxation.

In contrast to the U.S. federal estate tax, many European countries have an inheritance tax, which is a tax upon the receipt of an inheritance that is typically paid by the individual receiving the property.

Schurig then provided an overview of who and what is taxed by the U.S. U.S. citizens are taxed on transfers of their worldwide property regardless of their place of residence or questions of domicile. A U.S. resident is defined for income tax purposes as a lawful permanent resident, one who is "substantially present" in the U.S., or an individual who has elected to be a resident for a given year on his personal income tax return. For transfer tax purposes, a resident is a person who is domiciled in the U.S. at the time of death or transfer. U.S. residents are taxed on worldwide income and transfers of worldwide property, but Schurig noted that these different definitions of resident could lead to the different imposition of U.S. taxes.

Non-resident aliens, however, are taxed on income connected with the conduct of a U.S. trade or business and on certain types of non-business, "fixed or determinable annual or periodical income." Interest on bank deposits and on portfolio interest is not, however, subject to income tax. In addition, non-resident aliens are taxed only on transfers of property situated in the U.S., including real property and tangible personal property located in the U.S. and stock in a U.S. corporation. Transfers of stock in a U.S. corporation are not, however, subject to gift tax. Certain lifetime transfers of non-resident aliens are, however, subject to tax, includ-

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MSBA ANNUAL MEETING

OCEAN CITY, MARYLAND

The MSBA annual meeting in Ocean City will be held from Wednesday, June 8 through Saturday, June 11, 2011. The Section Meeting will be held **Friday June 10th at 8am**. Jeffrey K. Gonya, Esq. and Ashley Short, Esq. will present Unique Estate, Gift, Inheritance and Transfer Tax Issues Under Maryland Law. Richard T. Wright will present Maryland Legislative Updates. For more information, visit www.msbaannualmeeting.org or call Wanda Claiborne of the MSBA at 410-685-7878.



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NOMINATING COMMITTEE REPORT

The following is the report of the nominating committee for the Estates and Trusts Section of the Maryland State Bar Association (MSBA) for positions to be filled for the 2011-2012 fiscal year:

Nominations for officer positions with the Estates and Trusts Section Council of the MSBA for a one-year term for fiscal year 2011-2012 are as follows:

Chair	Sharon J. Ritter (without election)
Chair-Elect	Deborah A. Cohn
Secretary	Mary Beth Beattie

Nominations for Council Member positions with the Estates and Trusts Section Council of the MSBA for a two-year term for fiscal years 2011-2013 are as follows:

Charles S. Abell
Anne W. Coventry
Michael W. Davis
Jay M. Eisenberg
Mary Alice Smolarek
Angela M. Vallario

Nomination to fill remaining term of Deborah A. Cohn (2011 – 2012):

Eileen D. O'Brien

Other nominations for officers and members may be made by written nomination signed by not fewer than 15 members of the Section. Any such nomination(s) must be submitted to the current Secretary, Eileen D. O'Brien, not later than May 31, 2011, ten (10) days before the Section's annual meeting, which will be in Ocean City, Maryland on June 10, 2011.

SUBMITTED BY: Edwin G. Fee, Jr.
John P. Edgar
Richard T. Wright

Nominating Committee

ANNOUNCEMENT

Feeney & Kuwamura, P.A., is pleased to announce that they have relocated to newly renovated Suite 350 at 1010 Wayne Avenue in downtown Silver Spring. The Law Offices of Feeney & Kuwamura, P.A., can be reached by telephone: (301) 587-2240 or fax: (301) 589-5412 or, for more information, please visit our website: www.fak-law.com.

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ing transfers with a retained life estate, those made within 3 years of death, and revocable transfers. Property that is not situated in the U.S. includes the proceeds of life insurance, interests in foreign corporations, and deposits with a foreign branch of a U.S. Bank.

In 2008, a new category of individual was created known as a “covered expatriate.” A covered expatriate is either a citizen who relinquishes citizenship or a long-term resident who ceases to be a permanent resident if the individual has an average net income tax liability or net worth above a certain amount, or fails to certify that he or she has complied with all U.S. Tax obligations for the preceding five years. Essentially, covered expatriates are now subject to an “exit tax” and Schurig discussed the various considerations now applicable to these individuals. Schurig noted that there is no such thing as a tax haven for a U.S. person because U.S. persons are taxed on all of their assets.

As for gift taxes, non-resident aliens are not subject to gift tax on transfers of intangible property, but transfers of U.S. situs property are subject to the tax. Non-resident aliens do, however, have access to the annual exclusion (though not to spousal gift splitting), to other gifts described under IRC §2503, to the charitable deduction, and to the marital deduction for gifts to a citizen spouse. Non-resident aliens do not have access to the lifetime gift tax exemption.

For application of the estate tax, there is no difference under the law between the treatment of U.S. citizens and permanent residents, but non-residents are taxable only on the value of their assets located in the U.S. The non-resident alien unified credit is only \$13,000, unless altered by treaty. Schurig noted that in 1988 Congress eliminated the unlimited marital deduction for non-U.S. citizen spouses, but implemented the qualified domestic trust (“QDOT”) to ensure that the government could collect any tax due from a non-citizen spouse in the future. She then outlined some of the QDOT requirements, including that such a trust have at least one trustee who is a citizen of the U.S. or a domestic corporation. Occasionally U.S. citizens qualify for the foreign death tax credit for property in which they incurred death taxes. Finally, Schurig warned that when planning in these contexts, trusts are often problematic vehicles in other countries, and that even in countries with which the U.S. has a bilateral treaty, foreign tax may be due for which there is no offsetting U.S. credit or exemption.

Using and Managing Life Insurance in the Current Economic and Political Environment

Lee Slavutin began his presentation by discussing the income

taxation of life insurance and several rules that must be kept in mind. Premiums are not deductible except when they are part of a retirement plan, group term insurance which is deductible for the business up to \$50,000, and as a bonus to the employee, which is taxable to the employee but deductible.

Slavutin noted the transfer for value rules, where the death benefit received by the transferee becomes taxable for income tax purposes. He noted that the gift of a policy subject to a loan or a loan that exceeds the basis in the policy triggers ordinary income (cancellation of indebtedness income), which triggers the transfer for value rules.

Slavutin spent some time discussing the owner’s basis in a life insurance policy. For policy surrenders, Revenue Ruling 2009-13 confirmed that the tax treatment is as follows. The adjusted basis in the policy is the value of the premiums paid minus the cost of charges since the inception of the policy. The gain equals the proceeds minus the adjusted basis. By contrast, for life settlement purposes, the basis is reduced by the cost of insurance for every year of the policy’s existence.

A policy should never be borrowed against because the insurance company charges interest on the loan. If the policy is surrendered, the loan is cancelled and the policy owner will have cancellation of indebtedness income.

If an insurance policy is transferred to a charity, an income tax deduction is available provided all rights in the policy are given away. The deduction is the lesser of the fair market value of the policy or its cost basis. In order to qualify for the 50% adjusted gross income deduction, premium checks must be written directly to the charity.

Slavutin also briefly discussed the rules pertaining to section 1035 exchanges. For example, if an old policy is cancelled and a check is delivered from the old company to the new, which the insured never touches, the transfer qualifies as a tax-free exchange.

On planning with life insurance, Slavutin focused particularly on what should be monitored when a policy is held in trust. He noted the problem of policies that are not reviewed regularly, particularly when they are not term policies. Life insurance should be treated like any other investment, including bearing in mind the prudent investor rules. Slavutin urged the attendees to monitor the financial strength of the insurance company and the risk that the cost of insurance will increase. Although he could not name specific companies,

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Slavutin pointed out that two large insurance companies have only a BB rating. He urged those in attendance to check with the appropriate insurance publication websites and ratings agencies to do their due diligence on insurance companies. Practitioners should also make sure that the premium is adequate to maintain the policy and its performance. He also advised those in attendance to be mindful of the health status of the insured.

Slavutin next addressed the valuation of life insurance policies, particularly in the context of getting a policy out of one trust into a new one, and situations where the Form 712 may not accurately report the policy's value. For the former, decanting is an option in the eleven states that have a decanting statute and where the trustee of the original trust has the right to invade principal, though one should be alert to the transfer for value rules. In a 2007 ruling, a sale to a defective grantor trust created no transfer for value problem because the transaction was treated as a sale to the insured.

For universal life insurance policies, which came into existence after the relevant 1974 Treasury Regulations dealing with valuation had been promulgated, the value really should be the reserve value of the policy, not its cash value. The

reserve value is often close to the cash value but is a creature of the gift tax regulations.

Slavutin wrapped up his presentation by touching briefly on a variety of topics. For employer-owned policies on key-person employees issued after August 2006, including split-dollar arrangements, the employee must be notified in writing and his or her written consent be obtained when the policy is purchased. The policy must be reported on a Form 8925 every year. For term insurance, Slavutin advised making sure that the policy contains a conversion option, which must be based on the health of the insured when the policy is originally issued, and to see how long that option lasts. A conversion option allows the policy to be converted to any type of life insurance. The audience was advised to always be mindful of beneficiary designations on policies and to take note when a client is divorced or has minor children. Finally, before entertaining questions, Slavutin noted a couple of underwriting loopholes, including: (1) some companies do not treat cigar smokers as smokers; and (2) that some companies may not insure clients who travel frequently to high-risk areas, although some states prohibit companies from considering this factor.

SEARCHING THE MSBA ESTATE AND TRUST LAW EMAIL LIST ARCHIVES

For those persons wishing to review past messages on the MSBA Estate and Trust Law Email Lists, they are archived and can be accessed as follows:

1. Enter the following address in your Internet browser: http://lists.msba.org/scripts/lyris.pl?enter=msbaetl&text_mode=&lang=english
2. When the log in screen appears, type your email address into the requested box and leave the password box blank
3. Click on "Click here to enter msbaetl"
4. This leads to the "msbaetl" screen.
5. Click on "Search" leaving empty the box to the left of this button.
6. At the "Read Messages" screen, you can search the archives for particular words, for messages from a given date, or for a designated number of archived messages sorted by date, author, or particular subject threads. To review a designated number of archived messages sorted by date, author, or particular subject threads, you merely designate the number of messages to be show, how these messages are to be organized, and click on the "Show" button.
7. Showing messages sorted by subject matter thread is particularly helpful because you see the original inquiry and all the responses sent to that inquiry.



REALITY BYTES 11.0

*By Robert C. Young, Esq.
Stewart, Plant & Blumenthal, LLC*

(If you are reading this article on a printed page, you are missing all of the links to Internet sites contained in the on-line version. To read this column online, go to: <http://technobytesmd.blogspot.com/>.)

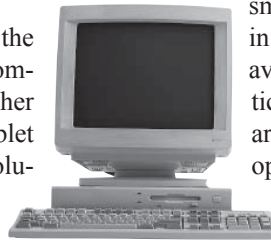
Wednesday, May 18, 2011

Where Are We Going? (Part II): Clouds

I've looked at clouds from both sides now
From up and down and still somehow,
It's cloud's illusions I recall,
I really don't know clouds at all.

Joni Mitchell, Both Sides Now

In Part I of this series, I explored the idea that the desktop computer (whether PC or Mac) is becoming less important as we increasingly turn to other devices, such as smartphones, netbooks, tablet computers, and other digital devices. This evolution gives us greater freedom.



What are the components that make this new freedom possible and are their dangers or weaknesses in this new step? One component is new hardware. Whether a smartphone or a netbook, or a tablet computer, devices have gotten smaller and more functional. More importantly, a wider range of these smaller devices will connect us to the Internet. We can take them with us and use them in more and more places.

Size is not the only thing that matters, however. Another critical component is how we use the smaller devices for specific tasks. In the history of technology, desktop computers are a revolutionary shift from the massive mainframe computers of the past. They offer full-scale computing power in a smaller package. We load our desktop computers at work or at home with a host of full-scale programs to do word processing, bookkeeping, gaming, media functions and many other tasks. We will continue to use desktops for those functions. The desktop computer encourages us to load more and more programs and those programs get larger and larger as developers offer newer, more powerful versions of old software and new software products.

We are enticed by each new version of Word or Quicken,

but do we actually need everything in these increasingly bloated versions of a program or operating system? Some, because of very specialized needs, would answer affirmatively. For example, those involved in publishing or graphic design will continue to want a computer that can run the robust programs needed to produce their work. For most of us, we do not need more and more computing power on a single computer for our personal needs. We have a series of various, discrete tasks that can be accomplished very well with smaller devices.

So, the new evolution in technology leverages this interest in more discrete computing. In place of massive desktop programs, we now have "Apps," short for applications. These are little programs that operate on the new range of smaller devices that go anywhere. They specialize in doing one thing well. Apps also have opened up avenues for developers to offer increasingly eclectic software for selected audiences. Because apps are less complicated software, they can be developed at much lower cost and tailored to very specific needs and interests.

The age of the "App" is here. Oprah is giving iPads to her staff. Oprah uses an iPad and apps while she exercises, accessing CNN, ABC News, and Scrabble while she is on the treadmill. Oprah even has her own App coming out. America and the world will surely follow.

The final component is "cloud computing." This refers to the use of the Internet as part of the computing experience. Software on mobile devices can be more minimal because some the functionality is provided by programming features residing on the Internet. Let's take this blog as an example. Instead of writing this column on a full word processing program on my computer, I write this text using Google Blogger. I connect to Google's website, open this blog and create or edit posts. The word processing software resides on Google's site, as does the finished product. I do not have to have software on my computer or iPhone or hard drive memory to store the text from this column. The Google software has spell-checking, formatting and other functions for creating a blog.

There certainly are more robust programs for creating blogs, but Google's Blogger is more than adequate. More

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importantly, it frees me to work on this column at work, at home, and on the road. I wrote some of this blog at an ACTEC meeting in Pennsylvania. I am also free to work on this blog on all kinds of devices, from my desktop computer at work or at home, my laptop on the road, or even my iPod Touch or iPhone (although typing significant text on the iPod or iPhone is somewhat difficult). The simple fact is that this column "lives" in the cloud. It is available first on the Internet. You can read it there by going to <http://technobytesmd.blogspot.com>. You can find prior posts. You can find links to material cited in the blog posts. Why wait months to get a stripped down, printed version?

Cloud computing thus has opened up a wide variety of activities. The Internet's social media juggernaut, Facebook, is almost complete as an activity in the cloud. While you can upload pictures or graphics or some other items to your Facebook page, almost everything else is created on Facebook's servers on the Internet. You can create short status updates or longer notes and use a significant number of apps that function within Facebook.

The Internet has become the primary resource for information. We have seen the disappearance of encyclopedias as Google and Wikipedia have risen. Venerable print publications are disappearing into the Internet. The Oxford English Dictionary is discontinuing its printed edition and will be available only on the web. The telephone white pages are going too, with customers being given an option to request a printed telephone directory.

Is there a dark side to cloud computing? First, when functionality is dependent on the Internet, you need to be able to connect to the Internet. People with iPhones and other smartphones now are required to have data service plans from their cellular network, so they have access to the web. If they are out of range of a cell tower or a WiFi hotspot, however, they may not connect. A more major problem, however, is whether the cellular networks will be able to keep pace with the demand to connect to the Internet.

Until recently, one of the major disincentives to buying an iPhone was that it was only available from AT&T and AT&T's network proved unsatisfactory in meeting the rising demand for Internet connections. Apple finally ended this exclusive arrangement this year by making the iPhone available on the much stronger Verizon's network. Eventually, Verizon too may struggle to provide bandwidth to a legion of new customers.

Broadband usage has been steadily increasing. Exponential growth is expected in coming years. Reports from the Mobile World Congress (MWC) 2010 highlight this issue. Given this trend, vendors at MWC outdid each other in predicting traffic growth over the next five years: Cisco claimed that global data traffic will increase by a factor of 39 between 2009 and 2014, while Ericsson predicted fiftyfold growth by 2015. NSN plumped for forecasting an equally round, but rather more ambitious, hundredfold rise. Analysys Mason is currently working on its own

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Join the Estate and Trust Law E-mail List

The Estate and Trust Law Section offers an active e-mail list which is open to Section members. The e-mail list provides Section members the opportunity to post questions or comments concerning issues relevant to the practice of estate and trust law. Members may also use the e-mail list to communicate with other Section members on items of general interest to the membership.



To subscribe to the e-mail list, visit the Section's website at http://www.msba.org/sec_comm/sections/estate and click on the "Email Lists" tab. On the next screen, click on the "Join List" tab to the right of "Estates and Trust Law Section." You will be asked to enter your name and email address. You will then receive an e-mail that you must reply to in order to verify your e-mail address. When you have been added to the email list, you will receive a welcome message.

Questions or comments about the e-mail list may be directed to the MSBA care of John Anderson at janderson@msba.org or to the Estate and Trust Law Section care of Brian R. Della Rocca at bdellarocca@steinsperling.com.

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forecast of global traffic, which will be published in April. The consensus within the industry is that there will be substantial growth in demand for wireless traffic over the next five years.

Meeting this growth is going to require further technological development. Bandwidth is going to have to be sacrificed from other parts of the spectrum. "Subscriber management" points in the direction of getting folks to pay for the bandwidth being used for data transmission. Right now, I can use my laptop or my iPhone without a wireless plan from my cell phone carrier, but I have to depend on finding a WiFi connection. I have one at home through the modem for our Internet service, so I am paying for that service, but there is no price structure base on data usage (yet). I use as much or as little as I want, moderated only by the speed of the connection (and whether my son is also on the computer; more users on the same connection slows the speed).

On the road, I must depend on hotel WiFi networks or other free WiFi connections, which can range from excellent (at the Bedford Springs Resort where I typed part of this piece) to non-existent. Of course, this wireless isn't "free." The establishment providing it is paying for it, and is passing along the cost in the price of the goods and services they sell (room rates or the cup of coffee at Starbuck or food at McDonalds). As broadband demand increases, the issue of net neutrality will be hotly debated. The danger is that some of us will be able to afford the direct or indirect cost of access and faster connections and others will be shut out.

There are other concerns with cloud computing. One of the critical elements in the use of smaller computing devices is the use of programs and storage on the Internet. Your iPhone or iPad does not have to be loaded with all kinds of programs, just apps, many of which function as a simple interface for programs that are on the Internet, not your device. Similarly, your work or results is often stored on the Internet, not on your device.

Let's return to the example of Facebook. You type your updates on the web. You up load pictures on the web. You share material already on the web with others through Facebook. You type and store notes on the Facebook site. None of this is on your computer unless you choose to save it in some way on your own on your computer.

Of course, there is the big question of who has the legal right to all this stuff that you put up on the Internet. Are all of the personal things you share on Facebook still yours, or does Facebook have rights to keep them and use them for its purposes. Facebook implicitly "shares" what you post, but

uses what you do online to market products to you or promote other activity on the web. Ingeniously (or insidiously), we are Facebook's "product." We generate the content that drives more and more users and activity to Facebook. Facebook, in turn, sells "us" to advertisers and marketers.

Increasingly, we are turning to the cloud to store information. We are backing up our computers. We are storing the work product from programs that we use. Amazon recently announced a new service to combine music that you purchase at Amazon and storage of that music on its servers (Cloud Drive). It is even selling a music player that you can use on the web or on one of your devices (Android devices only right now). This is a blast of competition for Apple, who wants you to buy music from the iTunes Store, but has no integration yet for storage.

Another example is a cloud-based service called Evernote which is available for your full computers and for mobile devices like smartphones. It is really a clipping and copying service for the Internet. If you see an article or posting that you like or want to retain, Evernote lets you copy and save or cut and paste this item and saves it on its server. You also can create your own notes -- shopping lists, books to read, pictures, etc. It is intended to cut down on paper and to work across platforms. You synchronize the device that you are using to the Evernote servers online. You can then access your notes from another device, including a mobile device. I use it for reservations, confirmations, notes, articles of interest, directions, and many more things. It is free and can be upgraded to a premium service. Its attraction, however, is its accessibility through the cloud.

What happens if Amazon or Facebook or one of new storage services goes out of business? What happens to your "stuff?" If you actually store large amounts of information in the "cloud," there are also issues about security and privacy of that information. Whatever information you are storing or creating on the Internet in fact is stored somewhere on someone's server. So you have to be careful about the security of those servers. If hackers can get to the information on those servers, you may be in big trouble. Recently, Sony admitted that hackers had breached its servers twice within a short period of time and made off with significant information (including credit card numbers) stored on those servers connected with Sony's online PlayStation gaming network.

There is also increasing concern about the security of the Internet itself. I have reported here before about cyber-warfare between nations. Recently, there were news reports about a

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new Internet "18 minute gap." For approximately 18 minutes in April of 2010 **15% of the world's Internet traffic** was mysteriously routed through servers in China. According to *ComputerWorld*, just as puzzling was that the intercept affected U.S. government and military networks, including those belonging to the Army, Navy, Air Force and Marine Corps, as well as the Office of the Secretary of Defense, the Department of Commerce, NASA and the U.S. Senate.

Now *The Wall Street Journal* reports that we are embroiled in a rash of "hacktivism" in the wake of WikiLeaks' release of classified diplomatic cables. Having released the classified cables, WikiLeaks suffered a back lash. Hackers attacked and shut down or slowed the WikiLeaks servers to try to slow or stop the disclosure. Amazon, which had been providing WikiLeaks with server space, turned them out. Credit card companies announced that they would stop transferring money to WikiLeaks. Hackers supporting WikiLeaks have struck back. So we had a WikiLeaks cyber-war. What is ominous here, however, is that individual hackers, not governments, appear to be launching these attacks and causing chaos, at least briefly, on parts of the Internet.

Finally, some think that this new "freedom" is nothing of the sort. If we are constantly connected, we may find that our work follows us 24/7, so that we no longer have purely leisure time to ourselves. This, of course, depends on how the user uses and manages technology, not something that technology imposes on the user. You can always turn off the device, leave at home, or simply choose to use it or not. One way to separate your work and personal life is to be clear where the line is, when you are available for work activities and when you are not. This applies when you are in the office and do not want to be disturbed. You forward your telephone to voicemail or have your calls answered; you stop reading email. This type of focus should apply beyond the physical confines of the office. Some people have to be "on-call," but there should be a clear understanding for all of us as to when we are not on-call.

These changes are rapidly occurring. They are changing our lives. There are significant issues to consider, but I doubt that any of these issues will halt the growth of the cloud and the rise of the Internet as the primary arena for the technology now and in the future.

Monday, May 16, 2011

The New York Times Wants You To Pay (Sort Of)

If you read articles from The New York Times (NYT) online, you may have established an account with the Times

in order to get greater access to the material posted online. Until now, The New York Times online has been more or less free. If you have established an account, you should have received a notice in March from the NYT, letting you know that this is about to change.

Like many American newspapers, The New York Times has grappled with the age of the Internet, where the overwhelming amount of "free" content has often pushed aside established journalism, whether print or broadcast. The internet has spawned entirely new methods for people to get the news: the "blogosphere," social networking sites like Facebook, media sites like YouTube, and global instant messaging via Twitter. Of course, these new media have weaknesses. The Internet voraciously demands to be fed 24/7 with the news, latest, most interesting stories. Fact checking and analysis sometimes get left behind. Stories run like wildfire before they are fully investigated and often end up misrepresenting what actually happened. In the end, however, once a version of something has spread around the world on the Internet it is difficult to convince people that there is a more nuanced, more difficult truth to be told. The Internet provides us with the illusion that we know everything there is to know with a few clicks or touches.

The NYT initial trial in Canada went well, so in the NYT has rolled out this program in the U.S. After encountering some announcements online in early May, I received the following e-mail offer: "As a valued NYTimes.com reader, you are invited to enjoy unlimited access to NYTimes.com and our NYTimes apps at a special introductory rate." Doing a little math, the unlimited package costs you \$277.60 for 52 weeks (one year). A year of home delivery of the actual paper costs \$384.80 and it also gets you unlimited access to NYTimes.com.

The New York Times is not the only premium publisher trying to figure out how to price itself in the digital age. Try accessing content online at The Wall Street Journal. You will get some pieces without any sale pitch. Increasingly, however, you will find messages that direct you to subscribe to get the full article that you are looking for. The New Yorker recently announced that it is selling subscriptions on the iPad. Other premium publishers are in this market. As we all move increasingly to the use of iPhones and other smartphones and iPads or other tablets, we are abandoning the traditional paper publishing products.

I have a regular subscription to The New Yorker. I have cherished this magazine since discovering it somewhere in

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my youth. I know that people get it in the mail (before it hits the newsstands) and devote an evening to reading it. I have never been able to do that. I think many others have reached that point. We subscribe to support a distinctive and distinguished publication to keep it alive, as we would a worthy charitable cause.

On the evening of May 1 President Obama announced the U.S. forces finally had located and killed Osama Bin Laden. In the ensuing days, the media was filled with details, analysis and commentary. (The Internet also was full of scams trying to capitalize on the enormous interest in this story.) The New Yorker was no exception. Online by way of my iPhone, I was able to read insightful reporting and commentary from The New Yorker and other publications, coverage that would have taken hours, days or weeks to reach me in print. In fact, the online publications and the print publications are becoming very different things. The Internet requires that the best online content must be timely and incisive.

So The New York Times, The Wall Street Journal, The New Yorker, Wired and many more print publications, all of which still hold to some central principles of traditional journalism, have struggled to preserve their distinctive brands. Economically, they cannot continue to give everything away for free on the Internet. The advertising revenue that fueled print journalism for years just isn't there on the Internet. Most of these publications have to offer something for free to draw an audience to their online sites, but they have to draw a line somewhere and try to collect some revenue for "premium" content. Let's hope for the sake of the internet as a medium that informs and educates us that these publications and others like them find a way in the new technological world. We desperately need analysis and intelligent discourse on the Internet, to counter-balance the error-filled flood of spectacle, scandal and sensationalism that too easily can prevail.

Saturday, March 5, 2011

Update: Microsoft and iPhones

In the last issue of the MSBA Estate & Trust Law Section Newsletter, I took Microsoft CEO Steve Ballmer to task for lack of vision and lackluster leadership in Microsoft's battle to compete with Apple and Google. One of my favorite tech commentators (and all around curmudgeon) John Dvorak has come to much the same conclusion in his Second Opinion column on The Wall Street Journal's Marketwatch website. Entitled *Microsoft is Dead Money for Investors*. Dvorak notes a string of "failures to launch", such as:

◆ Microsoft's indecisiveness over smart-phone operating systems (late to enter the field, then letting the Windows Phone 7 wither (even though it appears to be a strong product) (a *déjà vu* of The Zune).

◆ Microsoft's dismal efforts in the tablet computer wars (despite the fact that Microsoft was a pioneer in tablet computing long before was an iPad).

Dvorak adds another example of stumbling indecisiveness:

“Somewhere along the line, Redmond has gotten gun-shy. . . . The most telling example of this was the short-lived Kin phone, which Microsoft released then killed just about six weeks later, before it could even attempt to get traction.”

Dvorak concludes that Microsoft is so worried about failure that it is paralyzed and investors should take note, because an investment in Microsoft is "dead money." Read his full comments at www.marketwatch.com/story/microsoft-is-dead-money-for-investors-2011-03-04.

iPhones

While rest of the world was swooning this week over Steve Jobs' re-appearance from another medical leave of absence to announce the second generation iPad, I was celebrating the third week of my very own iPhone. As you probably know by now, Apple finally struck a deal with Verizon and has released a version of the iPhone on America's largest cellular network. As our family has a Verizon wireless plan, this was the perfect opportunity to replace my aged, but trusty Palm Treo. (A nice follow up to the Microsoft comments above would be to note that Palm's Treo appeared to have been the leading rival to RIM's Blackberry smart-phone at one point, and Palm failed badly in bring out succeeding generations that could compete.)

I was aided in my acquisition of an iPhone by my daughter's boyfriend, who wanted to surprise her with one for Valentine's Day. So he stayed up into the earlier hours of the morning when the iPhone first became available to Verizon customers and placed an order for two iPhones. After about a week of gingerly getting to know the iPhone, I was ready to try to duplicate what I had on the Treo. On my Treo, I could synchronize my calendar, contacts and other information from the Palm Desktop program on my office computer. I did this for years with a cable wired to the computer. I could only do it when I was in the office.

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After about an hour or so on the telephone with our firm's IT support, I am please to say that I can synchronize that information from TimeMatters, where most of it is stored, to Mircosoft Outlook. This is still a manual sync, but once completed, I can access Outlook remotely from my iPhone by going through Microsoft Exchange. Whatever I change in Exchange, synchronizes into TimeMatters the next time I manually synchronize the programs. I also get my office email through Exchange, as Outlook is our office email program. Until now, I have not used Outlook much, but I now see its true potential and must say that it works rather well as an integrated email, contacts, and calendaring program. It also works well with the iPhone. So Microsoft can still make good products. Outlook demonstrates what it can do in the changing technological environment. Microsoft has the money and the talent to compete in this new environment; it just needs better leadership before it's too late.

I am quite pleased now this remote access is pretty much everywhere there is Verizon service and that is a lot of places. Verizon has a much better network than AT&T, the iPhone's exclusive home network until now. The Verizon network seems to be holding up to the influx of new iPhone users. Partly that may be because Verizon has not been overwhelmed yet by a tidal wave of new iPhone customers. New iPhone customers may come more gradually to Verizon, but I suspect they will come eventually.

The best part of having an iPhone is that it is a mini iPad. So now I am ready to start checking out the new generation of iPads.

Friday, December 17, 2010

Mini-Byte: The Social Science Research Network

For those interested in finding academic papers on estate planning topics (or a wide variety of other topics), a fine resource is the Social Science Research Network ("SSRN").

Here is a year-end post that I received from Gregg Gordon, the President of SSRN, which gives you some background:

SSRN's 16th year was "sweet". The eLibrary (<http://ssrn.com/search>) has delivered over 41.3 million downloads to date and grown to over 314,000 documents from 149,000 authors. Our CiteReader technology, developed with ITX Corp, has captured 6.4 million references and 6.5 million footnotes. The technology has been expanded to extract references from within footnotes and those references will be displayed on the abstract pages in early 2011. Scholars are finding the links in the References and Citations tabs, on

the abstract page, excellent ways to access both the past and future literature in a discipline.

In the near future, we will release Search Within functionality that finds specific information in an existing search result or taxonomy classification. We will also release simplified access to all of the SSRN Rankings of papers, authors and organizations. Over the next few months, we will create subject area networks in Innovation, Religious Studies, and Music and Composition; continuing our interdisciplinary growth in the social sciences and humanities.

Thursday, December 16, 2010

Sixth Circuit on Warrantless Searches of Email

The federal Sixth Circuit Court of Appeals has held that emails are protected under the Fourth Amendment to the Constitution from warrantless searches. The case is U.S. v. Steven Warshak. Here is a report from The Wall Street Journal: <http://blogs.wsj.com/law/2010/12/15/sixth-circuit-rules-that-emails-protected-from-warrantless-searches>.

Sunday, December 12, 2010

Mini-Byte: Another Pogue Crusade?

The New York Times Technology writer David Pogue was part of a successful crusade against Verizon for predatory billing practices. Verizon was billing customers for accidental connections that did not involve any air time. That campaign ultimately resulted in Verizon paying \$92 million in refunds.

A reader has given Pogue a suggestion for another campaign: roll-over megabytes. AT&T has roll-over minutes, which allow a customer to carry forward minutes that the customer paid for, but did not use. Pogue and his reader are suggesting the same concept for megabytes of data that go unused. Read Pogue's comments and join the crusade: <http://pogue.blogs.nytimes.com/2010/12/10/heres-a-thought-rollover-megabytes/>

Mini-Byte: Favorite Tech Reports

I have mentioned in other columns additional, probably better, sources for information about technology. I thought that I would provide you with a short list of these sources, as there has been at least one change of name recently. Many of the names below are hyperlinks in the online

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HIGHLIGHTS FROM HECKERLING 2011

*By Danielle Cruttenden
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Before a record crowd at the 45th Heckerling Institute on Estate Planning Dennis Belcher, a panelist for Recent Developments, announced that the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, hereafter referred to as the Tax Relief Act of 2010 or "TRA 2010," was a "game changer." Sam Donaldson, another panelist, reminded us how one year earlier most of us were stunned by the sun setting of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") and the repeal of the federal estate and generation skipping tax. As the days and months passed in 2010, planners believed that the chance of retroactive estate and gift tax grew increasingly slim. Some of us encouraged clients to make taxable gifts with the threat of increased estate and gift tax rates. Then, to the surprise of most, after significant approval by the Senate and the House, the Tax Relief Act was signed into law on December 17, 2010 by President Obama providing a federal and generation skipping tax exemption of \$5 million and sets the maximum rate at 35%. The relief, however, is short lived as the TRA 2010 provisions apply for two years only. The new law extends the provisions of EGTRRA to sunset on December 31, 2012 instead of December 31, 2010.

The Tax Relief Act of 2010 served as the main theme of the conference. The presentations focused on understanding the new law, how it affects 2010 decedents' estates, what opportunities are presented and how planning for our clients will change. While other interesting and helpful presentations were included as part of the conference, this article will focus on what was discussed about TRA 2010.

TRA 2010 - Synopsis

Estate and generation skipping taxes were reinstated effective as of January 1, 2010 providing a \$5 million dollar exemption for both and a maximum rate of 35%. Estate, generation skipping and gift taxes were reunified, except that for 2010, the gift tax exemption remained at \$1,000,000. Beginning in 2011, the gift tax exemption is also \$5 million. Inflation adjustments apply in increments of \$10,000 beginning in 2012. There is a 9-month automatic extension to September 19, 2011, to file estate tax returns and make disclaimers.

Estates of 2010 decedents may elect to have the carryover basis rules apply. An adjustment to basis of \$1.3 million is provided under those rules as well as an additional \$3 million adjusted basis for property passing to a surviving spouse. For a decedent's estate with less than \$5 million, the personal

representative will want the step-up in basis and will not elect carryover basis rules to apply. For an estate exceeding \$5 million, the personal representative will need to consider whether the amount of appreciation is covered by the available adjusted basis. For those estates with appreciation that exceeds the amount of available basis adjustment, the decision is much more difficult. The personal representative will need to consider many factors. The following are some of the factors mentioned by Heckerling speaker, Steve Akers: (1) whether the election will change the amount passing under a formula clause, requiring court approval if consents cannot be obtained from all the beneficiaries; (2) the amount of estate tax payable currently versus the gain that would be subject to income tax on future sale of assets; (3) anticipated future capital gains rates, (4) anticipated dates of sale; (5) anticipated cash needs of beneficiaries; (6) determination of which beneficiaries bear estate taxes in comparison to which persons bear income taxes due to lack of step-up in basis; and (7) whether the expenses of administering the estate will be increased by making or not making the election.

The allocation of basis is to be reported on informational Form 8939, Allocation of Increase in Basis for Property Acquired from a Decedent. As of the time of the conference the time for filing Form 8939 had not been extended from April 15, 2011. On March 31, 2011 the Treasury Department and the IRS announced that Form 8939 should not be filed with the decedent's final Form 1040 and further stated that the filing date and Form 8939 will be released at a later date, expected to be soon after guidance is issued for the form.

TRA 2010 provides for the portability of unused exemption to a surviving spouse. The personal representative of a deceased spouse's estate may elect to transfer any unused estate exemption to the surviving spouse on a timely filed Form 706. The deceased spousal unused exclusion amount, otherwise known as "DSUEA" is effective only after 2010 and is applicable for both estate and gift tax purposes. Portability does not, however, apply to the generation skipping tax "GST" exemption. Further, a spouse may not accumulate exemption through multiple marriages. A surviving spouse may only receive the unused portion of the last spouse to whom he or she was married. Further, there is a privity requirement, so that a spouse may not use his or her spouse's DSUEA. While portability will simplify estate planning for many clients, it will still not eliminate planning for Maryland

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Highlights from Heckerling. . .

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estate taxes or the need for trust drafting. Additionally, there is the risk that portability will not be extended beyond the two years of enactment.

TRA 2010 resolved most of the uncertainty that existed during the alleged period of GST repeal. Clarity came with the retroactive application of a \$5 million exemption of generation skipping exemption effective January 1, 2010, and the application of a 0% tax rate for all GST transfers in 2010. All generation skipping relief provisions such as qualified severances are extended. It is now clear that transferors existed in 2010 for GST purposes; that annual GST exclusion gifts could be made in 2010 and that direct skips in trust were just as effective as direct skips not in trust. Planners generally agree that the reinstatement of the estate and GST tax as of January 1, 2010, now clarifies that estate tax inclusion periods (ETIPs) did not terminate at the beginning of 2010, even if a 2010 decedent's estate elects for a carry over basis rules to apply.

Due to the fact that \$5 million may be allocated to GST transfers to trusts in 2010, it is important to remember that donors should opt out of the automatic allocation of GST for 2010 direct skips. It would be a waste of GST allocation if applied to direct skips that are subject to the 0% rate. As the time for filing disclaimers has been extended to September 19, 2011, consider whether a disclaimer can now be made that would result in a direct skip to take advantage of the 0% GST tax rate.

The mechanics for allocating GST exemption for 2010 decedents that elect for the carryover basis rules to apply remain unclear. Guidance from the Treasury Department and IRS should be forthcoming.

Whether or not we should file returns for 2010 GST distributions and terminations is debatable. As the GST tax was made retroactive for 2010, the law would require the filing of a return reporting a 2010 GST distribution or termination even though a 0% rate applies. Some planners may conclude that the filing of such returns are unnecessary on the theory that such returns are not filed to report distributions or terminations made from GST trusts with a zero inclusion ratios.

TRA 2010 also extended the election for IRA charitable rollovers. Individuals who are age 70 ½ and older may transfer up to \$100,000 per year directly from an IRA to a qualified charity without the transfer being treated as a taxable and have it count toward their required minimum distribution. This is available for 2010 and 2011 only and it does not apply to donor advised funds or supporting organizations.

The speakers were in general agreement that clients with extreme wealth should not have buyer's remorse for taxable gifts made in 2010 because of the removal of the otherwise taxable appreciation of those gifted assets from their estates. However, for those who are less likely to benefit from those taxable gifts, tax lawyers should consider whether a rescission or disclaimer of the gift is available to undo the gift. It is debatable whether a taxpayer could succeed on the argument that the gift should be undone on the basis of a mistake of fact or law. The better approach is to consider disclaimers of gifts as the time for filing disclaimers is extended to September 19, 2011. As state law needs to be followed for a disclaimer to be made, one will need to determine whether the disclaimer laws of the state of the donor or donee apply.

Drafting Thoughts

For clients with more than \$10 million, drafting will not change much. Formula clauses with credit shelter and marital trusts will likely continue to be used as the rate is more important to them than the exemption amount. The focus will be on how to help clients determine how much they can, and are willing, to gift to take advantage of the \$5 million gift exemption (\$10 million for married couples.) Ideas for gifting are discussed below in this article. The risk of "clawback," addressed below, will need to be explained to our clients.

For clients with less than \$10 million, much consideration will need to be given to the trade off between estate tax and an opportunity to get a step-up in basis at the death of the second spouse. Drafting to lock in the marital deduction at the first death will be key. Drafting should be flexible to permit inclusion of assets in the estate of the second to die in order to achieve the step-up in basis of assets at the second death. Presenter, Bruce Stone, suggested that the credit shelter trust name an independent trustee so that distributions can be made for the best interests of the spouse bringing those distributed assets into the surviving spouse's taxable estate. The trust document could also be written to allow an independent trustee or third party to grant the surviving spouse a power of appointment over the trust assets thereby causing inclusion of the credit shelter trust in the second to die's estate.

Disclaimer Wills continue to provide the necessary flexibility for clients of homogeneous families with less than \$10 million. QTIPs will continue to be useful for blended families. Many states, including Maryland, provide a state only QTIP election. The state only QTIP election will allow the personal representative to determine which portion of the estate to

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defer the payment of state estate tax and which portion is to be covered by the increased federal exemption amount. In making that decision, the personal representative will want to consider reducing the amount sheltered from federal estate tax in order to achieve a step-up in basis of the assets at the death of the second spouse.

Grantor trusts may be written to preserve the possibility of achieving a step-up in basis at the death of the grantor by giving an independent trustee or other independent party the power to grant a testamentary limited power of appointment to the grantor. As long as the power allows the possibility for shifting of benefits from one beneficiary to another, the granting of the power should cause inclusion in the grantor's estate. The document should exonerate the independent third party in its decision whether to grant the power.

Wealthier clients with blended families will need to address the client's goals in light of different tax scenarios. Bruce Stone suggests using "floors and ceilings" to direct how trusts are funded for the spouse and children. By identifying how much a client wishes to leave a spouse initially, and how much the client ultimately wants to benefit the children, an initial floor amount can be established with language in the document that makes adjustments to shift some assets away from the outright marital deduction and over to a QTIP trust depending on the applicable federal and state estate tax exemptions. The following example was given: A \$6 million client wants to leave a minimum of \$3 million to support the surviving spouse, but also wants to ultimately to leave one-third of the residuary estate to the spouse and two-thirds to the children. If the client leaves \$3 million to the spouse outright, then the children will be short \$1 million. The document could give a marital gift of \$3 million but then provide for the reduction of that marital gift to an amount that equals 1/3 of the residuary estate and the excess amount paid to a QTIP trust. The remaining \$3 million would be directed to the children, except however, that a ceiling would apply so that the gift to the children would not trigger a federal or state estate tax. That portion of the children's gift needed to result in \$0 federal or state estate tax would be directed into a QTIP trust. In decoupled states such as Maryland the diverted portion may need to be diverted to two separate QTIP trusts, one of which is the Maryland only QTIP that holds the difference between the \$1 million Maryland estate tax exemption and the amount of the federal estate tax exemption.

Developing a client's statement of intent to include in the document may assist in legal proceeding in which a court must intervene or is asked to interpret the meaning of a formula clause or other funding mechanism in the document.

Gift Planning Ideas

The increase in the lifetime gift exemption is an opportunity for our clients. Surprisingly, TRA 2010 does not place a ten-year term minimum for GRATS nor does it address discounts for partnerships, limited liability companies or fractional interests in property. Therefore, clients should consider making these gifts to obtain discounts while they are still available, after a consulting with their advisors who can help them assess the risk of such gifts.

Gift splitting for spouses allows the lifetime gift exemption of a less wealthy spouse to be used for the benefit of the descendants of the more wealthy spouse. Question: Should a marital agreement address a way to "compensate" the less wealthy spouse for the use of his or her gift exemption by the wealthier spouse?

Any discussion of gifting, however, must come with an explanation of the risk of clawback. The clawback stems from the worksheets on Form 706. Using those worksheets, if the \$5 million exemption declines to \$1 million in 2012, then the estate of a 2012 decedent will owe an estate tax on the gifted assets. Beth Kaufman, one of the Recent Developments panelists and former associate counsel to Treasury, points out that if you take away the worksheets and read the statute, a different conclusion is reached. It is Ms. Kaufman's opinion that a clawback is not intended by the law if the federal exemption is later reduced and that this would somehow be fixed. Nevertheless, she advises that we still disclose the risk to our clients, explain what it is, tell the client that we cannot predict what Congress will do, but that we believe it would be worked out.

Finding ways to taking advantage of the \$5 million GST exemption will be a focus for wealthier clients. Planners should consider direct skips to the lowest generation possible or to trusts that will trigger the use and allocation of the GST exemption. Some planners include a provision in their trust documents that permits an independent trustee, a trust protector or someone other than the grantor to add upper level generation beneficiaries as discretionary beneficiaries to a skip person trust. This would allow the trust assets to benefit both the grantor's children and grandchildren without any GST tax being due when the trust is created. With this approach it is recommended that there be a considerable delay before adding upper level beneficiaries. The speakers proffered that even in the event of a clawback, there is no way to impose GST tax retroactively on direct skips that occurred in 2011 and 2012. It is not clear how the inclusion

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ratio will be determined of a gift to a dynasty trust if the \$5 million GST exemption is later reduced.

Clients will likely be interested in talking about using their increased gift exemption but may be reluctant to actually pull the trigger out of concern that may need the gifted away assets later in life. Clients will need to determine what they can afford to give away. However, here are some planning ideas that would preserve some direct or indirect access to gifted assets in the event that the client determines that a “reversal” of the gift is necessary:

Lifetime Credit Shelter Trusts for Spouses - A donor may make gifts to a lifetime credit shelter trust to benefit donor’s spouse. The term “spouse” can be defined by the document to be the person to whom the donor is married at the time so that it could also be available for the benefit of a new spouse. The trust would benefit the spouse by containing terms similar to those in a standard testamentary style credit shelter trust. The spouse would be the discretionary beneficiary of the trust and can also be the trustee assuming distributions are limited to a HEMS standard. The trust could contain a limited power of appointment, exercisable at death or during life, and be written broadly enough to appoint the assets back to the donor. (To address the possibility of the donee spouse pre-deceasing the donor spouse, life insurance on the donee spouse could be payable to the donor spouse or to a trust for the donor spouse without substantially different terms to avoid the reciprocal trust doctrine.) If the donor spouse is concerned about how the donee spouse may exercise the power of appointment, the document could require the consent of a non-adverse third party, such as the donor’s sibling, and the third party’s consent could also be required in order to change the donee’s exercise of the power.

Non-Reciprocal Lifetime Credit Shelter Trusts: The same concept above, except that each spouse creates a lifetime credit shelter trust for the benefit of the other. The terms of each trust would need to be structured substantially differently so as to avoid estate tax inclusion under the reciprocal trust doctrine.

Self Settled Discretionary Trusts: Twelve states, including Delaware, allow distributions to the settlor of a self settled trust in the discretion of an independent trustee without subjecting the trust to the claims of the settlor’s creditors. These trusts can address the concern of some clients that they do not want to gift away too much money. These trusts can also be structure to include the settlor’s spouse as the beneficiary as long as the settlor is married. The trusts must be established in one of the twelve states that affords such creditor protection. There is still a Section 2036 concern,

for many planners who fear that the IRS will argue estate tax inclusion based upon retained enjoyment. Consider whether a power should be given to a third party to remove the settlor as a beneficiary which could be exercised shortly before the settlor’s death.

Preferred Partnership: The idea behind this technique is to allow gifting to the children (either outright or in trust for them) while maintaining a comfortable stream of income to the parents which stream comes from the preferred interest of a newly created partnership. The parents would also have a common interest in the partnership from which distributions could later be made if needed from the anticipated growth in value of that interest.

Gifts and Sales to Trusts: These will still provide benefit to clients by removing the appreciation of the gifted asset from the client’s taxable estate. The sale is a “leaky freeze” in that it removes the appreciation, but still permits the client to benefit from the receipt of principal and interest on the promissory note given in exchange for the asset. One interesting observation made is that in past years these sales were made difficult by the limited gift seed that could be made to the trust (\$1,000,000 or the amount remaining of the client’s unused gift exemption) unless the client wanted to pay a gift tax. Going forward the issue may be to make sure that the client does not gift too much seed money to the trust, especially if the asset the trust may acquire is highly volatile.

Grantor Retained Annuity Trusts (GRATs): While GRATs turn off some clients as being too complicated, they should still be considered as a way to gift, especially while interest rates remain low. Zeroed out GRATs have the advantage of transferring future appreciation of the gifted asset without the payment of gift tax or gift exemption.

More aggressive approaches, such as Turney Berry’s 99 year GRAT as well as his Shark Fin CLAT, were discussed for their interesting results. These ideas are not for the faint of heart. Conservative planners are concerned that the IRS would attack both ideas as abusive. This article does not permit a detailed discussion of these methods. Both of these planning ideas were discussed by Turney Berry when he presented at Maryland’s Advanced Estate Tax Institute last Fall and they are both easily searchable on Google.

Undoing Transactions

With an increase in the federal exemption amount some clients may decide that their life insurance trusts no longer

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serve a purpose and discontinue funding the trusts to fund those policies. Before allowing clients to allow ILITs expire they should be reminded that such trusts exclude the death benefit from state estate taxes. Clients should review their life insurance needs before allowing policies to lapse as they may be uninsurable down the road.

Clients who created qualified personal residence trusts (“QPRTS”) may decide to stop paying rent to their children (or trusts for their children) in order to maintain additional cash and to intentionally cause inclusion of the house in their estate to gain a step-up in the tax basis upon death.

The discontinuation of family limited partnerships and limited liability companies may be better for clients who get no significant tax benefit from the ongoing administration costs associated with maintaining them. Clients may wish unwind the business so that the underlying assets will be included in their taxable estate and obtain a step-up in basis on those assets at death. Alternatively, clients may see the non-tax benefit of maintaining the partnership or LLC, such as central management and asset protection, but decide to discontinue the gifting of those interests to their children allowing the parents to maintain a greater percentage of the income stream from the entity.

Clients who have created irrevocable trusts with grantor status may wish to review whether they have the ability to “toggle off” the grantor status to allow the income tax burden to fall on the trust. For clients with estates less than \$10 million, and who are willing to assume the risk that the exemption will not be reduced, the client/grantor should consider a repurchase of the assets in the grantor trust in order to get the step-up in basis on the assets in his or her estate.

Conclusion

With only a two-year window and uncertainty regarding the exemptions and rates in the future, we will need to continue to be flexible in our planning. Instead of letting the exemptions dictate how trusts are funded we should spend more time learning our clients weighted objectives and design plans with those goals in mind in the most tax efficient way that we can. Income tax planning will become more of a focus. For our wealthier clients, we should find ways to take advantage of the increase in the gift tax exemption while it is available after disclosing to them the risk of clawback. State estate tax planning also continues to be a focus for many. We need to advise clients that exemptions and rates may change again in two years and that continued unpredictability in the law is really all that we can predict.

Reality Bytes. . .

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version of this column, so you can click on them and go to the websites:

Marketplace Tech Report - This is a five minute podcast each day on technology issues. It was formerly called Future Tense and hosted by Jon Gordon. It has changed its name to become part of American Public Media's series of financial and business reports. It is now hosted by John Moe and provides excellent coverage of a wide range of technology topics. (American Public Media also distributes Garrison Keillor's A Prairie Home Companion and The Writer's Almanac.)

John Dvorak's Second Opinion - Distributed by The Wall Street Journal's Digital Network, this column features sharp criticism and iconoclastic views of John Dvorak, who is tech journalism's equivalent of Andy Rooney. For another side of Mr. Dvorak, see his blog, aptly named Dvorak Uncensored.

All Things Digital - Also distributed by The Wall Street Journal's Digital Network, this website includes a wide variety of contributors, including the Journal's excellent Personal Technology columnist, Walt Mossberg and Boom Town's Kara Swisher.

TWIT - TWIT (This Week in Tech) is a website for commentary on technology assembled by Leo Laporte. One of its primary features is a weekly podcast of roughly an hour in length, TWIT (podcast).

Pogue's Posts - a central site for accessing the columns of David Pogue, technology columnist of The New York Times.

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