"The End of the Perfect Storm of Estate Planning is Nearing (maybe!) -- Planning for the Remainder of 2012"

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About Dean Mead

Dean Mead is a business law firm founded on the principle of delivering exceptional client service using the highest ethics and integrity possible. That tradition continues today as we remain steadfast in our commitment to our clients and their legal needs.

Firm History

In 1980, eight attorneys established the business law firm of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A. The founders were Stephen T. Dean, Robert W. Mead, Jr., Charles H. Egerton, Darryl M. Bloodworth, Albert D. Capouano, Stephen J. Bozarth, Lauren Y. Detzel and Lynn J. Hinson. With the exception of Mr. Dean, who passed away in August 2000, the founding partners remain active leaders in the firm today.

In 1987, Dean Mead attorney Michael D. Minton returned to his hometown of Fort Pierce to open an office in what is known as Florida's Treasure Coast region. The office has expanded to represent a diverse client base from Palm Beach County to Indian River County and conducts business under the name Dean, Mead, Minton & Zwemer.

In 1989, Dean Mead opened its initial office in Brevard County, as R. Mason Blake and other firm attorneys began intensive work on the new town of Viera. This was followed by the establishment of Dean Mead's Merritt Island office in 1992. In 2003, those offices were combined into one location in Viera, where the firm conducts business under the name Dean Mead.

In 2008, Dean Mead formed a strategic alliance with the Bovay & Cook law firm in Gainesville. During that time, we had the privilege to work with Mr. Jack Bovay, one of north central Florida's most prominent tax and estate planning attorneys. Our working relationship was so successful that we decided to open a new office in Gainesville on January 1, 2011, operating under the name Dean, Mead & Bovay. Mr. Bovay has formally joined our firm to serve as the Managing Shareholder of the Gainesville office.

Dean Mead has provided legal representation to clients throughout Florida for more than 30 years. Since its inception, the firm has grown to nearly 50 lawyers and is now well known under our abbreviated name, Dean Mead.

Preparing for the Future

While we are fully prepared to help our clients resolve problems when they occur, one of the most valuable services we provide is preventive counseling to help clients avoid legal problems before they arise. Through effective counseling and educational initiatives like electronic updates and seminars, we help our clients identify areas of concern and develop appropriate courses of action. In this way, we are helping our clients to shape their future, rather than reacting to the past.

Changes in the marketplace can also create opportunities for our clients. We assist clients in exploring the possibilities and developing plans to make the most of them.

Reputation for Excellence

Many of our lawyers have achieved the highest distinctions possible in their fields, including board certification by The Florida Bar, an AV rating from Martindale-Hubbell and inclusion in the *Best Lawyers in America, Chambers USA, America's Leading Lawyers for Business* and *Florida Trend Magazine's Legal Elite.*

Teamwork and Technology

We provide integrated solutions for our clients by working collaboratively across offices and practice areas. Our lawyers work in industry based client teams in an attempt to provide comprehensive service that anticipates and addresses all of our clients' needs.

We employ state-of-the-art technology to increase efficiency while decreasing costs. We have fully automated offices that include high speed communications, a computer-based research system, advanced document management systems and expert databases. The end result for our clients is more coordinated representation with cost-saving efficiency.

Beyond the Borders

Dean Mead is a member of ALFA International, a global network of law firms that can provide our clients with high quality legal representation throughout the United States and countries around the world. When our clients' business needs take them outside the State of Florida, our affiliated law firms can provide them with seamless legal representation.

Giving Back

We have strong ties to our communities and are dedicated to investing substantial time, talent and financial resources to help support and strengthen the communities in which we live and work. Our attorneys are regularly engaged in a wide range of *pro bono*, community, civic and religious activities. In addition, the firm is a strong supporter of education and the arts. We are an active participant in the Take Stock in Children's SOAR scholarship program, and have made a major commitment to the University of Central Florida College of Medicine by endowing a medical scholarship.

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I. Estate, Gift and Generation-Skipping Transfer (GST) Tax Law in 2012

Effective Date	Estate Tax Exemption / Flat Rate	Gift Tax Exemption / Flat Rate	GST Exemption / Flat Rate	Portability of Estate Tax Exemption
1/1/2012	$5,120,000 / 35%	$5,120,000 / 35%	$5,120,000 / 35%	Yes

II. What You May See for 2013

A. Sunset of EGTRRA

Effective Date	Estate Tax Exemption / Top Rate	Gift Tax Exemption / Top Rate	GST Exemption / Flat Rate	Portability of Estate Tax Exemption
1/1/2013	$1,000,000 / 55% + 5% surtax on estates between $10 million and $17,184,000	$1,000,000 / 55%	$1,000,000 indexed for inflation since 2001 (approx. $1.4 million) / 55%	No

1. Reduced exemptions & higher rates

2. Key provisions will go away

i. Automatic allocation of GST exemption to transfers to GST Trust. Code § 2632(c).

ii. Qualified severance of a trust into multiple trusts for GST tax purposes after creation of trust and allocation of GST tax. Code § 2642(a)(3).

iii. Extension of time to allocate GST exemption, to elect out of automatic allocation to a lifetime direct skip and automatic allocation to lifetime transfer to GST trust under Treas. Reg. § 301-9100-3 (which requires a showing of good faith, substantial compliance and no prejudice to the government). Code § 2642(g).

iv. Retroactive allocations of GST tax exemption to transfers in trust where a beneficiary who is a lineal descendant of the grandparent of the transferor or of the transferor's spouse or former spouse predeceases the transferor. Code § 2632(d).

v. Portability of unused exclusion amount to surviving spouse (2010 Act). Code § 2010(c).

3. Unanswered questions

i. What is meant by the EGTRRA sunset provision, as amended by the 2010 Act, which provides that the tax laws are to be applied "as if [EGTRRA] had never been enacted"?

ii. How will the sunset affect allocations of GST tax exemption which were made during EGTRRA in excess of the 2013 GST tax exemption amount? Will it be necessary to recalculate the inclusion ratio of GST trusts?

iii. Will automatic allocations of GST tax exemption to indirect skips during EGTRRA still be effective?

iv. Will qualified severances made during EGTRRA be affected?

B. President Obama's Estate, Gift, and GST Tax Proposals for FY2013 as outlined in the Treasury Greenbook (note: this is the President's "wish list", not an actual bill)

1. Restoration of Estate, Gift, and GST Tax to 2009 Levels

i. Estate, gift and GST tax rates top out at 45%.

ii. $3,500,000 exemption for estate and GST taxes.

iii. $1,000,000 exemption for gift tax.

iv. Portability of unused estate tax exemption would become permanent.

v. Would apply to decedents dying and any transfers made after December 31, 2012.

2. Consistency in valuation for income and transfer taxes

i. Basis of property can be no greater in the hands of the recipient than the value of the property as determined for estate or gift tax purposes.

ii. New reporting requirement on executors and donors to provide valuation and basis information to the Internal Revenue Service and the recipient of the property.

iii. Would apply to transfers after the enactment date.

3. Modified valuation discount rules

i. Code § 2704 currently provides that certain restrictions will be ignored for purposes of valuing interests in family-controlled entities if those interests are transferred to or for the benefit of a family member by gift or upon death. Over time, Code § 2704(b) has lost its effectiveness due to judicial decisions and new state statutes that resulted in many restrictions falling within exceptions to "applicable restrictions". The Internal Revenue Service has also identified additional arrangements designed to circumvent its application.

ii. In order to put the bite back in Code § 2704(b), this proposal would create an additional category of restrictions ("Disregarded Restrictions") that would be ignored under Code § 2704 of the Code in valuing interests in a family-controlled entity transferred to a family member if the restriction will lapse or may be removed by the transferor and/or the transferor's family after the transfer.

a. Disregarded Restrictions would include limitations on a holder's right to liquidate that holder's interest that are more restrictive than a standard to be identified in regulations and any limitation on a transferee's ability to be admitted as a full partner or to hold an equity interest in the entity.

b. In determining whether a restriction may be removed by member(s) of the family after the transfer, certain interests to be identified by regulation held by charities or others who are not family members of the transferor would be deemed to be held by the family.

c. Regulatory authority would be granted, including the ability to create safe harbors to avoid the application of Code § 2704.

iii. In a case involving Disregarded Restrictions, the transferred interest would be valued by substituting certain assumptions to be specified by regulation for the Disregarded Restrictions.

iv. Would apply to transfers after the enactment date of property subject to restrictions created after October 8, 1990 (the effective date of Code § 2704).

4. Grantor Retained Annuity Trusts (GRATs)

i. Minimum term of ten (10) years required.

ii. Maximum term of life expectancy of the annuitant plus ten (10) years.

iii. Remainder interest must have a value greater than zero at the time of creation and the annuity amount could not decrease during the annuity term.

iv. Would apply to trusts created after the enactment date.

5. Limited duration for GST tax exemption

i. Any GST exemption allocated to a trust would terminate on the 90th anniversary of the creation of a trust.

ii. "Pour-over" trusts and trusts created under decanting authority would have the same creation date as the initial trust. One exception to this rule is if, prior to the 90th anniversary of the creation of the trust, trust property is distributed to a trust for a beneficiary of the initial trust and the trust meets the requirements of Code § 2642(c)(2) (distribution only to beneficiary during life and includible in gross estate of beneficiary at death).

iii. Would apply to trusts created after the enactment date and to additions to preexisting trusts made after the enactment date.

6. Coordination of income tax and transfer tax rules for grantor trusts

   i. Intended to eliminate opportunities to structure transactions between the deemed owner and the trust which can result in a significant wealth transfer without any transfer tax consequences.

   ii. Assets of a grantor trust would be included in the grantor's gross estate for estate tax purposes.

   iii. Any distribution to a beneficiary from a grantor trust during the lifetime of the grantor would be subject to gift tax.

   iv. If the grantor ceases to be treated as an owner of the trust, the remaining trust assets would be subject to the gift tax at that point.

   v. The proposal would not change the treatment of any trust already included in the grantor's gross estate under other provisions (e.g., GRITS, GRATs, PRTs and QPRTs).

   vi. Would apply for trusts created on or after the enactment date and to any portion of a preexisting trust attributable to a contribution after the enactment date.

7. Extended Lien for Code § 6166 Deferral Assets

   i. Currently under Code § 6166, estates containing certain closely held business interests may defer estate tax on such interests for up to fourteen (14) years from the due date of the estate tax payment in order to avoid a forced sale or failure of the business.

   ii. Currently, Code § 6324(a)(1) imposes a lien on estate assets generally for the ten (10)-year period immediately following the decedent's death to secure the full payment of the estate tax. Thus, the estate tax lien under Code § 6324(a)(1) expires approximately five years before the due date of the final payment of the deferred estate tax under Code § 6166.

   iii. Under the proposal, the estate tax lien under Code § 6324(a)(1) would be extended to apply throughout the Code § 6166 deferral period.

iv. Would be effective for estates of decedents dying on or after the effective date and for decedents dying before the enactment date as to which the current Code § 6324(a)(1) lien period had not expired on the effective date.

C. Possibility of retroactivity to January 1, 2013, again!

1. It is possible that we could start 2013 with the sunset of EGTRRA since this is an election year and Congress will be in a lame duck session after the elections. However, do not rule out the possibility of legislation sometime in 2013 that will apply retroactively to January 1, 2013.

D. Legislative proposals

1. The bills introduced since the end of 2010 generally provide for a (1) total repeal of the estate, gift and GST tax, (2) return to 2009 exemption levels or (3) continuation of 2011 and 2012 laws. However, there are not currently any bills making their way through Congress that have momentum.

III. Benefits of 2012 Gifts

A. Exemptions are as high as they have ever been and the values of many assets are still depressed.

B. Applicable federal rates and §7520 rates are still at or near historical lows.

C. With exemptions scheduled to revert to $1+ million in 2013, there may never be another opportunity to give away as much property transfer tax free. Even if exemptions return to these levels at some point in the future, making gifts now allows the appreciation and income on transferred assets to grow in the hands of the donee, not the donor. The growth can even be compounded income tax free to the donee if transfers are made to a grantor trust.

D. What is the "clawback" and will it apply?

1. If a gift is made in 2012 which uses exemption in excess of the estate tax exemption in the year of the decedent's death, will estate tax have to be paid on the difference?

2. Example: Assume taxpayer who made gifts (not covered by the annual gift exclusion) of $5,000,000 in 2011 dies with $3 million of assets in 2013 when the exemption is $1 million and top rate is 55%.

<u>2011 Gift Tax Computation</u>

Taxable Gifts	$5,000,000
Prior Taxable Gifts	$ 0
Total Taxable Gifts	$5,000,000
Tax of Total Taxable Gifts	$1,730,000
Maximum Unified Credit	<$1,730,000>
Gift Tax Due	$ 0

No Gift vs. Clawback vs. No Clawback at Death

	No Gift	Clawback	No Clawback
Tentative Taxable Estate	$8,000,000	$3,000,000	$3,000,000
Adjusted Taxable Gifts	$ 0	$5,000,000	$5,000,000
Augmented Amount	$8,000,000	$8,000,000	$8,000,000
Tax on Augmented Amount	$4,040,800	$4,040,800	$4,040,800
Gift Tax on Adjusted Taxable Gifts	$ 0	$ 0*	($2,045,000)**
Gross Estate Tax	$4,040,800	$4,040,800	$1,995,800
Unified Credit	($345,800)	($345,800)	($345,800)
Net Estate Tax	$3,695,000	$3,695,000	$1,650,000***

* Gift tax on gifts at 2013 rates	$2,390,800
Unified Credit computed using applicable credit amount in 2011 and at 2013 Rates	($2,390,800)
Total	$ 0

** Gift tax on gifts at 2013 rates	$2,390,800
Unified Credit computed using 2013 applicable credit amount and rates	($345,800)
	$2,045,000

*** $3,000,000 @ 55% = $1,650,000.

3. Planners differ on whether the clawback exists under a technical reading of the estate tax calculations under Chapter 12 of the Code. Several people close to Washington have said that the clawback was not intended and the confusion will be fixed in future legislation. Voting to uphold or impose the clawback likely would be political suicide.

4. At least one legislative proposal, sponsored by Rep. Jim McDermott (D-WA) has included revisions to Code § 2001(g) to eliminate any potential clawback.

E. Even if the clawback applies, is it still a good idea to make gifts in 2012?

1. The donor should not be worse off than if the assets were held until death, unless (a) the assets depreciate in value between the date of gift and date of death or (b) low basis assets are gifted and the income tax cost of losing a stepped-up basis is greater than the estate taxes saved on the appreciation in the assets since the date of transfer (which always have been caveats in making lifetime gifts).

2. The clawback would impose tax only on the value of the gift on the original date of transfer. The income and appreciation of the gifted property would still avoid estate tax.

IV. Planning Ideas for 2012 to use Lifetime Gift/GST Exemption without the Grantor or the Grantor's Spouse Retaining any Interest in the Transferred Property

Before undertaking any transactions to fully utilize gift or GST exemptions, it is important to determine exactly how much of each exemption you or your client have used. This includes carefully reviewing prior gifts to trusts. Even if the gift tax return does not report an allocation of GST exemption to a gift to a trust, it is possible that GST exemption could have been automatically allocated to the transfer pursuant to Code § 2632, even if the current beneficiaries are only one generation below the transferor.

A. Gifts to grantor dynasty trusts for the benefit of children and descendants

1. Use gift and GST exemption to transfer assets to dynasty trusts for the benefit of children and descendants, thereby getting income and appreciation out of transfer tax system for generations to come.

2. Can supercharge the benefit of the exemptions by making the trust a grantor trust. Because grantor is legally responsible for the payment of all income tax on income and gains of trust assets, the payment of such tax is not treated as an additional gift to the trust or its beneficiaries. Rev. Rul. 2004-64. This effectively allows the income and appreciation to grow inside the trust income tax free.

3. The benefits can be supercharged even more by gifting assets which are subject to valuation discounts, such as business interests or fractional interests in real property (see *Defined Value Formula Gifts* below for ways to protect against valuation adjustments).

   i. For gifts of real property (or interests in entities holding real property), the grantor could lease the transferred property back from the trust and pay fair market rent if the grantor has a desire to use the transferred property after making the gift. This permits the grantor to transfer additional funds into the trust gift tax free. Additionally, no income tax should be due on the rent. This is an especially good idea for vacation homes.

4. Cash is a great asset to gift as well for multiple reasons because it provides the trustee flexibility to purchase assets from the grantor on an installment basis (see *Sales to Grantor Trusts* below) and there is no potential IRS dispute over the value of a cash gift. There is also no problem with the loss of basis step-up (see below).

B. Trusts for grandchildren (and more remote generations)

1. Clients may have exemptions remaining, but not want to make more gifts for the benefit of children because they have already taken care of them and do not want to waste GST exemption on possible distributions to children.

2. Create dynasty trusts that are grantor trusts for the benefit of grandchildren and more remote descendants and allocate GST exemption.

   i. Trusts can last up to 360 years in Florida.

   ii. A trust protector can be included in the trust with the power to add to the class of beneficiaries, which could be exercised to add the children if a need ever arose. However, distributions to children would waste GST exemption that was allocated to the trust.

   iii. Caution: Crummey powers may be given to trust beneficiaries to get annual exclusions for gifts to a grandchildren's trust. However, the crummey annual exclusion is only for gift tax purposes. GST exemption still needs to be allocated to a transfer subject to a crummey right of withdrawal unless (a) the trust is for the sole benefit of the powerholder and (b) the assets of the trust will be includible in the gross estate of the powerholder at his or her death. Code § 2642(c).

3. Consider "generation-jumping", especially if the donor does not have any GST exemption remaining, but has gift tax exemption remaining.

    i. Only one GST tax applies regardless of how many generations are skipped. Code § 2653. Therefore, a donor can create a trust for the benefit of great-grandchildren and pay only one GST tax.

    ii. Since GST exemption would not be allocated to the trust, the assets will not be subject to estate tax until the death of great-grandchildren. This would avoid two levels of estate tax (children and grandchildren).

C. Cancellation of existing debt obligations

1. The value of the gift is presumed to be the amount of unpaid principal of the obligation, plus accrued interest to the date of the gift. Treas. Reg. § 25.2512-4. However, the donor may assert a lower value for a promissory note if there is satisfactory evidence that the note is worth less than the unpaid principal plus accrued interest because of factors such as the interest rate, date of maturity, insolvency of the obligor and insufficency of the collateral. Treas. Reg. § 25.2512-4.

2. The cancellation of a debt owed by a grantor trust to the grantor will be disregarded for income tax purposes. Rev. Rul. 85-13.

3. Cancellation of indebtedness income under Code § 108 should not arise to the obligor if the cancellation is intended to be a gift. Rev. Rul. 2004-37.

4. Consider gifting cash to a trust that will be used to repay a note instead of simply cancelling the note.

    i. It is more conservative for the donor to gift cash to the trust if the donor is attempting to claim crummey annual exclusion gifts.

    ii. Generally, it's a great idea to repay promissory notes in full during the grantor's life because it gives more credibility that the initial transaction creating the obligation was bona fide and not a disguised gift. Additionally, the satisfaction of a note by a grantor trust during the grantor's life avoids the potential that the IRS will treat the death of the grantor as a disposition triggering gain. See *Madorin v. Commissioner*, 84 T.C. 667 (1985).

5. If the debt originated from an installment sale to someone other than a grantor trust, then the cancellation of the debt will accelerate the deferred gain or loss, potentially creating income tax for the donor. Code § 453B(f). Effectively, the cancellation is treated for income tax purposes as if the obligor paid off the remaining balance of the note.

    i. Acceleration of deferred gain into 2012 may be a good idea because capital gains rates are scheduled to increase in 2013 and the medicare surtax will apply.

6. Before cancelling a debt obligation, the donor should consider the history of the loan and the payments thereunder. The IRS has successfully argued that a transfer of funds was actually a gift, and not a loan, where the donor did not have an expectation of repayment at the time the initial transfer was made (notwithstanding any loan documentation to the contrary at the time of the transfer), and there was no history of repayment.

    i. This could result in substantial tax consequences to the donor because the transfer will be treated as a gift in the year it was initially made, not in the year that the loan was cancelled, thus triggering possible interest and penalties.

    ii. The substantial changes and limited window in the 2012 gift tax laws should provide strong support for a donor to defend against this argument by the IRS. A donor could argue that he or she decided to forgive the loan to take advantage of the 2 year window to make $5 million worth of gifts.

D. Life Insurance Planning

1. Existing ILITs

    i. Make lump sum cash gift into ILITs to pay for future premiums or purchase assets that will generate the income necessary to pay premiums. This is especially a good idea if (a) the trust does not contain crummey withdrawal powers, (2) the donor already makes or intends to make annual exclusion gifts to the trust beneficiaries outside of the trust or (3) the annual premiums exceed the amount of available annual exclusions.

    ii. If the terms of the existing ILIT are not great, decant the policy into a new ILIT with more favorable terms, and then make the gift to the new ILIT.

2. New ILITs

   i. Make lump sum cash gift into a new ILIT to purchase a new policy (e.g., single premium policy) or to purchase a policy owned by an existing ILIT whose terms are not as favorable as the new ILIT.

      a. Sale between trusts will be disregarded for income tax purposes if each trust is treated as having the same grantor.

3. Existing policies owned by the insured

   i. Gifting cash to a trust to purchase the policy from the owner is better than gifting the policy to the trust.

      a. If the policy is gifted, the insurance proceeds will be included in the estate of the insured if the insured dies within 3 years of the date of the transfer. Code § 2035. However, a policy that is sold for fair market value can be removed from the insured's estate even if the insured dies with 3 years of the sale. Code § 2035(d).

      b. The purchase and sale of the policy may have income tax consequences unless the seller is treated as the grantor of the purchasing trust for income tax purposes. See Rev. Ruls. 2009-13 and 2009-14.

      c. Structure the transaction to avoid the "transfer-for-value" rule of Code § 101. The failure to meet one of the exceptions may cause at least a portion of the proceeds to be taxed as ordinary income (note: a sale from the grantor to his or her grantor trust avoids the transfer for value rule because the policy is treated as being transferred to the insured. PLR 200636086).

      d. Avoid the step transaction doctrine. Upon the receipt of cash by the trust, it is best for some time to pass before the purchase. Additionally, the trustee may want to explore other investment opportunities before deciding if the policy is a good investment.

      e. The gift tax return for the donor will reflect a cash gift rather than a gift of the policy, which may or may not reduce the chances of an audit. The donor should consider disclosing the sale of the policy by attaching a statement to the return pursuant to Treas. Reg. § 301.6501(c)-1(f)(4) to commence the statute of limitations for the IRS to challenge the transaction.

4. Valuing policies for gift tax purposes

   i. Treasury regulations *do not* sanction the use of cash surrender value as an adequate measure of fair market value.

   ii. Generally, interpolated terminal reserve value is an accepted measure of value for policies on which additional premiums will be due. If the policy is a single premium or paid-up, then replacement cost may be used. Treas. Reg. § 25.2512-6(a).

   iii. It may even be necessary to explore the secondary market to determine fair market value if the insured is older or in declining health.

5. Life insurance is a great way to leverage the GST exemption of the donor by structuring the donee trust as a dynasty trust. In addition, ILITs can provide liquidity for the payment of estate tax by purchasing assets from, or loaning cash to, the estate after a decedent's death.

E. Exercising Powers of Appointment

1. A general power of appointment over existing trust assets may be exercised to appoint the property into a new trust and avoid estate tax at the death of the power holder. The power holder will be treated as the transferor of the property for gift and GST tax purposes, thus using the power holder's exemptions and starting a new measuring period for the maximum duration of the trust. Code § 2514(b).

2. The exercise of a limited power of appointment will be treated as a general power if the limited power is exercised by creating another power of appointment which can be used to postpone the vesting period of the trust property (the "Delaware tax trap"). Code § 2514(d). Therefore, the power holder can appoint the property into a new trust and create another limited power of appointment in a beneficiary of the new trust. The original power holder will be treated as the transferor of the appointed property for gift and GST tax purposes, thus using the power holder's exemptions and

starting a new measuring period for the maximum duration of the trust.

F. Late allocations of GST exemption to existing trusts

1. Even if a client has already exhausted his or her gift tax exemption through lifetime gifts, they may have GST exemption remaining.

2. Existing trusts should be analyzed to determine whether a late allocation of GST exemption can be made to avoid GST or estate tax that will be incurred in the future. See Code § 2642(b)(3).

3. If existing trusts are not currently structured as GST trusts, consider modifying these trusts (either judicially or nonjudicially) or decanting into new GST trusts in order to use the donor's GST exemption.

V. Planning Ideas for 2012 to Use Lifetime Gift/GST Exemption Where the Grantor or the Grantor's Spouse Desires to Retain an Interest in or from the Transferred Property

A. Sales to Grantor Trusts

1. One of the best ways to leverage transfers to trusts is to sell an asset to the trust, have the trust pay for it in installments and use the income from the asset to make the note payments. This allows the grantor to get back the value of the asset on the date of sale, but all appreciation in the asset will stay in the trust to pass outside of the grantor's estate.

i. Example: Donor sells an asset worth $5,000,000 to a grantor trust in exchange for a promissory note. Donor receives payments of principal and interest at the current low rates. If the asset is worth $7,500,000 when grantor dies, then $2.5 million has escaped estate tax.

2. The sale is disregarded for income tax purposes so no gain or loss will be recognized on the transfer. Rev. Rul. 85-13. The trust will have a carryover basis in the purchased assets. Additionally, no income tax is due on the interest payments back to the grantor.

3. Although there is no bright-line rule, practitioners generally agree that a trust should own assets equal to at least 10% of the purchase price. The remainder of the purchase price can be paid by the issuance of a promissory note. Income generated from the purchased assets (or any other assets of the trust) can be used to make note payments.

4. Economically, this is a low risk transaction for the grantor, but has substantial tax savings and can significantly benefit the donee.

   i. Cash can be returned to the donor almost immediately in the form of a down payment by the trust.

   ii. The grantor is obligated to pay the income tax on the income generated by the trust assets, which further reduces the gross estate of the grantor and allows the trust assets to grow income tax free to the trust.

   iii. The income and appreciation of all purchased assets in excess of the interest rate due under the note increases the value of the trust, not the grantor's estate. Only the value of the note, which has a fixed growth rate equal to the interest, should remain in the grantor's estate.

   iv. The grantor receives a consistent income stream back from the trust pursuant to the note terms. Payments under the note can be structured in an amount to meet the grantor's cash needs. Alternatively, note payments can be interest only and prepayments of principal can be made as necessary to meet the grantor's cash needs.

   v. If the note payments cannot be satisfied in cash, then the trust can retransfer assets back to the grantor as payment.

   vi. Grantor can retain a secured interest in the assets sold to the trust.

5. A gift tax return would report a gift of the initial "seed" assets to the trust if the trust does not have sufficient equity. The seed gift is often in the form of cash, which may or may not reduce the risk of an audit. The donor should still consider attaching a statement to his or her gift tax return pursuant to Treas. Reg. § 301.6501(c)-1(f)(4) disclosing the sale to get the statute of limitations running. Additionally, the donor should not be required to answer "yes" to the question on the gift tax return asking whether any item on Schedule A reflects a valuation discount because Schedule A will only reflect a gift of cash.

6. The purchased assets should still be appraised if market values are not readily ascertainable. However, it is advisable for the assets to be sold for a price negotiated between the parties at arm's length after giving due consideration to the appraisal rather than simply relying on the appraised value without further negotiation.

i. If the IRS argues that the assets were sold for less than fair market value, then the donor can still argue that the transfer was made in the ordinary course of business (i.e., bona fide, at arm's length and free from donative intent). If a transfer is made in the ordinary course of business, then it is considered to be made for adequate and full consideration, regardless of whether the purchase price is less than fair market value. See Treas. Reg. § 25.2512-8.

ii. An appraisal may include a combined discount that is substantially higher than anything that the IRS is willing to accept. The negotiation of a sales price permits the donor to report on the disclosure statement that the assets were sold for greater than its appraised value.

7. Gifted assets retain a carryover basis in the hands of the grantor trust. However, this does not mean the assets cannot later receive a step up in basis at the donor's death. The grantor can retain a power to substitute assets of the trust (other than Code § 2036(b) stock) during his lifetime under Code § 675(4), which can be exercised near his or her death to substitute high basis assets into the trust for lower basis assets, or substitute cash into the trust for the low basis assets. If a trust does not contain a power of substitution, the grantor can purchase the assets from the trust shortly before his or her death for cash. The sale will be disregarded for income tax purposes because the trust is a grantor trust. It may even be a good idea to borrow money, if necessary, to repurchase the assets. After death, cash can be generated to repay the loan by reselling assets. See Rev. Rul. 2011-28.

B. Long-term Grantor Retained Annuity Trusts (GRATs)

1. Grantor transfers assets to a trust, but retains the right to receive an annuity from the trust at least annually. The value of the gift is equal to the value of the remainder interest in the trust calculated at the time of the gift and is based, in part, on the Code § 7520 rate. The lower the Code § 7520 rate, the smaller the value of the remainder interest.

2. The purpose of a long-term GRAT is to lock in the Code § 7520 rate, which is currently near historical lows, for an extended period of time and transfer the appreciation in the asset without transfer tax to the remainder beneficiaries of the trust.

3. Although the assets of the GRAT will be included in the grantor's gross estate if the grantor dies during the annuity term, Treasury released final regulations under Code § 2036 in November 2011

which provide that the amount to be included in the grantor's gross estate for estate tax purposes is that portion of the trust corpus necessary to generate sufficient income to satisfy the retained annuity using the Code § 7520 rate in effect at the time of the decedent's death.

i. The appreciation of the trust assets in excess of the Code § 7520 rate (currently 1.6%) is not included in the decedent's gross estate.

ii. The decedent will realize a benefit as well if the Code § 7520 rate is higher at date of death than date of funding because a higher rate at death will result in a lower amount of principal necessary to produce the decedent's retained income interest.

4. Some practitioners have even suggested doing a 99 year GRAT to maximize the potential benefits. However, a 99 year GRAT has not been the subject of a court case or PLR. It is possible the IRS may consider it to be abusive.

C. Domestic Asset Protection Trusts (DAPTs)

1. Donor creates an irrevocable trust in one of the jurisdictions that permits DAPTs and retains an interest in the trust as a discretionary beneficiary. An independent person is typically designated to serve as trustee so that the donor does not have any control over distributions.

2. DAPTs are intended to shield assets of the settlor from the settlor's future creditors.

3. Gifts to these trusts can be completed gifts for gift tax purposes even if the donor retains an interest in the trust as a discretionary beneficiary, which means exemption will be used.

4. The retention of an interest in the trust as a discretionary beneficiary does not, by itself, cause the assets to be included in the estate of the grantor under Code § 2036. However, assets of the trust will be included in the estate of the settlor under Code § 2036 if (i) there was an implied agreement or understanding between the settlor and trustee that distributions would be made for the benefit of the settlor or (ii) creditors would be able to reach the assets of the trust under state law. PLR 200944002.

5. Florida law does not provide creditor protection for assets held in a self-settled trust created under Florida law. It is unsettled under existing caselaw whether assets held in a self-settled asset

protection trust created by a Florida debtor in a jurisdiction that permits such trusts (such as Alaska, Delaware, Nevada etc.) will be protected from the creditors of the Florida debtor.

6. Caution: the Florida Uniform Fraudulent Transfer Act (F.S. Chapter 726) can be invoked to recover assets (or equivalent value) transferred to third parties (including trusts) if the transfer is made with the actual intent to hinder, delay or defraud a creditor, or without receiving reasonably equivalent value.

D. Family/Credit Trusts

1. Donor creates an irrevocable trust for the benefit of spouse and descendants during the spouse's lifetime. The assets of the trust will not be included in the spouse's estate for estate tax purposes.

2. Donor will typically be treated as the grantor of this trust for income tax purposes since spouse is a beneficiary, unless certain limitations are drafted into the trust. Code § 677(a).

3. Spouse may have a limited power of appointment, but it should not be exercisable in favor of the donor spouse.

   i. If the beneficiary spouse can appoint the trust property for the benefit of the donor spouse, then this could arguably be viewed as a retained interest subjecting the trust assets to the donor's creditors under state law and thus causing estate tax inclusion under Code § 2036.

   ii. Alternatively, the IRS may argue that there was an implied agreement or understanding that the spouse would appoint the property back into trust for the donor spouse, thus causing inclusion under Code § 2036 or potentially § 2038.

   iii. Several steps can be taken to minimize the inclusion risk if the spouse wants to be able to appoint the property back to the donor spouse, such as waiting as long as possible (several years) to exercise the power appointing property back to the donor spouse.

   iv. Consider granting authority to the Trust Protector to give property back to the donor in trust.

4. Trustee(s) should be mindful of making distributions to the spouse because the gift exemption (and GST exemption if allocated to the trust) of the donor spouse would be wasted. Trust assets should be considered as a last resort for the spouse since the donor can make unlimited gifts directly to spouse outside of the trust tax free.

5. The trust should contain a clear definition of the term "spouse" to define what interest, if any, the spouse will have as a beneficiary in the event the donor and donor's spouse get divorced after the creation of the trust.

6. Gifts to a trust of which the spouse is a beneficiary generally cannot be split for gift tax purposes under Code § 2513 unless the value of the spouse's beneficial interest is capable of being valued so that it can be severed from the rest of the gift. Treas. Reg. § 25.2513-(b)(4). However, see *Robertson v. Commissioner*, 26 T.C. 246 (1956) (spouse was permitted to split gifts made to a trust of which she was a discretionary beneficiary because the trustee was required to consider other assets and resources available to such spouse in making distributions, and the sufficient personal assets available to the spouse showed that there as no likelihood that any distributions would be made.)

7. A beneficiary cannot have a right to receive a distribution from the trust that would satisfy the legal obligations of the donor to support that beneficiary.

   i. For example, the trust should not permit distributions to be made for the support and maintenance of the donor's spouse or minor children because the donor has a legal obligation under state law to support his or her spouse and minor children. The failure to prohibit such distributions may cause the assets of the trust to be included in the donor's estate for estate tax purposes under Code § 2036.

   ii. Trusts should include a savings clause that provides a blanket prohibition on distributions in satisfaction of a legal obligation, such as "none of the principal and none of the income therefrom shall ever be payable to me or to discharge any obligation of me to my creditors, to my estate or to the creditors of my estate. The authorization to distribute income or principal for a beneficiary's support does not include authority to make distributions that would discharge or substitute for any obligation of mine to support the beneficiary. I intend that no distribution from a trust hereunder shall be deemed to discharge or substitute for my obligation to support a beneficiary of a trust hereunder, and I direct that no distribution shall be made that would have that effect."

E. Non-reciprocal Trusts (e.g., Spousal Lifetime Access Trusts (SLATs))

1. Each spouse creates an irrevocable trust for the benefit of the other spouse.

2. How to avoid the "reciprocal trust doctrine".

    i. *Estate of Levy v. Commissioner*, T.C. Memo 1983-453 held that the reciprocal trust doctrine did not apply to trusts created by spouses for the benefit of each other because wife had a broad lifetime limited power to appoint assets of the trust created for her benefit to anyone other than herself, her creditors, her estate and the creditors of her estate, while husband did not have a power of appointment in the trust created for his benefit.

    ii. Notwithstanding *Estate of Levy*, it is advisable to take precautions in addition to creating different powers of appointment to avoid the reciprocal trust doctrine, such as:

        a. Create trusts at different times;

        b. Fund trusts with different assets and different values;

        c. Have different distribution standards (HEMS vs. any purpose);

        d. Require trustee to consider other assets of one spouse, but not in the other trust;

        e. Permit one trust to be converted to a unitrust; and

        f. Have different trustees and removal powers.

3. Non-reciprocal trusts can also be created between persons who are not married (e.g., siblings, partners, etc.). Additional caution should be used when trusts are created outside immediate family members because the IRS may be more likely to use substance over form arguments.

4. Potential consequences if trusts are treated as reciprocal.

    i. Trust assets will be included in the donor spouse's estate for estate tax purposes under Code § 2036 to the extent mutual value was contributed to the reciprocal trust. Drafter should build in a contingent marital trust where any assets included in the donor spouse's estate would be transferred to defer estate tax at the death of the donor spouse.

ii. Although the reciprocal trust doctrine is a tax law concept, state courts may invoke a similar concept to treat each donor as if he or she created the trust for himself or herself. This would result in self-settled trusts for each donor, which are not valid under Florida law to protect trust assets from the creditors of the settlor.

F. Terminate QTIP Trusts

1. Many use QTIP trusts to (1) delay taxation on the trust property until his or her spouse's death; (2) provide income for his or her spouse's life; (3) control the disposition of the remainder interest on his or her spouse's death; (4) protect assets from creditors; and (5) balance the taxable estates of spouses to assist a less wealthy spouse in using his or her estate tax unified credit.

2. An individual can use gift tax exemption by terminating a QTIP trust.

i. Termination of a QTIP Trust may result in the surviving spouse making two separate gifts: (1) a gift under Code section 2511 of the present value of spouse's life income interest determined under Code section 7520 (unless spouse is compensated for such interest); and (2) a gift under Code section 2519 of the remainder interest (if distributed to the remainder beneficiaries) equal to the fair market value of the trust less the present value of spouse's life income interest.

a. Code § 2519 gift is not eligible for the annual exclusion.

b. When a Code § 2519 gift (as opposed to a Code § 2511 gift) results in actual gift taxes, spouse has a right to recover from the trust the gift tax under Code § 2207A. This results in a "net gift" whereby the gift tax is calculated based upon the amount of property actually received by the remainder beneficiaries. However, spouse must use his or her gift tax exemption against the gift since the right of recovery under Code § 2207A applies only to actual taxes incurred, not the use of exemption. If a tax results from the QTIP termination and spouse chooses not to exercise his or her right of recovery under Code § 2207A, spouse will be treated as making an additional taxable gift equal to the amount of taxes spouse could have collected. See Treas. Reg. § 25.2207A-1(b).

3. Estate Tax Consequences. Code § 2035(b) adds to the gross estate for federal estate purposes the amount of any gift taxes paid on gifts made by the decedent within three years of death. In *Estate of Anne Morgens v. Commissioner*, No. 10-73698, 9th Cir. (May 3, 2012), Aff'g 133 T.C. No. 17 (December 21, 2009), the U.S Court of Appeals for the Ninth Circuit affirmed the Tax Court's holding that gift tax paid on a Code § 2519 is includible in the spouse's estate under Code § 2035(b) when the spouse dies within three years of the trust termination notwithstanding the spouse's exercise of the right of recovery from the trust under Code § 2207A. The Court held that Code § 2035(b) applies based upon its finding that the spouse was legally responsible for the tax notwithstanding her right to recover the taxes from the trusts.

4. Income Tax Consequences. There are also income tax consequences to consider in deciding whether to terminate a QTIP trust. Code § 1001(e) provides that, for purposes of determining gain or loss on the disposition of the income interest in the QTIP trust, the adjusted basis of the life income interest should be disregarded. Therefore, when spouse "sells" his or her income interest when a QTIP trust is terminated, the entire value of the property received in exchange for the right to receive income is treated as gain.

5. Divide the QTIP Trust First. It may be possible to divide a QTIP trust into two separate trusts prior to termination so that the above tax implications can be minimized to the separate trust that is subsequently terminated. *See* PLRs 200723014 and 199926019.

VI. Consider Taxable Gifts in 2012 to Take Advantage of 35% Gift and GST Tax Rate if the Donor does not have any Exemption Remaining

A. Top estate and gift tax rate will increase to 55% in 2013; GST rate will be 55%.

B. Donors are better off making lifetime gifts than transferring property at death, even if the tax rates are identical, because gifts are tax exclusive while transfers at death are tax inclusive.

1. Example: D has assets of $1,350,000. If D makes a gift of $1 million, D will incur $350,000 in gift tax and the donee will receive $1 million. If, however, D holds $1,350,000 until his death, then D's estate will pay estate tax of $472,500 (35% x

$1,350,000). The beneficiary of D's estate will only receive $877,500 ($1,350,000 - $472,500).

VII. Using Disclaimers and QTIP Elections to Hedge Against Uncertainty at the End of 2012

A. Disclaimers and QTIP elections can be very beneficial if 2012 ends without clear guidance as to whether 2013 law will be amended because they act as a hedge against unfavorable changes in the law. They effectively allow decisions to be made in 2013 which will change the nature of a gift (to use or not use exemption) made in 2012.

B. Disclaimers must meet the following requirements of Code § 2518 to be effective for federal tax purposes:

1. Written disclaimer;

2. Received by the transferor, transferor's legal representative or the holder of legal title to the property to which the interest relates within 9 months after the later of (a) the date of transfer or (b) the date that the disclaimant attains age 21;

3. Disclaimant has not accepted the interest or any of its benefits; and

4. The interest passes without any direction on the part of the disclaimant to either the spouse of the transferor, or to a person other than the disclaimant.

C. Gifts can be made in December, which gives the transferee until September to decide whether to disclaim any portion of the gift.

1. Example: Husband has made $3 million of lifetime gifts and has $2 million of gift tax exemption remaining. Husband makes a gift at the end of 2012 worth $3 million to Wife and provides in the transfer document that any portion of the gift disclaimed by Wife shall pass to a trust for the benefit of descendants. Assume the exemption is decreased to $3 million in 2013. If Wife executes a qualified disclaimer of $2 million in 2013, then Husband would be treated as making a $2 million gift in 2012 to the trust for his descendants and his remaining $2 million exemption would be used because the disclaimer relates back to the date of the transfer. If, instead, the exemption remains at $5+ million in 2013, Wife could accept the entire gift and preserve Husband's remaining gift tax exemption. No gift tax would be due on any portion of the gift accepted by Wife because of the unlimited marital deduction.

2. Key: One of the donees must be a person to whom gifts can be made tax free.

3. The biggest drawback to this planning is that a donee cannot accept any of the benefits prior to disclaiming the gift. Otherwise, the disclaimer will not be qualified for tax purposes. This may limit the type of assets that can be gifted.

D. Partial QTIP elections can work similar to disclaimers, but not as well because the spouse is required to receive all of the income from the donee trust during the spouse's lifetime.

1. Example: Husband has made $3 million of lifetime gifts and has $2 million of gift tax exemption remaining. Husband makes a gift at the end of 2012 worth $2 million to a lifetime QTIP trust for Wife. Assume the exemption is decreased to $3 million in 2013. The donor can make a partial QTIP election over $1 million of the property transferred (which qualifies for the marital deduction) and the Husband's gift exemption will be used for the remaining $2 million. If, instead, the exemption remains at $5+ million in 2013, a QTIP election could be made on the entire trust, preserving Husband's remaining gift tax exemption.

2. QTIP elections under Code § 2523(f) must be made on a timely filed gift tax return, which, if extended, could be as late as October 15, 2013.

VIII. Using Defined Value Formula Gifts to Protect Against Unanticipated Gift Tax

A. This is a formula transfer structured to define the specific value of a certain asset being transferred to a donee. If given full effect, the clause should operate to avoid any unanticipated gift tax for the donor.

1. Example: Donor makes a gift of $500,000 worth of XYZ stock. If the value of one share of XYZ stock is determined to be $1,000 pursuant to an appraisal obtained by the donor, then the books of XYZ are adjusted to reflect 500 shares being transferred for the benefit of the donee. If the IRS audits the transaction and determines that the per share value is actually $2,000, then donor has still only made a gift of "$500,000 worth of XYZ stock." Therefore, donee only has a legal right (which has not changed despite the IRS audit) to 250 shares, not 500 shares. Accordingly, the donor has transferred only 250 shares and retained the remaining 250 shares.

B. Generally, this type of transfer will only be necessary when the donor intends to make a gift of a specific dollar amount of property, and no more than that amount, such as when a donor is using up the remaining amount of his or her gift tax exemption.

C. Defined value clauses should not be confused with "savings clauses", which the IRS has successfully attacked for decades. On their face, savings clause appear to be essentially the same as defined value formula clauses. From a technical standpoint, the two clauses operate differently. Courts have upheld defined value formula clauses while rejecting savings clauses because of these technical differences. Careful drafting is a must.

1. Defined value formula clause: "I hereby gift $100,000 worth of XYZ stock to Trust A." Here, the value of the gift is fixed at $100,000 regardless of the shares of stock necessary to satisfy that amount.

2. Savings clause: "I hereby gift 10 shares of XYZ stock worth $100,000, but if such shares are finally determined to be worth more than $100,000, then the amount of shares gifted shall be reduced." Here, the donor made a gift of 10 shares, but has the right to recover some portion of the shares if their value is later determined to exceed $100,000.

* The distinction lies in determining what property right is created in the donee at the time of the gift.

D. Several cases in recent years have upheld the use of defined value formula clauses. See *Hendrix v. Commissioner,* T.C. Memo 2011-133; *Petter v. Commissioner*, 653 F. 3d 1012 (9th Cir. 2011); *Christiansen v. Commissioner*, 586 F. 3d 1061 (8th Cir. 2009); *McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006). However, each case involved the use of a charity to receive any amount of the transfer that would have otherwise caused a gift tax if transferred to the non-charitable donee.

E. Enter *Wandry v. Commissioner*, T.C. Memo 2012-88 (March 26, 2012), which is the first court opinion upholding the use of a defined value formula gift where a charity was not involved. (see Dean Mead Blog Posting attached).

F. If the donor desires to transfer multiple assets pursuant to formula, consider contributing these assets first to an entity and then transferring an interest in the entity. This would permit a single asset to be transferred pursuant to the formula.

G. Planning points when using defined value formula gifts:

1. Include an adjustment clause that will automatically adjust the property between the donor and donee to the appropriate allocation under the formula clause once the value is finally determined.

2. Use a grantor trust as the donee. There will be a period of time where the IRS has the opportunity to challenge the gift. This will

create uncertainty as to the appropriate allocation of the gifted asset between the donor and donee. Using a grantor trust alleviates the need to file amended income tax returns if the initial allocation is improper because all tax items will have been reported on the grantor's individual return.

3. Prepare the gift tax return consistent with the formula gift by reporting the formula and the value.

4. The grantor should not be the trustee of the donee trust. It is advisable to have an independent trustee acting on behalf of the trust beneficiaries to ensure that the trust receives the proper amount of the gifted asset pursuant to the formula.

H. One alternative is gifting cash and doing a defined value formula sale.

1. Gift tax return reports cash gift and no valuation discounts.

2. It is advisable to disclose the sale by filing a disclosure statement to start the statute of limitations. Treas. Reg. § 301.6501(c)-1(f)(4).

IX. Considerations in Determining Whether to Make Gifts and How Much

A. Maintain sufficient cash flow for donor(s)

1. Gift property that will not impact or reduce the donors' cash flow below an amount they are comfortable with, such as 2nd or 3rd homes, art, vacant land, life insurance or other non-income producing property.

2. Cancel debts that donor does not expect repayment for. Potential may be available to take a discount on the face value of the obligation if the obligor appears financially unable to repay debt.

B. Basis issues

1. Gifted assets take a carryover basis. Therefore, advisors must analyze whether it is more important for the donor to hold the asset at death to obtain a step-up. If a grantor trust is used, then it is still possible to retain a power of substitution over the assets, which can be used to require the assets prior to death to get a step-up. A grantor can have limited right of substitution without estate tax problems. See Rev. Rul. 2011-28. Alternatively, a donor can always buy assets back from the grantor trust if there is no power of substitution.

C. Use of credit comes off the bottom, not the top

1. Gift needs to be in excess of the future exemption to get the benefit of the 2012 exemptions. For example, a donor who has not made any gifts prior to 2012 will not specifically benefit from the higher exemptions in 2012 by making a gift of $3 million if the exemption amounts in subsequent years is $3 million or more.

D. Estate planning in 2012 is still estate planning, just with a twist.

1. While $1 million may be easy for clients to give away during their lifetime, $5 million may be very difficult, especially given the real estate and stock market turmoil over the past several years. Clients may be very apprehensive about giving away such a large amount out of fear that they may need the money at some point in the future.

2. The twist is figuring out how to protect those clients who are apprehensive and want to retain an interest in the property so that they will be able to access the value that was gifted if necessary at some point in the future with minimal or no adverse tax consequences.

X. **Plan early - Do not wait until the end of the year to start planning!**

A. It is unlikely that there will be legislation before the November elections and, given the lame duck session and the strong political views on the estate tax, legislation may not be passed prior to year end.

B. If you or your client wants to wait to see if any legislation is enacted, plan your gifts out now and get the documents ready to go.

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Wandry v Commissioner: Tax Court Blesses Use of Defined Value Formula Clause

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In an extremely important taxpayer victory, the United States Tax Court issued a memorandum opinion upholding the use of a defined value formula clause to fix the value of the donor's gift for federal gift tax purposes. *Wandry v. Commissioner,* T.C. Memo 2012-88 (March 26, 2012). This type of formula clause is intended to prevent unanticipated gift tax from arising on a transfer, even if the IRS audits the transaction. Although *Wandry* is only a memorandum opinion, meaning that it has not been reviewed by the entire Tax Court, and may be appealed, it certainly is a positive step for taxpayers in the defined value clause arena.

In April 2001, Albert and Joanne Wandry and their children started Norseman Capital, LLC, a Colorado limited liability company ("Norseman"). Albert was designated to serve as the initial manager of Norseman. On January 1, 2004 Albert and Joanne gifted interests in Norseman to their children and grandchildren. The amount of each gift was defined in the assignment as follows:

I hereby assign and transfer as gifts effective as of January 1, 2004 a sufficient number of my units as a Member of Norseman Capital, LLC, a Colorado limited liability company, so that the fair market value of such for federal gift tax purposes shall be as follows:

1. Kenneth Wandry $ 261,000

2. Cynthia Wandry $ 261,000

3. Jason Wandry $ 261,000

4. Jared Wandry $ 261,000

5. Grandchild A $ 11,000

6. Grandchild B $ 11,000

7. Grandchild C $ 11,000

8. Grandchild D $ 11,000

9. Grandchild E $ 11,000

Although the Donors did not have a completed appraisal at the time of the gift, the Assignment document also contained the following:

I intend to have a good faith determination of such value made by an independent third party professional experienced in such matters and appropriately qualified to make such a determination. Nevertheless if, after the number of gifted units is determined based on such valuation, the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted united shall be adjusted accordingly so that the value of the number of units gifted to each person equals the amount set forth above.

An appraisal was issued on July 26, 2005 concluding that a 1% Norseman membership interest was worth $109,000. Gift tax returns were filed for Albert and Joanne for 2004 reporting net transfers from each donor of $261,000 to their children and $11,000 to their grandchildren. In addition, the gift tax return schedules described the gifts to the children as a 2.39% Norseman membership interest ($261,000 / $109,000), and the gifts to the grandchildren as a .101% Norseman membership interest ($11,000 / $109,000). These membership interests where derived by dividing the total dollar value gifted to each descendant by the appraised value of a 1% interest.

The IRS audited Albert and Joanne's gift tax returns in 2006 alleging that the each donor actually made gifts of a 2.39% interest to each child and a .101% interest to each grandchild (rather than gifts of $261,000 and $11,000, respectively). The IRS sought to increase the value of the 2.39% Norseman membership interests from $261,000 (as reported on each donor's gift tax return) to $366,000, and the .101% Norseman membership interests from $11,000 (as reported on each donor's gift tax return) to $15,400. Albert, Joanne and the IRS eventually agreed to increase the value of the 2.39% and .101% Norseman membership interests to $315,800 and $13,346, respectively.

The key issue in this case was whether Albert and Joanne actually made gifts of a 2.39% and .101% Norseman membership interest to their descendants, or whether they made a gift of a fixed dollar amount of Norseman membership interests. If Albert and Joanne gifted a fixed percentage of Norseman membership interests, then an increase in the value of the 2.39% and .101% membership interests would result in gift tax. However, if it was determined that Albert and Joanne made a gift of a fixed dollar amount, then no gift tax would result because the value of the gift would remain unchanged. In essence, the formula under the assignment would operate to adjust the percentage membership interest transferred by Albert and Joanne at an amount less than 2.39% and .101% so that each donee only received those membership interests equal in value to the stated gift.

The IRS asserted the following arguments:

1. The descriptions contained in the gift tax returns of a specific percentage membership interest was a binding admission by Albert and Joanne that they transferred fixed percentage membership interests;

2. The capital accounts of Norseman, which were adjusted after the gifts to show the children and grandchildren as the owners of a 2.39% interest and .101% membership interest, controlled the nature of the gifts by Albert and Joanne;

3. The specific language of the gift documents transferred a fixed percentage of membership interests to the donees; and

4. The adjustment clause contained in the assignments is void for Federal tax purposes as contrary to public policy.

The Tax Court rejected all of the IRS arguments, holding:

1. The fact that the descriptions in the gift tax return included a specific percentage membership interest was not controlling because such percentage membership interest was merely based on the net dollar value reported by each donor and the appraisal. Albert and Joanne reported their gifts of a net dollar value consistent with the gift documents.

2. State law controls in determining the nature of the donees legal interest in property, not the capital accounts of an LLC. The Court noted that capital account entries are always tentative until a final adjudication or the expiration of the statute of limitations.

3. The clause contained in the assignments was a valid formula clause which operated to correct the allocation of Norseman membership units among Albert, Joanne and the donees after the appraisal was determined to have understated Norseman's value. This was not an attempt to reverse a completed gift of a fixed percentage membership interest.

4. There is no well-established public policy against formula clauses. The use of a formula clause such as this, which merely defines the rights transferred and does not undo a prior transfer, does not create a "severe and immediate" public policy concern.

Wandry represents a landmark case in the defined value clause arena. Although taxpayers have had success with similar clauses in recent years (*McCord, Hendrix,* *Christiansen, Petter*), this is the first case which did not involve the use of a charity to receive any amount in excess of what a donor intended to gift. For example, in *Petter*, *McCord* and *Hendrix*, the donor gifted a specific number of units, which were allocated between the non-charitable donee and charity pursuant to a formula. If the IRS increased the value of the gifted units on audit, then the number of units allocated to the non-charitable donee decreased while the number of units allocated to the charity increased. Essentially, the charity was in place to receive any amount in excess of what the taxpayer intended to be subject to gift tax. The *Wandry* case, however, validates what some practitioners have been asserting since *McCord* - that a charity is not required to avoid unanticipated gift tax. This is significant because some taxpayers simply do not want to involve a charity.

Since the case of *Proctor v. Commissioner* in 1944, the IRS has attacked the use of clauses designed to avoid gift tax. The IRS has historically been successful in these challenges. In recent years, however, courts appear to be more accepting of formula gifting clauses. What has developed is a fine-line distinction between “savings clauses”, which are void, and “defined value clauses”, which are gaining acceptance. To the untrained eye, the clauses appear to almost be identical; however, the consequences of using the wrong clause are drastic.

A savings clause is void because it operates to undo a prior completed transfer because of an event (such as a court decision) occurring after the completion of a gift. A basic example of a savings clause is “I give a 10% interest in ABC, LLC to my son, but if the value of this 10% interest is finally determined to be greater than $100, then the interest transferred shall be adjusted.” A defined value clause is valid because operates to irrevocably transfer a fixed value. A basic example of a defined value clause would be “I give to my son $100 worth of my interest in ABC, LLC.” The difference lies in what the donor is giving away. With a defined value clause, son is entitled from the outset to nothing more than $100 worth of ABC, LLC. With a savings clause, the son is entitled to 10% from the outset, unless a subsequent event occurs which changes what son is entitled to.

With the end of 2012 fast-approaching, and gift tax exemptions scheduled to plummet from $5,120,000 to $1 million beginning in 2013, defined value formula clauses may become even more popular for 2012 gifts. If properly drafted, a donor could potentially utilize the full $5,120,000 exemption in 2012 while minimizing exposure to gift tax. Here are a few points to consider if you intend to make or draft a defined value formula gift:

1. Obtain an appraisal in advance or contemporaneously with the gift. Although Albert and Joanne did not obtain an appraisal until after the gift documents were executed, this factor was certainly not favorable to the taxpayer.

2. Use grantor trusts as donees. A significant drawback of the defined value clause is deciding how to allocate ownership and tax items during the period in which the IRS is still able to audit the transaction. If too much property is allocated to the donee, then it may be necessary to amend several years of income tax returns. However, if the donee is a grantor trust, then all tax items will be included on the grantor's return during the years of uncertainty. No amended returns should be necessary.

3. Prepare gift tax returns consistent with the formula gift. As shown in *Wandry*, the IRS will likely use any inconsistencies against the donor on audit. Do not overlook the importance of filing an accurate and complete gift tax return!

4. Formula gifts work well if a single asset is gifted, but not so well if multiple assets are transferred. If you or your client intend to gift multiple assets, consider transferring the assets to an entity first, and then making a formula gift of the entity interest.

It is no secret that the IRS absolutely despises defined value formula clauses and it is unlikely that they will give up their fight because of *Wandry*. *Therefore, practitioners and donors should remain cautious in utilizing these type of clauses*. The IRS can still appeal *Wandry*, which would lie in the Tenth Circuit. There is marginally favorable precedent already in the Tenth Circuit (*See* King v. Commissioner). However, the Tax Court stated in *Wandry* that it did not view *King* as controlling because it was not "squarely on point." This may or may not deter the IRS from appealing *Wandry* to the Tenth Circuit. The IRS may instead choose to find a similar case in another jurisdiction (outside of the Fifth (*McCord, Hendrix*), Ninth (*Petter*) or Tenth Circuits) and try for a more favorable outcome. Alternatively, the IRS may forgo the court system altogether and issue regulations to limit the use of defined value clauses, as invited by the Ninth Circuit during oral arguments in *Petter*.

About Dean Mead:

Dean Mead is a business law firm that provides full-service legal representation to businesses and individuals throughout Florida. The firm has nearly 50 attorneys practicing in multiple practice areas including: tax, estate and succession planning, business law, general commercial litigation, employee benefits, bankruptcy and creditors' rights, real estate and health law.

Lauren Y. Detzel

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Ms. Detzel is chair of the firm's Estate and Succession Planning Department and specializes in techniques to reduce or avoid paying estate tax such as family limited partnerships, grantor retained annuity trusts (GRATs), sales to intentionally defective trusts, charitable trusts, lifetime gifts and generation skipping trusts. Particular emphasis includes planning for the succession of closely held or family business. She also handles many contested tax matters in the transfer tax area, ranging from audits of returns and administrative appeals within the IRS to Tax Court and Federal District Court litigation. Ms. Detzel handles the entire gamut of administration of estates and trusts, including contested matters of will and trust interpretation and reformation.

Key Practice Areas

- Asset Protection Planning
- Business Succession Planning
- Transfer Tax Controversies
- Trust and Estate Administration
- Wealth Preservation and Estate Planning

Primary Industries

Trust and Estate Litigation

Professional and Civic Activities

- The Florida Bar
  - Tax Section - Member, Executive Council, 1980 - Present
  - Tax Section – Chair, 1997 - 1998
  - Real Property, Probate, and Trust Law Section, Member, Executive Council
  - Certification Committee for Wills, Trusts, and Estates – Chair, 1994 - 1995
  - Certification Committee for Wills, Trusts, and Estates – Member, 1992 - 1995
- American College of Trust and Estate Counsel
  - Fellow and Member of Estate and Gift Tax Committee; Chair, Asset Protection Committee
- Wealth Transfer Planning, National Will and Trust Document Assembly Program
  - Editorial Board, Florida Author
- Central Florida Estate Planning Council – President, 2000 - 2001
- Orange County Bar Association, Chair, Wills and Trusts Committee
- America Bar Association - Member
  - Tax Section
  - Health Law Section
- University of Florida Levin College of Law - Adjunct Professor

Education

- Board Certified in Wills, Trusts and Estates, The Florida Bar
- Juris Doctorate: University of Florida Levin College of Law, Gainesville, Florida, *with highest honors*, 1977
    - Order of the Coif, University of Florida Law Review Executive Editor
- Undergraduate Degree: University of Louisville, Louisville, Kentucky, *magna cum laude*, 1973

Bar Admissions

- Florida
- U.S. District Court Middle District of Florida
- U.S. Tax Court

Recognition & Awards

- Honored as the *Best Lawyers*® 2011 Orlando Tax Lawyer of the Year

- Named an Outstanding Trusts and Estates Lawyer in *The Best Lawyers in America*, 1993-2012

- Named one of Orlando's Best Lawyers by *Orlando Magazine*, 2001-2012

- Named an Outstanding Tax and Wealth Management Attorney in *Chambers USA, America's Leading Business Lawyers*, 2003-2011

- Named an Outstanding Wills, Trusts & Estates Attorney in *Florida Trend Magazine's Legal Elite*, 2004-2010

- Named one of the Top 100 Attorneys in Florida by *Florida Super Lawyers Magazine,* 2009 and 2011

- Named one of Florida's Top 50 Female Attorneys, North Florida's Top 25 Female Attorneys, and Outstanding Estate Planning & Probate and Tax Attorneys in *Florida Super Lawyers Magazine*, 2006-2011

- Recipient of the Gerald T. Hart Award as the Outstanding Tax Attorney in the State of Florida by The Florida Bar Tax Section, 2005

- Martindale Hubbell: Preeminent AV Rating

Speaking Engagements

- Planned Giving and Proposed Changes in Tax Law, University of Florida's Orlando Regional Council, December 2011

- Estate Planning Seminar 2011 Florida Legislative Update, Orlando, June 2011

- Asset Protection: Protecting Your Client's Assets in Today's Litigious Environment, February 2011 and August 2010

- Estate Tax Relief - It's Finally Here (At least for two more years), January 2011

- Understanding Your Trustee Duties and How to Stay Out of Trouble, January 2010 and November 2009

- Strategies for Dealing with Problem Trusts, July 2009

- Ethics in the Practice of Tax Law Seminar, University of Florida Graduate Tax Program, 1992 - 2011

- Graduate Tax Program, Adjunct Professor of Law, University of Florida College of Law, 1989 - 2000 and 2006-2011

- Southern Federal Tax Institute

- University of Miami Heckerling Institute on Estate Planning

- American College of Trust and Estate Counsel

- ALI-ABA

- The Florida Bar

- Practicing Law Institute

Publications

- Carryover Basis a 'Discredited' Concept in Estate Planning, *Estate Planning Journal*, April 2010

- Roth IRA Conversions: Benefits And Planning Opportunities, *Florida Bar Journal*, June 2009

- SunTrust Will and Trust Manual

- Estate Planning Changes in the 2001 Act - More Than You Can Count, 95 Journal of Taxation 74, August, 2001

- Testimony Before the House Committee on Ways & Means, Hearing on President's Tax Relief Proposals That Affect Individuals, March 21, 2001

- Also quoted in the following *Dow Jones Newswires* articles:
  - "Getting Personal: When A Charity is Drawn Into Estate Fight", May 4, 2011
  - "New Tax Rules Make Big Gifts Appealing", January 7, 2011
  - "Tax Strategies Address Deaths in 2010", September 27, 2010
  - "For Heirs Of Rich, Taxes Not Business As Usual", September 17, 2010
  - "Getting Personal: Real Estate Blues Are Boon For Some Trusts", September 10, 2010

- Ms. Detzel is the Editor of Dean Mead's Estate Planning Blog at deanmead.com

David J. Akins

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Mr. Akins is a shareholder in Dean Mead's Orlando office. He provides representation in the area of personal wealth planning, with an emphasis on gift planning, charitable planning, estate planning, probate, and the administration of estates and trusts. A significant portion of his practice is related to planning for family-owned and closely held businesses. He represents taxpayers in gift, estate and GST tax controversies with the IRS. Mr. Akins also represents fiduciaries and beneficiaries in disputes involving estates and trusts.

Key Practice Areas

- Business Succession Planning
- Charitable Planning
- Estate and Wealth Preservation Planning
- Gift and Estate Tax
- Income Taxation of Estates and Trusts
- Probate and Trust Administration and Disputes

Primary Industries

Trust and Estate Litigation

Professional and Civic Activities

- The Florida Bar - Member, 1988-Present
  - Real Property, Probate and Trust Law Section - 2004 - Present
  - Executive Council
  - Vice-Chair, Estate & Trust Tax Planning Committee
  - Tax Section, 1988 - Present
- Orange County Bar Association – Member, 1988-Present
  - Estate, Guardianship, and Trust Committee - 1988-1998; 2004 - Present
- American Bar Association
  - Real Property, Probate and Tax Law Section
- Central Florida Estate Planning Council - Member - 1988-Present
  - President - 2009-2010
  - Board of Directors - 2005 - 2011
- American Institute of Certified Public Accountants - Member
- Florida Institute of Certified Public Accountants – Member
- Rotary Club of Orlando - Member
- University of Florida Alumni Association
  - Gator Club Member of the Year - 2001
- Central Florida Gator Club (*a member organization of the University of Florida Alumni Association)*

    - President - 2000-2001
    - Board of Directors - 1997-2001

Charitable and Pro Bono Service

- First Presbyterian Church, Orlando, Florida
    - College of Elders - 1993-Present
    - Session Member - 1993-1995
    - Support Commission - 1993-1995
- Florida Hospital Foundation Planned Giving Advisory Board - Member
- Orlando Regional Healthcare System Foundation Planned Giving Advisory Board Member

Education

- Master of Laws, LL.M. in Taxation: Emory University School of Law, Atlanta, Georgia, 1987

- Juris Doctorate: University of Florida College of Law, Gainesville, Florida 1984

- Bachelor of Arts Degree in Accounting: University of Florida, Gainesville, Florida, 1977

Bar Admissions

- Florida, 1984
- Georgia, 1986

Prior Legal Experience

- Holland & Knight, LLP, Orlando, Florida, 1998-2005
- Maguire, Voorhis & Wells, P.A., Orlando, Florida, 1987-1998
- Merritt & Tenney, Atlanta, Georgia, 1985-1987

Recognition & Awards

- Named an Outstanding Estate Planning & Probate Attorney in *Florida Super Lawyers* Magazine, 2006-2011

- Named an Outstanding Wills, Trusts & Estates Attorney in *Florida Trend* Magazine's Legal Elite, 2006, 2008

- Named an Outstanding Estate Planning Attorney in *Orlando Business Journal's* Best of the Bar (Top 5%), 2005-2006

- Martindale-Hubbell: Preeminent AV Rating

- Listed in Leading American Attorneys

Speaking Engagements

- What Trustees Should Know about Florida's New Attorneys' Fee Statute, Trust & Estate Litigation Seminar Series, October 19, 2010

- Asset Preservation: Protecting Your Client's Assets in Today's Litigious Environment, Estate Planning Seminar Series, August 12, 2010

- Estate Tax Apportionment, Florida Bar Probate Seminar, March 19 and 20, 2009

Publications

- What Trustees Should Know about Florida's New Attorneys' Fee Statute, co-authored by David J. Akins and David P. Hathaway, *the Briefs*, a publication of the Orange County Bar Association, October 2010

- Mr. Akins is a contributor to Dean Mead's Estate Planning Blog at www.deanmead.com.

Matthew J. Ahearn

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Mr. Ahearn is Board Certified in both Wills, Trusts & Estates and Tax Law by The Florida Bar Board of Legal Specialization. He has extensive experience in the areas of estate and business succession planning, asset protection planning, charitable planning and planning to minimize or avoid wealth transfer taxes. Mr. Ahearn handles all aspects of probate and trust administrations, including estate and gift tax audits before the Internal Revenue Service. He represents both beneficiaries and fiduciaries in contested matters. In addition, Mr. Ahearn is a member of the Firm's Board of Directors.

Key Practice Areas

- Asset Protection Planning
- Business Succession Planning
- Charitable Planning
- Estate Planning
- Guardianships
- Marital Agreements
- Probate and Trust Administrations
- Tax

Primary Industries

Trust and Estate Litigation

Professional and Civic Activities

- American Bar Association - Member, 1998-Present
    - Tax Section, 1998-Present
    - Real Property, Probate and Trust Law Section, 1998-Present
- The Florida Bar, Member - 1998-Present
    - Tax Section, 1998-Present
    - Real Property, Probate, and Trust Law Section, 1998-Present
- The Florida Bar Foundation, Inc. - Fellow
- Orange County Bar Association – Member, 1999-Present
- Orlando Ballet - Board of Directors, 2009-2011
- Central Florida Estate Planning Council - Board Member, 2010

Education

- Board Certified in Tax Law, The Florida Bar
- Board Certified in Wills, Trusts & Estates, The Florida Bar

- Master of Laws (LL.M) in Taxation: University of Florida Levin College of Law, Gainesville, Florida, 1998
- Juris Doctorate: Stetson University College of Law, St. Petersburg, Florida, *cum laude*, 1997
- Bachelor of Arts Degree: University of Florida, Gainesville, Florida, 1993

Bar Admissions
Florida

Speaking Engagements
The New Florida Power of Attorney Act, Estate Planning 2011 Florida Legislative Update, Dean Mead Seminar Series, June 21, 2011

Publications
- *The New Florida Power of Attorney Act*, Estate Planning 2011 Florida Legislative Update, Dean Mead Seminar Series, June 21, 2011

- *The Perfect Storm Provides Opportunity for Transfer Tax Planning*, Dean Mead e-Newsletter, March 2009

- *Never Say Never – The Estate Tax Will Be Repealed!*, Dean Mead e-Newsletter, December 23, 2009

- Mr. Ahearn is the Editor and a frequent contributor to Dean Mead's Estate Planning Blog at www.deanmead.com.

Brian M. Malec

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Mr. Malec handles all aspects of estate and succession planning, including the implementation of wills, trusts, business entities and sophisticated estate planning techniques to protect and transfer wealth among individuals and families while minimizing income, gift, estate and generation-skipping transfer taxes.

Mr. Malec also handles all aspects of probate and trust administration, including advising fiduciaries throughout the administrative process and representing beneficiaries seeking to assert their rights in an estate or trust.

Key Practice Areas

- Asset Protection Planning
- Estate and Succession Planning
- Income Tax of Estates and Trusts
- Probate and Trust Administration
- Tax

Primary Industries

Trust and Estate Litigation

Professional and Civic Activities

- The Florida Bar - Member
  - Tax Section
  - Real Property, Probate and Trust Law
    - Family Trust Subcommittee
- Orange County Bar Association, Tax Section - Member
- Central Florida Estate Planning Council - Member

Education

- Master of Laws (LL.M.) in Taxation: University of Florida Levin College of Law, Gainesville, Florida, 2008
  - Graduated with a 4.0 GPA
- Juris Doctorate: University of Florida Levin College of Law, Gainesville, Florida, *cum laude*, 2007
  - Member, Journal of Law and Public Policy
- Bachelor of Science Degree, Major in Legal Studies; Minor in Business Administration: University of Central Florida, Orlando, Florida, *summa cum laude*, 2004

Bar Admissions

Florida, 2007

Recognition & Awards
Book Awards: Estate Planning; Taxation of Property Transactions - University of Florida Levin College of Law, Gainesville, Florida

Speaking Engagements
Inherited IRAs in Florida, Estate Planning 2011 Florida Legislative Update, Dean Mead Seminar Series, June 21, 2011

Publications
- *The "Olmstead Fix": Is It Safe to Create LLCs in Florida Again?*, Estate Planning 2011 Florida Legislative Update, co-authored with Lauren Y. Detzel, June 21, 2011

- *Inherited IRAs in Florida*, Estate Planning 2011 Florida Legislative Update, Dean Mead Seminar Series, June 21, 2011

- *Estate Tax Relief - It's Finally Here! (At Least for Two More Years)*, co-authored the article with Lauren Y. Detzel, Matthew J. Ahearn, David J. Akins, and Erik N. Bonnett, January 6, 2011

- *Florida Bankruptcy Court Exempts Inherited IRA*, Steve Leimberg Asset Protection Planning Newsletter # 173

- *Important Legislative Developments in Florida for Inherited IRAs and Charging Order Protection for LLCs*, Steve Leimberg Asset Protection Planning Newsletter # 174

- *Procedural Issues for 2010 Decedents Under the 2010 Act*, co-authored with Lauren Y. Detzel, January, 2011

- *Asset Preservation: Protecting Your Clients' Assets in Today's Litigious Environment*, co-authored with David J. Akins, August 12, 2010

- *Strategies for Dealing with Problem Trusts*, co-authored with Lauren Y. Detzel and David J. Akins, June, 2009

- Mr. Malec is a frequent contributor to Dean Mead's Estate Planning Blog at www.deanmead.com.

Estate and Succession Planning

Dean Mead's Estate and Succession Planning Department is one of the largest and most respected groups of estate planning attorneys in Florida. We are frequently called on by accountants, other attorneys, banks, and trust companies to handle the most sophisticated estate planning, probate, and trust administration cases. The firm's high level of expertise in those areas is evidenced by the fact that our team members include:

- Chair of the Department named Orlando *Best Lawyers®* Tax Lawyer of the Year for 2011
- A fellow in the American College of Trusts and Estates Counsel
- An adjunct professor of Estate Planning in the Graduate Tax Program at the University of Florida College of Law
- Former chair of the Tax Section of the Florida Bar
- Former chair of the Florida Bar Certification Committee for Wills, Trusts, and Estates
- The Florida Bar Tax Section's "Outstanding Tax Lawyer of the Year" (2005)
- Four attorneys who are board certified as experts in Wills, Trusts, and Estates
- Two attorneys who are board certified as an expert in Tax law
- Nine attorneys who have a master of laws degree in taxation (LL.M.)
- Board Member of the Central Florida Estate Planning Council
- Past President of the Central Florida Estate Planning Council
- President of the Indian River County Estate Planning Council
- Past President of the Martin County Estate Planning Council

Our Estate and Succession Planning Department specializes in estate and trust administration matters and the development of estate plans which help our clients achieve maximum savings in income, estate, gift, and generation-skipping transfer taxes. We handle the traditional aspects of personal estate planning, such as the preparation of revocable trusts, wills, and irrevocable trusts. In addition, we work closely with our clients to plan for the succession of family businesses and wealth among generations in a tax efficient manner. We analyze and implement the latest techniques to reduce estate and gift taxes and preserve our clients' wealth, including limited liability business entities such as family limited partnerships and limited liability companies, GRATS, and charitable remainder and lead trusts. Further, we assist our clients with the preparation of estate and gift tax returns, audits of those returns, and appeals to the IRS and courts to contest proposed tax deficiencies.

Our Estate and Succession Planning Department constantly monitors the latest developments in both tax and non-tax laws affecting our clients. We advise our clients on the income, gift, and estate tax consequences of charitable gifts and our Team has extensive experience in the establishment of private and publicly supported charitable organizations. We handle the negotiation and preparation of marital agreements and provide asset protection planning for individuals. Our Team has significant experience assisting land owners in multigenerational business succession planning while preserving land holdings. When necessary, we represent fiduciaries and beneficiaries in court and mediation to settle disputes that arise during administration of a trust or estate.

We recognize that our clients' estate planning needs frequently require expertise in other areas of the law, so we work closely with attorneys in the firm's other practice groups to provide our clients with the full service they need. We pride ourselves on utilizing the latest technology to provide exemplary service in an efficient and cost effective manner to our clients.

Areas of Experience

- Business Succession Planning
- Charitable Giving
- Estate, Gift and Generation-Skipping Tax
- Limited Liability Business Entities
- Probate and Guardianship
- Trust, Estate and Fiduciary Litigation
- Tax Controversies and Audits
- Trust Administration
- Trust and Estate Income Taxation
- Wills and Trusts
- Wealth Preservation

Estate and Succession Planning Team

Lauren Y. Detzel is a shareholder and chair of the firm's Estate and Succession Planning Department. She is Board Certified in Wills, Trusts and Estates by The Florida Bar Board of Legal Specialization. Ms. Detzel specializes in techniques to reduce or avoid paying estate tax such as family limited partnerships, grantor retained annuity trusts (GRATs), sales to intentionally defective trusts, charitable trusts, lifetime gifts and generation skipping trusts. Particular emphasis includes planning for the succession of closely held or family business. Ms. Detzel also handles many contested tax matters in the transfer tax area, ranging from audits of returns and administrative appeals within the IRS to Tax Court and Federal District Court litigation. She handles the entire gamut of administration of estates and trusts, including contested matters of will and trust interpretation and reformation. *ldetzel@deanmead.com*

Matthew J. Ahearn is a shareholder and is Board Certified in both Wills, Trusts & Estates and Tax Law by The Florida Bar Board of Legal Specialization. He has extensive experience in the areas of estate and business succession planning, asset protection planning, charitable planning and planning to minimize or avoid wealth transfer taxes. Mr. Ahearn handles all aspects of probate and trust administrations, including estate and gift tax audits before the Internal Revenue Service. He represents both beneficiaries and fiduciaries in contested matters. Mr. Ahearn earned his Master of Laws in Taxation from the University of Florida in 1998. *mahearn@deanmead.com*

David J. Akins is a shareholder and provides representation in the area of personal wealth planning, with an emphasis on gift planning, charitable planning, estate planning, probate and the administration of estates and trusts. A significant portion of his practice is related to planning for family-owned and closely held businesses. He represents taxpayers in gift, estate and GST tax controversies with the IRS. Mr. Akins also represents fiduciaries and beneficiaries in disputes involving estates and trusts. Mr. Akins earned his Master of Laws in Taxation from Emory University School of Law in 1987. *dakins@deanmead.com*

John C. "Jack" Bovay is a shareholder and he has a varied practice that includes estate, succession and asset protection planning for high net worth individuals and families who desire to preserve that wealth for future generations. He also handles the statutory and tax aspects of probate and trust litigation. Jack graduated from Washington and Lee University in 1979. He received both his law degree and LL.M. in Taxation from the University of Florida College of Law. Jack is board certified as a specialist in both Wills, Trusts and Estates Law and also in Tax Law. He is also a Florida CPA. Jack is an AV-rated lawyer and was listed in the 2007 edition of *Florida Super Lawyers*. In addition to his law practice, Jack serves on the board of the University of Florida Law Center and the Southeast Tissue Alliance. Furthermore, Mr. Bovay serves as an adjunct professor for the University of Florida Levin College of Law. *jbovay@deanmead.com*

Bradley R. Gould is a shareholder who practices in the area of federal income, estate, and gift tax law and family business succession planning. He represents businesses and business owners in all types of business and tax matters, including choice of entity, mergers and acquisitions, reorganizations, and other general business matters. Mr. Gould represents individuals, businesses and fiduciaries before the Internal Revenue Service. He also counsels clients on estate and wealth preservation planning matters. In addition to being an attorney, he is also a Certified Public Accountant. *bgould@deanmead.com*

Michael D. Minton is a shareholder and currently serves as president of Dean Mead. Mr. Minton practices in the area of Federal income, estate, and gift tax law and family business succession planning. He frequently lectures on tax issues related to agribusiness, including water resource issues and the emerging carbon credit market. Mr. Minton earned his Master of Laws in Taxation from the University of Florida. He was awarded a Special Merit Award by The Florida Bar Tax Section in 2009 and has been named an outstanding Tax attorney in *Chambers USA - America's Leading Business Lawyers* and *The Best Lawyers in America*. *mminton@deanmead.com*

Robert J. Naberhaus III is Board Certified in Wills, Trusts and Estates Law. He has extensive trust, estate planning and administration experience working with high net worth individuals. He also concentrates his practice in the areas of fiduciary representation, business succession planning, generational planning, charitable planning, guardianship and probate litigation. *RNaberhaus@deanmead.com*

Brian M. Malec is an associate and practices in the areas of estate planning, probate and estate administration and taxation law, including estate, gift and income taxation. He earned his Master of Laws in Taxation from the University of Florida in 2008. *bmalec@deanmead.com*

Dana M. Apfelbaum, is an associate and practices in the area of federal income, estate, and gift tax law and family business succession planning. She counsels individuals in estate planning, with an emphasis on implementing the client's objectives, asset protection and minimizing wealth transfer taxes. Ms. Apfelbaum also represents fiduciaries through all stages of probate, estate and trust administration. In addition, she represents businesses and business owners in all types of business and tax matters, including choice of entity, mergers and acquisitions, reorganizations, other general business matters, and succession planning. *dapfelbaum@deanmead.com*

Richard I. Withers is an associate and practices in the areas of estate planning, business succession planning, probate and trust administration and tax planning for business and individuals. He represents businesses and business owners in all types of business and tax matters, including choice of entity, mergers and acquisitions, reorganizations and other general business matters. He also counsels clients in the areas of estate planning and wealth preservation. Mr. Withers earned his Master of Laws in Taxation from the University of Florida. *rwithers@deanmead.com*

Tax

Dean Mead's Tax Department handles tax planning issues for businesses and individuals. The attorneys in our department have extensive experience in a full range of tax specialties and areas, including sales and purchases of businesses, mergers and acquisitions, tax planning for real estate transactions, debt restructuring, tax controversies, state and local tax issues, agribusiness, employee benefits, ESOPs, and with all types of business entities, including LLCs, S and C corporations, partnerships, charitable and other not-for-profit organizations.

Our Tax Department works closely with our real estate, litigation and health law attorneys to provide our clients with advice for structuring or planning their transactions in the most tax efficient manner possible. The expertise of our team allows us to focus on a wide array of tax issues with an unparalleled degree of depth and experience to address our clients' needs.

The majority of our tax attorneys have Master's Degrees in taxation, many are board certified in tax law by The Florida Bar, a few members hold CPA certificates, and two members are Fellows of the American College of Tax Counsel. Three members of our Tax Team have been honored as the "Outstanding Tax Lawyer of the Year" by the Tax Section of The Florida Bar. Additionally, several members of our Tax Team have been named as "Outstanding Tax Attorneys" by The *Best Lawyers in America®*, *Chambers USA*, *Legal 500*, *Florida Trend* magazine, and *Orlando Magazine*. In addition, one of the firm's founding shareholders, Charlie Egerton, is the immediate past chair of the American Bar Association (ABA) Tax Section.

Areas of Experience:

Business Entity Formation and Operation (Partnerships, LLCs, S Corporations, and C Corporations)

We assist business owners with selecting and establishing the best legal entity to conduct a business, including partnerships, LLCs, S corporations, and C corporations. Our Tax Team also assists our clients in all aspects of tax planning related to the operation of their businesses (whether a partnership, LLC, S corporation, or C corporation).

Our lawyers advise clients on the most appropriate entity to use for any given business venture. This advice includes the tax advantages of the respective entities as well as the non-tax and business issues surrounding each transaction. We continue representation of our clients on an ongoing basis and provide advice on the business issues that arise during the course of operation, including employment, tax, contracts, securities, and licensing and regulatory matters.

Mergers and Acquisitions

A large part of our tax practice involves providing tax advice to our clients in connection with the sale and purchase of businesses, including mergers and acquisitions. This work also involves other tax-free reorganizations of business entities, stock sales, purchases and redemptions, and asset sales and purchases.

Real Estate Tax

Dean Mead's Tax Department provides a broad array of tax services in connection with real estate transactions, including the structuring of tax-free exchanges (forward, reverse, and build-to-suit exchanges), planning to preserve long-term capital gains in connection with dispositions of real estate, and the structuring of joint venture arrangements for the acquisition and/or development of real properties. Team member, Charlie Egerton, is recognized as a national expert in the areas of like-kind exchanges and taxation of real estate development.

We have extensive experience negotiating and drafting RESPA Affiliated Business Arrangements for developers so that they may share in the income generated by the title policies and mortgage loans originating from their developments.

Tax-Exempt Organizations

Our Tax Department represents tax-exempt organizations with numerous organizational and operational issues. We assist clients in selecting the initial structure of the organization, such as Section 501(c)(3) charitable organizations, Section 501(c)(6) trade associations, Section 501(c)(4) social welfare organizations and a variety of other categories of tax-exempt organizations. We also assist in evaluating the tax-exempt purposes of the organization, qualifying it as tax-exempt and complying with laws governing tax-exempt organizations.

Many tax-exempt organizations wish to qualify under Section 501(c)(3) of the Internal Revenue Code because contributions to these organizations are deductible to the donors. We assist our clients in determining whether the organization qualifies as a Section 501(c)(3) organization. Each Section 501(c)(3) organization is further classified as a public charity or a private foundation and we help our clients determine which status would be more beneficial to their organization.

Our lawyers also handle tax issues that surround the qualification, operations and transactions of the tax-exempt organization. State law is an important consideration for tax-exempt organizations. We assist our tax-exempt organization clients in obtaining state law tax exemptions and complying with registration requirements for fundraising. In addition, we provide legal services to tax-exempt organizations that are operating in combination with taxable entities. For example, tax-exempt organization clients may use a taxable subsidiary to house an unrelated business.

Tax Controversy Issues

Dean Mead's Tax Department includes attorneys who focus their practice on tax controversies and regularly represent clients before the IRS during all phases of a tax examination (audit) or controversy, including preparing written protests and representing taxpayers at the IRS Appeals Office and litigation in the United States Tax Court, the Federal Court of Claims, the federal district courts, the federal circuit courts of appeals and the United States Supreme Court.

Individuals and Entities

The types of tax issues our team handles include income tax, employment tax, estate and gift tax, and federal excise taxes. We represent individuals, corporations, partnerships and limited liability companies, and also tax-exempt organizations, regarding their tax issues. Our team assists Dean Mead's clients in evaluating the strength of their reported tax positions when an examination of their tax return is initiated.

Audit and Appeals

Our team works with clients from the inception of an audit to develop an audit strategy and to manage the audit in an effort to obtain favorable results through settlements, administrative hearings or judicial resolutions. Our attorneys also work with the certified public accountants representing the taxpayer. When a matter is not resolved during an audit, we represent our clients in administrative appeals to the IRS Appeals Office in an effort to obtain favorable settlements for our clients.

Litigation

Because we are sensitive to the fact that litigation is uncertain, costly and public, we strive to resolve cases without litigation whenever possible. Our familiarity with the substantive, procedural and evidentiary rules allows us to counsel clients with a coherent and consistent strategy to obtain the desired resolution. Thus, our Team often works at the development stages of a matter to document a transaction to minimize future disputes with the IRS. We also assist clients in responding to IRS inquiries at the earliest stages of an examination, with the objective of a consistent approach throughout the examination and IRS appeals process and, if necessary, in litigation. Throughout these processes, we are vigilant and creative in identifying potential settlement approaches while preparing the case for a full presentation at trial if that should prove unavoidable.

"Up To Date"

Our practice is constantly evolving in response to changes in the way the IRS conducts examinations, develops alternative approaches to resolving disputes administratively and prepares cases for litigation. As the IRS involves its attorneys earlier in the process and for multiple purposes, our clients have found it essential and beneficial to do the same. With extensive experience in both controversy procedures and tax law, we are able to develop resolution strategies that are individually designed and factually based on each client's particular circumstances. Our Team keeps up to date on new developments in the tax laws in order to represent our clients in their tax controversies.

Areas of Experience

Agricultural Law
Anti-Referral Laws
Arbitration
Asset-Based Loans
Bankruptcy and Creditors' Rights
Builder Lines of Credit
Business Succession Planning
Charitable Giving
Collections
Commercial Development
Commercial Lending
Complex Loan Workouts
Construction Disputes
Construction Loans
Contract Disputes
Contracts
Corporate Loans
Corporate Maintenance and Compliance
Corporate Reorganizations
Corporate/Partnership
Disputes Among Partners
Eminent Domain
Employee Benefits and Retirement Planning
Employment Contracts/Shareholder Agreements
Employment Litigation
Entity Selection, Formation, and Administration
Environmental Permitting and Enforcement
Estate Planning
Estate, Gift and Generation Skipping Tax
Excess Coverage Counsel
Facility and Medical Staff Issues
Family Limited Partnerships
Federal and State Antitrust
Federal and State Securities Law
Federal and State Tax Matters
Financial Institutions
Financing
Florida Documentary Stamps
Formation & Operation of Group Practices
Formation of Business Entity
Governmental Approvals
Hazardous Waste Disposal
Health Law
HIPAA Contracts and Compliance Guidance
Homeowners Associations
Initial Public Offerings
Insurance Coverage Analysis and Litigation
Insurance Reimbursement and Coverage Disputes
Investigations
Joint Venture, Partnership & LLC Agreements
Land Use and Zoning
Landfill Sites
Leasing
Litigation
Loan Negotiation, Documentation, and Closing
Managed Care Contracting
Medical Litigation/Administrative Hearings
Medical Professional Associations
Medicare/Medicaid Fraud and Abuse
Medicare/Medicaid Reimbursement
Mergers and Acquisitions
Mining and Mineral Rights
Mortgage Lending
Non-Profit and Charitable Organizations
Partnerships, S Corps, LLCs
Permitting
Pesticide Litigation
Physician-Hospital Relationships, Contract Negotiations
Private Placements
Probate and Trust Litigation
Professional Negligence
Property Leasing and Management
Property Tax Challenges
Provider Licensing/Certification
Purchases and Sales of Businesses
Real Estate Development
Registration and Exemptions
Residential Development
Sales and Acquisitions
Secured and Unsecured Lending
Stark I and II, Fraud & Abuse
State and Local Taxation
Syndicated Loan Transactions
Tax Controversies and Audits
Tax Planning
Tax Structuring of Mergers and Acquisitions
Tax-Deferred Exchanges
Title Insurance
Trust Administration
Utilities Law
Water Law
Wetlands and Wetlands Banking
Wills and Trusts
Worker Protection and Safe

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