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A Potpourri of Planning Traps, Ideas and Strategies

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Same Sex Marriage Issues

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Federal Taxation and Estate Planning for Same-Sex Marriages

U.S. v. Windsor (June 26, 2013)

- § 3 of DOMA held invalid
  - Federal law defining marriage as only heterosexual marriages
- § 2 left unchanged
  - States not required to recognize same-sex marriages from other jurisdictions
- Federal government recognizes any valid marriage
  - Defers to local law to determine valid marriage

Revenue Ruling 2013-17
(September 16, 2013)

- All terms relating to marriage deemed gender neutral
- Adopted a State of Celebration Rule
  - Validity of marriage determined by laws of the State where the marriage occurred
- No marriage "equivalents"
  - E.g., civil unions and domestic partnerships
- Applied prospectively, but could file amended returns if limitations period was open

Obergefell v. Hodges (June 26, 2015)

- The 14th Amendment requires States to issue marriage licenses to individuals of the same gender
- The 14th Amendment requires States to formally recognize same-sex marriages entered into in another State
- State laws banning same-sex marriage are effectively invalidated
- In the wake of Obergefell, same-sex couples should proactively plan their estates

Taxation of Same-Sex Couples

Same-sex married couples have been subject to the same Federal tax rules as opposite sex couples since Windsor and are now subject to the same State tax rules

State Law Issues

- Generally, planning for same-sex couples married after Obergefell is the same as planning for opposite sex married couple
  - Caution: Adopted child of same-sex couple could have been adopted by only one of the individuals in that relationship
- Interesting issues arise for same-sex couples who reside in Florida but were married in another jurisdiction before Obergefell
- Tenancy by Entirety
  - Real Property & Personal Property
- Homestead
- Elective Share/Pretermitted Spouse Etc.
- Drafting issues

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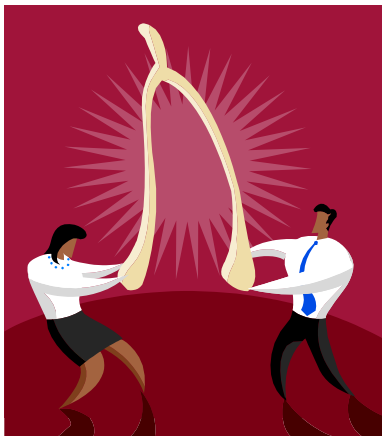
Planning for Divorce



*"**Marriage** is often due to lack of judgment, **divorce** to lack of patience and **remarriage** to lack of memory"*

Income Tax Issues in Divorce: Alimony

- **§§ 71(b) / 215**
  - "Alimony" is includible in income of the recipient spouse and deductible by the payor spouse
  - Alimony means any payment in cash if:
    - Payment is received by or on behalf of a spouse under a divorce or separate instrument;
    - The divorce or separate instrument does not designate such payment as not includible in income and not allowable as a deduction under section 215;
    - Payee spouse and payor spouse are not members of the same household at the time of payment is made; **and**
    - There is no liability to make any payment for any period after the death of the payee spouse or to make any payment as a substitute for such payments after the death of the payee spouse.

Income Tax Issues in Divorce: Alimony

- **§§ 71(c) / 215**
  - Payments for child support are not deductible.
  - If any amount specified in the instrument will be reduced upon the occurrence of an event to a child (e.g., attaining 18, graduating, dying, etc.), then the reduction is treated as child support, not alimony.

Trap for the Unwary

Divorce Planning

There are several of ways to make alimony mistakes in divorces:

- If there is any obligation to make an alimony payment (or a substitute payment) after the recipient's death, all such payments, including those paid before death, are not deductible alimony.
- Payments made to a spouse before a divorce or separation agreement is signed may not qualify as alimony
- The Tax Court has ruled that when a divorced parent cannot pay both alimony and child support, the payments will first be applied to child support, effectively reducing the tax deduction for the spouse making the alimony payment.

Planning Opportunity

Divorce Planning

In general, the cost of personal, non-tax related legal advice is not a deductible expense.

If the wealthier spouse is paying the legal fees of the ex-spouse, the fees will generally not be deductible. Instead, have the soon to be ex-spouse be responsible for his or her own legal fees and increase the alimony payment (a deduction for the paying ex-spouse) to cover the legal costs.

Planning Opportunity

Divorce Planning

§219(f)(1) provides that Alimony is considered "Earned Income" for IRA purposes

IRA Contribution Limits in 2015:

- Under age 50: $5,500
- Age 50 and older: $6,500

Income Tax Issues in Divorce: Basis

- **§ 1041(a):** No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) (1) a spouse, or (2) a former spouse, but only if the transfer is incident to the divorce.
- **§ 1041(b):** The basis of the property in the hands of the transferee is equal to the adjusted basis of the transferor.
- § 1041 does not apply if the recipient is a non-resident alien. Therefore, transfers of property to a non-resident alien spouse may be taxable.

Income Tax Issues in Divorce: Basis

Which Asset Is Best For Your Client?

Rental Property	**Stock Portfolio**
FMV: $100,000	FMV: $85,000
Purchase Price: $100,000	Basis: $85,000
Basis (after depreciation): $25,000	
Unrealized Gain: $75,000	**Unrealized Gain: $0**
Tax Liability: $18,750 (25% tax rate)	
After-Tax Value: $81,250	**After-Tax Value: $85,000**

PLANNING OPPORTUNITY

Divorce Planning

Divorce negotiations should take into account the After-Tax Value of an asset, not just its Fair Market Value

Income Tax Issues in Divorce: Basis

Which Asset Is Best For Your Client?

Personal Residence

FMV: $950,000

Basis: $700,000

Unrealized Gain: $250,000

Tax Liability: $0 (§ 121 exclusion)

After-Tax Value: $950,000

Stock Portfolio

FMV: $1,000,000

Basis: $600,000

Unrealized Gain: $400,000

Tax Liability: $95,200 (23.8% rate)

After-Tax Value: $904,800

Income Tax Issues in Divorce: Basis

- Assume you represent a doctor, which asset is best for your client?

Stock Portfolio	**Traditional IRA**
FMV: $800,000	FMV: $1,000,000
Basis: $800,000	Basis: $0
After-Tax Value: $800,000	After-Tax Value: $700,000

- Although the IRA has a lower after tax value, the account is protected from creditors. Therefore, the doctor may be willing to give up some $ in order to retain exempt assets rather than non-exempt assets.

Planning Opportunity

Divorce and Basis

Divorce negotiations should take into account the Asset Protection Value of an asset

(e.g., Retirement Assets)

Income Tax Issues in Divorce: Trusts

Lifetime QTIPs

- QTIP = Irrevocable trust that provides for all income to be distributed to the spouse at least annually, and the spouse is the sole beneficiary during his or her lifetime. The trustee usually also has the ability to distribute principal for HEMS.
- To qualify for a marital deduction, the income interest of the spouse must continue until the spouse's death. It cannot terminate upon divorce.
- Upon a divorce, § 682 says that the income of the trust required to be paid to the beneficiary spouse is taxed to the beneficiary spouse, but § 682 does not shift the liability for principal. In Florida, capital gains are generally allocated to principal. Therefore, capital gains generally will be taxed to the donor, not the ex-spouse, even if the trustee may make principal distributions to the ex-spouse.

Income Tax Issues in Divorce: Trusts

SLATs (Spousal Lifetime Access Trusts)

- Popular in 2012 when it appeared $5+ million exemptions were going away.
- Basically, a SLAT is a lifetime credit shelter trust that provides for discretionary distributions for the spouse and, potentially, descendants.
- If the definition of a "spouse" in the SLAT is such that the ex-spouse's beneficial interest would continue after a divorce, who pays the tax on the SLAT income and gains?
- The SLAT is a grantor trust as to the donor during the marriage under § 677(a). Depending on who is serving as trustee, the grantor trust status could continue after divorce because § 677(a) and § 672(e) combine to measure grantor trust status by reference to the marital status at the time of creation of the trust.
- Thus, unless this issue is addressed, the donor spouse will continue to be liable for the tax on the trust income and gains that may be distributed to the ex-spouse!

Gift Tax Issues in Divorce: Utilizing Exemptions

As part of the Divorce Negotiation for a Wealthy Client,

Treat the Annual Exclusions and Gift Exemptions as Tradable Assets

Planning Opportunity

Gift Tax Issues in Divorce: Utilizing Exemptions

Assume wealthier spouse has children from a prior marriage and a taxable estate, but the other spouse does not.

- Less wealthy spouse may be able to get more in the divorce by agreeing to split gifts with the wealthier spouse for gifts made before the divorce.
- § 2513(a)(1) states that, in order to be able to make a split-gift election, the two must be married at the time of the gift and neither can be remarried before the end of the year.
- Example - Wife makes a gift of $1 million to her children in trust. Husband agrees to split the gift, which means each is treated as making a gift of $500,000. This effectively saves wife's estate $200,000 ($500,000 x 40%). How much would wife pay soon to be ex-husband to save $200,000 of estate taxes?
  - Consider the wealth that could be transferred, and the taxes that could be saved, if discountable assets (such as minority LLC/LP interest) were gifted.
- Gifts do not even have to use exemption. Rather, one could just use the other's annual exclusions.

Planning Opportunity

Gift Tax Issues in Divorce: Utilizing Exemptions

Assume wealthy wife is required to make a significant property settlement for the benefit of a less wealthy second husband.

- In lieu of giving funds outright to the spouse, wife could create a lifetime marital trust prior to the divorce for the benefit of the soon to be ex-spouse.
- Properly created, the trust would create no gift taxes.
- At the ex-husband's death, the remainder of the trust reverts to wife's children from a prior marriage. In addition, the marital trust will be included in husband's estate and use his unified credit to the extent he has not used it. This benefits wife's children by reducing the overall transfer taxes.

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Business Opportunities

Business Opportunities

A great way to build value in young generations and save estate tax is to allow younger generations (or trusts for them) to take advantage of business opportunities, using the parent's business knowledge and relationships

But when does this amount to a gift of the "Business Goodwill" to the younger generations?

Business Opportunities

Two recent Tax Court decisions highlight this issue, but came to two different conclusions

In Adell, the Court held that the business goodwill belonged to the younger generation

In Cavallaro, the technology connected with a family business belonged to the older generation resulting in a substantial indirect gift

Business Opportunities

The Adell Family Business

The Issue was the Value of the Business at Father's death.

The Estate contended that the pivotal role that the decedent's Son played depressed the value of the Business– the son's "Personal Goodwill" greatly reduced the value of the Father's company. The Son was not subject to an employment agreement or covenant not to compete.

The Court agreed that a very Substantial Value had to be assigned to the son's personal goodwill, reducing the value of the father's estate

Business Opportunities

The Cavallaro Family Business

Oldest son and father came up with a new idea involving computer circuit boards. This venture was unsuccessful at first and diverted capital. Father gave up on it.

Son and his brothers formed a new corporation. Eventually, business took off and was merged with father's company

The merged entity was sold six months later for $57 million.

The IRS took the position that the merger was an indirect taxable gift by the parents to the sons

Trap for the Unwary

Business Opportunities

The Cavallaro Family Business

The Tax Court found numerous facts that showed the Father's Company owned the technology, including:

- It's personnel and facilities made the machines,
- It claimed a research and development credit for the device,
- It was the seller on one major sale contract,
- The son's company had no employees or bank accounts of its own,
- All its bills were paid by the father's company.
- A confirmatory bill of sale for the technology was done seven years after the son's company was formed

Business Opportunities

These cases are extremely fact specific, but the following facts could strengthen the client's case:

- The old business continues to operate.
- The owner of the existing business does not work in any capacity for the new business when it is created.
- The economic risk of the venture should rest solely on the new business owners. The parent and the old business should not directly or indirectly guarantee the obligations of the new owners and their business.
- Minimize transactions between the two businesses.

Business Opportunities

- The children should work in the business for a period of time and by doing so acquire their own business goodwill through the relationships they create or broaden.

- The new business owners are not subject to any non-compete, non-solicitation, confidentiality or trade secrets limitations.

- A significantly different name is used for the new business.

Section 2704(b) Regulations

Is This the End of Valuation Discounts for Transfers of Family Businesses?

Section 2704(b) Regulations

§ 2704(b) Certain restrictions on liquidation disregarded

- **General rule:** If (1) there is a transfer of an interest in a corporation or partnership to (or for the benefit of) a member of the transferor's family, and (2) the transferor and members of the transferor's family hold, immediately before the transfer, control of the entity, then any applicable restriction shall be disregarded in determining the value of the transferred interest.
- **"Applicable restriction"** means any restriction:
  - which effectively limits the ability of the corporation or partnership to liquidate, and
  - with respect to which either (1) the restriction lapses, in whole or in part, after the transfer, or (2) the transferor or any member of the transferor's family, either alone or collectively, has the right after such transfer to remove, in whole or in part, the restriction.
- **Exception:** the term "applicable restriction" shall not include:
  - any commercially reasonable restriction which arises as part of any financing by the corporation or partnership with a person who is not related to the transferor or transferee, or a member of the family of either, or
  - any restriction imposed, or required to be imposed, by any Federal or State law.

Section 2704(b) Regulations

- To avoid a restriction being an applicable one, state laws have been changed so that the default rules of state law restrict the ability of the entity to liquidate.
- However, § 2704(b)(4) provides: **The Secretary may by regulations provide that other restrictions shall be disregarded in determining the value of the transfer of any interest in a corporation or partnership to a member of the transferor's family if such restriction has the effect of reducing the value of the transferred interest for purposes of this subtitle but does not ultimately reduce the value of such interest to the transferee.**
- This is very broad authority!

Section 2704(b) Regulations

- § 2704(b) became effective October 9, 1990. However, no regulations expanding the class of applicable restrictions have ever been issued.
- IRS and Treasury officials hinted about 12 years ago that they were close to issuing such a proposed regulation (a § 2704 guidance project that was placed on the IRS/Treasury Priority Guidance Plan in 2003), but President Obama's first budget proposal included a revenue proposal to revise § 2704.
- The § 2704 regulation project was put on hold pending the possible passage of legislation that might provide legislative support for the positions the new proposed regulation might take.
- However, the 2014 and 2015 Greenbooks dropped this legislative proposal. It's understood that the proposal was dropped because the Treasury intends to issue regulations that would produce the same results.
- The grant of regulatory authority under § 2704(b)(4) is so broad, some question whether any such regulation would be struck down as invalid. In order to be declared invalid, it would have to be shown that (1) § 2704 is unambiguous or (2) the regulations are not based on a reasonable interpretation of § 2704. (*Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

What Might the Regulation's Say?

- It's impossible to know, but here is what some are speculating:
  - The legislative history (the 1990 Conference Report) makes clear that Chapter 14 was not intended to "affect minority discounts or other discounts available under [former] law."
  - It's possible that actual operating companies will be exempted, while asset holding entities would be covered.
  - The regulations may rely on the distinction made under § 6166 between active companies and ones that are just holding entities.
- Many taxpayers (or their families) may actually benefit from the new regulations because their entity interests, without discounts, will be worth more at death, meaning a higher "step up" in basis under § 1014.

What Should You Do?

- Although the release and effective dates of any regulations are uncertain, it's likely that only transfers that are completed prior to the effective date (for example, completed gifts of partnership units or sales of them) will be grandfathered from the new rules.
- If clients have plans to make gifts or sales, then consider accelerating the gifts.
- For those that have delayed making a final decision on whether to make a gift, the threat of the possible release of the regulations should incentivize them to reach a decision.

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Basis Planning

The New Reality

Obtaining a Higher Basis

Planning for Death becomes more about Basis and Income Tax Planning

Trust and Estate Income Taxes

Top Fiduciary Income Tax Rates

	2012	2015
Top Federal Income Rate	35%	39.6%
Health Care Surtax	0%	3.8%
Top Federal Ordinary Tax Rate	**35%**	**43.4%**
Dividend and Capital Gain Rate	15%	20%
Health Care Surtax	0%	3.8%
Top Federal Ordinary Tax Rate	**15%**	**23.8%**

State Income Tax Rates: **0%** to **11%**

Top Potential Rate: 54.4%+

Beginning at $12,300 in 2015

Planning for step-up in basis at death of surviving spouse

Simple Fact Pattern

- H & W have $5 Million ($2.5 Million each)
- No basis in their assets
- H & W have not updated their estate planning after ATRA and still have A/B Trust Plan
- H dies in 2015
- W dies in 2025
- Following illustrations assume 5% growth of assets and sale of all assets after W's death

A/B Trust Plan

2015

H dies

$2.5 Million

↓

In 2025 (W dies)

Bypass Trust

↓

FMV $4,000,000

Basis <$2,500,000>

$1,500,000 →

Income Tax = $357,000
(Assumes 23.8% Rate)

2025

W dies

$4,000,000 Estate

$0 Estate Tax

$0 Income Tax

Total Tax = $357,000

Assume H & W updated their estate planning to provide that all assets would pass to a marital trust instead of a bypass trust.

All To QTIP

2015

H dies

$2.5 Million

Marital Trust

In 2025 (W dies)

$4,000,000 → Full step-up in basis at W's death → $0 Income Tax

2025

W dies

$4,000,000 Estate

$0 Estate Tax

$0 Income Tax

Total Tax = $0

Heirs saved $357,000 in Income Tax

Assume same facts, except that H & W's estate is $10 Million ($5 Million each)

All To QTIP

2015

H dies

$5 Million

Marital Trust

In 2025 (W dies)

$8,000,000 → Full step-up in basis at W's death → $0 Income Tax

2025

W dies

$ 8,000,000	Estate
$ 8,000,000	Marital Trust
$16,000,000	Gross Estate
<$ 5,430,000>	DSUE
<$ 6,620,000>	Exemption*
$ 3,950,000	Taxable Estate
$ 1,580,000	Estate Tax
$ 0	Income Tax

Total Tax = $1,580,000

*Assumes estate tax exemption grows by 2%

A/B Trust Plan

2015

H dies

$5 Million

Bypass Trust

In 2025 (W dies)

FMV $8,000,000
Basis <$5,000,000>
$3,000,000

→ Income Tax = $714,000 + $380,000
(Assumes 23.8% Rate)

2025

W dies

$ 8,000,000	Estate
<$ 430,000>	DSUE
<$ 6,620,000>	Exemption*
$ 950,000	Taxable Estate
$ 380,000	Estate Tax

Total Tax = $1,094,000

$480,000 Less than All to QTIP Plan

*Assumes estate tax exemption grows by 2%

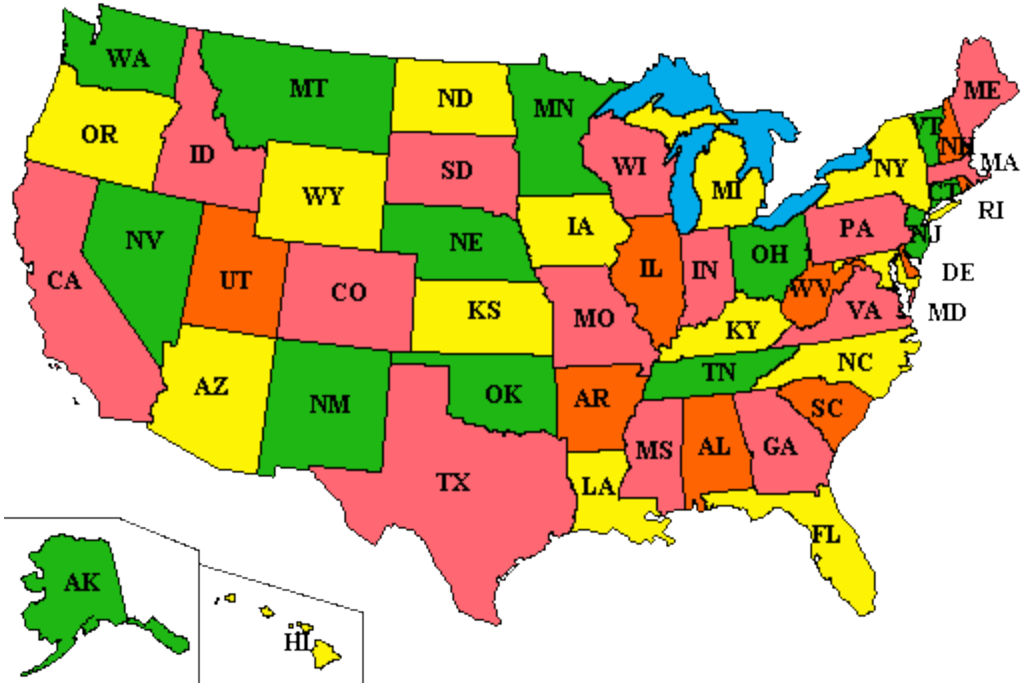
Planning Options

- Set formula split between Bypass Amount and Marital Amount
- All to spouse, outright
  - Disclaimer
- All to Marital Trust
  - Clayton QTIP
  - Partial QTIP Election
- Combination of above plans

Planning Options

- Power by Disinterested Trustee to confer General Power of Appointment to beneficiary
- Sale of loss assets to avoid step down in basis

Berlinger Update / Forum Shopping



Bacardi vs. White

- Prior to the enactment of Florida Trust Code (effective July 1, 2007), the Florida Supreme Court decision in Bacardi vs. White controlled the rights of a spouse or former spouse holding a support judgment resulting from dissolution of marriage against two types of Florida trusts:

  a) spendthrift trusts where the trustee has an obligation to make distributions to a beneficiary based upon a stated standard; and
  b) discretionary trusts where the trustee has broader discretion whether to make a distribution.

- Bacardi held that with respect to spendthrift trusts that were not discretionary, a spouse or former spouse with a support judgment could seek a court order to obtain distributions otherwise provided to the intended beneficiary.

Bacardi vs. White

(continued)

- For a discretionary trust, where the trust was not obligated to make present distributions to a beneficiary, Bacardi held a court could not direct the trustee to make a distribution.

- However, if the trustee of a discretionary trust decides to make a distribution to the intended beneficiary then such beneficiary's former spouse who has a support judgment may petition the court to grant a continuing garnishment.

- Thus if the trustee wants to make a distribution to or for the benefit of a beneficiary, under Bacardi, the beneficiary's former spouse holding a judgment could cut off the proposed distributions before they reach the hands of the intended beneficiary.

Spendthrift Provision
Florida Statute 736.0502

- Paragraph (3) - A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this part, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution by the beneficiary.

Exceptions to Spendthrift Provision Florida Statute 736.0503

- Paragraph (2) - To the extent provided in subsection 3, a spendthrift provision is unenforceable against (a) A beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

- Paragraph (3) – Except as otherwise provided in the subsection and in § 736.0504, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary's child, spouse, former spouse, or a judgment creditor described in paragraph (2)(a) or paragraph (2)(b) only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.

Discretionary Trusts
Florida Statute 736.0504

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(4) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

Berlinger vs. Casselberry
133 So. 3d 961(Florida 2nd DCA 2013)

- After 30 years of marriage Roberta and Bruce Berlinger divorced in 2007 and Roberta was granted permanent alimony of $16,000 per month. Bruce remarried and he and his new wife relied upon discretionary trusts created for Bruce by other family members to pay all of their living expenses including expenses of his new wife.
- Bruce voluntarily stopped paying alimony in May of 2011. Roberta filed various legal actions against the trust to get the trust to pay the alimony that Bruce refused to pay.
- The trustee of the discretionary trust for Bruce argued that §736.0504 applied and that, because the trustee was not making distributions directly to the beneficiary, but was instead paying all of their expenses, including providing credit cards for them to use for additional expenses and cash advances, there was no distribution that could be attached. Thus the alimony was not to be paid from the trust.
- The 2nd DCA disagreed stating that the statute does not prohibit a garnishment and therefore Roberta was entitled to get a writ of garnishment against the trust for unpaid alimony. The trust was not required to make distributions to her, but would not be allowed to make any distributions to or for the benefit of Bruce before paying all outstanding unpaid alimony amounts to Roberta.
- Because the court issued a continuing writ of garnishment, the order of the court further provided that "if the trustee wishes to make distributions to Berlinger beyond the amount of the then outstanding amount of alimony, the trustee must seek court approval before doing so to ensure that there remain sufficient assets in the trust to secure the continued payment of alimony". The court cited Bacardi and Florida's public policy favoring enforcement of alimony and support orders.

Legislation in other States

Four (4) states: Alaska, Delaware, Nevada and South Dakota provide significantly greater protection for discretionary trust beneficiaries.

What to Do?

- Legislation in Florida is currently being considered so this problem may possibly be resolved.
- Until such time, and if it is not resolved, clients who are concerned about beneficiary's alimony awards being enforced against the trust should consider creating a trust in another state that has greater protection.
- Draft trusts to eliminate a beneficiary's interest in the trust if a garnishment is filed.
- Query - Can you move trust situs for existing trusts to another state? IF there is a beneficiary who is not current on alimony or child support would a transfer to another state would be a fraudulent conveyance?

Forum Shopping

Any good planner needs to be aware of laws in other states that are more favorable than those in Florida, whether it relates to trusts or business entities, and then analyze when to create trusts or entities in those other jurisdictions

Issue: Will such forum shopping be successful? Some recent cases give us some concern

1. Rush University Medical Center vs. Sessions

(2002 Illinois Supreme Court)

Mr. Sessions created an irrevocable self-settled spendthrift trust in 1994 that was governed by the laws of the Cook Islands and transferred his 99% limited partnership interest in a Colorado limited partnership and real property in Illinois to the trust. He was a lifetime beneficiary and trust protector of the trust. Mr. Sessions made a pledge of $1.5 million to Rush University Medical Center for the construction of Rush University Presidential Residence which was later constructed even though no payments were made towards the $1.5 million pledge. In 2005 Mr. Sessions was diagnosed with terminal cancer. He blamed the doctors at Rush University for not diagnosing his cancer early enough for treatment to be effective. As a result, Mr. Sessions amended his estate planning documents so that his pledge would not be satisfied at his death which occurred on April 25, 2005. At the time of his death, Mr. Sessions had less than $100,000 in his estate but the assets in the trust were valued at approximately $19 million, including over $2.7 million of real property in Illinois. Rush University sued the trust alleging breach of contract and that the trust should be voided based on Illinois common law that self-settled spendthrift trusts are deemed to be fraudulent and void per se and their assets reachable by the creditors of the beneficiary. The court ruled that the public policy of Illinois was strongly against self-settled spendthrift trust and therefore allowed recovery against the trust, applying Illinois law to invalidate the transfers to the trust, even though the trust provided that it was governed by the Cook Islands law. Although the assets offshore could not be reached and the decision was not binding on a Cook Island court, the assets subject to jurisdiction in Illinois presumably would be recoverable.

2. In Re: Huber

(2013 Washington Bankruptcy Court)

Bankruptcy Court in Washington held that an Alaska self-settled trust was invalid with respect to claims of the settlor's creditors in bankruptcy. The settlor of the trust – the debtor – was a lifelong resident of Washington State as were all of the other beneficiaries of the trust. The trust provided that it was to be governed by Alaska law. The record indicates that all of the assets of the trust were located in Washington except one $10,000 CD that was held by the Alaska bank trustee. The court applied Washington law to invalidate the Alaska spendthrift trust. The court looked at the State of Washington's public policy against a self-settled trust and applied Washington law because Washington had the most significant relationship to the matter and the contacts with Alaska were very minimal.

3. Dahl vs. Dahl

(2015 Utah Supreme Court)

Dr. and Mrs. Dahl lived in Utah; however Dr. Dahl created an irrevocable trust in Nevada. The trust document provided Nevada law was to apply. After years of litigation in which Mrs. Dahl was claiming a share of the assets transferred to the trust as marital property, the Supreme Court of Utah determined that Utah has a strong public policy interest in the equitable division of marital assets and that Utah state law should apply to the trust even though the stated choice of law in the trust was Nevada.

4. Wells Fargo vs. Barber

(2015 Federal Middle District of Florida Court)

A Florida resident created a single member LLC in Nevis to hold Florida real property. When a Florida creditor tried to foreclose against the Florida-based LLC owners, the issue became what law applied – Nevis or Florida?

Federal District Court ruled that Florida law will apply which allows a foreclosure on a single member LLC interest, unlike the law of Nevis, where no foreclosure is allowed.

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Estate Tax Closing Letters Florida Law Update

Estate Tax Closing Letters

On June 16, 2015, the IRS posted the following notice on its website –

"For all estate tax returns filed on or after June 1, 2015, estate tax closing letters will be issued only upon request by the taxpayer. Please wait at least four months after filing the return to make the closing letter request to allow time for processing. For questions about estate tax closing letter requests, call (866) 699-4083."

Estate Tax Closing Letters

For estate tax returns filed before June 1, 2015, the IRS posted the following guidance –

For estate tax returns filed after January 1, 2015 and before June 1, 2015		
If…	And…	Then:
The filing threshold was met	• No portability election was made; or • The portability election not denied; or • The portability election was denied due to a late filing	A closing letter will be issued
The filing threshold was not met	• No portability election was made; or • The portability election was not denied	A closing letter will be issued
	The portability election was denied due to a late filing	No closing letter will be issued
The return was filed pursuant to Rev. Proc. 2014-18	The portability election was not denied	A closing letter will be issued
	The portability election was denied due to failure to meet the requirements	No closing letter will be issued

Estate Tax Closing Letters

- Rev. Proc. 2014-18 applies to returns filed by 12/31/2014
  - Was date extended to May 31, 2015 by the notice?
  - Was it a mistake?

Amendments to 733.817

- Update the statute for changes in federal estate tax laws since the last substantive update in 1998
- Address tax issues not previously covered
- Codify case law
- Other substantive, clarifying and stylistic changes

Effective Dates

- The amendments became effective July 1, 2015
- Some amendments apply prospectively only, to estates of decedents who die on or after July 1, 2015
- Clarifying and stylistic amendments apply retro-actively to all proceedings pending or commenced on or after July 1, in which the apportionment of taxes has not been finally determined or agreed

Change to Prior Law

- 733.817(4)(c) – direction against apportionment (inter document)

- No longer effectively direct payment of taxes attributable to property not passing under the governing instrument from property passing under the governing instrument by a reference to “this section”

Change to Prior Law

- A reference to “this section” literally refers to all of 733.817, including the definitions and procedural provisions

- As under prior law, an express direction that all taxes are to be paid from property passing under the governing instrument whether attributable to property passing under the governing instrument or otherwise continues to be effective

- Applies to estates of decedents who die on or after July 1, 2015

Clarification of Prior Law

- 733.817(4)(d) – waiver of federal rights of recovery

- Continues **and highlights** the requirement that in addition to meeting the requirements of 733.817 also must meet the greater specificity required to waive certain federal rights of recovery

- Specifically states that a general waiver of all rights of recovery under the Code is not sufficient to waive the rights of recovery under Section 2207A or Section 2207B of the Code

Change to Prior Law

- 733.817(4)(d)1.b. – property included in the gross estate under both Section 2044 and Section 2041 of the Code

- Deemed included under Section 2044 of the Code for purposes of allocation and apportionment of tax

- Applies to estates of decedents who die on or after July 1, 2015

Change to Prior Law

- 733.817(4)(e) – apportionment of taxes attributable to general power of appointment
- Permits holder of GPA to expressly direct by will that property subject to GPA bear the additional tax incurred by reason of the inclusion of the property in the gross estate of the power holder
- Additional tax calculated in the manner as tax attributable to section 2044 interests
- Applies to estates of decedents who die on or after July 1, 2015

Clarification of Prior Law

- 733.817(4)(i) – grant of permission or authority is not an express direction

- Grant of **permission or authority** in a governing instrument to **request** payment of tax from property passing under another governing instrument is not a direction to pay tax from property passing under the other governing instrument

- Grant of **permission or authority** in a governing instrument to **pay** tax attributable to property not passing under the governing instrument is not a direction to pay tax from property passing under the governing instrument

- See, *NationsBank v. Brenner*, 756 So.2d 203 (Fla. 3d DCA 2000)

Change to Prior Law

- 733.817(3)(e) – apportionment of tax on protected homestead
- Prior law apportioned to the following interests included in the measure of the tax:
- Class I – recipients of property not disposed of under the will or revocable trust
- Included not only property passing by intestacy, but recipients of exempt property, family allowance, elective share and pretermitted shares

Change to Prior Law

- Class II – recipients of residuary interests under the will and revocable trust
- Class III – recipients of non-residuary interests under the will and revocable trust
- If the assets in Classes I, II and III were insufficient to pay tax on protected homestead, then source of payment was unclear

Change to Prior Law

- New law apportions the net tax on protected homestead, **exempt property and the family allowance** to other estate and revocable trust property included in the measure of the tax:

- Class I – recipients of property passing by intestacy

- Class II – recipients of residuary interests under the will and revocable trust, **and pretermitted shares**

- Class III – recipients of non-residuary interests under the will and revocable trust

Change to Prior Law

- Property used to satisfy the elective share is not charged with estate tax on protected homestead, and now exempt property and family allowance, even if the property used to satisfy the elective share does not qualify for the marital deduction

Change to Prior Law

- If the estate and revocable trust property described in Classes I, II and III are exhausted, the remaining net tax attributable to protected homestead, exempt property and family allowance is apportioned proportionately to those interests

- Applies to estates of decedents who die on or after July 1, 2015

Change to Prior Law

- 733.817(1)(e)3 – definition of "included in the measure of the tax"

- Fills gaps in prior law by specifically excluding from "included in the measure of the tax" –
  - Gift taxes on gifts within 3 years of death
  - Recapture of excess Section 529 gifts due to death within 5 years

- Applies to estates of decedents who die on or after July 1, 2015

Change to Prior Law

- 733.817(3)(g) – common instrument construction
- Purpose is to treat all recipients of property from related governing instruments as taking under a common instrument for purposes of apportioning tax to residuary and non-residuary interests
- Applies to –
  - Will and revocable trust if either pours into the other
  - Revocable trust and another revocable trust if one is the beneficiary of the other
- Applies to estates of decedents who die on or after July 1, 2015

Change to Prior Law

- 733.817(4)(h) – conflicts between governing instruments

- If governing instruments contain effective tax apportionment directions that conflict, the most recently executed tax apportionment provision controls

- The date of an amendment will apply only if the codicil or trust amendment contains an express tax apportionment provision or an express modification of the tax apportionment provision

Change to Prior Law

- General statement ratifying or republishing provisions not amended not sufficient
- A will is deemed executed after another governing instrument executed on the same day
- Applies to estates of decedents who die on or after July 1, 2015

Clarification of Prior Law

- 733.817(2)(c) – deduction for state death taxes
- The credit against federal estate tax for state death taxes was replaced by a deduction after 2004
- The deduction for state death taxes is allocated to the interests that resulted in the deduction for purposes of determining the federal tax attributable to the interests
- Applies to all proceedings pending or commenced on or before July 1, 2015, in which the apportionment of taxes has not been finally determined or agreed for the estates of decedents who died after December 31, 2004

Amendment to 710.123
Termination of Custodianship

- Transfer to a custodian for the benefit of a minor under UTMA
  - by gift
  - by exercise of an inter vivos or testamentary power of appointment
  - pursuant to authorization in a Will or Trust (if Trust is irrevocable; see, amendment to 710.105)
- Transferor can create the custodianship so that it terminates when the minor attains age 25

Amendment to 710.123
Termination of Custodianship

- If custodianship created by gift or inter vivos exercise of a power of appointment
  - minor has right to compel distribution upon attaining age 21
  - complies with 2503(c) of the Code; not a future interest; qualifies for annual gift exclusion
- Transferor may limit time the minor has to compel distribution after attaining age 21
  - must give written directions to the custodian when the custodianship is created
  - custodian must deliver written notice at least 30 days before minor attains age 21, but not later than 30 days after the minor attains age 21
  - right to compel distribution expires on the later of
    -- 30 days after minor attains age 21
    -- 30 days after delivery of notice
- Effective July 1, 2015

Amendment to 736.0109
Methods of Notice

- Accountings by corporate fiduciaries
- May be posted to a secure electronic account or website where the document can be accessed
- Requires the recipient to sign a separate written authorization solely for this purpose
- Sender must provide separate notice when document is posted (by means other than electronic posting)

Amendment to 736.0109 Methods of Notice

- Document deemed received on earlier of –
  - date separate notice is received
  - date recipient accesses the document
- Recipient must be notified at least annually
  - Six month limitations period may apply even if document
    never accessed
  - Authority to electronically post may be revoked
- Failure to give such notice within 380 days of last such notice automatically revokes authorization to electronically post

Amendment to 736.0109
Methods of Notice

- Documents electronically posted must remain accessible for at least 4 years
- Notice to recipient is complete when sent
  - Presumed received on the date sent
  - Unless sender has knowledge message did not reach the recipient
- Effective July 1, 2015

Amendment to 709.2109 – Suspension of Agent's Authority Under POA
Amendment to 744.3203 – Suspension of POA Before Incapacity Determined

- If Agent under POA is principal's parent, spouse, child or grandchild, then authority is not automatically suspended by judicial proceeding to determine incapacity
- Authority will be suspended during judicial proceeding to determine capacity if petitioner files a motion stating that a specific power should be suspended for one of five stated grounds
- Court may award attorney fees to Agent who successfully challenges suspension
- Applies to proceedings filed to determine incapacity after July 1, 2015

Amendment to 765.202 – Designation of Health Care Surrogate
Amendment to 765.203 – Suggested Form

- May become effective immediately **without** determination of lack of capacity to make health care decisions by primary or attending physician
- While principal has decision making capacity, the principal's wishes control (see, amendment to 765.204(1))
- New suggested form of Designation of Health Care Surrogate
- Effective October 1, 2015

Amendment to 765.2035 – Designation of Health Care Surrogate for a Minor
Amendment to 765.2038 – Suggested Form

- Addition of New 765.2035 – Designation of Health Care Surrogate for a Minor
- Addition of New 765.2038 – Suggested From
- Designation of health care surrogate for a minor may be made by
  - Natural guardian
  - Legal custodian
  - Legal guardian
- Effective October 1, 2015

Amendment to 765.302 - Procedure for Making a Living Will
Amendment to 765.303 - Suggested Form

- References to "attending or treating physician" replaced with "primary physician"
- "Primary physician" = the physician designated to have primary responsibility for an individual's health care by the individual or the individual's
  - surrogate
  - proxy
  - Agent under a POA
- No designation, or the designated physician is not reasonably available, a physician who undertakes the responsibility
- Effective October 1, 2015

For Copies of Statutes

http://laws.flrules.org

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