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RECENT DEVELOPMENTS IN ESTATE PLANNING AND TAX PLANNING FOR 2012

A BRIEF OVERVIEW FOR OUR CLEINTS

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Table of Contents

I. The American Taxpayer Relief Act of 2012 ("ATRA") 1
A. Estate Tax / Gift Tax / Generation Skipping Transfer Tax 1
1. The tax rate 1
2. The ability to utilize the full exemption 1
3. The "portability" provisions 1
B. Personal Income Tax Changes 2
1. Capital Gains and Qualified Dividends 3
2. Medicare Tax on Investment Income 3
3. Personal Exemption 4
4. Itemized Deductions 4
5. IRA Distributions to Charity 5
6. AMT Exemption 5
7. Bonus Depreciation 5
8. Built-In Gains 5
9. 401(k) Roth Conversion 5
10. Employee Payroll Tax 5

II. Other Estate Tax, Gift Tax, Generation Skipping Tax Developments 5
A. Estate Tax Marital Deduction 5
1. Defense of Marriage Act 5
B. Gift Tax Issues 6
1. The Gift Tax Annual Exclusion 6
2. Annual Exclusion for Gifts of FLP Interests 6
3. Gift of Winning Lottery Ticket 6
4. Avoiding Valuation Surprises - *Wandry v. Commissioner* 6
C. Life Insurance Issues 8
1. Termination of Split-Dollar Plan 8
2. Income on Surrender of Policy 8
3. Trust-to-Trust Sale of Policy 8

III. Other Income Tax Developments 9
A. Mortgage Interest Deduction 9
B. Charitable Gift to Disregarded Entity 10
C. Distribution of Trust Income to Charity 10

IV. Non-Tax Developments 10
A. Biology v. The Law 10
B. Asset Protection 11
1. Protection from IRS Collection 11
2. Protection of Assets from Divorce Claims 11
3. Protection of Trust Assets Under Georgia Law 11

OVERVIEW OF
RECENT DEVELOPMENTS IN
ESTATE PLANNING AND TAX PLANNING
FOR 2012

I. The American Taxpayer Relief Act of 2012 ("ATRA")

Congress passed ATRA with an effective date of December 31, 2012. It includes many provisions which are not relevant to this outline, but included the following key elements which are generally applicable to this subject matter:

A. Estate Tax / Gift Tax / Generation Skipping Transfer Tax. The estate and gift tax exemption (and the generation skipping transfer tax exemption) of $5,000,000 is made permanent, and it will continue to adjust for inflation in future years. The inflation adjusted exemption for 2013 is $5,250,000.

1. The tax rate on amounts above the exemption increases from 35% to 40%, but 40% is much more favorable than the 55% top rate which would have become effective if Congress had not acted.
2. The ability to utilize the full exemption in making lifetime gifts is retained, whereas from 2002 through 2009 only $1 million of the exemption could be used for gift tax purposes in lifetime transfers.
3. The "portability" provisions are retained, so that the unused exemption of a deceased spouse may be passed to the surviving spouse by means of a timely filed estate tax return.
4. There are no changes impacting such estate planning strategies as GRATs, valuation discounts, or transactions involving grantor trusts (although such changes remain a part of the Administration's tax plan for the future.)

The general structure of the tax system remains unchanged. Therefore, persons with Wills and trusts which have been structured to optimize the tax exemptions in the past based on something like "the maximum exemption amount available at my death" rather than a stated dollar amount, and who expect to have estates which are valued at more than the exemption amounts, generally will not need to revise those documents as a result of this change in the law. However, now that the $5+ million exemption seems permanent ($10+ million for married couples), many people with estates valued at less than the exemption amount(s) may wish to consider simplifying their estate plans and eliminate much of the complexity which was originally included to optimize the smaller tax exemptions which were previously applicable.

Note, however, that tax planning should not be the dominant objective in the design of an estate plan. Many people with estates valued at less than $5+ million (or couples with less than $10+ million) have important planning objectives for which the use of trusts remains a valuable alternative. For example:

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- Those with children who are not yet fully mature find trusts to be extremely flexible in their selection of the person or persons (trustees) who should manage the property while the children are young, yet ensure that the economic benefits are available to fulfill the support and education needs of the children.
- Young couples realize that, if either of them die prematurely, it is likely that the survivor may remarry. Trusts can provide the surviving spouse with the economic benefits of their wealth, while ensuring that the remainder must eventually pass to their children rather than to the family of the survivor's second spouse.
- Older couples often worry that, if either of them were to die, the survivor might be vulnerable to a much younger suitor with designs on diverting the benefits of the family's wealth to themselves. Trusts can avoid such risks.
- Couples with children by more than one marriage will find trusts valuable to ensure that all the children are treated as they intend regardless of which spouse dies first and which survives.
- Many people wish to provide their beneficiaries with some protection of the assets against threats which might arise from business reversals, financial challenges, and marital problems. Properly designed trusts are popular to provide one's spouse and children with all of the economic benefits of the family's wealth, and even with broad control of the property through serving as trustee, while substantially shielding the property from such threats.
- Where the family wealth includes an ownership interest in a closely-held business, the use of one or more trusts to hold those equity interests can prevent fractionalizing the voting rights, and allow flexibility in selecting the appropriate members of each generation to exercise management control, yet ensure that all of the beneficiaries are treated "equally" as to the economic benefits.
- Where the family includes a "special needs" beneficiary, a properly constructed trust can provide economic benefits in addition to those which may be available through Medicaid or other public support programs, without jeopardizing the beneficiary's eligibility to qualify for such programs.
- Families with "sacred" assets attributable to one spouse's ancestors can use trusts to provide the surviving spouse with the economic benefit of such assets, while ensuring that the ownership can't move outside the appropriate bloodline.

B. Personal Income Tax Changes. ATRA's changes in the income tax system focus primarily on taxpayer's with income above a stated "threshold" level, and the tax

treatment for those who do not exceed that threshold is generally unchanged. One unfortunate fact is that the threshold amounts change depending on the tax question being asked.

Issue	Threshold
taxable income subject to 39.6% top tax bracket and long term capital gains and qualified dividends subject to 20% tax rate	taxable income over $400,000 (single) $450,000 (joint) $11,950 (estates & trusts) (adjusted for inflation)
phase-out of personal exemption and reduction of allowable itemized deductions	adjusted gross income over $250,000 (single) $300,000 (joint) (adjusted for inflation)
3.8% Medicare surtax on net investment income (applicable to lesser of (i) net investment income or (ii) taxable income in excess of threshold)	modified adjusted gross income over $200,000 (single) $250,000 (joint) $11,950 (estates & trusts)
exposure to Alternative Minimum Tax	AMTI greater than $50,600 (single) $78,750 (joint) (adjusted for inflation)

1. Capital Gains and Qualified Dividends. The tax rate on both long-term capital gains and qualified dividends is unchanged for taxpayers having taxable income not greater than the threshold, but increases to 20% for taxpayers with taxable income over the threshold.

2. Medicare Tax on Investment Income. A new 3.8% Medicare tax on "net investment income" arises from The Affordable Healthcare Act rather than ATRA, and is applicable to taxpayers with "modified adjusted gross income" over the threshold (IRC §1411).

(a) The tax is computed on the lesser of (i) the taxpayer's net investment income, or (ii) the amount by which modified adjusted gross income exceeds the threshold. "Modified adjusted gross income" is adjusted gross income plus net income earned abroad which is otherwise excluded from taxable income.

(b) "Net investment income" means

(i) "gross income from interest, dividends, annuities, royalties, and rents, other than such income which is derived in the

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ordinary course of a trade or business" not described in (iii) below, and

(ii) net gain (to the extent taken into account in computing taxable income) attributable to the disposition of property (other than property held in a trade or business not described in (iii) below, and

(iii) other gross income from a trade or business which is a "passive activity with respect to the taxpayer" or is "trading in financial instruments or commodities."

(c) Gain from the sale of an ownership interest in a partnership or S corporation is exempt to the extent that gain from the sale of the underlying assets would have been exempt (trade or business in which the taxpayer is not passive and not in business of trading financial instruments or commodities.) NOTE, this does not exempt gain from the sale of stock in C corporation even if the taxpayer was active in the business.

(d) Does not apply to distributions from qualified retirement plans (pensions, profit sharing, 401(k), etc.) or distributions from IRAs.

(e) Because of the language in (b)(ii) above limiting tax on gains "to the extent taken into account in computing taxable income," the 3.8% tax will not apply to the excluded gain on the sale of a personal residence ($250,000 / $500,000) or to gain which is deferred under a §1031 exchange transaction.

Therefore, the effective top tax rate for long-term capital gains and qualified dividends for taxpayers with income in excess of the threshold will be 23.8% plus any state income tax. For taxpayers at lower income levels, the tax rate on long-term capital gains and qualified dividends will continue to be 15%, or 18.8% if the Medicare tax is applicable.

3. Personal Exemption. The phase-out of personal exemptions (IRC §151) is reinstated for taxpayers with adjusted gross income over the threshold.

4. Itemized Deductions. The reduction in allowable itemized deductions (IRC §68) is reinstated, and will generally reduce a taxpayer's itemized deductions by 3% of the taxpayer's adjusted gross income in excess of the threshold amount. A maximum of 80% of otherwise allowable itemized deductions can be lost in this calculation.

(a) Because the "cut back" is calculated as a percentage of adjusted gross income in excess of the threshold, this does not impose a maximum cap on itemized deductions, and should not be a deterrent to such activities as charitable giving.

(b) Example:

Taxpayer is married and has $500,000 of adjusted gross income ("AGI") in 2013, and $90,000 of the usual itemized deductions. The cut-back will be the lesser of (a) 3% of the portion of AGI in excess of $300,000 ($200,000 x 3% = $6,000), or (b) 80% of the allowable deductions ($72,000). Therefore, the taxpayer's adjusted itemized deductions after the cut-back will be ($90,000 less $6,000) $84,000.

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Now, suppose this same taxpayer makes a 2013 charitable gift of $100,000, increasing her itemized deductions to a new total of $190,000. The cut-back is still 3% of excess AGI, or $6,000, so her adjusted itemized deductions will increase by the full amount of the $100,000 charitable gift, to $184,000. Note that none of the charitable deduction was lost to the cut-back.

5. IRA Distributions to Charity. The ability to make charitable contributions from an IRA of up to $100,000 per year for taxpayers 70½ years of age and older was extended through 2013.

(a) This allows the IRA participant to fund the charitable gift without having to first take the IRA distribution into income, which might prevent her from exceeding the thresholds for exposure to the 39.6% income tax rate, the 20% rate on capital gains, the 3.8% Medicare surtax, or the cut-back on personal exemptions and itemized deductions.

(b) In addition, the IRA distribution to charity is applied against the participant's minimum required distribution from the IRA that year.

6. AMT Exemption. A permanent exemption applicable to the Alternative Minimum Tax (AMT) is set at $50,600 (single) and $78,750 (joint filers), and will adjust for inflation in future years.

7. Bonus Depreciation. The Act provides for a one year extension of the 50% "bonus depreciation" rules for business capital investments.

8. Built-In Gains. The "recapture" period for tax on built-in gain ("BIG") from S corporation conversions will remain at 5 years through 2013 (rather than 10 years).

9. 401(k) Roth Conversion. The Act permits 401(k) plan participants to convert their plan to a Roth plan, under which contributions are taxed going in but withdrawals are tax-free.

10. Employee Payroll Tax. The 2% payroll tax cut for employees is terminated. As a result, the employee portion of the FICA contribution is again 6.2% up to the wage base.

NOTHING was accomplished with regard to spending cuts. The scheduled cuts associated with the "fiscal cliff" were postponed until March 1, 2013. Interestingly, it is said that the current debt ceiling will probably be reached again about that same time, so it appears that we will probably have another crisis in Congress before the taste of this one is entirely forgotten.

II. Other Estate Tax, Gift Tax, Generation Skipping Tax Developments

A. Estate Tax Marital Deduction.

1. Defense of Marriage Act - *Windsor v. United States*, 833 F. Supp. 2d 394 (S.D. N.Y. June 6, 2012), aff'd, 2012 WL 4937310 (2d Cir. Oct. 18, 2012). In this case, the

District Court and the Court of Appeals held that section 3 of the Defense of Marriage Act ("DOMA"), defining "marriage" as between one man and one woman, is unconstitutional. Now due to *Windsor*, the notion that state recognized marriages of same-sex couples will be allowed the same marital deduction (or other federal tax entitlements) as other spouses whose marriages are respected under state law. The Justice Department has announced that it will no longer defend DOMA's constitutionality.

B. Gift Tax Issues.

1. **The Gift Tax Annual Exclusion** has been inflation-adjusted to $14,000. Therefore, any donor may now make qualifying gifts of up to $14,000 per calendar year to each of any number of recipients, which gifts are completely excluded from the gift tax. Spouses electing to "split" such gifts can share their exclusion and allow either spouse give up to $28,000 per calendar year to each recipient.

2. **Annual Exclusion for Gifts of FLP Interests**. In the *Hackl*, *Price*, and *Fisher* decisions, courts determined that a gift of typical interests in a family limited partnership did not qualify for the gift tax annual exclusion because the rights associated with those interests made the benefits to which the donees were entitled too speculative to qualify as a "present interest." In *Estate of Wimmer v. Commissioner*, T.C. Memo 2012-157 , the court found that the partnership produced regular income from its publicly traded securities that was predictable, and the general partner had a fiduciary duty to distribute at least a portion of that income to the donee trusts to enable them to pay their income tax liabilities. As a result, the value of the expected income flow could qualify as a present interest for purposes of the annual exclusion.

(a) It seemed that the court was straining to find a result here, and the facts in this case may be difficult to duplicate.

(b) If an annual exclusion gift is intended, it is probably best practice to give the donee a right, concurrently with the gift, to require the donor to repurchase the partnership interest for cash equal to the appraised value.

3. **Gift of Winning Lottery Ticket**. A lottery winner made a taxable gift upon contributing a winning lottery ticket to a newly formed corporation in which she owned only 49 percent of the stock and other family members owned the rest. *Dickerson v. Commissioner*, T.C. Memo 2012-60. The taxpayer was a waitress at a local Waffle House, and was given a lottery ticket by a long-time customer before the drawing. When her numbers were picked, she wanted to share it with her family. A lawyer created an S corporation in which 51% of the stock was given to other family members, and she conveyed the lottery ticket to that corporation. At the same time, several of her co-workers sued her alleging that there was an agreement among the waitresses that the waitresses would share whatever lottery winning occurred from tickets that they obtained and, therefore, the other waitresses were entitled to share in 80 percent of the proceeds. The court determined that the value of the gift made to her family was 51% of the present value of the lottery proceeds, but that there should be a discount applicable to the 80% being claimed by the other waitresses. The court determined that the appropriate discount was 65%, plus another 2% for anticipated litigation expenses.

4. <u>Avoiding Valuation Surprises</u> - *<u>Wandry v. Commissioner</u>*, T.C. Memo 2012-88, nonacq., 2012-46 I.R.B. This is the latest in a series of valuation cases responding to the IRS's objection to "defined value clauses." When a taxpayer wishes to make a gift or sale of property for which the fair market value may be subject to opinion, he rarely wants to expose himself to a surprise assessment of gift tax if the IRS chooses to disagree with his valuation. In order to avoid that risk, taxpayers have employed several different strategies.

(a) A "savings clause" generally declares that Donor transfers property to recipient, but declares that if the result as finally determined for gift tax purposes is that the transfer constitutes a taxable gift, then the transfer is void and the property is to be returned to Donor. Such "condition subsequent" clauses are void under the decision in *Commissioner v. Proctor*, 142 F.2d 824 (4th Cir. 1944).

(b) A "formula allocation" clause declares that Donor transfers property, under a formula in which a portion is given to intended recipient, and the balance is given to some exempt transferee (such as a charity.) The portion given to the intended recipient, for instance, might be the largest portion which can be transferred without incurring any gift tax. If the valuation is adjusted upward by the IRS, then the portion passing to the intended recipient is decreased and the portion passing to charity (tax free) is increased. Such formula allocations have been uniformly upheld by the courts in *McCord v. Commissioner*, 461 F.3d 614 (5th Cir. 2006); *Estate of Christensen v. Commissioner*, 586 F.3d 1021 (8th Cir. 2009); *Estate of Petter v. Commissioner*, T.C. Memo 2009-280; and *Hendrix v. Commissioner*, (T.C. Memo 2011-133).

(c) A "formula transfer" clause defines the amount or portion of property transferred by Donor in the forumla, and the remainder is retained by the Donor. This approach is approved for the first time in the *Wandry* decision.

In *Wandry*, the taxpayer made certain gifts of interests in the family business to children, which gifts were defined in terms of "a sufficient number of my Units as a Member of [Company] so that the fair market value of such Units for federal gift tax purposes shall be as follows: Child 1 - $261,000, Child 2 - $261,000, Child 3 - $261,000," etc. The taxpayer further declared, "Although the number of Units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted Units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date. Furthermore, the value determined is subject to challenge by the Internal Revenue Service ("IRS"). I intend to have a good-faith determination of such value made by an independent third-party professional experienced in such matters and appropriately qualified to make such a determination. Nevertheless, *if, after the number of gifted Units is determined based on such valuation, the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted Units shall be adjusted accordingly so that the value of the number of Units gifted to each person equals the amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law*." [emphasis added]

The IRS argued that this approach is materially different from the "formula allocation" clauses in *Petter* and the other cases cited above, and violates the "condition subsequent" prohibition in *Proctor*. The court disagreed and went on to analyze the subject case documents under the *Petter* rationale.

The Tax Court's decision in *Wandry* offers substantial added comfort to taxpayers who wish to make gifts of interests in closely-held businesses, family limited partnership and LLCs, fractional interests in real estate, and similar assets which are difficult to value. Many practitioners feel that it is important that the position on the gift tax return be supported by a qualified independent appraisal, and that such appraisal should be as contemporaneous as possible with the making of the gifts. In *Wandry*, the independent appraisal was not completed until many months later, which might be a point of attack if the IRS sees these facts again. Such a professional appraisal also supports the premise that the taxpayer is acting in good faith and deserves the support of the court, and does not simply amount to (using words of the court in *Petter*) “shady dealing” by a “tax-dodging donor.”

C. Life Insurance Issues. Life insurance is often an important part of an estate plan, and its generally favorable tax treatment adds to its value. It is possible, however, to incur challenges to those tax benefits in certain transactions are implemented improperly.

1. Termination of Split-Dollar Plan. *Neff v. Commissioner*, T.C. Memo 2012-244. The employer maintained an "old" collateral assignment equity split-dollar insurance plan, under which Neff and Jensen owned the policies and, upon termination, the employer was entitled to receive the lesser of the total premiums which it had paid or the net cash surrender value of the policies. After adoption of the revised split-dollar regulations in 2002, the split-dollar arrangement was terminated in 2003. The employer had paid a total of $842,345 in premiums on the policies, the total cash surrender value of the policies was $877,432. The employer was actually paid $131,969, that being the present value of the reimbursement rights upon the deaths of Neff and Jensen. Neff and Jensen retained ownership of the policies, and did not report any taxable income on the theory that they had simply purchased the employer's right to reimbursement for its fair market value. The court disagreed and found that Neff and Jensen had essentially received compensation for the economic benefit of the unreimbursed $710,376 in premiums that the employer had paid to the life insurance companies and that they no longer were encumbered by the reimbursement rights of the employer.

2. Income on Surrender of Policy. *Feder v. Commissioner*, T.C. Memo 2012-10; *Brown v. Commissioner*, 693 F.3d 765 (7th Cir. Sept. 11, 2012), aff’g T.C. Memo 2011-83. Upon termination of a life insurance policy with policy loans in excess of the investment in the contract, the policy loan is discharged from the cash surrender values of the policy which are owned by the policyholder. This is not "discharge of indebtedness income" under §108, because the insurance company will not "lend" more than the policy owner's cash value. It is equivalent to the insurance company's paying the cash surrender value to the policy owner, and the policy owner's using it to repay the loan. Therefore, it is taxable under the rules of §72(e)(5) in which the taxable income is the amount of the

amount received (including that used to repay the policy loans) less the cost basis in the policy. This issue has been decided similarly in *McGowen v. Commissioner* (108 AFTR 2d 2011-6063 (10th Cir. 2011), aff'g T.C. Memo 2009-285); *Brown v. Commissioner* (T.C. Memo 2011-83); *Sanders v. Commissioner* (T.C. Memo 2010-279); and *Ledger v. Commissioner* (T.C. Memo 2011-183.) These cases all appear to flow from the taxpayers' attempts to recognize the taxable income under §108, where there is an "insolvency" exemption which may avoid or limit the tax liability.

3. Trust-to-Trust Sale of Policy. PLR 201235006. An irrevocable life insurance trust ("ILIT") is a popular vehicle to own life insurance policies for the benefit of one's family, while preventing the death proceeds from being subject to estate tax at death. In some cases, however, the passage of time creates new family circumstances in which it would be desirable to change that trust, even though it is "irrevocable." In this case, an ILIT (referred to here as "Trust A") had previously been created, which owned a policy on the life of Taxpayer. Taxpayer created a new ILIT (Trust B) for the benefit of Taxpayer's daughter and granddaughter. Taxpayer retained a nonfiduciary power to reacquire the assets of Trust B in exchange for assets of equivalent value, which causes Trust B to be treated as a "grantor trust" for all income tax purposes. The trustee of Trust B wants to buy the life insurance policy from Trust A for its gift tax value. Taxpayer proposes to transfer cash to Trust B in an amount sufficient to buy the policy from Trust A for its gift tax value. The trustee of Trust B will then be named the owner and beneficiary of the policy. The Service ruled as follows:

(a) Trust B will be a "grantor trust" for income tax purposes, in which the Taxpayer and Trust B are treated as the "same taxpayer."

(b) The sale to Trust B (deemed to be the "same taxpayer" as the insured) is not a transfer for value for income tax purposes, because it is deemed to be a transfer to the insured himself, so that the death proceeds will not lose the exemption from income tax.

(c) Taxpayer's power of substitution and the grantor trust status will not cause the death benefits under the policy to be included in Taxpayer's gross estate for federal estate tax purposes.

While care must be taken to ensure compliance with the analysis in this ruling, this provides a clear path to transferring an insurance policy to a new trust, which addresses current family needs, without jeopardizing the income tax or estate tax benefits of the arrangement.

III. Other Income Tax Developments

A. Mortgage Interest Deduction. IRC §163 Taxpayers are generally allowed to deduct for federal income tax purposes "qualified residence interest" on loans up to $1 million of acquisition indebtedness plus $100,000 of home equity indebtedness. In two separate cases, the question was presented whether those limitations apply on a "per residence" or "per taxpayer" basis.

1. *Sophy v. Commissioner*, 138 T.C. No. 8 (2012). The taxpayers (an unmarried couple) owned their home as joint tenants with right of survivorship, and filed separate tax returns as single individuals. The total indebtedness on the home was about $2.7 million, and the taxpayers argued that each of them could deduct qualified mortgage interest on a $1.1 million portion of the debt. The IRS and the Tax Court determined that they must share the $1.1 million limitation. The court reasoned that the statute uses the phrase "any indebtedness with respect to any qualified residence" in defining both acquisition indebtedness and home equity indebtedness. That phrasing suggests that the limitations should be applied per residence.

2. *Bronstein v. Commissioner*, 138 T.C. No. 21 (May 17, 2012). The taxpayers were a married couple who elected to file separate tax returns. Wife purchased the home and acquired the mortgage in her own name, and paid all costs of the mortgage with her own funds. Wife claimed the interest deduction on the entire mortgage, applying the $1 million cap. The IRS and the Tax Court disagreed, because the specific language of the statute (§163(h)(3)(B)(ii)) clearly limits a married taxpayer filing separately to a deduction for interest paid on the first $500,000 of acquisition indebtedness, and (§163(h)(3)(C)(ii)) the first $50,000 of home equity indebtedness.

B. Charitable Gift to Disregarded Entity. Notice 2012-52, 2012-35 I.R.B. 317. It is not uncommon for a charitable organization to create a separate wholly-owned subsidiary (typically an LLC) in order to segregate possible liability from an activity or event to be carried on in the LLC. For example, Charity may create an LLC to produce and operate a golf tournament. In this Notice, the IRS has clarified that a donor making a gift to such an LLC will be entitled to a charitable deduction, the charity will be treated as the recipient of the gift for the purposes of meeting the substantiation and disclosure requirements, and the charity is encouraged to disclose in the gift receipt or other statement that the LLC is wholly owned by the charity and treated as a disregarded entity.

C. Distribution of Trust Income to Charity. PLR 201225004 IRC §642(c)(1) allows a trust an unlimited income tax deduction for amounts distributed to charity "pursuant to the terms of the governing instrument." In this case, the trust instrument did not direct specific distributions to charity, but gave the beneficiary a limited power of appointment which was exercisable in favor of qualified charities. The IRS ruled that distributions made pursuant to the beneficiary's direction under the limited power of appointment would be made "pursuant to the terms of the governing instrument" and thus meet the statutory requirements for such amount to be deducted on the trust's income tax return as a charitable deduction.

IV. Non-Tax Developments

A. Biology v. The Law. Estate planning is usually focused on the preservation of the family wealth for descendants. Problems are arising where the reach of reproductive biology has far exceeded the scope of who are "descendants" under the law. Further, more

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people are gravitating to the use of multi-generational "dynasty" trusts to provide added protection to the family's assets, and perhaps to save taxes, so the documents being put in place may be required to deal with these problems for many decades in the future. Consider some of the possibilities:

- A couple can not conceive, so they secure an egg or sperm from a donor, a fertilized egg is implanted in the wife who carries it to term and delivers a child in the usual way. If it was not the wife's egg, is the baby a grandchild of wife's parents? If it was not the husband's sperm, is the baby the grandchild of husband's parents?
- Suppose the fertilized egg is implanted in a surrogate who carries to term and delivers a child. Is that baby the grandchild of the surrogate's parents?
- Suppose husband dies following cancer treatment, and after his death wife is inseminated with sperm which husband banked during their marriage. Is the baby the child of husband, and/or the grandchild of husband's parents?

The law is struggling with such scenarios where no direction is provided in the governing instrument, but it is likely to be many years before a consistent answer is provided. For now, the general rule is that a baby born to a woman following artificial insemination is presumed to be her child even if there is none of her biological material involved; and if she is married, the baby is presumed to be the child of her husband unless he can prove that he did not consent to the insemination. (See Uniform Parentage Act §705). With regard to posthumously conceived children using the banked sperm of a deceased father, two cases have held that the sperm donor was the legal, genetic, and biological father of children born to his surviving widow 18 and 24 months after his death - at least for purposes of entitlement to social security benefits.

B. Asset Protection. The recent economic condition has resulted in a greater number of cases involving a creditor's attempt to reach trust assets held for the benefit of a debtor.

1. Protection from IRS Collection. *United States v. Evseroff*, 2012-1 USTC ¶50,328 (E.D.N.Y. 2012). Taxpayer participated in several tax shelter arrangements between 1978 and 1982, and in 1992 received a deficiency notice from the IRS for over $700,000. While challenging the tax deficiency, the taxpayer engaged in some estate planning in which he transferred assets to an irrevocable trust for his children, including his residence in which he continued to reside. The court concluded that the assets of the trust could be reached under the fraudulent conveyance law, because after the transfer he was unable to satisfy his known obligations. In addition, because he continued to reside in the home without paying rent, the court found that the trust was simply the taxpayer's nominee.

2. Protection of Assets from Divorce Claims. *Tannen v. Tannen*, 3 A.3d 1229 (N.J. Sup. Ct. 2010), aff'd per curiam, 31 A.3d 621 (N.J. 2011). The trust was created by the wife's parents for her benefit, and included typical spendthrift protection language to protect the trust assets from claims of third parties. Wife and her husband engaged in the usual financial battles incident to divorce. For purposes of determining alimony claims, the court considered the support available to the wife from this trust. Note, the court did not determine that the trust assets were marital property which would be subject to equitable division. Such trusts continue to be a popular vehicle to provide children with all of the economic benefits of property transferred by gift, inheritance, or intra-family sale, while providing substantial protection from claims which might arise in the context of marital, business, or financial problems.

3. Protection of Trust Assets under Georgia Law. The Georgia Trust Code, which was completely revised in 2010, includes two changes which may make Georgia an unattractive jurisdiction in which to try to protect assets held in a trust.

First, the 2010 Code includes approval of spendthrift protection language to restrict the rights of a beneficiary's creditors in trying to reach the assets held in trust for the beneficiary. O.C.G.A. §53-12-80. However, Georgia is one of the few states which makes an exception for claims of creditors where the claim arises from a tort judgment. Torts include such legal actions as negligence claims and professional malpractice claims. Therefore, if one wishes to protect family assets from claims which might be asserted against a beneficiary who is a practicing professional, a director of a company, or in any other position in which they may be subject to claims based on alleged malpractice or other negligence, then one may wish to consider creating the trust in a state other than Georgia.

Second, with no discussion or explanation, the Georgia Legislature has subjected the assets held in one's Revocable Living Trust to an obligation for payment of all debts and claims which may be asserted against one's estate. While there has never been much law on this subject, traditionally the Georgia courts have not allowed creditors of the decedent's estate to pursue collection against the assets held in the deceased debtor's living trust. This presents a problem especially for those whose estates are more likely to have creditor problems, such as (a) owners of closely held businesses who have provided a personal guaranty for business debt, (b) anyone involved in protracted litigation who might die before it is finally resolved, and (c) physicians and other professionals for whom the incidents of malpractice suits is greater following death.