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THE THURSDAY REPORT

Issue # 260 Thursday, February 7, 2019

Re: The Valen-Thurs-Day Report

In This Issue:

We welcome contributions for future Thursday Report topics. If you are interested in making a contribution as a guest writer, please email Alan at agassman@gassmanpa.com

Quote of the Week

If I had a flower for every time I thought of you … I could walk through my garden forever.

– Alfred Tennyson

Editiors Note: If “you” was the tax code, we would have the largest garden known to man!

Fifth Third Bank V. Morales by Jay Adkisson

Leimberg Information Services, Inc.

Steve Leimberg's Asset Protection Planning
Email Newsletter Archive Message #379

Date:04-Feb-19

Subject: Jay Adkisson on *Fifth Third Bank v. Morales*

"It has long (measured literally in centuries) been fundamental within fraudulent transfer law that the concept of value is to be measured from the standpoint of creditors. If there is a substitution of assets, then the substitution should not have a deleterious effect on the value of the debtor's estate in terms of creditors' ability to collect on assets. Thus, substituting an asset that the creditor can enforce the judgment against **now** *with an asset that the creditor must wait until* **later** *to collect, is not normally going to satisfy reasonably equivalent value."*

Jay Adkisson provides members with his analysis of *Fifth Third Bank v. Morales*. As Jay notes in his commentary, *Morale*s is an opinion which was issued in December of 2017, and which has potentially very significant repercussions for some forms of asset protection planning, but which opinion has managed to escape his notice until now.

Jay Adkisson is a litigator practicing in the Southwest U.S. who represents both creditors in attacking asset protection structures and debtors, trustees and beneficiaries in defending against judgment enforcement actions. Jay is the co-author (with **Chris Riser**) of **Asset Protection: Concepts & Strategies** (McGraw-Hill 2004), and has been an ABA adviser to the drafting committees of, inter alia, the Uniform Voidable Transactions Act and the U.S.-Canadian Harmonization of Judgment Registrations Act.

Here is his commentary:

EXECUTIVE SUMMARY:

The U.S. District Court for the District of Colorado has determined that a trustee's swap of a piece of valuable real estate for a 15-year no-interest promissory note amounted to a fraudulent transfer, where the debtor/settlor/trustee had, before the transaction, suffered a judgment on a personal guarantee, and holding that the note did not provide reasonably equivalent value in exchange for the real estate as seen from the standpoint of creditors. The Court additionally found that the debtor and her daughters (transferees) had engaged in a civil conspiracy. This decision may call into question the efficacy of certain popular asset protection strategies, particularly those involving asset swaps in exchange for long-term promissory notes and like financial instruments.

FACTS:

Lucy Morales created a revocable trust in 2009 which named herself as the granter, trustee and beneficiary. Lucy transferred her property in Montrose, Colorado, to this trust. Some time later, Lucy amended the trust to name her daughters as successor trustees, and to whom all the trust assets would pass on Lucy's death.

In 2011, Fifth Third Bank (hereinafter, simply the "Bank") loaned $510,000 to two Chicago-area surgical centers with which Lucy, apparently a registered nurse, was financially involved. Lucy guaranteed the repayment of the Bank's loan.

In 2013, the loan went into default, the Bank called Lucy's guarantee, and eventually obtained a judgment in Illinois against Lucy for $607,768.10. The following year, 2014, the Bank registered and publicly recorded the judgment against Lucy in Montrose County, Colorado, and about the same time obtained an Order from the Colorado court which placed a judicial lien against Lucy's and her trust's assets, include the Montrose property.

Lucy and her daughters then came up with a transaction by which the trust (of which Lucy was still the trustee) would sell the Montrose property to the daughters in exchange for the daughters giving the trust a no-interest, 15-year Note in the amount of $395,000 -- the latter amount being about the fair market value of that property. This deal went down in December, 2015.

A couple of years later, in July, 2017, the Illinois Court entered a turnover order for the Note, *i.e.,* requiring Lucy and her daughters to turn the Note over to the Bank for collection. Meanwhile, back in Colorado, the Bank brought a fraudulent transfer action against Lucy and her daughters, contending that the "sale" of the Montrose property was simply a fraudulent transfer to keep the property out of the Bank's hands. Eventually, both sides moved for summary judgment in that Colorado action, brought in the

U.S. District Court for the District of Colorado, which resulted in the order next to be discussed.

The Court found that there was substantial evidence in the facts and circumstances surrounding the transaction (a/k/a the "Badges of Fraud") to conclude that Lucy and her daughters intended to hinder, delay or defraud the Bank, not the least being the timing of the transaction after Lucy was deep in financial difficulty and the Bank was trying to collect her assets.

Cutting to the chase, the Court spent the bulk of its opinion considering whether the Note provided "reasonably equivalent value" (known to creditor-debtor attorneys as "REV") for the Montrose property. Here, the Court noted one of the most important points of law in this area:

> Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.

Further, the statutory definition of "value" under the Uniform Fraudulent Transfer Act ("UFTA"), or, in this case, the equivalent Colorado statute ("CUFTA"), requires a determination as to whether the debtor's assets were depleted to the detriment of creditors. The goal, said the Court, is basically to weed out those transactions which have little rational purpose other than to cheat creditors.

Did the Note provide reasonably equivalent value for the Montrose property? The Court thought not:

> Here, the record indicates that the Defaulting Defendants did not receive reasonably equivalent value from the Transfer of the Montrose Property to the Defendants. At the time of the Transfer, the Montrose Property was worth between $375,000.00 and $400,000.00. Yet, the Defaulting Defendants received no funds for the Transfer. They instead received a Note with no payments due for fifteen years (when Ms. Morales would be 90 years old), no accumulating interest, and only one default provision that merely provided for the acceleration of payment. Moreover, the Note was made payable to the Trust-the assets of which would revert back to Defendants upon Ms. Morales's death. Nothing in the record suggests that Defendants assumed additional liability for Ms. Morales's outstanding loan obligation to Plaintiff or for the judicial lien

> on the property. Nor did the Transfer involve a public non-collusive sale following Colorado state procedures.

Further, the Court found that the Note constituted a "future promise to pay" which was not synonymous with a contemporary economic obligation, and so effectively there was no value at all passing *at the time of the transfer,* which is the critical point in time at which REV is measured.

Lucy and her daughters argued that the daughters' promises to maintain the Montrose property and assigning rents back to Lucy constituted REV and was sufficient consideration to support the Note transaction. The Court disagreed:

> Value is viewed from the objective standpoint of the creditor, not the debtor. Consideration having no utility or value from a creditor's vantage point may be "good" consideration supporting a valid contract, but it cannot constitute reasonably equivalent value, as a matter of law, where the exchange injures creditors' interests.

Because the Note transaction afforded no value from the viewpoint of creditors, and there were no other significant factors that indicated that the Note transaction was anything other than a scheme to cheat the Bank, the Court found that summary judgment in favor of the Bank was appropriate.

The Court also found that summary judgment in favor of the Bank and against Lucy and her daughters as to civil conspiracy was also appropriate, since under Colorado law:

> A fraudulent transfer is an unlawful act that supports a creditor's claim for conspiracy.

COMMENT:

This is the first case of which I am aware which addresses the so-called *installment note strategy* or *note-for-asset exchange strategy,* which is a widely-popular mixed estate tax planning and asset protection technique. The idea is one of swapping an asset that is expected to appreciate, or one that throws off substantial income, in exchange for a low interest rate note thus accomplishing what is known as an *estate freeze,* which is normally accomplished by making a granter-taxed trust or a beneficiary-taxed trust the counterparty to the transaction.

In English, Dad transfers away an asset that might double in value in a few years, in exchange for getting a note back that pays 3% interest or something. All the appreciation is now out of Dad's estate, except for the 3%. This is sometimes done with so-called *private annuity transactions* ("PATS") instead of notes, and also sometimes the notes are designed to terminate on the maker's death, known as *self-cancelling installment notes* ("SCINS"). Many times these transactions are designed so as to offer the flexibility of the obligee (Dad, in our example) to later gift the note or annuity stream to yet another trust, so as to attempt to protect that exposed thread from creditors and also try to take advantage of certain estate tax strategies.

From an asset protection viewpoint, there has been a swap of an asset that is immediately available to creditors for an asset that has no immediate value to creditors but has equivalent value, albeit *future* equivalent value. The idea behind this transaction was that the swap of assets -- an immediately collectable asset for a future collectable asset -- would provide reasonably equivalent value such that it would be difficult for a debtor to maintain a fraudulent transfer action. The Mora/es Court now explodes that concept, by pointing out two things.

First, it has long (measured literally in centuries) been fundamental within fraudulent transfer law that the concept of value is to be measured from the standpoint of creditors. If there is a substitution of assets, then the substitution should not have a deleterious effect on the value of the debtor's estate in terms of creditors' ability to collect on assets. Thus, substituting an asset that the creditor can enforce the judgment against ***now*** with an asset that the creditor must wait until ***later*** to collect, is not normally going to satisfy reasonably equivalent value. This is seen, among other places, in the line of cases where LLCs interests have been held not to provide reasonably equivalent value to cash and like assets, such as in *UBS Financial Services, Inc. v. Lacava,* 2018 Ohio 3055, 2018 WL 3689450 (Ohio App., Aug. 2, 2018), and *Regions Bank v. Kaplan,* 2018 WL 3954344 (M.D.Fla., Aug. 17, 2018).

Some planners would like to claim that an asset substitution by a trust can *per* se never be a fraudulent transfer, but, as this case illustrates, they're wrong (again). The salient question is not whether a fraudulent transfer claim can be brought -- it certainly can -- but whether such a claim is practically defensible by the transferee. Prior to this decision, the thinking was that it would be particularly difficult for a creditor to unwind an asset-substitution transaction, but as this opinion illustrates that might not be the case. At the very least, where (as here) the debtor is finally distressed, the odds of such a transaction surviving a fraudulent transfer claim now seems quite low.

Second, the *Morales* court points out that the element of value is to be tested in the fraudulent transfer context at that snapshot in time when the transaction occurred, and not at some future date. It simply doesn't matter, if *Morales* is to be followed, that the substituted asset has significant value to creditors in the future if the asset has no collectable value today. The only pertinent inquiry is whether value is provided at the time of the transaction; if the substituted asset has no value at that time, then the value of the asset is zero.

Of course, even a future asset may have a present value, but in the vast majority of cases that will mean a *discounted present value,* i.e., a no-interest promissory note that will pay $395,000 -- as here -- is not on paper worth $395,000 today, but some lesser present value that takes into account a variety of factors including reversing the prevailing interest rate. But for the court's purposes, the real present value of that asset is determined by its marketability, *i.e.,* what would it sell for today to the hypothetical average purchaser. If the promissory note is unsecured, then who would pay much of anything for a note from a private trust that isn't going to pay anything for 15 years?

By way of contrast, consider a publicly-traded zero-coupon bond which may have a discounted present value against its face value, but which present value is subject to immediate liquidation at that price today.

Which is to say that with fraudulent transfer generally the courts have a very strong tendency to look through and past the "paper" of a transaction and to the fundamentals of the economics of the deal. In the crucible of the courtroom, the bench officer's analysis is much less how the transaction is represented by the contracting parties to instead one where the court asks: *What is really going on here?*

In this case, what was really going on was easy to see. Lucy didn't want the Montrose property to be lost to Fifth Third Bank, and so "sold" the property through a dubious note to her daughters (statutory insiders under the UFTA -- transfers to insiders almost never succeed anyway). Without saying in so many words, the Court determined that the note was a sham and of course a sham note is never going to provide value.

Will a better transaction avoid this result? At some point, the answer is probably, but that would likely require the note to make interest payments like any other commercial note and the note to be collateralized with the Montrose property -- meaning that creditors could just take the note and credit-bid the sum of $1 or something for it, and later foreclose on the property if a payment was missed.

The conundrum for planners may be this: Is it better to have a note transaction that may be somewhat defensible against a fraudulent transfer claim but leaves the note itself exposed to creditors, or is it better to just make an outright gift of the asset and start the typically four-year extinguishment period running to possibly eliminate a later fraudulent transfer claim outright?

The biggest problem in this case, of course, is that Lucy waited far too long to attempt to pull this stunt, as pretty much anything that a financially-distressed debtor does is going to be subject to strict scrutiny. A person who has no creditors might believably argue that they had no intent to defeat creditors, but were doing their planning for other purposes, such as business or succession planning. A person who does have creditors might make the very same claim, but it is extremely likely to fall on deaf ears.

As I have written time and time again, folks who have signed personal guarantees are in a very bad situation because they have effectively pledged the totality of all their non-exempt worldly wealth to back the debt, and the courts do not countenance such debtors' attempts to belatedly take chips off the table when the cards start going against them. *Essentially,* a *personal guarantee is* a *financial noose that somebody places around their neck, and then that debtor must hope for the life of the underlying debt that the trap door doesn't spring open.*

Probably, Lucy figured that she was going to lose the property anyway, and so why not make the attempt?

If so, that was a very, very bad idea. The court's order defers until later its ruling on damages and attorney's fees, etc., and a judgment for conspiracy damages might be non-dischargeable -- in other words, Lucy through these antics might have taken an easily-dischargeable judgment and turned it into a non-dischargeable civil conspiracy judgment. Ouch.

On this point, there is a significant concern with any transaction that may be questioned as a fraudulent transfer, being that the debtor may convert otherwise dischargeable debt into non-dischargeable debt. Moreover, a fraudulent transfer also drags the transferee into the case (here, Lucy's daughters) and thus take persons who originally had no debt and essentially turn them into co-debtors for some portion of the debt, such as conspiracy damages and (in some states) punitive damages.

Those who say "there is no downside to making a fraudulent transfer since it will just be reversed", simply don't know what they are talking about. To the contrary, good planners and transactional attorneys will invest the necessary time to research that a particular deal is structured so as not to be easily susceptible to a fraudulent transfer challenge. Bad planners and amateurs will simply wing it based on what they hear other folks are doing, and then hope for the best.

By making a fraudulent transfer, one can make things worse. Much worse. It is not a cost-free gambit, but a horrendously bad idea which continues to be propagated by second-rate planners who have never themselves had to litigate the fallout.

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

Jay Adkisson

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We just read the best 199A summary that we have seen. Hat's off to Steve Akers at Bessemer Trust for all that Steve does, but this week we especially thank him for his thorough and concise summary of the many moving parts that apply to assure that clients can have the best positioning for deducting up to 20 of trade or business income.

Steve's summary starts with the following and can be viewed in its entirety on Bessimer Trust's platform by clicking HERE.

From Section 199A – Qualified Business Income Deduction Including Highlights of Final and Newly Proposed Regulations:

Practitioners have been waiting anxiously on final regulations for the Section 199A qualified business income 20% deduction. Final regulations were issued on January 18, 2019 for Sections 199A and 643(f) (regarding the multiple trust rule). Additional proposed regulations and notices were issued the same day. Corrected final regulations making a few revisions were issued on February 1, 2019, prior to the submission of the final regulations for publication in the Federal Register.

The final regulations make a number of taxpayer-friendly changes from the proposed regulations for both Section 199A and 643(f).

Notice 2019-7 also provides a safe harbor for treating certain rental real estate enterprises as trades or businesses for purposes of §199A.

What is a Public Benefit Corporation and Why Should You Care?

by Kelsey Weiss

Benefit Corporations are a type of corporation that allows a "public benefit" to be listed as the corporation's charter purpose in its governing documents. Being a benefit corporation has no effect on tax status. This distinction simply changes the charter purpose of the corporation to reflect a specific narrow function for public good.

However much good benefit corporations profess to do for the world, benefit corporations are not the same as nonprofits. Benefit corporations are still for-profit companies but with a specific purpose for public good provided in their governing documents.

In general, the directors of a corporation are legally obligated to put the financial interests of shareholders first and foremost. To provide some legal wiggle room, registering as a benefit corporation provides corporate directors and officer's legal protection to do more than just look out for the shareholders financial interests. Instead, doing so allows them to lead the corporation in pursuing a mission of public good. In other words, shareholders of a benefit corporation are unable to sue the directors/corporation for putting the public benefit listed in the charter before the financial interests of the shareholders. The distinction puts shareholders on notice that this event is likely to happen.

Directors of benefit corporations have the additional requirement of creating an annual benefit report and making the report available to the public (except in Delaware). By requiring this, the goal is to make the financials of benefit companies more transparent to not only the shareholders, but to the public as well.

Currently, thirty-four states allow for some version of benefit company incorporation and six states are in the process of passing legislation allowing them. As long as the particular state allows for benefit corporations, new companies can incorporate as a benefit corporation using specific forms provided by the state. Existing companies can become benefit corporations by amending the corporation's governing documents. The amendment filed must contain a statement that the company is a benefit corporation.

While it is not required by any state as of yet, benefit corporations can become certified by B Labs, a nonprofit company, if they so choose. Benefit corporations can become B Corp Certified by undergoing a lengthy assessment by B Labs. This certification supposedly stands out to consumers as proving that the corporation "is meeting the highest standards of verified performance." According to B Labs, the certification commits the company to consider stakeholder impact for the long term by building it into the company's legal structure.

You may be using products made by a benefit corporation and not even know it! Several well-known corporations are registered as benefit corporations and certified B Corps. For example, Ben and Jerry's not only makes delicious ice cream, but is a certified B Corp committed to taking on social issues such as voting rights and racial equality. The corporation Method is claimed to be the world's largest green cleaning company and sells its cleaning products at Target stores. Even Etsy, a tech company allowing its members to sell homemade goods on its platform, is a certified B Corp (and the first to go public). And those who enjoy libations made by New Belgium Brewing, America's fourth-largest craft brewer, can feel good knowing that New Belgium is one of the most sustainable breweries in America diverting 99.9% of its waste away from landfills.

The growing trend of corporations registering as benefit corporations is a push a right in the right direction for corporate law by allowing directors and officers of large corporations to focus on bigger social issues. These corporations are still for-profit and still create shareholder revenue and thus incentives for investment by shareholders. However, shareholders of benefit corporations know that the company they are investing in is also doing some good for the world.

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Why is the IRS Punishing Triple Net Landlords?

by Alan Gassman

"There are horrible people who, instead of solving a problem, tangle it up and make it harder to solve for anyone who wants to deal with it. Whoever does not know how to hit the nail on the head should be asked not to hit it at all." - Friedrich Nietzche

Actually the IRS is far from horrible and by our view IRS employees are saints for what they do for taxpayers with understaffing, older computers, and other significant challenges. But triple net landlords may not feel that way right now, due to a tax situation not of the IRS's making. Please write your Congressperson if you want to change this.

While the IRS as a whole is by no means "horrible," the new Final Regulations regarding Section 199A of the Internal Revenue Code must seem that way to landlords who lease property under triple net leases. The vast majority of these will not be considered to be "active trades or businesses" for purposes of qualifying for the 20% deduction that will be available to most active landlords.

Code Section 199A was introduced to the Internal Revenue Code as part of the 2017 Tax Cuts and Jobs Act with the intent of giving taxpayers some degree of parity with the 21% income tax bracket bestowed upon large and small companies that are taxed as separate entities (known to tax professionals as "C corporations". C corporations are different than "S corporations," as S corporations report their income under the "K-1" system that causes the shareholders to pay the income tax on their personal returns).

Since the term "trade or business" was not defined under Section 199A, the real estate community has been waiting for the Final Regulations which were released on Friday, January 18, and basically follow what the Proposed Regulations (released last August) said, which is that which is that passive investors are not considered to be an active trade or business, even though they take significant economic risks and may work hard to verify that the tenants pay the taxes, insurances and maintenance of the leased property, comply with applicable law and otherwise do what tenants are supposed to do.

The practical result will be that landlords will need to become active and possibly renegotiate lease terms to have at least a chance of being eligible to have the deductions that other landlords will have, or to perhaps qualify under the new safe harbor rules that allow the deduction to non triple net leases if they satisfy the 250 hour per year requirement, which requires tabulation of the work hours of landlords and agents of landlords, and certain time log and verification procedures.'

This seems very unfair since REIT (Real Estate Investment Trusts) income will often include triple net lease profits that will qualify for the Section 199A deduction, and C corporations only have to pay the 21% rate on net income from triple net leases.

Tax professionals, and masochists may enjoy or derive a better understanding by reading on.

The new Final Regulations refer to several Supreme Court cases to aide in defining what types of enterprises will qualify as a trade or business, and these cases do not bode well for landlords of triple net leases. For example, the Final Regulations cite to the Supreme Court's 1987 landmark "trade or business" case, Commissioner v. Groetzinger, which held that to be engaged in a trade or business the following two requirements must be met:

1. The taxpayer's involvement must be continuous and regular; and

2. The primary purpose of the activity must be for income or profit.

The very definition of a triple net lease seemingly disqualifies the majority of triple net landlords from qualifying under this definition under the assumption that they do not have continuous and regular involvement.

With triple net leases, the tenant is usually responsible for the three "nets": real estate taxes, building insurance, and maintenance. By having the tenant be responsible for most of the on-site responsibilities, the landlord is able to spend more time and effort buying and selling other properties and therefore investing more into the economy.

In turn, triple net lease agreements usually benefit the tenant because the pricing of the agreement will reflect the fact that the tenant will be responsible for a lot of the on-site responsibilities. Now tenants have the upper hand when landlords ask to be allowed to provide at least 250 hours of services per year (cumulatively, as to all leases that the landlord will aggregate under the complicated aggregation rules, which are discussed in our blog post entitled Real Estate: Investing with Section 199A: Don't Let Your Deductions Fly Out the Window).

The new Final Regulations do, however, contain one saving grace for taxpayers with triple net leases by quoting the 1941 Supreme Court case of Higgins v. Commissioner.

In Higgins the Supreme Court stated that the determination of "whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." Since it is a factual determination, a taxpayer with the right fact can successfully argue that his or her triple net or almost triple net rental enterprise should constitute a qualified trade or business.

However, doing so will be a tough and expensive hurdle for many landlords to jump over.

Perhaps Congress will act in a compromise to assist the continued growth in the economy in recognizing that taxpayers with triple net leases put themselves at significant financial risk, in that tenants like Toys R Us and Sears may go bankrupt and leave a landlord high and dry after many months of eviction and then bankruptcy litigation. Many landlords are not aware that the bankruptcy law allows tenants to have the court terminate long term leases and limit damages to one year of rent.

Non-triple net lease landlords who spend considerable time in their leasing activities can take considerable comfort from Notice 2019-7, which was published alongside the new Final Regulations. The Notice provides the above-mentioned safe harbor for non-triple net leases to be "treated as a trade or business solely for the purposes of Section 199A."

Under the new safe harbor, non triple net rental real estate may be treated as a trade or business, if the following three requirements are met:

1. separate books and records are maintained to reflect income and expenses for each rental real estate enterprise;

2. 250 or more hours of rental services are performed per year with respect to the rental enterprise; and

3. the taxpayer maintains contemporaneous records, including time reports or similar documents, regarding the following: 1) hours of all services performed, 2) description of all services performed, 3) dates on which such services are performed, and 4) who performed the service. Interestingly,

while triple net lease arrangements outside of REITs will likely not qualify under Section 199A, banks that are taxed as S corporations, or partnerships, are eligible for the deduction, although in many respects a loan is like a triple net lease where the landlord has put money out for a long term series of payments, where in many cases the vast majority of the value is in the years of payments to be received, just like a long term promissory note.

It is even more disturbing that other types of businesses involving much less risk on the part of the owner qualify for the deduction. These include brothels, franchisors and vending machine owners. How is it possible that a brothel owner sitting back and receiving rent from independent contractor "professional entertainers" may qualify for the benefits of Section 199A, but taxpayers with triple net leases do not?

For more information on the different types of businesses that qualify for Section 199A, please see our post entitled Beautiful Losers: The Discriminatory Nature of the 199A Proposed Regulations, especially if you like Bob Seger and the Silver Bullet Band.

As the infamous Marquis de Sade once stated, “Social order at the expense of liberty is hardly a bargain.”

To view any of our four on-demand webinars on Section 199A, click on the links below, or to receive our white papers on this topic, email agassman@gassmanpa.com and mention the “secret decoder ring.”

199A for CPAs:

https://gassmanlaw.com/wp-content/uploads/2019/01/199A-for-CPAs.pdf (Materials for the presentation)

https://www.youtube.com/watch?v=w3XhhBzAyfU

199A for Doctors:

https://gassmanlaw.com/wp-content/uploads/2019/01/Doctor-PPT.1a-FINAL.pdf (Materials for the presentation)

https://www.youtube.com/watch?v=_JPXnSvR888

199A Planning for Real Estate:

https://gassmanlaw.com/wp-content/uploads/2019/01/Real-Estate-199A.pdf (Materials for the presentation)

https://www.youtube.com/watch?v=fEezNairaN8

Using Management Arrangements:

https://gassmanlaw.com/wp-content/uploads/2019/01/Management-Arrangements-FINAL.pdf (Materials for the Presentation)

https://www.youtube.com/watch?v=hLl-1inqgbA

If you are a landlord or tax advisor, thanks sincerely for what you do for others. If you are a triple net tenant it is time to ask the landlord if you can give up some of the responsibilities so that the landlord pays less tax on the rent income.

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Famous Births Today:

1944 – American journalist Carl Bernstein – Watergate
1970 – British actor Simon Pegg – “Shaun of the Dead”
1942 – Former New York City Mayor Mike Bloomberg

Many Estate Plans Fail...Will Yours?

By Martin Shenkman

Summary: Too many estate plans fail. Many fail miserably. Why does this happen? What can be done about it? Good news it is easily fixed. You just have to want to do it. Does it matter? You decide, but in too many cases people bet (and lose!) the most important goals of their lives as a result of planning failure: having to reduce your life- style in your later years because of poor financial planning; making lawyers or the IRS your heirs; leaving people you claim to love embroiled in intractable conflict; or losing dignity and control over your life because of illness or old age. Don’t you want a better result? Everyone will say yes, but many of you will not take the requisite steps.

■ What is Failure:

■ An obvious failure is when an estate ends up in litigation and much of the estate is dissipated in legal and other fees and family relationships are destroyed. Many Star- types seem to make this a routine. No reason for that.

■ But failure can occur without winding up in court. Example: Evil heir steals much of the estate and the family relationships are destroyed. An elderly parent or other relative is intentionally alienated from family so one heir can steal or inherit most of the money.

■ But a couple that doesn’t plan properly (investments, budgeting, insurance) and runs out of money is also a failure.

■While estate taxes are a non-issue for most folks, no one knows what tax law changes tomorrow will bring, and income tax savings can have a huge impact.

■ For wealthier folks, tax issues remain taxing! Complex planning is vital to minimize that blow, but too few wealthy take the time to administer their plans.

■Failure to use proper trusts (and it ain’t only the super wealthy that need trusts) can expose an inheritance to divorce, IRS or other creditor claims and quickly decimate a lifetime of savings.

■ A growing threat is aging. If you don’t have the proper safety net in place you may become a target for elder financial abuse. But even ab- sent abuse, failure to realistically deal with the challenges of aging, and few people do (and having a power of attorney is barely a start), will almost assure a tragedy.

■ Many estate plans fail – but most should not. What can you do to avoid your estate, financial, retirement, insurance and other planning being a failure? Read on!

■ Who Causes Estate Plan Failure:

■You and anyone and everyone. No exceptions to possible culprits. But don't despair all of this is easily fixed if you the client will demand success, permit success, and work towards success.

■Refusal of clients to address critical issues, often because they are unpleasant (no one likes addressing the challenges of aging or health), hard (facing the reality that you saved too little and spend too much is tough, especially when you thought estate planning was to be a fun process of dividing up your zillions), really difficult (you have an heir who is fiscally irresponsible, a drug addict or worse), and so on. ■Many people just prefer to do the ostrich (that is not a new dance step but rather the act of put- ting your head in the estate planning sand instead of dealing with real issues.

■Another big problem is sycophant advisers who will tell you whatever you want to hear to keep your business, rather than telling you what they know you need to hear fearing you might be unhappy with them. You the client must take charge and direct every adviser on your team (you do have a team don't you?) to Dr. Phil you! That means tell it like it is, not blow smoke in your ear. Here's a common ploy of the sycophant adviser. "You should consult your attorney." You complain "But she'll bill me!" Dude you think your wealth adviser is meeting you because you're so handsome? They bill too. A good and honest wealth adviser might explain why regular meetings with your attorney and CPA, even if they do bill you, is critical. The sycophant adviser will play into your annoyance about being billed and try to inappropriately control the process.

■ Golf buddies and mahjong partners mean well but ruin too many plans. Just because Joey takes the purple pill doesn't mean it's right for you. Talk to your CPA not the gals around the poker table. ■Yes, we all know that everything on the internet is true. While there is a lot of really valuable information on the internet, much of the estate planning advice you find on line barely qualifies as dribble. Good to read and bone up but please talk to real advisers for real advice.

■ What Causes Estate Plan Failure:

■Not planning. Things rarely work out just 'cause you want them to. You must proactively plan.

■Not addressing real issues. Successful planning can be costly, complex, and unpleasant. Unless you have the access to the fountain of youth, an assurance of no health issues (130 million Americans live with chronic illness), more money than you could ever spend (do you have financial forecasts by your wealth adviser showing at least say 80% likelihood of not running out of money by age 100?), one of the only non- dysfunctional families on the planet, and so on, real planning is not likely going to be a feel good romp!

■Not taking a holistic view of planning. Planning is never about a particular magic bullet. It is never sufficient to "have a will." You need to address financial, tax, asset protection, legal, family, insurance and an array of issues. A narrow approach will never work. Marsh Private Client services published a report with lots of eye- popping stats including: 78% of families employ domestic workers but only 58% carry Employment Practice Liability Insurance. Only 13% of families carry individual directors and officers (D&O) liability coverage though many family members serve as directors or officers of for-profit and not-for-profit enterprises. Having a will is pretty useless if you get sued, have coverage gaps, and lose.

■Not having a collaborative team of advisers. Yep, that must cost some more money, will require a bit of coordination, and seemingly make the process longer and more com- plex. But planning will never succeed without it. Assuming your lawyer, wealth adviser, CPA, is the sole per- son you need to consult with, or that your estate planner and wealth adviser don't need to communicate will doom your plan. Guaranteed. ■Planning fatigue can derail your plan. If you start with expectations that are too narrow or simplistic, then if complications arise, or extra steps are necessary to address your circumstances, or personal decisions become more difficult than you initially anticipated, you might grow weary from the process and not complete the planning.

■ Snake in the Planning Room: OK this will upset a lot of folks but re- member we're Dr. Phil'ing this discussion. Many services are getting commoditized. You can get an online broker for peanuts, do your will online for less than your attorney would charge for an email, and use tax prep software for a fraction of what your CPA charges. Properly used that's all good stuff. But the reality is that many professionals, in every discipline are hurting as a result of this. That exacerbates the adviser-sycophant we discussed above. That will have some advisers try to control the planning process, convince you they have all the right answers, and much worse. Any adviser who minimizes the need for your involving your other advisers, any- one who won't let the sun shine into the planning room, is likely a bad apple. Good advisers welcome di- verse thoughts from others on the planning team. They are not threatened because the common goal is doing the best possible job for you the client. Isn't that the goal you want your advisers to have? There are outstanding advisers that complement and supplement other advisers to best help their clients. Top advisers foster communications with you and all advisers, not control communications to the exclusion of other advisers. Wealthy investors need to identify the right advisers.

■ Cheap: Hey sorry but we are calling 'em like we see 'em. Many plans are ruined because clients get penny wise and pound foolish. You can get all your stuff for cheap online, or from discount providers. You can always find a CPA to do a tax return cheaper than your current CPA, but is that really a benefit? You can get a will done cheaper by a different lawyer, but it should be the value of what you receive and the goals you achieve, not just the cost that you consider. Cheap doesn't assure adequacy. Focus instead on strong professionals who will help you appropriately control costs. Demand collaboration even if it costs a few bucks (it will save far more in the short run). Don't dismiss full service institutions or firms. If they can fill gaps in your team and backstop your other advisers on matters they may not have expertise in, they may be worth more than their additional costs.

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Alan's Forbes Blog

IRA Guidance on Pre-Kindergarten 529 Plans and Other Issues

529 College Savings Plans are like mutual funds, but the growth is never subject to tax as long as the Plan is used to pay college and graduate school tuition and permitted living expenses.

The 2017 Tax Act added a provision which allows 529 Plans to be used to pay up to $10,000 per year for each student in kindergarten through twelfth grade.

A good rule of thumb for a newborn child is that $75,000 contributed to a 529 Plan should fund 13 years of private tuition at $10,000 a year, assuming a 6% rate of return.

While many Plan sponsors have not yet modified their platforms to permit pre-college distributions, any 529 College Savings Plan can be converted to another Plan. Conversions are easy to accommodate, so if the Plan contributed to does not offer this feature when the child is ready, the Plan can be converted to one that does. Families should also know that the beneficiary of the Plan can be changed annually, so those cute little grandchildren better behave and send holiday cards if they want to stay in private school.

On July 30, 2018 the IRS confirmed that new regulations will limit the per year pre-college amount to $10,000 total per child, even when multiple 529 Plans are established for one child. This means that grandparents from both sides of the family cannot fund 529 Plans that would pay $20,000 a year of combined tuition, which would have been nice.

In addition, the new regulations will provide that refunds received by students for permitted 529 expenditures can be recontributed to any 529 Plan held for the student within sixty days of the refund. This allows the distribution to be disregarded for income tax purposes. For example, a student who receives $5,000 from a 529 Plan set up by her grandfather may receive a partial refund of the tuition if she becomes ill and cannot finish the semester. She can put the refunded money into any 529 Plan or Plans then existing for her benefit, and the money will be treated as being held by the Plan as if the amount refunded was never withdrawn.

The announcement also gives guidance on the conversion of traditional 529 Plans to Achieving a Better Life Experience (ABLE) accounts for disabled beneficiaries. The announcement reiterates that such rollovers cannot exceed the annual ABLE contribution limit of $15,000 per beneficiary per year, and thus cannot be used to circumvent the $15,000 per year contribution limit. ABLE accounts were enacted by Congress in 2014, and enable family members and benefactors of disabled and special needs individuals to contribute up to $15,000 per year without disqualifying the disabled beneficiary from Medicaid or SSI (social security for disabled individuals). The amounts put away can grow tax-free if eventually used for "qualified expenses," which can include the following:

- Living expenses
- Education
- Housing
- Transportation
- Employment, training, and support
- Assistive technology
- Personal support services
- Health, prevention, and wellness
- Financial management
- Administrative services
- Legal fees
- Oversight and monitoring
- Funeral and burial costs

The announcement can be found here on the IRS website and is well drafted and appreciated by those of us who practice in this area. Hat's off to Peter A. Holiat, of the IRS Office of the Associate Chief Counsel (TEGE) who wrote this announcement. He is helping so many.

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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.

In the attached article from *Wealth Management,* **Christopher P. Woehrle** describes a case addressing Internal Revenue Code **compliance** in the context of **charitable gifts of publicly traded securities.**

click here to see article

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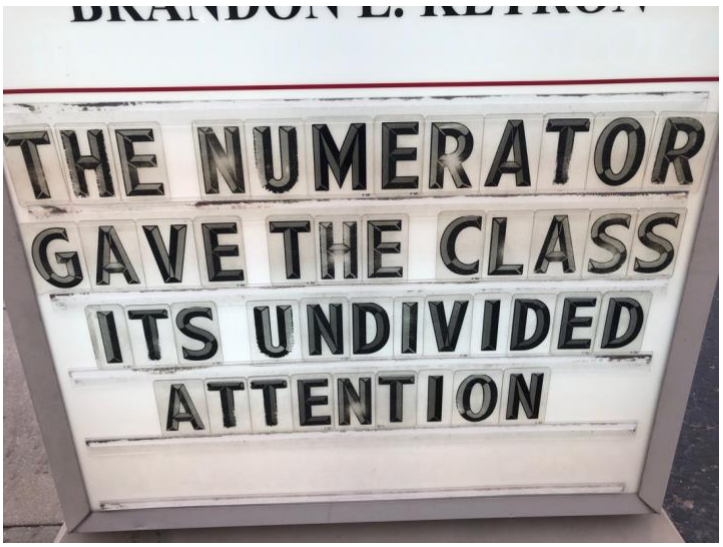
Humor-or something similar…

"What I find most disturbing about Valentine's Day is, look, I get that you have to have a holiday of love, but in the height of flu season? It makes no sense." – Lewis Black



Calendar of Events

Newly announced events in RED

EVENT	DATE/TIME	LOCATION	DESC.	REGISTRATION
Johns Hopkins All Children's Foundation 2019 Estate, Tax, Legal and Financial Planning Seminar **February 7, 2019**	**Resurgence of a Forgotten Problem for Family Limited Partnerships: Section 2036 (A)(2) and the *Powell* Case Panel Discussion with Paul Lee, Jerry Hesch, Jonathan Blattmachr and Moderater, Alan Gassman, Esq.** **Alan will be presenting a stand alone presentation, "Creative Planning with Section 199A After the New Regulations".**			Contact: Agassman@gassmanpa.com
Pinellas County Medical Association "What You Need to Know About" Webinar Series	February 12, 2019, 12:00 PM	Gotowebinar	Limiting Liability by Using Medical Practice Companies and Other Entities	Please Click HERE

EVENT	DATE/TIME	LOCATION	DESC.	REGISTRATION
Professional Acceleration Workshop	February 16, 2019, 9:00 am – 1:00 PM	University of Florida, Gainesville, FL	Professional Acceleration for Tax and Estate Planning Lawyer Workshop for University of Florida LLM program.	Email Agassman@gassmanpa.com
Pinellas County Medical Association "What You Need to Know About" Webinar Series	February 19, 2019, 12:00 PM	Gotowebinar	Employee Practices, Exposures and Insurances with Chuck Wasson.	Please Click HERE
University of Florida Tax Law Institute Conference	February 27 - March 2, 2019,	Tampa Marriott Waterside	Check out our Silver Sponsor display table!	Please Click HERE
New Jersey Bar Association Presentations	March 11, 2019, 9:00am and 1:00PM New Jersey Law Center, New Brunswick, NJ	Alan will be speaking on two separate topics: What to Do for Clients Who No Longer Have to Worry About Federal Estate Tax with Deirdre Wheatley and *What New Jersey Lawyers Need to Know About Florida Law*		To Register click HERE
Special webinar presentation with Holly Kerr	March 5, 2019	Insurance Coverage with Holly Kerr and Alan Gassman		Email Alan at Gassman@gassmanpa.com

Special webinar presentation with John McDonald	March 6, 2019	"Selling Your Business: Advanced Planning Considerations with Chris Denicolo and John McDonald"		Email Alan at Gassman@gassmanpa.com
Pinellas County Medical Association "What You Need to Know About" Webinar Series	March 12, 2019, 12:00 PM	Gotowebinar	Anti-Kickback and Related Laws with Renee Kelly	Please Click [HERE]()
9th Annual Pinellas County Medical Association Continuing Medical Education Cruise	March 14-18, 2019 	Port of Tampa	Biggest Mistakes Physicians Make in Medical Practice	FOR INFORMATION AND RESERVATIONS CONTACT JEN BOLL 727-526-1571 / 1-800-422-0711
Pinellas County Medical Association "What You	April 9, 2019, 12:00 PM	Gotowebinar	Cornflakes and Estate Planning Mistakes with Mike Jensen	Please Click [HERE]()
Need to Know About" Webinar Series				
Florida Bar Association	April 18, 2019, 10:00 am – 2:00 PM	Stetson Tampa Law Center *Primary Florida and Federal Creditor Protection Laws, A Closer Look at Florida and Federal Creditor Exemption Laws and Planning* And *Putting it All Together with Leslie Share*		Contact: Agassman@gassmanpa.com
University of North Carolina Tax Institute	April 25-26, 2019	Creative Planning with Section 199A After the New Regulations		Contact: Agassman@gassmanpa.com
Maui Mastermind Financial Pillar Super Course	June 22-23, 2019	Hilton-Atlanta Airport	Crucial Legal and Tax Principals for Accumulating Wealth	Please Click [HERE]()
45th Annual Notre Dame Tax Institute	October 26-27, 2019	South Bend, Indiana	TBD	Contact: Agassman@gassmanpa.com
Maui Mastermind Wealth Summit	November 3-8, 2019	Wailea Beach Resort, Maui	Essential Aspects and Decisions for Your Remarkable Financial Future	Please Click [HERE]()