estate planning studies®

January 2016

Divorce negotiations from the perspective of an estate planner

Rupert Murdoch's divorce from Anna Murdoch is reportedly the most expensive divorce in history, costing him $1.7 billion.[1]

Planning for dissolution of a marriage raises a number of complicated issues. It's more than just signing a standard form document to dissolve a marriage. From the perspective of a tax and estate planning attorney, there are a number of issues which are often not addressed in the negotiations. This *Study* will explore some of those issues.

THE STATISTICS. But let's begin with some interesting statistics with regard to divorce:

• What is the true divorce rate in America? The most often repeated statistic is that roughly 49% of all first marriages end in divorce. But divorce rates in most demographic groups have been diminishing since the 1970s. However, the divorce rate for Baby Boomers has been rapidly growing.[2]

• The highest percentage of divorces occurs in the third year of marriage.[3] On average, divorces in second marriages generally occur by the sixth year, while most divorces in first marriages occur by the eighth year.[4]

• Wives initiate over 66% of all divorces.[5]

• "It has been well documented that women and men who cohabit with their future spouse before first marriage are more likely to divorce than those who do not cohabit with their spouse before first marriage."[6]

• 8% of newly married adults have been married three times or more.[7]

• Women who first had sex in their teens have roughly *double* the risk of divorce later in life compared to women who had their first unmarried sexual experience in their adult years.[8]

• Over 75% of people who marry partners from an affair get divorced.[9]

• Roughly 20% of adults over age 25 have never been married, up from 9% in 1960.[10]

• According to Swedish researcher Yvonne Aberg, divorce is contagious. She found that as the proportion of divorced office workers increased, the chances of divorce by the remaining married office workers also increased. The more single people in the office, the greater the divorce rate.[11]

• Children of divorced parents are more likely to divorce.[12]

NET AFTER-TAX VALUE. The basis of assets transferred as a result of divorce should be an important part of the divorce negotiating process. However, courts may be reluctant to get embroiled in speculative tax consequences of a divorce. For example, in *In Re Marriage of Fonstein*,[13] the California Supreme Court stated: "Regardless of the certainty that the tax liability will be incurred if in the future an asset is sold, liquidated or otherwise reduced to cash, the trial court is not required to speculate on or consider such tax consequences in the absence of proof that a taxable event has occurred during the marriage or will occur in connection with the division of the community property."

While the court may refuse to get involved with tax basis issues, divorce negotiations should take into account the after-tax value (including the cost of satisfying any secured debt) of an asset, not just its fair market value.

> ***Example:*** Assume a spouse has a choice between taking $1.0 million in cash or $1.2 million in stock which has a zero basis. Which is the better option? For tax purposes (assuming an immediate stock sale), the $1.0 million in cash may be a better choice. Why? Assuming a combined state and federal capital gains tax rate of 30%, the $1.2 million is stock carries an inherent tax cost of roughly $360,000, meaning the stock has a true after-tax value of only $840,000.

> ***Trap:*** Do not assume that your client's divorce attorney understands the tax ramifications of the divorce settlement. The engagement letters of many divorce attorneys specifically disclaim the attorney's responsibility for any tax or estate planning issues involved in the settlement. It is critical to have competent tax and estate planning advisor be an integral part of any settlement negotiations. Moreover, all estate planning documents (including beneficiary designations) should be reviewed and redrafted by an estate planning attorney.

In general, a pre-death transfer of property secured by a debt that exceeds its tax basis creates a taxable event to the transferor. I.R.C. § 1041(e) provides an exception to this rule and a potential trap to the ex-spouse who receives the property. If property is transferred directly (i.e., not through a trust) to a spouse or ex-spouse and the property has a liability in excess of its basis, no recognition occurs on the transfer, and the recipient spouse takes the transferor spouse's basis.[14] But, if the recipient spouse later transfers the asset, the amount by which the secured debt exceeds the tax basis can be taxable to the recipient spouse.

> ***Example:*** Assume a divorcing wife owns a tract of land that has a fair market value of $2.1 million, a basis of $200,000 and secured debt of $1.5 million. The husband receives the property as a part of the divorce and immediately sells it, thinking that he gets to keep the $600,000 in equity. When his CPA asks him about the tax basis in the transaction, the husband responds with "what's tax basis?" The recognized taxable gain is $1.9 million. Assuming a state and federal effective income tax rate of 30%, the taxes on the sale are $570,000, leaving the client with $30,000 after payment of the mortgage. Instead of getting $600,000, the husband nets $30,000 before payment of commissions. Assuming a 6% sales commission, the husband could actually be out of pocket for the sale.

ALIMONY IS EARNED INCOME. I.R.C. §219(f)(1) provides that alimony is considered earned income for IRA purposes.

> ***Opportunity:*** Assume a non-working 51-year-old client is getting divorced. Allocating a portion of any "property" settlement to long-term alimony (e.g., $6,500 per year) would create an income tax deduction for the payer and allow the payee to fund a tax-deductible IRA contribution.

Interestingly, I.R.C. §219(f)(7) provides that non-taxable combat pay is also treated as earned income for IRA contribution purposes. Is there a common theme here?

DEPENDENCY DEDUCTIONS. The tax savings from being entitled to the dependency deduction for a couple's children should be a part of the negotiations. Assuming all of the dependency exemption requirements are met,[15] the parents can enter into a written declaration[16] governing which of them will be entitled to the deduction for a dependent child. While the parent in the higher income tax bracket will normally receive the greater tax benefit for the dependency exemption, the phaseout of personal and dependent exemptions for higher-income taxpayers should be taken into account in making this decision. Before making a final decision, run the projected tax benefits for each spouse over the years they might be entitled to the deduction.

In some states,[17] the court does not have authority to award the dependency deduction to the non-custodial parent without the custodial parent's approval, giving the custodial parent additional leverage in the negotiations.

> ***Trap:*** The custodial parent is normally the party responsible for filing and paying the "kiddie tax" of an applicable child.[18]

DIVORCE TRUSTS. Divorces are seldom amicable. As a result, conflicting perspectives and desires for control can create implacable disagreements. For example, a less wealthy spouse will be concerned that the wealthier spouse will renege on support payments or have future financial problems. The wealthier spouse may not want a former spouse to remarry and still receive benefits or the wealthier spouse may not want to benefit the heirs of the soon-to-be ex-spouse.

One solution may be the creation of a divorce trust. While divorce trusts are not regimented, there are general terms that will normally apply. For example:

- The trust could provide for payments equal to the settlement terms between the divorcing couple.
- The trust must generally be irrevocable to avoid adverse tax consequences and to provide the beneficiary spouse some assurance of payment.

While creative planning may offer new approaches, in most cases, these trusts will generally fall into one of the following approaches. Assume the husband has a higher new worth in the following examples.

LIFETIME QTIP. The husband can create a lifetime QTIP trust for the wife, with the provision that the trust rolls over to a trust for his descendants at her death. The assets remain available to benefit the wife for life. At her death the basis in the assets step-up to their fair market value, and her available estate exemption can reduce the family's overall estate tax. The husband should make a timely election to treat the trust as a QTIP trust eliminating any gift tax on the transfer to the trust. However, the client should be aware that the wife must receive all income generated by the trust, and the trust cannot terminate before the wife's death.

BYPASS TRUST. But what if the donor spouse wants the trust to cease providing benefits to the soon-to-be ex-spouse before her death (e.g., after a stated number of years or when she remarries)? In that case, the donor spouse will effectively be forced into using some form of a lifetime Bypass trust because the rules governing QTIP Trusts would not permit such an early termination before the beneficiary/spouse's death. There are at least two major downsides to this decision. First, upon the termination of the trust benefits to the ex-spouse, there is no step-up in the basis for the trust assets. Second, the trust will be covered by the grantor spouse's transfer tax exemption rather than the former spouse's exemption. However, with the high federal transfer tax exemption and only Connecticut having a gift tax, this concern will not be a pertinent part of most clients' decisions.

REVERSIONARY TRUST. The grantor of the trust may want the assets of the trust to revert to the grantor upon certain prescribed events (e.g., death or remarriage of the former wife), particularly if there are no children from the marriage who could be named as remaindermen. If the trust provides that it reverts to the settler at its termination (i.e., the end of support obligations), then the trust will normally be includable in the settler's estate.[19] However, assuming the trust is satisfying deductible divorce obligations, there may be an offsetting estate deduction. With the larger federal transfer exemptions creating fewer taxable estates, reversionary trusts may become more acceptable from an estate tax perspective.

> ***Trap:*** The transfer of assets to a trust for the benefit of an ex-spouse (as opposed to a direct transfer to an ex-spouse) can create taxable income to the transferor. For example:
>
> - A transfer of an asset having a liability in excess of basis can create current taxable income to the transferor.
>
> - A direct transfer of an installment sale note to a spouse or ex-spouse as a result of a divorce is not a taxable disposition.[20] However, if the transfer

is in a trust for the spouse or former spouse, the disposition is taxable to the transferor.

CHARITABLE REMAINDER TRUST. One creative solution in divorce negotiations is to have the wealthier spouse create a charitable remainder trust ("CRT") that names the soon to be ex-spouse as lifetime beneficiary. The grantor of the trust obtains a current income tax deduction equal to not less than ten percent of the value of the contributed assets. The sale of an appreciated asset contributed to the trust would not generally create current taxable income to the trust or grantor. The grantor could retain a lifetime income interest from the trust after the death of the ex-spouse. Finally, the grantor spouse could retain the right to change the charitable remainderman during the grantor's life.

The ex-spouse receives an income stream for life in lieu of direct ownership of assets. For a financially challenged spouse, this might be a good choice for at least part of the benefits they receive as a result of the divorce.

Opportunity: The CRT for the spouse can have a provision that terminates the CRT upon the remarriage of the spouse or upon other contingencies.[21] The contingency is not taken into account in calculating the value of the charitable remainder interest and the resulting charitable deduction.

DIVORCE AND CHARITABLE REMAINDER TRUSTS. Many married clients have created CRTs that have lifetime payouts for the lives of the two spouses. The IRS has permitted a division of the CRT if they get divorced.[22]

Opportunity: In lieu of a division of an existing CRT, the clients might provide that one of them renounces all of his or her rights to the CRT as a part of the negotiated divorce terms. This renunciation might create a charitable deduction to the disclaiming party because the present value of what the charity will receive may have increased. If they file a joint return in the year of the renunciation (e.g., they remain married until the following year), the non-disclaiming spouse could receive an indirect tax benefit from the renunciation.

RETIREMENT PLANS. In managing the divorce negotiations, advisors and clients should understand the differences in the tax treatment of various retirement plans. For example, if distributions are made pursuant to a qualified domestic relations order (QDRO) from a qualified retirement plan to an alternative payee before the plan participant reaches age 59½, then the funds can be withdrawn without having to pay an early withdrawal penalty of 10%.[23] A similar exception does not apply to IRAs.[24]

Trap: In *Hartley v. Commissioner*,[25] the Tax Court ruled that when a family court required the plan participant to withdraw funds from his ERISA retirement plan to pay for alimony, the 10% early withdrawal penalty applied because the payment was made to the plan participant and not an alternative payee as required by I.R.C. § 72(t)(2)(C) and because a QDRO was never prepared.

Opportunity: Assume a husband is a participant in a defined benefit plan. Based upon his health and family history, the husband believes he will live longer than the mortality tables indicate. By retaining all of the defined benefit account and giving other assets to his wife, the husband might retain a greater financial benefit then actuarially calculated by the plan administrator.

ERISA generally provides that the retirement benefit of a qualified retirement plan cannot be assigned. [26] The statute provides an exception for assignments incident to a divorce.[27] In order to pass a portion of an ERISA retirement benefit to an ex-spouse, the divorce decree must satisfy the requirements of I.R.C. § 414(p).

Trap: In *Hendon v. E.I. Dupont Nemours & Co.*,[28] the Sixth Circuit Court of Appeals ruled that even when a divorce decree and martial dissolution agreement provided that a divorced spouse waived rights to an ERISA retirement plan, the ex-spouse was still entitled to the qualified plan assets upon the death of the plan participant. The Court ruled that the waiver was not in compliance with the requirements of ERISA.

I.R.C. § 457 deferred compensation plans for governmental and non-profit employees are also subject to the qualified domestic relation orders.[29] Federal law does not require a qualified domestic relations order for a divorced-based IRA transfer.[30]

CREDITOR ISSUES. Financial problems are often a root cause of divorce. As a result there may be numerous creditor-related issues in the divorce process.

Opportunity: If there is the possibility of bankruptcy for an ex-spouse, then the non-bankrupting spouse is well advised to obtain the advice of bankruptcy counsel before the settlement is finalized. While a property settlement may be deemed a preference or fraudulent transfer, it is less likely that a support obligation to a spouse and children would be overturned. Moreover, payments for alimony, maintenance and support are not dischargeable in bankruptcy.[31] Therefore, one method of protecting a divorcing spouse of a financially distressed party may be to treat the payment as alimony and support—albeit at a potential tax cost to the recipient ex-spouse.[32]

Trap: Many clients mistakenly believe that because the divorce decree or settlement requires one spouse to pay marital debts, creditors cannot seek recovery from the other spouse. Because the creditor is not a party to the contest, it is normally not restricted in its rights. For example, assume a couple has co-signed a line of credit note, and the divorce decree assigned the liability to the husband. If the husband declares bankruptcy after the divorce, the ex-wife might still be responsible for the debt.

Opportunity: ERISA Plans are generally exempt from the claims of most creditors.[33] Original IRA owners[34] have a federal bankruptcy exemption of up to $1.0 million plus the full value of IRAs which received rollovers of ERISA plans.[35] A number of states[36] also provide creditor protection for IRAs. As a result, divorcing clients in financial difficulty should do their best to retain their own retirement assets upon a divorce and try to obtain rights to their spouse's retirement assets.

Caution: Occasionally, a client will consider a friendly divorce as a means of protecting assets from the creditor claims of one of the spouses. The Massachusetts Federal District Court decision of *U.S. vs, Baker*[37] offers an excellent example of the problems that can result from such a fraudulent conveyance.

LIFE INSURANCE. As a part of divorce settlements, one or both spouses may be required to maintain life insurance on their life for the benefit of an ex-spouse and/or children.

If the insured former spouse wants to deduct the insurance premiums as alimony, the insured should consider having the ex-spouse be both owner and irrevocable beneficiary of the policy.[38] However, many divorced clients have a rather adverse reaction to an ex-spouse benefiting from their death.

Trap: If the policy has a significant cash value, and the couple is no longer married when the transfer to the ex-spouse is made, the transfer may be a taxable gift for gift tax purposes. Moreover, if the insured dies within three years, the death benefit could be pulled back into the insured's taxable estate.[39]

Trap: In *Smoot v. Smoot*, life insurance proceeds paid to a former wife from a policy owned by the decedent were taxable in the insured former husband's taxable estate.[40] As a result, the former wife was required to contribute to the estate taxes due on the taxable estate.[41] The case illustrates two problems with divorce-related life insurance. First, the ex-spouse will not be happy about the diminution of any insurance proceeds by the applicable state or federal estate taxes. Second, because the insurance death payment is made directly to the former spouse, the executor of the estate may have a hard time getting funds out of the former spouse to cover the ex-spouse's portion of the estate taxes.

Drafting: Divorce agreements should clearly state whether the former spouse is responsible for any applicable portion of any state or federal estate taxes on the insurance proceeds. Moreover, the insured's Will may specifically provide that the insurance recipient is required to pay any applicable taxes in order to avoid having the taxes reduce the residuary estate.

Opportunity: If the former spouse is the owner of the policy, the ex-spouse will direct the ultimate disposition of the death proceeds. Instead, the insured could place a policy in an irrevocable life insurance trust (an "ILIT") and give the ex-spouse a beneficial interest until the spouse has died, married or cohabited, at which time the benefits of the trust could pass free of transfer taxes[42] to other heirs (e.g., the children from the first marriage). If the policy is owned by an ILIT, the insured will lose the alimony deduction for the payment of insurance premiums, but as the creator of the trust, the insured can also direct the ultimate disposition of the death proceeds. If the ILIT is properly created and operated, the policy is also excluded from the insured's taxable estate.

Trap: If the divorce decree provides that the insurance policy will revert to the insured upon the satisfaction of the divorce obligations it was designed to fund, then this reversionary interest[43] may result in the husband having to include the policy in his taxable estate, even when the spouse is the irrevocable beneficiary.[44] However, the decedent's estate may qualify for an estate tax deduction for the amount of the proceeds.[45] In many cases it will be better to have the settlement agreement provide for transfer of the policy into a trust for the benefit of any joint descendants.

Trap: Assume a former spouse obtained a life insurance policy on the ex-spouse. Does the insured ex-spouse have an obligation to cooperate with the former spouse to retain the policy? In a Kansas Supreme Court decision,[46] the court ruled that a husband had no obligation to help the ex-spouse maintain a life insurance policy on his life. The case largely turned on Kansas Statutes Annotated § 40-453(a), which provides that an insurable interest ceases when an insured requests the insurer to terminate or non-renew the policy applicable to such person's life. The Court noted: "we hold a court order requiring a child support obligor to cooperate with a child support obligee's efforts to obtain insurance on the life of an obligor is against public policy, as expressed by the Kansas Legislature in K.S.A. 40-453(a). . . ."

Drafting: In drafting the divorce settlement agreement, specifically provide that any ex-spouse who is insured by the other spouse must cooperate in maintaining the coverage. The responsibilities for paying the insurance premiums should also be spelled out.

GIFTING AND DIVORCE. The couple's transfer tax exemptions and annual exclusions should be viewed as a tradable asset. The unused transfer tax exemption of a less wealthy spouse can be a valuable asset to the wealthier spouse.

Opportunity: A husband wants to begin transferring equity in his family business to children from a prior marriage. He has a prenuptial agreement that restricts the rights of the current spouse. The appraiser has provided a discount in value of 40% for the minority interest he will transfer in the business. If the spouses elect gift-splitting, the donor spouse can effectively transfer his and his wife's transfer tax exemptions (with an applicable valuation adjustment of 40%) to a generation-skipping trust and could obtain a transfer tax savings of up to $3,620,000.[47] There are multiple ways to make the trade-off including:

• The husband could modify his Will to provide a more generous trust for the benefit of the soon-to-be former wife,[48] or

• The husband could create an ILIT or non-insurance trust with other assets that provides a life interest to the ex-spouse, but which passes the trust assets to the husband's family at the ex-wife's death (or other triggering event such as her remarriage), or

• The husband might provide a larger property settlement to a soon-to-be ex-wife. "In return for saving me $3.6 million in transfer taxes, I will agree to increase the property settlement by $2.0 million."

Opportunity: Both spouses have been married before, and both are wealthy. One spouse has 10 potential donees and the other has 20 potential donees. Using gift splitting, each of them can double the non-taxable annual exclusion of the other, without any adverse impact to either spouse's estate planning, while saving both families significant estate taxes.

Drafting: Make sure there is a document in which each spouse agrees to sign a gift tax return for the year in which they consent to gift-splitting.

Opportunity: In an amicable divorce, clients should also review the possibility of using their transfer tax exemptions more effectively. For example, assume a husband and wife could each create Bypass/Exemption trusts naming the other as beneficiary. These irrevocable trusts could grow estate-tax-free and protect the ex-spouse/beneficiary from creditor claims. Clients should make sure that the terms of the trusts do not "mirror" each other to avoid application of the reciprocal trust doctrine.[49] If the doctrine applies, both trusts will be ignored for transfer tax purposes.

REVOCATION OF RIGHTS IN EXISTING TRUSTS. Many clients have created existing irrevocable trusts (e.g., an ILIT) in which a soon to be ex-spouse is a Trustee, beneficiary and/or holder of rights over the trust (e.g., a limited power of appointment).

Drafting: The settlement agreement or the irrevocable trust terms should provide that the former spouse irrevocably renounces all of the spouse's rights, powers and other benefits in any existing trusts upon divorce or legal separation.

TAX BASIS RECORDS. There are no federal laws mandating that the transferor spouse provide basis and holding period information to the recipient spouse. Although Treasury Regulations[50] require that such information be provided at the time of any transfer, there are no penalties for failing to provide the information.

Drafting: Any divorce settlement agreement should require that the transferor spouse provide the transferee spouse with sufficient records to support both the basis of the property and its holding period. Without such information, the IRS could challenge the transferee's unsupported tax filings.

CONCLUSION. Divorce attorneys do not tend to include tax advisors in their settlement negotiations. As a result, unidentified tax and estate planning issues often arise after the divorce. Moreover, divorced clients have often had their fill of attorneys and are not particularly eager to talk with an estate planning attorney about estate revisions. The failure to address these issues can be extremely costly.

Footnotes

1 *The World's Most Expensive Divorce Settlements,* Yahoo Finance. July 9, 2012. Accessed: June 8, 2015.

2 Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce among Middle-aged and Older Adults, 1990-2010,* 3 (Nat'l Ctr. for Fam. & Marriage Res., Working Paper Series WP-13-03, 2013); Susan Gregory Thomas, *Divorce Late in Life: The Gray Divorcés*, Wall St. J. (Mar. 3, 2012).

3 Time, Sept. 25, 2000.

4 *Id.*

5 Margaret Brinig & Douglas W. Allen, '*These Boots Are Made for Walking': Why Most Divorce Filers Are Women*, 2 Am. L & Econ. Rev. 126 (2000).

6 Casey E. Copen, et al., Ctr. for Disease Control, First Marriages in the United States: Data From the 2006–2010 National Survey of Family Growth, National Health Statistics Report No. 49, 2 (Mar. 22, 2012).

7 Gretchen Livingston, *Four-in-Ten Couples Are Saying "I Do," Again*, Pew Res. Ctr. (Nov. 14, 2014), http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/.

8 Anthony Paik, *Adolescent Sexuality and Risk of Marital Dissolution*, 73 J. Marriage & Fam 472 (2011).

9 Holly Hein, *Sexual Detours: Infidelity and Intimacy at the Crossroads (*2000).

10 Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, Pew Res. Ctr. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married.

11 Sue Shellenbarger, *Co-Workers Can Wreck a Marriage: At the Office, Divorce Is Contagious*, Wall St. J. (Nov. 13, 2003, 8:53 AM),available at: http://www.wsj.com/articles/SB10686862404494500.

12 Nicholas H. Wolfinger, Understanding the Divorce Cycle: The Children of Divorce in Their Own Marriages (2005).

13 522 P.2d 1169 (Cal. 1976).

14 For a more detailed analysis of this issue, see Boris Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts, ¶ 44.6 (2015); I.R.S. P.L.R. 9615026 (Apr. 12, 1996); I.R.S. P.L.R. 8644012 (Jul. 31, 1986); Treas. Reg. § 1.041-1T(d) Q&A 12 (2015).

15 I.R.C. § 152(e) (2015).

16 The form's requirements are provided for in Treas. Reg. § 1.152-4(e)(1) (2015).

17 C.f., Georgia: *Blanchard v. Blanchard*, 401 S.E.2d 714 (Ga., 1991).

18 I.R.C. § 1(g)(5) (2015).

19 See: I.R.C. § 2036 (2015).

20 I.R.C. § 453B(g) (2015). The Code section has a parenthetical exception to the exclusion from taxability that provides "*other than a transfer in trust*."

21 I.R.C. § 664(f).

22 I.R.S. P.L.R. 200824022 (Jun. 13, 2008); Rev. Rul. 2008-41, 2008-2 C.B. 170.

23 I.R.C. § 72(t)(2)(C) (2015); I.R.S. Notice 87-13, 1987-1 C.B. 432.

24 I.R.C. § 72(t)(3)(A) (2015).

25 104 T.C.M. (CCH) 553 (2012).

26 I.R.C. § 401(a)(13) (2015).

27 The Pension Benefit Guaranty Corporation has issued a helpful booklet on divorce and Qualified Domestic Relations Orders. The

booklet includes sample forms and a checklist. Copies can be found at www.pbgc.gov/publications/

28 No. 96-6233, 1998 WL 199824 (6th Cir. Apr. 13, 1998).

29 See I.R.C. § 414(p) (2015).

30 26 USCA § 408(d)(6) (2015).

31 See 11 U.S.C. § 523(a)(5), 727, 1141(d)(2), 1228(c)(2), 1328(a)(2) (2012).

32 i.e., the recipient of the alimony is taxable. I.R.C. §§ 61(a)(8), 71(a) (2015).

33 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 403(b); *Patterson v. Shumate*, 504 US 753 (1992).

34 Inherited IRAs do not have similar protections.

35 11 U.S.C. § 522(n).

36 See the IRA State Exemption Chart at http://moranknobel.com/retirement.htm

37 2015 WL 4886081 (D. Mass., August 17, 2015). See: Jay Adkisson on *U.S. v. Baker*, US District Court finds Divorce Obtained to Fraudulently Transfer Assets, LISI Asset Protection Newsletter #308 (October 6, 2015).

38 See Rev. Rul. 70-218, 1970-1 C.B. 19.

39 I.R.C. § 2035 (2015).

40 *Smoot v. Smoot*, No. 2:13-cv-00040 (S.D. Ga. Mar. 31, 2015).

41 *See* I.R.C. § 2206 (2015).

42 On transfers of an existing life insurance policy to the ILIT, the insured/owner must survive the transfer by three years for the policy to be outside the insured/owner's taxable estate.

43 I.R.C. § 2042(2) (2015).

44 Rev. Rul. 76-113, 1976-1 C.B. 276; *Estate of Kahanic v. Comm'r,* 103 T.C.M. (CCH) 1434 (2012); Louis A. Mezzullo, *Using Life Insurance to Satisfy Support Obligations in a Divorce*, 38 Est., Gifts & Tr. J. 329 (November 2013).

45 Rev. Rul. 76-113. 1976-1 C.B. 276; see also I.R.C. § 2053(a)(4) (2015).

46 *In re* Marriage of Hall, 286 P.3d 210 (Kan. 2012); *see also* Howard M. Zaritsky, Marriage of Hall*: Ex-Husband Cannot Be Made to Cooperate with Ex-Wife's Attempt to Maintain Life Insurance Policy on His Life*, Est. Plan. News. (LISI), no. 2012, Oct. 15, 2012.

47 i.e., $5,430,000 (spouse's 2015 gift exemption), discounted at 40% ($9,050,000 in transferred value), multiplied by the top estate tax rate of 40%.

48 Although the wife will normally prefer an irrevocable transfer and current benefits.

49 See Cheryl L. Hader, Planning to Avoid the Reciprocal Trust Doctrine, 26 Est.Plan. 358 (Oct. 1999); Paul E. Van Horn, Reciprocal Trusts Revisited, 19 Prac. Tax Law. 39 (Summer 2005).

50 Temp. Treas. Reg. § 1.1041-1T, Q&A-14 (2015).