

**Personal Informal Notes from
Spring 2011 ABA RPTE Meeting:**

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by Steven B. Gorin *

I. Business Planning

I.A. Miscellaneous Recent Developments

Estate of Van v. Commissioner, T.C. Memo 2001-22, Code § 2036 estate inclusion for personal residence. The estate argued that this was an oral agency agreement; the court rejected the argument.

Estate of Adler v. Commissioner, T.C. Memo 2001-28, was another Code § 2036 real estate case that the IRS won.

Estate of Sylvia Riese v. Commissioner, T.C. Memo 2011-60, involved a QPRT in which the grantor did not, in fact, enter into a rental agreement before death, but there was every indication that they contemplated rental payments. Consider including an automatic rental provision after the term ends.

Trout Ranch LLC v. Commissioner, T.C. Memo 2010-283, involved a conservation easement. Consider adding a conservation easement to get the deduction and generate tax savings that would then be used to repay the bank – at least a little.

Estate of Levy v. U.S., 2010 WL 4942108 (5th Cir. 2010).

Palumbo (3/9/2011) – family settlement agreement.

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I.B. Formula Clauses

Some people use them in every sale of a closely-held business interest.

Some use disclaimers that have a gift over to an incomplete gift trust.

Another uses a Community Foundation for the gift over – if not charitable intent, then general power of appointment marital deduction trust for the gift over.

II. From Representing the Client to Administering the Estate

Be sure to open a new client matter and check conflicts to make sure you can represent the fiduciary. Define roles.

Consider the extent to which the attorney-client privilege would be waived on audit. Make sure the file has sufficient documentation of nontax reasons for strategies.

Nonjudicial settlement agreements can be handy during administration.

If a family office works on administration, have them keep time records and deduct those expenses on the estate tax return.

Watch for the mismatch when an asset is included in one's estate under Code § 2036 and it does not pass (or a discounted value passes to) the marital or charitable portion. Similar issue applies to buy-sell agreements ignored under Code § 2703.

In *Estate of Frank M. DiSanto v. Commissioner*, T.C. Memo 1999-421, the decedent had a controlling interest and a non-controlling interest passed to the surviving spouse, creating a mismatch between inclusion and deduction.

Form a post-mortem partnership and get discounted assets to the credit shelter trust and controlling interests to the QTIP trust.

What happens when the parent who is getting older serves as general partner of the limited partnership? If one has bad facts and the parent makes a transfer within three years of death, the mismatch can occur. Let's document the good facts:

- Make sure the file documents the legitimate and significant nontax reasons.
- Respect the partnership agreement's formalities.
- Memorialize significant partnership decisions.
- Make sure assets were actually transferred into the partnership's name.
- Make sure that investment returns are paid to the partnership and not to the partner who contributed them.

- Make sure the prospective decedent continues to have enough money to live on (and to pay estate tax).
- Make sure distributions are proportionate.
- Have separate engagement letters and separately bill the partnership.

If the estate is below the amount that can pass free from estate tax, consider dissolving the partnership.

Conversely, if the children's estates are above the threshold, consider continuing the partnership, because Code § 2036 shouldn't apply since the children were not the main ones to fund the partnership.

Review buy-sell provisions to update valuations used for the buy-out and to ensure proper funding of the sale.

III. Hot Topics

III.A. Carryover Basis Election

Guidance on Code § 1022 is still its top priority.

The IRS intends to provide a sufficient amount of time to prepare once Form 8939 is issued. First we will have guidance and then the form and instructions. Guidance would likely address whether we can file protective elections opting into carryover basis if needed to avoid estate tax.

III.B. Portability

Only the last deceased spouse's exemption can be used.

On March 23, the Joint Committee on Taxation called for technical corrections allowing a widow who remarries to give her first husband's exemption to her second husband.

Cathy Hughes unofficially requested comments on portability.

III.C. Building Flexibility as Estate Tax Exemptions and Rates Change

Consider leaving flexibility for the estate inclusion to get a basis step-up:

- Broad powers to distribute assets from the credit shelter trust to the surviving spouse.
- Give a third party the power to grant a general power of appointment to the surviving spouse, which might be conditioned on the approval of a nonadverse party.

Create an irrevocable trust that can distribute to the donor's spouse. Be careful to avoid reciprocal trust rules; see Letter Ruling 200426008.

Sales can protect clients by allowing them to retain an interest through the promissory note.

III.D. GST Tax

September due date applies for GST reporting other than indirect skips.

III.E. Budget Proposals

President Obama would extend portability and limit applicability of allocations of GST exemption to 99 years.

Proposals would not apply the required minimum distribution to small IRAs.

III.F. IRS Developments

Code § 2801 tax applies to the receipt of gifts or bequests from covered expatriates.

Regulations on mortality rate assumptions should be issued soon.

Private trust company guidance is delayed because of the interaction between transfer tax and income tax rules.

Saunders and *Foster* Tax Court cases were issued in the last couple of days regarding Code § 2053 deductions.

Proposed regulations under Code § 108(a) discuss discharge of indebtedness income for a disregarded entity or grantor trust. The deemed owner must be bankrupt, etc. to get relief.

III.G. Miscellaneous Developments

Hendrix case (Tax Court Cause No. 10501-03) on defined value clauses still has not been decided.

We're still waiting for the tax patent legislation, that the Senate passed overwhelmingly) to get through the House.

IV. Expert Witnesses in Trust and Estate Litigation

The litigator panelists would meet the expert face-to-face before even considering hiring him or her.

The expert witness also wants to get a feeling for whether the litigator and case are credible. Being a consultant has a different standard than being a witness – if the witness does not believe in the case, the witness would want to decline appearing as an expert.

Be careful not to leave a paper trail showing that the expert is part of the trial strategy team.

The expert really should dig into the case and get comfortable with all aspects of the relevant facts.

When an expert is designated as a testifying expert, his notes lose their confidentiality, even though they were when he was designated as a consulting expert. Do not leave a paper trail that would cause problems later when one converts a consulting expert to a testifying expert.

The level of detail in an expert report depends on the circumstances. Always have an oral conversation about what level of detail one wants in a report.

Do not destroy drafts of expert reports – it looks suspicious even if honest.

The trial lawyer needs to fully understand the expert's thought process so that the lawyer can protect the expert's view at trial by re-directing. Also, the questioning needs to be smooth – almost like a conversation.

An expert report cannot really replace a deposition – it's not detailed enough.

V. Planning For Collectibles

V.A. Estate Planning for Collectors Generally

One-third of individuals with over \$10M in assets are collectors.

Review our estate planning questionnaire to make sure we ask about whether they have a collectible.

Discussing a collection can bring the clients closer to us and help us protect them.

The provenance of artwork must be maintained to be able to sell it. Failure to report constitutes tax fraud and a “dirty little secret” that ex-spouses, etc. can use against the family.

Ask the client who the dealers are in that collectible to be able to sell at a fair price.

A client might love her collection more than a museum or children might.

Make sure the client inventories her collection. Writing the story behind the collection increases its value. Inventories are need for insurance purposes.

Collections can be expensive to maintain; do the beneficiaries have the resources to do so?

The IRS attends auctions and finds out about sales. Collectibles are taxed at higher capital gain rates.

V.B. Charitable Contributions of Art

Donating art:

- The charity needs to be a public charity to get full fair market value deductions.
- Making sure one holds for a year and a day is important to make it long-term capital gain property. Be sure to buy from the artist, even if it is intended as a gift, so you can change its character from inventory to investment.
- Tangible personal property's related use rule has been extended from 2 years to now 3 years.
- Obtain a qualified appraisal by a qualified appraiser using USPAP.

Donors prefer donating fractional interests in art so that they can continue to use it. The *Winokur* Tax Court case approved fractional interests of art. Congress has made such gifts not worthwhile.

The charity and the prospective donor can buy fractional interests together from a third party. Perhaps the donor can gift cash to help the charity do that.

An income tax deduction is allowable regarding a gift of art to a charitable remainder trust only after the art is sold. Ralph Lerner helped a client with that once, and they placed a replica in the original frame and friends couldn't tell the difference. If the charity that is the remainder beneficiary of the trust buys the painting, it would be more willing to pay the full price.

V.C. Other Tax Issues

One could use a Code § 1031 like-kind exchange to upgrade a collection and avoid capital gain tax (and sales tax), but one must be an investor and not a collector. It's safest to do the same type of art – an oil painting for an oil painting, but any piece of art for another piece of art would probably suffice.

Look to the hypothetical willing buyer and willing seller in the market where it is most likely to be sold.

V.D. Donee's Perspective

How can one get the collection kept together forever?

If they have illegal components, such as parts of endangered species, or are artifacts, then those aspects pose risks.

Final acceptance might be conditioned on Board approval.

Have advance discussions with the museum's curator.

Provenance can be strengthened through not only invoices but also the collector's correspondence with the artist.

A museum can never promise that the collection will always be on display and never be sold. Donating an endowment to fund efforts to display the art will improve the art's chances of being displayed.

VI. What Every Lawyer Should Know About Clients with Disabilities

Be sure to ask the person what would help him or her communicate or get around. Even if disability is not obvious, ask up front if the person has any limitations.

A person's physical inability does not necessarily translate into mental inability. Do not assume anything.

Blind or deaf people tend to have a very high rate of unemployment.

Many deaf people use sign language rather than standard English, so do not assume they have the skills.

Multiple sclerosis – stress creates symptoms, which can worsen the disease. Provide snacks and water, because medicine can make a person sick without them.

A blind person would appreciate oral communication so that he does not need to rely on a reader to communicate. Also, software that reads documents has more difficulty with PDFs than it does with Word.

Video relays are free – one can call an 800 number for free to be able to communicate with a deaf person.

VII. Collaboration with Allied Professionals

VII.A. Geriatric Care Managers

Geriatric care managers try to keep clients safe and living independently at home. They look carefully for physical and emotional abuse and are mandatory reporters to Adult Protective Services.

Our malpractice insurance would not cover geriatric care management.

The care manager identifies home health aides, match skills and personalities, and supervise the aides, as well as providing backups.

Aides are not trained in care management.

A care manager could be a:

- Registered nurse,

- Masters level social worker, or
- Vocational counselor.

Questions to ask when interviewing:

- Credentials
- Length of time they have been a care manager
- Sample report (sanitized to preserve confidentiality)
- Several references, including family members, other geriatric professionals, other estate planning lawyers.

A geriatric care manager has purchasing power and the related ability to negotiate discount, because it refers a lot of business to the home health aides. They can buy shorter blocks of time and insist on continuity of service by one aide.

They will provide free initial consultation regarding need for their services.

One-third of people 65+ fall each year. One-third less light comes into their eyes as well.

VII.B. What Lawyers Should Do

We need to find referral sources.

People will try to steal from our clients. Clients who are isolated are vulnerable.

Clients need home-delivered meals.

“Smart homes” will be big – homes that can monitor their residents’ health.

As lawyers, we can monitor the geriatric care managers. Some lawyers hire them as staff. A paralegal can monitor the geriatric care manager. See the sample contract; often, providers so not have standard contracts, and we can establish the negligence standard.

Make sure we don’t have a duplication of services.

We ought to guard against undue influence.

Contracts with service providers who are in the home should secure the person’s private information. Make sure they do not sell off information to financial service providers who can exploit the client.

One can hire a professional downsizer.

“The Forgetting” is a PBS documentary on Alzheimer’s.

VIII. Group Health & Disability Claims & Appeals - The Brave New World for Making, Administering, and Paying Claims

Insurance companies want to have discretion in paying claims. That is going away.

The battle of the experts wins. The claimant should have multiple experts to show the need. Providing this to the plan administrator will likely win.

The claimant would want to appeal the decision and simultaneously initiate a new claim.

The claimant will have access to the claim processing documents in 2012.

Service providers do not necessarily consider maximizing benefits for participants, so participants need to make sure the service providers are pursuing all avenues. The more specific the request for coverage, the better case the patient would have for obtaining coverage in response to a general approval.

ERISA gives participants the right to read the plan document. Patients can authorize providers to read them. A provider who wants to be diligent can get a power of attorney to exercise the patient's rights.

A phone call to an office does not start any of the machinery of the claims process.

IX. Health Care Reform

Affordable Care Act is part of a trend of increasing regulation of health care, which prior regulation has greatly increased costs.

The first phase was for the first plan year beginning after 9/22/2010, with exemptions for grandfathered plans, administrative extensions and waivers.

Grandfathered health plans are coverage provided by a group health plan or a health insurance issuer that include the following features:

- Plan or policy continuously existed on 3/23/2010
- Must continuously exist for as long as grandfathered status is claimed
- One must disclose to participants the intent to maintain grandfathered status.

Material changes triggering loss of grandfathering include changing cost-sharing and co-payments more than is permitted by regulation.

Pre-existing condition exclusions are not allowed for children under age 19 for all plans with dependent care coverage.

Generally, dependent coverage applies until age 26.

A plan cannot rescind coverage absent fraud or an intentional misrepresentation of a material fact.

Lifetime and annual limits will be limited with respect to “essential health benefits.”

Essential health benefits are in the process of being defined by regulation but include at least the following general categories and the items and services covered within the categories:

- Ambulatory patient services
- Emergency services
- Hospitalization
- Maternity and newborn care
- Mental health and substance use disorder services, including behavioral health treatment
- Prescription drugs
- Rehabilitative and habilitative services and devices
- Laboratory services
- Preventive and wellness services and chronic disease management
- Pediatric services, including oral and vision care.

Code § 105(h) prevents self-insured plans from discriminating in favor of the top 25% most highly compensated employees. Just pay additional compensation to the key employees in their retirement years for them to buy their own insurance rather than messing with these rules.

80% (85% for large plans) of the premiums collected must go towards care rather than plan administration.

Small employers, other than professionals, receive a tax credit for certain costs.

Employers must tell employees, via W-2s, the cost of coverage – optional in 2011 and mandatory in 2012.

Regulations will require automatic enrollment in employer health care plans unless employees opt out.

The government is going to tell us how to explain coverage.

Individuals must maintain minimum essential coverage or pay a penalty.

The amount of disclosure to employees about approved or denied claims for their dependents might cause HIPAA issues.

Healthcare.gov has a lot of good information and is very user-friendly, although it is a little salesman-y.