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Including Special Needs Planning

IN THIS ISSUE

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The Tax Cuts and Jobs Act of 2017 (H.R. 1)

By Jane M. Fearn-Zimmer, LL.M.

The sweeping tax law changes introduced in the *Tax Cuts and Jobs Act of 2017* will significantly impact both the rich and the poor in dramatically different ways. For moderate to high net worth taxpayers, estate planning will focus on revising existing estate plans, preserving the step up in basis, and income tax planning to limit capital gains tax liability. Fewer taxpayers are expected to be subjected to the alternative minimum tax (AMT). The uncertainty already inherent in estate tax planning will continue due to the anticipated sunset of various new tax provisions on or before 2026, and the possibility of their repeal under a different administration. Only the wealthiest taxpayers dying between January 1, 2018 and December 31, 2025 will be subject to the federal estate tax, due to the increase of the basic exclusion amount to $11,180,000 per person and $22,360,000 per couple, as indexed for inflation. If both members of a married couple die during this period, they must have amassed more than $22,360,000 in order to be subject to the federal estate or gift tax. The dramatic increase in the amount of wealth now transferable free of the federal estate, gift, and the generation skipping transfer tax presents important planning opportunities that the wealthiest taxpayers should take advantage while they can.

Income Tax

From an income tax standpoint, lower to moderate income taxpayers will likely see a change in the computation of their taxable income due to the decreased personal income tax rates the doubled standard deduction and the suspension of the personal exemption for the taxpayer, the tax payer's spouse, and dependents. Deductions will be limited or lost for some taxpayers, resulting in a possible increase of personal income tax liability. New provisions governing section 529 college savings plans and section 529A ABLE account plans (special tax-favored savings accounts for qualified disabled individuals) are now available. Lawrence P. Katzenstein, a partner with Thompson Coburn, LLP in St. Louis, Missouri, articulated a growing concern in the non-profit community that the new tax laws will negatively impact charitable giving because of the expectation that fewer people will itemize their deductions due to the doubling of the standard deduction and the $10,000 limitation on the deductibility of state and local income and property taxes. The elderly and disabled will likely be impacted through decreased support from non-profits serving these populations.

The good news for lower income elderly and disabled taxpayers is that the new tax law preserves the credit for the elderly and the disabled. Authorized by IRC § 22, this credit is available to taxpayers over the age of 65 and to permanently retired disabled individuals who have not yet reached the age of 65. Disabled individuals must have a physician's

Fairness Hearing on Medicare "Homebound" Class Action

A Fairness Hearing will be held in the United States District Court for the District of Connecticut, in New Haven, on February 26, 2018, regarding the class action settlement in the *Sherman v. Hargan* litigation, [*(U.S.Dist.Ct. D.Ct., No. 15-cv-1468 (JAM), ECF 86-2, Dec. 12, 2017*]. The *Sherman* class action litigation is brought on behalf of Medicare homebound beneficiaries by the widow of a Medicare beneficiary who was denied coverage for home health services and was unsuccessful in the first two levels of appeal in the Medicare administrative appeal system. The lawsuit alleged that there were policies and practices in effect that denied Medicare beneficiaries meaningful review of home health claims until they were able to secure a hearing before an administrative law judge at the third tier of the review process.

The settlement, which was already approved by the judge in October, 2017, will require the dissemination of specific language to Medicare administrative contractors and qualified independent contractors. The language required will reinforce the established principles that home health redeterminations must contain an individualized statement of the reason for the decision. The language required by the settlement also emphasizes that in home health expedited determinations, the provider bears the burden of proof to justify the termination of coverage, not with the beneficiary to prove that she is entitled to coverage. The required language also re-iterates that in home health expedited reconsiderations, the reviewers must consider and give appropriate weight to the evidence submitted by the beneficiary. This evidence can include statements from the beneficiary's doctors who are not connected to the provider proposing to terminate the coverage in question. The notice of the proposed Fairness Hearing may be found online at *http://www.medicareadvocacy.org/wp-content/uploads/2017/12/Sherman-Notice-to-Class.pdf*. The settlement agreement may be found online at *http://www.medicareadvocacy.org/wp-content/uploads/2017/12/Sherman-Proposed-Settlement-Agreement.pdf*.

certification as to their disability. [*Internal Revenue Serv., U.S. Dep't. of the Treasury, Pub. No. 524, Credit for the Elderly and Disabled, For Use in Preparing 2017 Returns,* available online at *https://www.irs.gov/publications/p524*]. Veterans may substitute VA Form 21-0172, Certification of Permanent and Total Disability, which can be obtained from the local Veteran's Administration office. [*Id*]. Since the credit is nonrefundable, disabled individuals under age 65 must have taxable disability income paid under an employer's accident, health, or pension plan and that income must be includible in the taxpayer's income as a substitute for wages, based on absence from work due to permanent and total disability. Finally, both the taxpayer's adjusted gross income and the nontaxable amount of Social Security or nontaxable pension, disability, or annuity income must be below set limits ($17,500 for single, head of household or a qualifying widow(er) with dependent child, $20,000 if married filing jointly and only one spouse qualifies). [*Id*]

Many seniors who itemize may see a big increase in their medical expense deduction, which is applicable under IRC § 213 to all taxpayers. The new provision authorizes the deduction of the excess of adjusted gross income applicable in 2017 and 2018 to the amount exceeding 7.5 percent of the taxpayer's adjusted gross income. After 2018, only medical expenses in excess of 10 percent of the taxpayer's adjusted gross income will be deductible.

Medical Expenses

The medical expense deduction may only be taken for the amounts paid (and unreimbursed by insurance, worker's

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Communicating with Clients

Kevin O'Connor's Rules for Communicating with Bereaved Clients

An elder law and special needs practice brings with it the unavoidable attrition of clients through death. Speaking with bereaved family members does not have to be difficult, thanks to many sensitive client communication tips graciously shared by Kevin O'Connor, Esq., an estate planning attorney in Graton, California, who was a licensed clinical social worker prior to practicing law.

- Take a moment to slow down. Speaking with someone who just lost a loved one is a very different conversation than an ordinary work conversation. Begin with an expression of condolence and listen and make an assessment as to how grieving family member is doing. Sometimes, getting down to business is therapeutic and by efficiently managing the post-death administration process, you are helping them process death.
- If the client wants to share her story, simply listen. It's a gift to you that your client wants to share with you and your attentive and respectful listening is a gift to the client. If necessary, redirect her to the task at hand.
- Be sensitive. Avoid platitudes. Don't make awkward comments like "at least he didn't suffer for a long time," "I'm sure you must feel (fill in the blank)." Don't philosophize. Avoid trying to make the other person feel better by sharing with them what seems to you like a great cognitive reframe.
- Eulogizing an individual can be a bad idea. We may be fond of a former client, but perhaps the client was difficult, or even abusive, to a family member. Don't be the person who makes the victim endure yet another story about what a great woman his mother was, when his experience of her was very different.

compensation, or another third party payor) for the diagnosis, mitigation, treatment, prevention, or cure of disease, or for the purpose of affecting any structure of the body, and for transportation essential to receive medical expenses. [*IRC § 213*]. Personal consumption expenses and cosmetic procedures are excluded from eligibility for the medical expense deduction (unless the latter is necessary to ameliorate a deformity arising from or related to congenital abnormality, personal injury from an accident or trauma, or a disfiguring disease [*IRC § 213(d)(9)(A)*]. However, a broad range of properly substantiated therapeutic expenses may qualify for the medical expense deduction. For example, breast reconstruction following a mascetomy to treat breast cancer can be a valid medical expense deduction. [*See Rev. Rul. 2003-57.* In *Emmanuel v. C.I.R., T.C. Summary Op. 2002-127, (Oct. 3, 2002)*], the tax court ruled deductible the expenses of maintaining a therapeutic swimming pool (*i.e.*, the cost of chemical treatments, equipment, and electricity), the use of which was restricted to the disabled taxpayer and his micro cephalic, physically disabled and intellectually impaired son. That decision also ruled deductible the cost of the disabled son's enrollment in a YMCA summer camp program, which was structured to enhance social and physical growth in the areas of recreation and leisure activities for special needs populations. The disabled son's participation in the program was of therapeutic value to treat his problems and as such, was deductible under IRC § 213.

As *Emmanuel v. C.I.R* illustrates, many expenses incurred by individuals with special needs on account of their medical, physical or psychiatric conditions may be deductible as medical expenses. For instance, the excess of the cost of the special needs diet designed to treat a medical condition over the ordinary cost of the nutrition the taxpayer would incur but for the restricted diet may be deductible as a medical expense. [*See Letter No. 2011-0035, IRS Office of Chief Counsel (March 24, 2011),* available online at *https://www.irs.gov/pub/irs-wd/11-0035.pdf*].

While not precedential, *Private Letter Ruling INFO 2009-0010* [*(Jan. 2, 2008)*] provides some support for the proposition that meal and lodging charges furnished as a necessary part of assisted living dementia care may also be deductible under Treas. Reg. § 1.213-1(e)(1)(v)(a), applicable to individuals confined to a "… hospital or another institution because of a mental illness that makes it unsafe for them to be left alone" and IRC § 7702B. However, if the principal reason for assisted living is due to familial or personal preferences, then the associated meal and lodging charges would not be deductible as medical expenses.

The medical expense deduction may be taken for the cost of inpatient hospital care and/or skilled nursing home care if the availability of medical care is the principal reason for being in the nursing home. [*See IRS Topic 502, Medical and Dental Expenses,* available online at *https://www.irs.gov/taxtopics/tc502*]. Unreimbursed payments for qualified long-term care services under IRC § 7702B(c) may also be deductible as medical expenses under IRC § 213. "Qualified long-term care services" can include rehabilitative, maintenance, and personal care services for a chronically ill individual. An individual is "chronically ill" when certified by a licensed health care practitioner as either (1) being unable to perform at least two of the six basic activities of daily living (*i.e.*, walking, dressing, bathing, toileting, feeding, transitioning) for a period of at least 90 days due to a loss of functional capacity (the ADL level); (2) having a level of disability similar to the ADL level as determined under regulations prescribed by the secretary; or (3) requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment. A "licensed health care practitioner" generally means a physician, registered nurse, or licensed social worker. A "severe cognitive impairment" was defined in IRS Notice 97-31 as a loss or deterioration in intellectual capacity which is comparable to the cognitive decline encountered in Alzheimer's dementia and is measured by clinical evidence and standardized tests that reliably measure impairment in the individual's short-term or long-term memory, orientation as to people, place, or time and deductive or abstract reasoning.

When 24/7 care is required due to cognitive deficits, higher level of care assisted living and personal care services provided pursuant to a plan of care may be deductible pursuant to IRC § 7702(B) and IRC § 213. Thus, the Tax Court held in *Estate of Baral v. C.I.R.*, [*137 T.C. No. 1 (July 5, 2011)*], that the compensation paid to in home care providers on behalf of a 92- year- old woman diagnosed with Alzheimer's disease and dementia, who was confused, required assistance with her activities of daily living, required medication administration, and supervision due to being a fall risk, provided under her physician's plan of care, were deductible under IRC §§ 213 and 7702B. As a practical matter, most assisted living facilities prepare care plans through the auspices of a social worker, nurse or other health care professional, for their residents.

The portion of a lump sum life care fee paid to a retirement home allocable to the retirement home's obligation to provide medical care to the resident may be deductible. [*Rev. Rul. 75-302, 1975-2 C.B. 86; Rev. Rul. 76-481, 1976-2 C.B. 82*]. The structure of the transaction is important. For instance, a continuing care retirement community's entrance fee will not qualify for the medical expense deduction if it is structured as a loan because a loan is not a taxable event [*C.I.R. v. Tufts, 461 U.S. 300(1983)*]. The medical expense deduction was denied in *Finzer v. U.S.,* [*496 F.Supp.2d 954 (E.D.Ill. 2007)*], when the resident was required to execute a promissory note to secure future payments, or a percentage of the entrance fee is returned upon the death of the resident.

ABLE Accounts

The new tax law also adds key provisions relating to ABLE accounts, which are a special new type of tax-advantaged savings accounts for blind or disabled individuals with a qualifying disability incurred prior to age 26. What if a child for whom a section 529 educational savings account was funded is later identified as a qualified disabled individual who is eligible for an ABLE account?

The new law would allow ABLE account beneficiaries who are employed to make income contributions above the $15,000 annual ABLE account contribution cap (which is tied to the annual exclusionary amount of IRC § 2503(b) applicable in 2018 and is indexed annually for inflation) to their own ABLE account from their own earnings, up to the federal poverty level of $11,700, as long as they do not participate in their employer's qualified retirement plan. The new law also allows a tax-free rollover of up to $15,000 annually in funds held in an educational savings section 529 plan into a section 529A ABLE account for the same beneficiary of the section 529 plan or for a family member of that individual, without an adverse income tax consequence. Up to $15,000 of the funds rolled over from the educational savings plan to the ABLE account will be treated as a permissible contribution to the ABLE account plan, for purposes of determining whether an excess contribution has been made. If more than $15,000 in funds held in an educational saving plan is rolled over into an ABLE account plan in the taxable year, the excess over the $15,000 limit is treated as an excess contribution, subject to a safe harbor provision, penalties and interest. The ABLE provisions sunset on December 31, 2025.

Adoption Expenses

The new tax law also preserves the exclusion for an employer's payment or reimbursement of qualified adoption expenses. Qualified adoption expenses may include adoption fees, court costs, attorney's fees, and other expenses directly incurred in the course of adopting a child, including the adoption expenses of a special needs child. In 2017, the maximum exclusion amount is $13,570 to a qualifying taxpayer per child. In 2017, the exclusion is phased out ratably beginning with taxpayers' with modified adjusted gross income in excess of $203,540. Taxpayers with modified AGI's above $243,540 in 2017 receive no exclusion for the adoption credit.

Estate Tax

The new tax law temporarily eliminates the federal estate tax for all but the wealthiest tapayers, by increasing the generation skipping transfer tax exemption, as well as the basic exclusion amount of IRC § 2010(C)(3)(A) (formerly known as the "unified credit"), to the sum $11,180,000 per person, or $22,360,000 per married couple. The Act also increases the annual exclusion amount for gifting under IRC § 2503(b) to $15,000 for the 2018 taxable year. The new law decreases the maximum income tax bracket for individuals, estates and trusts to 37percent and increases the charitable contribution limit to 60 percent for cash contributions to public charities.

Because the new law significantly increases the amounts of wealth that can be transferred or bequeathed free of federal estate, gift, and generation skipping transfer tax, estate planning documents that incorporate a formula to compute the amount of property passing to the children free of federal transfer tax, with the remainder distributed to a surviving spouse, may need to be revised to avoid unintentionally disinheriting a surviving spouse. Annual exclusion gifts and exempt gifts of medical and educational expenses remain relevant. Mr. Katzenstein advises that lump sum gifts to irrevocable trust may make sense for non-tax reasons, but that for taxpayers who have to worry about the federal estate tax, it still makes sense to utilize rolling grantor retained annuity trusts (GRAT's), among.

The practice of electing portability to preserve the deceased spouse's unused exclusionary amount for the estate of the surviving spouse will also be impacted by the new tax law. The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 amended IRC § 2010 to allow the executor or administrator of the estate of a decedent survived by a spouse to elect to preserve the deceased spousal unused exclusion amount (DSUEA or DSUE) to the surviving spouse's own transfers during life and at death. Since 2010, when the concept of portability was introduced, and later made permanent in 2012, portability may be elected as a strategy to minimize future federal estate tax liability anticipated upon the death of the second spouse. If the assets in the estate of the first spouse to die appreciate substantially to an amount in excess of the basic exclusion amount of the second spouse to die, the surviving spouse who elected portability would be able to absorb additional federal estate tax liability with the unused portion of her predeceased spouse's basic exclusion amount. Federal estate tax returns not otherwise required were filed to preserve the DSUEA for decedents dying prior to 2018. Absent any further legislation, the increase in the estate tax exemption is scheduled to sunset on December 31, 2025. Lawrence P. Katzenstein recommended continuing to make portability elections in some cases, due to a concern that the exemption is scheduled to fall back to old levels in 2026.

Renee C. Vidal, Esq., a tax and estate planning attorney with Flaster Greenberg in Cherry Hill, New Jersey, advises that with the increased GST exemption, consideration should be given to making a belated GST allocations to a dynasty trust. For other trusts, she observed that decanting a trust into a dynasty trust that can then make a GST election may be an option and trusts should be re-evaluated based on the taxpayer's circumstances to determine whether the trust can be decanted, (which may depend on state law and the terms of the trust), or whether distributions can be made from the trust to beneficiaries in further trust for beneficiaries listed in the categories that would use the GST election. Another strategy is to make distributions from non-GST trusts up to the newly increased GST exemption limit to "skip" persons.

Estate plans should be reviewed for continued suitability in light of these changes. For instance, where an estate plan contains a formula bequest to leave the maximum amount possible to the children in a credit shelter trust without incurring federal estate tax, and the remainder is intended to fund a QTIP marital trust for the surviving spouse, the funding formula may not accomplish the testator's intent because, under the new tax laws, the entirety of the taxpayer's estate may now pass to the children, inadvertently disinheriting the spouse. Every client's estate plan needs to be reviewed in light of the new tax law, because some estate plans may still achieve non-tax objectives and the cost of leaving a current plan in place may be significantly less than undertaking new planning. Ms. Vidal notes that estate plans will generally fall into one of three categories. The first category is comprised of individuals whose estate is well below the federal exemption and may want to simplify their estate plan. The second category consists of individuals whose estate remain below the federal exemptions but whose plans are impacted by the change in the tax laws due to funding formulas. These individuals should consider reviewing and revising their existing plans. The final category is comprised of individuals whose estate exceeds the federal exemptions, who should consider additional planning opportunities to utilize the additional basic exclusion amount and GST exemption.

For more moderate net worth taxpayers, especially many elderly individuals, the family home is the most valuable asset. The new tax law contains several new provisions relating to residential real estate. As mentioned, beginning with the 2018 taxable year, the state and local income, sales, and property tax deduction will now be limited to a combined $10,000 per year for individuals and joint filers or to $5,000 for married taxpayers filing separately. The new provision sunsets on December 31, 2025. The Internal Revenue Service advised, in *IR-2017-210 [Dec. 27, 2017]*, that some prepayments of 2018 state and local real property taxes in 2017 may be deductible as to assessments made prior to 2018. The timing of an assessment turns upon state law as well as the timing and finality of local assessments. The new tax law also eliminates the mortgage interest deduction to interest on $750,000 of acquisition indebtedness, or $375,000 for married taxpayers filing separately, beginning after December 31, 2017 and ending on December 31, 2026. For acquisition indebtedness incurred prior to December 15, 2017, the current limitation of $1,000,000, or $500,000 in the case of married taxpayers filing separately, is retained.

Taxpayers with residences in multiple states should ensure that their living wills and powers of attorney are valid in each jurisdiction. Ms. Vidal noted that this is a good time for everyone to inventory all of their documents to make sure that their powers of attorney, medical powers of attorney, and living wills are up to date. Individuals holding property in multiple states should consider using a revocable living trust to hold their real estate to avoid probate in multiple jurisdictions.

529 plan

A special provision in the new tax will allow grandparents and other family members to help pay for private elementary school by funding a 529 plan. Contributions to college 529 plans are not deductible for federal income tax purposes, but capital gains and dividends compound tax free as long as the funds withdrawn are used to pay for qualified higher education expenses. Generally, up to the annual exclusionary amount under IRC § 2503(b) as index for inflation may be deposited by any parent into a 529 college savings account annually. For the 2018 taxable year, the section 2503(b) exclusion amount rose to $15,000. The five-year election available under IRC § 529(c)(2)(B) allows pre-funding up to five years worth of contributions in a 529 college savings account. This year, using the strategy, known as "superfunding," parents may deposit up to the sum of $300,000 a 529 college savings account in 2018. The amount is computed based on the assumption of 2 parents electing five years each of their annual exclusionary amounts of $15,000 for the 2018 taxable year. With compounding of investment returns over a period of years, superfunding allows for a significantly higher return on investment than annual deposits in the same amounts.

Historically, the funds on deposit in a 529 college savings account could only be used tax-free to pay for college tuition, room and board, at qualified higher educational institutions, as well as computers and software. Under the Tax Cuts and Jobs Act of 2017*,* beginning on January 1, 2018, up to the sum of $10,000 may be withdrawn annually to pay for private elementary school tuition. Many states offer state income tax benefits for 529 plans. Currently, only a minority of states penalize the practice of temporarily depositing funds earmarked for tuition in a 529 plan tuition in order to take advantage of the state income tax benefit and then withdrawing the funds a short while later to pay for qualified educational expenses.

Some states compute their residents' state taxable income using the federal taxable income computation as a starting point. The new federal tax laws will impact state taxable income as well. [Caragh DeLuca, *State Tax Impact of Federal Law Reform for Asset and Wealth Management, PWC's Insights* (Jan. 30, 2018)]. Ironically, the new tax law, which was intended to simply the tax code, is incredibly complex and will likely impact different taxpayers in different ways.

KEEPING CURRENT

Death of Medicaid Applicant Moots Federal Review of Medicaid Determination

Hillspring Health Care Center, LLC v. Dungey, No. 1:17-cv-35, *(S.D. Ohio, W. Div., January 4, 2018)*. The plaintiff's decedent was a nursing home resident who owned a life insurance policy with a $10,000 face value and a cash surrender value in excess of $6,000. She was physically and mentally unable to liquidate the policy. Ohio law treats life insurance as an excludible resource when the Medicaid applicant is unable to access the cash value or if another person would be entitled to receive all the proceeds of the policy. The plaintiff alleged that the policy was irrevocably assigned to a funeral home. The plaintiff/

nursing home filed the Medicaid application, which was denied after the applicant's death for excess resources based on the cash surrender value of the life insurance. The state hearing officer ruled that the evidence did not demonstrate that the life insurance policy was irrevocably assigned to the funeral home. The plaintiff then took an administrative appeal, followed by an appeal to the Court of Common Pleas. The magistrate's determination that nothing in the record indicated that there was an irrevocable preneed funeral contract was affirmed by the Common Pleas Court judge. The plaintiff then filed in federal district court, seeking a declaratory judgment and relief under 42 USC § 1983 for violating the Federal Medicaid Act's medical assistance and nursing facility services mandates, the Rehabilitation Act of 1973, and the decedent's due process and equal protection rights under section1983. The federal district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) or (b)(6) as moot, due to the death of the plaintiff nearly three years prior to the date of the filing of the federal court complaint. The claims were also barred by the Rooker-Feldman [460 U.S. 462, 483, n. 16 (1983)] doctrine, which precludes federal review of a final adjudication by a state court rendered before the filing of the federal court lawsuit.

For the full text of this decision, go to http://business.cch.com/elr/HillspringHealth.pdf

Patient Who Received Emergency Psychiatric Treatment Not Financially Liable for Involuntary Psychiatric Commitment

Newton Medical Center v. D.B., No. A-5101-15T4 (N.J. Super. App.Div., January 17, 2018). D.B., a schizophrenic, was involuntarily committed on an emergent basis after a psychotic episode in which he was determined to pose a danger to himself and others. The patient incurred a bill of over $65,000 for an 11-day stay in the psychiatric facility and the bill was reduced because D.B. was uninsured. The hospital did not follow the charity care regulations, contenting that these regulations only applied to patients admitted through the hospital emergency room, not a psychiatric emergency screening service (PESS), and sought to collect the reduced bill. The appellate division reversed summary judgment for the plaintiff/hospital and ruled that when a mental health patient is admitted to a hospital on an emergent basis through the referral of a PESS, the charity care regulations dealing with emergency room admissions apply because the PESS patient faces similar emergent circumstances as a patient admitted through the emergency room. Because the plaintiff/hospital did not contact the patient as required by the charity care regulations, the plaintiff/hospital was barred from recovering from the defendant.

For the full text of this decision, go to http://business.cch.com/elr/NewtonMedicalCenter.pdf

Fair Hearing To Provide Private Nursing Services Mooted by Acceptance of Alternate Services

Matter of A.M.P. v. Independent Health Ass'n. Inc. et al., 2018 NY Slip Op. 00208 (App.Div.S.Ct. January 11, 2018). Petitioner is an adolescent child who receives Medical Assistance through a Medicaid-managed care provider and whose services stopped after the Medical Assistance managed care provider tried to find a substitute provider, but was unsuccessful. The petitioner filed for Fair Hearing. On Fair Hearing in July, 2015, the denial of services was reversed and the managed-care provider was directed to provide private duty nursing services to petitioner, with immediate compliance required. The petitioner filed a compliance complaint on August 3, 2015, advising that the nursing services directed in the Fair Hearing decision were not yet provided. The Office of Temporary and Disability Assistance (OTDA) determined that the Medicaid managed care provider was in compliance with the Fair Hearing decision and closed the inquiry on August 13, 2015. The petitioner sent another compliance complaint on August 26, 2015, advising that there were still no nursing services in place. On October 21, 2015, OTDA issued a notice of compliance resolution that the noncompliance issue was resolved. In November, 2015, the petitioner filed for a writ of mandamus to compel immediate compliance with the Fair Hearing decision, alleging that no private duty nursing services were provided from February 27, 2015 through October 5, 2015 and only partial services were provided from October 6, 2015 through November 7, 2015, with a cessation of nursing services after November 8, 2015. After the petition was filed, the petitioner received private duty nursing services and the petition was dismissed as moot. In December, 2016 the managed care provider terminated the private duty nursing services on the grounds that it was unsafe for nurses to assist the petitioner in his home. Before a fair hearing was held, the petitioner accepted alternative services and withdrew the Fair Hearing requests. Given these events, the July 2015 Fair Hearing decision was no longer in effect and the appeal was moot.

For the full text of this decision, go to http://business.cch.com/elr/MatterofAMP.pdf

PRACTICE TIPS

Planning After the Tax Cuts and Jobs Act of 2017

By Jane M. Fearn-Zimmer, LL.M

I recently attended a very interesting and informative seminar presented by financial professionals, including Mark H. Wander, a certified public accountant with Baratz and Associates in Marlton, New Jersey. Mr. Wander generously shared many practice tips for estate planning with the new law in mind.

Many fewer estates will require federal estate tax returns, but there are still plenty of planning opportunities. Classic estate planning strategies, such as gifting to adult children in a lower income tax bracket, remain relevant. As Wander, cautions, just make sure that your clients gift the right assets. Your clients do not want to gift low basis, high value assets, due to the loss of the step up in basis.

Despite the increase in the basic exclusion amount to $11,180,000 per individual, taxpayers making gifts greater than the $15,000 annual exclusionary amount which are not exempt gifts for medical or educational expenses are still required to file an IRS 709 (gift tax return). The gift tax return is generally an informational return with no federal gift tax due.

Family limited partnerships are still a viable wealth transfer strategy, with the ability to discount for lack of marketability and lack of control.

There are still many reasons to make gifts in trust, including privacy by avoiding the probate process, creditor protection, curbing spendthrift children, centralizing asset management, avoiding family conflict by controlling asset disposition, and preserving a fund for a special needs beneficiary while protecting the beneficiary's eligibility. A transfer to an irrevocable trust may also facilitate qualifying for the Veteran's Benefit Aid and Attendance.

Seeking opportunities to reduce income taxes is important due to the relatively compressed trust and estate income tax brackets. Wander recommends that when possible, trusts should be funded with appreciating assets which are not spinning off income. An example might be Facebook stock, which has no divided but tremendous appreciation. Drafting the trust to retain the step up in basis to the date of death value will facilitate significant income tax savings both through the deferral of the realization event and upon the step up.

Even though taxpayers will be limited in their ability to deduct some mortgage interest beginning in 2018, if the real property in question is converted to a rental property, then both the mortgage and the real property taxes are deductible. Particularly in the realm of rental real estate, care should be taken to obtain the guidance of a tax professional to avoid running afoul of the passive income activity limitations.

Here are some other tips for drafting probate documents. When drafting wills, be sure to acknowledge any parties left out as opposed to making no reference to them whatsoever. Keep a file memo explaining why the beneficiary was disinherited.

When drafting a charitable bequest in a will or trust, be careful to identify the specific charity with accuracy. It is important to communicate exactly which non-profit entity is to receive the bequest. For example, if John leaves 5% of his residuary estate to the American Cancer Society, is that the national chapter of the American Cancer Society or the local chapter closest to John's residence? Using an address and identifying the beneficiary with precision is recommended.

Remember that an estate cannot take a charitable interest deduction unless the charity is left an income interest in the will or trust. So if the testator would like to take a charitable interest deduction, the document must be drafted to provide for this.

Don't forget about estate planning for digital assets! Incorporate a provision in your client's financial powers of attorney and also in their will or trust document authorizing the fiduciary to access digital accounts. Compile a list of digital accounts and passwords for the fiduciary.

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