10th Annual American Heart Association Long Island Trust & Estates Conference

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May 9, 2023

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I. Estate and Gift Tax Rules

A. Federal Transfer Tax Rules

1. For decedents dying and gifts made before 2026 the basic exemption equivalent exclusion amount is increased to $10,000,000 (with inflation adjustments).

2. For 2023, the exclusion amount is $12,920,000 per taxpayer or with proper planning $25,840,000 for a married couple.

3. The GST exemption is increased to the same level as the estate tax exemption equivalent.

4. The annual gift exclusion is $17,000 per donee in 2023. In order for the annual exclusion to apply, the gift must be of a ***"present interest"*** in property. The recipient must be free to use, enjoy and benefit immediately from the property transferred with ***"no strings attached"***.

B. New York State Estate &Gift Tax

1. For individuals dying on or after January 1, 2023 the exemption is $6,580,000.

2. The NYS exemption, however, does not apply to all taxpayers. The exemption is eliminated for all New York decedents whose estates exceed 105% of the New York State exemption amount. This is referred to as the ***"Estate Tax Cliff."***

3. New York State does not have a gift tax. However, the New York gross estate of a resident decedent is increased by the amount of taxable gifts, other than those included in the decedent's federal gross estate, made within three years of the decedent's death.

   a. This provision does not apply to:

      i. Gifts made when the decedent was not a resident of New York State;

      ii. Gifts made before April 1, 2014;

iii. Gifts made after December 31, 2018 but no later than January 15, 2019; or

iv. Gifts of real or tangible personal property having an actual situs outside NYS at the time the gift was made.

II. Basic Estate Planning Techniques

A. Revocable Living Trusts

1. A Revocable Living Trust is a will substitute. It is, generally, established for one of the following purposes:

   a. The avoidance of probate.

   b. Privacy concerns.

   c. To provide someone other than the grantor with the control over the assets in the event that the grantor becomes incapacitated or incompetent.

2. Probate is the process whereby a Last Will and Testament is submitted to a Probate Court (Surrogate's Court in New York) for the Court to determine the validity of the Will. Once the Court determines that the will is valid, it will issue, to the executor and trustee named in the will, the authority to act on behalf of the estate or trust created thereunder, if the will meets the state law requirements.

   a. Assets that pass outside of a will avoid probate. Assets that pass through the operation of law or a contract are not subject to probate. Some examples of non-probate assets are:

      i. Jointly owned property passes to the surviving joint tenant as a matter of law.

      ii. Insurance policies where there is a named beneficiary, other than the insured's estate, pass to the beneficiary as a result of the insurance policy, which is a contract between the insured (or other owner) and the insurance company.

      iii. IRAs, 401(k)s, and other retirement plans where there is a named beneficiary, other than the plan participant pass to the beneficiary as a matter of contract right.

iv. Trusts where the beneficiary is someone other than the grantor pass directly to the beneficiary. As previously set forth, a trust is a contract between the grantor and the trustee for the benefit of the beneficiary.

b. Proponents of Revocable Living Trusts cite the following reasons for using these trusts to avoid probate:

i. Probate is a legal process that requires the use of an attorney. The cost of probate, therefore, may be quite costly. Whereas, on the death of the grantor of a Revocable Living Trust the trustee does not need to go to court in order to distribute the assets or continue to hold the assets, in trust, in accordance with the terms of the trust.

ii. The probate records are public records that can be accessed by anyone. Therefore, anyone that is concerned about their privacy can use a Revocable Living Trust to protect their privacy.

iii. Normally, the grantor of a revocable living trust is also the trustee, during their lifetime. A successor trustee is named in the event that the grantor is unable to serve in that capacity. Therefore, if the grantor becomes incapacitated or incompetent the successor can act without any court action to appoint a guardian or conservator for the grantor.

(a) It should be noted that a Durable Power of Attorney will serve some of the same purposes without the need for a Revocable Living Trust.

iv. If the grantor is desirous of disinheriting a child the use of a Revocable Living Trust may be helpful. When probating a will, anyone who would inherit from the decedent's estate if there was no will must be notified and must receive a copy of the will. That individual can then challenge the will as part of the probate process. On the death of the grantor of a Revocable Living Trust, no such notice is required.

(a) It should be noted that such individual can challenge the Revocable Living Trust, however, it is much more difficult to do than to contest a will in a probate contest.

v. If the grantor owns real property in states other than the state in which they own their principal residence, the real property must be probated in each of those other states. To avoid

multiple probates, the grantor could establish a Revocable Living Trust and transfer the ownership of the real property in the other states. When the grantor dies he will not own real estate in those other states since the real estate is owned by the trust, thereby avoiding probate in each of those states.

c. There are the following concerns regarding the use of Revocable Living Trusts:

i. In order to avoid probate the grantor must transfer title to all of her probate assets to the trust. If the grantor dies with any probate assets in her name, probate will be required as to those assets.

(a) Frequently, when the grantor establishes the trust she is very diligent in making the appropriate transfers. However, as time goes by she us much less diligent and upon death she may have considerable probate assets in her name.

(b) For this reason, a pour-over will is executed at the time that the trust is executed. The purpose of the pour-over will is to take any probate assets in the grantor's name, on her death, and pour them into the trust from the will.

ii. When it comes to avoiding probate, some states are more probate friendly than others. Some states are referred to as ***"hands-on"*** states (i.e. Florida, California). In those states the probate court is involved with all major actions taken by the executor. For example, if the estate desired to sell assets an attorney must make application to the probate court for its blessing. This can be very costly to the estate.

(a) New York State is an example of a ***"hands off"*** state. After the executor is appointed the New York State Surrogate's Court will only be involved if there is a complaint filed against the executor. Unless there is a will contest, the cost of probate in a ***"hands off"*** state may not justify the cost of setting up a Revocable Living Trust and the transferring of all present and future probate assets thereto.

iii. Some proponents of revocable living trusts state that estate taxes can be saved by utilizing those trusts. However, this point is generally made through an inappropriate comparison

of a tax-sensitive Revocable Living Trust with a non-tax-sensitive will.

B. Credit Shelter Trusts

1. If the combined estates of a married couple exceed the credit shelter exemption equivalent amount in effect, there can be an overall tax savings by using the Unified Credit to shelter some part of the first spouse's estate.

2. This can be accomplished by using either a bequest to someone other than the surviving spouse, or a bequest in trust for the benefit of the surviving spouse that does not qualify for the marital deduction.

3. A credit shelter trust is a trust established on the death of the first spouse by transferring assets in an amount equal to the decedent's available exemption amount. The trust can be solely for the benefit of the surviving spouse, or it can provide benefits (in the form of income or principal distributions) to others.

4. Since the enactment of the rules creating portability of the federal estate tax exemption, the use of credit shelter trusts has changed dramatically. Prior to portability the practice was to create a trust in the estate of the first spouse to die in an amount equal to that spouse's entire available federal estate tax exemption. The benefit would be that such amount would be taxed in the first estate (sheltered by the unified credit) and by-pass the estate tax on the second spouse's death.

    a. Portability and the increased federal estate tax exemption have combined to make the decision to utilize a credit shelter trust more complicated. There are many tax and non-tax reasons that must be considered before deciding whether to utilize a credit shelter trust or to allow the assets to pass to the surviving spouse directly.

5. While the federal exemption can be ported to a surviving spouse, presently, the New York State estate tax exemption cannot. As such, using credit shelter trust planning to, at a minimum, take advantage of the available New York State estate tax exemption on the death of the first spouse allows for significant tax savings to a family

C. QTIP Trusts

1. ***§2056*** provides that a bequest to a surviving spouse is deductible from the gross estate. However, to be eligible for the marital deduction, the surviving spouse must receive a ***"nonterminable"*** interest in property.

    a. A terminable interest is one that meets the following requirements:

i. It may lapse, expire, or terminate with the passage of time or the happening or non-happening of a contingency. However, the bequest may be conditional on survival for up to six months.

ii. An interest in the property has also been given to another individual.

iii. Such third party may possess or enjoy any part of the property after the surviving spouse's interest terminates.

b. Property interests meeting these tests, and therefore failing to qualify for the marital deduction, include term interests, life estates, and certain annuities.

c. Based upon the definition of a terminable interest, it would appear that a transfer to a surviving spouse, in trust, will not qualify for the estate tax marital deduction.

2. However, an election exists whereby the personal representative of the estate can convert a terminable interest into property eligible for the marital deduction.

3. For a transfer to be eligible for the election, thus allowing the transfer to qualify as a ***"Qualified Terminable Interest"***, the following requirements must be met:

a. The surviving spouse must be entitled, for life, to all of the income from the entire interest or a specific portion of the entire interest.

b. The income payable to the surviving spouse must be paid annually or at more frequent intervals.

c. No one can have a power to appoint any portion of principal or income to anyone other than the spouse during the spouse's lifetime.

4. A ***QTIP Trust*** is generally designed to meet the definition of a Qualified Terminable Interest, and therefore any property transferred to such a trust will be eligible for the marital deduction.

a. All of the income must be distributable to the surviving spouse for the surviving spouse's life, and during the surviving spouse's life, no other person can receive any income or principal distributions from the trust.

5. The QTIP Trust has a number of special advantages that can be useful in planning estates in which it is desirable to provide for the marital deduction, such as:

    a. Eliminating control by the surviving spouse over the ultimate disposition of property.

    b. Having the power to invade trust principal for spouse's benefit may be given to the trustee or others.

    c. Protecting a financially challenged spouse by providing assistance in making decisions.

6. Other types of trusts can qualify for the marital deduction, including a trust that grants a General Power of Appointment to a surviving spouse, but the QTIP Trust is the most popular form of marital trust.

D. Insurance Trusts

1. In large estates, life insurance can provide a source of liquid funds that are available to support the insured's family during the administration of the estate, and to pay debts and taxes, thus avoiding the forced sale of estate assets. When life insurance is being used to fund for the payment of expenses and estate taxes, there are a number of options as to how to plan with the life insurance.

2. Often, a trust is established which would be the owner of the insurance policy.

    a. The trust would be authorized to buy assets from the decedent's estate or lend money to the estate in order to create the liquidity necessary for the payment of estate taxes. However, the trust should not mandate that the proceeds be used to pay the estate tax. This would cause the proceeds to be included in the estate of the insured.

    b. Some of the factors that should be taken into account to determine that the owner of a life insurance policy should be a trust are:

        i. The number of beneficiaries who would have to share the ownership.

        ii. The age of the beneficiaries.

        iii. The financial condition of the beneficiaries so as to avoid the attachment of the life insurance policy by any potential creditors.

iv. The necessity of providing an income stream during the surviving spouse's life.

3. To fund for the payment of the premiums, the insured merely makes annual transfers to the trust and the Trustee pays the premiums to the insurance company.

   a. This transfer may be covered by the annual gift exclusion, if "***Crummey"*** powers of withdrawal are provided to the beneficiaries. This right of withdrawal is necessary in order to make the annual transfer to the trust a gift of a present interest, eligible for the annual exclusion.

4. If an individual already owns an insurance policy that they want to transfer to an insurance trust, the provisions of ***§2035*** must be understood.

   a. ***§2035***, provides that, if an insured transfers all incidents of ownership in an insurance policy, pays all the premiums, and dies within three years of the transfer, the full pay-on-death proceeds of the policy will be included in the insured's gross estate.

5. Often a married couple is looking to insurance to provide a source of liquid funds to pay for estate taxes. When used in conjunction with a properly planned estate (one in which no estate taxes are due until the death of the survivor), the ultimate beneficiaries (generally the children of the couple) utilize the insurance to pay the estate taxes. Insurance companies offer married couples a special type of policy generally referred to as ***"second to die insurance"*** which insures the joint lives of the spouses under one policy and pays on the death of the second spouse when the estate taxes will be due.

   a. To maximize the benefits of the second-to-die policy, the insurance should not be owned by either of the spouses. As such a Joint Insurance Trust is often used to own the policy and keep the proceeds outside of the taxable estate of either spouse.

E. Grantor Trusts

1. Although a trust is generally a separate taxable entity, the Grantor Trust rules may require that a portion or all of a trust be ignored for income tax purposes. When this occurs, the grantor (or potentially another individual) is deemed to own the trust assets and is required to report all the income from the trust as if the ***"owner"*** earned the income directly.

2. The Grantor Trust rules, contained in ***§671*** - ***§679***, were brought in to prevent many of the income shifting advantages that were previously available for trust transactions. To a large extent they were designed to combat the effect of the ***"Clifford Trust"*** that grew out of the case of ***Helvering v. Clifford*** (**309 US 331 (1940)**).

   a. Despite the tightening of the rules relating to the income taxation of trusts, many taxpayers continue to try to take advantage of trusts while at the same time exerting control over the trust assets.

3. In many respects, the primary issue with regard to the Grantor Trust rules is how much control a person can retain without having the trust income taxed to him.

   a. There is a disparity between the income tax Grantor Trust rules and the estate and gift tax rules, as the control retained may be sufficient to invoke the income tax aspects without causing estate inclusion.

4. The term ***"Grantor"*** is not defined in the Internal Revenue Code or the Regulations. As it is applied, the Grantor is the person who creates and funds a trust and retains powers that causes the income of the trust to be attributed to him.

   a. ***"Grantor"*** not only includes the Settlor of a trust, but often includes the Settlor's spouse and can, in certain circumstances, include an individual who is not the Settlor of the trust.

III. Estate Planning with IRAs

A. RMD Rules After Death of the Participant

1. In General

   a. Prior to SECURE, the determination of the RMD rules following the death of the account owner were based upon the identity of a Designated Beneficiary (if one existed).

      i. A Designated Beneficiary is defined as an individual named as a beneficiary by the plan participant, or a trust named as beneficiary if the trust met the requirements to be considered a ***"see-through trust"***.

   b. SECURE did not change the definition of Designated Beneficiary, but instead changed the payout period applicable to a Designated Beneficiary, and added a category of beneficiaries, known as

"Eligible Designated Beneficiaries," for whom the pre-SECURE rules continue to apply.

2. Distribution Rules

a. Prior to SECURE, accounts either had a Designated Beneficiary or it had no Designated Beneficiary.

i. No Designated Beneficiary

(a) If the plan participant had not reached the RBD prior to death, then the ***"5-year rule"*** applied. In such a circumstance the entire account had to be withdrawn prior to the end of the year that contained the 5th anniversary of the date of the participant's death. During this 5-year period, no annual distributions need be made. The only requirement is that the account be completely distributed by the required date.

(b) If the plan participant had already begun taking required distributions, then the account had to be withdrawn over the plan participant's remaining life expectancy.

ii. Designated Beneficiary

(a) If the IRA had an individual or qualifying trust as a beneficiary, then the beneficiary would be entitled to Required Minimum Distributions over an extended life expectancy. The measuring life expectancy depended on whether the beneficiary was the spouse of the plan participant or a non-spouse.

(b) If a non-spouse beneficiary was named on the account, then the beneficiary would have a requirement to take distributions over the beneficiary's life expectancy.

(c) If the spouse was named as the sole beneficiary of the account, then certain options existed:

(i) The spouse could roll over the decedent's IRA to their own IRA or elect to treat the IRA as their own;

(ii) If the participant had not reached the RBD, the spouse could elect a life expectancy payout,

and defer the commencement of the RMD until the end of the year in which the decedent would have reached the RBD; or

(iii) If the participant had already reached the RBD, the spouse could elect a life expectancy payout over their own life expectancy or the remaining life expectancy of their deceased spouse.

(d) The Designated Beneficiary would have the ability to name a successor beneficiary, and on the death of the Designated Beneficiary, the successor beneficiary could continue the RMD based upon the remaining life expectancy term of the original Designated Beneficiary. The successor beneficiary did not have the ability to modify or extend the minimum distribution term.

b. As a result of SECURE, there are now 3 categories of potential beneficiaries of an IRA.

i. A beneficiary that is not a Designated Beneficiary.

(a) This category includes the participant's estate, a charity or a trust that does not qualify as a see-through trust. SECURE did not change the rules applicable to non-Designated Beneficiaries. If the decedent has not reached RBD then the 5-year will apply, and if the decedent has already begun taking RMDs then the decedent's remaining life expectancy will be the measuring period for the post-death RMDs.

ii. Designated Beneficiaries

(a) Designated Beneficiaries must withdraw the entire account by the last day of the year that includes the 10th anniversary of the date of death.

(b) In effect, this change has eliminated the ability for this class of beneficiaries to "stretch" the IRA payout after death as had been available prior to the enactment of SECURE.

(c) While this is considered the 10-year rule, it actually covers 11 calendar years.

iii. Eligible Designated Beneficiaries.

(a) Eligible Designated Beneficiaries are still entitled to a life expectancy payout, albeit in a potentially modified version. The following individuals qualify as Eligible Designated Beneficiaries:

(i) The spouse of the participant is still entitled to rollover the decedent's account balance as well as be entitled to the same life expectancy payment options that existed pre-SECURE. Upon the death of the spouse the life payout term would cease, and the 10-year rule would apply for any successor beneficiary from the date of the spouse's death.

(ii) A minor child of the participant can utilize a life expectancy payout term for so long as the child is a minor. Once the child reaches majority, the 10-year rule applies.

(A) When SECURE was enacted, there were many questions raised as to what the definition of "minor" child would be, considering that minority is defined differently throughout the country.

(B) The 2022 Proposed Regulations provide clarity by defining the "age of majority" as 21.

(iii) A disabled beneficiary or a chronically ill beneficiary can use their life expectancy to determine the annual required distribution. Upon the death of the disabled or chronically ill beneficiary, any successor beneficiary will be required to withdraw the remaining account balance by the end of the year that includes the 10th anniversary of the original beneficiary's death.

(A) The 2022 Proposed Regulations provide a safe harbor for determining when a beneficiary is disabled. The safe harbor will apply if, by the account owner's death, the Commissioner of Social

Security has determined that the beneficiary is disabled. Disabled or chronically ill beneficiaries must provide proper documentation of their condition by October 31 of the year following the account owner's death

(iv) Any individual who is not more than 10 years younger than the participant is eligible for a life expectancy stretch payout, but, again on that individual's death the 10-year rule will apply.

c. The 10-Year Rule

i. It was originally believed that similar to the 5-year rule, during the 10-year period, no interim distributions would be required, provided that the entire account be withdrawn by the end of the year containing the 10th anniversary of the date of death.

ii. However, in February the IRS issued proposed regulations that included a provision (***Prop. Reg. §1.409(a)(9)-5(d)***) stating that RMDs are required in each year of the 10-year term, if the participant died after the RBD.

(a) This **"at least as rapidly"** rule would thus provide that annual required minimum distributions must be taken (using the beneficiary's life expectancy) with the balance required to be withdrawn no later than the last day of the year that includes the 10th anniversary of the date of death of the plan participant.

(b) The existence of this provision in the Proposed Regulations was unexpected and has caused some confusion, in that taxpayers are unsure as to whether this rule should apply prior to the finalization of the rules.

iii. Responding to this confusion, the IRS issued **Notice 2022-53** to provide some clarification on the applicability of the Proposed Regulation's position on RMDs during the 10-year payout period.

(a) Pursuant to the Notice, Taxpayers who are beneficiaries of a retirement account of a participant who died in 2020 or 2021 (after the RBD) who did not take the annual RMDs, that would have been required

under the Proposed Regulation, in 2021 or 2022 will not be subject to the 50% excise tax penalty for failing to take the RMD.

(b) It should be noted that the Notice does not expressly state that the RMD is no required for 2021 or 2022. It merely provides that the 50% penalty will not be applicable if the RMD is not taken.

(i) Given that the penalty will not be asserted, many are taking the position that the 2021 and 2022 RMDs do not have to be taken and will not be required to be ***"made up"***.

(c) As the Notice only refers to 2021 and 2022 RMDs and contains a statement that the Final Regulations will be applicable no earlier than 2023, the IRS may be close to finalizing the rules.

d. Effect of SECURE on Pre-2020 Deaths.

i. Generally SECURE applies to distributions with respect to individuals who die after December 31, 2019. However, there is language in the code that has an impact on deaths that occurred prior to 2020.

ii. If an individual died prior to 2020 and a Designated Beneficiary has elected a life expectancy payout, upon the death of the Designated Beneficiary the 10-year rule will apply for any successor beneficiary, rather than the successor being allowed to continue the life expectancy payout of the Designated Beneficiary, as had been provided in pre-SECURE rules.

iii. It is unclear, however, as to what the rule is if the secondary beneficiary had also died prior to 2020, how the rule works if there are multiple designated beneficiaries of the account that are taking distributions as a result of a pre-2020 death of the account owner, and how this change would apply to an Accumulation Trust that was in place and taking distributions as a result of a pre-2020 death

B. Trusts as Beneficiary of an IRA

1. Under pre-SECURE rules, two types of trusts could qualify as a ***"see-through trust"***, and thus qualify and be treated as a Designated Beneficiary.

   a. The first, a Conduit Trust, required that all distributions made from the retirement plan to the trust during the lifetime of the conduit beneficiary to be passed out to the trust beneficiary. In a Conduit Trust, the conduit beneficiary is considered the sole beneficiary of the trust and establishes the life expectancy for the required distributions.

   b. With an Accumulation Trust, the trustee can withhold distribution of any retirement plan distributions received in the trust. All of the beneficiaries who could ever receive a distribution are counted as beneficiaries for the purpose of applying the minimum distribution rules, and in order to qualify as a Designated Beneficiary, all of the countable beneficiaries of the trust must be identifiable individuals.

2. Any trust that did not qualify as a see-through trust would not be considered as a Designated Beneficiary and the rules of no Designated Beneficiary would apply.

3. After SECURE, leaving benefits to a Conduit Trust will still be treated, for purposes of the determining which minimum distribution rule should apply, the same as leaving the benefits outright to the individual. As such, the 10-year rule will apply to the distributions to the trust and because the conduit beneficiary must receive all retirement plan distributions received by the trust, the beneficiary will receive the entire account within 10 years of the participant's death. If the conduit beneficiary is an Eligible Designated Beneficiary, the rules applicable to that category of Eligible Designated Beneficiary shall apply.

4. Since all beneficiaries of an Accumulation Trust are considered for the purpose of determine the required distribution, an Accumulation Trust cannot qualify as an Eligible Designated Beneficiary and thus will be subject to the 10-year rule.

   a. An exception to this rule applies to an Accumulation Trust established for the benefit of a disabled or chronically ill individual. A Special Needs Trust for an EDB will allow for the long-term lifetime payout.

   b. If the Accumulation Trust has a non-individual beneficiary (for example having a charity as a remainder beneficiary) then the trust

will not be a see-through trust and will be considered a non-Designated Beneficiary.

5. The 2022 Proposed Regs provide a number of provisions relating to trusts as IRA beneficiaries, hoping that ***"comprehensive and definitive guidance will minimize the need for taxpayers to request private letter rulings."*** The proposed rules make it clear that in the proper circumstances, see-through trusts are still a viable planning tool.

C. Secure 2.0

1. Increase in Age for Required Beginning Date - ***Secure 2.0*** increases the relevant age from 72 to 73 starting on January 1, 2023, and then to age 75 on January 1, 2033.

2. Changes to Catch-Up Contributions - Effective for years beginning after December 31, 2024, individuals that are age 60, 61, 62 and 63 will be allowed to make catch-up contributions in an amount equal to the greater of $10,000 or 50% more than the regular catch-up amount in 2024. However, effective for years beginning after December 31, 2023, catch-up contributions are subject to mandatory Roth tax treatment (and thus made on an ***"after-tax"*** basis) for any employee whose wages are at least $145,000 (indexed for inflation). This Roth requirement does not apply to Simple IRA catch-up contributions. ***Secure 2.0*** also provides that for tax years beginning after December 31, 2023, the annual catch-up limit for IRA contributions will be indexed for inflation.

3. Changes to Penalty Provisions - **Secure 2.0** adds a few new exceptions: The first additional provision allows for penalty-free distributions used for emergency expenses which are unforeseeable or immediate financial needs relating to personal or family emergency expenses. Only one distribution of this type is permissible in a given tax year, and the maximum distribution that will qualify is $1,000. The taxpayer has the option to repay the distribution within 3 years but cannot take another emergency distribution during the 3-year period unless the previous distribution had been repaid. In addition, any taxpayer that self-certifies to having experienced domestic abuse can withdraw the lesser of $10,000 or 50% of the balance of their account) and avoid the penalty. Such taxpayers are given the 3-year period to recontribute the amount withdrawn. Further, effective for distributions made after the enactment of ***Secure 2.0***, no 10% penalty will apply to distributions made to any individual with a terminal illness. Finally, effective 3 years after the date of the enactment of ***Secure 2.0***, taxpayers will be permitted to withdraw $2,500 per year to be used for long-term care insurance, and such distribution will not be subject to the early withdrawal penalty. The provision requires the policy to provide ***"high quality coverage"*** to be eligible for the exception.

4. Failure to take RMD Penalty Change - ***Secure 2.0*** reduces the penalty that a taxpayer will face for not taking the amount of the Required Minimum Distribution from the current level of 50% of the amount that is not properly distributed to 25%. The new law also provides that the penalty will be further reduced to 10% if the failure to take the RMD is corrected in a timely manner.

5. Miscellaneous Provisions –

   a. ***Secure 2.0*** makes a number of changes that will make retirement plans more available to employees, including provisions that expand automatic enrollment, creating Starter 401(k) plans for employers with no other retirement plan and improving coverage for part-time employees. The new law also provides enhanced use of ROTH accounts for Simple IRAs and 401(k)s and a number of other benefits that will be available in the coming years.

   b. For tax years beginning after December 31, 2022, ***Secure 2.0*** changes the credit available for small employers that begin retirement plans. The new rules provide that the credit is now equal to 100% (increased from 50%) of qualified start-up costs for employers with 50 or fewer employees. For employers with 51 to 100 employees the credit remains 50% of the costs. In either event, the maximum credit is $5,000 and is available for the first 3 years of the plan's existence.

   c. ***Secure 2.0*** creates an additional credit for small employers that maintain a retirement plan. The credit is for all or a portion of the employer's contributions for the first 5 years of the plan's existence (including the year of creation). For employers with 50 or fewer employees, the credit is equal to an applicable percentage of the employer's contributions, up to a maximum of $1,000 per employee. The percentage is based on the number of years that the plan has been in place, not how long the employee has participated. In years 1 and 2 the credit is 100% of the employer's contribution and reduces to 75% in year 3, 50% in year 4 and 25% in year 5. Reduced annual percentages are available to employers with between 51 and 100 employees and no credit is available if there are more than 100 employees.

   d. Effective after December 31, 2023, ***Secure 2.0*** allows beneficiaries of 529 accounts to make a direct trustee-to- trustee rollover from the 529 account to the ROTH IRA without tax or penalty. The 529 must have been in existence for more than 15 years and the allowable rollover cannot exceed the amount contributed to the account

(increased by the earnings thereon) more than five years before the rollover. The total rollover cannot exceed $35,000 over the beneficiary's lifetime. Rollovers are subject to the ROTH IRA annual contribution limits, but the AGI limit is waived.

e. ***Secure 2.0*** expands the IRA Qualified Charitable Distribution provision by allowing a one-time, $50,000 distribution to charities through Charitable Gift Annuities, Charitable Remainder Unitrusts, and Charitable Remainder Annuity Trusts. In addition, the pre-existing QCD rules are modified by providing that the $100,000 QCD limit will be indexed for inflation.

IV. Primer on Charitable Trust Planning

A. Charitable Remainder Trusts

1. A Charitable Remainder Trust is an irrevocable trust that pays an income stream to the Settlor (or other non-charitable beneficiaries of Settlor's choosing), with the remainder to be donated to one or more charities.

   a. The income interest can be paid for a term of years, or for the life of the income beneficiary or beneficiaries.

   b. Charitable remainder trusts can be set up during lifetime (inter-vivos) or on death (testamentary)

2. Very often, the charity acts as trustee, managing and investing the property to produce income for the lifetime beneficiaries while preserving the remainder for its charitable purposeTo qualify as a Charitable Remainder Trust a number of technical rules must be adhered to.

   a. The trust instrument must be irrevocable and create a valid trust under state law.

   b. The income interest must meet the requirements so that the trust qualifies as an annuity trust (***Charitable Remainder Annuity Trust*** or ***CRAT***) or a unitrust (***Charitable Remainder Unitrust*** or ***CRUT***).

      i. A CRAT must pay a fixed annual amount to a permissible income beneficiary for life or for a period not to exceed 20 years.

      ii. A CRUT must pay a fixed percentage of the annual value of the trust to a permissible beneficiary for life or for a period not to exceed 20 years.

iii. The annual payout percentage cannot be less than 5%, nor more than 50% of the initial value of the trust, in the case of a CRAT; and not less than 5%, nor more than 50% of the annually revalued principal in the case of a CRUT.

c. The income beneficiary must be named in the trust. The trust can have more that one named income beneficiary.

i. A charitable organization can be an income beneficiary, provided there is at least one non-charitable income beneficiary as well.

ii. The Internal Revenue Code refers to a ***"person"*** as the income beneficiary. ***"Person"*** generally includes an individual, estate, corporation or partnership.

iii. The trust can, in certain instances, pay the income interest to the members of a class of individuals.

d. The remainder beneficiary that will receive a distribution of the corpus of the trust upon the termination of the last income interest must be an organization that qualifies as a charitable organization under ***§170(c)***.

i. The actuarial value of the remainder interest must be at least 10% of the fair market value of the assets transferred to the trust, calculated at the time of the transfer.

ii. It would make good planning sense for the trust to specify a contingent remainder beneficiary in the event that the primary charitable beneficiary does not exist or qualify at the time that the income interests cease.

e. The trust instrument cannot place unreasonable restrictions on the investment of trust assets. The trustee must be able to realize a reasonable amount of income or gain on the investment or disposition of trust assets.

f. A CRAT must require that no additional contributions can be made after the initial funding.

i. If additional contributions are allowed in a CRUT, then the trust document must provide for a mechanism for determining the annual unitrust payment in light of any additional contributions.

g. For both CRATs and CRUTs, no amount other than the annuity or unitrust amount can be paid to the non-charitable beneficiary.

3. There are no specific requirements in ***§664*** regarding the type of property that can be contributed to a CRAT or a CRUT. The utilization of appreciated property is often favored as the transfer to the CRAT or CRUT does not cause the recognition of gain.

B. Charitable Lead Trusts

1. A Charitable Lead Trust is an irrevocable trust which pays the lead or income interest to a charitable beneficiary for a period of years, with the remainder interest being paid to a non-charitable beneficiary or reverting to the grantor of the trust.

2. Similar to the remainder trusts, the income interest in a Charitable Lead Trust must be in the form of an annuity (CLAT) or a unitrust (CLUT).

3. To be a qualified Charitable Lead Trust, the trust must:

   a. have at least 1 charitable income beneficiary (the income beneficiary can be chosen by the Trustee if the Settlor grants the Trustee the power to select the beneficiary);

   b. have at least 1 non-charitable remainder beneficiary; and

   c. provide for the income to be paid to the charitable beneficiary for a term of years, the life of one or more individuals, or the life of a measuring life plus a term of years.

4. During the term of the charitable income interest, no amounts can be paid from the trust for a non-charitable purpose.

5. Additional contributions can be made to a lead trust set up as a unitrust (CLUT), but not to a lead trust established as an annuity trust (CLAT).

6. With regard to the income interest to be paid:

   a. In a CLAT, the annuity must be fixed as a dollar amount or percentage when the trust is set up, however, the annuity can be increased by 20% each year.

   b. Unlike with a CRUT, there is no minimum percentage payout in a CLUT.

C. Tax Consequences

1. Charitable Remainder Trusts

   a. The grantor of a remainder trust is eligible for an income tax charitable contribution deduction equal to the present value of the remainder interest going to the charity.

      i. The present value of the remainder interest is calculated by taking the FMV of the property and reducing it by the present value of the income interest (calculated using the IRS tables and the ***§7520*** rate).

      ii. The Regulations provide an ***"adjusted payout rate"*** to be used to calculate the present value of the remainder interest in a CRUT.

      iii. The amount of the charitable deduction will be determined based upon the character of the asset to the grantor.

   b. The value of the remainder interest is eligible for the unlimited estate or gift tax charitable deduction.

   c. If the trust is established to provide the income interest to an individual other than the grantor, the present value of the income interest will be a taxable gift.

      i. Provided that the trustee is required to distribute the annuity or unitrust amount to the income beneficiary each year, the annual exclusion will be available to reduce the taxable gift.

   d. The beneficiary of the income interest will be taxed on the amount distributed under the four-tier system applicable to taxing trust distributions. Income paid to the beneficiaries is taxed in the following order:

      i. Ordinary income;

      ii. Capital gain income (short-term capital gains deemed distributed before long-term gains);

      iii. Other income (generally this means tax-exempt income); and

      iv. Return of capital (tax-free).

e. Charitable remainder trusts are exempt from income tax, other than on unrelated business income.

2. Charitable Lead Trusts

a. The allowable income, estate and gift tax charitable contribution deduction is based on the present value of the annuity or unitrust income interest.

b. If the remainder interest of a lifetime CLT is retained by the grantor, then no gift is made and no gift tax consequences ensue. If the remainder interest is left to someone else, then there is a taxable gift made by the grantor.

i. As a gift of a future interest, no annual exclusion would be available for the gift to the remainder beneficiary.

c. The remainder interest of a testamentary CLT is included in the decedent's estate.

d. Unlike remainder trusts, Charitable Lead Trusts are not exempt from tax. Rather, CLTs can be established as either a grantor or a non-grantor trust.

i. The non-grantor Charitable Lead Trust is treated as a complex trust for income tax purposes and is entitled to take a ***§642(c)*** charitable deduction for the annuity or unitrust amount paid to the charity.

ii. The grantor of a CLT established as a grantor trust will receive an up-front income tax charitable deduction. The benefit of this deduction taken in the year of formation is recaptured over the term of the income interest when the grantor is taxed on the income of the trust.

D. Benefits of Using Charitable Remainder Trusts

1. A CRT is tax-exempt, so appreciated assets contributed to the trust and then subsequently sold by the trust will not result in any taxable income or gain to the grantor.

2. The grantor will receive an income tax deduction based upon the value of assets transferred to the trust.

3. The value of any assets contributed to a CRT is removed from the estate of the grantor, thus reducing any potential estate tax burden.

4. Gift tax liability will only arise if the income interest is granted to an individual other than the grantor, and only based upon a present value computation.

5. A CRT can provide a certain income stream to the donor while allowing the charitable motives of the donor to be met.

E. Benefits of Using Charitable Lead Trusts

1. A CLT allows for the transfer of assets to a non-charitable beneficiary at a reduced transfer tax cost.

2. Appreciation in assets can be removed from the grantor's estate.

3. CLTs allow for an annual giving program to a charity or charities to be established without removing the ultimate property ownership from the family.

4. If established as a grantor trust, the up-front income tax deduction can be used to offset income at higher tax rates, while the recapture of the deduction can spread the tax cost over future periods at lower rates.

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Education

New York University, LL.M. in Taxation, **1994**
University of Pennsylvania, J.D., **1991**
Hofstra University, B.B.A. in Accounting, **1988**

Admissions

State Bar of New York
United States Tax Court

Honors and Awards

2020- Super Lawyers Top 100 NY Metro Area
2017 -Leadership in Law
2016-2021 - New York Metro Area Super Lawyers
2014 - Top Ten Legal Eagle
2013 - Who's Who in Corporate Law
2001 -Long Island Business News 40 Under 40

KC
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Neil is the Managing Partner of Katz Chwat, P.C. and is responsible for the administration of KC's overall practice. He serves as lead attorney for many of the firm's tax controversy and planning, corporate sales and acquisitions, business planning and transactions, and estate planning matters.

Neil's practice focuses on Federal and State income tax issues, as well as matters relating to corporate, partnership, estate and gift taxation. His services include strategic planning and drafting various business agreements and complex estate plans, and negotiation and representation in the acquisitions or sales of business interests. He has represented clients before all administrative levels of the Internal Revenue Service and the New York State and New York City Tax Departments as well as the U.S. Tax Court and the New York State and New York City Divisions of Tax Appeals and Tax Appeals Tribunal.

Among the key strengths that Neil brings to his role at KC is an analytical approach to problem-solving. He enjoys breaking down very complex subjects and communicating them in terms that can be easily understood. His thorough technical knowledge of Internal Revenue and New York State tax laws is also valued by his clients and professional colleagues.

Neil is a regular contributor and speaker for numerous professional organizations, including the New York State Society of CPAs, National Conference of CPA Practitioners, Nassau and Suffolk County Bar Associations, Financial Planners Association and Nassau and Suffolk Estate Planning Councils. In addition, he provides continuing education seminars to many local and regional CPA firms. For over 25 years, Neil was a professor of Taxation at the Frank G. Zarb School of Business at Hofstra University, teaching in both the undergraduate accounting program and the graduate tax program. Neil has also been a featured lecturer at the LIU Post Tax & Accounting Institute and the Hofstra University Entrepreneurial Assistance Program.

Neil is a primary lecturer and contributor to the development of the Katz Tax Seminars, LLC; a well recognized, widely attended continuing education program registered with the National Association of State Boards of Accountancy as a sponsor of continuing education on the National Registry of CPE Sponsors.

In May of 2012 Neil testified as an expert witness at a hearing before the United States House of Representatives, Committee on Small Business, Sub-Committee on Economic Growth and Capital Access. At the hearing titled "Planning for the Death Tax: Can Small Businesses Survive?" Neil testified on the impact that the Estate Tax rules have on small business owners and their families.

In 2001, Neil was named as one of Long Island's "40 Rising Stars Under 40" by the Long Island Business News. In June of 2013 was listed in the LIBN "Who's Who in Corporate Law." Neil was also recognized as a "Top Ten Legal Eagle" for his work in Corporate, Contracts & Business Law by Long Island Pulse Magazine in 2014.

Neil has co-authored a number of articles that have appeared in various professional publications, including the CPA Journal, the New York State Bar Association Elder Law Attorney, the Nassau Lawyer, and the Suffolk Lawyer.
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