THE THURSDAY REPORT

Thursday, June 17th, 2021 - Issue 306

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Dear Thursday Report readers:

You may have noticed that we missed two weeks of Thursday Reports. To be candid, a great deal of time has gone into this month's articles, and we are very thankful to have extremely talented and articulate law clerks who are helping us to make sure that what we are writing is both thorough and accurate.

We welcome any question, comments and suggestions for future issues, as well as valuable gifts and invitations to fly on private jet airplanes to exclusive resorts or gift cards to Wendy's or McDonald's.

As we are working to finalize derivative articles for national publications, we greatly enjoy and appreciate the opportunity to have feedback and advice from our Thursday Report readers.

Without the Thursday Report we would probably not even know what day of the week it was.

Best personal regards,

Alan S. Gassman

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Article 1

Florida Community Property Trusts

Rethinking client trust logistics with a new powerful catalyst.

By: Alan Gassman and Brock Exline

Hats off to the members of the Probate and Trust Tax Law Section of the Florida Bar for working with State Senator Berman and State Representative Diamond to design, draft, and implement what we believe to be the best community property trust legislation in the country.

The statute will hopefully go into effect July 1, 2021, a mere 28 days before Alan's birthday, and there could be no better present.

Advantages of Community Property Trusts

The reason that we believe Florida's Community Property Trust Act is the best legislation is that the statutes indicate that creditors of one spouse can only reach that spouse's one-half of the assets held in a Florida community property trust. In all other states with community property trust laws, except Tennessee, creditors of one spouse can reach all of a married couple's assets held in a community property trust.

Another advantage of the Community Property Trust Act is that any person residing in the State of Florida can serve as the trustee or a co-trustee under a Florida community property trust.

Before the enactment of these new statutes, which will become effective on July 1st, married couples who wanted to enter into a community property trust had to use a trust company dually registered with Alaska, South Dakota, or Tennessee, or an individual residing in one of those states.

The Community Property Trust Act works the same way by permitting any Floridian or a dually-registered trust company to act as a trustee of a Florida community property trust.

Florida has 2.5 times the population of the states of Alaska, South Dakota, and Tennessee combined, and Florida married couples can serve as trustees for themselves.

Furthermore, a great many individuals who reside in the Northeast or the Midwest have close friends, relatives, or advisors in Florida that can serve as trustee of a community property trust.

For most married couples, the sole benefit of having a community property trust is that all assets under a community property trust will receive a fair-market value date of death basis for federal income tax purposes if the Community Property Act works, which is an issue described below.

For example, Harry and Sally Deli live in New York and are in their 70s. They have $3 million worth of stock for which they paid approximately $500,000.

If they sell them now, they will have a $2.5 million capital gain and may have to pay a 23.8% combined federal income tax and Medicare tax, not to mention a 37% New York state tax.

The federal income and Medicare tax would be $595,000, and the New York capital gains tax would be $925,000, if they are in the highest brackets.

If one of them dies and these assets are held in joint names, then the surviving spouse will have the ability to sell $1.5 million worth of these holdings immediately after the sale without paying state, federal, or Medicare tax, if values stay stable, but would pay one-half of the tax amounts described above if rates stay the same and the surviving spouse sells the other half of the investments while living.

Instead of holding these investments jointly or placing them into the name of the spouse that might be expected to die first, Harry and Sally can establish a Florida community property trust and have it drafted by the estate planning lawyer for their daughter, who lives in Boca Raton, Florida, and their daughter can serve as trustee.

On the first death, the surviving spouse can claim a $3 million basis in the stocks and pay no state, federal, or Medicare tax on the sale.

The second advantage of a community property trust, or community property ownership in general, is that on the death of one spouse, all community property can be used to fund a credit shelter trust that can benefit the surviving spouse without being subject to federal estate tax in his or her estate.

While the estate tax exemption of $11,700,000 per decedent has made estate tax planning less of a concern for most taxpayers, many factors have caused a greater number of married couples to have the need for and interest in estate tax planning. The scheduled reduction in the estate tax exemption to one-half of its otherwise inflation-adjusted amount in 2026, and Bernie Sanders' proposed plan that would reduce the estate tax exemption to $3.5 million and the gift tax exemption to $1 million stand to affect more taxpayers. These potential legislative changes along with significant increases in net-worth that have occurred as the result of the recent stock market run-up and rising real estate prices are incentivizing many married couples to learn about and engage in estate tax planning.

One challenge for many couples is how to lock up as much in assets as possible under a credit shelter trust on the first death, when the surviving spouse may have significant estate tax challenges, but only approximately half of the assets that can be used to fund a credit shelter trust are far less than the exemption amount.

For example, let us assume that Harry and Sally have $7 million in personally owned investment assets, a $1 million home, and $3 million in IRAs.

They also receive approximately $150,000 in pension income, and their assets are expected to grow at approximately 7.25% a year after taxes.

They have a 20-year life expectancy, despite eating a lot of deli food, including corned beef, potato knishes, and egg creams almost every day.

In 20 years, their net-worth will be approximately $47,338,199 so they would like to not only avoid capital gains tax for the surviving spouse but also place as much as possible into a credit shelter trust on the first death.

If Harry and Sally each presently has approximately $4,000,000 worth of assets in a separate revocable trust, or $8,000,000 worth of assets in a joint trust that only has half of the assets locked up under a credit shelter trust on the first death, then there can be a significantly higher estate tax on the second death.

Harry and Sally may therefore consider a JEST ("Joint Exempt Step-up Trust") in lieu of a Community Property Trust for their planning.

But, is the JEST Trust Better - We're Not Jesting

Under a JEST Trust, the first dying spouse has the power to direct trust assets to creditors of his or her estate, which attracts the assets to his or her estate so that they may receive a new income tax basis under Code Section 1014(e), and be considered to be the assets of the first dying spouse for purposes of funding a Credit Shelter Trust.

Three Private Letter rulings and a Technical Advisory Memorandum ("TAM") published in 1999 and 2000 support this proposition, although there is some risk that the IRS might not follow these non-precedential pronouncements and take the position that the transfer of assets considered as owned by the surviving spouse to a credit shelter trust might be characterized as a gift by the surviving spouse. This risk is ameliorated by the design of the JEST trust, which contains provisions that would make any credit shelter trust funded by the surviving spouse considered to be an incomplete gift for gift tax purposes by giving the surviving spouse a power to direct how assets may pass among common descendants or otherwise upon death, and requiring the surviving spouse's consent to any distribution.

The same Private Letter rulings and TAM that concluded that a credit shelter trust could be funded with assets considered as owned by the surviving spouse also concluded that those assets would not receive a new income tax basis, based upon the assertion that the arrangement constitutes a gift by the surviving spouse to the first dying spouse, that is then inherited by the surviving spouse, thus triggering Internal Revenue Code Section 1014(e).

The Private Letter Rulings and TAM, however, failed to point out that the Statute applies when an asset is gifted to a decedent who devises it back to the donor upon death, and not a situation where the assets are left to an irrevocable trust that may benefit the donor.

A properly drafted JEST trust may therefore contain provisions that would make it unlikely or potentially even impossible for the surviving spouse to benefit from the credit shelter trust that is funded with the assets considered to have been held by the surviving spouse. The provisions would accomplish this by providing that a separate credit shelter trust funded from the assets from the first dying spouse would be used before any distributions would be made to the surviving spouse from the second credit shelter trust and that the surviving spouse will not even be a beneficiary of the second credit shelter trust unless or until trust protectors who are serving in a non-fiduciary capacity would add the surviving spouse as a beneficiary.

As a practical matter, assets might be sold to avoid capital gains taxes shortly after the death of the first spouse, and the surviving spouse would not be added to or considered to be a beneficiary of the JEST credit shelter trust unless or until it is clear that the income tax return for the tax year of the sale would not be audited, or that the audit would not be complete.

The JEST trust is clearly more complicated than the community property trust from the point of view of the drafter, but should allow for the funding of a credit shelter trust from all assets of the JEST.

Will a Community Property Trust Work?

Regarding possible concerns about the Florida Community Property Trust Act, credible articles have been written which indicates that the IRS may not allow for a full step-up in basis for a trust which provides community property treatment for individuals who do not live in a community property state.

Westfall & Mair discuss the 1944 Supreme Court case which creates uncertainty regarding whether community property trusts settled in a non-community property state (such as Florida) are entitled to the 1014(b)(6) double step-up in basis. In Commissioner v. Harmon, 323 U.S 44, the Supreme Court held that an Oklahoma statute that allowed couples to opt-in to a community property regime was not recognized for the purpose of federal income taxes. Moreover, the IRS takes the position that the Harmon decision ought to apply to the Alaska trust scheme for income reporting purposes. However, a number of commentators argue that 1014(b)(6) will apply to community property trusts settled in a consensual community property state.

Stay tuned for a more in depth discussion on the Harmon decision and uncertainties regarding the application of 1014(b)(6) to community property trusts settled in non-community property *states in Part II of this article.*

The Almost Ready for Prime Time Charts - Use at your own wrist.

MARRIED COUPLE TRUST DECISION CHART

	JEST (Joint Exempt Step-Up Trust)	Florida Community Property Trust	Tenants by the Entireties Trust	Joint Trust Non-TBE-JEST-CPT
Step-up in Basis After First Death	Probably Yes	Probably Yes	Only Half of a Step-Up	Depends Upon Drafting and Logistics
Can Lock Up All Assets After First Death	Yes	Only as to Half	No - Surviving Spouse Will Have Ownership	Will Depend Upon Drafting
Creditors of One Spouse Can Reach Trust Assets	Yes - the Debtor Spouse's Share	One-Half of Trust Assets Exposed to One Spouse's Creditors	Protected from Either Spouse's Creditors	Depends Upon Trust Drafting
Can Create Credit Shelter Trust With More Than Half of the Trust Assets	Yes, All Trust Assets May Go Into Credit Shelter Trusts	Only as to One-Half	Up to Half, But Only by Disclaimer or Surviving Spouse Will Not Have a Power of Appointment	Depends Upon Drafting - Be Careful!
May Share Upon Divorce as Set Forth in Pre- or Post-Nuptial Agreement	Yes	No - Must Be Divided Equally Upon Divorce	Probably Not	Yes
May Be Converted from Former Joint or Individual Trust	Yes	No - Must Be Created On or After July 1, 2021 as a new Florida Community Property Trust	Yes	
Complicated to Draft?	Yes	Simple to Draft if the Statute is Followed	Simpler than JEST	Will Depend upon Specifics
Requires a "Qualified" Florida Trustee	No	Yes	No	No

Charts Comparing the 4 States with Community Property Trust Statutes:

State	Requirements	Creditor Protection	Property Included	U.S.C. s. 1014(b)(6)
Florida	**(1)** Expressly declares that the trust is a community property trust within the meaning of this part **(2)** Has at least one trustee who is a qualified trustee, provided that both spouses or either spouse also may be a trustee **(3)** Is signed by both settlor spouses consistent with the formalities required for the execution of a trust under this chapter. **(4)** Contains substantially the following language in capital letters at the beginning of the community property trust agreement: THE CONSEQUENCES OF THIS COMMUNITY PROPERTY TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE COURSE OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD BE SIGNED ONLY AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL ADVICE.	(1)An obligation incurred by only one spouse before or during the marriage may be satisfied from that spouse's one-half share of a community property trust. (2) An obligation incurred by both spouses during the marriage may be satisfied from a community property trust of the settlor spouses.	All property owned by a community property trust is community property under the laws of the state during the marriage of the settlor spouses.	**36.1511 Application of Internal Revenue Code; community property classified by another jurisdiction.**--For purposes of the application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. s. 1014(b)(6), as of January 1, 2021, a community property trust is considered a trust established under the community property laws of the state. Community property, as classified by a jurisdiction other than this state, which is transferred to a community property trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than the state retains its character as community property to the extent otherwise provided by ss. 732.216-732.228.
South Dakota	An arrangement is a South Dakota special spousal trust if 1) one or both spouses in a marriage transfer property to a trust, 2) the trust expressly declares that some or all the property transferred is South Dakota special spousal property as provided in this chapter, 3) and at least one trustee is a qualified person. A South Dakota special spousal trust is enforceable without consideration. Both spouses or either spouse may be a trustee. The trust must be signed by both spouses. The trust may be revocable or irrevocable. For purposes of this section, a qualified person is any person who meets the requirements of §§ 55-3-41 and 55-3-39, but without regard to whether that person is the transferor. 4) A South Dakota special spousal trust shall contain the following language in capital letters at the beginning of the trust: THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR	Notwithstanding anything contained in § 55-17-9 to the contrary: (1) A provision of a revocable South Dakota special spousal property trust does not adversely affect the interest of a creditor unless the creditor has actual knowledge of the trust when the obligation to the creditor is incurred. The interest of a creditor in an irrevocable South Dakota special spousal property trust may be subject to the rights and liabilities of a creditor with respect to transfers under chapter 55-16 as provided in § 55-17-6; (2) A spouse shall act in good faith with respect to the other spouse in matters involving South Dakota special spousal property. The obligation under and effect of this	The trustee of a South Dakota special spousal trust shall maintain records that identify which property held by the trust is South Dakota special spousal property and which property held by the trust is not South Dakota special spousal property.	For purposes of the application of § 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. § 1014(b)(6), as of January 1, 2016, a South Dakota special spousal trust is considered a trust established under the community property laws of South Dakota. For purposes of this chapter, the term, special spousal property, means community property for those purposes. Community property as classified by a jurisdiction other than South Dakota transferred to a South Dakota special spousal trust retains its character as community property while in the trust. If the trust is revoked and property is transferred on revocation of the trust, the community property as classified by a jurisdiction other than South Dakota retains its character as community property to the extent otherwise provided by South Dakota law.

	MARRIAGE, AT THE TIME OF A DIVORCE, AND AT THE DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST AGREEMENT, YOU SHOULD SEEK INDEPENDENT LEGAL ADVICE.	section may not be varied by a South Dakota special spousal property trust.		
Alaska	(a) A community property agreement must be contained in a written document signed by both spouses and classify some or all of the property of the spouses as community property. It is enforceable without consideration. (b) A community property agreement must contain the following language in capital letters at the beginning of the agreement: THE CONSEQUENCES OF THIS AGREEMENT MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE. (c) A community property agreement may not adversely affect the right of a child to support.	(j) An obligation incurred by only one spouse before or during marriage may be satisfied only from the property of that spouse that is not community property and from that spouse's interest in community property. This subsection does not apply to an obligation described in (b) of this section. (k) An obligation incurred during marriage by both spouses may be satisfied from property of each spouse that is not community property and from the community property.	(h) The trustee of a community property trust shall maintain records that identify which property held by the trust is community property and which property held by the trust is not community property.	N/A
Tennessee	An arrangement is a community property trust if one or both spouses transfer property to a trust, that: (1) Expressly declares that the trust is a Tennessee community property trust; (2) Has at least one (1) trustee who is a qualified trustee whose powers include, or are limited to, maintaining records for the trust on an exclusive or a nonexclusive basis and preparing or arranging for the preparation of, on an exclusive or a nonexclusive basis, any income tax returns that must be filed by the trust. Both spouses or either spouse may be a trustee; (3) Is signed by both spouses; and (4) Contains the following language in capital letters at the beginning of the trust:	(a) An obligation incurred by only one spouse before or during marriage may be satisfied from that spouse's one-half (1/2) share of a community property trust. (b) An obligation incurred by both spouses during marriage may be satisfied from a community property trust of the spouses.	(c) All property owned by a community property trust will be community property during marriage.	N/A

	THE CONSEQUENCES OF THIS TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE.			

Article 2

The Demise of Equity Split Dollar in Estate Planning

By: Alan Gassman and Professor Jerry Hesch

We've been working with Jerry Hesch on an article for Leimberg Information Systems on the Morrissette II case but Jerry says the article is "far from ready to be published." Therefore, in the spirit of asking for forgiveness rather than permission, I've taken the liberty of putting some of Jerry's brilliant and very pertinent observations into a shorter article, but please dont share this with more than five colleagues or tell Jerry that it is in the Thursday Report. Also please do not email Jerry with any questions at his email address which is jhesch62644@gmail.com. Lastly, please do not change lanes anywhere in the Miami-Dade area without checking all blind spots in case Jerry is driving his Triumph motorcylce near you and keep high levels of underinsured motorist coverage until Jerry sells the bike.

First, a new and improved summary of the central findings of Morrissette II.

On May 13, 2021, a Tax Court opinion clarified the treatment of split dollar transactions in Morrissette II. (T.C. Memo 2021-60)

In Estate of Morrissette v. Commissioner, 146 T.C. 171 (2016) ("Morrissette I"), the Tax Court ruled that the advancement of funds by Mrs. Morrissette to irrevocable dynasty trusts created for her sons for the purpose of purchasing life insurance policies were not considered to be a taxable gift because it was a legitimate split-dollar arrangement with a legitimate business purpose under the economic benefit regime. Morrissette I did not address how to later value such arrangements.

Now, 5 years later, the Tax Court judge held that because the advancement of funds to an irrevocable trust for the purpose of paying life insurance premiums was treated as a bona-fide sale for full and adequate consideration under the economic benefit split dollar regulations, Sections 2036 and 2038 did not apply.

Second, the court held that the special valuation rules under Internal Revenue Section 2703 did not require that the cash surrender value of the policies be included in Mrs. Morrissette's gross estate.

Finally, the judge determined that the fair market value of the decedent's split-dollar rights would be valued for estate tax purposes using the discounted cash value method of valuation.

Practitioners may feel that equity split-dollar is no longer safe for estate and gift tax purposes, because the Tax Court required that the split-dollar arrangement must also have a legitimate and significant nontax purpose.

Factors Supporting the Use of the Loan Regime: Not By Jerry Hesch

1. It is simple to explain to a client.

2. The split-dollar loan regulations allow for the loan to be due at the death of the insured. The insured can be a child of the advancing party.

3. All interest can accrue and be due at the end of the note term.

4. The long-term AFR in effect at the time the loan is made applies for the life of the loan. Therefore a discount is automatic if the AFR has increased since the loan was made.

5. Market rates can be used to value the promissory note.

6. There is no need to calculate or report an annual gift that otherwise would be considered to have been made from the advancing party to the policy owner if equity split dollar rules applied.

A Discussion on the Use of Split-Dollar Arrangements Through the Lens of Morrissette II

Under the split-dollar life insurance rules an individual or entity can pay life insurance premiums for the benefit of an irrevocable life insurance trust or other policy owner and be repaid when the insured under the policy dies or the policy is cashed in or borrowed upon.

The Treasury Regulations with respect to split dollar life insurance permits the party that pays the premium to be repaid the amounts advanced, without interest, under what is called the "equity split dollar regime", or at a lower than market rate interest rate under the "split dollar loan regime."

When the equity split dollar regime is used the fact that there is no interest charged on the amounts advanced causes the life insurance trust or other life insurance policy owner to be considered to have received a gift based generally upon what the premium on a term life policy would cost for the equivalent arrangement.

When the loan value regime is used the applicable federal rate in effect at the time that each premium is paid can be locked in for the life of the policy.

If the life expectancy of the insured, or the second to die of two lives with a second to die life insurance policy is more than 9 years, then the applicable federal rate can be used. If the life expectancy of the insured, or the joint life expectancy of the insureds for a second to die policy is more than 3 years, but not more than 9 years, then the midterm applicable federal rate can be used. And if the life expectancy of the insured or second to die of the insured is less than 3 years then the short term applicable federal rate can be used.

The loan agreement can provide that the applicable federal rate locked in with each payment will not change with respect to that part of the loan, and no payments will be due until the policy matures, is cashed in, or is borrowed upon.

Traditionally, when the insured or insureds under a policy are relatively young the cost of term life insurance coverage is relatively low. In such a case, equity split dollar was normally recommended, and it was generally assumed that the entity advancing the monies would not be considered to be the owner of the life insurance policy for estate tax purposes, and would only recieve back the advanced amounts, without interest, when the policy matured.

In the Morrissette case Mrs. Morrissette was in her nineties and had three sons in their 40's who were owners in Interstate Movers, a large moving company that had been in the family for many years.

Mrs. Morrissette's sons wanted to put a buy-sell agreement into place whereby irrevocable trusts for the benefit of each son's descendants would own life insurance policies on the son's siblings, to be used to buy the siblings out of the company upon their death.

In other words, the dynasty trust established for one son purchased life insurance on the life of his two siblings, and would be able to buy stock in the company from the estates of the siblings upon their death.

When Mrs. Morrissete died her estate valued the right to eventually be repaid a $30,000,000 value on the split dollar arrangements at $7,500,000, based upon what the appraisers determined that a willing buyer would pay a willing seller for the right to be repaid $10,000,000 upon the eventual deaths of each of her sons.

The IRS asserted that this valuation was significantly lower than what the repayment rights were worth, and also attempted to use Internal Revenue Code Section 2036(a) to attempt to include the total value of the life insurance policies in Mrs. Morrissette's estate.

Under Section 2036(a) assets that are the result of a gift will be considered as owned by the grantor if the grantor retains certain rights over the assets, unless the transfer made by the decedent was considered to be a "bona fide sale for adequate and full consideration."

In the Morrissette II decision the judge went into lengthy discussion of what would be considered to be a bona fide sale for adequate and full consideration, and found that the business arrangement between the sons coupled with Mrs. Morrissette's desire to see a deceased son bought out of the company in the event of his death was a sufficient bona fide purpose so that Internal Revenue Code Section 2036(a) did not apply.

It is nevertheless of concern to many estate tax experts that the judge appeared to believe that there would not be a bona fide business purpose for a typical equity split dollar arrangement, where the advancing party is not receiving any compensation under the arrangement.

For this reason, many experts believe that split dollar arrangments that involve estate tax planning can only be safely entered into under the loan regime, so that interest is paid to the advancing party, so that the loan arrangement can be considered to be a bona fide transfer for good and valuable consideration, which includes the interest paid on the loan.

In the Morrissette II case the IRS also attempted to use Internal Revenue Code Section 2703, which indicates that the valuation of certain arrangements that are entered into between family members will not take into account certain discounts if certain requirements are not met.

One way to escape Section 2703 treatment is to assure that the arrangement is a bona fide business arrangement.

In the Morrissette case the judge ruled that the equity split dollar arrangement was a bona fide sale for adequate consideration for § 2703 purposes.

A final lesson learned from Morrissette II is that the court allowed very little if any discount in valuation, despite the fact that Mrs. Morrissette would of had to wait for her sons to die to be repaid, in large part because her revocable trust that owned the right to be repaid gave the trustee discretion to simply transfer the repayment rights to the three trusts that owed the policies, and the trustee of Mrs. Morrissette's revocable trust transfered these rights to the three trusts within two months after she died, thus effectively cancelling their obligation to repay the loan.

While the judge's conclusion on this may have been incorrect, split dollar repayment arrangements should probably be structured to be payable to trusts or other entitites that do not merge with the exact same parties who are benefitted by life insurance trusts or other entities that own life insurance policies that the split dollar arrangements are established to benefit.

Split dollar life insurance can still be very advantageous for families who wish to facilitate having premium paid on life insurance policies without having to make large gifts to irrevocable life insurance trusts.

For example, large gifts of cash to an irrevocable life insurance trust will not be as effective for estate and gift tax planning as gifting non-voting or minority interest corporate stock, LLC interests, or limited partnership interests, and corporations, LLC's, and limited partnerships can advance monies to irrevocable life insurance trusts under split dollar arrangements so that the family has the best of both worlds - full use of annual gifting under the $15,000 per person per year exemption, and funding life insurance that will not be subject to federal estate tax on the death of an insured or insureds.

Advantages of Using a Split-Dollar Loan Where the Trust Uses the Loan Proceeds to Insure the Life of a Child: Not By Jerry Hesch

Assume Senior loans $1,000,000 to an irrevocable grantor trust where the trust uses the loan proceeds to pay the premium on a policy insuring the life of Senior's child who is 30 years younger than Senior.

Using the 2.08% long-term Applicable Federal Rate (AFR) for June 2021 all interest accrues. All principal and accrued interest is due at loan maturity (the death of the insured child).

Senior dies six years later when principal and accrued interest are $1,131,472. At the date of Senior's death, the child's life expectancy is 30 years. Therefore, the value of the note is the present value of the right to collect the principal and accrued interest for another 30 years. Using the 2.08% AFR, in 30 years the principal and accrused interest will total $2,098,281.

Assume that at the date of Senior's death, the long-term AFR is 4.0%. Using the 4.0% AFR as the discount rate, the present value of the right to receive $2,098,281 in 30 years is $646,939. In valuing newly issued debt obligations Section 1274 uses the AFR. However, the AFR is only used to determine the value of a debt obligation when it is issued. In valuing promissory notes, numerous court decisions use a variety of factors, such as market rates. Because the AFR is recognized in the legislative history of Section 1274 as a below market rate, the court decisions justify the use of market rates in valuing existing promissory notes. Instead of using the existing 4.0% AFR, then a market rate of 5.0% might be used as of the date of this article. At a 5.0% discount rate the present value of the right to receieve $2,098,281 in 30 years would be $485,495.

At Senior's death, principal and accrued interest were $1,131,472. Using the AFR in effect at Senior's death, the note is valued at $646,939. That is an effective valuation discount of 42.8%.

If a market rate is used as the discount rate, the value in the estate would be $485,495. That is an effective discount of 76.8%.

Much more can be written about the Morrissette II case, but the above is hopefully helpful for those who are planning with life insurance. As always, please do not Heschitate to reach out to us with any questions.

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§ 2036. Transfers with retained life estate.
(a) General Rule
The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transger (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death—
(1) the possession or enjoyment of, or the right to the income from, the property, or
(2) the right, either alone or in conjunction with any person, to designate the persons who shalll possess or enjoy the property or the income therefrom.

Article 3

Florida Supreme Court Tells The American Bar Association What To Do

Differences in Opinion on Racism and Diversity- Florida Lawyers Caught in the Middle

Read on Forbes

By: Alan Gassman

Although "[a] simple letter to the Business Law Section...would have sufficed", the Florida Supreme Court has, on its own motion, made law that denies continuing legal education credit to Florida lawyers for programs presented after April 15 that require diversity among course faculty or participants. In re: Amendment to Rule Regulating The Florida Bar 6-10 (Labarga, J., dissenting).

I have been a member of the Florida Bar since 1984, and have been proud for what it does and what it stands for.

During these years I have been the chairman or co-chairman of over 45 continuing legal education programs, and I have spoken for many more than that.

Some years ago I was informed by the Bar employees who managed these programs that we had to have diversity speakers, meaning women and/or racial minorities for each program.

My initial reaction was that this was an inconvenience in situations where my top picks were not women or racial minorities, but I quickly understood the importance of this edict, and was more than willing to follow it.

As a result of this, speaking and writing opportunities became available to a number of lawyers who would have not otherwise participated as presenters in our programs. Most of them did a great job, and many grew professionally in part because of the recognition and career development that comes with the dozens if not hundreds of hours of preparation that can go into a good one hour talk.

I have also been on the board of advisors for non Florida Bar conferences, including law school sponsored conferences. While serving on these boards the same rule generally applies, whether it is written or not. Quite candidly, many people who take the time and trouble to be on an advisory board for a conference want to see diversity and actually insist upon it when the first draft roster has none.

Recently I was shocked to see a notice from the Tax Section of the Florida Bar which informed thousands of surprised Florida lawyers that the Florida Bar will not give credit for continuing legal education hours provided after April 15th by the ABA CLE Programs because of the ABA CLE policy which states that all continuing education programs must have at least one diversity speaker. One would think that the ABA, being the American Bar Association, has determined that its procedures are legal.

The origin of this horrific notice was that the Business Law Section of the Florida Bar had imposed a similar rule, and this was found by the Florida Supreme Court, on its own motion, to violate the law by discriminating against white males who would not have speaking opportunities because they were being replaced by non-white males or by females.

The ABA implemented its Diversity & Inclusion CLE Policy back in March of 2017. The policy requires its sponsored CLE programs with three or more panelists to have at least one diverse member, programs with five to eight panelists must have at least two diverse members and programs with nine or more panelists must have at least three diverse members.

Following the April 15th ruling ABA President Patricia Lee Refo stated “We are reviewing our CLE requirements in light of the Florida Supreme Court opinion while maintaining our unwavering commitment to diversity and inclusion in the legal profession.”

The Florida Bar’s spokeswoman, Jennifer Krell Davis, told the ABA Journal “The Florida Bar is complying with last week’s order from the Florida Supreme Court and will not be certifying CLE credit for courses that come from sponsors with speaker quotas as described in the order.”

The specific finding of the Florida Supreme Court is as follows: In re: Amendment to Rule Regulating The Florida Bar 6-10, Case No. SC21-284 prohibits The Florida Bar from approving continuing legal education programs that use “quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants.”

To support its position the Florida Supreme Court cited two seminal affirmative action cases; Grutter v. Bollinger, 539 U.S. 306 (2003) (5-4 decision) and Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion). Both of these cases held, among other things, that race-conscious university admissions programs cannot use quota systems. “Quotas based on characteristics like the ones in this policy are antithetical to basic American principles of nondiscrimination,” the Court said.

As Justices Brennan, White, Marshall, and Blackmun stated so eloquently in their concurrence in Bakke, “Candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known and have aptly been called our ‘American Dilemma’. Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.”

Furthermore, the justices go on to explain that “claims that law must be ‘color-blind’...must be seen as aspiration rather than as description of reality.” For “we cannot...let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.” Regents of U. of California v. Bakke, 438 U.S. 265, 327 (1978)

I am scheduled to speak and commonly speak for a number of not for profit educational organizations, but should I speak or assist with a program that is determined to be racist in nature by one Supreme Court or the other?

Recently I volunteered to donate money and go to law schools to speak to law students about how to be successful tax lawyers. I was told point blank that one law school would not permit me to do this unless I was a woman or a minority. I respect that decision but kept my money in my wallet.

When I took my Florida Bar oath I agreed to “never reject, from any consideration personal to myself, the cause of the defenseless or oppressed...” Am I to support a Florida Supreme Court rule that punishes organizations that support diversity and inclusion?

The new Florida Supreme Court ruling creates a Catch-22 for many educational organizations. Universities work on grants and other enterprises which require diversity and now will be forced to choose between falling in line with grant requirements or receiving Florida Bar approval for CLE programs. Other organizations that provide continuing legal education must now make a concerted effort to not have diversity speakers, or at least to not require diversity speakers.

Sadly, the safest route for these organizations will be to have only white male speakers to prove there is no diversity requirement at play.

Article 4

President Biden's Budget Includes Big Tax Increases That Will Rock Your Tax World

Some of the significant tax changes that many taxpayers hoped wouldn’t happen, like Senator Van Hollen’s taxation on transfers and death, are included.

Read on Forbes

By: Martin Shenkman

Martin M. Shenkman, CPA, MBA, PFS, AEP (distinguished), JD, is an attorney in private practice in Fort Lee, New Jersey and New York City. He is an estate planning attorney, author of 42 books, and more than 1,200 articles.

Introduction

President Biden released his administration's proposed budget for fiscal year 2022. While spending focuses on infrastructure, clean energy, etc., it includes a host of proposed tax changes affecting individuals and corporations. Some of the significant tax changes that many taxpayers hoped wouldn't happen, like Senator Van Hollen's taxation on transfers and death, are included. Those changes would transform tax planning, raise significant revenues, and might have an impact on the reduction of wealth concentration in America.

Your Next Tax Move

While planning your next chess move, consider that there is often many changes from proposals to final legislation so it remains premature to assume that the proposals will be what will be enacted. That said, taking protective action before new tax legislation becomes effective may prove worthwhile. But caution remains in order. Senator Van Hollen's proposal still has a retroactive effective date back to January 1, 2021. So planning steps you take now to avoid costly tax changes, might themselves trigger tax costs. So immediate action, with caution and flexibility, should be evaluated with your advisor team. Some have already labeled the proposal negatively as constituting excessive spending and high taxes. So what might actually get enacted is unclear. Very important to current planning steps, is what will be the effective date of any new changes.

Proposed Individual Tax Increases

The American Families Plan increases income taxation of high-income individuals, restricts tax deferred like-kind exchanges (swamps of real estate that avoid current income taxation a sale would trigger), and much more. Some of the proposals include:

Higher Tax Rates: The top income tax rates will be bumped up from 37% to 39.6%. While some had expected that this increase would apply to taxpayers earning over $400,000, the proposal applies to income over $509,300 for married filing joint taxpayers, and to income over $452,700 for single taxpayers. While this is a rate increase, it is not clear that for 2.6% of a rate differential triggering gains that might be unnecessary will be advantageous.

Capital Gain Rates Might Double: Consistent with proposals that have been buzzing capital gains (e.g. sale of stock, investment real estate, etc.) of those with adjusted gross income over $1 million will be taxed at 37%. That is about double the current 20% capital gains rate. This could have dramatic changes in investment, retirement, and other planning. It might also warrant immediate planning. If you are planning on selling investment real estate, a family business, or diversifying out of a concentrated stock position, it might be beneficial to sell now before the rates double! Evaluate options with all your advisers. It might be helpful to create forecasts reflecting various tax and economic scenarios to determine what might be worth pursuing. But be careful. What might the effective date of any such change? If this change is enacted, future planning could be dramatically changed. Taxpayers might forecast and plan sales and income for a decade or longer into the future. Then, actions can be taken to control income realization to stay below the $1 million threshold and avoid doubled rates. This might include using installment sale treatment, charitable remainder trusts and more. Harvesting gains and losses may take on a very different approach then it has had historically.

New Realization Tax on Transfers

Perhaps the most dramatic change is to make the transfer of property by gift, and on assets owned at death trigger events for capital gains. This will transform planning. If you want to make gifts of appreciated assets (for example to use some of the current $11.7 million transfer tax exemption just in case that is reduced in the future) be wary that those transfers might trigger capital gains if made after the effective date of the new legislation. But what date might that be? So, immediately action might be worthwhile. But you might discuss with your advisers using techniques to unwind the transfers to avoid an unintended capital gains cost on transfers. Some advisers integrate provisions into irrevocable trusts that are a common recipient of gift transfers that permit one or more persons (trustee, one primary beneficiary, or all beneficiaries) to disclaim the transfers thereby (hopefully!) unwinding the transfers. For income tax purposes it may be possible to rescind a transaction during the same tax year if trip up over the effective date. This is all complex and there are many views of each potential options, so review them with your tax advisers. Consider what this type of change might do to future planning? If your estate will pay capital gains on all appreciation in assets you own on death, the historic bias of holding assets until death so that the capital gains would disappear (with a basis adjustment from what you paid for an asset to the fair value of the assets at death). That may prove costly. Instead, a totally new planning approach may become the rage. You might have your wealth adviser and/or CPA forecast income and tax consequences out for years or even decades. It might prove advantageous for some to realize some amount of gain each year before death to avoid the higher almost 40% tax on death. Estate planning documents might benefit from amendments to permit this type of planning.

Tax on Trusts and Entities

There is another facet to the above realization regime. Gain on unrealized appreciation also would be recognized by a trust, partnership, or other non- corporate entity that is the owner of property if that property has not been the subject of a recognition event within the prior 90 years, with such testing period beginning on January 1, 1940. The first possible recognition event for any taxpayer under this provision would thus be December 31, 2030. This might suggest that if you have created irrevocable trusts (or create them now to try to avoid a reduction in exemption which might not be incorporated into new legislation) a capital gains tax could be due on all appreciation as soon as 2030! What planning options might exist? Might trustees be able to distribute appreciated assets to beneficiaries to avoid that tax? Will trust agreements permit that? Will lots of grandchildren be driving red hot sports cars in 2031?

Social Security Taxes

Another proposal is to coordinate the net investment income and self-employment taxes. Historically, high income taxpayers who earned income from a closely held business, e.g. a physician from her medical practice, paid themselves a more modest salary that was subject to Social Security taxes. The remaining profits were withdrawn as a distribution to owners that was not subject to those taxes. The savings, especially over years of work, could add up. The proposal is that all passthrough business income (e.g. S corporations, limited liability companies, partnerships) of high-income taxpayers will be subject to either the net investment income tax or Social Security taxes. That might result in the restructure of closely held business entities, revisions to governing documents (e.g. partnership agreements) and changes in how profits, salary and other payments are made. This may have ripple effects on valuations, buy-out agreements, and more.

Carried Interests

Hedge fund principals may face higher taxes as carried interests will be taxed as ordinary income instead of capital gains, about a doubling of the rates.

More Audits

The IRS will receive more funding to expand enforcement. That might mean lots more audits.

Business Tax Increases

The American Jobs Plan proposes several corporate tax changes including the increase corporate income tax rate to 28% from its current 21%. For those who restructured family and closely held business entities to regular or “C” corporation form to take advantage of lower corporate tax rates, this change might have them evaluate switching to an S corporation or other format. That, however, is not so simple as there can be costs in restructuring C corporations. Be certain to review any plans with all of your tax advisers before taking any steps. Moving forward, the decision as to which type of business structure and choice of entity may change from what it has been since the 2017 tax law changes. Be careful as well to review your estate planning documents, especially trusts. If you change a C corporation to an S corporation your irrevocable trusts will require special provisions to avoid tainting the tax favored status of an S corporation (the pass through of income to owners instead of paying a corporate tax). There is a laundry list of other changes, but those are beyond the scope of this preliminary discussion.

Featured Events

Please Don't Register for this Event "Trust Structures and Strategies" HERE

The video recording will be emailed to all registrants - whether you attend live or not. Saturday, June 19th at noon. Please don't watch it.

This event does not qualify for continuing education credit.

NEW SATURDAY SERIES

Please consider your Saturday mornings booked for the foreseeable future...

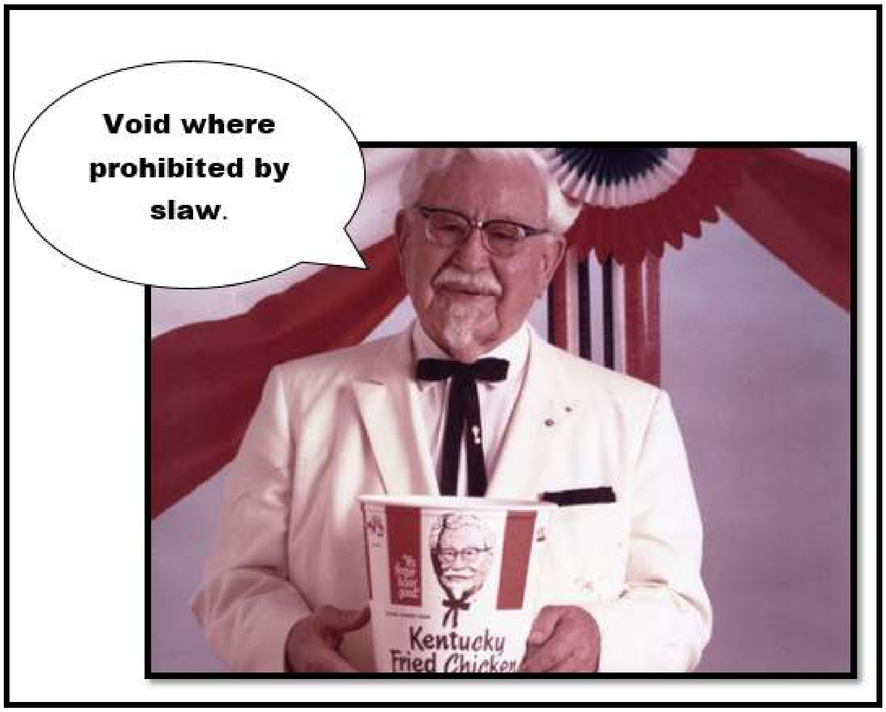
"Toast, Trusts, and Taxes with Alan Gassman and Friends"

A Sometimes "Maybe" Discussion Illustrating Important Planning Ideas and Information

Join Alan and his guests for these Saturday morning conversations.

Please send Alan questions and ideas for discussion.

For mature audiences only.



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Saturday, June 26th	Free webinar from our firm	**Asset Protection Meets Estate Tax Planning** 11:00 AM EDT	Register Here
Saturday, July 3rd	Free webinar from our firm	**Special Update on Recent Developments and Hot Topics** 11:00 AM EDT	Register Here
Saturday, July 10th	Free webinar from our firm	**More Mathematics Of Estate Tax Planning** 11:00 AM EDT	Register Here
Saturday, July 17th	Free webinar from our firm	**Hard Questions and Interesting Answers for Estate Planners** 11:00 AM EDT	Register Here
Saturday, July 24th	Free webinar from our firm	**Estate Planning for Business Owners** 11:00 AM EDT	Register Here

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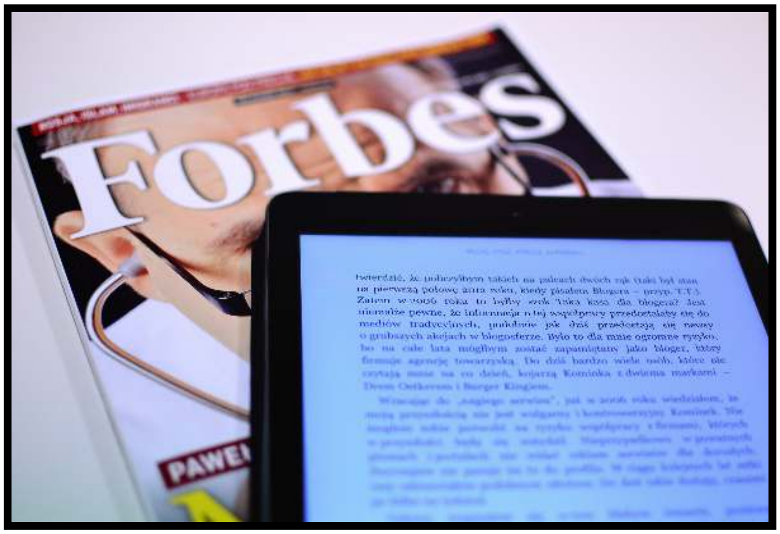
All Upcoming Events

Register for all future free webinars from Gassman, Crotty & Denicolo, P.A. using this link

Wednesday, July 21, 2021	**Free webinar from our firm**	**Alan Gassman, Jody Craig, Professor Jerry Hesch, and Michael Lehmann present:** *Charitable Planning for the Business Owner* **from 12:30 to 1:30 PM EDT**	**Register**
Thursday, July 26-29, 2021	**AICPA & CIMA ENGAGE 2021 in Las Vegas, NV (Face to Face)**	**Jerry August, Alan Gassman and Kevin McGraw present:** *Ready for a Sale Panel on Business in Distress* **from 9:30 to 10:45 AM PT**	**Register**
October 21-22, 2021	**Notre Dame Tax and Estate Planning Virtual Conference**	**Alan Gassman and Jonathan Blattmachr present:** *Tools and Strategies to Avoid Ethical Issues in Estate Planning*	**Coming Soon**
Thursday, November 4, 2021	**Estate Planning Council of Birmingham**	**Alan Gassman presents:** *Hot Topics In Estate Tax And Creditor Protection* **from 8:00 AM to 10:00 AM CT**	**Coming soon**
Sometime in November	**FL Bar Advanced Asset Protection Conference**	**Alan Gassman presents:** *Advanced Strategic Planning Techniques*	**Coming Soon**

Forbes Corner



"MATHING OUT" ESTATE TAX PLANNING STRATEGIES

Jun 03, 2021

Examples and discussion may only be the tip of the iceberg in respect to going about “running the numbers” for a married couple who is interested in what to do from an estate planning standpoint. When in doubt, math it out... Continue reading on Forbes

Senate Estate And Gift Tax Bill Will Reduce Exemption To $3,500,000 And Take Away Many Opportunities

Mar 27, 2021

Senator Bernie Sanders released his proposed estate and gift tax reform legislation on Thursday, March 25, to the displeasure of a great many American families and their advisors. Senators Kirsten Gillibrand, Jack Reed and Chris Van Hollen reportedly co-sponsored this plan... Continue reading on Forbes

For Finkel's Followers

3 Ways You Are Personally Sabotaging Your Company Culture

By: David Finkel

As a business leader, shaping the company culture within your business is one of the most important things you can do as a business owner. It is the invisible guiding hand that could make the difference between you reaching your goals or missing the mark. And for many business owners, they struggle with the company culture that they envision in their head vs the reality of their day to day culture.

So today, I want to talk about three ways that you are personally sabotaging your company culture and how you can prevent making these mistakes in the future.

1. Feedback is Discouraged

Many business owners suffer from control issues and fear that no one will be able to do the job like they do. So they instinctively micromanage people on their team. This behavior can affect your ability to hire and obtain team members, and can also prevent you from scaling and growing your business. A team that doesn't feel like they are able to do their job without constant oversight are often fearful of giving feedback or offering up suggestions. Which means that there may be a lot of good ideas left on the table.

To prevent this issue, it's important that you take steps as a leader to keep your micromanaging tendencies in check. Allow your team members to own projects or tasks within their skill set, and ask for and listen to any feedback that they may have along the way. If you follow the gold standard of hiring, you can be confident that you have team members that have experience in their position and can offer insight outside of your own.

2. You are Never Happy

Another issue many business owners face, has to do with feedback given to team members. Are you one to gloss over victories and successes and focus on shortcomings and mistakes? This can have a huge impact on your company culture in more ways than you think. If your team is constantly worried about whether they can do a good job this can breed procrastination amongst your team members. They are so afraid of doing the wrong thing or presenting a presentation or a report that isn't up to your standards they will subconsciously hold off on doing it until the last minute.

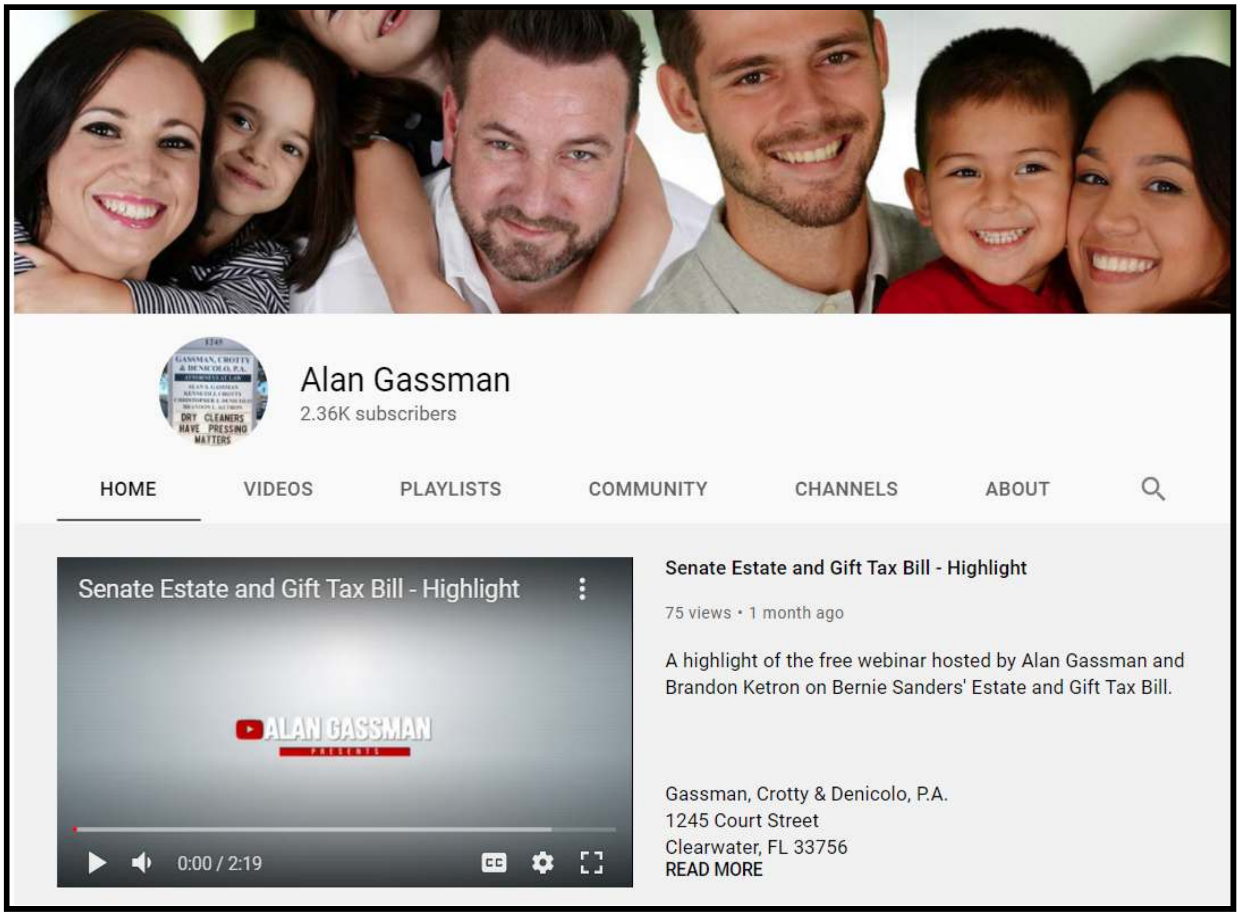
To prevent this issue, give your staff the ability to make mistakes. Ask them for a draft. Give them room to grow and make mistakes and work with them on how to improve things in the future. In the same realm if you find yourself making a mistake, own it and give yourself grace to do better the next time.

3. You Don't Eat Your Own Cooking

The last way that you are sabotaging your company culture has to do with your inability to eat your own cooking. Do you tell your team to be on time for meetings but consistency show up five minutes late? Do you ask them to complete their quarterly action plan by next Friday but fail to turn in your own? Your team is watching and anything that you ask your team to do, you should model yourself whenever possible.

Company culture is an ongoing task. Every day you have the opportunity to help shape the future of your business and by changing these three behaviors you will be well on your way to shaping a company culture that you can be proud of.

You Tube Channel



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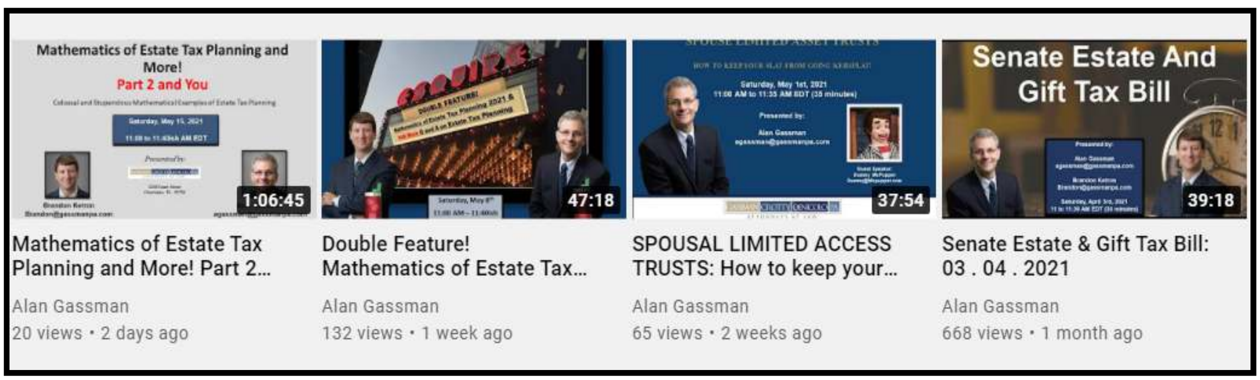

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Asset Protection in Florida

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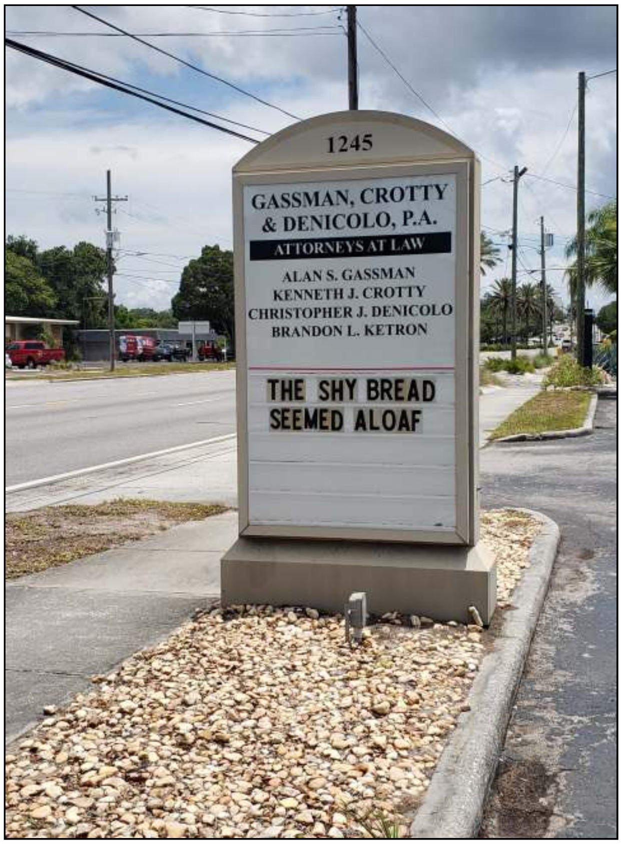

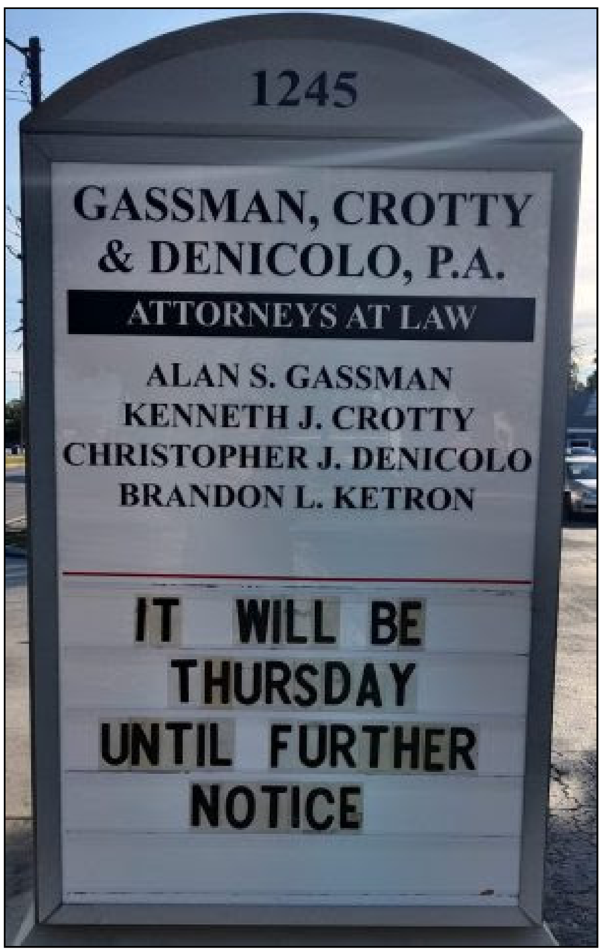

Today in History

By: Wesley Dickson

- Ransom E. Olds, who founded Oldsmobile, was born on this day in 1864. When he eventually passed in 1950, it made the Ransom E. News.
- June is World Bicycle Month, so take a brake from what you are doing, and ride until you get wheelie tired.
- Amsterdam established their municipal postal service on June, 1748. The city would have done it sooner, but it kept getting the red light.
- The US National Defense Act, which was passed June, 1916, established the Reserve Officers Training Corps ("ROTC"). Today, there are over 250 ROTC programs across the US.
- On this day in 1944, the Nazi forces pulled out of Rome - They decided they ought to roam elsewhere.
- The Rolling Stones began their first tour in June, 1964. Despite all the time the band has been touring, they have been unsuccessful at gathering any moss.
- Aretha Franklin's hit "Respect" reached #1 in June, 1967. Tune in next Thursday to find out what that means to me.
- Bohemian Rhapsody by Queen was certified Gold in June, 1976. When asked about the huge accomplishment, the band simply asked "Is this the real life?"
- The late Larry King began his series Larry King Live on this day in 1985.

5 Star Reviews from Readers like You!

Great newsletter and courses. I'm not always able to attend but it looks like you're having fun!

- Anonymous

As always, Alan is entertaining and generous with his knowledge. I’m happy to be able to call him my friend!

- Sandy

Did you enjoy reading the Thursday Report? Send your thoughts and comments to info@gassmanpa.com for a chance to be our next featured 5 star review!

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