Estate Planning and Tax Update

Estate Planning Council of Greater Miami
10th Annual Estate Planning Symposium

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Agenda

1. Federal Legislative Update
2. Florida Legislative Update
3. Florida Community Property Trust Act
4. Recent Tax Court Gift Tax Case: *Smaldino v. Comm'r*
5. Estate Planning with Cryptocurrency
6. Recent Chief Counsel Advice on GRATs: CCA 202152018
7. Corporate Transparency Act
8. Intrafamily Promissory Notes
9. Planning Ideas and SLATs

BUILD BACK BETTER ACT

Build Back Better Act
House Proposal dated September 15, 2021

- Reduced the transfer tax exemptions to $5 million dollars indexed for inflation effective January 1, 2022.
- Irrevocable grantor trusts are included in the grantor's estate.
- The proposed act also would have restricted the use of valuation discounts for non-business type assets held in a business.
- Impact of Proposal: Many practitioners became concerned that the reduction of the gift tax exemption would be enacted and accelerated planning to complete gifts before the end of the 2021 year.
- Warning: Some of this rushed planning may raise concerns highlighted by the Smaldino case.

BUILD BACK BETTER ACT

Revised Build Back Better Act Proposal dated October 28, 2021

- The revised House Proposal of the Build Back Better Act did not include a reduction in the transfer tax exemption, any limitations on grantor trusts or discount planning.
- The new tax proposals would generally not impact estate tax planning other than on the income tax side.
- A surtax of 5% on estates and non-grantor trusts was introduced on income of $200,000 or above and an additional 3% (combined 8%) on income above $500,000.
- Impact of Proposal: As a result of this proposal, some clients placed estate planning on hold or delayed funding one SLAT in 2021 with the plan to fund the second SLAT in 2022. As a result of this proposal, it seemed less likely that a reduction of the transfer tax exemptions would occur before 2026.
- Planning Pointer: When should the second SLAT be funded in 2022?

STATUS OF BUILD BACK BETTER ACT

- The Build Back Better Act did not pass and it is questionable whether new tax legislation will be enacted in 2022.
- Senator Manchin continues to generally oppose the Build Back Better Act.
- While Senator Manchin generally opposes the spending under the Build Back Better Act, he has expressed a desire to modify the Trump tax act.
- While Senator Manchin may favor tax reform, it is questionable whether Senator Sinema wants to make the same changes.
- Generally, most clients will plan as though changes to tax legislation will not be enacted in 2022.

WHAT TO DO WITH PLANNING CREATED IN 2021 (OR 2020)

- File gift tax returns (do not elect gift splitting on SLATs) and report all gifts and possibly sales transactions.
- If a second SLAT was deferred until 2022, consider the timing of this transaction to reduce the risk of the reciprocal trust doctrine (or place the second SLAT on hold).
- Review the planning documentation to determine whether any clean-up work is necessary. See the Smaldino case.
- Consider swapping assets held by trusts created during this time period, or sales of discounted assets to these trusts.

CHANGES TO EXCLUSION AMOUNTS

- As a result of indexing for inflation, the gift, estate, and GST exclusion amounts have increased to $12,060,000 effective January 1, 2022.
  - A single person now has $360,000 of additional lifetime exclusion, and a married couple has $720,000.
- The annual exclusion for gift tax purposes has increased to $16,000 effective January 1, 2022.
- As noted above, on January 1, 2026, transfer tax exemptions are still scheduled to reduce to $5,000,000 indexed for inflation.

FLORIDA LEGISLATIVE UPDATE

Compensation of Attorney for Personal Representative F.S. 733.6171

- If an attorney intends to charge a fee based on the statutory compensation schedule to represent the estate, then certain disclosures are required.
- Disclosures to Charge Statutory Fee:
  - There is not a mandatory statutory fee for an estate administration.
  - The attorney fee is not required to be based on the size of the estate, and the presumed reasonable fee under this section may not be appropriate in all administrations.
  - The fee is subject to negotiation between the personal representative and attorney.
  - The personal representative is not required to select the attorney who prepared the Will, rather the selection is made at the discretion of the personal representative.
  - The personal representative shall be provided with a summary of ordinary and extraordinary services rendered at the conclusion of the representation.
- The attorney must obtain the personal representatives timely signature acknowledging the disclosures.
- If the attorney does not make these disclosures, the attorney may not be paid for legal services without prior court approval or the written consent of all interested persons.
- The effective date of this law is October 1, 2021.

FLORIDA LEGISLATIVE UPDATE
Compensation of Attorney for Trustee of a Revocable Trust
736.1007

- If an attorney intends to charge a fee to represent the trustee during the initial administration of the trust which is based on the statutory schedule, then certain disclosures are required.
- The required disclosures are basically the same as the disclosures required for an estate administration, and such disclosures must be timely acknowledged in writing by the trustee.
- If the attorney does not make the required disclosures, the attorney may not be paid for legal services without prior court approval or the written consent of the trustee and all qualified beneficiaries.
- The effective date of this law is October 1, 2021.

FLORIDA LEGISLATIVE UPDATE

DISINHERITANCE FOR ELDER ABUSE UNDER WILL F.S. 732.8031

- Florida law now provides that a beneficiary of a will is disinherited if convicted in any state or foreign jurisdiction of abuse, neglect, exploitation, or aggravated manslaughter of an elderly person or disabled adult.
- In such cases, the abuser will be deemed to have predeceased the decedent.
- A final judgment or conviction for abuse, neglect, exploitation, or aggravated manslaughter of the decedent creates a rebuttable presumption that this section applies.
- Even in the absence of a qualifying conviction, the abuser may still be disinherited if the greater weight of evidence shows that the abuser caused or contributed to the decedent's passing.
- It is possible to override this statue and allow the abuser to inherit by clear and convincing evidence. Establishing such intent requires a valid written instrument, sworn to and witnessed by two persons, which expresses a specific intent to allow the convicted person to retain "his" or "her" inheritance, survivorship rights, or any other rights removed by this law.

FLORIDA LEGISLATIVE UPDATE
DISINHERITANCE FOR ELDER ABUSE
KEY DEFINITIONS

- Elderly Person. A person 60 years of age or older who is suffering from infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care is impaired.
- Disabled Adult. A person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities for daily living.

FLORIDA LEGISLATIVE UPDATE

DISINHERITANCE FOR ELDER ABUSE UNDER TRUST F.S. 736.1104

- A beneficiary of a trust who was convicted in any state or foreign jurisdiction of abuse, neglect, exploitation, or aggravated manslaughter of an elderly person or disabled adult for conduct against a settlor shall be deemed to have predeceased the victim.
- A final judgement of conviction of abuse creates a rebuttable presumption that this section applies.
- A court may also determine that the greater weight of evidence shows that the abuser caused or contributed to the person's death, and thereby triggered the disinheritance.
- Notwithstanding this law, an abuser can inherit if established in a separate writing by clear and convincing evidence.

Florida Community Property Trust Act

Community Property Crash Course

- Community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington (and also Wisconsin through the Uniform Marital Property Act).
- Opt-in community property states through community property trusts: Alaska, South Dakota, Tennessee, Kentucky, and now Florida.
- Community property thrust: property acquired by spouses during marriage should be construed as one total "community" of property.
- Each community property state has its own separate rules.

Florida Community Property Trust Act

Community Property Crash Course

- All property acquired during marriage is owned one-half by each spouse regardless of titling.
- TITLE DOES NOT AFFECT CHARACTERIZATION
- General exceptions:
  - Gifts and inheritances
  - Proceeds from sale of separate property
  - Property acquired with separate property
  - Property acquired before marriage
- Gifts of community property are considered made one-half by each spouse, so can't gift-split community property.
- *Personal property*: separate or community property classification is determined when asset is acquired under law of state in which couple is domiciled.
- *Real Property*: separate or community property classification is determined under law of state where real property is located.

Florida Community Property Trust Act

Community Property Crash Course

Property	Classification
Automobile purchased during marriage and titled in husband's name	Community property (owned one-half by husband and one-half by wife)
Income earned by wife during marriage and deposited into bank account in wife's name	Community property (owned one-half by husband and one-half by wife)
Gift of cash received by wife from her parents during marriage	Separate property of wife
Vacation home acquired by husband before marriage	Separate property of husband

Florida Community Property Trust Act

Community Property Crash Course

- Typically no spousal protection statutes (e.g., elective share).
- IRC § 1014(b)(6) treats surviving spouse's one-half interest in community property as acquired from the deceased spouse, resulting in a "double basis step-up."
- Irony: "Section 1014(b)(6) was designed to equalize the incidence of taxation between community-property and common-law states." *Willging v. United States*, 474 F.2d 12 (9th Cir. 1973).

Florida Community Property Trust Act

Analysis of Statute

- Fla. Stat. §§ 736.1501 through 736.1512.
- Effective July 1, 2021.
- Property owned by a community property trust, including the appreciation of and income from the property, is deemed to be community property during the marriage of the settlor spouses.
- Requirements for community property trust
  - Magic language: declares trust is a community property trust and includes disclaimer in Fla. Stat. 736.1503(4) regarding, generally, creditors' rights and rights on divorce or death
  - At least one Qualified Trustee (i.e., Florida resident or Florida corporate trustee)
  - Signed by both settlor spouses

Florida Community Property Trust Act

Analysis of Statute

- Can be revocable or irrevocable, but in all events, after death of first spouse, surviving spouse may amend the trust with respect to disposition of his or her one-half share of the community property.
- Settlor spouses are deemed to be the only qualified beneficiaries.
- After first death, surviving spouse is deemed to be the only qualified beneficiary as to his or her one-half share of the community property.
- Neither spouse needs to be domiciled in Florida.
- Creditors' rights:
  - Debts of one spouse may be satisfied by that spouse's one-half share of community property in trust
  - Debts of both spouses may be satisfied by entire community property in trust

Florida Community Property Trust Act

Analysis of Statute

- On first death:
  - Surviving spouse's one-half share of the community property not subject to the disposition by decedent spouse.
  - Decedent spouse's one-half share of the community property may be disposed of by decedent spouse.
  - Decedent spouse's one-half share of the community property is not included in the elective estate.
- On divorce:
  - Community property trust terminates and one-half of trust assets are distributed to each spouse.
- Homestead:
  - Property transferred to a community property trust may continue to qualify as homestead property.
  - Property acquired by a community property trust may qualify as homestead property if it would qualify as settlor spouses' homestead if owned individually.

Florida Community Property Trust Act

Analysis of Statute

- Fla. Stat. 736.1511: "For purposes of the application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26 U.S.C. s. 1014(b)(6), as of January 1, 2021, a community property trust is considered a trust established under the community property laws of the state."
- Will it work?

Smaldino v. Commissioner
TC Memo 2021-127

- In 2012, Mr. Smaldino transferred 10 rental properties into an LLC initially owned 100% by his revocable trust.
- On April 15, 2013, Mr. Smaldino also transferred 8% of the Class B membership interests in the LLC to a Dynasty Trust for the benefit of his children and grandchildren.
- On April 14, 2013, Mr. Smaldino transferred 41% of the Class B membership interests in the LLC to his wife. On April 15, 2013, Mrs. Smaldino transferred that same 41% interest to the Dynasty Trust for the benefit of Mr. Smaldino's descendants from a prior marriage.
- Mr. Smaldino reported the 8% gift on his 2013 gift tax return and made no election to split gifts. Mrs. Smaldino reported the gift of the 41% interest on her gift tax return. The IRS determined that Mr. Smaldino actually made the entire gift of the 49% interest to the trust (8% plus the wife's 41%), which resulted in a gift tax deficiency of $1,154,000.
- Issue: Did Mr. Smaldino indirectly give the entire 49% interest in the Company to the Dynasty Trust?

Smaldino v. Commissioner Effective Dating

- Mr. Smaldino executed a document entitled "ASSIGNMENT SEPARATE FROM CERTIFICATE" to transfer to Mrs. Smaldino $5,249,118.42 of the LLC. The documents indicated an April 14, 2013 effective date, but not the actual date it was signed.
- Mrs. Smaldino executed an "ASSIGNMENT SEPARATE FROM CERTIFICATE" equal to the same amount of LLC interest trust she received from Mr. Smaldino to transfer such interest to the Dynasty Trust. The document states it is effective April 15, 2013, but does not indicate the signature date.
- Mr. Smaldino executed an "ASSIGNMENT SEPARATE FROM CERTIFICATE" transferred $1,031,881.58 of the LLC to the Dynasty Trust. This document indicated an effective date of April 15, 2013, but no evidence of when it was actually signed.
- The court expressed concerns with effective dating without specifying the date that the documents were actually signed.

Smaldino v. Commissioner
Issues with Operating Agreement of the LLC and Income Tax Returns

- The operating agreement for the LLC was never amended to reflect that Mrs. Smaldino became an owner of the entity.
- The LLC agreement was amended to admit the Dynasty Trust as a member, but did not indicate the date that it was signed.
- Mrs. Smaldino was never listed as a partner of the LLC on the Company's 1065 tax return for 2013.

Smaldino v. Commissioner
Issues with Appraisal

- Mr. Smaldino hired an appraiser to value the 49% Class B units in the Company.
- The appraisal was dated August 22, 2013, but appraised the interest as of April 15, 2013 indicating an overall value of $6,281,000.
- The court determined that the assignment documents effectuating the gifts were not signed until on or after August 22, 2013.
- Given the backdating of the documents, this is further evidence that Mrs. Smaldino never actually controlled her membership interest.

Smaldino v. Commissioner
Indirect Gift and Substance Over Form

- The court held that the transfer by Mr. Smaldino to Mrs. Smaldino and then by Mrs. Smaldino to the Dynasty Trust was an indirect gift by Mr. Smaldino.
- The court concluded that the LLC units were never effectively transferred to Mrs. Smaldino and therefore Mr. Smaldino made the entire gift of the 49% interest to the Dynasty Trust.
- The Court focused on the wife's testimony that she made a commitment in advance to make these gifts and that the documentation supporting the transaction was suspect.

Smaldino v. Commissioner

How Long Should the Wife Own the Interest?

- In Smaldino, the wife ostensibly owned the LLC interest for one day. Even aside from the questionable planning, one day is probably not a sufficient amount of time to own an interest and establish an independent step.
- Many practitioners suggest that the "interim" owner should hold the property for a minimum of 30 days. Obviously, the longer the period of time that the property is held the better.
- Implications for Rushed Planning in 2020 and 2021: In some cases, clients may have separated joint property into separate property for one of the spouses to fund a SLAT. To the extent that the entire interest was transferred to one spouse and then conveyed back to a SLAT for the benefit of one of the joint owners, there could be an issue regarding whether the doner spouse held the previously owned joint property for a sufficient period of time.

Smaldino v. Commissioner
Gift Tax Returns

- The Smaldinos did not elect to gift split on their 2013 gift tax returns.
- Note that gift splitting could have been an option considering that Mrs. Smaldino was not a beneficiary of the trust (unlike a SLAT).
- It is possible that gift splitting could have pushed Mr. Smaldino above his available lifetime gift exemption. In addition, some clients are concerned that the spouse may not sign the gift tax returns without further incentive.
- Mr. Smaldino did not report his gift to Mrs. Smaldino on the gift tax return. Note that taxpayers are generally not required to report gifts to a spouse under Section 6019(2) of the Code.
- In some cases, it may be helpful to report the interim gift to the spouse to run the statue of limitations and disclose the entire transaction.

Cryptocurrency and Estate Planning

Overview

- Total market cap of all cryptocurrencies is over $1.6 trillion as of January 31, 2022.
- Billions of dollars in institutional investments
- Multiple cryptocurrency ETFs.
- Bitcoin is official currency in El Salvador.
- NYC and Miami mayors taking paychecks in bitcoin.
- Crypto exchange crypto.com buys naming rights to LA Lakers arena (formerly the Staples Center) for $700 million.
- Crypto exchange FTX buys naming rights to Miami Heat arena (formerly American Airlines arena) for $135 million.
- Store of value vs. utility vs. speculation vs. FOMO investing

Cryptocurrency and Estate Planning

How do my Fiduciaries Access my Crypto?
Florida Fiduciary Access to Digital Assets Act

- The Florida Fiduciary Access to Digital Assets Act (Fla. Stat. § § 740.001-740.11) grants fiduciaries (PR, trustee, agent under POA, guardian) access to digital assets (includes cryptocurrency).
- Twofold purpose:
  - Provides fiduciaries the legal authority to manage digital assets and electronic communications as they would tangible assets and accounts
  - Provides custodians of digital assets and electronic communications the legal authority needed to interact with the fiduciaries of their users while honoring the user's privacy expectations for his or her personal communications

Cryptocurrency and Estate Planning

How do my Fiduciaries Access my Crypto?
Florida Fiduciary Access to Digital Assets Act

- PR and trustee generally allowed to access digital assets unless prohibited by user, governing document (will or trust agreement), or court.
- Agent must be specifically authorized under the power of attorney.
- Fiduciary provides a written request, copy of the will, trust, or power of attorney for access.

Cryptocurrency and Estate Planning

Crypto Storage

- Applies to cryptocurrency held by a third-party service like an online crypto exchange.
- Third-party storage:
  - Cryptocurrency exchange (Coinbase Pro, Binance)
  - Internet-based digital wallet (Coinbase, MetaMask)
- Offline storage:
  - Requires transferring the private key associated with the cryptocurrency
  - Cold storage (USB drive with the private key)
  - Paper wallet (piece of paper with the private key)
- Private key is usually a string of alphanumeric characters or a QR code that represents ownership of the cryptocurrency.

Cryptocurrency and Estate Planning

Estate Planning and Administration

- Have the conversation:
  - Determine if client owns or intends to acquire crypto
  - Include crypto in the estate planning questionnaire/client intake forms
- Advise clients to create a digital inventory and keep records of where crypto is stored.
- Ask if client wants to grant agent under POA the power to access crypto.
- Educate fiduciaries in the administration process of how to find and identify crypto.
  - Review browser history, phone apps, bank statements, computer files, tax returns

Cryptocurrency and Estate Planning

Drafting Concerns

- Consider a directed trust (see the new Florida Uniform Directed Trust Act) if client has substantial cryptocurrency holdings and named trustee isn't equipped to manage.
- Make clear crypto isn't included in a tangible personal property bequest:

"(*excluding cash, bullion, cryptocurrency wallets of any kind, such as cryptocurrency paper wallets, hardware wallets, desktop wallets, or mobile telephone wallets*)"

- Make clear in fiduciary powers in will:

"access, manage, control, delete and terminate any such asset or account, including, but not limited to, e-mail, telephone, bank, brokerage, investment, insurance, social networking, utilities, non-fungible tokens, cryptocurrency private keys, cryptocurrency exchange accounts, and other accounts"

- Make clear in fiduciary powers in trust:

"access, handle, distribute and dispose of digital assets; to access, use and take control of digital devices, including but not limited to desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, non-fungible tokens ("NFTs"), cryptocurrency wallets of any kind, including cryptocurrency paper wallets, hardware wallets, desktop wallets, or mobile telephone wallets, and any similar digital device; to access, modify, delete, control, copy, transfer and otherwise deal with digital assets, including but not limited to e-mails, documents, images, audio, video, software licenses, domain registrations, NFTs, cryptocurrency private keys, and similar digital files, regardless of the ownership of the physical device upon which the digital asset is stored; to access, modify, delete, control, copy, transfer and otherwise deal with digital accounts, including but not limited to e-mail accounts, social network accounts, social media accounts, file sharing accounts, financial management accounts, NFTs, cryptocurrency exchange accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, and other online accounts"

Cryptocurrency and Estate Planning

Crypto and Tax Reporting

- IRS Notice 2014-21:
  - Cryptocurrency is property for federal tax purposes.
  - General tax principles applicable to property apply to crypto transactions– e.g., a service provider's receipt of crypto for services rendered is ordinary income and sale or exchange of crypto is taxable to the extent FMV exceeds basis).
- IRS mailed 10,000 "educational" letters in July 2019 to taxpayers explaining filing obligations and how to correct past errors.
- Revenue Ruling 2019-24 and FAQ on IRS website in October 2019.
- Infrastructure Investment and Jobs Act of 2021 signed into law on November 15, 2021 will require cryptocurrency exchanges **starting in 2023** to perform intermediary Form 1099 reporting for crpyto transactions.

CCA 202152018

- Donor received offers to purchase minority interests in his company.
- Three days later, donor created a two year GRAT funded with shares of the company.
- The value of the shares was determined based on an appraisal dated approximately seven months before the date of the contribution to the GRAT.
- The merger transaction was completed some time after the funding of the GRAT.

CCA 202152018
Findings Under the CCA

- The appraisal should have considered the pending merger because it was relevant to the question of value.
- The seven month old appraisal was not reflective of value based on its lack of timelines and failure to consider the likely merger.
- The retained annuity failed to meet the requirements of a qualified annuity under Section 2702 of the Code because the taxpayer intentionally based the annuity on an undervalued appraisal.
- Result of CCA. The Chief Counsel's office takes the position that the entire transfer to the GRAT was a gift without any offset for the retained interest under Section 2702.

CCA 202152018
Reliance on Atkinson Case

- In Atkinson v. Commisioner, the donor created a CRAT, but no payments were actually made from the CRAT to the donor for two years. The Tax Court held that the CRAT was not valid under Section 664(d)(1) of Code because it did make the required annuity payments. As a result, the charitable deduction was denied in that case.
- This facts of this CCA are analogous to the operational failure of the Atkinson because the trustee paid an annuity amount that had no relation to the value transferred to the GRAT. Rather, the annuity was based on an outdated and misleading appraisal of the Company.

CCA 202152018
Planning Pointers and Takeaways

- Avoid relying on old appraisals in gifting transactions.
- An appraisal that does not consider contemporaneous offers may cause a GRAT to fail from inception.
- If it is questionable whether an appraisal is actually reflecting very likely subsequent sales and/or transactions, it may be advisable to avoid contributing these assets to GRATs.

Corporate Transparency Act

Effective Dates

- Required entity reporting to identify beneficial owner information ("BOI").
- "Access to BOI reported under the CTA would significantly enhance the U.S. Government and law enforcement's ability to protect the U.S. financial system from illicit use. It would also impede malign actors from abusing legal entities to conceal proceeds from criminal acts that undermine U.S. national security, such as corruption, human smuggling, drug and arms trafficking, and terrorist financing."
- Signed into law on January 1, 2021, but reporting not required until final regulations are published.
- FINCEN published proposed regulations on December 8, 2021, and public comments are due by February 7, 2022.
- Statute: 31 USC § 5336
- Proposed regs: Prop. 31 CFR 1010.380

Corporate Transparency Act

Overview

- Who must file?
  - A **reporting company** must submit a report to FINCEN identifying (i) all of its **beneficial owners** and (ii) the **company applicant.**
- What must be filed?
  - Report must include the following with respect to each beneficial owner and the company applicant:
    - Full legal name
    - Date of birth
    - Current residential address (or business address of the company applicant if merely a corporate or formation agent)
    - Identifying number from an acceptable identification document (e.g., passport, driver's license, or another state-issued ID) and a scanned image of the ID

Corporate Transparency Act

Overview

- When to file?
  - *New reporting companies* formed after the effective date of the final regs must file within 14 days of filing formation documents with secretary of state
  - *Existing reporting companies* must file within 2 years of the effective date of the final regs under the statute (or 1 year under the proposed regulations).
  - Reporting companies must update any changes to BOI submitted in prior reports within 1 year of change under the statute (or 30 days under the proposed regulations).
- What if you don't file?
  - Penalties for *willfully* providing false information, failing to report, or failing to update a report after a beneficial owner change.
  - Civil penalty of up to $500 for each day a violation continues, up to $10,000
  - Imprisonment for up to 2 years for criminal violations.
  - Penalties are imposed on the person who files the report, to persons in control of a reporting company, the reporting company, or any other entity.

Corporate Transparency Act

Definitions

- **Beneficial owner** is an individual who meets at least one of the following:
  - Exercises **substantial control** over the reporting company
  - **Owns or controls** at least 25% of the reporting company
- **Company applicant** is a person who files the formation or registration document or who directs the filing of such document.
- **Reporting company:**
  - *Domestic* corporation, LLC, or other entity formed by the filing of a document with a secretary of state or equivalent
  - *Foreign* corporation, LLC, or other entity formed registered to do business in the U.S. by the filing of a document with a secretary of state or equivalent
- Exempt entities include banks, securities brokers/dealers, venture capital fund advisers, insurance companies, accounting firms, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies.

Corporate Transparency Act

Control and Ownership Tests

- *Substantial Control Test*: An individual has **substantial control** over a reporting company if he or she:
  - Serves as a senior officer,
  - Has authority over the appointment or removal of any senior officers or a majority of the board of directors, OR
  - Has control over direction or, or substantial influence over, important matters
- *25% Ownership Test*:
  - 25% determined by aggregating directly, indirectly, jointly, through control of an ownership interest owned by another individual, or through a trust or similar arrangement.
  - Examples of indirect control:
    - Control over an intermediary entity that exercises substantial control over a reporting company
    - Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees, through any other contract, arrangement, understanding, relationship or otherwise

Intrafamily Loans

- Intrafamily loans are subject to close scrutiny.
- There is a presumption a transfer between family members is a gift, which may be rebutted by a showing the transferor had a real expectation of repayment and an intention to enforce the debt.
- Loan vs. gift Factors
  - (1) a promissory note or other evidence of indebtedness exists
  - (2) interest was charged
  - (3) there was security or collateral,
  - (4) there was a fixed maturity date,
  - (5) a demand for repayment was made,
  - (6) actual repayment was made,
  - (7) the transferee had the ability to repay,
  - (8) records maintained by the transferor and/or the transferee reflect the transaction as a loan, and
  - (9) the manner in which the transaction was reported for Federal tax purposes is consistent with a loan.

Estate of Bolles v. Comm'r
TC Memo 2020-71

- Mother made advances/loans to son between 1985 and 2007.
- Son stopped making payments in 1988.
- Mother executed revocable trust in 1989 excluding son as beneficiary.
- Despite Mother recording advances as loans and tracking interest, Court ruled the advances made after 1989 were gifts because:
  - No loan agreements or attempts to force payment
  - Lack of security
  - Critical factor: Mother lost the expectation of repayment in 1989 when she executed trust excluding son as a beneficiary. From the point forward, the advances lost their characterization as loans and became gifts.

Estate of Moore v. Comm'r

TCM 2020-40

- Loans from Mr. Moore to his children were recharacterized as gifts because:
  - No fixed payment schedule
  - No payments were ever made
  - Drafting attorney told children they did not need to make payments
  - No demands for payment
  - Children didn't have resources to repay the loans
  - No security
  - Mr. Moore's written estate planning goal for his children to "receive" $500,000
- Loan from the FLP to Mr. Moore was recharacterized as a distribution because no promissory note existed, no interest charged or paid, no security, no maturity, no payments or demand.

Planning Idea to Use the Higher Estate Tax Exemption Before It Sunsets

- SLATs remain a popular technique among clients to "lock in" the higher estate and GST tax exemptions before they sunset.
- The reciprocal trust doctrine could apply if two SLATs are similar.
- The filing of a gift tax return does not run the statute of limitations on the reciprocal trust doctrine because the reciprocal trust doctrine is an estate inclusion issue under IRC § 2036.
- One of the biggest issues with a SLAT is how to benefit the donor spouse when the donee spouse dies.

How to Minimize the Risk of the Reciprocal Trust Doctrine

- According to *Estate of Herbert Levy*, TC Memo 1983-453, trusts were not reciprocal because one trust included a special power of appointment and the other did not.
- Consider including the following differences when creating SLATs:
  - Execute the trusts on different dates.
  - Utilize different trustees, including independent persons.
  - Vary the distribution standards between the trusts.
  - Vary ages that descendants become trustees among the trusts.
  - Include a power of appointment in one trust but not the other one.
  - Delay the date that the donee-spouse becomes a beneficiary under one of the SLATs.
- What to do with existing reciprocal SLATs?

Reciprocal SLATs - Reformation

- In re Matter of Jill Petrie St. Clair, 464 P. 3d 326.
- Case involved reformation of reciprocal SLATs.
- The case was brought to Kansas Supreme Court to affirm the district courts order reforming lifetime SLATs and to comply with the Bosch case.
- In December 2002, husband created a SLAT for the benefit of wife.
- In September 2003, wife created a SLAT for her husband. Apparently, both SLATs were funded at this time.
- District court reformed the SLAT created by wife to add a 5 by 5 power and a lifetime power of appointment. It was petitioners' position that these two differences were necessary to avoid the reciprocal trust doctrine.
- The Kansas Supreme Court affirmed the district court's reformation order.
- Why not decant?

Grantor Trust Status of a SLAT

- Typically, a SLAT is a grantor trust on the basis of the spouse being a trust beneficiary.
- Once a SLAT is created, it can be difficult to turn off grantor trust status.
- A SLAT continues as a grantor trust even if the donee and donor are divorced.
- Grantor trust status could be turned off on divorce if that event removes the donee spouse as a beneficiary (or a floating spouse).

SLATs and Marital Agreements

- If the donee-spouse remains a beneficiary under the SLAT, consider entering into a marital agreement to address various issues related to it.
- One approach is to treat the SLAT as marital property in case of divorce.
- If the parties only create one SLAT it may be more important to enter into a marital agreement.
- In the case of (non) reciprocal SLATs, a marital agreement may still be important because one SLAT could greatly increase in value and the other could significantly decrease in value.

SLATs and Marital Property - Case

- Dayal v. Lakshmipathy, 2020 – Ohio – 5441 (Ohio Appeals).
- Husband created a SLAT for the benefit of wife in December 2012 and funded it with $4,554,698 in 2012.
- The purpose of the SLAT was to lock in the $5 million exemption before it was potentially reduced to $1 million.
- After 24 years of marriage, wife filed for divorce.
- The Court held that the assets held in the SLAT were not marital property.

SLATs and Gift Splitting

- Generally, married taxpayers cannot elect to split a gift to a SLAT, but they may split gifts in that year for non-SLAT transfers.
- Gift splitting may be possible if the donee-spouse interest is negligible.
- It may be possible to gift split a SLAT if the donee-spouse has significant other resources, distributions to such spouse are limited to an ascertainable standard, and the SLAT requires consideration of the donee-spouse's other assets.

Estate of Warne v. Comm'r

TCM 2021-17

Facts

- Mrs. Warne died owning (through her family trust):
  - Majority interests in four real estate LLCs and
  - 100% of a mobile home park LLC, which Mrs. Warne donated 25% to a family foundation and 75% to the Lutheran Church.
- Main Issue:
  - Whether discounts apply to the split charitable donations of the mobile home park LLC

Estate of Warne v. Comm'r

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Split Charitable Discount?

- Estate: discounts are inappropriate and contrary to public policy of encouraging charitable donations.
- IRS: value of charitable deduction reflects benefit received by donees.
- Tax Court: Whereas the value included in the gross estate equals the (undiscounted) 100% interest, the charitable deduction is based on what is actually received by the charity subject to a valuation discount.
- Estate unsuccessfully attempted to distinguish from *Ahmanson Foundation* because the interests were split in that case between the decedent's son and a charitable organization, whereas here the split was between two charitable organizations.
- Stipulated discounts:
  - 25% interest to the family foundation: 27% discount
  - 75% interest to the church: Stipulated 4% discount
- Reminder of inclusion/deduction mismatch when dividing equity interests.