

**Steve Leimberg's Estate Planning Email Newsletter - Archive Message #3032**

**Date:** 24-Apr-23

**From:** Steve Leimberg's Estate Planning Newsletter

**Subject:** [Thomas A. Tietz, Sahar Pouyanrad, & Martin M. Shenkman: The Need for Trust Compilations - Organizing Planning for Clients](#)

*“The suggestion of this newsletter is that the client’s estate planner prepare, and maintain, a trust closing binder, analogous to closing binders commonly prepared in real estate and corporate transactions. However, unlike the real estate and corporate closing binder, this “binder” would be a checklist and compilation that does more than merely list and organize documents.*

*The trust binder in contrast can be used to identify ways to backstop, refine and administer the client’s estate and trust plans and could be reviewed and, as necessary, updated at each annual meeting, or even more frequently as circumstances demand. The term ‘binder’ is in quotation marks since the binder doesn’t end at the closing as a traditional real estate or corporate closing binder would, and in most instances will be electronic and no longer a physical binder (absent a specific client request). Given the complexity of many plans, practitioners might find this a useful tool in planning, creating, implementing and maintaining those plans.”*

**Thomas A. Tietz, Sahar Pouyanrad and Martin M. Shenkman** provide members with commentary that examines a topic frequently overlooked by many professionals: organizing the planning that we do for clients. Because of the length of their commentary, members can access it by clicking this link: [Organizing Planning for Clients](#)

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## **EXECUTIVE SUMMARY:**

The suggestion of this newsletter is that the client's estate planner and other professional advisers prepare, and maintain, a trust closing binder, analogous to closing binders commonly prepared in real estate and corporate transactions. However, unlike the real estate and corporate closing binder, this "binder" would be a checklist and compilation that does more than merely list and organize documents.

The trust binder in contrast can be used to identify ways to backstop, refine and administer the client's estate and trust plans, and could be reviewed and, as necessary, updated at each periodic meeting, or even more frequently as circumstances demand. The term "binder" is in quotation marks since the binder doesn't end at the closing as a traditional real estate

or corporate closing binder would, and in most instances will be electronic and no longer a physical binder (absent a specific client request). Given the complexity of many plans, practitioners might find this a useful tool in planning, creating, implementing and maintaining those plans. Recent cases such as Smaldino and Sorensen have highlighted the importance of observing formalities and proper administration. Hopefully, the suggestion in this article will provide a practical tool practitioners can use to endeavor to address the concepts raised in these cases.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Thomas A. Tietz*

*Sahar Pouyanrad*

*Martin M. Shenkman*

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## **The Need for Compilations: Organizing Planning for Clients**

By: Thomas A. Tietz, Esq., Sahar Pouyanrad, EMBA, AEP®, CEP®, ChSNC®, and  
Martin M. Shenkman, Esq.<sup>i</sup>

### **Introduction**

The suggestion of this article is that the client's estate planner prepare, and maintain, a trust closing binder, analogous to closing binders commonly prepared in real estate and corporate transactions. However, unlike the real estate and corporate closing binder, this "binder" would be a checklist and compilation that does more than merely list and organize documents. The trust binder in contrast can be used to identify ways to backstop, refine and administer the client's estate and trust plans and could be reviewed and, as necessary, updated at each annual meeting, or even more frequently as circumstances demand. The term "binder" is in quotation marks since the binder doesn't end at the closing as a traditional real estate or corporate closing binder would, and in most instances will be electronic and no longer a physical binder (absent a specific client request). Given the complexity of many plans, practitioners might find this a useful tool in planning, creating, implementing and maintaining those plans.

The above concept can be illustrated even using a common estate/trust plan. For instance, a plan involving an irrevocable life insurance trust ("ILIT") can consist of a significant number of documents. At least, some of the following, as well as other documents, usually comprise an ILIT plan:

- Memorandum explaining the plan completed in advance of the plan implementation.
- Insurance projections
- Insurance application
- Insurance policies
- Fully signed trust document
- Gift between spouses before funding the trust (*e.g.*, from one spouse to the other if the couple has only a joint checking account)
- Trust bank account opening documentation.
- Crummey letters for the first year (and perhaps years thereafter)
- If significant funding is made to the trust, there could be an investment policy statement for investible assets
- Documentation of a split-dollar loan or other financial arrangement to fund the trust (*e.g.*, a tier of GRATs the reminders of which may pass to the ILIT)
- A memorandum after the trust is completed addressing administration of the plan.
- Gift tax returns reporting gifts to the ILIT plan.
- If the current ILIT arose out of decanting of an old ILIT (*e.g.*, to effectively transform an old ILIT that paid out to beneficiaries at specified ages into one that holds assets for the beneficiaries' lives) the old trust, its funding and other documentation, the decanting instrument, and other documents
- If the ILIT is to be funded each year, then documentation concerning each year's gifts and Crummey powers

If the client's spouse has a similar ILIT plan, then the number of documents will at least double. Evidence should also be preserved regarding differences between the trusts to help address a possible reciprocal trust doctrine challenge by the IRS or a creditor in the future.

An ILIT would no doubt be in addition to the usual array of "core" estate planning documents the client may have. Thus, in even perceived simple or common plans, the number of documents and steps involved can mount quickly and an efficient means of organizing those documents for the needs of other advisers, annual trust and plan administration, etc. is necessary.

Where, as is often the case, a client has a team of professional advisers, assembling all relevant documentation would certainly require the involvement of each team member. In that case, of course, the likelihood that each team member does not have all the documentation relevant to his or her practice increases. So do the chances that a necessary step or document is missed.

For example: The estate planning attorney may want all relevant documentation: wills, trusts, powers of attorney, etc. The CPA responsible for tax compliance should have a complete package for his or her permanent file (*e.g.*, is the trust a grantor or non-grantor trust; were transfers to it a completed gift or not). The wealth adviser may wish to have documents needed to develop an investment policy statement for one or more trusts or entities involved. An insurance adviser may wish to have copies of the completed trust and all insurance-related documents and perhaps more.

The difficulty of ensuring that all documentation and steps are completed often increases as a result to the prospect of pending tax law changes that often result in rushed planning to "grandfather" planning before a potential change becomes effective. At the end of 2020 and 2021 (and even into early 2022), practitioners completed a plethora of planning for clients, both new and old, who were roused to action by the possibility that President Biden and the Democrat-controlled Congress might enact tax changes affecting both the income and transfer tax system. In the rush, many practitioners concentrated on simply completing planning that they thought should be done before the end of the year (or as quickly as possible before a law change was enacted). This was similar to the late 2012 wave of planning (before the gift tax exclusion was scheduled to decrease from \$5.12 million to \$1 million).

There may be a similar wave of rushed planning towards the end of 2025 (when the exemption is scheduled to be halved from \$10 million inflation adjusted to \$5 million inflation adjusted). When planning is completed on a time constraint, there are likely numerous unaddressed aspects of planning. Because of that phenomenon, practitioners consider communicating to clients that they may not yet have completed the planning that was thought to have been implemented. In fact, maintenance for that planning is just as important as the initial implementation.

### **What is in a Name, Checklist, Compilation, Contents, Exhibit List**

The document suggested to be completed is referred to by different names in the discussion following as it serves several purposes:

1. **Checklist:** It could help identify missing documents that might be necessary or advisable to the plan. As explained above, even the common ILIT plan could have several dozen related documents. Without a checklist, it may be a challenge for

- practitioners to ensure that nothing is missing. An annotated checklist indicating what documents or steps might have not been addressed (or that the practitioner never received ) can be sent to the client to document necessary or advisable follow-up. It might also be protective of the practitioners involved.
2. **Compilation:** It could serve to compile and organize all relevant documents to a particular trust or transaction.
  3. **Contents:** It could serve as a table of contents. All documents in the checklist would be numbered., Then, the actual documents could be organized electronically (or in paper if that is still desired) named with first the number corresponding to the table of contents. In that way, copies of all final documents are organized. That creates a record for any future use, such as for the CPA to use to select exhibits for a gift tax return. This creates a permanent record so that if years from now a document is needed it can be easily identified.
  4. **Exhibit List:** A CPA or other adviser preparing the gift tax return can use the same listing to extract items desired to be attached to the gift tax return as exhibits.

The applications of the checklist to these uses will be discussed further below.

### **Identify Missing or Incomplete Steps/Documents**

One method to identify aspects of planning that may be incomplete, as well as to communicate those points to clients and other advisers (in whose purview follow up steps may reside) is to prepare a checklist for each trust and transaction that was consummated. This same organizational approach (which will be discussed and illustrated below) is suggested for consideration for all estate planning (each complex trust, each significant transaction, etc.) to identify and organize documentation and identify open items or steps that might be considered to “shore-up” that planning.

Practitioners might explain to clients that organizing all the documentation for a plan in a systematic and organized manner may be vital to the long-term success of that plan. Creating a compilation can also assist practitioners in obtaining, completing, retaining, and organizing the documentation necessary to support a plan, a process that could help with the administration of any trusts, or the plan, in the event of a tax audit, creditor claim, or family challenge. To name a few examples, such information could be essential to corroborate the positions taken on income and gift tax filings, to properly plan for trust distributions, and to ensure that important steps and ancillary documentation is not missing or incomplete. This information, some of which is identified in the sample checklist below, may facilitate the administration of a client’s trusts and transactions, and assist the client’s professional team in documenting and compiling the planning the client completed.

### **Confirming Details and Ancillary Documents May Be Vital to Plan Success**

Simply put, in even what might be viewed as a modestly complex trust plan there may be dozens, even scores, of documents, that should be created, organized and retained to support the plan. The risk that one or more documents are overlooked, not saved, or not completed may be reduced significantly with a detailed organized checklist.

Several recent U.S. Tax Court decisions have addressed in some detail the importance of the details, ancillary documentation and steps, to the success of an estate plan. Two were losses for the taxpayers and one a victory, but all drove home a similar message about formalities and attention to detail.

Proper documentation from the planning stage through implementation is vital to the success of a plan. *Levine*<sup>ii</sup> was a taxpayer victory in an intergenerational family split-dollar estate tax case. The Court in *Levine* lauded the taxpayer for the detailed documentation explaining, among other things, the planning to be done, the planning using only “excess” assets, and the careful completion of all legal documentation to support the plan, with careful attention to the language used.

In contrast, *Smaldino*<sup>iii</sup> was a taxpayer loss in an indirect gift case. While some practitioners might dismiss *Smaldino* as merely a bad facts case, it demonstrates clearly many steps that should be handled properly to support a plan, including: consistent reporting of the transaction on income (e.g., K-1s) and gift tax returns, properly dating all documentation (e.g., gifts and other transfers), updating entity documentation (e.g., an amended and restated operating agreement reflecting each ownership change), complying with requirements of an entity’s governing documents (e.g., a document confirming manager approval to a transfer), having sufficient time between steps to help negate a step-transaction challenge, having and corroborating economic substance to transactions, having entity documentation that corroborates the estate planning transfers made, and more. The appraisal in *Smaldino* also raised issues.

Most recently *Sorensen*<sup>iv</sup> also highlighted the importance of proper documentation and implementation of planning. In *Sorensen*, the taxpayer attempted a defined value transfer, but the corporation’s stock ledger did not reflect the dollar value transfer and a later sale of the company to a third party sold a specific number of shares when in fact, to be consistent with the initial defined value transfer, the number of shares sold to the third party should have reflected the impact of the initial defined value transfer.

In sum, recent cases have reinforced the importance of having consistency and accuracy across dozens (or more) of different documents involved in common estate planning transactions. Practice approaches might warrant updating to respond to the clear messages of these cases. The points noted in the preceding discussions (which were not all the points raised in each case) comprise a list of perhaps 20 items. The above listing does not include obvious documentation such as a fully signed trust, bank account opening documentation for a trust bank account, direction letters to directed trustees, annual minutes or bylaws of entities, and more. Thus, a common estate planning transaction could easily have dozens of documents. Yet the above cases make clear that the dating of document execution, share reporting, and other aspects of each document should be consistent with the underlying transaction. While it is impossible to achieve perfection in most instances, striving for complete accuracy should be the goal of plan creation, implementation and later administration. A checklist is a key tool to accomplishing this.

### **Communicate to Clients Why Trust Compilations Should be Created and Maintained**

For any practitioner on the planning team to assume the lead in compiling all documentation for a plan, client authorization for the work will be necessary. Thus, the client needs to be on board with the need for this administrative step.

After the stress and pressure clients experienced in 2020 and 2021 to complete their planning, many of them may be experiencing “estate planning fatigue.” Apart from the pressure of 2020-2021 planning, many clients tend to lose interest in planning after the plan documents and primary transfers are completed. Following up to be certain that ancillary documents were completed, insurance coverage updated, minutes done, direction letters completed, etc., doesn’t capture the interest and excitement of the primary planning steps.

But, as the several recent cases mentioned, among others, have emphasized, good housekeeping remains vital. Practitioners should consider communicating to their clients the importance of completing all the follow-on steps of the planning that was started. Explain that the creation of a compilation will make the periodic follow-ups (*e.g.*, annual review meetings) and future trust administration easier for them and their professional advisors.

Practitioners can incorporate some of the following points in client communications as they recommend preparation of a trust planning compilation for the client's consideration:

- Organizing and safekeeping all governing instruments and supporting documents may save the client time, money and aggravation in the future. It should be emphasized that the best time to start the compilation would be relatively soon after the planning is completed, while the transactions are fresh in the practitioner's, the client's, and the rest of the professional team's minds.
- A compilation will organize the planning documentation in an easily accessible format for future amendments, restatements and administration of the plan.
- Even a simple estate plan can involve a surprising number of documents that need to be organized and disseminated. Without a visual guide, a client may not realize the amount of extra documentation that might be prepared and organized.
- A client who created and funded an irrevocable trust may need to have his or her professional team file a gift tax return on the clients' behalf to report the gifts to the IRS. It may also be essential for the client to allocate annual or lifetime exclusions and/or generation skipping transfer ("GST") tax exemption to the trust. The filing process could ensure avoiding transfer taxes by the trust for generations to come, or even indefinitely, and safekeeping of the related documents is recommended. Organizing a comprehensive package of all documents pertaining to the trust, gifts to the trust, and other trust transactions can provide a cost-efficient roadmap for a client's professional team to prepare the gift tax return and refer to it in the future. In fact, the practitioner can draft the compilation table of contents in such a way that can also be used as a basis for preparing the exhibit list for the Form 709 gift tax return.
- The mad rush to plan in 2020 and 2021 yearends, similar to 2012, resulted in less organized and potentially incomplete planning for clients. Even if it has been communicated to clients previously, reiterating that the rush assuredly could have resulted in incomplete planning and/or implementation than would have occurred in a more normal planning environment may protect the practitioner and help emphasize the need for a follow up by clients.
- A careful organization of all the supporting documents related to a transaction may be the only way to fully understand all the nuances of the transaction and identify potential gaps which could require follow up and correction.
- The process of assembling a compilation may identify the missed steps and overlooked or incomplete documents. In short, preparing a compilation may be vital to identifying the inevitable oversights resulted by the rush and volume of yearend planning, or merely the complexity and number of steps in any complex plan whenever completed or implemented. This process may provide the practitioner and the client the opportunity to determine and correct if a document was missed, not signed, partially signed, or dated incorrectly. While not a guarantee that a correction will be respected, it is far preferable to have such issues discovered now than wait for it to be brought up by the IRS during an audit years later.
- Until recently, storing and sharing a trust compilation would have required a massive amount of printing, mailing and physical storage. Today, with the use of

any of the widely available secure digital systems and programs, storing and sharing a trust compilation is easier, and safe (e.g., a client portal created in ShareFile). Clients can maintain the records, which can be shared with their professional advisors and successor trustees as easily as sharing a link digitally.

### **Tailor the Compilation to the Type of Trust Created**

The characteristics of a trust, and the corresponding transactions that the trust is involved in, may affect the format of the trust compilation, how it is organized, and the recommended steps a client should take to report the planning on a gift tax return, as well as during the trust administration process.

Organizing the files for a particular trust or transaction is not going to be an intuitive or obvious process and can be especially frustrating for a client who may not understand the intricacies involved in tailoring the estate plan. Practitioners should consider educating clients about the complexities of implementing a plan and the consequences of oversights. Here are a few examples that practitioners can communicate to their clients:

- If the client established a non-grantor “complex” trust, the trust could pay taxes on undistributed income and realized gains. A well-designed non-grantor trust might not owe state taxes on that income or gains if properly structured and administered to avoid taxation in a particular state. However, if the trust is established as a non-grantor trust, it must be administered in a manner that qualifies for that status. If the trust has the option to make a distribution to the client’s spouse, an “adverse party” (e.g., a child who is also a beneficiary of the trust) would have to approve the spousal distributions.<sup>v</sup> Thus, the checklist created for a non-grantor trust should include a section to save documentation of adverse party approvals of spousal distributions, and a section for the annual trust income tax returns. A non-grantor trust probably should not own life insurance on the settlor’s life because of the risk that the income could be used to pay premiums, leading to the trust’s being characterized as a grantor trust. Thus, the trust compilation may not have a heading for life insurance. Alternatively, it might be helpful to have a caption “Non-Grantor Trust Administration” wherein a list of matters that might unintentionally transform the intended non-grantor trust into a grantor trust can be reviewed periodically to decrease the likelihood that such mistake is made.
- If the trust is a life insurance trust, it should have captions to include information on insurance premiums, policies and illustrations (formatted in a manner to encourage periodic review with an insurance consultant to confirm that policies are performing as intended), split dollar or premium financing arrangements, and other related documents.
- If the client and his or her spouse both created trusts for each other (non-reciprocal spousal lifetime access trusts or SLATs), the trusts could be designed, funded, and operated in a manner which could support their integrity as non-reciprocal trusts. Perhaps a caption in the checklist can be provided for where some of the key differences relied upon are noted. The client, if not a beneficiary, should not receive distributions from the trust he or she established. Perhaps a caption in the annual trust administration section to monitor distributions could be included. If the trust has any powers that make the trust a grantor trust (e.g., the power to swap trust assets, the ability to loan trust funds to the grantor), the checklist could include sections regarding the exercise of those powers so those too can be monitored for compliance with trust terms.

Customizing the checklist and your permanent file to accurately reflect, among other things, the actual nature of each of a client's trusts, the assets of each trust, and the specific transactions that each of the trust is involved in, etc. may not only facilitate administration, but it may help the client understand the various steps which will need to be taken now or in the future. That customization may enhance the likelihood of the independent nature of the trust's being respected, and that the planning will meet the client's objectives.

### **Trust Compilation Contents**

Each checklist should be tailored to reflect each client's particular planning strategy, the entities, and the trusts involved. The listing and explanations in the sample checklist below are generic but should give the practitioner a starting point to identify what might be included in a trust compilation. The practitioner can provide a customized checklist to each client as a guide to collecting and organizing all the relevant documentation. Many items in the sample list will not be relevant to a particular client's planning, and some key items to a specific plan may not be listed.

When evaluating the relevance of the illustrated captions below to your clients' trust plans, the practitioner should omit the items that may not be relevant for that plan, and make notations for future follow up for those items that are relevant. That may serve as a useful reminder of steps the practitioner may have typically taken in creating the plan but might have missed. For example, the client may not have created a personal balance sheet, budget or financial forecasts before funding the trusts. Doing so may have been advisable and desirable before the planning was completed to help determine how much should be transferred to each trust. But even after the transfers are completed, it may still be helpful to obtain financial data in the compilation to help corroborate that the transfers did not constitute a fraudulent conveyance, and that the clients had adequate resources to support the transfers. Practitioners could inform the clients about what steps might still be taken to help support the transaction's validity.

It is preferable to create the financial background prior to a transfer to help demonstrate, if necessary, that there was no need for the client to retain an interest in the trust (e.g., by an implied agreement with the trustee as to distributions, or tax reimbursements), or that the transfer was not a fraudulent conveyance (*i.e.*, intended to hinder, delay or defraud a creditor because the client had sufficient resources after the transfer). However, the practitioner may still recommend that the client creates the financial analysis and incorporates it into their trust compilation after the fact. Contemporaneous evidence that a client's financial position shortly after the transfer is considered solid could be good evidence to have.

### **Creating a Trust Summary**

The first step in creating a trust or a transaction compilation should be to establish a summary of the trust and transactions involved. This is particularly important for a client who has multiple trusts. The summary would help the entire professional team, as well as the client, to quickly glean the key facts and purposes of each trust and transaction. Here are common categories/captions to consider for a succinct trust synopsis. This summary may be incorporated into the checklist or listed as the first item in the checklist.

1. Name of Trust.
2. Formed under name and date of agreement. A testamentary trust might be formed under a will, which could have been executed on one date and then come into

- existence on a later date. A formerly revocable trust would become irrevocable on, at the latest, settlor's death. It is good practice to record not only the date of the execution of a document but also the date on which it achieved its current status. In many cases, existing irrevocable trusts may have divided on the occurrence of a certain event (*e.g.*, death of the settlor or sale of a family business), so the prior trust is the instrument under which the trust in question is created. Some trusts might be the result of a merger with, or hold assets that were decanted from, another trust. Capturing a concise and organized historical background in the summary could help create a timeline for the trust and prevent a future need to review old files.
3. Trust Tax Identification Number.
  4. Current Trustees. There may be multiple trustees. A modern trust may have a general, administrative, distributions, investment, insurance, charitable, special holdings, or other trustees or other fiduciaries, such as an investment or distribution adviser. Be certain to list each category of trustees or other fiduciaries, and the person(s) or institution(s) named to serve. It may also be useful to succinctly indicate the functions and responsibilities of each trustee or other fiduciary.
  5. Successor Trustees
  6. Powerholders. Modern trusts, especially often have an array of special function appointments, or persons designated to hold certain powers.
    - a. These could include, among other possibilities, a trust protector with certain designated rights or powers, a person with the power to appoint trust assets to the settlor or others, someone authorized to make loans to the settlor.
    - b. A person may be designated to hold powers to determine or resolve matters such as who a descendant is, whether a person should remain a beneficiary despite the instrument's referring to their former name, and LGBTQ matters (*e.g.*, incorrect pronouns or names due to self-identification after a trust was drafted)
    - c. A special powerholder may be appointed to assure compliance with religious precepts, such as a limited power of appointment to assure dispositions in accordance with Islamic law.
    - d. All these powerholders could be identified with brief explanations of the powers and purposes of the appointment.
  7. Trust assets. Identifying key trust assets will clarify the purpose of the trust and how it should be administered. For example, if the trust owns stock of a Subchapter S corporation, care will have to be taken to assure that the trust retains the right to hold that stock and not jeopardize subchapter S status.
  8. Letters of Trusteeship. Indicate details (dates, court number, etc.) of any court provided documentation appointing one or more trustees (or other fiduciaries) for a testamentary trust.
  9. Beneficiaries should be listed with key information and any special circumstances that may be relevant to the trust administration.
  10. Summary of selected trust provisions. This could be a broad overview with references to the actual section or provision numbers of the trust for further details. For example, if income must be distributed to a spousal beneficiary, the trustee will have to be on notice for that. Those distributions might affect investment allocations and have specific income tax implications.

### **Protection for the Practitioner**

In *Wellin*, the plaintiffs alleged a failure to properly identify, address and potentially have clients waive inter-generational and spousal conflicts of interest in the course of executing

their estate plan. Also, questions were raised as to whether the client was informed of the potential tax consequences of grantor trusts, and the potential risks of the transaction.<sup>vi</sup> Similar claims appear to have been made in *Raia*, that counsel did not explain potential consequences of a transaction.<sup>vii</sup> Providing an organized table of contents may assist in clarifying the nature of the transaction to the client in a visual way that can augment any other explanations given. Several of the steps suggested in the sample checklist below, *e.g.*, creating a schematic of the plan, collecting letters, memoranda and other client communications, may also protect a practitioner from later arguments that the client did not understand the plan.<sup>viii</sup> Also, several of the due diligence steps, such as obtaining (or at least requesting and documenting the request), for example, a balance sheet and, financial forecast, etc. may protect both the client and the practitioner if there is a later challenge to the plan by the IRS or a creditor.

Practitioners might consider noting in a draft of the checklist provided to the client, items that the client did not wish to pursue even though recommended, or that remain outstanding at the time the checklist is sent.

For unusually complicated transactions involving scores and scores of documents, color coding or indicating which steps and documents are being prepared by which party might facilitate completion of the transaction.

## **Conclusion**

The preparation of a trust compilation may help both the practitioner, as well as his or her clients and the clients' professional advisors, in better understanding the myriad of planning steps that were taken as part of the transaction. It can also assist in formulating a plan to administer the trust more successfully, leading to a better chance of achieving the clients' objectives.

The concept of a trust compilation will be particularly relevant to planning completed in 2020 and 2021 if the transaction has not been reviewed since then. But it can and should be applied to all planning. The preparation of a "checklist" for planning before it is consummated may increase the likelihood that all documents related to the transaction have been identified and have or will be executed. More importantly, a checklist may provide the client with a visual understanding of the plan and a guide to the administration of that plan.

A sample checklist has been illustrated below but should be adapted by the practitioner for their practice, their style of presenting information to clients, and the particular client's plan and circumstances.

# Sample Template Trust Compilation with Explanations

CLIENT NAME  
TRUST NAME  
Trust Compilation  
Table of Contents

**Introductory Comments:** If the client has multiple trusts that are relatively simple (*e.g.*, two simple life insurance trusts), perhaps the practitioner can create a single compilation for the entire plan. If a complex trust plan was implemented (*e.g.*, a note sale of interests in several closely held businesses to a trust), the practitioner might consider creating a separate compilation for each such complex trust transaction.

Once created, an electronic compilation can easily be shared with the client as well as other members of the client’s professional advisory team. Each relevant document could be saved in an electronic folder with the corresponding tab number/name. For example, if the fully executed trust agreement is listed as number 10 on the checklist, as it is below, a copy may be saved as “10\_Smith Family 2023 Irrevocable Trust,” and so on. If all the files are then saved in the same folder and organized by “Name,” they will be organized sequentially in the same order as the checklist.

If a physical/paper binder is created, then the trust agreement would be placed behind tab 10 in a loose-leaf binder.

## Overview

### 1. Schematics

- a. **Comment:** Many complex trust transactions can be better understood and administered if there is a diagram or schematic of the plan. Each plan has unique nuances, and many plans entail complexities that can be confusing even to the astute practitioner. The adage “A picture is worth a thousand words,” is true. A diagram may be critical to communicate the interrelationships of various trusts, trustees, assets, and entities especially to those advisers who are more tangentially involved in the plan but nonetheless have important roles to serve. A schematic is another approach to explaining the plan to a client that might mitigate later claims that the plan was not understood.

### 2. Planning memorandum

- a. **Comment:** Consider collecting substantive letters and memoranda concerning the planning to be included along with the documentation for the trust and transaction. This may confirm the information that was provided to the client prior to completion of the transaction, as well as provide copies to other members of the professional team. This information may be helpful in the future when endeavoring to understand the motives or reasoning for a particular step in the planning. This may not only be helpful to assure that the client understands the plan, but it may be a favorable factor if the plan is later challenged.<sup>ix</sup>

## Due Diligence

### 3. Financial Data

- a. Balance sheet of settlor
  - i. **Comment:** Including this information may demonstrate that the client had adequate resources after the transfer to the trust to demonstrate that the transfer did not leave the transferor with inadequate resources, and arguably then was not a fraudulent conveyance. It is also helpful to demonstrate the appropriateness of the planning, *e.g.*, how much wealth is being transferred relative to the temporary or bonus exemption amount. Consider including a balance sheet before the transactions are completed, as well as an updated balance sheet reflecting the financial position of the settlor after the transactions are completed.
  - ii. Before trust transactions balance sheet
  - iii. After trust transactions balance sheet
- b. Financial projections
  - i. **Comment:** These may also potentially demonstrate that the client has adequate resources after the transfer to demonstrate that the transfer was not a fraudulent conveyance. Financial institutions can play an integral role in proactively producing a goals-based analysis that could take a holistic, long-term, deep dive into the client's resources prior to making the transfers, to ensure funding trusts or charitable vehicles should not burden the client financially. These forecasts could also help explain the consequences of the planning to the client from yet another perspective that when coupled with a schematic, planning memorandum and other explanations, will increase the likelihood of the client's understanding a complex plan. The financial analysis may also identify gaps in the plan that might be addressed by financial planning. For example, a forecast of a non-reciprocal spousal lifetime access trusts may identify a financial risk created by the premature death of one or either spouse, and might suggest insurance to fill that gap. A financial analysis may also be viewed favorably by a court if the analysis can demonstrate that the planning involved only excess capital (*i.e.*, not the resources the client requires for living expenses).<sup>x</sup>

#### 4. Judgment and Lien Searches

- a. **Comment:** As a protection for the client's making a transfer, consider verifying that the client does not have outstanding claims against him or her that could render the transfer inappropriate, inadvisable, or, worse, a fraudulent conveyance. The documentation could corroborate that the client (and by association, the practitioner) made a good faith effort to identify debts that could later be argued as a fraudulent conveyance or one that rendered the client unable to support himself or herself after the transfer. Practitioners who assist a client make transfers when identifiable claims exist could themselves face harsh repercussions. "Courts in a number of states have specifically held that lawyers can violate applicable disciplinary rules by facilitating fraudulent conveyances. This can result in an attorney being suspended or even disbarred."<sup>xi</sup>

#### 5. Title run-down

- a. **Comment:** If real estate is transferred to a trust, a title search on the real estate may be obtained prior to the transfer to identify liens or claims that could relate to the property, the entity or even the client.
6. Affidavit of Judgment and Lien
7. Affidavit of Solvency
  - a. **Comment:** Several states require an affidavit of solvency for every transfer of assets to a self-settled domestic asset protection trust (“DAPT”). Perhaps this step should not only be limited to DAPT transfers. If the clients create SLATs, if those SLATs are successfully challenged by a creditor or the IRS as triggering application of the reciprocal trust doctrine, the trusts are deemed “uncrossed” with each spouse being deemed to be the transferor to the trust for which they are a beneficiary. That would effectively make that SLAT a self-settled trust. Perhaps having an affidavit of solvency, if other precautionary steps are taken (primary of which is having situs in a DAPT jurisdiction) may as a fallback position, permit the trust to qualify as a DAPT and even still be outside the client’s estate. Also, an affidavit of solvency includes a number of provisions that may prove helpful to any transaction. “To the best of my knowledge and belief the information provided as part of this Affidavit, and in conjunction with the planning and funding of the Trust for which I am the Settlor, and all attachments to this Affidavit and the Trust, are true, complete and not misleading.” These and many other provisions may prove helpful to a client funding a non-DAPT trust to deflect a challenge that the transfer constituted a fraudulent conveyance. The statements may also prove protective of the practitioner.
8. Waiver of Elective Share and Community Property Rights
  - a. **Comment:** Consider any possible retitling of assets that has occurred, or will occur, whether there are step-transaction considerations, and whether a transmutation agreement is necessary or advisable for community property. If there is a change in title to assets consider whether it might be beneficial to disclose that spousal transfer on a gift tax return.<sup>xii</sup>
9. Local State Counsel Opinion
  - a. **Comment:** If the trust is created in a state other than where the practitioner is licensed to practice, a legal opinion of an attorney in that state as to the validity of the trust under that state’s laws might be obtained.

## **Trust and Trustee Documentation**

10. Executed Trust
  - a. **Comment:** Be certain that the executed trust document is complete. For example, some persons, such as a trust protector, may sign a counterpart to the trust rather than the actual trust document. Consider creating a list of basic information for the trust under this heading so that both the practitioner and the client can have this information at hand.
  - b. Name of Trust
  - c. EIN
  - d. General Trustee
  - e. Investment Trustee
  - f. Insurance Trustee

- g. Trust Protector
- h. Loan Director
  - i. **Comment:** Indicate general requirements for the person holding a power to loan to the settlor to direct such a loan. Note the trust provision containing this provision and the name of the person.
- i. Substitution Power:
  - i. **Comment:** Indicate general requirements for the person holding a power to substitute assets held in the trust with assets held by the settlor of equal value. Note the trust provision containing this provision and the name of the person.
- j. Power of appointments:
  - i. **Comment:** Indicate general requirements and parameters for the person holding a power of appointment, whether it is general or limited, and other pertinent facts. Note the trust provision containing this provision and the name of the person. Consider whether the powerholder should be separately advised of the existence of the power so that they can affirmatively determine whether to exercise it.
- k. Power to add a charitable or other beneficiary:
  - i. **Comment:** Indicate general requirements and parameters for the person holding a power to add beneficiaries, and other pertinent facts (e.g., is the settlor potentially included). Note the trust provision containing this provision and the name of the person. Consider whether the powerholder should be separately advised of the existence of the power so that they can affirmatively determine whether to exercise it.

l. Powers of Appointment

11. Trust Company Ancillary Documents

- a. **Comment:** If the client has named a corporate or institutional trustee, or uses a professional investment adviser, attach copies of formal acceptance and all account opening documents, fee schedules and negotiated fee agreements, and other forms and contact information related to the institution. If a separate agreement is signed with, for example, the trust protector, memorializing that relationship, attach that here as well.

12. Fiduciary Actions

- a. **Comment:** If there are any actions taken by fiduciaries or powerholders named in the trust, those actions can be added to this section as they are completed to create a chronological history of the trust.

**Initial Funding**

13. Declaration of Initial Gift to the Trust

- a. **Comment:** Some practitioners suggest that if you make transfers to a trust as gifts, there should be a document confirming that the assets were indeed gifted to the trust, *e.g.*, a “gift letter.” If there is one, attach it here.

## 14. Initial Funding

- a. **Comment:** Attach copies of the documentation supporting the initial gifts to the trust. Often, if business, real estate, insurance or other assets are to be transferred to a trust, the initial funding will include cash and/or marketable securities to open trust accounts. Thus, this documentation may include a check, wire transfer information, assignment of entity interests, etc. If the trust will purchase assets, the initial funding may be used to support the later purchase. Valuations of assets should be included, as well as documents pertaining to cost basis of assets. If more than merely cash and marketable securities are transferred on the initial funding, see further suggestions in the comments below. Some practitioners prefer to have an initial funding in cash and securities before other assets are transferred to the trust.

## Secondary Gift Funding

**Comment:** In many trust plans, an initial or seed gift is made to the trust (see above), followed by additional gifts of other assets (*e.g.*, stock in a closely held business). This section would need to be tailored to the specific transaction. We have included a sample of the type of documentation that may be used to effectuate the gift of interests in a closely held business to the trust, so this illustration would have to be adapted to reflect the specific assets transferred in the secondary gift funding. Values might be added if the practitioner believes that there should be a correlation between the value of seed gifts and an anticipated sale, *e.g.*, some suggest that a 9:1 ratio is advisable, others suggest 10:1. There are many different views on all of this, but whatever view the practitioner takes might be noted.

## 15. Entity Formation Documents

- a. Certificate of Formation, Articles of Organization, etc.
- b. Certificate of Good Standing
  - i. **Comment:** If ownership interests in an entity, (*e.g.*, a limited liability company or corporation) will be transferred to the trust, a certificate of good standing might be obtained from the state in which the entity was created and authorized to do business. If the entity does not validly exist, or is not in good standing under state law, the asset protection goals, the intended funding amount, and even the validity of the transfers may be affected.

## 16. Entity Due Diligence

- a. **Comment:** Consider having due diligence performed on each entity before a transaction is completed.
- b. Tax liens
- c. UCC search
- d. Litigation search

## 17. Initial Governing Agreement for \*Entity-Name

- a. **Comment:** If the entity is a corporation, a shareholder's agreement for that corporation prior to the transfer to the trust should be included. This record would demonstrate the ownership before the transfer is made, confirming the grantor's position in making the transfer. Courts have looked negatively on the failure to amend and restate entity governing documents to reflect ownership.<sup>xiii</sup>

## 18. Pre-Transfer Membership Interest Certificates

- a. **Comment:** If the transferred interests to the trust are shares of stock in a corporation (or if membership interests in a limited liability company are certificated), copies of the relevant certificates should be attached. A list of the certificate numbers, date of issue, date of cancellation, and other relevant data can be included for reference. Creating a history of all certificates for the entity in this checklist would allow the practitioner, as well as the client, to have a single resource for future reference. The old equity interests may be cancelled, and new interests (see below) issued to the trust as transferee. In some instances, such as if there is a defined value transfer, practitioners may have the transfer documentation held in escrow pending final determination of gift tax value as finally determined, and that may be then reflected in the checklist.

## 19. Appraisal

- a. **Comment:** A “qualified appraisal,” completed by a “qualified appraiser,” that values the private equity, real estate or other non-marketable assets transferred by the client to the trust should be included. The date of the appraisal and the determinations of value might be indicated in the checklist to make that information easily accessible. That report should be attached, and practitioners should confirm that the final appraisal report reflects the values used when the transfers were completed. If a difference is noted, the entire planning team should have a discussion with the appraiser to determine how to address the issue. In some instances, such as when there is the potential for imminent tax law changes such as during 2020 and 2021, transfers may have to be completed before an appraisal could be obtained. In such instances, an appraisal was obtained after the transaction, and if a valuation adjustment mechanism was incorporated into the transfer documents, it would allow for adjusting the interests (or note on a sale, as discussed below) to reflect the appraised value. That would be a first-tier adjustment that, depending on how the transaction was structured, might be followed by a second-tier adjustment for gift tax value as finally determined. If a transfer was made without a qualified appraisal (a defined term for gift tax purposes), the practitioner should determine what additional disclosures will be required when filing a gift tax return. Practitioners should consider confirming that the appraisal reflects all relevant data about the entity or asset being appraised, and that the appraisal methodology is consistent with application Regulations and law. The IRS has challenged a number of recent transactions based on these issues, so clearly, valuation is a matter of IRS focus.<sup>xiv</sup>

## 20. Direction Letter

- a. **Comment:** Many trusts intended to hold concentrated and/or non-marketable assets, such as equity in a real estate LLC, or a family business, are structured as directed trusts, although the terminology and nuances can vary. In directed trusts, a specified person (*e.g.*, an “investment director” or “investment trustee”) may be authorized to determine which assets the trust will hold, and to direct the institutional or other independent trustee to retain or sell certain assets. One advantage of this type of structure is relieving the institutional (“general”) trustee of the liability for investment performance and decisions (assuming applicable state law and the trust instrument permit this). The general trustee’s fees are also usually less, perhaps significantly so, if that trustee is relieved of liability for investment decisions. Some

trustees may charge only a flat annual fee rather than a percentage of asset value if serving in a directed capacity. This nuance may be important to the transaction if an institutional trustee must be named to help secure situs in a particular jurisdiction. That has become more common as the use of hybrid DAPTs, DAPTs and SPATs has grown. In such instances, when transfers of non-marketable assets are made to the trust, the investment adviser may need to formally direct the general (perhaps institutional) trustee to hold such assets. This direction may be documented in a formal direction letter. A formal letter reviewed by counsel may be recommended so that any nuances of the trust and the direction can be addressed. For example, if the trust incorporates a mechanism to shift any gift value to an incomplete gift trust (*e.g.*, if there is a sale that later is determined to include a gift element as a result of an IRS valuation adjustment on audit), that gift value might be shifted by trust terms into a sub-trust under the main trust instrument that is incomplete. The nuances of this mechanism may need to be carefully addressed in the direction letter. If there are multiple transfers, each direction letter for the appropriate phase of the trust plan might be included in this compilation.

## 21. Entity Resolution or Consent

- a. **Comment:** The appropriate persons on behalf of the entity (*e.g.*, officers on behalf of a corporation, members on behalf of a member-managed limited liability company) may need to approve the assignments, sign off on the new governing instruments, waive rights of first refusal, and accept other prerequisites to the assignment of entity interests by the client to the trust. Care should be taken to identify any pre-requisites to transfer required by law, the trust instrument or the entity governing documents. Courts have said that the failure to obtain required approvals constitute a disregard of formalities that could jeopardize the transaction.<sup>xv</sup>

## 22. Assignment of Equity Interests

- a. **Comment:** If the client makes a gift of, or sold, membership interests in a limited liability company (“LLC”) to a trust, an assignment of LLC interests to the trust might need to be prepared to effectuate the transfer. Key information concerning the assignment might then be summarized in the trust compilation (date, interests transferred, special terms of the assignment, etc.). The consistency of dates, amount transferred (percentage interest or if a valuation adjustment mechanism is used, a dollar value of interests) to all other documents and the plan should be confirmed.

## 23. Amended and Restated Operating Agreement for \*Entity-Name

- a. **Comment:** Any amended governing instrument created reflecting the assignment (*e.g.*, an amended and restated operating agreement or perhaps a joinder agreement in which the trust agreed to be bound by the existing operating agreement) could be included in the compilation. The consistency of dates, amount transferred (percentage interest or, if a valuation adjustment mechanism is used, perhaps a dollar value of interests) to all other documents and the plan should be confirmed. It may be advisable to have a new governing instrument executed by the trust to reflect the trust as an equity owner after the transaction. If there is an interim change in ownership, *e.g.*, from one spouse to the other or a transmutation from community property to one-half to each spouse, consider having governing

documents signed for those interim steps prior to either spouse's transferring the interests later to a trust. Also, consider avoiding making the interests transferred in the retitling from the interests identical to the interests later transferred to the trust (*e.g.*, if husband transfers an entity interest to wife, have wife transfer only a portion of the entity interests to her trust and retain the excess interests). However, given the risks of a *Powell* challenge, practitioners might have to weigh the benefits of transferring all interests out of the client/transferor's name versus the risks created by having identical transfers of the number of entity interests.<sup>xvi</sup>

#### 24. Post-Transfer Membership Interest Certificates

- a. **Comment:** If new membership certificates were issued to the trust to indicate its ownership, key information might be indicated here, and copies of the new certificate(s) may be attached. If the transfer was subject to a valuation adjustment mechanism, there should be a consistent indication of that as a legend on the certificate (perhaps along with the more typical legends indicating transfer restrictions). Consider whether certificates or other documents might be held in escrow pending resolution of any valuation adjustment mechanism and, if so, that should be reflected here as well.

#### 25. Stock Ledger

- a. **Comment:** A copy of the stock ledger for a stock transfer should be obtained and retained in the file. Courts have noted the importance of the information contained in a stock ledger conforming to the underlying transaction, *e.g.*, a transfer of a dollar value of shares rather than a specified number of shares, as in a *Wandry*-style transaction.<sup>xvii</sup>

### Sale to Trust - \*Entity-Name

**Comment:** For larger estates where the mere use of all the client's estate tax exemption amount will not suffice to avoid or sufficiently reduce potential estate taxes, more complex trust plans, which may include the sale of assets to the trust to freeze the value in the client's estate and shift future growth outside of the client's estate, lock in discounts, etc. may be completed. Some clients may wish to consider completing such transactions before a possible change in tax law, as completed planning may be "grandfathered."<sup>xviii</sup> The template below should be adapted for whatever type of entity or other asset is sold and replicated when many different entities are involved, and the structure of the transaction (*e.g.*, a sale for a self-cancelling installment note (SCIN), or a private annuity) or other structures. In addition, if practitioners use any planning techniques in the transaction, such as a specific defined valuation adjustment clause, the template should be modified to reflect those techniques.

26. Formation Documentation; Good Standing Certificate

27. Governing Instruments for \*Entity-Name Prior to Sale

28. Pre-Sale Membership Interest Certificates

29. Appraisal

30. Equity Interest Sale Agreement

**Comments:** Whatever the approach, the appropriate captions should be provided for, and copies of documents should be attached as exhibits in that

sequence. Practitioners may consider listing items that might have been discussed and considered but ultimately rejected (adding reasons as appropriate), and mark them as “Not Used”, when applicable. This can avoid unnecessary searches in the future to determine what was not implemented and why.

### 31. Escrow Agreement

- a. **Comment:** Some sale or other transactions might use an escrow arrangement to hold documents of title, especially if there is a valuation adjustment mechanism that could result in a change in the anticipated or estimated equity interests as a result of a future appraisal or audit. That approach may lend further credibility to the valuation adjustment mechanism as a mechanism used, to assure that changes in the interests transferred will be properly reflected/allocated among the parties. Depending on what arrangements were used, key documents and relevant information can be listed below, and copies of all relevant documentation can be attached and numbered accordingly. Consider indicating in this checklist who will monitor the adjustment mechanism and inform the escrow agent. In that way, the responsible party will be reminded of the task. Also, indicate this at the end of the checklist in annual review steps.
- b. Escrow Agreement
- c. Certificates Held in Escrow
- d. Blank Assignments for Certificates
- e. Note Cancellation Agreement

### 32. Loan Documentation

- a. **Comment:** If the sale transactions are structured with the buying trust giving the seller a secured promissory note for part or even the entire purchase price, that documentation should be incorporated into the compilation. Consider indicating in this checklist who will monitor interest payments on the notes, etc. In that way, the responsible party will be reminded of the task. Also, indicate this at the end of the checklist in annual review steps.
- b. Note
- c. Amortization Schedule
- d. Pledge Agreement
- e. Split-Dollar Loan Documentation

### 33. Guarantee

- a. **Comment:** If a guarantee is used (*e.g.*, if the value of the trust assets is viewed as too small relative to the value of the assets being sold), documentation for that should be included in the checklist and compilation. In some transactions, and depending on who provides the guarantee, some advisers may recommend a fee to be charged by the guarantor. If the fee is determined by appraisal or some other means, that analysis should be included as well. Consider indicating in this checklist who will monitor guarantee fee payments. In that way, the responsible party will be reminded of the task. Also, indicate this at the end of the checklist in annual review steps. As the components of the transaction increase in number and

complexity, practitioners might find it useful to color-code the person assuming responsibility for each step to make it easier for each person to identify what they must complete and follow up on.

- b. Financial Data on Guarantor
  - c. Guarantee Agreement
  - d. Guarantee Fee Agreement
  - e. Appraisal determining guarantee fee.
34. Direction Letters
  35. Assignment of Equity Interests
  36. Unanimous Consent and/or Resolutions
  37. Amended and Restated Operating Agreement for \*Entity Name
  38. Post-Sale Membership Interest Certificates
  39. Trust Company Reporting/Personal Financial Statements
    - a. **Comment:** Sample language can be provided to the client and the client’s professional team to address the transaction and to define the valuation mechanism employed in the transaction. This information could be reflected in the trust records to ensure the terms of the transaction are respected. For example, if a fixed dollar value of an asset is transferred, the dollar value could be listed, and not a percentage. As previously discussed,, recent cases such as *Smaldino* and *Sorenson* have emphasized that these ancillary documents should properly reflect the transaction. The sample language provided should be tailored to the specifics of the client’s transaction. Following is sample language regarding the use of a *Wandry* defined value clause.
      - a. “Common Stock interests [membership interests] in [Entity-Name] are as determined under the share [membership] determination provision of the Gift Assignment [or under the Purchase and Transfer Agreement] dated [Date] and represent the fixed dollar amount therein as transferred. Any indication of the number of shares [percentage of membership interests] is an estimate based on appraisal that will be adjusted to reflect the gift tax value as finally determined.”

## **Life Insurance**

**Comments:** Some trust plans and transactions incorporate life insurance. If a particular client’s plan does not include life insurance, the practitioner may consider raising the point with the client if life insurance would be an appropriate option and noting it in the checklist even if not used. For example, if the plan entails the creation of SLATs, life insurance might be used to address mortality risk. If a client creates a SLAT, and the spouse dies prematurely, that death might cut off the client’s indirect access to the assets. However, if the spouse’s SLAT were to buy insurance on the spouse’s life, the client could have hedged against the financial risks of the spouse’s premature death. Thus, including the potential for insurance in the checklist, even if the client opts not to use insurance in the plan initially, may provide a reminder to consider it again on later reviews of the plan. Also, indicating a caption for insurance and that it was “not used” may protect the practitioner in the event of a later challenge that the mortality risk in the plan was not addressed.

40. Insurance Summary
41. Life Insurance Projections and Illustrations
42. Life Insurance Policy
43. Premium Financing or Split-Dollar Documentation

## **Post-Transaction Tax Filings**

**Comment:** While the plan is fresh in mind and practitioners are working with the client and the rest of the advisory team to organize all the relevant documentation, they should begin compiling a list of post-signing administrative matters to address regarding the trust and planning. It is easier to identify many nuances of a particular plan's administration while the plan is being completed than to pick up a "cold" file a year (or more) later and to then try to figure out which steps should be taken. Capturing this information contemporaneously might help the client and all advisers properly administer the trust plan. Ensuring that the client understands the importance of follow-up can help protect the practitioner. Merely adding the post-signing steps to the checklist may serve to put the client and other advisers on notice as to their roles in vital post-signing plan administration.

### 44. Gift Tax Return.

- a. **Comment:** A gift tax return may have to be filed by clients to report gifts, allocate GST exemption, and perhaps report certain non-gift transactions (e.g., a sale to a trust). When completing the initial draft of the checklist practitioners might note here some of the suggestions of points for consideration when the gift tax return is later prepared. For example, if assets are transmuted from community property to separate property, perhaps indicate here that the return preparer should consider the reporting of that transfer even if not required. The checklist being assembled can provide a roadmap to the return preparer of documents that might be included in the Exhibit list to the gift tax return. The process of creating this checklist and the accompanying compilation of all documents could save considerable time in the gift tax return preparation process. This groundwork can also enhance the ability to use the gift tax return preparation and review process as a second look at the transaction to identify documents or steps that might have been missed or not completed, so that the entire transaction can be further enhanced by the gift tax return preparation. Practitioners should consider, from a broad perspective, who should file gift tax returns and discuss this topic with both the client and the rest of the client's entire advisory team.

### 45. Trust Income Tax Returns.

- a. **Comment:** Even the grantor trusts with no income tax implications i the CPA may choose to file an annual informational return with the IRS. If the client completed split-dollar life insurance planning, the trust may have to file a required disclosure statement.<sup>xix</sup>
- b. 2023 Tax Year

- i. **Comment:** Practitioners should consider adding comments for any items the practitioner believes should be addressed as part of the annual income tax return filings.
- ii. Confirm state income taxation with your accountant.
- iii. For non-grantor trusts, discuss taxable income of the trust including distributions, with your accountant and financial advisor, to minimize taxation at highest compressed trust tax rates.

- c. 2024 Tax Year
- d. 2025 Tax Year
- e. 2026 Tax Year
- f. List remaining years

#### 46. Individual Income Tax Returns

- a. **Comment:** Clients may have certain aspects of their planning that should be reflected on their individual income tax return. For example, if the client engaged in a split dollar life insurance plan a mandated statement may need to be appended to the individual, as well as the trust's, income tax return. If there are relevant aspects of the plan that may be reflected on Form 1040, list those particular points here and which schedules should be attached to confirm that has been handled. Then list the years following.

#### 47. Entity Income Tax Returns

- a. **Comment:** Certain aspects of a client's trust plan might warrant disclosure on entity income tax returns. If the client sold or gave assets to one or more trusts subject to a valuation adjustment mechanism, the entity income tax returns' Forms K-1 might need to indicate that the ownership percentages for certain members or partners, or S corporation shareholders are estimated and may be adjusted in the future based on the valuation adjustment mechanism.

### Post-Signing Annual Reviews

**Comment:** Given the complexity of certain trusts and trust transactions, practitioners should consider recommending to clients that annual reviews be completed with all advisers addressing payments, actions, documents, etc. that should be monitored or undertaken as part of the administration of the trust and plan. Practitioners vary widely as to which, if any, of the following documents and steps should be addressed and how, so these are merely illustrations to consider.

#### 48. General Review Steps

- a. Confirmation of status of audit and impact on plan
  - i. **Comment:** Obviously, if there is a valuation adjustment the terms of the valuation adjustment mechanism should be addressed. But also, if the statute of limitations for a gift tax audit has tolled the reporting of the equity interests in the entity should be resolved. That may require modifications to Forms K-1 to reflect an actual percentage interest or actual number of shares and removal of any legend about a dollar value transfer, etc. Similar adjustments may be required to trust company records and elsewhere.

- b. Annual Minutes or Consents of underlying entities in which the trust holds an interest.
- c. Modification of Note, if applicable

#### 49. Actions/Consents by Various Persons

- a. **Comment:** Practitioners should evaluate whether there have been, or should be, any actions by various powerholders, fiduciaries or others. At each annual review meeting inquire whether any of the powers held by various persons in the trust were in fact exercised. If so, document what was done and review the actions, steps and any legal agreements with respect to such action for adequacy. Separately, review each potential power and whether there might be an advantage to the trust beneficiaries if any one or more of those powers were exercised. If any such powers were exercised, evaluate whether a certification of that action should be created now to supplement whatever documentation may have been created when the action was taken.
- b. Removal and appointment of trustees
- c. Loan Director direction of loan to settlor
- d. Certificate of grantor with power to substitute.
- e. Certificate of person holding power to loan grantor funds without adequate security.
- f. Certificate of person holding power to add a charitable or other beneficiary
- g. Documentation of any actions taken by Trust Protector
- h. Investment Trustee or Adviser direction letters to Institutional Administrative Trustee to continue holding specific assets
- i. Certificate of actions taken by the Insurance Trustee regarding any insurance policies held in the trust
- j. Documentation regarding the exercise of a power of appointment

#### 50. Note Payments

- a. **Comment:** If the client sells assets to a trust for a note, interest should be paid in accordance with the terms of the note. The practitioner should list each year below and update it reflecting the wire or check information to effectuate each payment.
- a. Note Payment Amortization Schedule
- b. Interest Payments on Note by year
  - i. 20\_\_
    - 1. Account statement or other documentation reflecting receipt of income payment.
  - ii. 20\_\_
  - iii. List and address future years and revise the amortization schedule when any additional principal payments are made (which is recommended).
- c. Principal Payments before Maturity
  - i. Date: \_\_\_\_\_, principal payment of \$\_\_\_\_\_.
    - 1. Direction Letter re: principal payment to be made.
    - 2. Account Statement or other documentation reflecting receipt of principal payment.
- d. Satisfaction

i. List the Maturity Date

51. GRAT Annuity Payments

- a. **Comment:** If a Grantor Retained Annuity Trust (“GRAT”) is used as part of the client’s planning, *e.g.*, as a spillover for a defined value mechanism,<sup>xx</sup> it is imperative that the periodic annuity be paid in accordance with the terms of the trust. The practitioner should list each year below and update it reflecting the wire or check information to effectuate each annuity payment. Including this information may assist in the proper administration of the GRAT and it could be easier to obtain corroboration of each payment as the trust is administered than in the future in response to an audit.

52. Guarantee Fee Payments.

- a. **Comment:** If a guarantee is used in the transaction and a fee is required to be paid periodically, someone should be charged with the responsibility to track each fee and the documentation reflecting the payment was made.

53. Other Steps.

- a. **Comment:** Practitioners should add whatever other steps or components may be involved in a plan and track them as part of this checklist of annual review meetings.

**Summary of Entity Ownership and Gift Exemption Used**

54. **Comment:** Consider including a summary of the ownership of the various transaction entities at the end of the checklist. You can also include the amount of used federal gift tax exemption. If based on the client’s state, gift tax and gift tax exemption apply, consider tracking the amounts in the summary. This section will need to be tailored to client’s transactions, and the valuation adjustment mechanism used. The following example involves the use of a *Wandry* valuation adjustment clause in gifts to the trust. The example involves several trusts and several entities.

55. Entity Ownership and Values after Gifts/Transfers:

a. 202X Gifts.

i. Trust 1- Name

1. LLC 1 – Total gift of \$\_\_\_\_\_, estimated at 100% of membership interests.
2. LLC 2 – Total gift of \$\_\_\_\_\_, estimated at 100% of membership interests.
3. Corporation 1- Total gift of \$\_\_\_\_\_, estimated as 19% of stock, 38 shares.
4. Total Gift: \$\_\_\_\_\_

ii. Trust 2- Name

1. Corporation 2- Total gift of \$\_\_\_\_\_, estimated at 100% of stock, 200 shares.
2. Corporation 1- Total gift of \$\_\_\_\_\_, estimated as X% of stock, X shares.

3. Total Gift: \$\_\_\_\_\_
- iii. Client remaining interests after transactions
  1. LLC 1- estimated at 0% of membership interests.
  2. LLC 2- estimated at 0% of membership interests.
  3. LLC 3- estimated at 0% of membership interests.
  4. Corporation 1- estimated minimum of X% of stock, X shares, after transactions, subject to valuation adjustment mechanisms
- iv. **Exemption used as of 2022:** \$\_\_\_\_\_ (Exemption used before 2022) + \$\_\_\_\_\_ (Trust 1 gifts) + \$\_\_\_\_\_ (Trust 2 Gifts) = \$\_\_\_\_\_

b. 2023 Gift and Sales

i. Trust 1- Name

1. Corporation 1- Total gift of \$\_\_\_\_\_, estimated as 5% of stock, 10 shares.
2. Corporation 1- Total sale of \$\_\_\_\_\_, estimated as 40% of stock, 80 shares.
3. Total Gift: \$\_\_\_\_\_

ii. Trust 2- Name

1. Corporation 1- Total sale of \$\_\_\_\_\_, estimated a X% of stock, X shares
2. Total Gift: \$0

iii. Client's remaining interests after transaction

1. Corporation 1- estimated 0% of stock after transactions, subject to valuation adjustment mechanisms.

iv. **Exemption used as of 2023:** \$\_\_\_\_\_ (Exemption used as of 2022) + \$\_\_\_\_\_ (Trust 1 gifts) = \$\_\_\_\_\_

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<sup>ii</sup> Levine Est. v. Comr., 158 T.C. No. 2 (February 28, 2022).

<sup>iii</sup> Smaldino v. Comr., T.C. Memo. 2021-127 (November 10, 2021).

<sup>iv</sup> Sorensen v. Commissioner, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022).

<sup>v</sup> Code Sec. 672(a): "For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust."

<sup>vi</sup> Wellin v. Nixon Peabody, LLP, 2021 WL 5445968 (11/22/21, 4th Cir. US Ct App).

<sup>vii</sup> Raia v. Lowenstein Sandler LLP and Eric D. Weinstock, Superior Court Of New Jersey Law Division: Civil Part Bergen County, Docket No. Ber-L- , 02/01/2019 ("Raia").

<sup>viii</sup> Glazier, Shenkman, Blattmachr and Garin, “Wellin v. Nixon, Peabody, LLP: Case Lessons On Defensive Practice,” Leimberg Estate Planning Newsletter #2725 (May 16, 2019).

<sup>ix</sup> For example, in the Levine case the court stated: “Swanson spent a good deal of time thinking through all the advantages and disadvantages, conditions and qualifiers. He put together a PowerPoint presentation for the family in late 2007 or early 2008. Then in January 2008 he sent a letter to Larson and the children in which he described the transaction and its legal and tax implications.” Clearly the Levine Court was positively impressed by the care counsel took to explain the plan to the taxpayer. *Levine Est. v. Comr.*, 158 T.C. No. 2 (February 28, 2022).

<sup>x</sup> The Levine Court stated: “From the beginning, Larson and Levine’s children made it clear to Swanson that Levine wanted enough money to maintain her lifestyle until her death. This meant that any estate planning needed to be done with Levine’s excess capital—i.e., assets that she would not likely need during her lifetime.”

<sup>xi</sup> Ken Laino, “Lawyers Can Face Severe Consequences For Helping a Client With a Fraudulent Conveyance,” *Asset Protection Law Journal*, May 28, 2014, <https://www.assetprotectionlawjournal.com/2014/05/lawyers-can-face-severe-consequences-for-helping-a-client-with-a-fraudulent-conveyance/>

<sup>xii</sup> See *Smaldino v. Commissioner*, T.C. Memo. 2021-127 (November 10, 2021).

<sup>xiii</sup> *Smaldino v. Comr.*, T.C. Memo. 2021-127 (November 10, 2021).

<sup>xiv</sup> CCA 202152018 Release Date: 12/30/2021 (GRAT failed because appraisal used was completed before third party offers received prior to transfer); *Daniel R. Baty v. Comm’r*, Docket No. 12216-21 (should executive be charged with knowing potential transaction affecting company); and *Dematteo v. Comm’r*, Tax Ct. Dkt. No. 3634-21 (July 21, 2022) (appraisal of insurance policy was in contradiction to Regulation).

<sup>xv</sup> *Smaldino v. Comr.*, T.C. Memo. 2021-127 (November 10, 2021). The Court in *Smaldino* specifically stated “The record does not suggest that petitioner, in his dual roles as trustee of the Smaldino Family Trust and as manager of the LLC, gave express or implied consent for the admission of Mrs. Smaldino as a member in disregard of the operating agreement’s restrictions. To the contrary, the record shows that on April 15, 2013—a day after he purportedly transferred the LLC member interests to Mrs. Smaldino—petitioner executed an amendment to the LLC operating agreement (providing for guaranteed payments to himself) which identified the Smaldino Family Trust as the LLC’s ‘SOLE MEMBER.’”

<sup>xvi</sup> *Estate of Nancy H. Powell v. Commissioner*, 148 T.C. No. 18 (2017).

<sup>xvii</sup> *Sorensen v. Commissioner*, Tax Ct. Dkt. Nos. 24797-18, 24798-18, 20284-19, 20285-19 (decision entered Aug. 22, 2022).

<sup>xviii</sup> See, Shenkman, Blattmachr and Matak, “Analysis of the Biden Administration’s Fiscal Year 2024 Revenue Proposals,” *Steve Leimberg’s Estate Planning Email Newsletter - Archive Message #3029*, Apr. 6, 2023.

<sup>xix</sup> This arrangement is a split-dollar arrangement under the Final Split-Dollar Regulations and is arguably a non-recourse arrangement. Therefore, for the advances to be respected as a split-dollar loan, the parties must represent that “a reasonable person would expect the loan to be repaid.” Complying with these requirements will prevent the loan from being treated as providing for contingent interest for purposes of Section 7872. This requirement includes filing statements with the parties’ income tax returns each year a loan is made under the arrangement, to comply with §1.7872-15 (d)(2).

<sup>xx</sup> Although some practitioners might be hesitant to use a GRAT in this manner as a result of the IRS position in CCA 202152018 Release Date: 12/30/2021.

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