“FIXIN’ TO DIE RAG”
– WHEN BOOMER ESTATE PLANS MATURE –
FROM REPRESENTING THE CLIENT
TO ADMINISTERING THE ESTATE

ABA SECTION OF REAL PROPERTY, TRUST & ESTATE LAW
22ND ANNUAL SPRING SYMPOSIA

WASHINGTON, D.C.
APRIL 29, 2011

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I. Overview

This paper and the panel presentation accompanying it is intended as a guide to new or unconsidered opportunities as well as tried-and-true methods in working with Baby Boomer clients, although the ideas herein apply to many generations. This paper looks at planning opportunities to consider before death, as well as attempting to offer practical advice in dealing with the often unanticipated tax and other issues that arise after a client's death.[1]

II. The impact on the estate planning profession of Baby Boomers and their estate plans

Because Baby Boomers are living longer than prior generations, their estate plans must be able to withstand the test of time, perhaps for a longer period than plans implemented for prior generations. According to some practitioners, children's fears that their parents will deplete their inheritance have caused a growing number of challenges to the estate planning undertaken by their parents.[2] Boomers may want to take extra precautions to safeguard the estate plan to ensure it remains intact. This may be achieved through the use of revocable trusts rather than wills and non-springing general powers of attorney. In addition, although many Boomers may be reluctant to do so, those with parents still living may want to approach their parents about leaving their assets in trust.

The importance of flexibility in estate planning documents, particularly irrevocable documents, has greatly increased. There are many common methods of providing greater flexibility to irrevocable trust documents that are becoming increasingly popular, such as the use of lifetime and testamentary powers of appointment, distributions in further trust (sometimes called "decanting" provisions), and trust protector and beneficiary "remove and replace" provisions.

Another result of the Boomers living longer is that some are losing mental capacity well before death. Many estate planners are emphasizing the importance of revocable trusts and durable powers of attorney to provide for the continuing care of clients. As clients begin to rely more heavily on such documents, we may see more challenges to the validity of powers of attorney.

With the new estate tax regime, the landscape for the estate planning community will likely be dramatically impacted for professionals servicing clients with net values of $10 million and under. These estate planning professionals may have to change their focus to more non-tax motivated planning goals. The increase in the estate and gift tax exemption amount effective for 2011 and 2012, in addition to the introduction of portability of a deceased spouse's unused estate tax exemption, effectively renders many previously taxable estates non-taxable (at least for the next two years). While the $5 million exemption technically only applies for a 2-year window, the potential for permanent repeal of the estate tax is a possibility, and the issue

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[1] The authors are grateful for and acknowledge the use of reference materials and ideas provided by several practitioners, including, particularly, John Porter and Stephanie Loomis-Price.

[2] James Podgers, *Boomers as New Consumers*, 82-OCT A.B.A. J. 110 (October, 1996).

of permanent repeal or extension of the increased exemption beyond 2012 may come into play in the next presidential election. The Obama Administration has indicated a desire to revert back to a 2009 estate tax exemption and rate and to make portability permanent.

However, assuming that permanent repeal is ever enacted, as the political landscape shifts back and forth, there arguably would not even exist certainty that any "permanent" repeal would actually be permanent. Even assuming that permanent repeal of the estate tax was adopted, it is unlikely that the gift tax would also be completely repealed, as that could result in significant income tax shifting maneuvers by taxpayers taking advantage of their children's or elderly parent's lower income tax brackets.

It is also important to note that, assuming that the gift tax remains in place, regardless of whether the exemption is $5 million or $1 million (or some other amount), many of the gift tax provisions in Chapter 14 of the Internal Revenue Code and elsewhere would presumably still be applicable, in the absence of a complete overhaul of those provisions, and therefore would still need to be considered in structuring estate plans.

For example, the deemed gift tax provision under § 2701 of the Code[3] could still result in unexpected taxable gifts in connection with structuring preferred partnerships and in connection with transfers of carried interest in funds. Similarly, the deemed gift provisions under § 2702 would still presumably be applicable with respect to transfers with retained interest in trusts. Also, while the repeal of the estate tax would make the application of § 2703 no longer relevant in connection with buy-sell agreements and, more recently, family limited partnerships, at least for estate tax purposes, those provisions are also gift tax provisions and would presumably still be applicable with respect to lifetime gifts. Lastly, the deemed gift tax provisions under § 2704(a), relating to lapses of liquidation or voting rights, and the disregarding provisions under § 2704(b), with respect to restrictions on liquidations of an entity that are more restrictive than the default restrictions under state law, would likewise still be applicable.

In the face of either full repeal or a permanent increase in the estate tax exemption, there will still be a need for trust structuring services for many practitioners' clients in the $10 million and under range, although these may no longer necessarily be motivated by estate tax efficiency or minimization. As the Baby Boomer generation is consistently living longer than other generations, trust and estate practitioners will need to be more sensitive to the asset protection needs of their clients to protect them from the risk of elder abuse or impoverishment by younger relatives. With parents living significantly longer, there may be more potential for the next generation to feel that their potential inheritance is not only more remote, but also diminishing as mom or dad live longer. More robust trust structures, perhaps with institutional trustees and "checks and balance" mechanisms, may become popular in order to ensure that there is a formal mechanism in place to ensure the client's long-term security.

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[3] All references to "Section __," "§ __," or "the Code" are to the specified section of the Internal Revenue Code of 1986, as amended, or to the Code itself, unless otherwise indicated. References to "Treas. Reg. § __" or "Regulation" are to the specified section of the Treasury Regulations.

III. Defending against pitfalls and capitalizing on opportunities that arise in an estate administration

A. Beware of conflicts of interest; identify the client; and protect privileges

Once an estate planning client dies, the lawyer who advised the client is often approached by the executor for assistance in filing the estate tax return and in distributing the assets of the estate. (In the perfectly-planned world, the estate planning client will have informed the proposed executor of his plans, and the executor will already know to contact the estate planner.) In this situation, the client is now the executor of an estate. Because the client has changed, the lawyer should run a conflict check before accepting the new engagement.

The executor should be made aware of his fiduciary obligations to the beneficiaries of the estate. If the executor is also a beneficiary (as is often the case), the potential challenges to the executor's actions increase (*e.g.*, breach of fiduciary duty and suits to remove the executor), and he should be reasonably informed of those potential challenges and the importance of taking action only in the best interest of the estate's beneficiaries.

This is jumping ahead in the outline a bit, but in the event the estate tax return is audited, the executor has an important decision to make. The Service will often ask for privileged documents – both those pre-dating and post-dating death. The executor must determine whether, and to what extent, any privileges should be waived. The decedent is unable to testify in person, and it is sometimes helpful to have contemporaneously-written evidence of the decedent's intent in engaging in his particular planning.[4] However, waiver of a single document may waive all documents with respect to the subject matter at issue in that document. Before waiving the privilege, the executor and the lawyer should be reasonably aware of all of the privileged, potentially responsive documents that exist.

If there is certain pre-death privileged evidence that helps the client's case in the audit, one possibility is to produce only those documents through the decedent's date of death, while withholding all privileged, responsive documents after the date of death. We will now turn back to the estate administration (pre-audit) process.

B. Settlement agreements – trust interpretation, funding, and distribution

Numerous non-tax pitfalls can arise during the estate administration process, such as will contests, beneficiary disputes, claims against the estate, and ambiguous testamentary directives. Fortunately, non-judicial settlement agreements among affected parties may be used to settle such non-tax issues. Non-judicial settlements of will contests are often viewed

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[4] At the planning stage, the estate planner should ensure that the file includes evidence of the business or financial reasons for engaging in the planning. This can be great evidence to the judge that the plan had a non-tax purpose. *See, e.g.*, *John J. Wells, Inc. v. Comm'r*, 47 T.C.M. (CCH) 1114, 1116 (1984) ("While obviously the true facts can never be known with complete certainty by an outsider, . . . we base our conclusion upon our view of the spoken testimony and how that testimony, coupled with the documentary evidence, comports with human experience.").

favorably by the courts as tending to reduce litigation and are generally regarded as valid and enforceable as long as they satisfy the requirements for valid contracts.[5]

Tension frequently arises between the executor and beneficiaries of an estate, with the executor trying to satisfy the requests of the beneficiaries while also fulfilling his or her fiduciary obligation to provide a correct and complete administration. Settlement agreements may be used to help alleviate some of the issues that arise as a result of this balancing act. For example, it is common for beneficiaries of an estate to request an early distribution of assets from the estate. Sometimes, a beneficiary may have a real need for the assets. However, the executor may face personal liability for estate taxes under 37 U.S.C.A. § 3713 if the remaining estate assets are insufficient to satisfy the liability. Accordingly, the executor may want to enter into an agreement with the beneficiaries to seek indemnification for all liabilities that may result from such an early distribution, including any additional tax liability for which the executor has personal liability. The executor may also want to require the beneficiaries to return assets to the estate to pay any additional tax liabilities that arise.

Although settlement agreements are often used to resolve non-tax pitfalls that can arise during an estate administration, such agreements may have tax effects that should not be overlooked by the practitioner. Payments made under a non-judicial settlement agreement should generally be treated the same for tax purposes as those made pursuant to a judicial decree.[6] For this reason, the parties to a settlement agreement may wish to negotiate the agreement with an eye toward minimizing taxes in order to take advantage of the opportunity.

It is possible that the primary motivation behind an estate settlement agreement is taxes. Tax-driven settlement agreements may have significant non-tax effects that should not be overlooked. For example, it is likely that many executors of estates of decedents dying in 2010 will enter into settlement agreements concerning the difficult task of determining whether to elect into the modified carryover basis rules of § 1022. Although such agreements are clearly tax driven, the election to apply carryover basis may have a significant effect on the disposition of assets under a formula funding clause.

When negotiating the tax aspects of a settlement agreement, it is also important to remember that beneficiaries may be affected differently. For example, the decision to deduct expenses of administration on the estate tax return versus the income tax return may shift tax savings from certain beneficiaries to others. In the case of the first spouse to die with a zero tax estate plan, the deduction is often taken on the income tax return rather than the estate tax return because there is no estate tax due by virtue of the marital deduction formula. However, this may have the effect of reducing the amount passing to the credit shelter trust. When beneficiaries

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[5] V. Woerner, *Validity and Enforceability of Agreement to Drop or Compromise Will Contest or Withdraw Objections to Probate*, 42 A.L.R.2d 1319 (Originally published in 1955).

[6] *See*, *e.g.*, *Lyeth v. Hoey*, 305 U.S. 188 (1938) (payment under an agreement to settle an individual's claim as an heir was properly excluded from gross income); *Barrett v. Comm'r*, 22 T.C. 606 (1954) (payment made to a surviving spouse under an agreement to settle the spouse's claim against the estate was allowed an estate tax marital deduction).

have conflicting interests, it is important that they obtain separate representation in negotiating the agreement.

C. Administrative expenses: Keep track of such expenses so you can justify and take the deduction

Administrative expenses can be deducted on Schedule J of the estate tax return or on the estate's income tax return. While deducting these expenses on the estate tax return will generally have a better result for the estate's beneficiaries, as discussed above, there may be an advantage to deducing the expenses on the income tax return. Administrative expenses vary with the size of the estate. It is important to keep good records of the expenses, because in the event of an estate tax audit, the Service will sometimes request backup for certain of those expenses. Having good records will make this job less time-consuming.

If there is a family office assisting with the estate administration, the record keepers in that office should keep track of time (and expenses) incurred while working on estate administration issues. The family office personnel should make sure they are pro-rating their time between estate administration issues (properly allocable to the estate) and other issues, such as managing ongoing partnership assets or working on financial plans (not necessarily allocable to the estate). It is easier in the long run if these hours are recorded at or near the time they are incurred, as opposed to months or years later when the estate is audited and the expenses are challenged.

D. Valuation mis-match pitfalls in funding estate obligations

1. Beware of the IRS's argument that could lead to an FLP marital deduction mis-match

While most of the focus on FLPs over the past decade has involved § 2036(a) challenges, an unexpected additional risk may exist that may have unintended estate tax consequences. This risk, often given little or no attention by estate practitioners when structuring and administering these vehicles, can actually be worse than full inclusion of transferred assets in the decedent's gross estate. The "marital deduction mis-match" issue has been raised by the IRS in the past and, most recently, in the *Black* and *Shurtz* cases.[7] In both cases, the marital deduction mis-match issue was ultimately determined to be moot because the taxpayers' estates prevailed in convincing the Tax Court that § 2036(a) did not apply because the transfers into the FLPs satisfied the bona fide sale exception. Nonetheless, the implications of this argument is disconcerting for an estate that is not so fortunate to prevail on a § 2036(a)(1) challenge.

The IRS's position as raised in *Black* and *Shurtz* would result in a valuation whipsaw effect in the FLP context where § 2036(a) causes the inclusion of underlying FLP assets in a decedent's gross estate at their full fair market value (i.e., with no valuation discount); yet the estate is only eligible for an estate tax marital deduction for the discounted value of assets that actually pass to or for the surviving spouse. If the value of the FLP's assets included in the gross estate exceeds the value of the limited partnership interests actually passing to or for the

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[7] *Estate of Black v. Comm'r*, 133 T.C. 340 (2009); *Shurtz v. Comm'r*, 99 T.C.M. (CCH) 1096 (2010).

spouse, the IRS's position is that the difference in value is subject to estate tax, without an offsetting marital deduction. If, for instance, the taxpayer dies owning only limited partnership interests or non-voting interests in an LLC, the amount of the marital deduction would be determined based upon a value that is discounted for lack of marketability and control. The end result would be that the marital deduction to which the decedent's estate would be entitled for property passing to the spouse or a marital deduction trust could be substantially less than the value of the partnership included in the decedent's gross estate. To make matters worse, if the estate tax liability that results at the first death is required to be paid by the residuary estate, and the residuary estate passes to or for the surviving spouse, the marital deduction could be lost and a "tax on tax" could result on the dollars paid to satisfy the estate tax liability.[8] The result of this could be the immediate imposition of an estate tax, the unnecessary utilization and even complete exhaustion of the decedent's estate tax exemption amount and, possibly, the imposition of a first death estate tax on tax to the extent that estate taxes are paid out of the residuary estate and are thus unable to pass by way of the marital deduction.

2. What if a buy-sell agreement fails under § 2703 and the estate is out of money? Is there a chance to have clawbacks from the beneficiaries?

Another "mis-match" problem can arise in the context of an estate administration where the purchase price established under a buy-sell agreement with respect to a decedent's interest in an entity is disregarded for estate tax purposes under § 2703, or pre-§ 2703 law. If § 2703 applies, then it is presumed that the purchase price established in the buy-sell agreement will be disregarded for purposes of determining the value of the decedent's interest in the entity for estate tax valuation purposes, unless the estate can overcome the burden of proof of establishing that the agreement: (1) was entered into for a bona fide business purpose, (2) was not a device to transfer value for less than adequate and full consideration to the natural objects of the decedent's bounty, and (3) had provisions comparable to third party transactions. However, the adjustment in the value of the interest under § 2703, in the absence of any provision in the buy-sell agreement to the contrary, will not impact the value of the purchase price for contract law purposes, thus resulting in a potential mis-match between the value upon which the estate tax liability will be imposed and the contract price that the estate will actually receive from the purchasing party. If the discrepancy between the buy-sell purchase price and the value finally determined for federal estate tax purposes is significant enough, it is possible that the buy-out price that the estate receives in exchange for the deceased stockholder's or partner's interest may not even be enough to cover the estate tax liability associated with the decedent's interest![9] In this situation, it is possible that the executor could be personally liable for the taxes if the executor makes a distribution that renders the estate unable to pay the liability.[10]

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[8] *See generally* N. Todd Angkatavanich, *Black Shirts (Black, Shurtz) and the Marital Deduction Mismatch*, TRUSTS & ESTATES (June 2010).

[9] See generally Edward A. Renn & N. Todd Angkatavanich, *Sabotaged – Don't Let a Buy-Sell Agreement Blow Up an Estate Plan*, TRUSTS & ESTATES (April 2006).

[10] 37 U.S.C.A. § 3713.

3. Mis-match issues with division of a controlling block

This mis-match issue can also arise as a result of a division of a controlling block of shares in an entity in order to fund different obligations in connection with the administration of an estate. The IRS has issued rulings on at least two occasions that resulted in a marital deduction mis-match where a "phantom asset" was included in the gross estate and was not eligible for the marital deduction. In PLR 9050004, the IRS ruled that where the decedent owned 100% of a corporation of which only 49% passed to a marital trust for his spouse, the estate was only entitled to a deduction for a discounted minority interest to reflect lack of control. In PLR 9403005, the decedent held common and preferred stock that together constituted a controlling block. The preferred stock passed into a marital deduction trust. The IRS ruled that the decedent's estate was only eligible for the marital deduction for the discounted value of the minority interest. The IRS ruled that the decedent's gross estate included a premium reflecting the controlling block; however, such control did not exist with respect to the stock passing to the marital deduction trust so that a lesser marital deduction was applicable. In *DiSanto*, the Tax Court held that, for marital deduction purposes, a discount applied to a minority interest in company shares passing to the surviving spouse after she disclaimed certain shares.[11] However, the decedent's gross estate was valued based upon a control premium.

E. Creation of entities post-death, such as a pecuniary credit shelter trust; obtaining the maximum value in a credit shelter trust; preferred partnerships

In some cases, it may not be advisable or even possible to create a partnership prior to the client's death. For example, when a deathbed client is concerned, there may not be sufficient time to form a partnership, and the partnership may not survive a § 2036 attack if the client dies soon after formation of the partnership. However, this does not mean that a partnership is not a viable option for the client's family and beneficiaries. The client's executor or trustee and family members may form a partnership or other business entity during the period of estate administration. In fact, the administration of an estate may be such a time-consuming, litigious, and complicated endeavor that the administration process itself serves as the purpose behind formation of a partnership or other business entity. An executor may determine, in the exercise of his or her fiduciary discretion, that transferring the estate's assets to a partnership can both protect the estate's assets against potential creditors and facilitate the transfer of those assets to the estate's beneficiaries. If the executor is unwilling or unable to form a partnership during the period of administration, then the trustee of the marital and/or credit shelter trust may wish to create a limited liability entity, with the surviving spouse and other family members possibly participating as well. The added benefit of waiting until after the first spouse's death to form such an entity is that the possible application of the marital deduction mismatch is avoided.

A post mortem partnership or LLC may also be of benefit to an executor if the executor wants to distribute estate assets but has lingering concerns over personal liability for taxes. In this situation, the executor may create an entity funded with estate assets and distribute

[11] *Disanto v. Comm'r*, 78 T.C.M. (CCH) 1220 (1999).

ownership to the estate beneficiaries, but retain the power as general partner or manager to receive special distributions or allocations for taxes.

Additional planning advantages can be obtained by the further utilization of either family limited partnership interests structured as preferred partnerships in accordance with § 2701. In addition to the credit shelter trust being funded with limited partnership interests in a newly created FLP, perhaps that FLP could be created as a two class preferred partnership such that the credit shelter trust would hold common "growth" interests in the FLP. Perhaps either the surviving spouse or a QTIP trust would be a preferred partner in the FLP owning interests that would likely be structured as qualified payment rights in accordance with § 2701. The preferred interest would pay an annual fixed cumulative preferred payment either to the surviving spouse or to the QTIP trust, and the value of the preferred interests above the preferred payment and a liquidation preference would be frozen for estate tax purposes at the surviving spouse's death. The common interests owned by the credit shelter trust, however, would have some or maybe all of the upside growth potential in the FLP's assets above the preferred payments. Arguably, § 2519 should not apply to the QTIP trust's contribution of assets into the FLP in exchange for the preferred partnership interests. Broadly speaking, § 2519 provides that if the income interest holder of a QTIP trust transfers that income interest, then the income interest holder (*i.e.*, the surviving spouse) will be deemed to have made a taxable gift of the entire interest of the QTIP trust. In the context of a preferred partnership, the question is whether the creation of the partnership with the contribution by the QTIP trust of its assets into the partnership will be construed to be a disposition of the surviving spouse's income interest of the QTIP trust, thereby triggering a gift under § 2519. There is authority suggesting that a properly structured partnership capitalization should not be deemed a disposition of an income interest under § 2519. FSA 199920016 considered this very issue where a QTIP trust and various family members created a family limited partnership. The QTIP trust received limited partnership interests (the FSA involved a single class limited partnership, rather than a preferred limited partnership). The partnership made regular distributions of income to its partners. Based upon these facts, the Service determined that no disposition would be made under § 2519 of the surviving spouse's income interest in the QTIP trust. The Service's conclusion under § 2519 was based upon the fact that the QTIP trust was receiving regular distributions of income from the partnership so that there was no disposition of an income interest. Additionally, it was noted that the surviving spouse/QTIP beneficiary had the right to compel the QTIP trustee to convert the trust's assets into income producing property, which further supported that no disposition of an income interest occurred as a result of the capital contribution. Under this logic, it would appear that in the case of a preferred partnership, no § 2519 disposition should be deemed to occur upon formation, particularly in light of the fact that the QTIP trust would be entitled (rather than have a mere expectation of continued distributions) to a preferred coupon payable on an annual basis cumulatively, and those distributions would need to be made before any distributions could be made to the common limited partnership holders

F. Tax payments – gross estate clawbacks for inter vivos gifts; transferee liability; what if there are insufficient liquid assets for payment?

Although planners may disagree over the likelihood of an estate or gift tax clawback, it is not a possibility that should be overlooked. If a clawback is applied but a lifetime gift renders the estate insolvent, is anyone personally liable for the tax? Section 6324(a)(2) provides that personal liability attaches to those persons who receive property from the estate or who hold, on the date of the decedent's death, property included in the gross estate under §§ 2034 to 2042, to the extent of such value. Thus, it is possible that the donees of the gift would be personally liable for the tax under this Code provision even without an agreement by the donees to satisfy such liability. It may be advisable to provide funding to cover the liability so that an unwanted scenario is avoided, perhaps through life insurance held in an ILIT and/or buyout provisions for the family business. Alternatively, a client may prefer to use tax planning strategies that do not result in large taxable gifts, such as sales to defective grantor trusts and zeroed-out GRATs.

IV. Last-minute planning opportunities for deathbed clients and important obstacles and options to consider

A. Deathbed family partnerships: tread lightly

Any practitioner considering implementing a family partnership for a client who is on his deathbed should proceed with caution, as these actions naturally will result in more IRS scrutiny than usual. The taxpayer victory in *Estate of Keller v. United States* was, as all § 2036 cases are, highly fact-specific.[12] I n *Keller*, the pre-death planning and post-death actions, combined with favorable state law principles of partnership property, paid off. This will not always be the case. In *Keller*, the decedent had, prior to death, demonstrated a clear intent that her partnership be created and funded. The partnership was created prior to her death, but not funded until a year post-death. Despite not being funded prior to death, the *Keller* court recognized the partnership, finding that the bona fide sale exception to § 2036 applied because the partnership had a legitimate business purpose, it was genuine, and the decedent retained significant assets ($110 million) outside the partnership.

Once the underlying facts are known, it is easier to understand how the *Keller* court ruled the way it did. It is the rare estate planning client who is in this position. *Keller* was a taxpayer victory because of the strong facts underlying the partnership's formation, strong testimony of the decedent's intent, and other good planning. Another elderly client with millions of dollars in assets may not be as prime a candidate for a family limited partnership. *Keller* should not insinuate that others, even those in similar situations, will have as successful a result if challenged by the Service.

B. What if the partnership has existed for some time and the deathbed partner is the controlling partner? How might you minimize the impact?

Another consideration with respect to last minute planning opportunities is whether a client should be "decontrolled" as the general partner of an FLP or of the voting interest in an LLC prior to his death. While heavily criticized, the opinion of the Tax Court in connection with the *Strangi II* case indicated, in dicta, that a decedent's ability as an owner of a general partner interest of an FLP to participate in decisions with respect to making distributions from the partnership was enough to trigger inclusion of the transferred FLP assets into the

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[12] *Keller v. United States*, No. CIV.A. V-02-62, 2009 WL 2601611 (S.D. Tex. Aug 20, 2009).

decedent's estate under § 2036(a)(2).[13] In addition, the Tax Court further indicated that the mere ownership of a limited partnership interest by the decedent at death may likewise be enough of a retained string in order to cause estate tax inclusion under that same section. Thus, in the case of a client who is near death, consideration should be given as to whether it makes sense to rid that client of any interest in the general partnership before death occurs. Arguably, to the extent that the client does not own any interest in an FLP general partner or voting interests in an LLC at death, § 2036(a)(2) should not apply to cause inclusion in the estate.

Of course, the avoidance of § 2036(a)(2) does not rid the estate of any potential argument that may exist with respect to any "implied understanding" argument that the IRS may make under § 2036(a)(1).

However, whether it necessarily makes sense to "decontrol" the client before death, and whether such "decontrol" could effectively be accomplished for a client who is approaching death, requires careful consideration of the issues in light of the facts and circumstances. It is possible that § 2035 could apply in connection with any attempted decontrol of a client's controlling interest in an FLP or LLC. If § 2035 applies, then to the extent that the taxpayer attempts to remove the § 2036(a)(2) taint from his estate by transferring by gift his controlling interest in the entity out of his estate, the decedent would still have to outlive that transfer by a period of 3 years in order to properly decontrol his interests.[14] However, § 2035 contains an exception for transfers for "adequate and full consideration," similar to the exception contained in § 2036(a). Thus, arguably to the extent that the transfer of the decedent's controlling interest in the entity before death is accomplished by way of a full value sale (as opposed to a gratuitous transfer) for adequate and full consideration, § 2035 and the 3 year requirement should not apply. While this exception should be helpful, it is not entirely clear what constitutes "adequate and full consideration" for these purposes. Arguably, if the general partnership or voting LLC membership interest is sold for its full fair market value, as determined by a third party appraiser, such should satisfy this requirement. However, if the *Allen* case is applicable, there is an argument that in order to constitute adequate and full consideration for purposes of § 2035, the amount of the sale would have to be not the appraised fair market value of the controlling interest, but, rather, the amount of assets that would otherwise be included in the decedent's estate if the sale had not taken place.[15]

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[13] *Estate of Strangi v. Comm'r,* 293 F. 3d 279 (5th Cir. 2002) ["Strangi II"].

[14] § 2035(a) provides that the gross estate includes the value of any property or interest therein if "(1) the decedent made a transfer…[of an interest in such property] during the 3-year period ending on the date of the decedent's death, and (2) the value of such property (or an interest therein) would have been included in the decedent's gross estate under § 2036…if such transferred interest…had been retained by the decedent on the date of his death."

[15] In *Allen*, the Tenth Circuit determined that in order to satisfy the adequate and full consideration exception to § 2035, the consideration required to be paid was the amount that would otherwise have been included in decedent's gross estate. The Court determined that the sale by a mother to her son of her retained life income interest in an irrevocable trust for the actuarial value of her income interest ($140,000) did not satisfy the exception to § 2035 because the sale price required to satisfy the exception was the full value that would have been included in her estate at death (approximately $900,000). The Court's rationale was that in order to constitute adequate and full

C. Should the client's interest in an FLP be "decontrolled"?

Whether it makes sense to attempt to "decontrol" a dying client's interest in an FLP or LLC also requires an analysis of the specific facts of the FLP or LLC as well as the client's personal circumstances. Of particular consideration is whether a marital deduction is planned for in the client's estate plan following his or her death. For instance, if a review of the record of administration of the FLP indicates that there is a meaningful risk that the underlying FLP or LLC assets may be included in the taxpayer's estate under § 2036(a)(1), perhaps due to a record of poor administration of the FLP's assets and/or a risk of an "implied understanding" existing, then the decision to "decontrol" the decedent's interest before death may not necessarily be the most prudent course of action.

This decision should be carefully considered in connection with the marital deduction mis-match issue discussed above. If there appears to be a significant chance that § 2036(a)(1) may apply so as to potentially cause full inclusion of the contributed underlying FLP assets in the client's estate, it may be more advantageous for the decedent to own the controlling interests, in addition to non-controlling interests, at his death in order to obtain a full marital deduction, by having the controlling block of interest passing into a QTIP trust or outright to the surviving spouse, without application of discounts. In contrast, to the extent that the client's interest has been decontrolled of the general partnership interests prior to death so as to address § 2036(a)(2), but if it is nonetheless determined that § 2036(a)(1) will still cause full inclusion of the FLP assets in the decedent's estate, insult may be added to injury due to the fact that the IRS may argue that the marital deduction mis-match may apply and that the estate will only be entitled to a marital deduction based upon a discounted non-controlling partnership or LLC interest passing to or for the benefit of the surviving spouse.

D. Partnership "Dos and Don'ts":

The Tax Court has made it clear that a person may not simply contribute assets into a family limited partnership and then be done with it, or, worse, manage the partnership in a manner that allows the person who funded it unfettered access to the partnership's income or to its assets, such as for the payment of personal expenses or debts. In the event of the audit of a gift or estate tax return, if a family partnership is involved, the IRS will generally investigate all of the circumstances surrounding the formation, as well as the operation, of the partnership, in order to determine what valuation discount, if any, is warranted, and whether the partnership's assets are still includable in the creator's estate. The more the formalities of the partnership arrangement have been respected, the greater the likelihood that an partnership will withstand the scrutiny of a challenge under § 2036(a)(1). Based upon cases over the last decade, a laundry list of "Dos and Don'ts" has emerged for purposes of the §2036(a)(1) analysis, which includes, but is not limited to, the following:

1. <u>Do</u> establish valid, legitimate, supportable reasons for establishing the partnership, in addition to its tax advantages. Non-tax purposes for creating a family partnership include liability limitations (*e.g.*, as to real

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consideration, the estate must be placed in the same economic position as if the sale had not taken place. *United States v. Allen*, 293 F.2d 916 (10th Cir. 1961).

estate), protection from creditors (including potential future ex-spouses), avoidance of ancillary probate (as to property located other than in one's home state), providing for the unified management of assets, and creating a relatively simple mechanism to make gifts to family members of what really are undivided interests in property.

2. Do carefully respect the formalities of the partnership agreement. Read the agreement (or get a summary of the applicable provisions), do what it says is to be done and keep contemporaneous records showing what you did.

3. Do prepare and execute resolutions memorializing all significant partnership decisions and the election of officers and, if applicable, directors or managers.

4. Do conduct and maintain minutes of all meetings of the partners.

5. Do, if there is a corporate general partner or manager, make sure to transfer assets from its account to the partnership's account to pay for its interest in the partnership, and make sure that the corporate general partner or manager also complies with all applicable procedures.

6. Do establish and maintain partnership bank and other accounts and be sure that all receipts and disbursements of the partnership flow through them. Any income generated by assets transferred to the partnership (*e.g.*, rents from real estate, dividends and interest from marketable securities and distributions from interests in closely-held businesses) must be deposited into the partnership's account and managed in accordance with the partnership agreement or operating agreement, as appropriate.

7. Do make sure that all actions taken by the partnership are taken in the name of the partnership, and that actions taken by its general partner or manager are taken by the correct person or entity.

8. Do make sure that all required consents to partnership actions and to transfers of partnership interests are obtained and properly memorialized.

9. Do provide sufficient time from the formation of the partnership to complete title transfers and record papers before additional actions such as gifting are taken.

10. Do use independent counsel for various family members who become general partners or receive limited partnership interests.

11. Do manage the partnership as a business entity.

On the other hand:

1. Don't contribute all or almost all of your assets to the partnership. Be sure to keep sufficient assets to live on, to pay your projected expenses, etc. In no event should you have to look to the partnership for your support on a regular basis.

2. Don't make distributions from the partnership unless they are pro rata to all partners/members.

3. Don't treat the partnership as if it is your personal bank account. Don't pay your bills from the partnership's accounts, and don't deposit your income or non-partnership assets into the partnership's accounts.

4. Don't skip the partnership (*e.g.*, don't pay income earned by any partnership asset directly to any owner of the partnership).

5. Don't forget to confirm that all of the appropriate assets have been properly contributed to the partnership (*e.g.*, confirm that deeds to real estate have been properly executed and recorded, that securities have been transferred into the partnership's name or accounts, and that proper assignment documents and all required consents have been properly executed and delivered as to all other assets).

6. Don't liquidate the partnership until after an estate or gift tax audit period ends, if at all. Pay attention to the term and purposes of the partnership as stated in the partnership agreement.

7. Don't permit any partner to utilize any partnership asset for personal use unless a fair market rental is promptly paid to the partnership (not just accrued on the partnership's books).

8. Don't only contribute your personal residence to the partnership.

9. Don't make disproportionate distributions between partners in order to pay for personal living costs, to pay for special medical needs (including nursing homes), and to make annual exclusion gifts and/or loans to family members.[16]

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[16] *Estate of Reichardt v. Comm'r*, 114 T.C. 144 (2000); *Estate of Thompson v. Comm'r*, 84 T.C.M. (CCH) 374 (2002), *aff'd*, 382 F.3d 367 (3d Cir. 2004); *Estate of Harper v. Comm'r*, 83 T.C.M. (CCH) 1641 (2002); *Estate of Schauerhamer v. Comm'r*, 73 T.C.M. (CCH) 2855 (1997); *Estate of Erickson v. Comm'r*, 93 T.C.M. (CCH) 1175 (2007); *Estate of Rector v. Comm'r*, 94 T.C.M. (CCH) 567 (2007); *Estate of Strangi v. Comm'r,* 293 F.3d 279 (5th Cir. 2002) ["Strangi II"]; *Estate of Abraham v. Comm'r*, 87 T.C.M. (CCH) 975 (2004); *Estate of Bongard v. Comm'r,* 124 T.C. 95 (2005); *Estate of Bigelow v. Comm'r*, 503 F.3d 955 (9th Cir. 2007); *Estate of Korby v. Comm'r,* 89 T.C.M. (CCH) 1150 (2005), *aff'd,* 471 F.3d 848 (8th Cir. 2006).

V. Planning opportunities in light of changes in the estate and gift tax law

A. With a bad fact partnership and a higher exemption, consider invoking § 2036 to obtain a higher stepped-up basis

FLPs have been popular planning vehicles for some 20 years now, having first become popular at a time when the unified credit exemption was $600,000. With the recent temporary increase to $5 million of the federal estate tax exemption (at least for decedents dying in 2011 and 2012), the need for maintaining certain older smaller FLPs may no longer exist. In addition, to the extent that some clients have FLPs that were funded with, for example, a few million dollars and, perhaps, have not been administered properly and may be potential candidates for inclusion in the estate under a § 2036(a)(1) or § 2036(a)(2) theory, it may make sense to take advantage of the $5 million estate tax exemption by taking a reporting position that § 2036(a)(1) and/or (a)(2) was applicable, so as to cause full inclusion in the gross estate and obtain the stepped-up tax basis in the underlying FLP assets. Alternatively, perhaps the partnership might be dissolved before the taxpayer's death.

B. Clients have a huge opportunity with the two-year $5 million gift tax exemption

The temporary increase in the federal gift tax exemption to $5 million per person provides clients with huge potential to transfer a significant amount of assets out of their estates on a gift tax free basis. The utilization of one's federal gift tax exemption in connection with the funding of a grantor trust provides the taxpayer with the ability to make a $5 million gift tax free into a trust for the benefit of younger generations while at the same time enabling the taxpayer to pay the income tax generated by those trust assets out of the taxpayer's own assets that would otherwise eventually be subject to estate tax. If GST exemption is allocated, the trust can exist and grow in a multi-generational manner.

In addition, through the use of leverage, the income shifting advantages of grantor trusts may be magnified. To the extent that a parent funds a trust with $5 million as a gift and makes a bona fide loan to that trust with interest imposed at the applicable federal rate, trust assets could be invested in a way to produce significant growth in the trust outside of the grantor's taxable estate. In addition, this would significantly increase the amount of potential income generated by that trust that would be paid for by the grantor out of his otherwise estate-taxable assets. For instance, assuming that the grantor makes a $5 million cash gift into the trust and makes a loan of 9 times the amount of that cash of $45 million, imposing interest at the applicable federal rate, the trust will have $50 million of assets that can grow and not be included in the grantor's estate (of course the unpaid balance of the $45 million note would be estate taxable). To the extent that the trust grows at a rate that exceeds the applicable federal rate, that growth is removed from the grantor's estate. The leveraging and income shifting benefits from this planning with an increased $5 million exemption are significant, even to the extent that no valuation discounts are applied in determining the value of the assets. To the extent that the taxpayer sells assets to the trust that may be entitled to the application of valuation discounts, for instance, a discounted interest in a limited partnership or LLC, or minority interest in a closely held company, the leveraging opportunities can be even further magnified.

C. Inter vivos trust planning by one spouse in a class trust where other spouse and beneficiaries are class beneficiaries – removes assets from the estate, but other spouse can still benefit from those assets

The benefits of gift planning and perhaps loan or sale planning with grantor trusts obviously must be weighed against the decision to make irrevocable transfers of assets out of the parent's estate. Of course, one must be mindful to not allow the tax "tail to wag the [non-tax] dog". In order to provide an additional level of flexibility into one's planning, particularly to the extent that significantly larger gift transfers to trusts are made, one might consider the possibility of including the grantor's spouse as one of a class of beneficiaries of the trust. For instance, perhaps a grantor trust would be created to be for the benefit of a class of beneficiaries consisting of the grantor's spouse, children and more remote lineal descendants. In addition, with the increase of the gift tax exemption also to $5 million, it is possible to create this structure so as to be generation-skipping transfer tax exempt.

D. Preferred partnership: Parents need a plan for management of their funds as they age and they need more cash flow; consider dividing assets into cash flow and growth, giving the parents the guarantee that they need

A preferred partnership is in most cases structured as a statutorily-blessed vehicle under § 2701 that, with the right assets, can provide one partner, typically the senior generation family member (sometimes referred to in this section as "parent") with fixed cash flow, through the issuance of preferred interests, while at the same time shifting future growth in excess of the preferred coupon away from the parent's taxable estate, through the issuance of common "growth" interests, in a transfer tax efficient manner. Typically, a preferred partnership is created by a parent contributing assets to an entity, such as a partnership or limited liability company, in exchange for preferred interests that pay a fixed annual preferred return. A child (or, perhaps, a GST tax-exempt trust for the child's benefit) would contribute assets to the partnership in exchange for common interests in the entity; the parent would typically also contribute additional assets in exchange for a modest common interest in the entity in order to ensure that the parent is considered a partner in the entity. Alternatively, the parent could initially own both the preferred and common interests and subsequently transfer common interests by gift or sale to the child or trust.

In a typical preferred partnership, the parent holding preferred interests would receive a fixed annual preferred interest payment but would not receive any of the potential upside growth of preferred partnership assets in excess of the preferred coupon (other than any upside growth attributable to the common interest owned by the parent, if any). The parent would also receive a liquidation preference entitling the parent to a priority return of his or her capital contribution upon liquidation of the partnership. The child, or trust for the child's benefit, would receive the upside growth potential in the common interests above the amount needed to pay the preferred coupon and the liquidation preference to the parent. Over time, if the preferred partnership's assets are invested in such a manner as to out-perform the required coupon on the preferred interest, the common interest would appreciate in value, thereby enabling the growth in the entity in excess of the preferred coupon and liquidation preference to be shifted to or for the benefit of the younger generation. The parent's preferred interests, however, would be "frozen" for estate tax purposes to the amount of the preferred coupon and the liquidation preference, and the excess appreciation would pass gift and estate tax free to the next generation(s).

E. Funding a preferred partnership in conjunction with a GRAT and a dynasty trust

GRATs are generally considered to be conservative techniques for shifting wealth due to the fact that they are statutorily mandated vehicles. In contrast, sales to defective grantor trusts are not authorized in the Code. Of course, one of the shortcomings associated with planning with GRATs is that it is generally considered that GST tax exemption cannot be effectively allocated to a GRAT during the GRAT trust term due to the application of the estate tax inclusion period (ETIP) rule. Thus, GRATs are generally considered to only be effective for transferring wealth down to the next generation, but not a multi-generational basis. In addition, the GRAT technique has inherent estate tax risks due to the risk of inclusion of some or all of the assets in the grantor's estate under § 2036 if he or she dies during the GRAT term.

The creation of a "Preferred Partnership GRAT," which involves the combination of a statutory GRAT with a statutory preferred partnership, may provide a way to obtain the statutory certainty of GRAT while at the same time shifting appreciation into a GST exempt trust and, perhaps even more importantly, containing the amount of potential estate tax inclusion if the grantor dies during the GRAT term. This technique dovetails the planning advantages of the preferred partnership with those of a GRAT by combining these two statutorily mandated techniques. Initially parent and a pre-existing GST exempt trust would create a preferred partnership, with parent initially owning preferred interests and the GST exempt trust owning common "growth" interests. Thereafter, the parent would make a gift transfer of his or her preferred interest to a long-term zeroed-out GRAT, while the GST exempt trust would continue to hold the common interests. The GRAT would be structured with a sufficiently long term so that the preferred payments made annually to the GRAT would be able to used by the GRAT to make its required annuity payment to the grantor. The GST exempt trust, as the common interest holder, would own all of the potential upside growth above the amount attributable to the preferred interests in the preferred partnership. At the end of the GRAT term, if the parent is living, the GRAT remainder would be distributed to the intended beneficiaries or trusts for their benefit in a GST non-exempt solution; however, the bulk of the appreciation will have passed into the GST exempt trust. In addition, if the grantor dies during the GRAT's annuity term, the estate tax inclusion would be limited to the frozen preferred interest gifted into the GRAT, but not the common "grantor" interest.[17]

Numerous proposals have been made to make GRATs a less attractive wealth transfer strategy. Proposals have been made to require a minimum 10-year term for GRATs, along with prohibitions against zeroed-out GRATs and declining annuity payments. *See* S. 3533, H.R. 4849, H.R. 5486. The Obama Administration's 2011 Budget Proposal also contains provisions requiring a minimum 10-year term for GRATs. Therefore, some restrictions on this

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[17] *See generally* N. Todd Angkatavanich & Karen E. Yates, *The Preferred Partnership GRAT – A Way Around the ETIP Issue?* 35 ACTEC Journal 289 (2009).

planning tool seem possible in our future. Because clients can reap the most benefit from zeroed-out GRATs and short-term rolling GRATs, it may be wise to go forward with these planning techniques while they are still available. Furthermore, the low federal rates may increase the chances of success with GRAT planning. To the extent that the 10-year minimum term becomes law, the Preferred Partnership GRAT technique may provide one way to minimize the increased mortality risk.

F. Valuation discounts were left out of TRA 2010, but will be revisited; what can we do in the meantime?

There has been a long history in which courts and the IRS have approved the application of valuation discounts for gift and estate tax purposes. Despite the long history of allowing such discounts for tax purposes, the elimination of valuation discounts has been a frequent topic of discussion in the area of estate planning. Not surprisingly, the elimination of family limited partnership and limited liability company valuation discounts has been long standing on the Democratic agenda. For example, the Clinton Administration entertained the idea of eliminating valuation discounts for anything other than active businesses in its budget proposals for 1999, 2000, and 2001. The possible elimination of valuation discounts has resurfaced recently, given the current economic environment and the size of the federal deficit. Congressman Pomeroy brought a lot of attention to this possibility with the submission of H.R. 436 in January of 2009, which includes the elimination of valuation discounts. The Obama Administration's 2011 Budget Proposal also proposed to restrict valuation discounts. Proposed legislation to eliminate or reduce valuation discounts include: (1) eliminating discounts for valuation of entities other than those conducting active trades or businesses; or (2) eliminating discounts through the implementation of aggregation rules.

Section 2704(b) and its accompanying regulations may impact valuation discounts for family limited partnerships and limited liability companies as well. Section 2704(b) provides that certain restrictions on liquidation are to be ignored when 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 the transferor and members of the transferor's family control the entity immediately before the transfer. Under § 2704(b)(4):

> The Secretary may by the 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.

Thus, § 2704(b)(4) appears to give the IRS broad authority to issue new regulations that list additional restrictions that should be ignored when determining the value of an interest in a closely-held business. Considering all of the IRS's challenges to the use of valuation discounts, it would not be surprising to see new regulations under § 2704(b).

Fortunately, we have not yet seen legislation eliminating or otherwise restricting the use of valuation discounts. Low federal interest rates in combination with low fair market values of many assets make this a very opportune time to engage in these types of transactions. If a client is planning to transfer entity ownership to kids or grandkids, the best time to do that would be right now because the loss of valuation discounts could be very significant. Of course, the IRS continues to challenge application of valuation discounts through the application of § 2036, § 2703, economic substance and step-transaction doctrines, and challenges to valuation methodologies employed by the taxpayer's appraiser. Therefore, planners should continue to exercise caution to recommend this planning technique only when proper.

VI. Maximizing planning opportunities with existing vehicles passing to younger generations

A. Generation one's buy-sell agreements are often a complete mess

Business owners frequently fail to plan for business succession or fail to review their existing succession provisions following changes in tax laws, changes to their estate plan, or changes in the dynamics of the business that can have a significant impact on the business succession plan. When preparing and maintaining an estate plan for a closely-held business owner, it is important to treat the succession planning aspect of the engagement as an integral part of the overall planning. For this reason, it may be advisable to include provisions in a buy-sell agreement requiring the shareholders to revisit and reapprove the terms of the agreement periodically or following specified events to ensure that the agreement continues to serve the best interests of the business and its shareholders. Furthermore, to ensure the buy-sell provisions are properly considered and adhered to during the estate administration, the shareholders' estate planning documents may contain references to any buy-sell provisions and instructions to the trustee or executor to comply with the terms of any such agreement.

B. Funding the buy-sell agreement: make sure your funding mechanism is properly structured and up-to-date

Aside from the § 2703 issues and the possible valuation mis-match issues discussed above in connection with buy-sell agreements, there are significant non-tax "business certainty" issues that also must be carefully considered by the planner. These issues can wreak havoc on an estate if not properly addressed.

These issues often arise in connection with the funding of a buy-out of a deceased partner's or stockholder's interest in a closely-held entity. For instance, in the context of a "cross purchase" buy-sell agreement, in which each partner agrees to purchase the interest of the other partner in the event of death, it is critical that the funding mechanism be well thought out, coordinated and maintained up to date. Often a buy-sell agreement will set a buy-out price that the partners agree that the surviving partner will pay to the estate of the deceased partner, and will provide for either a lump sum buy-out or perhaps a payout in installments over some term (*e.g.*, 60 months), or some combination of these. It is not uncommon for the partners to acquire life insurance on the other's life in order to provide some source of funds to satisfy the buy-out in the event of death (whether it is lump sum or in installments). Usually, this insurance is acquired in connection with the signing of the buy-sell agreement and the amount of coverage may be based upon the buy-out price (that the partners agree to *at that time*). However, it is very common for the partners to thereafter not re-visit the agreement. Over time, as the company grows, if the insurance coverage is not updated, there may be insufficient coverage to satisfy the buy-out if a partner dies. The result could be a mis-match of a number of sorts.

For instance, perhaps the surviving partner is obligated to buy-out the deceased partner's interests at an agreed upon price established years ago that is much less than fair value at date of death; such would result in a windfall for the surviving partner, to the detriment of the surviving spouse/estate (and possibly an estate tax mis-match).

Alternatively, perhaps the buy-sell agreement has a buy-out price that floats to reflect the fair market value at death, but the insurance coverage obtained years before will only satisfy a small portion of the buy-out obligation. Such could cause substantial financial strain to the surviving partner, particularly if the buy-sell agreement requires a lump sum payment.

Another, potential problem can arise if the partners' ownership of their respective life insurance policies is structured improperly so that each of them is the owner of the policy on their own lives, thus causing gross estate inclusion under § 2042. However, if the policy is actually payable to the other partner, such could be the worst of both worlds, in that the estate will owe estate tax on the policy, however, the estate will not even receive the insurance proceeds needed to pay the tax liability.

C. Maintain an FLP post-death as a multi-generational "dynastic partnership"

If the partnership continues after the death of the founding family member, the remaining partners can receive a substantial benefit in the form of a built-in vehicle for holding their own assets and the continued centralized management of assets. The reasons that the first generation created the partnership are often very good reasons for the second (and later) generations to keep the partnership intact.

Additionally, by keeping the partnership in place, subsequent generations have built-in estate planning that is stronger than what they could have created on their own. This partnership will have survived (or perhaps not survived) IRS scrutiny at the parent's generational level – a factor that should not be dismissed lightly. Even if the partnership has not withstood IRS scrutiny in connection with the parent's estate tax audit and resulted in full estate tax inclusion of the partnership's assets, nevertheless, the existing partnership structure that passes on to the next generation can provide a very robust structure; one that perhaps may be much stronger for the next generation's own estate planning than it potentially was for the founding generation.

For instance, the inherited limited partnership interests, once held by the family members in the next generation will, of course, still be subject to issues of valuation for transfer tax purposes. However, because the next generation partners were not the ones who initially formed the partnership, many of the IRS's most successful arguments against FLPs no longer exist at the next generation. Or, at least, these partners might not be subject to the scrutiny that the first-generation partner faced. Indeed, the § 2036(a)(1) arguments applied to FLPs would only be applicable to the original transferor of assets into the partnership. However, if the next generation partners never transferred assets into the entity, but, rather, merely inherited or were otherwise the donees of these interests, such an argument should simply not be applicable. The same logic should naturally apply when these partnership interests are eventually passed to the third or fourth generations. Thus, the maintenance of the entity as a multi-generational "dynastic partnership" could provide a robust structure that could continue for generations as the family's planning vehicle. Such could even be the case with a so-called "bad facts" partnership for which the IRS perhaps has successfully argued that § 2036(a) applied; the inclusion of the assets in the parent's estate could in effect "cleanse" the partnership and the remaining entity would be a much stronger planning vehicle for use and enjoyment by subsequent generational family members.

VII. Conclusion

Baby Boomers have both the benefits and burdens of living longer. By planning ahead, they can take advantage of opportunities that may have not been available to prior generations, giving them the opportunity to efficiently pass wealth to future generations while maintaining sufficient wealth at their own level. Baby Boomers have consistently demonstrated their ability to change the dynamic in society and "do things their own way." So too is the case with the challenges that this dynamic generation presents to the estate planning community. However, with these challenges also comes opportunities, which, with some creative planning, can be seized upon.