PHILADELPHIA ESTATE PLANNING COUNCIL

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President's Message

Douglas S. Simon, MD

As I sit down to compose my last President's message for the 2015-2016 year, I am amazed at how quickly the time has passed! This was a very special year in the history of PEPC as we celebrated our 75th Anniversary. We have made major strides into the future on many levels. We were fortunate to be able to celebrate the 75th with a fantastic gala on February 20th at the new Logan Hotel in Center City. One hundred and eighty members along with their spouses and significant others attended. The weather cooperated with probably the warmest Saturday night of the winter allowing the party to take place both indoors and outdoors. After a cocktail hour we settled in for an evening of dining and dancing in the main ballroom. Jordon Rosen, a long standing PEPC member and the immediate past President of the National Association of Estate Planners and Councils (NAEPC), presented the Council with a plaque from that group recognizing our milestone. We had the privilege of having eleven past presidents in attendance and I was fortunate to be included in a group photo with the people whose efforts guided us over the years to our current stature as the premier estate planning council in the country. It really is a moment of living history showing the past and present of the Council. We continue to be the largest estate planning council in the country as well as one of the most admired. Our robust programming and networking opportunities remain second to none.

This year provided outstanding opportunities for our members to have access to first rate educational and networking opportunities. Our slate of luncheon programs that kicked off in September was well received as we welcomed speakers from multiple disciplines over the course of the year. As always the presenters came from a wide variety of disciplines and geographies. Our Roundtable/ Brown Bag luncheon series, put together by board members Adam Sherman and Don DiCarlo, provided topical subjects

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Deliberately Violating the Delaware Tax Trap to Achieve a Step-Up in Income Tax Basis

Michael Breslow

Introduction

After the American Taxpayer Relief Act of 2012, and the now "permanent" and increasing estate/gift tax exemption amounts, and the introduction of portability, there are many clients who are the beneficiaries of Pennsylvania trusts whose heirs could benefit from the adjustment in income tax basis that would result from having the assets of the trust included in the beneficiary's gross estate for federal estate tax purposes. These clients have federal estate tax exemption remaining (either their own, or their own exemption plus exemption that they inherited from a predeceased spouse through portability) that exceeds the combined value of the client's personal assets and the assets of the trust. In many cases, including part or all of the assets of the trust in the client's gross estate would not cause federal estate tax to be imposed.

This article focuses on one method by which the assets of

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Coming Events

Annual Meeting, Seminar & Reception
Thursday, May 5, 2016
3:00 – 3:30 p.m. Registration
3:30 – 6:00 p.m. Program
6:00 – 8:00 p.m. Reception &
Access to the Mütter Museum
College of Physicians
19 South 22nd Street, Philadelphia, PA 19103

2016 Annual PEPC Golf & Tennis Outing Monday, May 23

Golf Outing:
Whitemarsh Valley Country Club
815 Thomas Road
Lafayette Hill, PA 19444
12:30 p.m. Tee Time

Tennis Outing:
St. Martin's Clubhouse
415 W. Willow Grove Avenue
Philadelphia, PA 19118
2:30 p.m. Round Robin

SCHEDULE:
Golf Registration: 10:30 a.m. – 12:00 p.m.
Lunch Buffet: 11:15 a.m. – 12:30 p.m
Golf Tee Time: 12:30 p.m.
Tennis Round Robin: 2:30 p.m. – 4:30 p.m.
Beginner's Golf Clinic: 3:00 p.m.
Reception: Cocktails & Hors D'oeuvres: 6:00 p.m.
Dinner: 7:00 p.m.

Please register at www.philaepc.org.

President's Message continued

in a timely manner that allowed us to utilize our deep roster of home grown talent. Each event was filled to capacity and received universally positive reviews. We continue to make progress on our new website which will be introduced this coming summer. Regan Greco and Eric Hildebrand deserve recognition for their ongoing efforts in this area.

As we approach the end of our fiscal year culminating in our Annual Meeting on May 5th at the Mutter Museum, I want to take time to thank the members of the board for their contributions to our continued success. I am continually amazed at the level of volunteer commitment the Council receives each and every year. Our board is composed of a truly talented group of distinguished professionals in their respective disciplines. They give generously of the most valuable commodity we all posses, their time. By running the committees and bringing fresh ideas and new perspectives to the table they keep the Council relevant and vital. We simply could not achieve to the level we do without this selfless commitment from each and every one of them. In addition, we strive to recognize our many sponsors for both individual events as well as our Platinum sponsors who sustain us throughout the year. Without their support we could not offer the array of opportunities in both the educational and networking areas that we do year in and year out.

One of the most important functions of the board is to bring on new members and ideas in a balanced fashion. This year we thank Samuel Freeman, Adam Sherman and Nina Stryker for serving as board members for the past four years. I have worked with each of them personally and I am grateful for their contributions and service to the organization. They each brought expertise and energy to the board and the committees that will be missed. We welcome new members Jill Fowler of the law firm of Heckscher, Teillon, Terrill and Sager, Chris Borden from Janney Montgomery-Scott, and Thomas McDonnell from Anderson Tax as members of the board of directors whose terms run through 2020. They are joined by returning board member Andrew Haas from the law firm of Blank Rome who will continue as a Director. Mathew Osterlich of PwC will serve as a director with the group whose terms expire in 2018. He is replacing Scott Isdaner of Isdaner and Company who is moving into the role of Secretary. Scott will hold the officer's chairs culminating in his Presidency in the 2019-2020 fiscal year. We are blessed to have such a deep bench of talent from which to select.

As we close out this year I want to take the opportunity to thank my fellow officers who have been invaluable in their counsel and input over not only this past year but the past five years as I worked my way through the various officer's positions. I believe that we leave the Council in excellent shape on many levels both financially and in the spirit of volunteerism that drives us forward. I am confident that our next President, Huldah Robertson, will take us to even higher levels and set the course for future generations of leaders to come. As always we remain indebted to both Denise Downing and her staff as well as her predecessor who trained her so well, June Neff. I look forward to seeing many of you at the Golf and Tennis Outing on May 23rd with golf at the Whitemarsh Valley Country Club and tennis at the Philadelphia Cricket Club. These are both tremendous facilities that offer a great day out among friends and colleagues.

In closing I want to thank the entire membership for allowing me the opportunity to serve as President for the 2015-2016 year. It has been a true pleasure and a privilege to hold the seat for this past year and I hope that my fellow officers and I leave the Council in at the very least slightly better shape than we found it and poised for continued future growth. I am confident that we are in good hands and look forward to a dynamic and prosperous future.

Delaware Tax Trap continued

a trust may be included in the beneficiary's gross estate for federal estate tax purposes without terminating the trust or causing inclusion for Pennsylvania inheritance tax purposes. Often, trusts contain a limited power of appointment by which the beneficiary may appoint the assets of the trust outright to or in further trust for a class of beneficiaries. In certain circumstances, the beneficiary may cause the inclusion of the assets of the trust in his or her gross estate for federal estate tax purposes to achieve a step-up in income tax basis by deliberately violating the so-called "Delaware tax trap." Several commentators have previously addressed this potential technique for achieving a step-up in income tax basis.[1] The focus of this article is on the method of deploying this technique for clients in Pennsylvania.

Background

Imagine that Husband died in 2007. A credit shelter trust for the benefit of Wife, that leaves the remainder to continuing trusts for Children, was funded with $1,500,000, the assets of which have appreciated to $3,000,000 in 2016. Wife has assets in her own name of $2,000,000, and Wife has not used any portion of her $5,450,000 federal estate tax exemption amount. Assuming the highest federal and Pennsylvania

Delaware Tax Trap continued

capital gains tax rates on the assets in the trust of 26.14%[2], on a sale of the credit shelter trust assets following Wife's death, the Children's trusts would save $392,100 if the assets of the credit shelter trust receive a step-up in income tax basis to $3,000,000. There would be no federal estate tax cost to including the credit shelter trust in Wife's gross estate because Wife's remaining exemption amount exceeds the combined value of her personal assets and the assets of the trust.

After Pennsylvania adopted the Uniform Trust Act, the simplest solution to achieve the step-up in income tax basis, if available, would be to terminate the shelter trust by nonjudicial settlement agreement among all of the beneficiaries and trustees with appropriate releases and indemnifications.[3] There are a number of disadvantages to terminating the trust.[4] Another option, instead of terminating the trust, is to modify the trust by nonjudicial settlement agreement or by petition to the court to grant the beneficiary a general power of appointment under §2041(a)(2).[5]

The following Sections describe how a beneficiary of a trust, through the exercise of a limited power of appointment to deliberately spring the so-called "Delaware tax trap," can cause the inclusion of the trust in the beneficiary's gross estate for federal estate tax purposes to achieve a step-up in income tax basis without terminating the trust.

The Delaware Tax Trap

Under I.R.C. §2041(a)(3), the estate of the donee of a limited power of appointment will be subject to federal estate tax on appointive property if the donee "exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power."[6] Section 2041(a)(3) is known as the "Delaware tax trap" because it was enacted in response to an older version of a Delaware statute that provided that the exercise of a power of appointment began a new perpetuities period.[7]

The Delaware tax trap has three elements:

1. A trust created after October 21, 1942 gives a beneficiary a power of appointment (the "First Powerholder");
2. The First Powerholder exercises his or her power of appointment in a manner that gives another person the right to exercise a power of appointment (the "Second Powerholder"); and
3. Under applicable law, the Second Powerholder can exercise his or her power of appointment in a manner that postpones the vesting of any trust interest or suspends the absolute ownership or power of alienation of such property for a period ascertainable without regard to the date of the creation of the first power.

If all three conditions are met, the assets of the trust over which the First Powerholder has exercised his or her power of appointment will be included in the First Powerholder's gross estate for federal estate tax purposes.[8] Because the trust assets are included in the First Powerholder's gross estate for federal estate tax purposes, the assets will achieve the desired step-up in income tax basis under §1014(b)(9).[9]

The Delaware tax trap applies whether or not the Second Powerholder exercises the power of appointment in the prohibited manner. The mere existence of a right in the Second Powerholder to extend the ownership rights of the trust property beyond the time period for vesting set forth in the original trust will result in the inclusion of the trust property in the estate of the First Powerholder. Importantly, these assets also will not be included in the First Powerholder's gross estate for Pennsylvania inheritance tax purposes.[10] As mentioned above, this preferable Pennsylvania inheritance tax result would not pertain if the trust assets were distributed to the First Powerholder and transferred through his or her probate estate after the termination of the trust.

To deliberately spring the Delaware tax trap to achieve a step-up in income tax basis, the beneficiary of a Pennsylvania trust must navigate Pennsylvania's current statutory scheme and existing common law principles relating to the rule against perpetuities.

Pennsylvania's Rule Against Perpetuities

For decades before January 1, 2007, a Pennsylvania donee of a limited power of appointment could not deliberately or inadvertently violate the Delaware tax trap by exercising a limited power of appointment to create another limited power of appointment because the Pennsylvania common law of rule against perpetuities precluded this result. The exercise of a limited power of appointment over a Pennsylvania trust did not begin a new perpetuities period for the trust, and the exercise was invalid if the result would extend the vesting beyond the original perpetuities period.[11] Thus, the perpetuities period that applied at the creation of the power (in the case of a trust created under the will or revocable trust, the creation of the power would have been the death of the testator/settlor), continued to apply regardless of the exercise

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Delaware Tax Trap continued

of powers of appointment by intervening beneficiaries. Accordingly, a First Powerholder could not grant a limited power of appointment that could postpone the vesting of the property without regard to the creation of the first power, regardless of the First Powerholder's intent.

In 2006, as a part of the Uniform Trust Act, Pennsylvania abolished the rule against perpetuities.[12] The legislature provided that the common law rule no longer will apply to any interests created after December 31, 2006.[13] For all interests created before January 1, 2007, the common law rule against perpetuities continued to apply.[14]

The Pennsylvania statute repealing the rule against perpetuities might have "re-set" the Delaware tax trap for Pennsylvania decedents. The exercise of a power of appointment over a trust interest created after December 31, 2006 would perpetually postpone the vesting period for that interest. If the exercise of the power of appointment also included the grant of successive powers of appointment to the beneficiaries of the appointed trust, the Delaware tax trap would have been sprung on the First Powerholder, resulting in estate tax inclusion under §2041(a)(3).

To avoid the inadvertent application of the Delaware tax trap, effective January 1, 2007, the Pennsylvania legislature added the following provision:

> "(3) If a power of appointment is exercised to create a new power of appointment, any interest created by the exercise of the new power of appointment is invalid if it does not vest within 360 years of the creation of the original power of appointment, unless the exercise of the new power of appointment expressly states that this provision shall not apply to the interests created by the exercise."[15]

Pennsylvania, as in the case of many other states in response to this problem,[16] created an artificially long vesting period so that the estate of a decedent who exercised a power of appointment over a trust created after December 31, 2006 and who granted a new power of appointment to the beneficiaries of the appointed trust, still could take the position that the period for vesting can only be ascertained by reference to the original date of the creation of the power, even though that period is several centuries (or even a millennium) away, thereby precluding the application of §2041(a)(3). For many larger estates, keeping the assets of the trust out of the First Powerholder's gross estate for federal estate tax purposes is the correct result and it is appropriate that Pennsylvania closed the trap.[17]

Fortunately, the legislature made this provision elective by including in the statutory language, "unless the exercise of the new power of appointment expressly states that this provision shall not apply to the interests created by the exercise."[18] By electing to "switch off" this provision, the Pennsylvania donee of a limited power of appointment still may deliberately cause the assets of the trust to be included in his or her gross estate under §2041(a)(3).[19]

Method to Deliberately Violate the Delaware Tax Trap in Pennsylvania

A. Powers of appointment created after December 31, 2006

Returning to the original hypothetical, because Husband died in 2007, after the repeal of the rule against perpetuities, the Pennsylvania rule against perpetuities did not apply to the credit shelter trust. To include the assets of the credit shelter trust in Wife's gross estate by deliberately violating the Delaware tax trap, Wife would exercise her power of appointment over the credit shelter trust to continue the trust for the Children. She would grant the Children powers of appointment over their own continuing trusts. Additionally, in the language of her exercise, Wife would include language similar to the following to spring the Delaware tax trap and cause the assets to be included in her estate for federal estate tax purposes:

> "I hereby exercise my power of appointment as follows [including the grant of successive powers of appointment to succeeding beneficiaries . . .] and I expressly state that 20 Pa. C.S. §6107.1(b)(3) shall not apply to the exercise of any power of appointment granted hereby."

By exercising her power of appointment in this manner, Wife will have met all three conditions for the applicability of the Delaware tax trap. She will have (1) exercised a power of appointment created after October 21, 1942; (2) granted a power of appointment to a second powerholder; and (3) permitted the second powerholder to exercise his or her power of appointment to postpone the vesting of the trust interest without reference to the creation of the original power of appointment. The third requirement is the key.

By "switching off" 20 Pa. C.S. §6107.1(b)(3), the rule applying a 360-year vesting period from the creation of the original power would not apply, no rule against perpetuities would apply to the continuing trusts, and thus the successive powerholders could exercise their second powers to postpone the vesting of the trust property "without reference to the creation of the original power."

Wife's exercise of her power of appointment to achieve

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Delaware Tax Trap continued

inclusion also could be tailored by formula. Wife could switch off 20 Pa. C.S. §6107.1(b)(3) as to a portion of the trust and could leave on 20 Pa. C.S. §6107.1(b)(3) as to the balance of the trust. In this way, Wife could maximize the use of her federal estate tax exemption amount to include in her estate the maximum amount of the trust possible without causing an increase in federal estate tax. Of course, this may add administrative complexity in the continuing trusts because of the disparate vesting periods and disparate transferors for GST purposes.

Another complication with which practitioners will have to contend is the fact that many wills and trusts contain internal termination provisions that are merely restatements of the rule against perpetuities existing at the time the document was drafted. Careful Pennsylvania drafters will have accounted for this in documents drafted after December 31, 2006. Of course, many post-December 31, 2006 decedents will have estate plans that pre-dated Pennsylvania's repeal of the rule against perpetuities.

Internal termination provisions are often drafted with very broad language. For example, many wills contain provisions that state "any interest created hereunder, *including as a result of the exercise of a power of appointed granted herein*, shall vest within 21 years after the death of the survivor of my descendants living on my date of death." Where a document has an internal termination provision, even an exercise described above would be superseded by the terms of the document, and the attempt to spring the trap will fail. In these circumstances, a nonjudicial settlement agreement to modify the trust under 20 Pa. C.S. §7710.1 to eliminate the termination provision will be necessary to effectively spring the Delaware tax trap unless there is evidence that the internal termination provision is a material purpose of the trust. It is likely exceedingly rare that the settlor or testator will have been materially focused on the rule against perpetuities. In most cases, no material purpose will be violated by removing an internal termination provision because the settlor or testator included the language as a restatement of the existing law to simplify the trust's administration.

B. Powers of appointment created before January 1, 2007

Deliberately springing the Delaware tax trap for powers of appointment created before January 1, 2007 is more challenging. These trust interests are still subject to the common law rule against perpetuities because Pennsylvania's repeal statute only applied prospectively.[20] As mentioned above, if the donee of a power of appointment exercises his or her power of appointment over a trust created before January 1, 2007, the "relation back" doctrine likely would result in the application of the law existing at time of the creation of the power.[21] In other words, the exercise of the power of appointment, even if occurring after December 31, 2006, does not change the rule against perpetuities analysis, the common law rule against perpetuities would apply and the period for vesting would always be ascertainable by referencing the original creation of the power. Thus, the Delaware tax trap could not apply.

There is an exception. A holder of a limited power of appointment could grant an *inter vivos* general power of appointment to a successive powerholder to include the assets of the trust in the first powerholder's gross estate under §2041(a)(3).[22] 20 Pa. C.S. §6104(c), which applies to pre-2007 interests, provides that, "[t]he period allowed by the common law rule against perpetuities . . . shall be measured from the expiration of any time during which one person ***while living*** has the unrestricted power to transfer to himself the entire legal and beneficial interest in the property." (emphasis added). If the first powerholder exercises his or her power of

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Delaware Tax Trap continued

appointment, and grants a second powerholder an *inter vivos* power to appoint the trust property to himself or herself, the measuring period for the rule against perpetuities begins on the date that the second powerholder may transfer the property to himself or herself and not the date of the original creation of the first powerholder's power. Thus, the trust assets would be includible in the first powerholder's estate under §2041(a)(3).

This method is only appropriate in situations in which the first powerholder is comfortable with the recipients receiving the assets outright, rather than in trust, and the powerholder has no generation-skipping agenda. This will also cause the assets to be included for federal tax purposes twice: upon the death of the first powerholder (under §2041(a)(3)) and upon the second powerholder's death (under §2041(a)(2)). The trust assets never would be included for Pennsylvania inheritance tax purposes, if the second powerholder did not exercise his or her power of appointment before death.[23] As with post-2006 interests, the language exercising the power of appointment in the first powerholder's will can be tailored by formula to include no more than necessary to achieve the maximum step up in basis without triggering federal estate tax.

This option also may be desirable to achieve a basis adjustment if it is likely that the trust assets will vest in the class of permissible appointees during the appointees' lifetimes as a result of the termination of the common law rule against perpetuities. For example, if the first powerholder is the last measuring life of the trust, and the appointees are likely to survive twenty-one years after the first powerholders' death such that the trust assets will vest in them in any event, then there is likely little to be lost by granting an *inter vivos* general power of appointment to such beneficiaries.

Because of the relation-back doctrine, there are not many other ways to spring the Delaware tax trap for a pre-January 1, 2007 trust and to retain the assets in trust that will not be included in the estate for federal tax purposes of successive beneficiaries. If the client desires this result, executing a nonjudicial settlement agreement to modify the trust to grant the beneficiary a general power of appointment is potentially the only option available.

Conclusion

For post-December 31, 2006 Pennsylvania trusts, deliberately violating the Delaware tax trap is an attractive option to achieve a step-up in income tax basis. For pre-January 1, 2007 Pennsylvania trusts, deliberately violating the Delaware tax trap also is possible under certain circumstances and for the right clients, but must be approached in a different way.

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Footnotes:

1 See e.g., Nenno, Richard W. Getting a Stepped-Up Income-Tax Basis and More by Springing—or Not Springing—The Delaware Tax Trap the Old-Fashioned Way. 40 Tax Management Estates, Gifts and Trusts Journal 215 (September 2015); Raatz, Les. Delaware tax Trap Opens Door to Higher Basis for Trust Assets, 41 Estate Planning 3 (February 2014).

2 Pennsylvania's income tax rate is a flat 3.07%. This calculation assumes the Pennsylvania income tax is a full deduction against the 20% federal capital gains tax and 3.8% net investment income tax.

3 This would be permitted under 20 Pa. C.S. §7710.1(b)-(e), provided the requirements are met. Notice to the Department of Revenue would be required in connection with the termination of certain Pennsylvania credit shelter trusts. The trustees then could distribute the trust assets to Wife and these assets would be included in her gross estate at her death under I.R.C. §2033, thus achieving the adjustment in income tax basis and the savings in capital gains taxes. I.R.C. §1014. In many cases, however, termination of a trust pursuant to a nonjudicial settlement agreement will not be an available option because termination violates a material purpose of the trust. 20 Pa. C.S. §7710.1(c). For example, if asset protection was important to Husband in connection with his estate planning, then terminating the trust and distributing the assets to Wife would likely violate a material purpose of the trust. In second marriage situations, the purpose of the credit shelter trust is very often to benefit the surviving spouse during his or her lifetime and to prevent him or her from diverting the assets to beneficiaries other than the first spouse's children. In these cases, termination of the trust would violate a material purpose of the trust.

4 First, there would be a Pennsylvania inheritance tax cost to distributing the assets of the credit shelter trust to the Wife and having the assets pass under her will. 72 P.S. §9107(b). Second, all parties would have to join in the settlement agreement, which they may not want to do (particularly if there is a corporate trustee, the family is not harmonious, or if the Children are concerned that Wife may leave the assets to beneficiaries other than Children). Third, there may be gift tax consequences if the Children agree to terminate their remainder interest in the credit shelter trust. See e.g., Treas. Reg. §25.2511-1(c)(1); PLR 200917004, PLR 200536018. Fourth, corporate trustees often charge termination fees, and additional probate assets will increase probate fees. Fifth, it may be beneficial for the family to keep the credit shelter trust in place as a separate taxpayer for other income tax reasons. Finally, the trust assets would lose the creditor protection provided by the trust, and would become subject to Wife's creditors and the creditors of Wife's estate. This final point is of particular significance if Wife has remarried because the assets of the credit shelter trust, if included in Wife's probate estate, would become subject to the elective share claim of her surviving spouse.

5 As with terminating the trust, the modification must not be inconsistent with a material purpose of the trust. For example, by creating a credit shelter trust, the testator's intent was to exclude the trust assets in the surviving spouse's gross estate at his or her death.

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Delaware Tax Trap continued

6 I.R.C. §2041(a)(3).

7 38 Del. Laws 198 §1 (1933).

8 I.R.C. §2041(a)(3).

9 Consideration must be given to the generation-skipping transfer tax consequences if the assets of the credit shelter trust are included in the powerholder's gross estate for federal estate tax purposes. The powerholder will become the transferor of the trust assets under §2652(a)(1)(A) and therefore the assets will be subject to the allocation of the powerholder's remaining generation-skipping transfer tax exemption amount. This may not be a problem if the powerholder has sufficient GST exemption remaining to allocate to the credit shelter trust assets and his or her own assets. While the powerholder may have extra estate tax exemption as a result of portability, he or she will only ever have his or her own GST tax exemption. If the powerholder has a generation-skipping planning agenda, it may be preferable not to deliberately spring the Delaware tax trap and to maintain the exempt status of the original trust. Additionally, if the powerholder's power is not exercised properly and the assets do not become includible in the powerholder's gross estate under §2041(a)(3), there is a risk that the GST exempt status of the trust could be inadvertently compromised under Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2), which maintains the common law rule against perpetuities for grandfathered trusts. For an excellent discussion of the GST implications of planning in light of the Delaware tax trap, see Nenno, Richard W. Terrors of the Deep: Tax Dangers When Exercising Powers Over Trusts—The GST Regulations and the Delaware Tax Trap. Tax Management Estates, Gifts, and Trusts Journal, Vol. 34, No. 1 (2009).

10 72 P.S. 9111(k) states "[p]roperty subject to a power of appointment, whether or not the power is exercised, and notwithstanding any blending of such property with the property of the donee, is exempt from inheritance tax in the estate of the donee of the power of appointment."

11 See Jordan, Martha W. Requiem for Pennsylvania's Rule Against Perpetuities. 46 Duq. L. Rev. 555, 566-69 (2008) (describing the historic Pennsylvania common law of the rule against perpetuities).

12 2006, July 7, P. L. 625, No. 98, § 9.

13 20 Pa. C.S. §6107.1(a).

14 Id.

15 20 Pa. C.S. §6107.1(b)(3).

16 See e.g. Alaska Stat. §§34.27.051 (1,000 years); Ariz. Rev. Stat. §14-2901(A) (500 years); Colo. Rev. Stat. §15-11-1102.5 (1,000 years); Tenn. Code Ann. §66-1-202(f) (360 years); Wyo. Stat. §34-1-139(b) (1,000 years).

17 See Nenno, supra, note 1, at 10 (considering these essentially perpetual vesting period statutes).

18 20 Pa. C.S. §6107.1(b)(3).

19 Nenno, supra, note 1, at 224.

20 20 Pa. C.S. §6107.1(a).

21 Jordan, supra note 11, at 575.

22 Raatz, supra note 1.

23 72 P.S. 9111(k).

Changes for Social Security Claiming Strategies

William F. Davis, CFP®

A report recently issued on the long-term outlook for Social Security's finances shows that the Trust Fund is projected to be empty sometime in 2034. This is actually good news, as the Fund had been expected to be exhausted a year earlier. Certainly not a cause for celebration, though.

Social Security has not collected enough in payroll tax to cover the benefits it's been paying out since 2010. It has made up for the shortfall by using some of the interest it collects on the Treasury Bonds held by the Trust Fund. As they said last year, in about 4 years (2020) the Trustees expect to begin gradually selling some of the bonds because at that point the interest alone won't be enough.

By 2034, there will be no Treasury bonds left. At that point, even though it will have used up the reserves it has been building up for decades, Social Security will still be collecting payroll taxes from those in the workforce. These will cover 75% of the benefits it projects it will need to pay out.

So after years of scary news about Social Security's worsening financial condition – and a recent report that confirms it – Congress finally made a move last year that equated to the most significant legislation since 1983.

With the passage of the Bipartisan Budget Bill of 2015 (the Budget Act) into law, three specific claiming strategies that had long been popular - the "file and suspend," the "restricted application," and the "retroactive benefits" methods - have been effectively eliminated for anyone born in 1954 or later.

This article will look at these eliminated methods, how the delayed retirement credits are calculated and how you can determine when you should begin taking benefits.

Claiming Strategies

Choosing one of these previously mentioned claiming strategies has long been a means for couples to maximize their Social Security benefits in the form of hundreds of thousands of dollars over a lifetime. ***However, these newly-implemented changes have effectively eliminated these strategies for anyone who hasn't been grandfathered in.***

Let's take a look at each of these three options, how they work, and how they have changed:

File & Suspend

How It Works

This is where an individual, who is at least at full retirement

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age (age 66 if born between 1943 and 1954), files for his/her own retirement benefit and immediately suspends the receipt of those benefits. This establishes a date for filing for the individual, which now provides for dependent benefits (such as spousal benefits) to be paid based upon the filer's individual record. Since the receipt of retirement benefits has been suspended, this individual's future benefit will earn delayed retirement credits which equate to a growth rate of 8% per year, up to his or her age 70.

It is important to note that the "file" part is necessary to enable the dependent benefits to be paid based upon the account. The "suspend" part is only necessary if the individual wants to take advantage of the delayed retirement credits (where else can you get a guaranteed 8% annual return?!?!).

This technique was the best of both worlds: money was building up AND coming in. Not only were delayed retirement credits accruing, but it also opened up eligibility to the filer's spouse to collect spousal benefits.

Once the higher earner reached 70, then any suspension could be removed, and the benefits would adjust to a higher rate thanks to the building up of the delayed retirement credits.

How It Has Changed

For those who have already filed and suspended, this ideal scenario is still in effect.

For those who aren't grandfathered in, there are some big, life-altering changes ahead in Social Security filing policies. For these folks, the option to file-and-suspend while simultaneously enabling a spouse to claim on their record has been eliminated. As of May 1, 2016, if a spouse suspends his or her benefits, benefits for everyone involved – including the other spouse or qualifying dependent – will be suspended, too. This means your spouse won't be able to claim spousal benefits – and vice versa – if you voluntarily suspend benefits on your own record. ***In essence, now a suspension on the part of one equals a suspension for all.***

Restricted Application

How It Works

The strategy allows a lower earning spouse to apply for benefits based on their husband's or wife's work record. This is where an individual, who is at least full retirement age, has not yet filed for retirement benefits and whose spouse has established a filing date (and could have suspended), files

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for only the spousal benefit that is based upon the spouse's record. This individual must specifically file a "restricted application" - this is important because if the individual who is filing has a retirement benefit of his or her own that either is larger or could eventually be larger than the spousal benefit, filing the restricted application allows his or her own retirement benefit to be delayed and future benefits will grow by the same 8% per year as mentioned above (again, where else can you get a guaranteed 8% annual return?!?!).

How It Has Changed

Whether you file for spousal or personal retirement benefits, you'll be "deemed" as filing for both, and thus receive the highest of the two.

Retroactive Benefits (Lump Sum)

How It Works

Above and beyond file and suspend, restricted application and "deeming," another part of the legislation eliminated the "retroactive benefits" provision, commonly called the "lump sum" option.

Retroactive benefits worked in conjunction with the file-and-suspend strategy. Previously, those who reached full retirement age and then delayed benefits had the option to undo this decision before reaching age 70, but without losing accumulated benefits. Upon undoing the suspension, a "lump sum" of all delayed benefits would be paid to the claimant.

How It Has Changed

A beneficial – and often necessary – option for those who would perhaps become terminally ill in their late 60s, retroactive benefits allowed them to receive their suspended Social Security benefits to offset medical costs or other expenses. Now, unless grandfathered in, this strategy is gone; while anyone can un-suspend receipt of benefits, they can no longer collect a retroactive lump sum.

Survivor Benefits

Although most everyone is affected by these policy changes – with the exception of those who are grandfathered in – there is one group that remains completely untouched in the Budget Act: those who will receive survivor benefits. Whether you're a surviving spouse, or a minor or disabled child whose parent passes away, your benefits should remain unchanged. And as with all benefits that stem from another's Social Security records, it helps to have reliable advice to determine the most financially sound path forward. This is a case in which variables can multiply exponentially.

Benefits for Former Spouses

One exception is for those who are no longer married - you may be able to receive spousal benefits based on your former spouse's work record. Your eligibility is contingent on the following conditions:

- You are currently unmarried.
- Your former marriage lasted 10 years or longer.
- You have been divorced for at least two years.
- You and your former spouse are age 62 or older, and your former spouse is entitled to Social Security benefits.

The good news is that your former spouse does not need to know that you've filed for a divorced spousal benefit, nor does he/she need to have filed (or followed the "file and suspend" method) for his or her own Social Security in order for you to claim it.

However, the other rules about initiating your divorced spousal benefits early are the same as those for married couples. Most importantly, if you claim it prior to full retirement age, the spousal benefit will be reduced. If you wait until your full retirement age to initiate spousal benefits, you can restrict your application to divorced spousal benefits only and then file based on your own work history, at age 70, maximizing your own benefits.

Delayed Retirement Credits

You may earn a credit for each month during the period beginning with the month you reach full retirement age and ending with the month you reach age 70. The benefit increase no longer applies when you reach age 70, even if you continue to delay taking benefits.

Basically, you earn 1 credit for each month you are fully insured and eligible but do not receive an old-age benefit, either because you do not apply for benefits or because you elect to voluntarily suspend your benefits to earn DRCs. Even if you were entitled to old-age benefits before full retirement age, you may still earn DRCs for months during the period from full retirement age to age 70, if you voluntarily elect to suspend those benefits.

How Social Security Computes Delayed Retirement Credits

The increase amount depends on your date of birth and the number of credits you earn; the number of credits need not be consecutive. Take the total number of credits and multiply that number by the applicable percentage from the table below. Then multiply the result by your benefit amount and add the result to your benefit amount.

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Increase for Delayed Retirement		
Year of Birth	Yearly Rate of Increase	Monthly Rate of Increase
1933-1934	5.5%	11/24 of 1%
1935-1936	6.0%	1/2 of 1%
1937-1938	6.5%	13/24 of 1%
1939-1940	7.0%	7/12 of 1%
1941-1942	7.5%	5/8 of 1%
1943 or later	8.0%	2/3 of 1%
Note: If you were born on January 1st, you should refer to the rate of increase for the previous year. Source: Social Security Administration		

Example:

Bob was qualified for Social Security benefits when he reached age 65 on January 24, 1998. However, he decided not to apply the benefits immediately because he was still working.

When Bob became age 66 in January 1999, he retired and then applied for benefits beginning with that month. Based on his earnings, his primary insurance amount was $782.60. However, because he did not receive benefits immediately upon attainment of full retirement age (65), he is due an increase based on his Delayed Retirement Credits.

Bob earned 12 credits, one for each month from January 1998 through December 1998. Based on his date of birth of 1/15/1933 he is entitled to a credit of 11/24 of one percent for each month of delayed retirement:

12 DRCs x 11/24 of 1% = 5.5%

So this means that 5.5% of the primary insurance amount of $782.60 is $43.04 which is rounded down to $43.00, the next lower multiple of 10 cents. $43.00 is added to the primary insurance amount, $782.60. The result, $825.60 is the monthly benefit amount.

What is the Best Age to Start Your Benefits

Your monthly old-age benefit amount can differ substantially based on the age when you start receiving benefits. Specifically, if you decide to start benefits before your full retirement age, your benefit will be smaller but you will receive it for a longer period of time; if you decide to start benefits after your full retirement age, you will receive a larger monthly benefit for a shorter period of time. The amount you receive when you first get benefits sets the base for the amount you will receive for the rest of your life.

However, there are a number of factors that you might want to consider when making that decision. The Social Security website offers guidelines and a basic understanding of how to make an informed decision on when to apply for benefits, taking into account your lineage, health, health insurance coverage, and other family circumstances. It can be found at https://www.ssa.gov/planners/retire/otherthings.html.

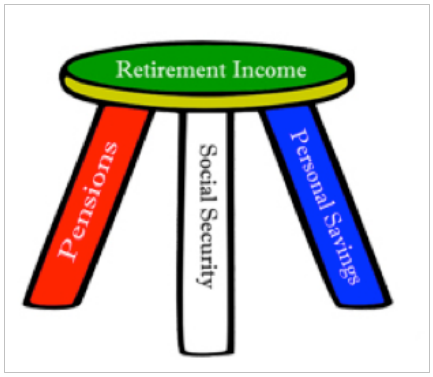
Conclusion

When scarce resources are needed to help sustain more and more people, drastic measures need to be taken – and the Budget Act is a major step. While this article has addressed a number of changes to the system, there still remains a lot of uncertainty in regard to the Social Security system and its future.

Is this a precursor to a significant overhaul of the system? Will benefits continue to be reduced? Will they eventually be eliminated? How will this impact my retirement?

The good news here – at least for the time being – is that the delayed retirement credits can continue to accumulate up to age 70. However, if you're still well below retirement age, putting your trust in Social Security to provide most of your monthly income would not be a wise decision, given the increased cost of living coupled with the growing cost of healthcare.

Retirement income has traditionally been described as a "three-legged stool" comprised of income from Social Security, an employer pension plan, and personal savings and investments. With the slow demise of the traditional employer pensions, the automatic enrollment of 401(K)s to employees today, and the use of long-term care insurance, the current landscape of the three-legged stool is changing dramatically. This has now shifted the responsibilities of saving for retirement to us all. And planning for retirement is much too important to do on your own. We all truly need to become our own financial planning advocate - become as educated as you can on financial planning topics, and find a trustworthy financial advisor to help you set financial goals for you and your family.



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of Apex Financial Advisors, Inc. Bill joined Apex upon its inception in 2011 after having lead a training team at Janney Montgomery Scott in Philadelphia. He received an undergraduate degree from La Salle University, a graduate degree from Temple University, completed the Financial Planning Program at The American College and holds the distinguished CERTIFIED FINANCIAL PLANNER™ designation. He is currently completing a master's degree in Financial Services at St. Joseph's University in Philadelphia.

Through his work with Apex Financial Advisors, Bill focuses on building and preserving financial wealth for his clients by designing and implementing personalized, comprehensive financial plans. His goal-oriented and needs-based approach to financial planning utilizes a long-term asset allocation strategy within the context of each client's individual risk tolerance. His clients include high net worth individuals and families, privately-held business owners, and corporate executives.

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Estate Planning Without An Estate Tax

Alan J. Mittelman, Esq.

It seems like only yesterday that estate planners were concerned that the $5 Million Federal estate tax (the "FET") exemption was going to expire and that the exemption would return to $1 Million. It actually was over three years ago, way back in December 2012. At that time, many planners were recommending that clients make large gifts before the then-existing FET law expired and the $5 Million exemption possibly lost forever.

This concept was very appealing since the loss of $4 Million of exemption ($8 Million for a married couple) could result in about $1.6 Million in additional federal estate taxes ($3.2 Million for a married couple). There was a frenzy to do last minute planning to save estate taxes as the clock ran down on the FET law.

Alas, Congress saved the day (as it often does at the very last minute and even after the last minute as they did in 2010). In January 2013 Congress passed the *American Taxpayer Relief Act* which made the $5 Million exemption permanent and indexed for inflation for future years. It also passed the portable exemption for surviving spouses. No longer do we

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have a system of "use it or lose it" for the exemption. If the first spouse to die does not use his/her entire exemption, then the surviving spouse (subject to certain limitations discussed below) gets the benefit of the "unused exemption" of the first spouse. The unused exemption can be used either during the surviving spouse's lifetime by making taxable gifts or at death as part of the surviving spouse's estate tax exemption.

These estate and gift tax law changes turned the estate planning world on its head. For the first time, many clients do not need to do any FET planning. After indexing, the exemption now is almost $11 Million for a married couple ($5.45 Million per spouse in 2016)(For purposes of this Article, the exemption is assumed to be $5 Million.). Furthermore, due to recent changes in marriage law, same sex couples now are permitted to marry and now can benefit from the portable exemption and the unlimited marital deduction, too. Talk about a seismic change.

What is Estate Planning?

Estate planning is the same as it always ways. It is just a matter of degree. For high net worth clients, FET saving plans still are very meaningful. The main difference is the new definition of "high net worth." A person who used to need FET planning typically had a net worth of $2 Million and up. Now, people with $10 Million of assets may not think they need FET planning, and in many cases they may be right.

But estate planning always has been more than tax planning. Tax planning received most of the attention. But there always was and still is much more to estate planning than the "tax plan." First, our clients are living longer than ever. The probability that our clients will need nursing care or become incapacitated in later years keeps increasing. Therefore, it is paramount that all of our clients have well-conceived plans to manage their affairs when the need arises. Everyone should have a Durable General Power of Attorney, a Healthcare Power of Attorney and Living Will. Choosing trustworthy and reliable people to appoint as Agent. Having a plan for old age is critical. We need to be part of this planning.

Also, Living Trusts (aka Revocable Trusts) are just as meaningful as before the new tax law, maybe even more so. A Living Trust can help an estate avoid probate. But it also can serve as a management device, either substituting for or supplementing a Durable General Power of Attorney. More and more of our clients are purchasing second and third homes in different states. A Living Trust to manage these assets and also to avoid probate administration in other states can save considerable money as well as time.

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Then when one dies, the same choices still exist: (i) leave one's assets outright to the surviving spouse or other beneficiaries or (ii) leave assets in trust for one or more beneficiaries. With the very high exemption, many people are now tempted to leave their estate outright to their beneficiaries. They just want a simple Will or at least think that is all they need until we provide better guidance.

For example, if a client is married and has a $10 Million estate, the entire estate can be left to the surviving spouse without any FET or any Pennsylvania inheritance tax. Then when the surviving spouse dies, he/she will have his or her own $5 Million plus exemption plus the unused exemption of the first spouse to die. If the estate grows even to $11 Million, there is not likely to be any FET at the second spouse's death since the exemption is now indexed. There may even be a temptation to put all of one's assets in joint name with the spouse so that the assets pass automatically to the surviving spouse without any probate. [The other key asset of most people besides jointly owned real estate, jointly owned bank account and brokerage accounts is a retirement plan which typically is payable to the surviving spouse as beneficiary.] However, choosing this simple path may be a major error.

Problems Leaving All Assets Outright to Surviving Spouse

First, outright gifts are entirely under the control of the surviving spouse. This may be perfectly okay if the surviving spouse does not remarry. Remarriage may result in loss of the portable exemption (the "unused exemption" of the first spouse to die.) The law provides that the portable exemption available to one's surviving spouse is the unused exemption of the last spouse to die of all the spouses that the surviving spouse was married to during his/her lifetime. What a mouthful! What this means is that if the surviving spouse remarries and his/her new spouse dies before our surviving spouse, then the new spouse's unused exemption becomes the new portable exemption. And let's just say that the new spouse had used his/her exemption during lifetime or used it to make bequests at death to his/her children. In such a case, there may not be any "unused exemption." The unused exemption of the surviving spouse will be lost!

This is a potential problem which must be discussed with each family that has significant assets even if the net worth is under the federal exemption.

Second, the surviving spouse may remarry and decide to change the family estate plan. The older the couple, the less likely it is that the surviving spouse will change the estate plan. But, this always is a risk.

In both cases, leaving some or all of the estate of the first spouse to die in trust may provide a better solution. Or for families that still prefer to leave all the assets outright for the surviving spouse, a written "Marital Agreement" (rather than an informal promise between the spouses) to determine what must happen to the family assets at the second spouse's death may solve this dilemma.

Problems with Leaving Assets Outright to Children or Grandchildren

Many planners use trusts for children only if the children are young (e.g., under the age of 35) or if a child is a "special needs child." However, this can be a mistake. Clearly, a trust still is needed to protect young children and a "Special Needs Trust" always should be used for special needs children. However, all children and grandchildren can benefit from receiving their inheritance in trust. A "Spendthrift Trust" still can protect an inheritance from creditors' claims. With rare exception, the inheritance is safe from future events, a very appealing concept for parents. In most cases, a Spendthrift Trust is protected from equitable division in divorce and alimony claims.

Just in the past year, we witnessed the benefit of a Spendthrift Trust for a 98 year old widow. This person, still driving at 98, was the cause of an auto accident in which the other driver (also 98) died. Our client only had a $250,000 auto liability policy. She had assets of about $1 Million and a trust fund created for her by her husband under the old FET regime. All of her assets were totally at risk while the trust was totally protected. Fortunately the case was settled for the insurance amount, but if the person who died in the crash was a young person with a family, our client would have lost all of her assets. Only the trust would have been protected. So for the client who tells you that his family doesn't have creditor problems, the real answer is that one never knows who ones creditors will be until the very end.

No Generation Skipping Portable Exemption

For those of our client who want to use trusts to leave an inheritance for children and then have the trusts continue for the lifetimes of their grandchildren, there still may be a tax problem. Our tax system has a FET, a gift tax and a generation skipping transfer tax. Just like the estate and gift tax system which has a "unified" $5 Million indexed exemption and then a 40% federal estate or gift tax, so too is there an exemption for gifts to grandchildren and then a 40% generation skipping transfer tax (the "GSTT"). However, unlike portable exemption of estate and gift tax, there is no portable GSTT exemption.

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This means that if the GSTT exemption is not used at the first spouse's death, then it is lost. The use it or lose it problem remains for the GSTT.

Therefore, if a husband and wife want to leave significant assets to their grandchildren (either directly when they die or as remainder beneficiaries of trusts after their children eventually die), the estate planner needs to advise the clients of the risk of incurring the GSTT if a trust is not used at the first spouse's death. For example, if the total estate is $10 Million and all is left to the surviving spouse, then the survivor's estate will be $10 Million when he/she dies. The portable exemption will shield the $10 Million from FET but only $5 Million will be sheltered from the GSTT. If instead the first spouse to die leaves $5 Million in trust for the benefit of the surviving spouse, then the $5 Million exemption for both FET and GSTT is used. When the surviving spouse later dies, his/her estate will be $5 Million and his/her exemption for both federal estate and GSTT tax will be $5 Million, too. The net result will be that the entire $10 Million estate is able to avoid the FET and the GSTT.

Use of Disclaimer Trust

Many estate planners have fallen in love with Disclaimer Trusts as the answer to planning an estate which might have FET problems or GSTT problems. The concept essentially is to leave all the assets to the surviving spouse. Then the surviving spouse can decide (with our guidance) whether to accept all the assets or make a disclaimer. If the spouse makes a disclaimer, then some or all of the inheritance will pass to a typical Non-Marital Trust which pays benefits to the surviving spouse for his/her lifetime and then passes to the children or grandchildren after the surviving spouse later dies.

In theory, this is a great plan. However, experience has shown that it is problematic at best to assume that the surviving spouse will make a rational decision when the first spouse dies. First, the surviving spouse may feel insecure and not want his/her money held in trust. The spouse may just not understand what all this "disclaimer" stuff is about. Second, the spouse may not have the capacity to make a disclaimer. Now, the Agent under the Durable Power of Attorney must make the decision. And the Agent may view the decision much differently that his/her parent. Children often don't realize the benefit of a trust when they have been dreaming of their inheritance for many years.

Irrevocable Insurance Trusts

Many of our clients have set up Irrevocable Trusts to own life insurance ("ILIT"). ILIT's have been used for first-to-die life insurance and for second-to-die insurance. These trusts usually were set up to keep the insurance death benefit exempt from the FET and sometimes to avoid the GSTT. In many cases, these trusts no longer are necessary, especially if they were set up solely to pay estate taxes. However, many trusts own insurance which was needed by the beneficiaries for something other than taxes and the need still exists. In such cases, it may make sense to retain the trust. In other cases, it might be better to terminate the trust and distribute the policy to the primary beneficiary or maybe even terminate the insurance. Each case stands on its own and should be reviewed with counsel. Of course, for large estates that still will have a FET to pay even with the enhanced exemption, ILITs still serve the purpose for which they were intended.

If the trust will be retained, worrying about Crummey powers may not be as important as it once was. The annual exclusion is now less meaningful than it once was for estates that will be under the exemption.

State Decoupling

An on-going estate tax problem for clients that live in states that have decoupled from the federal estate tax regime (e.g., New Jersey and New York) is the state estate tax. In these states, one needs to balance the amount left to a Non-Marital Trust vs. the acceleration of state estate taxes at the first spouse's death. There is no simple answer to this problem except moving out of the state. In some cases it may be best to leave only the state "exemption" to the Non-Marital Trust and then have the surviving spouse make a large taxable gift to children or trusts to children in order consume the unused exemption of the first spouse to die.

Same Sex Marriages

Since the Supreme Court ruled that same sex couples have a right to marry in the United States, all of the federal benefits enjoyed by married couples under the FET law now apply to all married couples regardless of their sex. Therefore, estate planners now need to consider the effects of marriage on their LGBT clients.

Planning for Large Estates

So what is a large estate now? For some families, an estate under $10 Million will be a small estate. However, we have seen how a $10 Million estate with generation skipping gifts can benefit from "traditional estate planning." Certainly a $20 Million estate is a large estate. Even with indexing, it seems likely that a $20 Million estate will have an estate tax bill to pay at the end. Therefore, traditional FET planning techniques still are appropriate to consider.

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Tools that can result in a discount when calculating the fair market value of a lifetime gift or gift at death will continue to be used if the IRS and Congress does not outlaw such discounts. For the present, family limited partnerships or family LLCs, GRATs and sales to grantor trusts remain excellent planning tools, as do insurance trusts and second to die insurance. However, discussing these tools in detail is beyond the scope of this article.

In summary, many of the same tools which one used prior to the new FET regime are necessary today. What estate planners need to do is take a fresh look at how estate planning is discussed with their clients. The old approach was pretty simple. Look how much the FET will be. We have to use trusts to minimize the taxes. It was a pretty easy sell. Now, the explanation is different but in many respects the story still is the same.

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Coping With Fakes and Forgeries

Matthew S. Wilcox

When time and money allow, scientific tests can often be used to determine if a suspect work of art is genuine or fake. Far more common in the art world however is the application of good old fashioned "connoisseurship," – that is, the accumulated knowledge, and often ineffable sense, a trained professional acquires by closely observing and physically handling an artist's work. This old-school approach to art study, which many academics in recent decades have rejected in favor of more theoretical methods, is being championed once again, as a possible solution to the ever-growing number of cases of art fraud. Indeed, today the debate over connoisseurship must transcend academic rhetoric. Billions of dollars in art sales annually rely on the buyers' confidence that they are acquiring something authentic.

Who determines what art is "right" and what is not continues to plague the industry. The French tradition of authentication makes it a legal right belonging to an artist, and upon death, to an heir or appointed designee. Similarly, in the United

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States a system has developed typically around a lone individual, who is recognized as the sole arbiter of authenticity for a particular artist's *oeuvre*. Anyone undertaking the monumental task of publishing a *catalogue raisonne*, a compilation of all the known works by an artist, is generally the recognized expert. However, in many other circumstances the recognized arbiter of authenticity may be the deceased artist's spouse, child, grandchild, former dealer or friend. (No objective qualifications are needed.) If an artist creates a trust or foundation, it may assume authentication authority. Regardless of who the recognized arbiter of authenticity may be, the role imbues them with enormous power. An authenticator's thumbs-up or thumbs-down can mean an art owner's windfall or loss of millions of dollars, given today's rarified art market. Given the high stakes, it is perhaps not surprising that accusations of authority abuse and conflict of interest are often leveled at authenticators. For instance, the writers of *catalogues raisonne* are often not scholars in the expected, disinterested sense, but avid dealers or collectors, with a very real interest in the outcome of their task. Similarly, artist foundations with large holdings of artworks, have been accused of trying to manipulate public perception, and the art marketplace by arbitrarily denying their stamp of approval to works outside their control.

Unlike court judges, whose rulings can be appealed, the all-powerful sole authenticator is beyond reproach. At least until – as happens frequently – he or she gets sued by an art owning claimant unhappy with the determination. Authenticators have been sued for saying a work of art is fake, for saying a work of art is real, and even for refusing to say anything at all. One person sued because of the health problems brought on by an authenticator's negative opinion of his art. In the most extreme case reported, a *catalogue raisonne* project was cancelled after its author started receiving death threats by art owners and their friends.

The litigious atmosphere surrounding the authentication process has prompted several artist foundations to announce they will no longer authenticate artwork. The Andy Warhol Foundation, The Roy Lichtenstein Foundation, The Keith Haring Foundation, The Alexander Calder Foundation and the Isamu Noguchi Museum no longer authenticate works of art. The cost of defending themselves in lawsuits has prompted this move. The Warhol Foundation spent $7 million defending itself in just one case. "Why should we go stand in front of a speeding car?" said the Lichtenstein Foundation's executive director, Jack Cowart. "We decided it's not the role of the Roy Lichtenstein Foundation to deal with *the art market's* authenticity issues." This comment obliquely references a division between academic/museum world predilections and those of the art market, or as one scholar put it, the lack of continuity between the academy and the commercial art world. To many scholars, focusing on the financial value of a work of art irresponsibly avoids more important points of critical thinking about art and its manufacture. Many scholars have added "authorship" to the category of irrelevant factoids for art inquiry.

Academia's trouble at the intersection of art and money goes back a long way, to a time when connoisseurship was the pinnacle of art study but, as one pundit puts it, "freighted with a sense of patrician condescension and entitlement."

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Fakes and Forgeries continued

In addition to those scholars who embrace the "new art history" focused on other theoretical approaches, many academics remain wary of reinvigorating a system that instills total authority in only one arbiter of authenticity, and reduces intellectual inquiry to severe black and white, binary conclusions: real or fake. Critical thinking about subjective matters, such as fine art, they argue, should always be open, dynamic and subject to debate. However, for the art buying public, the question needs to be perceived as settled, as even a hint of a question of authorship or attribution, can drive the value of a work of art downward.

In June, 2015, the New York State Senate passed a bill to protect art authenticators and those who support the process, like forensic scientists, from "frivolous or malicious suits brought by art owners." Still, the nature of fine art authentication through connoisseurship will always be fraught. Theodore Stebbins, the Harvard University Art Museum Curator, has recounted the tale of a painting he had accepted for a forthcoming *catalogue raisonne* of artist Martin Johnson Heade. The painting nagged at him, and with an auction of the work imminent in New York City, he rushed down from Cambridge to re-examine the work. He ended up withdrawing his authentication with minutes to spare, and an upset consignor in the audience. Stebbins, as the sole accepted arbiter of authenticity, was the only person on the planet that day with the authority to make this call. He notes that "case law allows experts to be wrong, and to change their mind." Like an appraised value, authenticity is essentially tied to an effective date with no guarantee that future arbiters of authenticity may concur.

POSTSCRIPT: This September Freeman's will host a two-day conference on Fakes & Forgeries with the Foundation for Appraisal Education (FAE), a non-profit organization that supports the appraisal profession through educational programming, scholarships and publications. The conference will feature speakers from across the art world, academia, the legal profession, forensic science, and the museum world. An exhibition of real and fake art and antiques will also be on display. The public is welcome to attend. For more information contact: mwilcox@freemansauction.com.

Matthew S. Wilcox is Vice President in Freeman's Trusts & Estates Department, an active estate appraiser and the mid-Atlantic representative at Freeman's Auctioneers and Appraisers. Matt is a director of the Foundation for Appraisal Education (FAE) and will be hosting FAE's annual conference, the topic of which will be art world fakes and forgeries. The FAE is a non-profit organization that supports the International Society of Appraisers (ISA) through educational programming, scholarships and publications.

February Luncheon Program

Sponsored by:

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Doug Simon (President), Jennifer Fox (sponsor) and Michael Amoia (speaker)

March Luncheon Program

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Doug Simon (President), Paul Brahim (speaker) and Peter Klenk (sponsor)

NAEPC® Notes

M. Eileen Dougherty, CTFA, CFP®, AEP®, ChFC®

As a reminder, because you are a member of The Philadelphia Estate Planning Council, you are also a member of The National Association of Estate Planners & Councils (NAEPC®). To learn more about the many benefits available to you as a member of NAEPC® please visit www.NAEPC.org or speak with your author. I write this column to bring you up to date on ideas of interest to our membership.

The Journal of Estate Planning is one of the many features available to you on the NAEPC website. Some recent articles of interest, include;

The Anatomy of the Perfect Modern Trust by Richard Oshins and Steven G. Siegel.

Compilation Notes from Heckerling 2016 by Martin M. Shenkman.

Estate Planning with Disregarded Entities by Richard Oshins and David Handler.

Guide to US Income Tax residency for the Global Client by Scott A. Bowman and Marianne R. Kayan.

High Performance Teaming and Professional Collaboration: A Multi-Disciplinary Approach to Estate Planning by Todd Fithian, our own Albert E. Gibbons and David W. Holaday. Note: NAEPC and Trusts and Estates Magazine will sponsor a free webinar on this topic on 5/17/16 at 2:00 PM, EST. Please see the NAEPC website for more details, and to view current and past issues.

The Robert G. Alexander Webinar Series continues on the following dates and features the following national speakers;
June 18, 2016 at 3:00 PM EST, *Speaker: S. Stacy Eastland*
August 10, 2016 at 3:00 PM EST, *Speaker: Carlyn McCaffrey*
September 14, 2016 at 3:00 PM EST, *Speaker: Christopher R. Hoyt*
October 19, 2016 at 3:00 PM EST, *Speaker: David A. Handler*

This year, the webinar series introduced the ability to apply for a yearly subscription at a discounted rate. If you cannot attend on the day of the webinar, you can listen at a later date, and will be sent the appropriate link.

As a member of the board of NAEPC, I have the ability to "gift" a webinar each time one is held. If you are interested in any of these webinars, please contact me at eileen.dougherty@hawthorn.pnc.com and indicate "I want a free NAEPC webinar" in the subject line. First come, first served!

The 53rd Annual NAEPC Advanced Estate Planning Strategies Conference will be held in Phoenix/Scottsdale Arizona from November 16, 2016 thru November 18, 2016. I hope you'll join me there for this great educational and networking opportunity. This event is open to ALL members!

75TH ANNIVERSARY GALA

On February 20, 2016, nearly 180 members and guests celebrated the Council's 75th Anniversary with a great party at the new Logan Hotel.

The evening started with a cocktail reception that offered perfect weather to step outside and enjoy a rare warm February night and then continued with a dinner dance in the main ballroom. The band was fantastic and people danced throughout the night. It was a real pleasure to see colleagues and friends relax and enjoy themselves in a completely social environment with no business on the table. It was a memorable evening that will hopefully carry us to the next big party for the 100th Anniversary, stay tuned.

12 Years of PEPC Past Presidents

Regan Greco, Kevin Manning and Mary LeFever

J.R. Burke, Doug Simon, Richard Schwartz and Huldah A. Robertson

PEPC Management Office: Kevin and Denise Downing with June Neff

Jordon Rosen presents Doug Simon with a proclamation from NAEPC

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75th Anniversary Gala continued

Regan Greco, Tim Lonchena, Erica Walker and Kevin Manning

PEPC President Doug Simon with Gala Sponsor, Tim Holman of Smith Kane Holman, LLC

Bill Mulcahy & Jeannette Leighton with Andrew Jaeger & Jessica Leighton

Alan Mittelman & Barbara Freed with Albert Gibbons & Joey Sheehan

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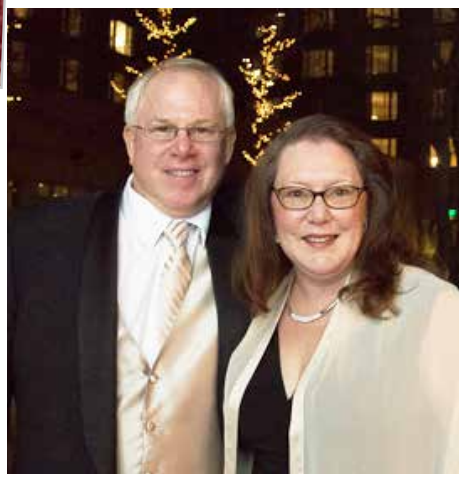

Joe and Peggy Robus

75TH ANNIVERSARY GALA

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Distinguished Estate Planner Award

The Philadelphia Estate Planning Council presented its **2015 Distinguished Estate Planner Award to John A. Terrill, II** at the January 19, 2016 luncheon meeting at The Union League of Philadelphia. The purpose of this annual award is to honor an individual for outstanding contributions in the field of estate planning.

John A. Terrill, II is a Partner at Heckscher Teillon Terrill & Sager, PC in West Conshohocken, PA. Mr. Terrill's practice largely focuses on estate planning for clients with complex assets, such as businesses, real estate, and other significant assets. He is a nationally recognized authority on asset protection planning, which involves estate planning with attention given to the preservation and protection of assets from undue exposure to litigation or other claims.

Paul Heintz presents the 2015 Distinguished Estate Planner Award to Jack Terrill

Distinguished Estate Planners: Paul Heintz (1996), Martin Heckscher (2011), Jack Terrill (2015), Robert Freedman (1999) and Eugene Gillin (2006)

Sign Up for a PEPC Committee

The Philadelphia Estate Planning Council offers many opportunities for member involvement. One of the most rewarding ways to get involved is through our many committees. The committees encompass all activities of the council including planning our social events, publishing our highly informative newsletter, enhancing our website and developing our education programs.

All members are encouraged to actively participate on a committee. Committee participation provides the opportunity to expand your professional relationships and increase your leadership skills.

To sign up, please contact the PEPC Office at staff@philaepc.org.

Thanks to all our Committee Volunteers

Annual Meeting

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2016 ANNUAL MEETING – MAY 5, 2016

"Effective Advanced Directive Planning from Pen to the Clinical Realities"

This program features three of the most nationally prominent speakers in their respective disciplines. Each speaker will describe the functional realities of the legal documents required for effective decision making and end of life care. Charles Sabatino is the Director of the American Bar Association's committee on Law and Aging where he is responsible for the ABA Commission's research, project development, consultation, and education in areas of health law, long term care, guardianship and capacity issues, and advance care planning. He helps write the guidelines for advance directive planning. He will speak on how to create documents that are most effective for both medical and financial decision making. Dr. David Casaret is Chair of Palliative Care at the Abramson Cancer Center at the Hospital of the University of Pennsylvania. His discussion will focus on the clinical realities of decision making following a terminal diagnosis and how to have the appropriate documents in place to facilitate the transition through this arduous period. Dr. C. William Hanson is the Chief Medical Information Officer for the health system. He previously was Section Chief for Critical Care in the Department of Anesthesiology and Critical Care. An internist and anesthesiologist, he has been Medical Director of the Surgical Intensive Care Unit. Dr. Hanson will focus on the last thirty days of life in an intensive care setting and the use of advanced directives. His talk will tie in the elements of both Mr. Sabatino and Dr. Casarett's presentations and allow the audience to understand the actual usage of the documents in the clinical setting as the end of life approaches and is managed by medical professionals.

AGENDA

Location: College of Physicians, 19 South 22nd Street, Philadelphia, PA 19103

3:00PM - 3:30PM	**Registration**
3:30PM - 4:00PM	**Opening Remarks & Council Business**
4:00PM - 6:00PM	**Program**
6:00PM - 8:00PM	**Cocktail Reception & Mütter Museum Access**

Find more information and register at https://www.philaepc.org/events/462

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Mark Your Calendar

2015-2016 Luncheon Programs – 11:45 – 1:45 p.m.
All luncheon programs are held at The Union League,
140 South Broad Street, Philadelphia.
Register at www.philaepc.org

Tuesday, September 13, 2016
Topic: "What is the Industry of Family Business Planning"
Speaker: Roy Kozupsky
Smith, Gambrell & Russell, LLP
New York, NY

Tuesday, October 18, 2016
Topic: "Why Can't I Open a Bank Account?"
Speaker: M. Read Moore
McDermott, Will & Emery LLP
Chicago, IL

Tuesday, November 15, 2016
Topic: "Creative Ways to Obtain a Basis"
Speaker: Mickey R. Davis
Davis & Willms, PLLC
Houston, TX

HOLIDAY CELEBRATION

THURSDAY, DECEMBER 8
5:30 – 7:30 P.M.

Union Trust
717 Chestnut Street, Philadelphia, PA