

ESTATE PLANNING STRATEGIST

4th Edition 2014

JEROME A. DEENER, ESQ.

DEBRA T. HIRSCH, ESQ.

ADAM M. GRENKER, ESQ.

**THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION
One Constitution Square, New Brunswick, New Jersey, 08901-1520
(732) 249-8500**

FOREWORD

For the past 50 years, the New Jersey Institute for Continuing Legal Education (NJICLE) has endeavored to serve the continuing legal education needs of the New Jersey bench and bar. Our seminars, publications, CD-ROMs, and other educational materials are designed to facilitate the practice of law and to enable judges and lawyers to more effectively exercise their responsibilities.

As we are poised to enter our second half-century of service, NJICLE has recently become a division of the NJ State Bar Association. We are excited about becoming a part of the state's leading lawyer organization and serving the CLE needs of its leadership and members.

Our success in bringing the legal community the very best in educational materials would not be possible without the judges and lawyers who volunteer their efforts to serve as lecturers and authors. NJICLE is the conduit through which they share their knowledge, skills, and expertise with their fellow professionals.

ESTATE PLANNING STRATEGIST was developed by Jerome Deener, Esq., who recognized the need for a practical guidebook to help practitioners successfully navigate the sometimes complex and troubled waters of estate planning. Without his commitment to continuing legal education and, in particular, this ever-evolving area of the law, this publication would not be possible. NJICLE is extremely grateful for his efforts.

A publication such as this would also not be possible without a dedicated publishing staff. It is, therefore, fitting to acknowledge the efforts of Michael Weisberg, Esq., our Publications Director, Donna Chamberlain, our Publications Administrator, and Dudley Engram, also of our staff, who together assure that orders are processed quickly and courteously.

Your satisfaction with the CLE products that we provide is very important to us. So that we may continue to serve you to the very best of our abilities, NJICLE always welcomes any comments or suggestions that you may have.

Joseph J. Hogya, Esq.

Senior Director

NJ Institute for Continuing Legal Education, a division of the NJ State Bar Association

One Constitution Square

New Brunswick, NJ 08901

jhogya@njsba.com

PREFACE

I have been practicing in the estate planning field since 1968, some 46 years, and have dealt with clients of differing ages, economic, and educational backgrounds; families of first, second, and even third marriages; loving family relationships; and totally dysfunctional families.

I have seen the federal estate tax exemption increase from \$60,000, with a marital deduction limited to 50% of the adjusted gross estate, to the current \$5,340,000 federal exemption and unlimited marital deduction.

In 1968, with a \$60,000 exemption, almost every client was in need of federal estate tax planning. For 10 years, ending in 2012, the federal estate tax law was based on a sunset provision that made planning beyond 2012 pure guesswork to the practitioner. In 2012 Congress finally enacted a law that provides us with a degree of permanency, but one which will affect substantially fewer clients. With the increased exemption to \$5,340,000, it has been estimated that in the entire United States, only 2000 estates will actually incur and pay a federal estate tax in the year 2014.

Despite the increased federal exemption, the lower New Jersey and New York exemptions (\$675,000 and \$1,000,000 respectively), as well as the higher income tax rates in 2013 and beyond, tax planning has become an even greater challenge. We are no longer estate planners that focus solely on federal estate tax issues. We need to view ourselves as tax planning professionals, which includes estate tax planning and income tax planning. The mantra or paradigm is “flexibility” in a plan so that ultimate choices can be deferred for as long as possible. To do this successfully, we need to know our clients, their specific objectives, and tie in those objectives to any federal, state, estate, and income tax issues associated with the plan.

All of this presents some of the greatest challenges I have witnessed in my 46 years of practice.

This new, fourth edition of ESTATE PLANNING STRATEGIST is designed to assist practitioners in meeting these challenges. Obviously, independent thought and discussions with our clients will be needed to successfully implement any plan.

The oxymoron of the day is: “permanency of the federal estate tax requires more flexibility than ever in the planning process.”

This publication was enhanced by the invaluable input of, and collaboration with, my partners Debra Hirsch, Esq., and Adam Grenker, Esq. In addition, I would like to thank and acknowledge the assistance of Sara Weinberg, Esq., Associate, Fox Rothschild, LLP, who has made substantial contributions to this treatise.

Jerome Deener, Esq.
February 3, 2014

TABLE OF CONTENTS

INTRODUCTION

I.	Recent Legislation.....	IN-1
II.	Income Taxation	IN-1
III.	State Transfer Taxation	IN-2
IV.	Achieving Flexibility	IN-3
	A. Disclaimer Planning.....	IN-3
	B. <i>Clayton</i> QTIP Trust Planning	IN-4
	Form A, Sample Disclaimer Trust	IN-5
	Form B, Sample “ <i>Clayton</i> ” Trust.....	IN-13

CHAPTER 1

LIFE INSURANCE TRUSTS

I.	Introduction.....	1-1
II.	Exclusion from Estate	1-2
	A. Funding of Estate Tax	1-2
	B. Incidents of Ownership	1-3
III.	Gift Tax Consequences	1-4
	A. Amount of Gift.....	1-4
	B. Use of Annual Exclusions.....	1-4
	C. Creation of Demand Powers	1-5
	1. Duration of Power	1-5
	2. Notice of Power	1-6
	3. Number of Power Holders	1-7
	D. Generation Skip Allocations	1-8
IV.	Gift and Estate Tax Issues Caused by the Lapse of a Demand Power	1-9
	A. Spouse as Holder of Power of Withdrawal	1-9
	B. Non-Spouse Power Holder.....	1-10
	1. “5/5” Limit.....	1-10
	2. General Power of Appointment	1-11
	3. Hanging Power.....	1-11
	C. GST Issues	1-13
	1. Allocation of GST Exemption for Post-2000 Transfers.....	1-13
	2. [Reserved for Future Use]	
V.	Income Tax Consequences.....	1-18
VI.	Substantive Trust Provisions.....	1-20
VII.	Problems with Irrevocable Trusts	1-20
VIII.	Choice of Trustees.....	1-21
IX.	Conclusion	1-22
	Form A, Sample Insurance Trust	1-23
	Form B, Sample Gift Tax Return.....	1-53

CHAPTER 2

QUALIFIED PERSONAL RESIDENCE TRUSTS

I.	Introduction.....	2-1
II.	Form of the Trust	2-2

ESTATE PLANNING STRATEGIST

A.	Grantor as Owner for All Income Tax Purposes.....	2-2
B.	Treatment of Mortgages.....	2-3
C.	Definitions and Trust Administration.....	2-4
III.	Tax Risk.....	2-7
IV.	Cessation of QPRT Status.....	2-7
V.	Residence Jointly-Owned by Husband and Wife.....	2-8
VI.	Continuing Control over Trust Property Following Trust Termination.....	2-9
VII.	Conclusion.....	2-13
	Form A, Sample QPRT with Subsequent Grantor Trust.....	2-15
	Form B, Sample Gift Tax Return.....	2-37

CHAPTER 3

GRANTOR RETAINED ANNUITY TRUSTS, PART I

I.	Introduction.....	3-1
II.	Present Value Concepts.....	3-1
	A. Annuity Trusts and Unitrusts.....	3-4
	B. Qualified Retained Interest.....	3-4
III.	Comparison of a GRAT and a GRUT.....	3-5
IV.	Comparison of GRAT/GRIT.....	3-6
V.	“Zeroed-Out” GRATs.....	3-9
VI.	GRATs and Limited Partnerships.....	3-10
	A. Governing Instrument Requirements.....	3-11
	B. Consequences of Grantor’s Death.....	3-11
	C. Serious Illness.....	3-15
VII.	Conclusion.....	3-16
	Form A, Sample GRAT.....	3-17
	Form B, Sample GRAT Disclosure for Gift Tax Return.....	3-33
	Form C, Sample Marital GRAT.....	3-41

CHAPTER 4

GRANTOR RETAINED ANNUITY TRUSTS, PART II (SHORT TERM GRAT)

I.	Introduction.....	4-1
II.	Present Value Concepts.....	4-1
	A. Use of Separate GRATs.....	4-1
	B. Short-Term GRATs and Layering.....	4-3
III.	Zeroed-Out GRATs –the <i>Walton</i> Case.....	4-8
IV.	Conclusion.....	4-8

CHAPTER 5

SALE TO A GRANTOR TRUST

I.	Introduction.....	5-1
II.	Comparison of IDIT and GRAT.....	5-1
	A. Advantages.....	5-2
	B. Disadvantages and Risks with the IDIT.....	5-10
III.	Grantor Trust Provisions.....	5-17

IV. Gift Tax Disclosure5-17
 V. Conclusion5-18
 Form A, Illustration of Sale of Limited Partnership Units to a Grantor Trust5-19
 Form B, Sample Grantor Trust.....5-21
 Form C, Sample Purchase Agreement5-41
 Form D, Sample Promissory Note5-45
 Form E, Sample Purchase Agreement.....5-49
 Form F, Sample “*Wandry*” Formula Clause5-51

CHAPTER 6

SELF-CANCELING INSTALLMENT NOTES AND PRIVATE ANNUITIES

I. Introduction6-1
 A. Private Annuity6-1
 B. Self-Cancelling Installment Notes (SCINs).....6-2
 II. Valuing Private Annuities6-3
 III. Valuing SCINs6-5
 IV. Income Tax Ramifications of SCINs and Private Annuities.....6-8
 A. During the Lifetime of the Seller6-9
 B. Upon the Death of the Seller.....6-10
 C. Transferee’s Basis6-12
 V. Gift Tax Implications6-13
 A. Bona Fide Transaction6-14
 B. Deferred Annuity Payments –the *Kite* Case.....6-16
 C. The Exhaustion Test.....6-17
 D. Importance of Filing a Gift Tax Return to Report the Sale.....6-18
 VI. Estate Tax Consequences6-18
 VII. Conclusion6-20
 Form A, Sample Purchase Agreement6-23
 Form B, Contingent Obligation SCIN Purchase Agreement with Promissory Note6-29

CHAPTER 7

FAMILY LIMITED PARTNERSHIPS

I. Introduction7-1
 II. Structure7-1
 III. Non-Tax Benefits of FLPs7-3
 IV. Valuation of Limited Partner Units.....7-4
 A. Revenue Ruling 93-127-6
 B. IRC § 27047-9
 C. IRC § 27037-11
 D. Mere Assignee Interests7-12
 V. Section 2036 Attack7-13
 A. Section 2036(A)(1)7-13
 B. Section 2036(A)(2)7-23
 C. Effect of *Strangi II* on Estate Planning7-27
 VI. Internal Revenue Service Response: Gift Tax – Annual Exclusions7-31
 A. IRS Rulings and Recent Caselaw.....7-31

ESTATE PLANNING STRATEGIST

B.	Planning Recommendations for Annual Exclusions.....	7-35
VII.	Planning with FLPs.....	7-38
VIII.	Income Tax Issues.....	7-42
IX.	FLP vs. LLC.....	7-45
X.	Conclusion	7-45

CHAPTER 8 CHARITABLE LEAD TRUSTS

I.	Introduction.....	8-1
II.	Description	8-1
III.	Mandatory Provisions of Charitable Lead Trusts	8-2
A.	Annuity Trust	8-2
B.	Unitrust.....	8-3
C.	Comparison of Annuity Trust and Unitrust	8-3
IV.	Reversionary v. Non-Reversionary Trust.....	8-4
V.	Grantor versus Non-Grantor Charitable Lead Trust	8-4
A.	Grantor Trust Status: Section 675(4)(C).....	8-6
B.	“Supertrust” Ruling.....	8-8
C.	Family Limited Partnership Ruling.....	8-10
D.	Recapture	8-12
E.	Planning for the Ill Client.....	8-12
VI.	Conclusion	8-13
	Form A, Illustration Regarding Economics of Fixed-Term CLAT.....	8-15
	Form B, Illustration Regarding Economics of Lifetime CLAT	8-16
	Form C, PLR 9224029	8-17
	Form D, PLR 9810019	8-25
	Form E, Sample Charitable Lead Annuity Trust.....	8-33
	Form F, Sample Gift Tax Return	8-49

CHAPTER 9 CHARITABLE REMAINDER TRUSTS

I.	Introduction.....	9-1
II.	Qualification as a Charitable Remainder Trust.....	9-1
A.	Charitable Remainder Annuity Trusts	9-1
B.	Charitable Remainder Unitrusts.....	9-2
C.	Comparison of CRAT with CRUT	9-3
D.	Governing Instrument and Regulatory Requirements.....	9-4
III.	Planning Benefits of Charitable Deduction.....	9-5
A.	Income Tax Consequences.....	9-5
B.	Estate and Gift Tax Consequences.....	9-9
IV.	Retirement Plan/Wealth Replacement	9-10
V.	Statutory and Regulatory Changes.....	9-11
A.	Taxpayer Relief Act of 1997 (Pub. L. No. 105-34, § 1089)	9-11
B.	The Final Regulations	9-12
VI.	Choice of Trustee	9-15
VII.	Problem Assets.....	9-16

VIII.	Conclusion	9-17
	Form A, Sample Charitable Remainder Annuity Trust.....	9-19
	Form B, Sample Charitable Remainder Unitrust	9-31
	Form C, Sample NIM-CRUT	9-45

CHAPTER 10
QUALIFIED SUBCHAPTER S TRUSTS AND ELECTING SMALL BUSINESS TRUSTS

I.	Introduction.....	10-1
II.	The Qualified Subchapter S Trust.....	10-1
	A. Requirements for Qualification.....	10-1
	B. QSST Election Procedure	10-4
	C. Tax Treatment.....	10-5
	D. Planning with QSSTs.....	10-5
III.	Electing Small Business Trusts.....	10-7
	A. Requirements for Qualification.....	10-7
	B. ESBT Election Procedure	10-9
	C. Potential Current Beneficiary.....	10-10
	D. Taxation of an ESBT — Tax at Highest Brackets	10-11
IV.	Comparison of Planning with ESBTs and QSSTs	10-12
V.	Conclusion	10-13
	Form A, Sample QSST Election	10-15
	Form B, Sample QTIP Trust which Qualifies as a QSST.....	10-19
	Form C, Sample Credit Shelter Trust Pouring into a Generation Skip Trust, both of which Qualify as an ESBT.....	10-23
	Form D, Sample ESBT Election	10-31

CHAPTER 11
SPOUSAL LIFETIME ACCESS TRUST (SLAT)

I.	Introduction.....	11-1
II.	Structure and Advantages	11-1
III.	Reciprocal Trust Doctrine.....	11-2
IV.	Gift-Splitting	11-3
V.	Conclusion	11-5
	Form A, Sample Last Will and Testament.....	11-7

CHAPTER 12
RECENT DEVELOPMENTS CREATE PLANNING OPPORTUNITIES FOR SPOUSAL JOINT PROPERTY

I.	Introduction.....	12-1
II.	Discount on Division of Joint Property.....	12-1
III.	Disclaimers.....	12-3
IV.	Stepped-Up Basis for Spousal Joint Property	12-4
V.	Planning Strategy	12-6
VI.	Conclusion	12-6

ESTATE PLANNING STRATEGIST

**CHAPTER 13
REDUCTION OF ESTATE TAX THROUGH RELATED PARTY LOANS**

I.	Introduction.....	13-1
II.	Caselaw	13-1
III.	Using <i>Graegin</i> -Type Notes	13-3
	Form A, Sample Loan Agreement	13-5
	Form B, Negotiable Promissory Note.....	13-13

**CHAPTER 14
FULL UTILIZATION OF TWO SPOUSES' EXEMPTION THROUGH POWERS OF APPOINTMENT**

I.	Introduction.....	14-1
II.	Potential Solution: Planning Solutions Using General Power of Appointment Instead of Actual Assets.....	14-2
	A. Private Letter Ruling Approval.....	14-2
	B. The PLR Plan	14-3
	C. Alternatives	14-4
III.	Estate and Gift Tax Consequences.....	14-4
	A. During WS and PS's Joint Lifetime.....	14-4
	B. WS Dies before PS.....	14-4
	C. PS Dies before WS.....	14-4
	Form A, Sample Revocable Living Trust	14-9
	Form B, Sample Irrevocable Trust.....	14-29

**CHAPTER 15
PORTABILITY VS. CREDIT SHELTER TRUST TO USE TWO SPOUSES' EXEMPTIONS**

I.	Introduction.....	15-1
II.	Portability Procedural Rules	15-1
III.	Choice between Portability and Credit Shelter Planning.....	15-2
	A. Advantages of Portability.....	15-2
	B. Advantages of Credit Shelter Trust Planning.....	15-3
IV.	Recommendations – Deferral of Decision and Flexible Drafting.....	15-6
	A. Disclaimer Plan.....	15-6
	B. Single QTIP-able Trust.....	15-7
	C. <i>Clayton</i> QTIP Trust.....	15-7
	Form A, Sample Insert to Pre-Nuptial Agreement.....	15-9
	Form B, Sample DSUE Provision for Spouse's Will.....	15-10

TABLE OF DISK FILE NAMES

Introduction

Form A, Sample Disclaimer Trust	introformA.docx
Form B, Sample “Clayton” Trust.....	introformB.docx

Chapter 1

Form A, Sample Insurance Trust	ch01formA.docx
Form B, Sample Gift Tax Return	ch01formB.pdf

Chapter 2

Form A, Sample QPRT with Subsequent Grantor Trust.....	ch02formA.docx
Form B, Sample Gift Tax Return	ch02formB.docx
Form 709	ch02formB2.pdf

Chapter 3

Form A, Sample GRAT	ch03formA.docx
Form B, Sample GRAT Disclosure for Gift Tax Return	ch03formB.docx
Form 709	ch03formB2.pdf
Form C, Sample Marital GRAT	ch03formC.docx

Chapter 4

NONE

Chapter 5

Form A, Illustration of Sale of Limited Partnership Units to a Grantor Trust	ch05formA.docx
Form B, Sample Grantor Trust.....	ch05formB.docx
Form C, Sample Purchase Agreement	ch05formC.docx
Form D, Sample Promissory Note	ch05formD.docx
Form E, Sample Purchase Agreement.....	ch05formE.docx
Form F, Sample “Wandry” Formula Clause	ch05formE.docx

Chapter 6

Form A, Sample Purchase Agreement	ch06formA.docx
Form B, Contingent Obligation SCIN Purchase Agreement with Promissory Note	ch06formB.docx

Chapter 7

NONE

Chapter 8

Form A, Illustration Regarding Economics of Fixed-Term CLAT.....	ch08formA.docx
Form B, Illustration Regarding Economics of Lifetime CLAT	ch08formB.docx
Form C, PLR 9224029	ch08formC.docx
Form D, PLR 9810019.....	ch08formD.docx
Form E, Sample Charitable Lead Annuity Trust.....	ch08formE.docx
Form F, Sample Gift Tax Return	ch08formF.pdf

Chapter 9

Form A, Sample Charitable Remainder Annuity Trust.....	ch09formA.docx
Form B, Sample Charitable Remainder Unitrust	ch09formB.docx
Form C, Sample NIM-CRUT.....	ch09formC.docx

Chapter 10

Form A, Sample QSST Election	ch10formA.docx
Form B, Sample QTIP Trust which Qualifies as a QSST.....	ch10formB.docx

Form C, Sample Credit Shelter Trust Pouring into a Generation Skip Trust, both of which Qualify as an ESBT	ch10formC.docx
Form D, Sample ESBT Election	ch10formD.docx

Chapter 11

Form A, Sample Last Will and Testament.....	ch11formA.docx
---	----------------

Chapter 12

NONE

Chapter 13

Form A, Sample Loan Agreement	ch13formA.docx
Form B, Negotiable Promissory Note	ch13formB.docx

Chapter 14

Form A, Sample Revocable Living Trust	ch14formA.docx
Form B, Sample Irrevocable Trust.....	ch14formB.docx

Chapter 15

Form A, Sample Insert to Pre-Nuptial Agreement.....	ch15formA.docx
Form B, Sample DSUE Provision for Spouse's Will.....	ch15formB.docx