PROGRAM MATERIALS
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Recent Developments in Asset Protection Planning During 2018 and into 2019

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Recent Developments in Asset Protection Planning During 2018 and in to 2019

(2923)

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March 12, 2019

AGENDA

I. Select Federal Developments	12:00 to 12:20 EST
a. New Tax Code Section 199A (Mr. Brown)	(10 minutes)
b. Offshore Voluntary Disclosure Program (Ms. Fox)	(3 minutes)
c. Discovery Rules Regarding Data (Ms. Fox)	(3 minutes)
d. Select Federal Gift, Estate, and Other New Limits for 2019 (Ms. Fox)	(4 minutes)
II. Select State Developments (Mr. Brown)	12:20 to 12:25 EST
III. Recent Case Law	12:25 to 1:00 EST
a. Various Asset Protection Cases (Mr. Brown)	(12 minutes)
b. Homestead & Contempt Case Development (Ms. Fox)	(11 minutes)
c. Tax Cases: Tax Motive Strengthens Asset Protection (Mr. Brown)	(12 minutes)

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I. Select Federal Developments

a. New Tax Code Section 199A

i. What's New?

1. This year, the Internal Revenue Service ("IRS") released final regulations for deductions taken under section 199A of the Internal Revenue Code ("IRC").

2. The new section 199A regulations apply to taxable years ending after the date of its publication in the Federal Register (i.e. February 8, 2019).

3. However, the preamble to the final regulations provides that for taxable years ending in 2018, taxpayers have an option to rely on the final regulations or to rely on the proposed regulations that were promulgated in their entirety on August 16, 2018.

4. These regulations describe the recent allowable "section 199A deductions."

ii. Limitation on Tax Deductions

1. The amount of qualifying income that can benefit from the section 199A deduction is subject to certain limitations and exceptions.

   a. If a taxpayer's taxable income exceeds the threshold amount of $315,000 for a married couple filing a joint return, or $157,500 for individual taxpayers or non-grantor trusts, then such taxpayers' ownership in a specified service trade or business ("SSTB") (i.e., trade or businesses involving the performance of services such as in health, law, accounting, consulting, financial services, investing and investment management, etc.) would not constitute a qualified trade or business eligible for the section 199A deduction.

b. The desire to avoid exceeding the above threshold amounts has opened up a new tax planning strategy of having multiple non-grantor trusts own various SSTB flow through entities and take advantage of the section 199A deduction.

iii. Disregarding nongrantor trusts

1. Congress has become aware of this, resulting in the new final regulations establishing anti-abuse rules to prevent taxpayers from establishing multiple nongrantor trusts or contributing additional capital to multiple existing nongrantor trusts in order to avoid Federal income tax.

2. The final regulations specifically implement the anti-abuse rules by stating that if a trust is "formed or funded with a principal purpose of avoiding, or of using more than one threshold amount for purposes of calculating the deductions under section 199A, [each such trust] will not be respected as a separate trust entity…"

3. Despite the limitations created by the regulations under section 199A, there are still reasons to use nongrantor trusts. One such reason is for asset protection (as opposed to the primary motive being tax driven).

iv. Asset Protection Motive May Avoid Having the Nongrantor Trust Disregarded

1. Nongrantor trusts can serve as strong asset protection vehicles for the following reasons:

a. The typical power to cause a trust to be a nongrantor trust when you want to be a beneficiary of the trust, which many individuals prefer (known as a self-settled trust), is to allow distributions (to you as a beneficiary of the trust you created and funded) only with the consent of another beneficiary. This removes the taint of the more typical self-settled trusts (that are subject to higher scrutiny) that allow distributions to you as a beneficiary in the sole discretion of a non-beneficiary trustee.

b. Non-beneficiary trustees have no skin in the game in allowing you to receive a distribution, where in contrast, in the nongrantor trust scenario, a beneficiary is depleting his or her own funds from the trust to the extent the consenting beneficiary allows distributions to you. Therefore, the asset protection element is stronger because someone has to give up something to allow funds to flow to you.

c. Furthermore, having the trust be a nongrantor trust makes the trust responsible for paying income taxes on its income. Grantor trusts on the other hand result in the trust income being taxable to you as the settlor/grantor.

d. Many grantor trusts (by the trust provisions or by state statute) allow the trust to reimburse the settlor/grantor for any such resulting income taxes. Having the trust pay the settlor's taxes has been cited in case law as evidence of a retained control/benefit over the trust, thereby allowing a court to rule that a creditor can pierce the asset protection design of the trust. Nongrantor trusts avoid such an attack.

e. The nongrantor trusts that we recommend can be set up as offshore trusts (e.g. having an offshore co-trustee) combined with "asset protection state law" (e.g. having a U.S. co-trustee) and as such, will be considered U.S. trusts for IRS purposes so that the trusts meet the nongrantor trust rules.

    i. This "asset protection state law" is necessary because otherwise, foreign trusts set up by a U.S. settlor for any U.S. beneficiaries are grantor trusts.

f. The offshore design (i.e. having an offshore co-trustee) is also a very strong evidentiary element that shows the trust is created for asset protection more than for purposes of any tax reduction.

g. Lastly, as intimated above, we can layer in one of the asset protection state laws for the nongrantor trust (such as

Nevada, South Dakota, Wyoming, Alaska, Delaware) so that the trust avoids state income taxation. This should not be considered as one of the proscribed tax motives because section 199A only refers to the federal code section 199A deductions.

h. All this being said, use of a nongrantor trust does not mean that the IRS will not nevertheless view any 199A deduction as being disallowable. That is, it is just too soon after the passage of these laws to know exactly what the IRS' stance on such strategies will be and how aggressively the IRS will, if at all, pursue such trusts if it is found that there is some underlying motive for income tax avoidance. Only time will tell how this strategy will play out following the evolution of tax regulations and the release of tax court cases and opinions. that directly address the matter

2. Arguing that there *was* a tax motive

   a. If the creditor is not the IRS, then perhaps that would be the time to dig out the file notes that the trust was at least partially designed for tax planning (even if not the primary motive).

   b. This can go a long way in avoiding a private-party creditor successfully arguing that the "asset protection" trust was nothing more than a transparent attempt to hinder creditors and try to paint you in a bad light to gain bias from a judge or jury.

v. Effects of Section 199A

1. Section 199A potentially allows:

   a. Individuals, trusts, and estates to deduct up to 20% of qualified business income ("QBI") received from a pass-through trade or business (such as S-corporations, partnerships, limited liability companies taxed as partnerships, and sole proprietorships) in which the taxpayer has an ownership percentage; and

   b. Deduction of up to 20% of an eligible taxpayer's combined qualified real estate investment trust ("REIT") dividends and qualified publicly traded partnership ("PTP") income. The sum of these two amounts is referred to as the combined QBI amount.

2. Section 199A was created as a workaround to certain problems that pass-through businesses would have faced under the new tax law following its implementation of a lower top marginal tax rate for corporations at 21% while rates largely remained higher for individual taxpayers.

    a. That is because in a pass-through type entity, the entity itself does not pay income tax on the entity level; rather, income and expenses of the business pass through the entity and are treated as the responsibility of the individual owner(s).

    b. For this reason, the section 199A deduction is intended to create a more level playing field for owners of such pass-through entities by effectively reducing the new top 37% marginal income tax rate for business owners to approximately 29.6% (i.e., 80% of 37%).

b. Offshore Voluntary Disclosure Program ("OVDP")

i. To assist U.S. taxpayers in voluntarily resolving past non-compliance related to unreported offshore income and failure to file foreign information returns under the FATCA regime the IRS launched the Offshore Voluntary Disclosure Program ("OVDP").

ii. Various forms of the Internal Revenue Service sponsored OVDP have existed since 2009 wherein taxpayers may seek amnesty for undisclosed foreign bank accounts.

iii. Since its initial launch in 2009, more than 56,000 taxpayers have used one of the forms of the OVDP to voluntarily comply, and to date has accrued payments in back taxes, interest and penalties totaling $11.1 billion.

iv. According to the IRS website, the number of taxpayer disclosures under the OVDP peaked in 2011 when approximately 18,000 taxpayers came forward, and has steadily declined over the years, reaching a low of approximately 600 disclosures in 2017.

v. Since its launch in 2009 the IRS has been clear that the OVDP would be closed at some point in the future. Given the steady decline of disclosures over the years, the OVDP came to a close on September 28, 2018.

vi. However, the IRS has continued to use other tools to combat tax avoidance, including taxpayer education, Whistleblower leads, civil examination and criminal prosecution.

vii. As an aside, it should be noted that the Streamlined Filing Compliance Procedures (which, as compared to the OVDP, has very specific requirements for eligibility), have remained in place and will continue to be available to eligible taxpayers who might not have been aware of their filing obligations.

viii. The IRS has noted that the circumstances of taxpayers with foreign financial assets vary widely, and as such, the IRS intends to continue offering the following options for addressing previous failures to comply with U.S. tax and information return obligations with respect to those foreign assets:

1. IRS-Criminal Investigation Voluntary Disclosure Program;
2. Streamlined Filing Compliance Procedures;
3. Delinquent FBAR submission procedures; and
4. Delinquent international information return submission procedures.

ix. These avenues are still worth considering if a taxpayer is concerned that their conduct is willful or fraudulent, and that criminal exposure is otherwise likely.

c. Discovery Rules Regarding Data

i. On March 23, 2018, the Clarifying Lawful Overseas Use of Data Act (the "CLOUD Act") was enacted. This law amended the Stored Communications Act to specifically provide that data held overseas by electronic communication service providers can be reached by federal authorities. Previously, it was unclear whether Federal authorities could request data held overseas.

ii. Under the new law, Federal authorities can request any and all records in a service provider's possession, custody, or control whether those records are maintained within or outside of the United States.

iii. Although this law may not have a significant impact on most individuals, everyone needs to be aware that simply storing data overseas does not limit the Federal authorities' ability to reach the overseas data.

1. Consequently, everyone should be cognizant of this fact when sending any form of electronic communication, particularly if such communication contains sensitive information.

d. Select Federal Gift, Estate, and Other New Limits for 2019

i. Gift and Estate Tax Exemption

1. The 2019 exemption amount is now $11,400,000, an increase from the $11,180,000 exemption in 2018.

   a. To the extent the applicable exemption amount is not used up during life by lifetime gifts, what is left will apply to transfers at death.

2. If lifetime gifts or death-time transfers exceed the applicable exemption amount (or the unused portion thereof), any applicable tax is calculated at a 40% tax rate with respect to the excess amount.

3. If co-spouses "gift-split," this exemption figure increases to $22,800,000. This tax law is set to sunset in 2025 so that on January 1, 2026, the exemptions will return to the pre-2018 exemption levels (i.e., $5,000,000 basic exclusion amount per person, plus additional amounts to account for adjustments for inflation).

ii. Annual Exclusion – Non-U.S. Spouse

1. Gifts between U.S. spouses can be made to an unlimited extent, without any gift or estate tax consequences.

2. However, if the recipient is not a U.S. person, then a $155,000 annual exclusion applies during 2019 (an increase of $3,000 from 2018).

iii. Gift Tax Annual Exclusion

1. This exclusion is the amount a person can give away to any number of individual recipients each year without any resulting gift tax consequences.

2. For 2019 the gift tax annual exclusion remains unchanged from its previous amount of $15,000, and $30,000 if "gift-splitting" by spouses.

iv. Generation-Skipping Transfer Tax Exemption

1. For 2019 the exemption amount has increased to $11,400,000 (increase from the $11,180,000 exemption in 2018).

    a. Unlike the estate tax exclusion amount, a deceased spouse's unused generation skipping transfer tax exemption cannot be used by a surviving spouse unless certain elections are available and made.

v. Foreign Gift Reporting Threshold

1. During 2019, the threshold amount remains at $100,000 for aggregate gifts during the year from a foreign donor.

vi. Foreign Earned-Income Exclusion

1. During 2019, the first $105,900 in income earned abroad by an individual is excluded from taxable income for U.S. income tax purposes.

vii. Alimony

1. Alimony payments will not be deductible and will not be income to the recipient.

2. This provision is effective for any divorce or separation instrument executed after December 31, 2018 and any divorce or separation instrument executed before that date but modified after that date if the modification expressly states that the new law applies to such modification.

3. This provision does <u>not</u> sunset after 2025.

4. Divorce negotiations will be impacted dramatically.

    a. Marital settlement agreements in the past have generally included provisions that allow a deduction for alimony to the payor spouse and a shifting of income to the recipient spouse's lower income tax brackets.

b. The inability to now shift income tax responsibility for alimony payments will alter final negotiated amounts.

c. Also, with personal exemptions being repealed under the new law, these will no longer be traded in settlement agreements for offsetting benefits.

viii. Partnership Audit Rules

1. The Bipartisan Budget Act of 2015, which was later amended by the Protecting Americans from Tax Hikes Act of 2015, substantially changed the rules governing IRS audits of partnerships (including limited liability companies taxed as partnerships) and said rules are applicable to partnership tax returns filed for tax years beginning after December 31, 2017.

2. Although the vast majority of partnerships will be affected in some way, the new rules are primarily designed to make it easier for the IRS to assess and collect tax on large partnerships (*i.e.*, partnerships with more than 100 partners) by shifting the tax liability for partnership audits from the partners to the partnership.

3. A partnership with 100 or fewer partners may elect out of the new regime, unless one or more of the partners is a partnership or trust.

4. Most partnerships (and limited liability companies taxed as partnerships) will need to amend the audit provisions set forth in their current partnership agreements (or operating agreements) to ensure such agreements account for the procedural requirements under the current audit regime. For this purpose, the current audit rules create the need for certain actions and choices to be considered when drafting or amending a partnership agreement (or operating agreement for limited liability companies taxed as partnerships) such as:

    a. Should the partnership agreement be amended or drafted to require an election-out to be made (if/when the partnership qualifies for such an election)?

    b. Should the partnership agreement require the partners of the year under examination to reimburse the partnership for imputed underpayments made by the partnership in the adjustment year?

c. Should the partnership agreement delineate the circumstances under which the partnership will make the election-out so as to shift the burden for an IRS adjustment from the partnership to the partners?

5. In addition, the current audit rules have replaced the concept of a Tax Matters Partner ("TMP") with a "Partnership Representative".

6. Because the authority of a Partnership Representative goes far beyond that of a TMP, consideration should be given to how partnerships (including limited liability companies taxed as partnerships) this change in law should be reflected in the partnership agreement (or operating agreement, as the case may be); specifically, by having the agreement address the Partnership Representative's status, authority, and the limitations imposed on the exercise of said authority. For this purpose, consideration should be given as to whether the partnership agreement (or operating agreement, as the case may be) should include provisions:

    a. requiring that some percentage of the partners agree to certain actions taken by the Partnership Representative;

    b. delineating how a Partnership Representative is to be elected and removed, and how a successor Partnership Representative is to be appointed; and

    c. imposing some level of duty on the Partnership Representative to make an unbiased decision, or at least provide for the possible appointment of a successor Partnership Representative if it appears that there is a conflict of interest.

II. Select State Developments

a. **<u>Changes in State Estate and Gift Tax Statute:</u>** The 2017 Tax Act doubled the federal estate and gift tax (i.e., now at $11.4 million per individual). In response, a number of states that previously had their exemptions tied to the federal amount have been active in revising their state legislation. The following states are among those that either made changes to their transfer taxes in 2018 or saw changes as a result of the doubling of the federal exemption.

i. **<u>Connecticut:</u>** Connecticut extended its phase-in of the federal exemption to 2023. The exemption will be phased as follows:

2019: $3.6 million

2020: $5.1 million

2021: $7.1 million

2022: $9.1 million

2023: federal exemption for deaths on or after January 1, 2023.

ii. **District of Colombia:** Despite recently enacting legislation that aligned their state estate exemption with the federal exemption, D.C. separated its exemption from the federal exemption, reducing the threshold to $5.6 million retroactive to January 1, 2018 (to be indexed for inflation).

iii. **Hawaii:** Hawaii reduced its exemption, effective January 1, 2018 to $5 million (to be indexed for inflation).

iv. **Maine:** Maine set its 2019 exemption to $5.7 million for those dying on or after January 1, 2019 (to be indexed for inflation).

v. **Maryland:** Beginning in 2019, Maryland's exemption will be capped at the fixed amount of $5 million, rather than mirroring the rate to the inflation-adjusted federal exemption.

vi. **Minnesota:** Exclusion amounts are not linked to the federal exemption and are currently set at $2.7 million for individuals dying in 2019 and $3 million for individuals dying in 2020 and thereafter.

vii. **New Jersey:** Effective for those dying on or after January 1, 2018, New Jersey repealed its estate tax. Note, however, that New Jersey still imposes an inheritance tax.

viii. **New York:** New York set its 2019 exemption to $5,740,000 for dates of death on or after January 1, 2019, and before January 1, 2020 (to be indexed for inflation). The maximum rate of tax will continue to be 16%.

b. Limits on State Income Taxation of Trusts

i. It is without question that trust income distributions to beneficiaries are taxable to the beneficiaries in whatever state they reside.

ii. However, the issue arises when states attempt to tax an out-of-state trust on its undistributed income, which will be distributed to the beneficiary

iii. Some states have ruled against the taxation of out-of-state trusts, including North Carolina:

1. In North Carolina Department of Revenue v. Kaestner Family Trust, the court held that the state's tax was unconstitutional as applied to the Kaestner Family Trust.

2. The Kaestner Family Trust was established by Mr. Kaestner in 1999 to benefit his three children. In 1997, one of the daughters moved to North Carolina. In 2002, the trust was split into three separate trusts, one for each child.

3. Despite the trustee being domiciled in Connecticut and the assets being managed by a firm in Boston, North Carolina taxed the undistributed income of one daughter's trust, based on her living in North Carolina.

4. Subsequently, the trust sued the North Carolina Department of Revenue upon their denial of a $1.3 million refund in taxes. The case is currently before the United States Supreme Court.

c. California

i. California passed a Senate Bill which allows trustees to modify provisions of an irrevocable trust through "decanting" without the consent of the settlor, beneficiaries, or court approval.

ii. Modifying a trust, in essence through the "decanting" process allows irrevocable trusts in California to obtain more favorable provisions as opposed to being locked into an outdated instrument.

d. Colorado

i. Property Tax Exemption

1. A property-tax exemption is available in Colorado for:

   a. senior citizens who are 65 years or older;

   b. the surviving spouses of senior citizens who are 65 years or older;

   c. disabled veterans; and

   d. active military service personnel.

2. For those who qualify, 50% of the first $200,000 in actual value of their primary residence is exempted from property taxation. The state pays the exempted portion of the property tax.

ii. Colorado Adopts the Uniform Trust Code.

1. Effective as of January 1, 2019, Colorado enacted the Uniform Trust Code. The Uniform Trust Code has been enacted in at least thirty-three states, meaning that Colorado has now joined the vast majority of states by enacting the Uniform Trust Code. It is important to note that, generally, the Uniform Trust Code is a default statute, meaning that the terms of the Code only apply to the extent that the trust agreement itself is silent on a specific issue.

2. The Uniform Trust Code made the following important changes to Colorado law:

    a. The Uniform Trust Code specifically allows non-judicial settlement agreements to settle trust disputes. While non-judicial settlement agreements were previously used under Colorado law, the Uniform Trust Code provides clear requirements to ensure that the agreement is binding and valid.

    b. The Uniform Trust Code specifically allows a settlor to include provisions for alternate dispute resolution in the trust agreement. This can require that disputes between trustees and beneficiaries go through mediation or arbitration before any action can be brought in court. This may result in disputes being resolved more efficiently.

    c. Trust registration is no longer required in Colorado unless a beneficiary requests that such registration be made. Under prior Colorado law, trust registration was mandatory even though trustees often neglected to do so. The Uniform Trust Code continues to allow trust registration, which is fairly unique to Colorado, while recognizing the reality that many trusts will never be registered even if there is a requirement to do so.

    d. The Uniform Trust Code allows a trust settlor and all of the beneficiaries to consent to the modification or termination of a trust even if such modification or termination is contrary to a material purpose of the trust. Although courts had already allowed trust modifications and terminations, the Uniform Trust Code codifies this rule and provides explicit guidance concerning how it operates. Since this provision allows irrevocable trusts to be amended, it can be extremely helpful when personal circumstances or changes in law occur after an irrevocable trust has been created, thereby frustrating the original intent.

e. Florida

i. In 2018, Florida voters struck down a constitutional amendment that sought to increase the maximum homestead property tax exemption to $75,000.

ii. Thus, the maximum exemption currently remains at $50,000.

iii. Florida property owners can therefore continue to reduce up to $50,000 from their property's taxable value if such property constitutes their permanent residence or the permanent residence of their dependents.

III. Recent Case Law

a. *UBS Financial Services, Inc. v. Lacava*[1]

i. Introduction

1. An issue that arose recently in the press was whether a fraudulent transfer could be deemed to occur in the absence of any apparent transfer.

ii. Factual Background

1. Mr. Lacava, aware of creditor issues at the horizon, convinced his wife to contribute funds to his 100% owned LLC. Specifically, she received a 94.8% ownership interest in the company in exchange for a $140,000 capital contribution.

2. Typically, a 100% owner of an LLC may welcome a second non-debtor member to buy into the LLC, thereby reducing the original owner's investment in the LLC and causing charging order protections to kick in.

   a. The added, but possibly misperceived, accomplishment here is that the debtor made no transfer.

[1] *UBS Fin. Servs. Inc v. Lacava*, 2018-Ohio-3276.

3. Instead, it was a third party member buying into the LLC for fair consideration, which thereby appears to cloak the initial member with protection from his/her creditors.

4. This can certainly work if all occurs for business or investment reasons at a time that no creditor is already on the trail of the "debtor."

iii. Discussion

1. However, in the case of Lacava, the court found that Lacava's wife could not show:

    a. That her husband received full consideration for his passing an interest in the LLC over to her; and

    b. That she acted in good faith. Because she could not meet these requirements, she was unable to defeat the fraudulent transfer claim against her husband. It looked too much like a creditor-dodge (the timing alone is a big contributor to that finding).

2. Interestingly, with regards to the first factor, although Lacava technically did not make a "transfer," he did in effect "transfer" a large interest in his LLC to his wife for her contribution of $140,000.

3. However, he did not receive the $140,000; instead that money went into the LLC.

    a. The court viewed such "transfer" as one in which the husband received no consideration (only the LLC received consideration).

4. Thus, a transfer can be deemed to have occurred when no actual transfer occurred when the facts show, such as in this case, that a transaction was engaged in with the intent to defraud creditors.

b. *Kimble v. US*[2]

i. The *Kimble* case illustrates the high penalties for failure to report foreign bank accounts.

[2] *Kimble v. United States* No 17-421, Court of Claims Opinion.

ii. In *Kimble*, the taxpayer held Swiss accounts at both HSBC and UBS and was not aware until 2008 that she was obligated to report them to the IRS on her tax return and on Foreign Bank Account Report Forms (FBAR).

iii. She initially applied to the U.S. Government's offshore voluntary disclosure program, and as part of the program, she filed amended tax returns disclosing the foreign investment income that she had failed to report in prior years, resulting in a total underpayment of nearly $100,000 in taxes between 2003 and 2008.

iv. As part of a proposed Consent Agreement, in addition to back taxes and interest, the IRS planned to impose a miscellaneous penalty of $377,309 as well.

v. Kimble withdrew from the program prior to completing it. Subsequently, the IRS imposed maximum willful FBAR penalties on her equal to $682,832, or 50% of the UBS account balance.

vi. This case reminds us of the importance to report the existence of any foreign accounts on our Form 1040s and to timely file an FBAR.

c. *Toni 1 Trust v. Wacker*[3]

i. New case law in Alaska effectively limited the utility of domestic asset protection trusts ("DAPTs"), especially when the settlor of the trust is subject to a cause of action that was not derived under the law of the state in which the DAPT was created.

ii. Factual Background

1. In *Toni 1 Trust*, the Tangwall family lost a countersuit in Montana and then tried to transfer some assets to an Alaska DAPT.

2. The Wackers then brought a fraudulent transfer action in the Montana court. The trustee of the DAPT defended against any remedy action being taken against the DAPT by asking the Alaska court to rule that the Montana actions and attempts to claw back fraudulent transfers to the Alaska DAPT had no bearing in Alaska because Alaska has the exclusive jurisdiction over matters affecting Alaska DAPT assets.

iii. Discussion

[3] *Toni 1 Trust v. Wacker*, 2018 Alas. LEXIS 27, 1 (Alaska 2018).

1. The Alaska Supreme Court ruled that Montana courts do not need to give full faith and credit to Alaska's law with regard to what remedies may be available to the creditor against the Alaska DAPT.

2. This is bad news for DAPTs because if the settlor of one of these trusts does not live in the state in which it was created, or can in any way be subject to the jurisdiction of a court from a state that does not have DAPT legislation, then the trust is vulnerable to creditors in fraudulent transfer and certain other cases.

3. Thus, if a fraudulent transfer cause of action occurs outside of the jurisdiction of the state in which the DAPT is created or if such cause of action or its remedy is actionable under federal law, the court can virtually ignore the laws of the DAPT state's jurisdiction.

4. Foreign asset protection trusts (FAPTs), on the other hand, are safer from US court decisions because they are completely under the jurisdiction of another country that is not required to consider any other jurisdictional state laws (though it is safer still for a settlor to limit his or her role in the trust to that of being only a "discretionary beneficiary," or not to be a beneficiary at all).

    a. Although no option is entirely without risk, foreign asset protection trusts can be far more secure than domestic asset protection trusts.

d. Homestead Laws:

i. *Dean White v. Julie Dawn White*[4]

1. Factual Background

    a. In the case of <u>Dean White v. Julie Dawn White</u>, Dean and Julie White owned a Utah residence that was placed into an LLC as its only asset. During a later divorce, Dean began to use that residence as his primary home. He was also awarded the LLC as part of the property settlement in the divorce. Dean later failed to satisfy some of the monetary awards that he owed to his ex-wife Julie. She therefore obtained a charging order against his ownership interest in

[4] *White v. White*, 2017 UT App 140 (August 3, 2017).

the LLC so that she could foreclose on the residence and collect from the proceeds from a forced sale.

b. For some unknown reason, Dean then sold the residence on behalf of the LLC and thereafter liquidated the LLC and collected the proceeds. This seems to be bad timing from a charging order standpoint since the proceeds are then exposed to those monetary awards that Dean owed to Julie. Dean's defense to having to hand over the sale proceeds to Julie was that the proceeds were protected by the homestead exemption under Utah law given that the proceeds were directly related to the sale of his home. The fact that the home had been in a single-member LLC, which defaults to being a totally disregarded entity for tax filing purposes, is completely irrelevant to the Court's finding that the homestead exemption did not apply to protect Dean's distributed proceeds. The Court ruled that the homestead exemption applied only to a residence owned by an individual, not by an LLC.

2. Discussion

a. This ruling has an interesting aspect in that by simply having a residence owned by an LLC the ownership of the asset was converted from being that of real property to that of personal property. The Court specifically stated that "A member's interest in an LLC is a "transferable interest," and a "transferable interest is personal property . . . The homestead exemption's reach does not extend to personal property but is limited to interests in real property…" The authors find this to be an additional corroboration of the view that state law defines the nature of what constitutes a property interest.

b. This can be relevant in an asset protection trust context. When a trust owns personal property or "movables" (in contrast to real estate), the trust instrument can designate the law that applies to a creditor's ability to reach a beneficiary's interest in the trust assets. Section 273 of the Restatement (Second) of Conflicts of Laws, entitled "Restraints on Alienation of Beneficiaries' Interests", provides in pertinent part that "[whether the interest of a beneficiary of a trust of movables is assignable by him and can be reached by his creditors is determined…(b) in the case of an inter vivos trust, by the local law of the state, if any, in which the settlor has manifested an intention that the trust is to be administered, and otherwise by the local law of the state to which the administration of the trust is most substantially related."

c. Applying this to asset protection trusts that own single-member LLCs that own real estate, the applicable law designated by the trust instrument should control. Therefore, if an offshore trust, for example, that designates the offshore trust law as the applicable law, which states that a creditor of a beneficiary cannot access trust assets to satisfy a claim against that beneficiary, would effectively protect those trust assets. On the other hand, if the offshore trust owned U.S. real estate directly, the Restatement (Second) of Conflict of Laws Section 239 refers to the situs of where the real property is located as being the applicable law. Asset protection can therefore be enhanced by having the trust own personal property (LLC) instead of the real estate when the real estate is located in a state that has less protective laws.

ii. *Dejesus v. A.M.J.R.K. Corp*[5]

1. Similar to the holding in White, in February of 2018, the Florida District Court of Appeals held in Dejesus that a residence owned by a business entity (specifically a corporation) does not qualify for Florida Homestead protection.

iii. *In Re Oyola*[6]

1. This recent bankruptcy case from the middle district of Florida involved a debtor that was neither a US citizen nor a US permanent legal resident; rather the debtor simply resided in Florida with her daughter and granddaughter.

[5] *Dejesus v. A.M.J.R.K. Corp*, No. 2D17-2374.
[6] *In Re Oyla*, 571 B.R. 874 (Bankr. M.D. Fla. 2017).

2. The debtor filed for bankruptcy under chapter 7 and claimed that the property was exempt from bankruptcy as her Florida homestead.

3. While it was undisputed that the debtor resided on the property with the required subjective intent under state law to make such property her permanent residence, the court had to analyze whether the objective fact that the debtor was a foreign national lacking US permanent residency barred her from claiming the homestead exemption.

4. Further, the court looked at the impact of the debtor's intent that her family reside on the property permanently. The court's holding demonstrated the creative uses of the homestead exemption for purposes of sheltering wealth from the claims of creditors.

e. *FDIC v. Lewis*[7]

i. Introduction

1. The popular press on DAPTs (again especially for those living outside of a DAPT state) has been covering cases that may lead readers to feel that these trusts are "not as advertised" with respect to being the formidable barrier to creditors seeking a debtor's assets.

2. The proponents of offshore asset protection trusts point out that the foreign nature of an offshore trust avoids many of the arguments used to invade the DAPTS.

3. Further analysis of the cases will reveal that the contempt remedy for creditors is typically only in situations where there is a close nexus in time between:

    a. the person creating and funding the offshore trust (or having control and access to the trust assets), and

    b. the legal process being engaged by the plaintiff in pursuing the debtor.

ii. Factual Background

[7] *FDIC v. Lewis*, (2016 WL 589666), Case No. 2:10-cv-00439-JCM-VCF; Contempt Order (March 23, 2018).

1. In *Lewis*, the debtor guaranteed certain debt obligations, specifically five commercial loan agreements, when he had a net worth of more than $100 million.

    a. Each loan was secured by one or more deeds of trust on the relevant properties

2. After the real estate market crashed in 2008, the borrowers were no longer solvent and were unable to satisfy the underlying loans, thus the banks foreclosed on the properties.

3. Despite debtor's previous net worth of over $100 million, the debtor now claims that he has no assets. However, what actually occurred was that the debtor conveyed millions of dollars in property to his children transferred money to offshore trusts, and laundered funds through various corporations.

4. Consequently, the court imposed sanctions and threatened to hold debtor in contempt after he disregarded court orders and repeatedly attempted to frustrate the judgment creditors' reasonable efforts to obtain information about his assets.

iii. Discussion

1. The timing of the creation of the trust makes the fraudulent transfer aspect of this matter suspect.

    a. The guarantor created an offshore trust in September of 2008, around the same time that he was unable to satisfy the loan payments.

2. On March 3, 2018, the court found debtor in contempt for creating his own impossibility to gain access to the assets, when such maneuver was implemented at a time that the connection to the plaintiff's action was so evident.

f. Estate Taxation of QTIP Trusts

i. In, *Treasury v. Taylor* (Maryland) and *In re Estate of Seiden* (New York), the respective courts held that a QTIP trust created by the first-to-die spouse decedent who died domiciled elsewhere (MD) or died in 2010 (NY) is not subject to state estate tax when the surviving spouse dies.

g. Fraudulent Transfer and Statute of Limitations

i. *Official Committee on Unsecured Creditors of Great Lakes Quick Lube LP v. John Theisen*[8]

1. In October 2018, the Wisconsin Court of Appeals ruled against a bankrupt debtor that had transferred assets prior to filing bankruptcy.

2. The Wisconsin statute allowed a creditor to claw back fraudulent transfers if a claim or legal action is commenced within one year of discovering that a transfer took place.

3. The one year period had already run, so the debtor was hopeful that the claim by the creditor was forever barred. The creditor however argued the one year period should not commence until the creditor could have reasonably determined that the transfer was in fact fraudulent (versus the simple fact that a transfer was made).

4. The court agreed. The court even went further and ruled that it only takes a single creditor (in a multi-creditor context) who had no reason to know of the fraudulent nature of a transfer to toll the commencement of the running of the one year statute.

h. Inherited IRAs

i. *In Re Todd*

1. Factual Background

2. Discussion

    a. The United States Bankruptcy Court for the Northern District of New York held that a debtor's inherited Individual Retirement Account ("IRA") is property of the debtor's bankruptcy estate and consequently not exempt from creditors under New York law.

    b. First, the court found that since the debtor in this case had unfettered access to the inherited IRA funds they did not

[8] *Official Committee on Unsecured Creditors of Great Lakes Quick Lube LP v. John Theisen,* No. 2018 AP 333 (2018 WI App 70).

fall within the circumstances in which IRAs may be exempt from the judgment of a creditor under New York law.

c. Secondly, the court found that the debtor's inherited IRA was not exempt as a qualified retirement account under New York statute, N.Y. C.P.L.R. § 5205 because:

i. inherited IRA holders cannot contribute to the account, and thus "cannot be used to actively save money for retirement";

ii. funds in inherited IRAs can be "accessed at any time without penalty"; and

iii. "inherited IRA holders are under an obligation to draw down their accounts."

d. In addition, the Court noted that while many other state legislatures (such as Alaska, Arizona, Florida, Missouri, North Carolina, Ohio, and Texas) have amended their state exemption statutes to specifically exempt inherited IRAs, the New York legislature has not done so.

ii. *In re Arehart*[9]

1. Factual Background

a. The taxpayer inherited an individual retirement account (IRA) from his mother and claimed that it was exempt from bankruptcy under state law. The trustee argued that *Clark v. Rameker*, 573 U.S. 122 (2014), applied, which provided that an inherited IRA is not exempt from bankruptcy under 11 U.S.C. §522 because the funds are not retirement funds.

2. Analysis

a. The Supreme Court ruled that the holder of an inherited IRA cannot make further contributions, is required to take distributions regardless of age, and can withdraw the entire balance without penalty.

[9] *In re Arehart*, No. 17-01678-TLM (Bankr. D. Idaho 2019).

b. The bankruptcy court, however, held that the state law granting the exemption is worded differently and is broad enough to encompass inherited IRAs. And thus, the IRA is exempt under state law.

iii. However, given that inherited IRAs are typically not protected, proper IRA planning that utilizes a trust may offer several advantages including protecting an inherited IRA from creditors and spendthrift beneficiaries, while assuring realization of long term tax deferral.

iv. Moreover, if there is no pressing need for cash, leaving the IRA in a trust allows the trustee of such trust to ensure that only the minimum required distributions are taken so that the account isn't quickly depleted in the case of a spendthrift beneficiary.

v. Lastly, placing ones IRA in a trust may also reassure the owner of such IRA that the people he or she desires to inherit the IRA asset will in fact inherit such assets.

vi. This in turn would avoid the possibility of the IRA owner's surviving spouse (or that of a beneficiary) passing the IRA assets to a future spouse or to children of a subsequent marriage.

i. *Estate of Streightoff v. Commissioner*[10]

i. This case illustrates a court's powers of equity in the face of technical non-compliance.

ii. Facts

1. In *Streightoff*, a decedent transferred a limited partnership interest to his revocable trust during his life, but the other partners never formally admitted the trustee of the revocable trust as a partner.

2. Consequently, the trustee of the revocable trust would not have the standard rights of a partner, such as the right to vote on certain partnership matters.

iii. Discussion

[10] *Streightoff v. Commissioner,* T.C.M. 2018-178.

1. The Tax Court rejected the argument that the interest held by the revocable trust was a mere assignee based on the doctrine of substance over form.

2. As a result, for estate tax purposes, the partnership interest was treated as a full partnership interest and not a mere assignee interest.

iv. Limitations of Revocable Trusts

1. Generally, revocable trusts are in essence a person's alter ego, so it is not surprising that a court would hold that an interest transferred to a revocable trust retains all of the characteristics of the individual transferring it.

j. *EGW and AW v. First Federal Savings Bank of Sheridan*[11]

i. Introduction

1. You may want to consider adding No Contest, or "In Terrorem," clauses into your plan if your plan does not already contain them. A No Contest clause, essentially, provides that any person that challenges any aspect of a will or a trust is automatically disinherited. This can be particularly valuable if you believe that any beneficiary will be displeased with their inheritance or if there is tension between any of your beneficiaries.

2. Many states do, however, provide limits on how broad these clauses can be. Oftentimes, the No Contest clause is disregarded when valid claims are brought that meets the standard of probable cause.

ii. Facts

1. Allen Willey created a revocable trust that provided for the management of his assets during his lifetime, and for distribution of the assets upon his death.

2. Mr. Willey served as the trustee of the trust during his lifetime.

[11] *EGW and AW v. First Federal Savings Bank of Sheridan*, 413 P.3d 106 (Wyo. 2018).

3. Initially, Mr. Willey names his son, Spencer as successor trustee and the trust ultimately benefited Spencer's minor children, E.W. and A.W.

4. A few years later, Mr. Willey amended the trust to remove Spencer as beneficiary and successor trustee. Appellants (E.W and A.W.) however, remained as beneficiaries.

5. Years later, Mr. Willey again amended the trust, changing (1) the successor trustee to First Interstate Bank of Sheridan and (2) provided that under no circumstances should Spencer or any lineal descendant of Mr. Willey be named trustee.

6. Additionally, the amendment also added a No Contest, or "In Terrorem," clause stating that the provisions of his Trust are honored without challenged from his son, grandchildren, or siblings. Any challenges would immediately terminate any interest in the Trust of any of Mr. Willey's descendants.

iii. Discussion

1. The court held that a No Contest clause does not violate public policy because it is well established in Wyoming that a testator has the ability to dispose of his property as he chooses.

2. The Court held that a No Contest clause barred even claims that did meet the standard of probable cause.

iv. Compare to Other States

1. Even in states that have not gone as far as Wyoming, however, No Contest clauses can be particularly useful because the mere presence of the clause can have a chilling effect on any potential litigation.

2. Considering the fact that it may be difficult to ascertain whether any claim actually meets the standard of probable cause before such claim is litigated, the beneficiaries may not be willing to risk bringing the claim at all.

3. Consequently, regardless of the law in your state, the inclusion of No Contest clauses can help ensure that probate or trust administration operates in an efficient manner and pursuant to your wishes without undue interference from your beneficiaries.

k. ***Estate of Powell v. Commissioner***[12]

i. Introduction

1. This recent Tax Court case significantly increased the risk that the full value of family limited partnerships and family limited liability companies will be included in your estate even if you gifted the majority of the interests in such company before your death.

ii. Facts

1. In Powell, the decedent's son, Jeffrey Powell, began his mother's estate planning a mere 9 days prior to her death. On the first day of this time frame, Powell created a family limited partnership ("FLP") naming himself as general partner. Powell thereafter funded the FLP with $10 million in cash and securities from his mother's revocable trust in exchange for a 99% limited partnership interest. Notably, the FLP's partnership agreement allowed for the entity's dissolution with the written consent of all partners.

2. The next day, Powell, purportedly acting on his mother's behalf vis-à-vis a doctor's note that allowed him to act as her agent under her durable power of attorney following her incapacity, created a charitable lead trust ("CLAT"), and transferred the 99% limited partnership interest to the CLAT. The CLAT paid the annuity interest to a charitable organization (specifically, a private foundation in his mother's name) for the remainder of her life; and named Powell and his brother as remainder beneficiaries upon their mother's death. Thereafter, Powell filed a gift tax return for the transfer to the CLAT. He determined the value of the 99% limited partnership interest to be $7.5 million after a 25% discount for lack of marketability and lack of control. This resulted in a discounted gift to the remainder beneficiaries. Consequently, however, the IRS issued deficiency notices for both the gift tax return and the estate tax return Powell filed after his mother's passing.

3. The Tax Court in this case held the following: (1) the assets gifted to the CLAT were includible in the decedent's gross estate under IRC Section 2033 (property in which decedent had an interest) or

[12] *Estate of Powell v. Commissioner*, 148 T.C. No. 18 (May 18, 2017).

IRC Section 2038 (revocable transfers) because Powell exceeded his authority granted under the power of attorney when making a gift; (2) the decedent's ability (along with the other partners of the FLP) to dissolve the partnership constituted a right "to designate the persons who shall possess or enjoy" the cash and securities transferred to the FLP "or the income therefrom", within the meaning of IRC Section 2036(a)(2) (transfer with right to designate enjoyment of the property); (3) because the decedent's interest in the FLP was transferred less than 3 years before her death, the value of the cash and securities transferred to the FLP was includible in the value of her gross estate to the extent required by IRC Section 2035(a) (certain gifts within 3-years of death); and (4) the exception under IRC Section 2036 (transfers for full and adequate consideration) did not apply in this case because Powell had no significant nontax reason for the transfer.

iii. Discussion

1. The first notable mistake in Powell is the misuse of Powell's authority as agent under his mother's power of attorney. Specifically, the power of attorney had granted Powell the authority to make gifts of up to the $14,000 annual gift exclusion to his mother's family members; however, he exceeded this power by gifting $7.5 million to his family and his mother's private foundation. As such, the blatant misuse of authority granted under the power of attorney caused the Tax Court to disallow the gift.

2. Another notable mistake in Powell is the last-minute aggressive estate planning that was implemented within days of the decedent's death. Sophisticated estate planning techniques require time to implement. Compressed planning such as that under the facts of Powell may have negative implications by triggering a challenge of the transactions under the step-transaction doctrine, which looks at the economic substance of each transaction, and when applied, can cause a multiple-step process to be treated as one transaction (i.e., transferring property to a family limited partnership and then transferring interests in the entity to younger generations collapses into a single indirect gift of the underlying property, without protection of the overarching family limited partnership, to the younger generations).

3. Further, the implication of IRC Section 2036 within the context of such planning is also worth noting as Section 2036 is frequently used to bring prior transfers into one's gross estate at such times when a decedent transferred property while retaining "the possession or enjoyment of, or the right to the income from, the property", or the right to direct (either alone or with another person) who has possession, enjoyment of, or the right to income from the property for a time that is based on the decedent's life, or does not end before the decedent's death. In this regard, the Tax Court in *Powell* stated that the decedent retained the power to direct the possession or enjoyment of the property along with her children who were the other partners in the FLP.

4. The Tax Court's decision in Powell is significant because it is the first case where the Tax Court held IRC Section 2036(a)(2) applied even though the decedent was a limited partner, and thus did not own a general partner interest; as such, this case established that the applicability of Section 2036(a)(2) does not depend on the type of ownership interest in the partnership (or LLC), but rather, focused on the actual powers held by the owner/decedent. Further, it shed light on practitioners and clients reviewing powers of attorney so as to tailor the gift provisions to what might be appropriate for the particular client's circumstances. For high net worth individuals, the gift provisions should be tailored to allow whatever type of gift or other transfers that might be appropriate to planning, but constrained to minimize the risk of abuse. In addition, emphasis should be placed on the importance of periodic reviews of one's estate planning documents for purposes of avoiding a compressed planning time frame prior to death as negatively noted in the facts of the Powell decision. Lastly, individuals with FLPs (or LLCs), or those seeking to create FLPs (or LLCs), should consider certain risks of the IRS asserting Powell type arguments about estate inclusion, in that post-transfer appreciation could result in a double counting, thus placing the individual in a worse situation than if the entity had not been pursued. This can be better avoided if for example any FLP or LLC to be gifted be owned just by the donees of the gifted interests and an incomplete - gift designed an irrevocable estate planning trust (an "IEPT") as the donor. This way, the settlor retains no powers over that entity (but instead, voting powers are among only the donees and an independent trustee of the IEPT).

l. Estate of Cahill v. Commissioner[13]

i. Introduction

1. While the Powell case discussed above is a case from 2017, its importance has transcended into 2018 vis-à-vis the holding (among others) in Cahill and is thus relevant to our presentation.

2. After Powell, practitioners expressed concern that the holding in Powell would extend to other situations involving multi-party transactions wherein parties could agree to unwind the deal. Low and behold, less than a year later the Cahill decision applied that reasoning in a much broader context separate and apart from one involving limited partnership interests.

3. Therefore, the Cahill case provides additional concern that Powell may not be just a bad facts case.

ii. Factual Background

1. Decedent's son was the trustee of the decedent's revocable trust and was the decedent's agent under the decedent's power of attorney.

2. Decedent was also the settlor of an irrevocable trust that was created by the decedent's son in his capacity as the decedent's power of attorney when the decedent was 90 years old and unable to manage his own affairs. The cousin of the decedent's son and the decedent son's business partner served as trustees. The primary beneficiaries of the trust were the decedent's son and his issue.

3. The irrevocable trust was formed to take legal ownership of three whole life insurance policies (the "policies"). Two were in the name of the wife of the decedent's son; and one policy was on the life of the decedent's son himself.

4. Sometime later, the decedent's revocable trust borrowed $10 million with the loan proceeds being paid directly to the life insurance companies to purchase the policies. The obligor's on the loan were the decedent personally and the decedent's son in his capacity as a trustee under the revocable trust.

[13] T.C. Memo. 2018-84 (June 18, 2018).

5. Each split-dollar agreement provided that upon the death of the insured, the decedent’s revocable trust would receive a portion of the death benefit equal to the greatest of: (i) any remaining balance on the loan related to the relevant policy, (ii) the total premiums paid by the revocable trust with respect to that policy, or (iii) the cash surrender value of the policy immediately before the insured’s death. The irrevocable trust would retain any excess of the death benefit over the amount paid to the revocable trust.

6. Each split-dollar agreement also provided that it could be terminated during the insured’s life by written agreement between the trustees of the revocable trust and the irrevocable trust. If one of the split-dollar agreements terminated during the insured’s life, the irrevocable trust could opt out to retain the policy. In that case the irrevocable trust would be obligated to pay the revocable trust the greater of the total premiums the revocable trust had paid on the policy or the policy’s cash surrender value. If the irrevocable trust did not opt to retain the policy, it would be required to transfer its interest in the policy to Northern Trust. In that case the revocable trust would be entitled to any excess of the cash surrender value over the outstanding loan balance with respect to the policy.

7. Each split-dollar agreement provided that the irrevocable trust was not permitted to sell, assign, transfer, borrow against, surrender, or cancel the related policy without the consent of the revocable trust.

8. In 2010 the decedent’s son reported total gifts to the irrevocable trust of $7,578 under the economic benefit regime rules of Treas. Reg. s. 1.61-22.

9. The decedent died a year later at the end of 2011, and his executor was his son.

10. As of the date of the decedent’s death, the aggregate cash surrender value of the policies was $9,611,624. The estate’s tax return reported the total value of the decedent’s interests in the split-dollar agreements as $183,700. In the notice of deficiency respondent adjusted the total value of the decedent’s rights in the split-dollar agreements from $183,700 to $9,611,624; i.e., to the aggregate cash surrender value of the policies as of the decedent’s date of death.

iii. Discussion

1. The IRS and the estate disagreed over certain aspects of the cash surrender of the policies. The estate asserted that Code Sections 2036(a)(2) and 2038(a)(1) didn't apply to include the cash surrender value in the decedent's gross estate because the decedent retained no rights with respect to the amounts transferred that would be sufficient to justify applying 2036(a)(2) and 2038(a)(1).

2. However, the court held that "the rights to terminate and recover at least the cash surrender value were clearly rights, held in conjunction with another person [the irrevocable trust], both to designate the persons who would possess or enjoy the transferred property under section 2036(a)(2) and to alter, amend, revoke, or terminate the transfer under section 2038(a)(1)."

3. The court further rejected the estate's argument that the decedent's right to terminate was invalidated by the fact that the irrevocable trust could prevent the decedent from terminating the split-dollar agreements. In this regard the court noted that this reasoning would mean that the words "in conjunction with any person" in Section 2036(a)(2), and "in conjunction with any other person" in Section 2038(a)(1), would have no meaning.

4. In reaching this decision, the court cited to the Powell case, which as noted above, applied Code Section 2036(a)(2) with respect to that decedent's limited partnership interests in a family limited partnership.

5. The court rejected the estate's argument that in order for 2036(a)(2) to be applicable, the decedent would need complete control, and noted that the language of the statute doesn't require unilateral control under the statute nor under case law.

6. With regard to the court's analysis under Section 2703(a)(1), the court held that the split-dollar agreements (specifically the provisions that prevented the decedent from withdrawing his investment) created agreements to acquire or use property at a price below fair market value.

7. The court further noted that under 2703(a)(2), the irrevocable trust's ability to prevent termination significantly restricted the decedent's right to use the termination rights.

8. In addition, the court held that the split-dollar agreements "clearly restrict[ed] [the] decedent's right to terminate the agreements and withdraw his investment from the arrangements," and therefore concluded that the requirements of 2703(a)(1) and (2) were each met, thereby causing the court to deny the estate's summary judgment motion with respect to Section 2703(a).

9. Although the court only denied the estate partial summary judgment, it is important because it laid out the framework the court will likely use to ultimately determine that the cash surrender value of the policies at the decedent's death will be includible in the decedent's estate. Such a conclusion would make the use of split-dollar policies less attractive as a way to shift wealth from one generation to the next.

10. On the other hand, it can also be argued that similar to Powell, this is just a bad facts case given the deathbed planning involved; specifically, given the fact that the decedent's son effectuated the creation of the irrevocable trust as the decedent's power of attorney and yet also executed the strategy of using the split-dollar life insurance arrangements within a year of the decedent's death (so the decedent stood on both sides of the transaction).

11. Similar to Powell, the Tax Court determined that the mere ability of the decedent to determine who will possess or enjoy the property or income from the property (even if in conjunction with others) will trigger estate tax inclusion under 2036(a)(2).

12. The Cahill court went further, however, by stating similar language in Section 2038(a)(1) would have given way to the same result. This breadth of estate tax inclusion should serve as a caution to practitioners when dealing with rights retained by a transferor of property, particularly as it relates to rights in entities whereby some control (however small) is retained. This is especially so given the Cahill court's expansion of Powell in that the Cahill opinion seems to suggest that the applicability of Section 2036(a)(2) isn't limited to family entities (such as family limited partnerships), but rather, that it can also be relevant and applied to other types of arrangements.

* * * * *

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