THE LAW OFFICES
OF
Louis P. Lepore

1110 South Avenue
Staten Island, NY 10314
Tel: 347-273-1385
Fax: 347-273-1484

THE PLANNER

THE MARCH 2011 EDITION: VOLUME II ISSUE 7

A monthly newsletter for Accounting, and Financial Professionals with a focusing on Estate Planning, Elder Law, and Special Needs Persons.

The Planner is a newsletter to inform and educate Accounting and Financial Professionals of the ever changing areas of estate taxes, and elder law to better service their clients.

From: Louis Lepore

Louis Lepore is an attorney admitted to practice law in the states of New York, New Jersey, and Florida. He has dedicated his practice of law to providing quality legal representation and personal attention to all of his clients on estate planning and elder law issues.

TABLE OF CONTENTS

7 Tips for Helping Families with Special Needs

This month's issue of The Planner examines the unique planning requirements of families with children, grandchildren or other family members (such as parents) with special needs. There are numerous misconceptions in this area that can result in costly mistakes when planning for special needs beneficiaries. Understanding the pitfalls associated with special needs planning is a must for all of us who assist families who have loved ones with special needs.

Tip #1: Avoid disinheriting the special needs beneficiary. Many disabled persons receive Supplemental Security Income ("SSI"), Medicaid or other government benefits to provide food, shelter and/or medical care. The loved ones of the special needs beneficiaries may have been advised to disinherit them - beneficiaries who need their help most - to protect those beneficiaries' public benefits. But these benefits rarely provide more than basic needs. And this solution (which normally involves leaving the inheritance to another sibling) does not allow loved ones to help their special needs beneficiaries after they themselves become incapacitated or die. The best solution is for loved ones to create a special needs trust to hold the inheritance of a special needs beneficiary.

Planning Note: It is unnecessary and in fact poor planning to disinherit special needs beneficiaries. Loved ones with special needs beneficiaries should consider a special needs trust to protect public benefits and care for those beneficiaries during their own incapacity or after their death.

Tip #2: Procrastinating can be costly for a special needs beneficiary. None of us know when we may die or become incapacitated. It is important for loved ones with a special needs beneficiary to plan early, just as they should for other dependents such as minor children. However, unlike most other beneficiaries, special needs beneficiaries may

never be able to compensate for a failure to plan. Minor beneficiaries without special needs can obtain more resources as they reach adulthood and can work to meet essential needs, but special needs beneficiaries may never have that ability.

Planning Note: Parents, grandparents, or any other loved ones of a special needs beneficiary face unique planning challenges when it comes to that child. This is one area where families simply cannot afford to wait to plan.

Tip #3: Don't ignore the special needs of the beneficiary when planning. Planning that is not designed with the beneficiary's special needs in mind will probably render the beneficiary ineligible for essential government benefits. A properly designed special needs trust promotes the comfort and happiness of the special needs beneficiary without sacrificing eligibility.

Special needs can include medical and dental expenses, annual independent check-ups, necessary or desirable equipment (for example, a specially equipped van), training and education, insurance, transportation and essential dietary needs. If the trust is sufficiently funded, the disabled person can also receive spending money, electronic equipment & appliances, computers, vacations, movies, payments for a companion, and other self-esteem and quality-of-life enhancing expenses: the sorts of things families now provide to their child or other special needs beneficiary. fails to receive the benefits that the parents or others provided when they were alive.

Another frequent mistake occurs when the special needs trust includes a pay-back provision rather than allowing the remainder of the trust to go to others upon the death of the special needs beneficiary. While these pay-back provisions are necessary in certain types of special needs trusts, an attorney who knows the difference can save family members and loved ones hundreds of thousand of dollars, or more.

Planning Note: A special needs trust should be customized to meet the unique circumstances of the special needs beneficiary and should be drafted by a lawyer familiar with this area of the law.

Tip #5: Use great caution in choosing a trustee. Loved ones or family members can manage the special needs trust while alive and well if they are willing to serve and have proper training and guidance. Once the family member or loved one is no longer able to serve as trustee, they can choose who will serve according to the instructions provided in the trust. Families or loved ones who create a special needs trust may choose a team of advisors and/or a professional trustee to serve. Whomever they choose, it is crucial that the trustee is financially savvy, well-organized and of course, ethical.

Planning Note: The trustee of a special needs trust should understand the trustmaker's objectives and be qualified to invest the assets in a manner most likely to meet those objectives.

Tip #6: Invite others to contribute to the special needs trust. A key benefit of creating a special needs trust now is that the beneficiary's extended family and friends can make gifts to the trust or remember the trust as they plan their own estates. For example, these family members and friends can name the special needs trust as the beneficiary of their own assets in their revocable trust or will, and they can also name the special needs trust as a beneficiary of life insurance or retirement benefits. Unfortunately, many extended family members may not be aware that a trust exists, or that they could contribute money to the special needs trust now or as an inheritance later.

Planning Note: Creating a special needs trust now allows others, such as grandparents and other family members, to name the trust as the beneficiary of their own estate planning.

Tip #7: Relying on siblings to use their money for the benefit of a special needs child can have serious adverse effects. Many family members rely on their other children to provide, from their own inheritances, for a child with special needs. This can be a temporary solution for a brief time, such as during a brief incapacity if their other children are financially secure and have money to spare. However, it is not a solution that will protect a child with special needs after the death of the parents or when siblings have their own expenses and financial priorities.

What if an inheriting sibling divorces or loses a lawsuit? His or her spouse (or a judgment creditor) may be entitled to half of it and will likely not care for the child with special needs. What if the sibling dies or becomes incapacitated

while the child with special needs is still living? Will his or her heirs care for the child with special needs as thoughtfully and completely as the sibling did?

Siblings of a child with special needs often feel a great responsibility for that child and have felt so all of their lives. When parents provide clear instructions and a helpful structure, they lessen the burden on all their children and support a loving and involved relationship among them.

Planning Note: Relying on siblings to care for a special needs beneficiary is a short-term solution at best. A special needs trust ensures that the assets are available for the special needs beneficiary (and not the former spouse or judgment creditor of a sibling) in a manner intended by the parents.

Bonus Tip: Stay up to date on changes in the law. The rules applicable to special needs trusts are constantly changing. Most recently, the Social Security Administration changed the rules on special needs trusts that are created using assets of the special needs beneficiary (called a "self-settled special needs trust"). The new Social Security regulations require certain provisions to be present in any self-settled trust drafted after January 1, 2000 that allows for early termination of the trust (termination prior to the death of the special needs beneficiary).

If these required provisions are not in the trust, the special needs beneficiary could lose SSI or Medicaid eligibility. The new regulations go into effect October 1, 2010. Please contact us if you have questions about the new regulations or if you would like more information on the changes.

Planning Note: A recent change in the Social Security Administration regulations governing self-settled special needs trusts could render some existing trusts invalid for SSI or Medicaid purposes. It is imperative to stay up to date on changes in the rules that apply to special needs trusts to ensure the benefits received by a special needs beneficiary are not jeopardized as a result of changes in the law.

Conclusion: Planning for a special needs beneficiary requires particular care and knowledge on the part of the planning team. A properly drafted and funded special needs trust can ensure that special needs beneficiary has sufficient assets to care for him or her, in a manner intended by loved ones, throughout the beneficiary's lifetime. Please contact us if you have any questions or would like to discuss any information in this newsletter further.

Planning Opportunities Under 2010 Tax Act

In the last issue of The Wealth Counselor, we took a first look at the changes in the federal estate, gift and generation-skipping taxes as found in the 2010 Tax Act (formally named the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

The 2010 Tax Act extends to December 31, 2012, the income, estate, gift and generation-skipping tax provisions enacted during the administration of President George W. Bush ("EGTRRA"). For the two-year period beginning January 1, 2011, it reinstates the unified federal estate, gift and GST exemption, sets the exemption at $5 million and sets the tax rate on amounts over the exemption at 35%. It also includes, for those 2 years only, a new "portability" provision that allows the executor of the first spouse to die to transfer any unused gift and estate tax exemption to the surviving spouse. It also changes the estate tax law and provides an option for estates of those who died in 2010. And it presents more uncertainty, as this tax "relief" is only for two years and has built-in uncertainties. Plus, just like under EGTRRA, if Congress does not act before the sunset date, the EGTRRA provisions and the 2010 Tax Act provisions will disappear and the tax laws will revert to how they read in 2000.

These changes, and the uncertainty that comes with them, present some unique planning opportunities and challenges for estate planning professionals. In this issue, we will examine some of them

Opting Out of the Estate Tax for Those Who Died in 2010: The 2010 Tax Act made a retroactive reinstatement of the estate tax, setting the exemption for 2010 at $5,000,000 (without portability), and repealed the carryover basis provisions that were unique to 2010. However, the executor for a decedent who died in 2010 may elect to opt out of the new law and therefore have the modified basis rules (unlimited step-down for loss assets and a limited step-up

of $1.3 million ($60,000 for non-resident non-citizens), plus $3 million for assets passing to a surviving spouse) and no estate tax apply.

The executor of a 2010 decedent has until September 19, 2011, to make the election; file estate tax, GSTT and basis allocation returns; pay estate tax; and make disclaimers.

Planning Tip: In almost all cases for 2010 estates that are less than $5 million (the applicable exclusion amount), the election to opt out should not be made. These estates almost always come out better with the $5 million exemption and fair market value step-up in basis. For larger estates, an evaluation will need to be made before assuming the carryover basis would be better.

Considerations for Determining Whether to Opt Out of the Estate Tax for 2010 Decedents:

- Calculating how much would be paid in estate taxes now vs. capital gain tax on the future sale of assets.
- Anticipating dates of sales of assets. If no sale is expected, there is no need to take the election.
- Considering ability to allocate basis adjustments up to the fair market value at the date of death for assets that will likely be sold in the near future.
- Anticipating future capital gains rates and ordinary income rates for ordinary income property.
- Weighing present value of anticipated income tax costs against current estate tax amount.
- Considering how to resolve potential disputes among heirs regarding the $1.3 million limited basis increase. (The surviving spouse will always get the $3 million step-up.)

Example #1: John dies in 2010, leaving $6.3 million estate with $5 million basis to Child.

Estate tax calculation: $6.3 million estate minus $5 million exemption equals $1.3 million taxable estate. Tax rate of 35% produces $455,000 due in estate taxes.

Income tax calculation: $6.3 million in assets minus $5 million basis equals $1.3 million gain. Apply the $1.3 Special Basis Allocation so Child's basis is now $6.3 million, generating complete step-up in basis.

Result: Carryover basis option is the easy choice.

Example #2: John dies in 2010, leaving $8 million estate with basis of $2 million to wife Olivia.

Estate tax calculation: $8 million estate using unlimited marital deduction equals zero taxable estate with zero estate tax. Complete step-up in basis provided under Section 1014. If left in QTIP, can make partial QTIP election to preserve $5 million exemption amount or possible disclaimer to remainder beneficiaries. On Olivia's death (assuming no asset growth and permanency of new tax law), estate tax is 35% of $3 million = $1,050,000.

Income tax calculation: $8 million in assets minus $2 million basis equals $6 million built-in gain. Only $4.3 million of basis adjustment available (special basis allocation of $1.3 million plus spousal basis adjustment of $3 million). Capital gains tax = 15% x $1.7 million = $255,000.

Result: Adjusted basis of $6.3 million vs. $8 million basis with estate tax. Also leaves $1.7 million subject to capital gains in the future.

Planning Tip: Estate taxes are payable currently. Capital gains taxes are only payable when the assets are sold. If they are not sold and the beneficiary dies with the assets in his estate, they would receive a full step-up in basis at his death (assuming current law).

Generation-Skipping Transfer Tax Planning: With the extension of EGTRRA, concerns for the GSTT in 2010 have been resolved. The GSTT exemption for 2010 was $5 million and the tax rate for 2010 only was 0%. While the sunset provision of EGTRRA still exists, the $5 million GSTT exemption and 35% tax rate will allow for some interesting planning opportunities over the next two years.

The goal of GSTT planning is to transfer wealth to generations beyond one's children tax free. The 2010 Tax Act opens a window of opportunity that makes this easier. When the GST exemption was $1 million, it was a very limited resource; sometimes it could be difficult to decide how to best use and leverage it over multi-generational gifting trusts, ILITs and IDGTs. With the larger GST exemption, choices are less limited and easier to implement. The $5 million exemption makes it easy to

create much larger dynasty trusts that will be exempt from estate taxes and provide asset protection for as long as the applicable Rule against Perpetuities will allow.

Planning Tip: Design multi-generational trusts so that gifts to the trust are completed gifts to avoid inclusion in the grantor's estate. Avoid estate tax in the beneficiaries' estates by making sure that no beneficiary has a general power of appointment. Benefit multiple generations by using cascading trusts. Allocate sufficient GSTT exemption to always have an inclusion ratio of zero.

Planning Tip: In the past, even if you could find enough Crummey beneficiaries to cover the annual premium for a multi-generational ILIT for gift tax purposes, allocating GSTT exemption to cover all of the premium payments was often the sticking point. A $5 million GSTT and gift tax exemption until December 31, 2012, makes trust funding for future premiums and single pay policies attractive options.

Planning Tip: Clients must be proactive with these dynasty trusts. Automatic GSTT allocation cannot be trusted because of the sunset provision. File a gift tax return to ensure and document the GSTT exemption allocation.

Portability of Deceased Spouse's Unused Exclusion Amount (DSUEA): For those dying in 2011 and 2012, the executor of the estate may transfer any unused estate tax exemption to the surviving spouse. It must be done on a timely filed Form 706 Estate Tax Return. Only the most recent deceased spouse's unused exemption may be used by the surviving spouse so a remarriage jeopardizes the original DSUEA. The DSUEA can be used to exempt gifts by the surviving spouse. There is no portability of the GST exemption and, unless Congress acts, DSUEA not used by December 31, 2012, will be lost.

Example: Jack and Jill are married and neither has made any taxable gifts. Jack dies in 2011 and leaves his entire $3 million estate to a bypass trust. His executor elects to permit Jill to use Jack's unused exclusion amount. Jill now has an applicable exclusion amount of $7 million (her $5 million basic exclusion amount plus $2 million DSUEA from her deceased husband, Jack).

Chapter 2: After Jack died, Jill married Jerry. Jerry died in 2012, and left his entire $4 million estate to his children. The $2 million DSUEA Jill previously received from Jack is wiped out by Jerry's subsequent death. If Jerry's executor makes the election to permit Jill to use Jerry's DSUEA, her applicable exclusion amount is $6 million ($1 million less than she had prior to Jerry dying). If Jerry's executor does not make such an election Jill's applicable exclusion amount is just her own $5 million ($2 million less than she had prior to Jerry dying).

Alternate Ending: Same scenario, but Jill dies in 2012 instead of Jerry. Jill left her entire $3 million estate to a bypass trust; therefore her DSUEA is $4 million (Jill's $7 million applicable exclusion amount minus the $3 million left to the bypass trust). If Jill's executor makes the election, Jerry can use Jill's unused exclusion amount, so his applicable exclusion amount will be $9 million (Jerry's basic exclusion amount of $5 million plus Jill's $4 million DSUEA).

Concerns: Open questions under the 2010 Tax Act are, what exemption is applied to gifts by one holding a DSUEA, and how? Is the DSUEA used first or one's own exemption? If there is an election, how will it be made?

Planning Tip: With the new portability option, clients may think they do not need to include a bypass trust in their planning. That is dangerous thinking. As professionals, we need to communicate that there are still many benefits and reasons to use a bypass trust, including:

- Asset protection;
- Certainty and control for the first spouse to die over how his/her share of the assets will be managed and distributed;
- Protection of the assets in event of a remarriage;
- Maximize and preserve GST exemption (portability only applies to gift/estate tax exemption);
- State estate taxes (portability is a federal provision and is not applicable to state laws);

- Income shifting down to other beneficiaries who might be in a lower tax bracket;
- A DSUEA is not indexed for inflation; and
- Portability may end and any unused DSUEA lost on December 31, 2012.

Bottom line: Bypass trust planning is proven, advantageous and reliable. DSUEA reliance is none of those plus compels filing an estate tax return even for non-taxable estates.

Charitable Donations from IRAs: Previously, those who wanted to make a contribution from their IRA to charity would have a check issued to them, make the donation to the charity, then pay income tax on the distribution and take the charitable deduction. For 2011, those over age 70 1/2 may make tax-free distributions up to $100,000 ($200,000 if married) directly from their IRA accounts to charity and counted against their Required Minimum Distribution (RMD) for 2011. (No tax paid, no deduction.) Donations made in January 2011 may also be counted as having been made in 2010 and applied to any unmet 2010 RMD obligation.

Dealing with the Uncertainty: Over the next two years, we can expect that the estate tax will remain a political football; the House Democrats have already complained that the estate tax exemption is too generous, President Obama suggested increased taxes for the wealthy in his State of the Union Address, and major tax reform hearings are already planned for 2011 in both the House Ways and Means and the Senate Finance Committees. Possibilities during this time include:

- Present legislation, with the $5 million exemption and 35% tax rate, will be made permanent.
- EGTRRA's 2009 regime, with a $3.5 million exemption and 45% tax rate, will be extended permanently. (This has already been proposed by the House Democrats.)
- Congress may do nothing, in which case 2013 will bring a $1 million exemption and 55% top tax rate. (This should be incorporated as a possibility in planning.)
- There could even be "permanent" repeal of the estate, gift, and GST taxes. With the $5 million exemptions and 35% tax rate, little revenue will be coming in from them, making them less painful to eliminate.

Practical planning applications can include:

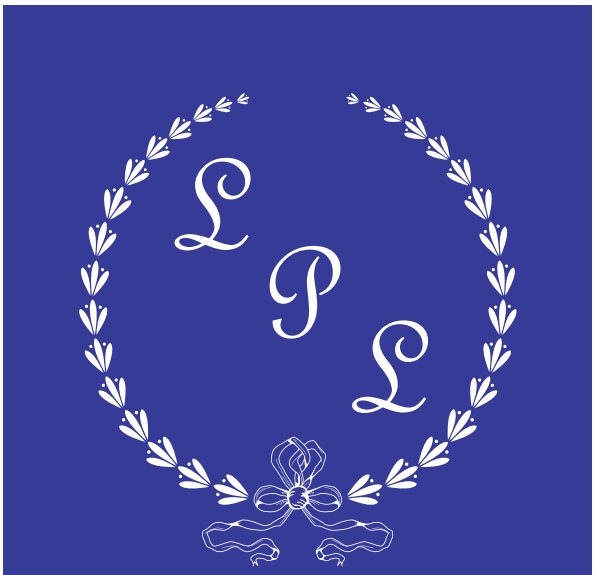
- Increased use of trust protectors with amendment power to deal with tax changes coupled with a grantor's statement of intent (to minimize estate taxes, maximize benefits to spouse, etc.);
- Decanting provisions, coordinate drafting with state law; Authorizing the trust protector power to grant a beneficiary a general power of appointment (with higher exemption amounts, it may be advantageous to include property in beneficiary's estate to receive step-up in basis);
- Including formula testamentary general powers of appointment;
- In decoupled states, funding the marital share with sufficient property to reduce both federal estate tax and state death taxes to lower amount (can divide marital share into two QTIPs);
- Having a contingency plan built in for possible repeal: all to a QTIP, all to a bypass trust, percentage division into marital and non-marital shares, etc.

Implementing a Client Maintenance Program: Estate plans that are being written today may not be used for another 15-20 years. Most of them will need revisions during that time. Rather than terminating the relationship when the documents are delivered and signed, a number of practitioners have implemented client maintenance programs for continuing the engagement. This increases the likelihood that the client's estate planning objectives will be achieved, provides an opportunity to review funding and beneficiary designations, and decreases the advisors' liability risk by strengthening the relationship with the client.

Conclusion: With the gift, estate and GSTT exemption so high for the next two years, there is a concern that the public will think there is no need to do any estate planning. All estate planning professionals can re-educate the public about the non-tax reasons to do estate planning, which are ultimately more important than the tax reasons, and the risks of deferring planning. Remember that we are more than planning technicians or document drafters or sellers of product. Most of us are in this field because we want to

help clients use, preserve, protect and transfer their wealth responsibly, in order to provide for themselves and their children, and to perpetuate their goals, dreams and values for future generations.

To comply with the U.S. Treasury regulations, we must inform you that (i) any U.S. federal tax advice contained in this newsletter was not intended or written to be used, and cannot be used, by any person for the purpose of avoiding U.S. federal tax penalties that may be imposed on such person and (ii) each taxpayer should seek advice from their tax advisor based on the taxpayer's particular circumstances.



THE LAW OFFICES OF Louis P. Lepore

1110 South Avenue
Staten Island, NY 10314

Tel: 347-273-1385
Fax: 347-273-1484