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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2836

Date:	**12-Nov-20**
From:	**Steve Leimberg's Estate Planning Newsletter**
Subject:	**Mary Vandenack's Notes from the NYU Advanced Trusts and Estates Conference**

The **NYU Advanced Trusts & Estates Conference** was held online on July 17, 2020. Mary E. Vandenack attended the NYU Advanced Trusts & Estates Conference, virtually, and agreed to share her notes.

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary's practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Law Practice Group and on the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Editor-in-Chief of Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation.

NOTES:

CHAIR:

Brad J. Richter

PLANNING ISSUES AND PROBLEMS WITH RESPECT TO DECANTING TRUSTS

Presenter: Wendy Wolff Herbert, Esq., Fox Rothschild, LLP, Princeton, NJ

Reasons for decanting include advancing tax goals, changing beneficial interests, changing trust situs, changing trustee provisions, changing administrative provisions, consolidating two or more trusts, dividing trust property, and addressing changed circumstances or errors.

Weidenmayer v. Johnson, 106 N.J. Super. 161 (App. Div. 1969). John Seward Johnson created a trust for his son, John Seward Johnson, Jr. The trustees exercised their discretion to distribute Seward's interest to him and he contributed the distribution to another trust. Such trust provided for Johnson for life and for some of his children. Two children from a prior marriage were excluded. The children that were cut out sued. The court held the trustees had not abused their discretion.

Hodges v. Johnson, 170 N.H. 470 (2017). New Hampshire has a decanting statute allowing a trustee to decant from one irrevocable trust to another. A trust had been created by Settlor. Over the years, family rifts evolved. The Settlor requested the trustees to decant the trusts. The trustees did so and the result was to eliminate four of six beneficiaries and various contingent beneficiaries. The New Hampshire Supreme Court upheld a lower court ruling that the decanting was improper and void because the trustee violated his fiduciary duty.

Decanting statutes are based on common law. Fiduciary standards apply. Decanting authority exists in 30 states. Statutes vary in significant aspects regarding tax authority, fiduciary rules and notice requirements.

Regarding decanting statutes, consider who may decant, trustee authority, income rights and how they can be modified, who can be beneficiaries of new trust, standards of discretionary distributions that can be used in new trust, whether trustee can grant a power of appointment in the new trust, whether decanting power can be used to extend permissible perpetuities period, whether existence of outstanding withdrawal powers prohibit decanting, any limitations on decanting to maintain tax savings exemptions and characteristics, and whether notice of decanting must be given to beneficiaries.

Tax Issues in Decanting.

Decanting does not typically result in a recognition event; however a decanting of assets from one trust to another may result in a taxable exchange if beneficiaries possess interests in the new trust that are materially different and the transfer requires beneficiary approval.

THE INTERSECTION OF DIVORCE AND TRUSTS & ESTATES: TOP TAX/PLANNING TIPS AND TRAPS

Presenter: Sharon L. Klein, President, Family Wealth, Eastern Region

Significant changes to the treatment of trusts have occurred. IRC Section 682 was repealed as of January 1, 2019. This applies on the basis of the date the trust was created whether or not before January 1, 2019. The effect of Section 682 was to prevent a settlor from paying tax on income that was distributed to a former spouse. Practitioners have taken a variety of approaches to addressing the issue in trusts that are affected. For example, actions may be taken in some cases to remove the spouse beneficiary. Another approach is to distribute the trust assets. When drafting trusts in the planning stage, consideration should be given to the possibility of divorce.

Alimony payments are not deductible to payor or taxable to payee after December 31, 2018.

Pre-marital planning should consider the portability of the federal estate tax exemption. This is a valuable asset to be considered when a less wealthy spouse is marrying a moneyed spouse. The less wealthy spouse (assuming wealth is less than exemption) has a valuable asset in the form of the exemption.

Another premarital planning technique is the asset protection technique. For this technique to be effective, settlor must choose a jurisdiction that limits claims of spouse, former spouse, or minor child. Despite the specific laws, an asset protection trust provides protection in the form of making it more complicated to pursue trust assets. A spouse who marries a settlor after the trust is created is not included in the class of exception creditors.

Estate planning documents should be reviewed and updated in conjunction with divorce. Some states don't allow for certain changes to estate planning documents during the pendency of a divorce; however, there are several documents that can and should be changed during the divorce. The updates that can be made should be made as soon as possible. Health care proxies and powers of attorney should be updated immediately to avoid having an about to be ex-spouse making decisions about COVD-19 treatments.

Divorce planning should consider a global asset perspective. Tax attributes of assets should be considered. Income and assets of divorcing clients should be considered via sophisticated analytics. Sophisticated analytics can improve negotiating leverage. Additionally, post-divorce, excellent financial planning is in order.

Credit and leverage can be useful in a divorce proceeding to assist one client buy the other out of various assets.

There is a trend including trust interests in divorce proceedings. If a trust is involved in a divorce, the trust terms matter; however, also look at the history of trust distributions. It will be more protective if there are multiple beneficiaries, a corporate trustee and the settlor of the trust is other than the divorcing spouse.

Trust decanting can be a useful tool in a divorcing situation. In *Ferri V. Powell-Ferri Holdings*, decanting was authorized. As a result, assets were placed out of reach of divorcing spouse. New trust is not a marital asset but could be considered in alimony.

Power to Adjust and Unitrust Regimes can be used to revise trust distributions.

Life Insurance plays an integral role in divorce. Insurance is often used to insure alimony or child support obligations. The pandemic has increased mortality risk. Be proactive to make sure insurance is performing if there is an investment component. Policy reviews should be conducted annually to review details. Details should include where premium notices are being mailed, beneficiary designation, ownership, and any tax issues related to the policy. Attorneys have been sued over life insurance policies not being titled properly.

States have different approaches to ownership and use of genetic material after divorce. States continue to vary as to the eligibility for inheritance of children born after the death of his or her genetic parent.

Personal exemption has been suspended.

Miscellaneous itemized deductions suspended.

<u>USE OF CHARITABLE VEHICLES TO DEFER GAIN</u>

Presenter: *Jerry Hesch*, Esq**.**, Adjunct Professor at Florida International University School of Law and Boston University School of Law, Miami, FL and Boston, MA

A key current estate planning concern is getting a step up in basis at death. Communicating sophisticated estate planning techniques in an understandable is very important.

Regarding using a charitable remainder trust to postpone reporting of a gain realized from the sale of a marketable security for cash, ask client whether they would rather invest after the transaction with ten million in cash or seven million in cash.

Senior establishes a CRUT and contributes public company stock valued at $10,000,000 with zero basis. A 14.691% unitrust interest for life is retained. Senior is entitled to an immediate $1,000,000 charitable income tax deduction. Illustration is that trustee sells stock after creation for $10,000,000 in cash, invest the cash and earns 5% interest and dividends. At the end of year one, Senior receives Distribution of $1,469,100. Section 664 applies to determine taxation of distribution. Tier 1 allocates $500,000 to trust accounting income. The remaining $969,100 is a distribution of trust principal and taxable as long term capital gain because there was no basis. The $1,000,000 charitable income tax deduction provides an immediate income tax benefit which can be used to offset the income for the year the CRUT is created and the next five years.

Clients don't get a charitable deduction for income tax purposes when they give at death. (There may be other charitable benefits.) A charitable annuity can result in a current income tax deduction for a donor. Example: Senior gives charity $1,000,000 in cash. Charity agrees to pay Senior $58,000 per year for the rest of Senior's life. Senior will have a charitable deduction of $323,384. Present value of $58,000 annually for a person age 70 is $676,616 (using 5.8% as annuity factor).

<u>"THE BAKER'S DOZEN" – 13 TIPS THAT YOU SHOULD KNOW WHEN PREPARING A 706</u>

Presenter: George D. Karibjanian, Esq., Partner, Franklin Karibjanian & Law, PLLC

5 Points to Preparing a 706

- Determine assets that are included and value.
- Compute tentative taxable estate.
- Compute tentative tax under unified rate schedule.
- Subtract the total amount of gift taxes paid.
- Subtract applicable credit, foreign death tax credit, credit for federal estate tax on prior transfers, and credit for gift tax on pre-1977 gifts included in estate.

Taxable gifts are not what you think it means! "Adjusted taxable gifts" are total "taxable gifts" made by decedent after 1976, other than gifts included in the gross estate. "Taxable gifts" are the total amount of gifts made each year, less exclusions (i.e., the annual exclusion as well as medical or educational exclusions and deductions for charitable and spousal gifts. What is missing from "adjusted taxable gifts" is the fact that the amount is not necessarily the total prior gifts as reported on 709.

Alternate Valuation generally occurs on the first of the date of the disposition of the asset or 6 months from the date of death or disposition of asset. Regarding jointly owned assets, see Treas. Reg. 20.2032-1(c).

Checking yes on Line 11a is likely to lead to an audit. The reason is the concern that there were discounts. 11b covers discount and is another box that may lead to audit.

Consider disclosing sale to grantor trust on a 709 return to start the statute of limitations. Line 13 e on 706 requires disclosure of sale to defective grantor trust. Audit could result years after the transaction.

An executed contract to purchase real estate is considered an interest in real property reportable on Schedule A. An executed contract to sell real property where title was not transferred before death is reported on Schedule C.

Recourse debt is reported on Schedule A. The full value of real property is reflected and unpaid portion of debt is deducted on Schedule K.

Promissory notes should be valued by appraiser. Discounts can be taken. See Treas. Reg. 20-2031-4. Value follows Rev. Rul. 67-276. Revisit discount and note value at alternate valuation date. It's possible that something like a pandemic occurred between date of death and alternate valuation date.

The rules for outstanding gift checks is different for non-charitable and charitable gifts. Non-charitable gift checks are included in gross estate if check has not cleared the account. Charitable gifts are deductible on decedent's final income tax return and not includable in the gross estate.

A post 1976 joint spousal interest is always 50-50. If joint tenancy is with someone other than spouse, there is a determination about who contributed to the asset. For pre-1977 joint spousal interests, contribution test applies.

Refund from joint income tax return is included based on proportion of refund that is from income of decedent.

Burial plot is not included in decedent estate. If the lot was one of 10, the one that was used for decedent is excluded.

Travel expenses of one person to and from burial site and stone setting are deductible. Travel for additional family members is not deductible. Expenses directly attributable to funeral service and burial are deductible.

Keep in mind that misrepresenting an entry creates an issue for preparers under Circular 230. If there is a grey area, create a memo, memorialize analysis and provide memo to client.

There are expenses occurred in the administration of an estate that related to non-probate assets that are deductible on Schedule L. This may include assets that pass by beneficiary designation or otherwise contractually.

Administration expenses are either estate transmission expenses or estate management expenses. Estate transmission expenses will reduce marital or charitable deduction if charged to the marital or charitable property. Estate management expenses will generally not reduce the deduction if deducted on the estate's income tax return.

HIGHLIGHTS OF THE SECURE ACT

Presenter: Brad J. Richter, Fried, Frank, Harris, Shriver & Jacobson LLP

A significant amount of assets exist in the form of retirement assets. There are multiple sources of controlling laws: Internal Revenue Code, ERISA, DOL, PBGC, creditors rights issues.

SECURE ACT was passed as part of budget bill December 20, 2019.

Changes at plan level include escalated automatic enrollment cap and credit for the same; increased flexibility for safe harbor plans; credit increase to small employers establishing SEP, SIMPLE-IRA, or other plan; 529 expansion to apprenticeship programs and educational loan repayments, pooled employer plan; and allowing long term part time workers to participate in 401k.

There were also changes at individual level. The age limit for contributions was removed. There must still be earned income to make IRA, ROTH IRA or spousal IRA contributions. Back-Door ROTH IRAs are permitted. The age at which required minimum distributions increased to age 72. There are penalty free withdrawals for birth/adoption. Graduate non-tuition fellowship and stipends are treated as compensation for IRA purposes. Kiddie tax was re-established.

The ability to use a stretch IRA was eliminated by repeal of the life expectancy for a majority of beneficiaries. Life expectancy has been replaced with a ten-year distribution period. Eligible designated beneficiaries (for whom life expectancy can be used) include spouse, minor child of participant/owner, disabled/chronically ill beneficiaries and less than ten years younger beneficiaries. SECURE Act impacts see-through trusts. There remains some uncertainty on full impact.

IRAs are income in respect of decedent. The amounts are includible in decedent estate and taxable for income tax purposes to recipient upon withdrawal. In estate plan drafting, give attention to estate tax apportionment clause.

The general rule of income taxation is one of ordinary income upon receipt. If there is no constructive receipts, there is no current taxation without actual receipt. Taxation results upon assignment in satisfaction of pecuniary amount. Exceptions to income taxation include rollovers, return of basis, life insurance, ROTH IRA distributions.

In some cases, tax considerations should not be the driver. For example, if there is a concern about the ability of a beneficiary to manage finances, beneficiary protection may prevail over tax consequences. There are likely to be less retirement plan trusts after the SECURE Act but trusts do still provide better control.

After the SECURE Act, lifetime distribution rules are unchanged. If an account owner dies after required beginning date, the life expectancy distribution scheme for beneficiaries other than eligible designated beneficiaries. Modified life expectancy rules apply to eligible designated beneficiaries.

If an account owner dies before required beginning date, the rules depend on whether there is a designated beneficiary. If spouse is sole designated beneficiary, spouse can use spouse’s single life expectancy or rollover; however, the ten-year rule applies to the successor beneficiary. If beneficiary is not spouse but is an eligible designated beneficiary, the life expectancy of eligible designated beneficiary can be used but ten-year rule applies to successor beneficiary. If spouse is not the designated beneficiary but another individual is a designated beneficiary, if beneficiary is eligible designated beneficiary, then life expectancy of such beneficiary can be used but ten-year rule applies to successor. If designated beneficiary is not an eligible designated beneficiary, ten-year rule applies. If there is not a designated beneficiary, five-year rule applies.

If an account owner dies after required beginning date, the rules depend on whether there is a designated beneficiary. If spouse is sole designated beneficiary, spouse can use the longer of spouse’s life expectancy or participant’s life expectancy (rollover is still usually the best approach). If beneficiary is not spouse but is an eligible designated beneficiary, the life expectancy of beneficiary can be used but ten-year rule applies to successor beneficiary. If beneficiary is not an eligible designated beneficiary, then ten-year rule applies. If there is not a designated beneficiary, distributions continue over life expectancy of account owner.

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

Mary Vandenack

CITE AS: