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The Thursday Report

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Re: Are You Ready for Some Thurs-Ball?

DAPTs & Klabacka: At the Intersection of Estate Planning and Family Law (Part 1 of 2) by Sandra Glazier, Martin Shenkman, and Alan Gassman

Alan Gassman Interviews David Kirk on 199A and Associated New Tax Law Issues – (Part 2)Click HERE for direct access.

5 Simple Steps to Start the Year Off with a Bang by David Finkel

Richard Connolly's World

When the Unthinkable Happens – Constructing a Cancer Plan by Martin Shenkman

Humor! (Or Lack Thereof!)

We welcome questions, comments, suggestions, and compliments, whether true or not…

Alex Karras-Defensive Tackle for the Lions, Webster's Dad, and of course....Mongo

Quote of the Week

"I never graduated college, but I was only there for two terms – Truman's and Eisenhower's"

– Alex Karras

The Super Bowl is the annual championship game of the National Football League (NFL). The game is the culmination to a regular season that begins in the late summer of the previous calendar year. Normally, Roman numerals are used to identify each game, rather than the year in which it is held. For example, Super Bowl I was played on January 15, 1967, following the 1966 regular season. The sole exception to this naming convention tradition occurred with Super Bowl 50, which was played on February 7, 2016, following the 2015 regular season, and the following year, the nomenclature returned to Roman numerals for Super Bowl LI, following the 2016 regular season. The next Super Bowl will be Super Bowl LII, scheduled for February 4, 2018, following the 2017 regular season.

The game was created as part of a merger agreement between the NFL and its then-rival league, the American Football League (AFL). It was agreed that the two leagues' champion teams would play in the AFL–NFL World Championship Game until the merger was to officially begin in 1970. After the merger, each league was re-designated as a "conference", and the game has since been played between the conference champions to determine the NFL's league champion..

Eagles Super Bowl QB, Nick Foles

DAPTs & Klabacka: At the Intersection of Estate Planning and Family Law (Part 1 of 2)

This isn't Sandra Glazier..it's an ice glacier

...this is Sandra Glazier

by Sandra Glazier, Martin Shenkman, and Alan Gassman

Reprinted from Leimberg Information Services

"Should your client's marital planning include use of a domestic asset protection trust ("DAPT") to safeguard separate assets in the event of a divorce? Given the uncertainty that can exist with respect to the enforceability of pre-and post-marital agreements, and the potential of a DAPT bolstering of separate property status, DAPTs can be an important facet of marital planning. Even when utilized for non-marital purposes, DAPT's can have a favorable impact on marital and divorce planning. After the Jobs Cut and Tax Act of 2017 the doubling of transfer tax exemptions will facilitate the transfer of more assets to completed gift DAPTs in matrimonial planning.

The Tax Act will also change the historic treatment of alimony for divorces after 2018. This change could also have an impact on existing prenuptial agreements that may have fixed the amounts of alimony in the event of a later divorce. It is precisely this type of unforeseeable risk that supports the recommendation of this newsletter that prenuptial agreements be backstopped by the creation and funding of a DAPT prior to marriage to lessen the potential problems of such unforeseen-risks.

DAPTs have now been adopted in 17 states, with Michigan becoming the newest state to join this trend on March 8, 2017 Nine additional states have recognized some modified or limited version of a self-settle trust as being exempt from creditor claims. These include inter-vivos spousal QTIP trusts whereby a gift is made by one spouse to a QTIP marital trust to benefit the other spouse, followed by a transfer on the death of the beneficiary spouse to a credit shelter type trust formed under the QTIP to benefit the donor spouse, who is deemed not to have contributed to the trust. Some states have enacted statutes that provide an additional measure of asset protection for certain specified trusts or accounts (such as 529 accounts and special needs trusts). This trend might provide support for rebuking public policy arguments historically utilized to evade or otherwise invalidate the exemption of assets governed by DAPTs from the claims of creditors. This may be of particular importance in divorces where a DAPT is created in a state which doesn't recognize spousal and child support obligations as exceptions to DAPT creditor protections."

Sandra D. Glazier, Esqi **and Martin M. Shenkman, Esq.**ii **and Alan Gassman**iii provide members with their commentary on whether a client's marital planning should include the use of a domestic asset protection trust to safeguard separate assets in the event of a divorce. Before we get to their commentary, here are **LISI**'s webinars for the week: Jonathan Blattmachr, Martin Shenkman and Joy Matak, February 2, 2018, 3:00- 4:00pm ET, Tax Cuts and Jobs Act: New Insights on Estate Planning.

Now, here is Sandra, Martin and Alan's commentary:

EXECUTIVE SUMMARY:

Should your client's marital planning include use of a domestic asset protection trust ("DAPT") to safeguard separate assets in the event of a divorce? Given the uncertainty that can exist with respect to the enforceability of pre-and post-marital agreements, and the potential of a DAPT bolstering of separate property status, DAPTs can be an important facet of marital planning. Even when utilized for non-marital purposes, DAPT's can have a favorable impact on marital and divorce planning. After the Jobs Cut and Tax Act of 2017 ("Tax Act") the doubling of transfer tax exemptions will facilitate the transfer of more assets to completed gift DAPTs in matrimonial planning.

The Tax Act will also change the historic treatment of alimony for divorces after 2018. This change could also have an impact on existing prenuptial agreements that may have fixed the amounts of alimony in the event of a later divorce. It is precisely this type of unforeseeable risk that supports the recommendation of this newsletter that prenuptial agreements be backstopped by the creation and funding of a DAPT prior to marriage to lessen the potential problems of such unforeseen-risks.

DAPTs have now been adopted in 17 states, with Michigan becoming the newest state to join this trend on March 8, 2017 [iv] Nine additional states have recognized some modified or limited version of a self-settle trust as being exempt from creditor claims.[v] These include inter-vivos spousal QTIP trusts whereby a gift is made by one spouse to a QTIP marital trust to benefit the other spouse, followed by a transfer on the death of the beneficiary spouse to a credit shelter type trust formed under the QTIP to benefit the donor spouse, who is deemed not to have contributed to the trust. Some states have enacted statutes that provide an additional measure of asset protection for certain specified trusts or accounts (such as 529 accounts and special needs trusts).[vi] This trend might provide support for rebuking public policy arguments historically utilized to evade or otherwise invalidate the exemption of assets governed by DAPTs from the claims of creditors.[vii] This may be of particular importance in divorces where a DAPT is created in a state which doesn't recognize spousal and child support obligations as exceptions to DAPT creditor protections.

COMMENT:

What are DAPTs? They are self-settled trusts in which the settlor is also named as beneficiary of the trust or may become a beneficiary if certain events occur. It is essentially a self-settled irrevocable spendthrift trust established by a grantor, at least in part, for his or her own benefit and/or the benefit of a spouse or other family members, which is intended to provide (among other things) creditor protection.

The nexus between the grantor, trustees and trust assets subject to the jurisdiction and administration of the state whose DAPT benefits are sought may, however, remain important to the "public policy" analysis. In *Huber*viii Washington's strong public policy against self-settled asset protection trusts was utilized to invalidate the creditor protections otherwise afforded to an Alaska DAPT.ix In *Huber,* the Grantor was a Washington State resident and had no substantial ties or relationship with Alaska under whose governing laws the DAPT was intended to be governed. The vast majority of the DAPT's assets were located in Washington, not Alaska. The sole Alaskan asset was a $10,000 CD. While there was an Alaskan corporate co-trustee, it was largely inactive in the administration and affairs of the DAPT. At its core, *Huber*x was resolved under a conflict of laws analysis as to whether Washington (where Grantor resided, the bulk of the assets were located, the creditors were located, and the proceedings took place) or Alaskan law (the stated governing law within the DAPT instrument) controlled. The court relied largely upon the Restatement of Trustsxi in reaching its conclusion that Washington law should control, despite the stated governance within the DAPT of Alaskan law. The *Huber* court recognized:

An inter-vivos trust of interests in movables is valid if valid:

> (a) under the local law of the state designated by the settlor to govern the validity of the trust, provided that this state has a substantial relation to the trust and that the application of its law does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in §6.1
>
> Comment b clarifies when a state has a substantial relation to the trust and when the law of the designated state will not be applied:
>
> b. Law designated by the settlor to govern validity of the trust. Effect will be given to a provision in the trust instrument that the validity of the trust shall be governed by the local law of a particular state, provided that this state has a substantial relation to the trust and that the application of its local law does not violate a strong public policy of the state with which as to the matter at issue the trust has its most significant relationship.
>
> A state has a substantial relation to a trust when it is the state, if any, which the settlor designated as that in which the trust is to be administered, or that of the place of business or domicil *(sic)* of the trustee at the time of the creation of the trust, or that of the location of the trust assets at that time, or that of the domicil *(sic)* of the settlor, at that time, or that of the domicil *(sic)* of the beneficiaries. There may be other contacts or groupings of contacts which will likewise suffice.xii
>
> ***
>
> Under the Restatement, the Debtor's choice of Alaska law designated in the Trust should be upheld if Alaska has a substantial relation to the Trust. Restatement § 270(a). Comment b provides that "a state has a substantial relation to a trust if at the time the trust is created: (1) the trustee or settlor is domiciled in the state; (2) the assets are located in the state; and (3) the beneficiaries are domiciled in the state. These contacts with the state are not exclusive." In the instant case, it is undisputed that at the time the Trust was created, the settlor was not domiciled in Alaska, the assets were not located in Alaska, and the beneficiaries were not domiciled in Alaska.xiii

Therefore, making sure that there is a significant and sufficient nexus between the DAPT assets, their administration, the role of the resident independent trustee, and the selected governing law may remain important to obtaining the benefits of creditor-protection when the settlor is a beneficiary of the trust. Many commentators question-the Huber decision on the basis that it was a simple fraudulent conveyance issue and should have been decided as such.

Like *Huber,* a 2015 Utah court decision negated the protections of a Nevada DAPT, created by the husband into which marital property was transferred, using a conflict of laws analysis. In *Dahl*[xiv] the court vitiated the asset protection of the Nevada trust by applying Utah law (as opposed to the stated governing law of Nevada as provided for in the DAPT) premised upon Utah's strong public policy favoring equitable distribution of marital assets.[xv] While the court found that under Nevada law the trust would have been deemed irrevocable; under Utah law the trust was revocable (and therefore subject to division in the Utah divorce proceedings). The finding of revocability was determinative in the decision that the assets could be subject to division in the Utah divorce proceedings. The finding of revocability was premised upon the following language contained in the DAPT:

> Trust Irrevocable. The Trust hereby established is irrevocable. Settlor reserves any power whatsoever to alter or amend any of the terms or provisions hereof.[xvi]

Therefore, despite the declaration of irrevocability and applicability of Nevada law, the ability to alter or amend the trust lead the Utah court to find that the trust was revocable and therefore subject to division in the Utah divorce proceedings. It is not clear why such language had been included in the trust instrument. Had language of revocability not been included, would the DAPT have been found enforceable? The answer to this question was not resolved.

Even though DAPTs have been around since 1997 (and offshore asset protection trusts long before that), there have been relatively few cases providing guidance with regard to DAPT enforceability. As a consequence, naysayers continue to suggest their shortcomings and risk. For example, the Uniform Voidable Transfers Act ("UVTA") Section 4, Comment 8, provides that a transfer to a self-settled domestic asset protection trust is voidable if the transferor's home state does not have DAPT legislation. The Comment provides the following example:

> By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y.

Despite the naysayers, the number of states permitting DAPTs continues to grow. 17 states with DAPT legislation is not an insignificant number. The trend in the growth of the number of states with DAPT legislation is also notable. Therefore, in appropriate circumstances, with proper caution to clients, and reasonable safeguards, DAPTs might be a useful tool in the planner's tool kit. Foreign asset protection trusts ("FAPTs") may be less subject to invasion, because court cases and statutes in these jurisdictions make it clear that the courts there will apply the jurisdiction enlisted in the instruments as opposed to the law of the settlor's residence when attempts to force distribution and invasion of the trust occur.[xvii]

U.S. based DAPT statutes tend to require use of at least one resident trustee (and in some jurisdictions that trustee may need to be one vested with distribution authority) in order to avail the trust of the jurisdiction's statutory creditor protections. A portion of the trust assets may be required to be located in the DAPT's governing state to provide nexus. Some states require certain prerequisites and formalities, such as affidavits of solvency, in order for transfers to the DAPT to be afforded creditor protection. Other states are less stringent or formal with regard to such requirements. Suffice it to say, it may be important to not only review the requirements set forth in a state's DAPT statutes, but also those implicated under applicable fraudulent transfers or conveyances statutes in that state. In assessing the pros and cons of the growing number of states that permit self-settled trusts, practitioners may find an annual chart created by attorney Steve Oshins helpful.[xviii] [xix]

Benefits may be retained by the grantor. The extent to which benefits may be retained by a grantor while still being afforded creditor protection (in the DAPT state) will largely depend upon the state's DAPT statute. Depending upon the "strings" attached, the creation of a DAPT may or may not constitute a completed gift.[xx]

The potential implications of bankruptcy policies, exceptions and preclusions are generally beyond the scope of this newsletter.[xxi] However, it may be worth noting that under 11 U.S.C. § 541(c)(2) DAPT assets will generally pass outside of the bankruptcy estate and be sheltered from creditors if applicable state laws operate to prevent creditors from having access, unless the 10 year fraudulent transfer statute (11 U.S.C. §548(e)(1)) applies to enable the court to set aside the transfer to a DAPT made with the intent to hinder, delay or defraud the creditor. For purposes of analyzing the impact of these bankruptcy code provisions, the applicable state law would be that law which would be applied by state courts if the creditor sued the debtor other than in the bankruptcy court arena.

The focus of this newsletter is not on bankruptcy ramifications or the potential tax benefits or consequences, but rather upon other practical planning opportunities and options which might be addressed through use of a DAPT. Besides providing general creditor protection, DAPTs may be considered a backstop to further enhance the security of a prenuptial agreement. In this application, one might consider whether a sufficient nexus to a DAPT state exists, or alternatively whether greater benefit might be derived from the use of an offshore FAPT. Key to this analysis may be whether the DAPT and divorce jurisdictions recognize DAPTs as being exempt from the claims of a spouse or children (such as Michigan's DAPT statute).[xxii]

If there wasn't a sufficient nexus between the grantor and the DAPT jurisdiction at the time the DAPT was created the state court judge may nonetheless consider the existence of the DAPT assets in the division of the marital estate or in otherwise establishing support obligations of the grantor. Many commentators believe that naming an institutional trustee in the DAPT state, and complying with the requirements of the DAPT statute, should be sufficient to establish nexus.

If the grantor was not a resident of the DAPT jurisdiction, or if the DAPT jurisdiction in question does not preclude the claims of a spouse (or child) for support or division of assets in the context of divorce, one might consider use of a so called "Jones clause" which could provide that the trust will be accessible solely to the ex-spouse as ordered by a court of competent jurisdiction, as an exception to the general creditor protection, especially where the purpose of the DAPT is for third party creditor protection or other estate planning purposes.

Consider the following scenarios when use of a DAPT might prove beneficial:

- Grantor is planning to wed and has a fiancé who is reticent to enter into a prenuptial agreement. Some state statutes explicitly recognize non-marital asset funding of a DAPT, without spousal consent, if done more than 30 days before the parties wed.[xxiii]. Even if the spouse-to-be is willing to execute a prenuptial agreement, given the number of prenuptial agreements that are challenged, implementing a DAPT (or other irrevocable trust plan) as far in advance of the marriage as possible may well provide additional protection. The asset disclosures to one's fiancé generally required to create enforceable waivers under a prenuptial agreement are not prerequisites to the creation of a DAPT. Nonetheless, the existence and specific terms of the DAPT, and the value (and possibly specifics of) its assets should be disclosed prior to the signing of a prenuptial agreement. Some matrimonial attorneys would suggest appending the entire trust agreement and a trust balance sheet to the prenuptial agreement to preclude any challenge based on lack of knowledge or disclosure. Further, regardless of a 30-day advance disclosure requirement in any applicable statute, the further in advance of the marriage that the DAPT is executed and funded the better.

- Grantor resides in or moves to a jurisdiction where the enforcement of prenuptial and postnuptial agreements may be questionable. The enforceability of a prenuptial waiver of statutory rights to invade separate property, granted a court under statutorily approved circumstances, was recently called into question in Michigan.xxiv This erosion of the enforceability of property agreements follows other cases which held certain postnuptial agreements to be unenforceable as a matter of public policy.xxv While the Michigan legislature is currently considering a statutory solution to reverse the ramifications of this case, DAPTs may provide a viable solution to part of the problem created by these (hopefully aberrant) cases and as belt and suspenders for situations where the formalities may not be follow or enforceability of prenuptial agreements allowed for any reason. In some states, family law courts may agree that assets under a properly managed DAPT are not considered the property of a donor spouse. In jurisdictions which recognize the donor spouse's DAPT interest as separate property, such treatment can have a significant impact upon the ultimate division of the marital estate and/or the establishment of support obligations.

- Perhaps the Grantor is a beneficiary under a trust that is scheduled to terminate or has a vested right of withdrawal, or is scheduled to receive a major distribution. While it might be possible to address these issues through a non-judicial trust modification, decanting, or moving the trust to an offshore jurisdiction, what if these options aren't available? Use of a DAPT might create or extend a period during which the assets can be afforded spendthrift and/or other creditor protections.

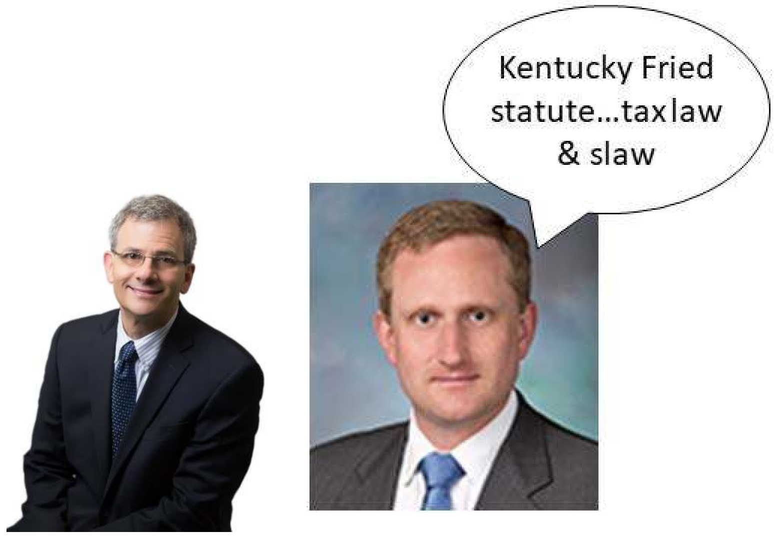
- Grantor was a minor when an annual exclusion Internal Revenue Code §2503(c) GST trust was created for his benefit, which of necessity terminates at age 21. Use of a DAPT could extend spendthrift provisions not otherwise available under the §2503(c) GST trust.

- Grantor inherits, receives or otherwise has an interest in a closely held family business whose operation could be adversely impacted should Grantor's creditors or spouse attempt to claim an interest in the entity. While the benefits of an LLC might eliminate some of the adverse constraints of such a claim if only a charging lien is available, further and enhanced protection might be afforded by a DAPT. This type of planning might be further enhanced by fractionalizing business assets (e.g. real estate, intellectual property rights, etc.) into separate LLCs (e.g. a real estate LLC that leases real estate to the operating entity) and thereafter transferring certain rights (perhaps preferably in the passive entities) to a DAPT and then leasing (licensing, etc. as appropriate) rights to the operating entity, etc.

Be sure to watch out for the conclusion of this article in the next edition of the Thursday Report…or register at LeimbergServices.com to avoid the wait.

Eagles QB, Carson Wentz

Part 2 of Alan Gassman's Interview with David Kirk on 199A and Associated New Tax Law Issues for LISI



David Kirk is uniquely qualified to lead the field on explanation and analysis of section 199a and other individual and business taxpayer provisions of the new Tax Act.

Known by many as one of the brightest and best qualified experts on these topics, David was an attorney for the Office of the Chief Counsel at the IRS and a chief draftsman of the Regulations under IRC Section 1411 (the Net Investment Income Tax). Readers will not want to miss what David has to say, or his very entertaining tone and sharp wit that gives us guidance and also the motivation and resilience needed to make sense of these new rules and apply them as best possible. If you are a professional in a tax-related field and have never heard of David Kirk, then hold onto your desk because you are in for a real treat and a lot of new knowledge.

Thanks to LISI commentators Alan Gassman and Brandon Ketron for their work on this LISI exclusive interview. To read part 1, click HERE

Alan: Right, speaking of partnership tax, when you are a partner in a partnership that needs to pay out wages to enable a higher earning (taxable income over $315,000 married or $157,500 single) partner to take the full 20% deduction, the deduction can be limited based upon the amount of wages paid by the entity and a partnership can't pay wages to the partners because of the guarantee payment rules, right? There is a lot of confusion and lack of knowledge on this.

David: Correct. According to the IRS, and that has been the case for - give or take - 40 years. So there has been a lot of discussion about why you are carving out W-2s, why you are carving out guaranteed payments, but you cannot W-2 yourself? Well, what the law says and what people do are two different things. So there are probably partnerships that do W-2 their partners. There are Schedule Cs that probably W-2 their owners. If something crazy can happen, it does happen.

So going back to the accuracy related penalty, does that mean that their math may be off? Yes. Does that mean your substantial understatement goes to 5%? Yes.

Alan: In regards to employee leasing, will you look through employee leasing to consider what you pay through the employee leasing company as wage, or is that going to be the death of employee leasing companies?

David: Well, it will be leasing, right? One question is whether employee leasing is a specified service business? The law seems pretty darn clear when it says "W-2", it means the W-2 reported to the Social Security Administration. There is some thinking about whether a common law employer concept could move the W-2s around to various businesses in a group, but that thought is far from fully baked.

I do not see any hook to apply any aggregation rule where one entity has the trade or business and another pays the wage. Would the IRS adopt 469 groupings in order to solve these, arguably, common problems? If I operate a business in several states, and I have a separate legal entity for each state, but my employees are in the parent entity, how is that going to work? Do I need to move all of my employees in Pennsylvania to the Pennsylvania entity? Or my Georgia employees to my Georgia partnership? Or can I just keep everyone where they are? Do I have to do all of my employee benefit plans all over again? This is going to be brutal. And it is for a provision that has a 2025 expiration date.

Alan: Going back to definitions and listed categories of businesses, what do you think a "health" trade or business is, or more important what isn't "health"?

David: You know, if you go back, there are a couple of PLRs out there on health that have to do with laboratory testing under the Section 1202 rules which are referred to under 199A. What they were probably trying to do back in '93 is to prevent doctors, lawyers, and accountants from being able to retire from their practice or sell their practice to their partners, get paid out and get a 50% exclusion. That makes sense. But due to the breadth, there are a lot of activities that could be health-related. But these PLRs found that if you employ physicians, but the physicians do laboratory tests, help get FDA approval, or are contract researchers, then probably you are not a health business, but just a business. Then you get into is it the skill or reputation of one or more of your employees? But if that is the case, then every business would be a service business. Even the ones that were carved out, which were architecture and engineering. You have some pretty good architects -- does that mean they are employees so therefore it is a skill or reputation? Does that mean you got caught by the catch all? It would be intuitive to look to Canons of statutory interpretation which may bring to a conclusion like *Congress intentionally did something and they always know what they meant to do so there would have been no need for them to carve that out if they knew they were going to be pulled back in. So, it must have meant that they were not intended to be pulled back in*. But is that the type of advice that you need to be giving your clients in hopes that you will deal with an IRS agent that understands the canons of statutory interpretation?

This is for the guy that is trying to do their return on software at their kitchen table. This is not just for the wealthy, this is everybody. How many questions are we going to have to ask to parse through these definitions? If you are a commercial tax software developer, what is your Q&A decision tree going to look like?

Alan: Amazing. Do you think these companies will break off their billing, break off their accounts receivable collection, and pay a reasonable management fee? You are going to have a bunch of small businesses trying to do that and the statute does not say you cannot do it.

David: But what is the end game (cue Taylor Swift)?

Alan: The end game is that 10% of your net profits ends up in a separate company that could maybe take a 20% deduction.

David: Well, sure, so it is basically [earnings] stripping.

Alan: Yes.

David: Just like self-charged rent and self-charged interest you have stripped out in order to reduce self-employment tax. We gave that away in the NIIT regulations, so it is not subject to net investment income nor self-employment, so it is a good stripper. So you are doing [the same thing] over here, and I am not sure that there is ability in the statute for the IRS to really combat a lot of this.

There is specific guidance, which one might say, would lend itself to what someone may call "legislative regulation writing" that gives the IRS the ability to carry out the purposes of this section for restricting allocation of items and wages [and] stop the splitting off of management fees and the application of this section in tiered entities. So maybe there is something there that they could stop but it requires regulations. There is nothing wrong with it until Regulations are issued that says that it is bad.

So query, how long will it take for Regulations to be issued and when will they be effective? That gets you into Section 7805. Section 7805(b) talks about retroactivity of Regulations. If they can issue Regulations within 18 months of the effective date of a law then they can be retroactive to January 1. Query whether that can actually happen? So like I said, it is going to be a tumultuous year.

Alan: Let's talk more about restructuring to allow more partners or S corporation owners to spread the income to have more of it fall below the $315,000, $157,500 thresholds to allow the 20% deduction to apply to listed businesses or trades and businesses where there are not enough wages or qualified property present to otherwise allow the deduction.

For example, is there anything to prevent a C corporation from funding an irrevocable trust for one or more shareholders by consent and direction of the shareholders, and for that complex trust to own and operate a trade or business or invest in a partnership entity that owns and operates a trade or business in order to have the full 20% deduction on the first $157,500 of net income, or on more income if the wage or wage plus qualified property at 2.5% tests are met and it is not a "listed" activity?

David: Well, I am not sure that anything prevents it per se, but I am not terribly sure in what situation this would make sense. If a corporation creates a trust for shareholders, it would likely be considered a deemed dividend of property to the shareholder – so there's a 23.8% dividend tax potential and there would be a 311(b) gain at the entity level. The trust might end up a grantor trust to the shareholders by reason of 1.671-2(e)(4).

But let me take that concept a step further. Imagine that you and I are partners in a specified service business – a law firm for example. Assuming that state law allows, is there anything to prevent me from taking my 50% and putting part of my interest into a complex trust to make the threshold of $157,500 available to the trust? How about going even further. I fund one complex trust for my son and one for my daughter. Now I have two $157,500 limits to work with. But could I do better?

What about this – I take my 50% in the law firm, create an S corporation, and put 25% of the firm in it. I then create a complex trust for my son and another for my daughter. I put 50% of the S stock in the trust for each child, and then put 12.5% of the firm in each trust. The complex trusts make ESBT (Electing Small Business Trust) elections. Now, do I have four $157,500 limits to work with on the theory that each side of an ESBT is a separate trust? Even if this does work, I have many collateral issues to deal with like (1) can trusts be an owner of a law firm under state law, (2) would the tax rates in the trusts be higher than for me, (3) we have the NIIT (Medicare tax) issue, if the trust does not materially participate in the practice, (4) do I have a taxable gift if the client is concerned with estate and gift taxes, and (5) will the entire arrangement be respected under Sections 704(e) if a partnership, or 1366(e) if an S corporation? That's an awful lot of brain damage to go through to get a 20% deduction when the provision is only on the books between 2018 and 2025, and at most, you may be saving just a little more than 20% of 37% of $157,000 per trust, which is $11,655 per year.

Alan: Agreed, but if this is to complex trusts that retain $157,500 of income and distribute the rest out to taxpayers who are also under the $157,500 of income then the savings can be multiple times that, and if this reduces the parent's or grandparent's income to below the $315,000/ $157,000 taxable level there is much more family income tax savings, not to mention other planning objectives that can be met through these types of structures.

David: Yes, but so are some of the expenses and formalities for the family to go through. But if there are other good reasons for the arrangement, it may make good sense. This is a good opportunity to look at all client needs to see what makes sense globally in each situation.

Alan: Any other big surprises that come to mind or big realizations that you came to this week?

David: Based on my experience over the last few weeks, the people that are most upset are the ones who have the business losses that are limited, mostly real estate professionals, startups, and oil and gas people. Real estate professionals that are chronic NOL taxpayers, or start up people, or people that have certain businesses that always run at a loss. Think about hedge funds, where a lot of the people run the management company at a loss because they W-2 bonus their traders. But then they make it up in interest, dividends or gains from their carried interest. Well, this $500,000 or $250,000 loss limit may limit the loss coming out of the management company to $250,000 or $500,000. Whereas, in the past, they have been allowed to kind of offset their interest dividends and just call it a day. Real estate folk are facing the same situation. So if you are used to having a good amount of interest, dividends and wages, but you are also a real estate professional and you have a giant Schedule E loss every year because of bonus depreciation, you have not been too accustomed to paying tax. But when you combine this $500,000 loss limit with the 80% NOL limit, now all of a sudden you are guaranteeing that just about everyone is going to be a tax-payer. When I say a tax-payer, I mean tax paying person.

So we have seen people that the $500,000 limit may change their liability by $15,000,000-$25,000,000. It is that big of a deal. And it came out of nowhere. If you had a $700,000 loss, $500,000 would be allowed, $200,000 would transform into an NOL to be used next year, subject to the 80% taxable income limitation. So maybe it is only a one year thing, but it looks like a budget gimmick.

Alan: Any other issues with trusts or estates that you've seen or heard about?

David: I worry about how all of this is going to work for trusts. Everyone is talking about the 20% deduction and the W-2 limit, but there is also another limit. The overall deduction is also limited to 20% of ordinary income. It actually says 20% of the taxable income over net capital gain. Will each side of an ESBT do separate taxable income calcs?

Or think of a CRT. Imagine that you have a CRT with $10,000 of ordinary REIT dividends. You'd think that we have a $2,000 deduction. But the problem is that CRTs do not calculate taxable income. See for yourself, look at the Form 5227 and try to find taxable income. It doesn't exist. How are you going to literally apply this provision?

We were just kicking around the loss limitation rule, how is this going to work for trusts? Does each side of an ESBT get $250,000? What about a CRT? In theory, a CRT can own business assets such as real estate that produce losses but don't create a UBIT problem. But CRTs can't have NOLs because a net loss in the ordinary income category just rolls forward – so do CRTs just ignore this provision? The real head scratchers always seems to involve CRTs.

Alan: So what areas are you going to specialize in? Are you going to start writing on 199A or where are you going to be?

David: As an individual tax guy, we need to know everything. There will be time for specialization next year.

For the time being, I am just strapping on a helmet and preparing to get smacked around for the next year or so.

Alan: I am sure that most of our readers can identify with this completely.

David: For me, I started getting people up to speed on the 469 trades or businesses, the 1202 definitions, looking at other areas of the Code and the international provisions. It is possible that people are going to need to know that, especially, look at you guys down in South Florida, you have a lot of Latin American people that might have CFCs that have never had a problem because they are operating companies back in their home countries. They are going to have this massive inflow of deemed income due to the repatriation tax. Did you realize that the massive in-flow happens on December 31, 2017, which means that their fourth quarter estimates are due on the 16th and that they might be underpaid? You see, even if you have a deemed income inclusion on December 31, 2017, individuals have the ability to defer the tax over eight years. If the repat income is through an S corporation, you can defer almost indefinitely. However, folks need to appreciate that the deferral does not defer the NIIT.

Alan: As you know, we have a lot of estate planners in LISI that read these letters. Does anything in particular come to mind as a "gotcha" or planning opportunity in this area?

David: For one thing, there is a provision for S corporations that makes death an acceleration event of the deferred tax under new Section 965(i). . If it does accelerate, it is on the decedent's final 1040 or on the estate's form 1041? I think it should be a liability for 706 purposes. But there is a mechanism that can defer the acceleration if the successor agrees to assume the liability. How is that going to work? Does the estate need to accept it, what if it is in a rev trust that simply turns non-grantor at death? Does that change it if a 645 election is made or is not? Does my will/trust need to require the fiduciary to make the election to accept the deferred tax to protect them from liability? Does a transfer include a testamentary trust that makes an ESBT election? In theory, the trust splits and the new

S portion is created as a new trust. That same issue with QSSTs, except the beneficiary becomes the owner. Are these transfers that cause acceleration? But if the QSST beneficiary signs the consent, has he or she accepted a liability that was of the trust? Is that some kind of taxable sale for the trust? And while we're in this morass, is the assumption of the liability to pay the deferred tax a deemed contribution to the trust by the QSST beneficiary and will that impact my GST inclusion ratio? Good gosh man, this is going to give me a stroke.

That is just a quick example of a situation where the learning curve is more akin to a brick wall. As people and the IRS are unpacking it. I think everybody just needs to be patient and learn and just be able to be comfortable with not knowing.

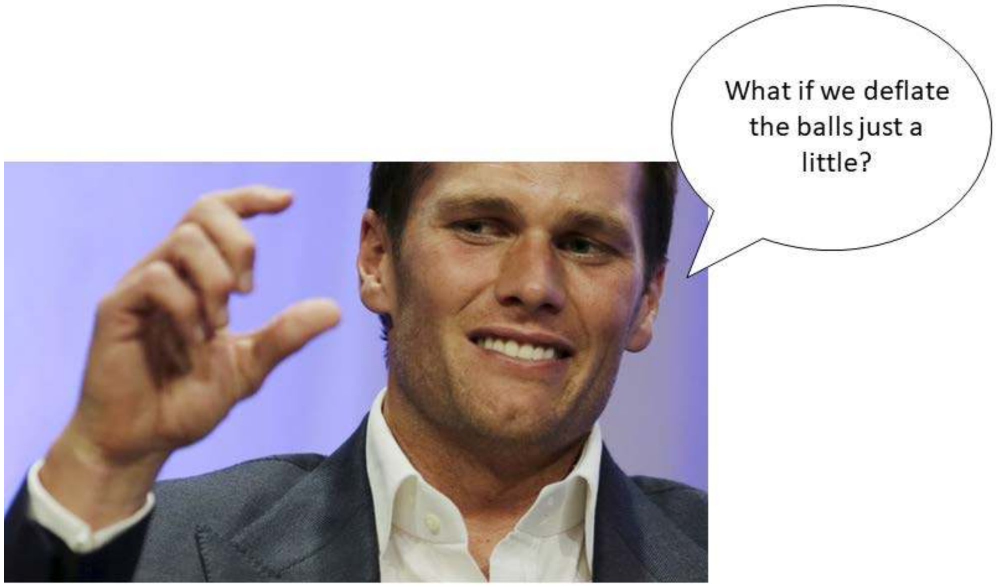
Alan: Yeah, wow that is a great quote.

David: So, I guess I should probably just stop at that then because I don't know how much longer I can go without swearing. And my head hurts.

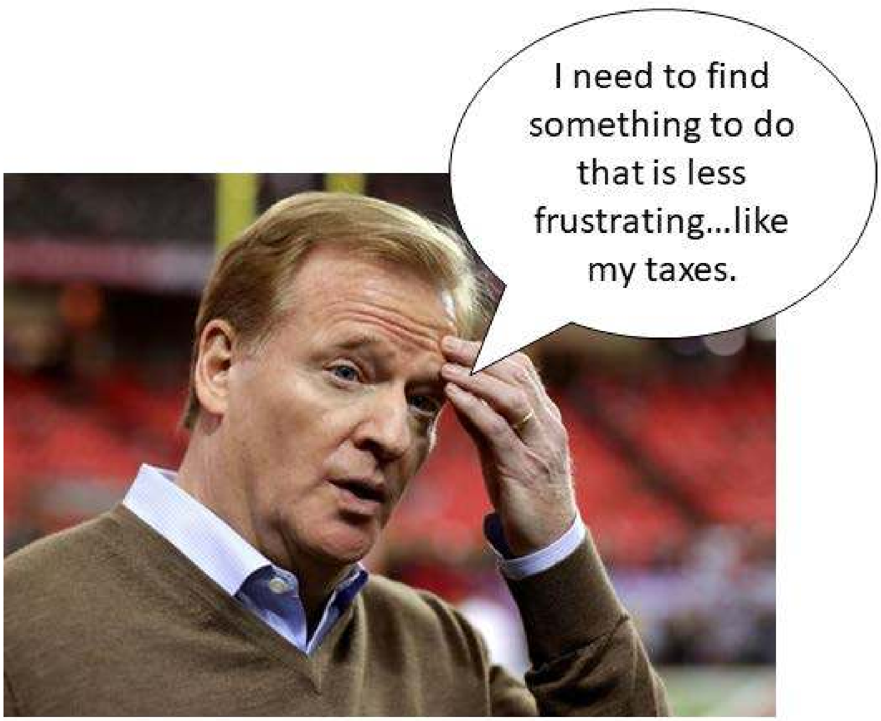
Alan: David, thanks so much for making yourself available for this interview. And final words?

David: There are going to be a lot of issues! I often joke with people, I think this is going to end up being like a land war in Asia, it will take 10 years and no one is going to know how it ends. I'll be there doing my best to help taxpayers and advisors to navigate the unpredictable deltas and pathways the best we can. At least we will not run out of situations to analyze and improve given the nature of the tax code, people and businesses.

You know, if you look up the word reform in the dictionary, it says something like *to change to a better state* or *improve by alteration.* I'm just not convinced that we actually have tax reform by that definition. I see this as a marketing gimmick. But I can't really come up with anything more fitting that doesn't involve a four letter word, so I guess I just need to accept it and move on. Thanks for hearing me out, maybe I can skip therapy this week.



Patriots QB, Tom Brady



NFL Commissioner, Roger Goodell

5 Simple Steps to Start the Year Off with a Bang

by David Finkel

Are you ready to start 2018 off strong with your company? Here is a simple five step process to create a powerful plan to grow your company.

Step One: Review your victories and key lessons from the prior year.

Growing your company takes effort and work, and noticing and celebrating the progress you've made is one form of fuel that keeps you and your team inspired and producing at your best. That's why the first step of planning out your year is to do a quick review of the progress you've made over the prior 12 months.

What were your accomplishments? What progress has your company made?

For example, one company we coach increased its pre-tax profit by more than $650,000. Another owner of an outdoor advertising company had been taking calls at 4 a.m. in morning to answer questions for his two field crews. His victory was successfully training his staff and building the internal systems so his crews could do their work without the 4 a.m. calls.

Now that you've articulated your company's biggest victories, determine your company's two or three most valuable lessons learned in last 12 months, including how you'll apply those lessons to improve your company in the future. Don't settle for cliché answers such as "people matter" or "be more careful whom you hire." Instead, decide what you will specifically do going forward. For example, in being careful who you hire, you might create an ideal candidate profile or invest a few hundred dollars in personality testing to improve your hiring choices. Also, resolve to take extra time to clarify your own role so you'll make a solid selection.

Step Two: Gather the facts and objectively evaluate your company's performance over the past year.

What targets did you set a year ago and where did the company end up in relation to them? What were your targets for sales and gross profit? What did you target for pretax operating costs? Number of new customers? Etc.

What insights pop out based on these data points? You might have set the goal of hiring two people, which you did, but while two came on board, one left. That's why it's important to lay out all the facts. They are the raw materials from which you'll build your action plan for the coming year.

Step Three: Conduct a "Gap Analysis".

What is the company you are trying to build over the next 3-5 years. What will be the gross revenue? Gross profit? New locations? Number of total clients? Etc. These represent quantitative measures.

Also consider qualitative measures--your company's brand, reputation in marketplace, quality of your teams and more.

Finally, as you look ahead 3-5 years, define what role you want to be playing for your company.

Now line up where you stand today relative to these future goals and objectives -- quantitative, qualitative, and your role.

Once you've identified "the gap" based on various measures, then plan how you'll shrink that gap as a company. This will get built into your company plan for the year.

Step 4: Determine your #1 limiting factor to growth.

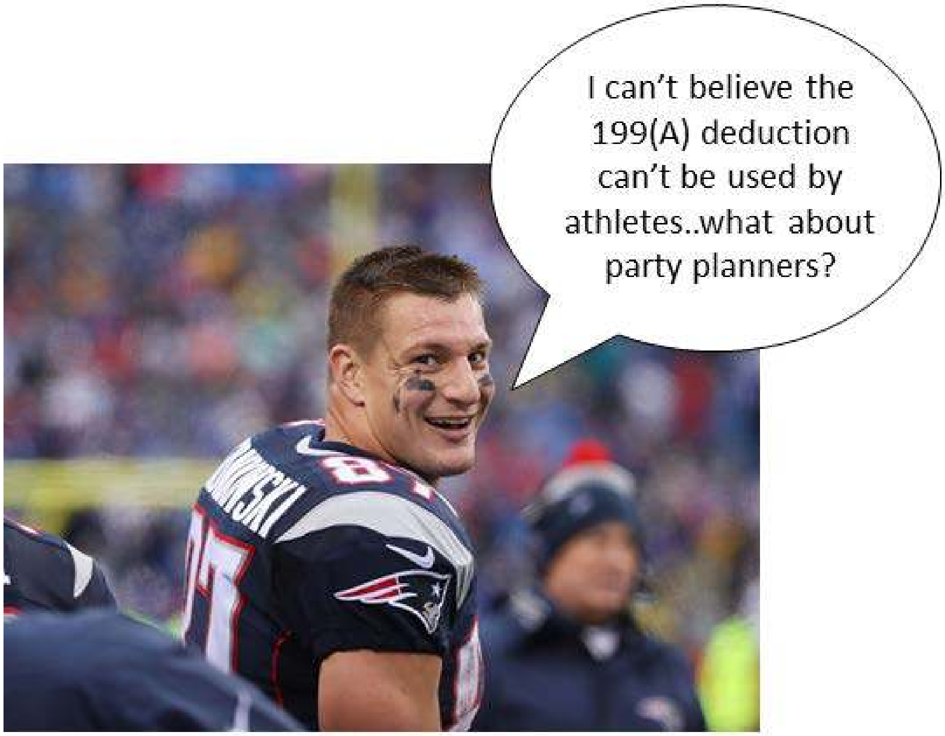
Naturally following from the gap analysis is addressing your company's number one limiting factor to growth. What slows you down from effectively closing the gap? Does your marketing team need to generate more leads? Do you have an operations challenge? A staffing challenge? Brainstorm the answer to this question: What one ingredient, if you only had more of, would do the most to help your company grow?

Step Five: Create a one-page action plan for the next 90 days.

Your challenge is to turn these four areas into a one-page action plan that will guide your company. If you've been active with us over the years, you know we've been adamant about creating a one-page 90-day plan of action every quarter. It's one global way to take in the whole plan in one view.

Your action plan answers these questions: What are the most important two or three focus areas for your company over the next 90 days? What are the stated criteria for success in these areas? What are the five or six milestones that will lead to that success? Of course, your plan isn't complete until you detail who owns each step and by when.

By following all five of these steps you'll start the year off focused on those fewer things that will make a dramatic difference to help you grow and succeed.



Patriots Tight End, Rob Gronkowski

Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from Wealth Management reports:

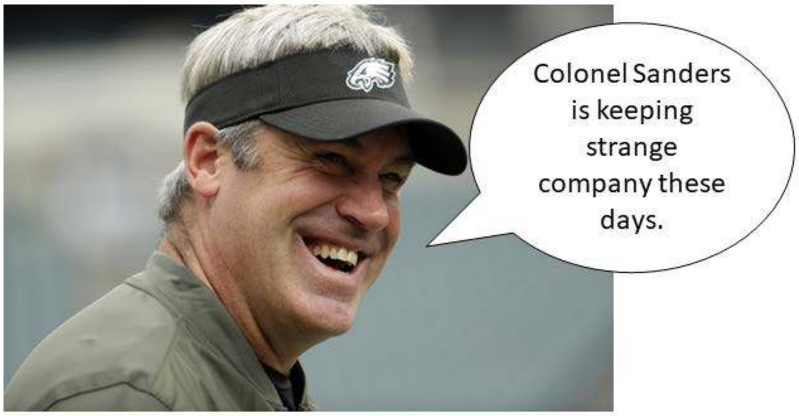
During his presentation at the Heckerling Institute on Estate Planning on Tuesday, S. Andrew Pharies, partner at DLA Piper in San Diego, advised attendees to identify high risk cases at the outset of any potential representation. "There are clues to look out for," Andrew warned. "A client who wants to disinherit a beneficiary, who wants unequal distributions among people of the same class, who has multiple marriages and children from different spouses and especially, a client who leaves a long-term advisor—these are big red flags."

The most important question you'll ask yourself in a high risk situation is, "Should I take the case?" These high risk cases become the "notorious" cases and bring with them a high risk of being fired. Moreover, there's a high likelihood that litigators will closely scrutinize your work product. Should you decide to take on a difficult case, go into it with your eyes wide open.

"Begin with the end in mind," advises Andrew, which means that in the end, you want to ensure that a court upholds the validity of the documents you drafted. Ask yourself, "What do I need to do during this case to make this end a reality?" You have the power to "create" the case and make sure that your documents will withstand a challenge.

To View the Full Article Click Here

Colonel Sanders and Alice Cooper



Eagles Coach, Doug Pederson

When the Unthinkable Happens – Constructing a Cancer Plan

by Martin Shenkman

1 in 2 men will develop cancer, and 1 in 3 women will develop cancer. More than 15 million people living in the U.S. today have had cancer. By 2026, the number will be more than 20 million cancer survivors. Planning after receiving a diagnosis of cancer is not a theoretical exercise but a reality. With cancer so prevalent, you will likely have a loved one or colleague affected, or you yourself will be. Following are some points to consider.

√ What cancer diagnosis do you have? What stage? Is it advanced? Is it localized?

√ Speak with your treating team on an ongoing basis to determine treatment plan options, risks of treatment, and to obtain a sense of the prognosis. If you are too ill or uncomfortable to have these conversations and communicate them to your advisers either have a family member or friend attend these meetings with you, or designate someone who has had a longterm relationship with you to have these conversations directly with your physician. Provide the requisite legal documentation (e.g. a HIPAA release) to facilitate this.

√ Consider the varied impact a cancer diagnosis might have. The emotional impact can be dramatic and may make it difficult to consider vital planning steps. This is particularly problematic because the most important time to plan may be at the point of diagnoses. It may become more difficult, because of the side effects of treatment, or lack of time, if you wait.

√ Will your health insurance cover most or only some of the costs? Some treatments are so costly that the phrase "financial toxicity" has been used to describe the consequences. What non-covered treatments might you need or want? How will they be paid for? Might other family members assist? If so to what degree? Your palliative care team should have discussions with you about financial issues.

√ Who will assist you with the many forms, insurance submissions, and other documentation?

√ Can you afford a care manager to coordinate your care plan with medical providers, and to interface with caregivers? How will your loved ones react to a care manager?

√ Will cancer impact your ability to function? Will it impact your ability to work and if so for how long and to what extent? How might that affect you financially?

√Review health insurance options. Is there a cap on overall coverage? What are the deductibles? Exclusions? Employer coverage tends to be more generous than private policies – do you have and can you maintain an employer plan? What type of coverage exists? Is there an HR department or designated person at the employer that can provide information? What if your job is lost? Are there out-of-pocket limits, and what are they? Drug costs vary greatly. What types of drugs, treatments and care will be required by your diagnosis? What will insurance cover?

√Review life insurance policies. If you have term insurance can you convert it to a permanent coverage if advisable? If you might have cash flow issues can you borrow on, or sell, permanent policies?

√ What's the anticipated impact on your life expectancy? However difficult to address, it is vital to do so. For example, pancreatic cancer generally has short term survival, sometimes less than a year. This often presents with advanced disease so the time for planning may be quite limited. Sometimes it is not just the diagnosis but the age or general health of the patient. For example, ovarian cancer in older women may be aggressive and limit planning. Many of these patients cannot tolerate chemotherapy as well as younger patients. The balance can quickly tip from being functional physically and mentally to not. Toxicity of chemotherapy in older patients could put them into a tailspin and they do not respond like a younger person may. Lung cancer in older patients usually presents with advanced disease and often has less than one year survival.

√ Review, revise and update all your estate planning documents as soon as possible. It may prove helpful to have current documents in place. There are ongoing changes in law affecting every aspect of planning and every document, not just the tax law changes that garner the headlines. There is also a practical issue, even if you are changing nothing, resigning documents with a current date to replace documents that are old will make those vital documents more readily accepted. While there is no legal reason a decade old health proxy or power is not valid, third parties often respond more quickly to documents that are more current.

For more information, call Tara Lembright of the American Cancer Society at 888-227-6446 x 4550 or email tara.lembright@cancer.org.

Patriots Coach, Bill Belichick

New Release of Gassman & Markham on Florida and Federal Asset Protection Law

In recognition of this year's 42nd Annual Alexander L. Paskay Memorial Bankruptcy Seminar in Tampa, Florida, we released a new much improved special edition of Gassman & Markham on Florida and Federal Asset Protection Law, and received praise from hundreds (well, a couple) of bankruptcy lawyers who attended the conference and received this 406 page book.

The book will be on Amazon within two weeks, and has a number of updated charts and information.

Check out our EstateView 11.2.

EstateView Estate Tax Planning software is now better than ever.

We released our version 11.2, which Thursday Report readers can try for free for ten days by requesting a copy **CLICK HERE.**

EstateView now shows an $11,200,000 estate tax exemption, which may be reduced to one-half on January 1, 2026 and thereafter, if you wish.

By a click of one button, the difference between the $11,200,000 exemption and one-half of that in 2026 can be shown, and the click of another button shows what happens with or without the portability allowance.

EstateView software instantly shows what would happen if the couple dies immediately, or based upon dates set by the user, both with and without planning for annual gifting, discounted annual gifting, life insurance trusts, and installment sales.

Try it - you'll like it!
For tax planning professionals.

EstateView also writes a letter to the client using all of the assumptions and planning scenarios. It takes five seconds for this letter to be created as a Word document.

EstateView Software - Showing clients how the estate tax system works, and how it applies to their situation.

This week's Thursday Report special - one year subscription $399.

Special thanks to Professor Jerry Hesch and David Archer, MBA for their dedication to this project.

CLICK HERE to see our introductory and instructional video.

CLICK HERE to see a typical client explanation letter.

Humor! (Or lack thereof!)

In the news with Ron Ross

ALOHA! YOU ARE NOW AUTHORIZED TO RUN HAWAII'S ALERT SYSTEM. PUSH THE BUTTON BELOW TO SEND OUT THE FOLLOWING ALERTS:

#1 Amber Alert

#2 Silver Alert

#3 Guy wearing Orange with Green and Purple alert

#4 Elvis alert

#5 Someone about to say "Book 'em Danno" alert

#6 Ballistic missile alert

#7 "Stitch", the Hawaii alert office cat, has-wandered-across-the-keyboard-setting-off-one-of-the alerts alert

All-Time great football quotes and jokes:

"Most football players are temperamental. That's 90% temper and 10% mental" – Doug Plank

"Sure, luck means a lot in football. Not having a good quarterback is bad luck." – Don Shula

"If the Super Bowl is really the ultimate game, why do they play it again next year?" – Duane Thomas

"We're going to start with the injury report, obviously. Manning, Clark, Addai, Reggie Wayne, Freeney, Mathis, Brackett — all those guys will not play. Oh, hold up. That was my wish list for Santa Claus." – Rex Ryan

"It's like my ex-wife. 21 different personalities and seven of them hated me." – Jack Rose

"Well, we've determined that we can't win at home and we can't win on the road. What we need is a neutral site." – John Mc Kay

"The only way to stop Jim Brown was to give him a movie contract" – Spider Lockhart

Upcoming Seminars and Webinars

Calendar of Events

Newly announced events are shown in RED

FICPA-Sandspur

Monday, February 19, 6:00 PM—8:00 PM

2501 Fowler Ave, Tampa, FL 33612

Alan will be presenting

"Trusts from A to Z" & "Demystifying the New 199(A) Deduction"

(6:00 PM—7:00 PM) (7:00 PM—8:00 PM)

The 199(A) deduction for pass through entities can be confusing. Alan and his team have spent countless hours digging through the new tax law to help demystify the new rules and show you how to avoid common pitfalls as well as helping decide what structure is best for your clients.

Clearwater Bar Small Firm Section

Friday, February 23, 12:00 PM—1:00 PM

2680 Gulf to Bay Blvd, Clearwater, FL 33759

Alan will be presenting **"Hiring a Rock Star Employee on Your Budget"**

Any firm is only a strong as its employees. Even the best minds need help to be successful. Alan will show you how to get the best possible people on your budget to help ensure your firm's success regardless of size.

Contact Agassman@gassmanpa.com for more information on either of these educational events.

Leimberg Information Services Webinar Presentations

199A CHALLENGES AND STRATEGIES--A DEEPER DIVE

Thursday, February 22nd, 2018, 3:00 P.M.—4:00 P.M.

Please join Alan Gassman and Martin Shenkman for this advanced level presentation on some of the most important components of Section 199A planning, and related consideration which go beyond the basic provisions and planning aspects of this new statute.

Items covered will include Wage and Employee Leasing and Common Paymaster Planning, Depreciation and Qualified Property Planning, What Is A Trade or Business, Segregation of Businesses Under Related Entities, Transfer Pricing Rules, Qualified Plan Considerations, Employment Tax Planning, Complex and ESBT Trust Planning and More.

OLD TRUSTS, NEW TRICKS. NEW TRUST, ESTATE AND TAX PLANNING STRATEGIES AFTER TAX REFORM

Thursday, March 22nd, 2018, 3:00 P.M.—4:00 P.M. EST

The new tax laws change not only the playing field and strategies that will apply to estate and trust clients who are not super wealthy, but also several key trust planning rules and the tax laws, metrics planning wisdom that will apply to Electing Small Business Trusts, Complex Trusts, Charitable Lead Annuity Trusts, Homestead Trust Planning and a host of other considerations beyond what the next tax law says.

Join Marty and Alan for this interesting and useful discussion of what to do with present structures that may no longer be needed, and how to adapt existing arrangements and client situations to new opportunities and traps for the unwary that must be considered.

This presentation will assume that the viewer is generally familiar with the new tax law, and wishes to make planning opportunities and appropriate adjustments available to colleagues and clients. Over 20 useful and client friendly charts and key clauses will be included.

To Register for either of these presentations, click HERE

Martin Shenkman

Elvis has not left the building

Alan Gassman

There are no professional advancement credits (CPE, CLE, etc.) offered for viewing this webinars.

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
5th Annual Estate Planning Symposium	Tuesday, February 6th, 2018	University of Miami	Sponsored by The Estate Planning Council of Greater Miami Asset Protection for Business Owners and Their Entities	Contact: Agassman@gassmanpa.com	
All Children's Conference	Thursday, February 8, 2018	701 4th St S St. Petersburg, FL 33701	Alan is on the planning committee and welcomes you to attend.	Contact: Agassman@gassmanpa.com	Click Here
Representing the Physician Seminar	Friday, February 16, 2018	Embassy Suites-1100 SE 17th St, Ft. Lauderdale, FL	Dentists are Different - Practical, Business, Regulatory and Common Forms and Language Used in the Representation of Dentists and Dental Practices	Contact: Agassman@gassmanpa.com	
FICPA-Sandspur	Monday, February 19, 2018	TGIFriday's -2501 East Fowler Avenue Tampa	"Trusts from A to Z" & "De-mystifying the New 199(A) Deduction"	Contact: Agassman@gassmanpa.com	Click Here
Leimberg Services Webinar with Marty Shenkman	Thursday, February 22, 3:00 PM – 4:00 PM	Gotowebinar.com	199A CHALLENGES AND STRATEGIES--A DEEPER DIVE	Click Here	Click Here
Clearwater Bar Small Firm Section	Friday, February 23, 12Pm – 1PM	Carrabba's 2680 Gulf to Bay Blvd, Clearwater, FL 33759	"Hiring a Rockstar Employee in Your Budget"	Contact: Agassman@gassmanpa.com	Click Here
Webinar with Jasmine Alexander	Thursday, March 8, 2018	Gotowebinar.com	"How to Motivate Your Clients to Organize Their Information"	Contact: Agassman@gassmanpa.com	
Ethics Webinar with Joe Corsmeier	Friday, March 9, 2018, 12:00 PM – 1:00 PM	Gotowebinar.com	Recent Ethical Decisions That Impact Florida Lawyers	Contact: Agassman@gassmanpa.com	Click Here
Leimberg Services Webinar with Marty Shenkman	Thursday, March 22, 3:00 PM – 4:00 PM	Gotowebinar.com	OLD TRUSTS, NEW TRICKS. NEW TRUST, ESTATE AND TAX PLANNING	Click Here	Click Here

			STRATEGIES AFTER TAX REFORM		
Professional Acceleration Workshop	Friday, April 6, 2018. 11AM-5PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Contact: Agassman@gassmanpa.com	Click Here
Ave Maria Estate Planning Conference-With Jonathan Gopman	Friday, April 27, 2018	Ritz Carlton Beach Resort-Naples, FL	"Asset Protection for the Everyday Estate Planning Lawyer: a nuts to bolts review of asset protection techniques from simple to complex"- **presented by Alan and Jonathan Gopman.**	Contact: Agassman@gassmanpa.com	Click Here
Florida Bar Annual Wealth Protection Conference	Friday, May 4, 2018	Tampa Airport Marriott	Creditor Protection Planning for Business and Investment Entities and Their Owners - Including 7 Strategies you Didn't Know About	Contact: Agassman@gassmanpa.com	
2018 MER Continuing Education Program Talks For Physicians	May 17-18, 2018	Nassau, Bahamas - Atlantis Paradise Island Resort	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	
Maui Mastermind Conference	June 15, 2018	1001 N Westshore Blvd, Tampa, FL 33607	Business Law for Business Owners and Investment Related Laws you Need to Know About	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	Thursday, July 5-7, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Agassman@gassmanpa.com	
Florida Osteopathic Medical Association Conference	September 13-16, 2018	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	

Notre Dame Tax Institute	October 11-12, 2018	South Bend Indiana	Tax and Estate Planning Institute	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	

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[i] Sandra D. Glazier, Esq. is a partner with the law firm of Lipson Neilson P.C., practicing out of its Bloomfield Hills, MI office.

[ii] Martin M. Shenkman, CPA, MBA, PFS, AEP (distinguished), JD, is an attorney in private practice in Fort Lee, New Jersey and New York City, New York.

[iii] Alan Gassman, Esq. is a partner with the law firm of Gassman, Crotty & Denicolo, P.A, in Clearwater, Florida.

[4] Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes, updated through August 2017, Edited by David G. Shaftel, www.actec.org/assets/.../Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust.

[v] Eleventh Annual ACTEC Comparison of the Domestic Asset Protection Trust Statutes, updated through August 2017, Edited by David G. Shaftel, supra.

[vi] *Ibid.*

[vii] *See In re Huber,* 493 B.R. 798 (W.D. Wash, 5/17/2013).

[viii] *In re Huber, ibid.*

"[ix]Specifically, pursuant to RCW 19.36.020, transfers made to self-settled trusts are void as against existing or future creditors. Carroll v. Carroll, 18 Wash.2d 171, 175, 138 P.2d 653 (1943)." *In re Huber, ibid* at 809.

[x]

[xi]Restatement (Second) of Conflict of Laws, §270(a) (1971).

[xii] *In re Huber, supra* at 807-808.

[xiii] *In re Huber, ibid* at 808, internal citations omitted.

[xiv] *Dahl v. Dahl,* --- P.3d ----2015 WL 5098249, 794 Utah Adv. Rep. 5, 2015 UT 79 (8/27/2015).

[xv] In *Dahl, Ibid* at *5, the court held that '[u]nder Utah choice-of-law rules, we will generally enforce a choice-of-law provision contained in a trust document, unless doing so would undermine a strong public policy of the State of Utah. See UTAH CODE § 75–7–107 & cmt."

[xvi] *Ibid* at *6.

[xvii] *Branch Banking & Trust Co. v. Hamilton Greens, LLC*, 2014 WL 1493086 (S.D. Fla. Mar. 24, 2014). Full Opinion at http://goo.gl/2Ca9bw; *See TrustCo Bank v. Mathews*, 2015 WL 295373 (Del. Ch., Jan. 22, 2015).

[xviii] "2017 Steve Oshins Releases 8th Annual Domestic Asset Protection Trust State Rankings Chart...with a Huge Surprise!" Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #342, April 24, 2017.

[xix] An article that details the state-by-state requirements for affidavits appears in Alan Gassman & Dena Daniels, *The Affability of Affidavits in Domestic Asset Protection Trust Planning,* Steve Leimberg's Asset Protection Palnning Email Newsletter – Archive Message #293.

[xx] For decades, it was assumed that the transfer of assets to a DAPT might be an incomplete gift. However, the IRS has held in PLR 9837007 and PLR 200944002 that transfers to a DAPT could be completed gifts for gift tax purposes. *See*, CCA 201208026 and Steve Leimberg's Asset Protection Planning Newsletter #287 by Alan Gassman, Leslie Share, Ken Crotty and Kacie Hohnadell.

Battley v. Mortensen, 2011 WL 5025249 (Bankr. D.C. Alaska 5/26/2011), motion for reconsideration denied.2011 WL 5025252 (Bankr, D.C. Alaska 7/8/2011) essentially represented the first Alaska case addressing its DAPT statute. This case reminds us that state statutes do not pre-empt federal statutes. Here §548(3) of the Bankruptcy Code essentially imposed a 10-year SOL with regard to fraudulent transfers made to a self-settled trust. To establish an avoidable transfer under § 548(e), the trustee must show that the debtor made the transfer with the actual intent to hinder, delay and defraud present or future creditors by a preponderance of the evidence.54 Here, the trust's express purpose was to hinder, delay and defraud present and future creditors. However, there is additional evidence which demonstrates that Mortensen's transfer of the Seldovia property to the trust was made with the intent to hinder, delay and defraud present and future creditors.

In another case, *TrustCo Bank v. Matthews*, 2015 WL 295373 (Del. Ch. 1/22/2015), the court conducted (but did not conclude) its choice of laws analysis, finding that the statute of limitations under both New York and Delaware law barred the banks attempt to void transfers to three Delaware DAPTs by the debtor in a collection action relating to financing of projects in Florida. Here the grantor of the DAPTs was a New York and then Florida resident, the DAPTs were funded after the debt in question was incurred, but disclosed to the creditor more than 2 years before the collection action.

But, it may be important to note that *In re Reuter,* 499 B.R. 655, 678 (Bankr. W.D. Mo 2013) the bankruptcy court upheld the protections of the Missouri DAPT and found the assets of a DAPT not to be property of the bankruptcy estate, where there was no claim that the transfers to the DAPT constituted an attempt to hinder the rights of creditors such that they constituted a fraudulent conveyance[xxii] *See* MCL 700.1045(a) & (b)(i)-(ii).

[xxiii] *See* Michigan statue MCL 700.1045(4)(b)(i; Alaska statute § 34.40.110(l); and, South Dakota statute § 55-16-15(2).

[xxiv] *See Allard v. Allard*, 318 Mich App 583 (2017) ("*Allard* III").

[xxv] *See Wright v Wright*, 279 Mich App 291, 761 NW2d 443 (4/22/2008; and, *Cheff v Cheff,* unpublished Mich App per curium decision no. 300231, (4/24/2012).