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Subject: Martin Shenkman, Thomas Tietz & Jonathan Blattmachr: The Bernie Sanders Estate Tax Proposal - Might it Foreshadow Future Democratic Proposals?

"While few, if any, believe the estate tax bill proposed by Sanders could be enacted with the current Trump White House and a Republican Congress, practitioners should take heed of the intent behind the proposals made in the Act. While one might dismiss this as mere electioneering by Sanders, be careful as this proposal might be a glimpse as to what could occur if the so-called Blue Wave (that is, the Democrats winning both Houses of Congress and the White House) from the 2018 mid-term elections continues through the 2020 election.

Why should practitioners care? While there may currently be a Federal estate tax and gift tax exemption of $10 million inflation adjusted (currently $11.4 million in 2019) that does not mean practitioners should be unconcerned with planning for clients with lower level of value of assets than the current exemption. The Act proposes a dramatic reduction in the exemption and restriction or elimination of several of the most powerful planning tools in an estate planner's arsenal."

We close the week with commentary by **Martin Shenkman**, **Thomas Tietz** and **Jonathan Blattmachr** that examines Senator Bernie Sanders' proposed tax act entitled "For the 99.8 Percent Act."

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), on the Board of the American Brain Foundation, and the American Cancer Society's National Professional Advisor Network.

Thomas Tietz, JD, is an Associate with Shenkman Law. He is experienced in assisting with the implementation of all facets of an estate plan, including the preparation of core documents such as the Last Will and Testament, Health Care Proxy, Durable Power of Attorney, to the more advanced techniques of an Irrevocable Life Insurance Trust, Grantor Retained Annuity Trust, self-settled Trusts, and the implementation of asset transfers to those trusts, depending on the client's needs. In addition to Estate Planning, he assists clients with estate administration, including the organization of the documentation and assets of a decedent for tax filings and disbursement, as well as assisting with corporate work, concentrating on the effects to family entities and businesses in relation to estate planning, including assisting with entity documents and complex entity ownership.

Jonathan Blattmachr, JD, is the **Director of Estate Planning** for the **Peak Trust Company**, a **Director** at **Pioneer Wealth Partners, LLC**, a wealth management firm in New York City, and is co-developer with Dallas Attorney Mike Graham of **WEALTH TRANSFER PLANNING**, a computer system for lawyers that offers specific client advice and automatically prepares wills, trusts, and other estate planning documents using document assembly.

Here is their commentary:

COMMENT:

Sanders' Proposal

Congressman Bernie Sanders' proposed tax act, entitled "For the 99.8 Percent Act," S. 309 116th Cong. (2019) (the "Act") should concern everyone with wealth and their advisers.

While few, if any, believe the estate tax bill proposed by Sanders could be enacted with the current Trump White House and a Republican Congress, practitioners should take heed of the intent behind the proposals made in the Act. While one might dismiss this as mere electioneering by Sanders, be careful as this proposal might be a glimpse as to what could occur if the so-called Blue Wave (that is, the Democrats winning both Houses of

Congress and the White House) from the 2018 mid-term elections continues through the 2020 election.

Why Practitioners Should Care

While there may currently be a Federal estate tax and gift tax exemption of $10 million inflation adjusted (currently $11.4 million in 2019) that does not mean practitioners should be unconcerned with planning for clients with lower level of value of assets than the current exemption. The Act proposes a dramatic reduction in the exemption and restriction or elimination of several of the most powerful planning tools in an estate planner's arsenal.

Some ultra-wealthy clients have appeared to plan with renewed vigor since it became clear that President Trump was unable to repeal the estate tax. In contrast, many moderate wealth clients ("moderate" relative to the current exemptions) say in the $5 million to perhaps $40 million wealth range, appear to have neglected planning as not really relevant to them. That could prove a costly mistake depending on the outcome of the 2020 election. Is it really worth the risk? Most clients do not find dealing with estate planning particularly enjoyable, so practitioners must educate them as to the risks this mere Sanders' proposal that is unlikely to get enacted may mean for their future.

It is relatively simple and inexpensive for a married couple to create, for example, non-reciprocal SLATs (spousal lifetime access trusts) and make gifts of, perhaps, $10 million each under current tax law.[i] If legislation similar to Sanders proposal is enacted as a result of a Democratic sweep in 2020, the same couple might face a daunting task to shift wealth, and the cost of doing so could be dramatically greater. Even if a client guesstimates only a 10% likelihood of both events occurring (a Democratic sweep and a Sanders-like estate tax change being enacted), isn't it worthwhile to plan and avoid that risk? Modern trust planning techniques provide an array of options to permit a client to benefit from assets transferred to completed gift trusts that can use exemption. These include: DAPTs (domestic self-settled asset protection trusts),[ii] hybrid-DAPTs where someone in a non-fiduciary capacity can name the settlor as a beneficiary, special powers of appointment to direct a trustee to make a distribution to the settlor,[iii] variations of non-reciprocal SLATs, loan powers, floating spouse-clauses, etc.

If clients can have access to the assets transferred, what is the impediment to proceed with planning in light of the risks posed by Sanders proposal? Other than the cost of the planning, there may be no substantive downside of planning now versus waiting and facing a potentially dramatically more limited planning regime? In fact, because effective estate tax planning although always requires assets be removed from claims of creditors of the client[iv], this planning may benefit him or her, as well as his or her family. That may be a calculus many moderate wealth clients have viewed quite differently with the current high exemptions. But that perspective should be reexamined.

Overview of Sander's Proposed Act

Senator Sanders proposed a tremendous increase in the estate tax, with the Act reducing the Federal estate tax exemption from the current $11.4 million to the $3.5 million level that existed in 2009.[v] Some have argued to make it even smaller. The Act would also impinge upon the ability of clients to make lifetime gifts, reducing the lifetime (gift tax) exemption to a "mere" $1 million.[vi] For those in the moderate wealth range, considered in this case to be $3 million + this could be significant and a dramatic change from the current planning environment. For the wealthy the dollar value of the exemption is critical. Too many wealthy clients, however, have been adopting a "wait and see" planning tactic, choosing to sit back and rely on the high current $11.4 million per person exemption, assuming the exemption as making the estate tax irrelevant to them. Sanders' announcement and the provisions of the Act should be a wakeup call for those clients, as well as for practitioners. It should be a call to action for clients to use their exemptions and use it wisely (discussed below), before it disappears even faster than it was slated to do so under the Tax Cuts of Jobs Act of 2017 (reducing by half to $5 million, inflation adjusted, in 2026) if there is a sufficient Democratic shift in Washington.

Mr. Sanders also proposed in the Act raising the estate tax rates with a maximum rate of 77% for estates over $1 billion.[vii] As a perspective, do not view that as too radical as that was the rate on estates above $10 million until 1977. For the uber wealthy, the marginal rate is the biggest fear as at high wealth levels the exemption becomes rather insignificant. At that level of wealth, estate planning has never really been only about the exemption, as even the current high amounts are relatively insignificant to the very wealthy. The marginal estate tax rate is really critical in terms of the estate tax pain felt by these clients.

The proposed changes are much tougher on clients than just the lower exemptions and the rate increases may indicate. Sanders' changes include restrictions on the use of valuation discounts, grantor retained annuity trusts ("GRATs"), and more techniques that have been the grease for many estate plans completed up to this point. The proposed restrictions on planning techniques may have an incredibly negative impact on the ability of very wealthy taxpayers to shift wealth to future generations without significant wealth transfer tax. So, the clients at this level of wealth should really be planning with vigor and not wait to see what might occur in 2020 or beyond. If one opts to wait, clients and practitioners might face a scenario similar to the end of 2012.

There was considerable worry at the end of 2012 that the estate tax exemption would drop from $5 million to $1 million in 2013. Taxpayers lined up outside their planners' offices hoping to get work done in time. Due to waiting until it was almost too late, some taxpayers had too little time to consider the implications of planning. In addition, compressed 2012 planning schedules increased the risk of causing step-transaction doctrine issues because there often could not be much time between different actions or transfers.[viii]

The 2012 rush resulting in some cases where planning that really didn't serve the client's needs as they might have hoped was created, as there just wasn't enough time for clients to absorb ideas or planners to compete forecasts or other steps a calmer planning schedule would have permitted. Also, if you wait to the last minute, what if there is a Democratic victory and the effective date of new tax legislation is so soon after the election that it precludes clients from completing any of the planning they wish to do? Consider the effective dates of Sanders' proposed changes to the estate tax rules, which are proposed to be effective for anyone dying after December 31, 2019.[ix] Wait and see might be the strategy most clients wish to employ, but it could also be a costly mistake.

Again, Why Wait?

With modern trust drafting techniques, practitioners can craft plans that allow clients to have the ability to perhaps benefit in some manner from assets transferred out of their estates. This might include in the use of non-reciprocal spousal lifetime access trusts), some control over investments in a fiduciary capacity (as the investment advisor of a directed trust), and other steps that traditional trust drafting which was less flexible did not afford. So, pose the question to your clients: why wait?

How Sanders' Act Would Change Planning

Here are some of the changes in the Act and what they might mean to planning if some variation of each change is enacted:

- **Exemption**: The proposed $3.5 million exemption would greatly reduce the ability of wealthy people to shift wealth out of their estates, or into protective structures that may limit the reach of divorcing spouses or claimants. This might mean that there is a great advantage for clients to using the current $11.4 million exemption now, or as much of it as possible, before a change is enacted. For clients of moderate wealth ("moderate" relative to the current exemption amount) consider that they might be able to make a simple gift to a trust to accomplish much of the asset protection, estate tax planning, succession planning and other goals that client has. Waiting might necessitate the use of much more costly and complex planning, and some of those same techniques are also curtailed under the Act as proposed.
- **Example**: Doctor Jane has $6 million in savings, $1 million in a house and $2 million in a retirement plan. As a surgeon she is worried about malpractice risks. She is also concerned about what might change with the estate tax rules if the political winds blow in another direction. She would like to remove $5 million from the reach of claimants and the estate tax. If she created a self-settled domestic asset protection trust ("DAPT") today she can gift $5 million to the trust by transferring securities (e.g., ACAT, using the Automated Customer Account Transfer system) securities to her new trust, and signing any documents needed to confirm the gift being made. If the exemption drops to $3.5 million that would limit what could be transferred to the trust, and the excess above $3.5 million would be more difficult to transfer given the other restrictive changes proposed in the Act. It might no longer be practical to do so at that point. So why wait?
- **Credit Shelter Trusts and One-Fund QTIP Trusts**: Years ago, the default or common estate plan for married couples might have been

to fund a credit shelter trust to the largest amount that would not generate a state or federal estate tax. As the exemption grew the default plan for married couples evolved to a so-called one-fund QTIP that might have provided the surviving spouse the right to disclaim into a family trust, or perhaps gave an independent (according to some views) executor the right to elect the portion of the QTIP qualifying for the marital deduction thereby shifting funds to a credit shelter trust. A drop in the exemption to a $3.5 million level might suggest that reverting to the historic default plan may prove better for many clients.

- **Credit Shelter Basis Planning Risk**: Practitioners have been helping advise and guide clients on terminating credit shelter trusts or distributing appreciated assets out of a credit shelter trust to garner a basis step up on the death of the surviving spouse. If a Sanders type bill is enacted after the 2020 election that could prove a costly mistake. While terminating or distributing assets out of a credit shelter trust to gain a basis step up might be advantageous with an $11.4 million exemption it could prove to be a very costly gambit if the surviving spouse dies after the exemption drops. It may be better to give the spouse special power of appointment who can exercise it to trigger the Delaware Tax Trap (or not), up to the moment of death. See Section 2041(a)(3)
- **Gift Exemption**: As mentioned above, the Act also would reduce the gift tax exemption (how much you can gift during your lifetime without a current gift tax) to a mere $1 million. That would inhibit a lot of the common planning techniques practitioners use today. In case that was not enough, the Act proposes that if a client make gifts this year to use their current high $11.4 million exemption, there will be a penalty for that with the gifts “clawed” back into their tax calculation.[x] If that were to be enacted, it might already be too late to plan. Again, while few if any practitioners believe that the Act will be passed with a Republican Senate and Presidency, the changes proposed, like these gift tax changes, would radically restrict planning. This clawback proposal is important to communicate to clients. Many likely assume that they can wait until after the 2020 election and then, based on the election results, determine whether or not to incur the cost and hassles of planning. But if this type of provision is replicated in future legislation it might negate the ability to plan effectively after new estate tax legislation is proposed if there is a Democratic sweep. This is a risk that clients should weigh carefully. For example, it is common

to transfer assets to a DAPT before marriage to backstop a prenuptial agreement or in lieu of a prenuptial agreement.[xi] That type of planning would have to rely on incomplete gift trusts or may no longer be feasible with such a low gift exemption. Also, if the gift exemption is reduced to $1 million, the ability of clients to leverage wealth out of their estates, to implement asset protection planning, to safeguard assets for matrimonial purposes, etc. could all be severely hindered. Practitioners must also consider the range of other restrictions proposed in the Sanders' Act. If GRATs, discounts, and other techniques are also proscribed as proposed in the ACT, the ability to plan around a $1 million exemption will be more limited than it had been in the past years when the $1 million exemption was law. Then, discounted FLP interests inside GRATs, rolling GRATs, etc. all facilitated wealth transfers "around" the low $1million exemption. If a sweeping change as Sanders has proposed is enacted the prior means of dealing with a low exemption will largely not be available.

- **Upstream Planning**: Many practitioners have touted the use of "upstream" planning to salvage otherwise unusable exemptions that elderly relatives of clients have. For example, if a parent has an estate of only $4 million, child could create a trust with $7 million, and give parent a general power of appointment ("GPOA") over that trust. That GPOA could require the consent of a non-adverse party, could be crafted as a limited power of appointment and someone could hold the right to convert it to a GPOA, etc. The intent of the plan was that parent's estate would include the assets in the trust and those assets would garner an estate tax free adjustment (hopefully step-up) in income tax basis on parent's death. If the exemption is reduced to the $3.5 million as in the Sanders' Act, most or all upstream planning would be obviated. If that occurs practitioners might want to review that planning to be certain that the estate inclusion in the upstream plan does not inadvertently trigger an unintended estate tax on the senior generation's death. While many such upstream plans were likely crafted to only include in the senior generation's estate an amount that does not trigger an estate tax, the more prudent course of action would be to confirm that. Clients who only recently had planning updated to address the inclusion of GPOAs to a higher generation will likely be frustrated by the yo-yo tax law changes and ongoing planning updates.
- **Grantor Trusts**: The heart of many estate plans for years has been the creation of grantor trusts. The Act would include in client's taxable

estates all assets held by trusts that are grantor trusts, reduced only by taxable gifts made to the trust.[xii] These are trusts whose income is taxed to the settlor creating the trust. Currently, this income tax characterization for a trust permits a GRAT to pay its annuity to the settlor with appreciated assets, without causing gain recognition. In addition, the creator of the trust will report any income attributable to the trust on their own tax return, therefore paying the income tax on trust income, permitting greater growth of wealth inside the trust. It also permits the client to sell assets to the trust without recognition of gain due to that sale and shift growth outside your estate. These sales, often done for a note issued by the trust, have been a mainstay of planning in the estate planner's arsenal. Consider: What if you added to any new trusts you draft for your clients (or old trusts that you decant into new trusts) a provision that says if the assets of the trust will be included in the clients estate then effective one-day before the clients death, the trust shall convert to non-grantor and all power holders of the trust that are holding powers that could taint or characterize the trust as a grantor trust agree that those powers or rights will be extinguished. Might that work as a safety net just in case you don't have the time or ability to affirmatively turn off grantor trust status just before a client's death? The answer based upon the language in the Act seems to be no: if the grantor trust status ends during the grantor lifetime, he or she will be deemed at that time to have made a gift of everything in the trust other than the amount of taxable gifts made to the trust.[xiii]

- **GST Tax**: Another foundation of planning has been to shift value to an irrevocable trust and allocate generation skipping transfer ("GST") tax exemption to the trust. Properly done under the current system, the value of assets in that GST exempt trust, no matter how much they appreciate, should never be subject to the transfer taxation system. The compounding of wealth outside the estate tax system can provide incredible wealth shifting opportunities. When this is coupled with a long-term trust (dynastic trust) wealth can compound outside a client's estate forever. The Act appears to limit the application of the GST exemption to a maximum of 50 years.[xiv] That change would hinder this type of planning and might result in a costly tax after 50 years of a trust's existence. If a change along the same lines as this proposal is enacted, but if it "grandfather's" existing trusts (i.e., the new restrictions only apply to trusts formed after the new law), many people, even those of moderate wealth, might benefit from creating long-term dynastic trusts now.

- **<u>GRATs</u>**: Grantor Retained Annuity Trusts ("GRATs") are a planning tool long favored by practitioners. A key benefit of GRATs is that clients can create these trusts to shift wealth out of their estates without using any (or any material) part of their gift tax exemption, to the extent the assets in the trust grow at a rate above the so-called Section 7520 rate (a relatively low rate the IRS announces each month). Many, perhaps most, GRATs were structured by practitioners as so-called zeroed out GRATs. This meant that the annuity payment the trust made to a client as the grantor creating the trust equaled (or almost equaled) the value of assets gifted to the trust. Upside appreciation (above the rate of return the IRS required be used in the technique) would inure to the beneficiaries of the GRAT with no gift tax cost. The Act's proposal would perhaps eliminate the viability of this technique in many cases by requiring a minimum 10-year term for any GRATs created after the enactment of the Act.[xv] If a client does not outlive the term of the GRAT, some or all the assets (generally) are included in the client's estate. That would dramatically increase the risk of a GRAT succeeding. There is also a minimum required gift amount, effectively removing the ability to have a zeroed out GRAT.[xvi] These two changes could potentially make GRATs impractical for very wealthy taxpayers that have traditionally used GRATs when they no longer had gift tax exemption remaining. It would also seem to eliminate the commonly used technique of "rolling-GRATs", where practitioners would create a 2-year GRAT and the client would "re-GRAT" each annuity received to a new GRAT and continue to shift appreciation beyond the Sec. 7520 rate out of the estate taxation system.
- **<u>Discounts</u>**: Valuation discounts would be severely restricted under the Act, e.g. not permissible in a family planning context[xvii] and would come into effect upon passage of the Act.[xviii]
- **<u>Example</u>**: Client wants to gift $18 million of interests in real estate LLCs that own neighborhood shopping centers. Because these are non-controlling interests under current law, the interests might be valued after a valuation discount at perhaps $11 million. At the current gift tax exemption, she might be able to simply gift all these interests to a trust for descendants. The discount in value is due to the interest she owns does not control the LLCs and cannot dictate when a distribution is made or when the LLC might be liquidated. If

the client waited until after the Act, or a similar proposal is enacted the elimination of discounts might reduce the percentage that can be gifted. If the exemption is lowered as well, even less can be transferred. This is all potentially even worse still. Based on some recent case law developments.[xix] The IRS might argue that if she retains any interests in the LLCs after the transfers are made, that the client "in conjunction with" others (i.e. those that the interests are gifted to) controls the LLC and therefore even the interests which client thought she transferred end up included in her taxable estate. The lower exemption and restriction or elimination of discounts will make it more difficult for clients to shift remaining equity positions out of their estate under a Sanders' estate tax regime to avoid the reach of Powell.

- **Crummey Powers**: Another common planning tool has been for clients to make gifts to trusts from which a class of beneficiaries can withdraw a pro-rata portion of the gift made by the grantor, up to the annual gift exclusion amount for that beneficiary. This has facilitated the ability for clients to make large gifts to a trust, e.g. used to buy and hold life insurance, and not incurring any gift tax cost due to the gift. The Act has proposed eliminating this technique.[xx] If this applied to all trusts after enactment, the results could eliminate the common Irrevocable Life Insurance Trust ("ILIT") which has been ubiquitous in estate plans. Practitioners might discuss with their clients implementing an ILIT so it is in place before any changes are made to existing law, in case existing trusts are grandfathered (i.e., exempted from the new change). Clients might also consider making large gifts now (using that exemption that might also disappear) so that they won't have to rely on annual gifts to fund their life insurance premium payments.
- **Example**: Client has a typical ILIT with Crummey powers. Premiums are $75,000/year and are easily covered by the annual demand powers available to children and grandchildren who are beneficiaries of the trust. But if a Sanders' type law is enacted and Crummey powers prospectively eliminated (even for trusts predating the law change) the client will not be able to fund premiums without incurring a costly current gift tax cost. The client might be able to transfer a sufficient amount of marketable securities to the trust now, using her exemption, so that the future premiums can be paid from a combination of the income and principal of the gift made. It might also be worthwhile if this is pursued to inquiring as to the results of

prepaying future premiums currently to minimize future income tax costs to the client.

- **<u>Example</u>**: Since GRATs are also on the chopping block, a wealthier client who does not have adequate exemption remaining to complete a large gift as in the prior example, might create and fund a GRAT that pours into the ILIT (a common approach when exemptions were lower for a non-GST exempt ILIT). The GRAT could be planned to endeavor to shift value to the ILIT to avoid the gift tax issues because if Crummey powers are in fact eliminated. This type of GRAT/ILIT plan might also be structured different then such plans had been historically. The traditional GRAT/ILIT plan would have entailed creating a two-year GRAT with the ILIT as the beneficiary. Each time an annuity payment was made the client would "re-GRAT" the annuity into a new GRAT also benefiting the ILIT. But if GRATs are slated for restriction as in the Sanders' Act then perhaps a tier of GRATs with different terms might be created now, before the new GRAT restrictions are enacted, so that the existing GRATs may be grandfathered and continue to fund insurance premiums for years to come despite the restriction on Crummey powers.

<u>Don't Dismiss the Sanders Proposal</u>

If you think that Sanders's proposals in the Act is just an inconsequential flash, think again. Many aspects of Sanders's proposal discussed above are not new and should not be a surprise to practitioners. Democratic candidates have long called for restrictions that would make the estate tax harsher. For example, President Obama's Greenbook proposals consistently proposed the reduction of the estate tax exemption to $3.5 million, but that was only a small part of the get-tough-estate tax plan he had proposed.

Many of the commonly used estate planning strategies discussed above, such as grantor retained annuity trusts ("GRATs") that can shift value out of a client's estate to the extent that the growth in those assets exceed a mandated federal interest rates, note sale transactions to grantor trusts (the client sells a non-controlling interest in an asset whose value is discounted because of the lack of control and marketability of that assets to lock in not only the discounts but future post-sale growth), and much more were curtailed in similar ways to those proposed in the Act. Whoever helped craft the proposals understood many of the tax planning strategies the wealthy use to shift assets outside their estates. These and other changes from the Obama White House appear to be part of the playbook for Sanders and other Democratic nominees.

Additional Planning Steps to Consider Now

Following are a list of planning steps practitioners might propose to their wealthy and mega-wealthy clients, along with some of the reasons why planning should be pursued sooner rather than later. But keep in mind if the Act was made law tomorrow (unlikely) clients could already be out of luck. So, while there is certainly no means of predicting what might, or might not happen, you should consider advising clients to at least review with their entire planning team whether they should accelerate their planning and get it in place now.

- **QTIPs:** Marital trusts such as Qualified Terminable Interest Property ("QTIP") trusts are taxed in the estate of the surviving spouse. This technique is commonly used by practitioners and many have made this the default plan for many clients. However, if a much lower exemption is enacted through the Act, those clients with QTIPs could be exposed to the potential of a high tax cost. Consider implementing a disclaimer of part of the income interest in the QTIP now for clients currently with a QTIP trust created by a deceased spouse. That disclaimer could trigger a deemed gift of all of the QTIP assets (principal).[xxi] That would use up part of the exemption the surviving spouse has before the law might reduce his or her exemption. It is not clear whether a change in the law might affect the unused exemption of the first spouse to die (called the Deceased Spouse Unused Exemption, or "DSUE"). Another approach might be to distribute out of the QTIP assets to the surviving spouse if the QTIP trust terms permit such a distribution, and have the surviving spouse gift those assets to, for example, a self-settled domestic asset protection trust ("DAPT") of which he or she can be a beneficiary. If a QTIP is not a GST exempt trust, consider creating a Sec. 678 grantor trust and shifting value out of the QTIP via a note sale to that new trust. Under the current law there are numerous options for practitioners to employ for their clients, but those clients may have to get them while they still can.
- **Crummey Trusts:** Many irrevocable trusts, including the typical life insurance trust or ILIT, are based on the premise of making annual

gifts that qualify for the (now $15,000) gift tax annual exclusion. But that the administration required to take advantage of this technique certainly can be a hassle: consistent gifts, writing checks, issuing annual demand notices (Crummey powers). Clients have consistently commented on their distaste of the steps required. Consider suggesting to clients that they make a big gift to the trust now (and file a gift tax return for that gift) that will cover what would have otherwise been annual gifts for a long time and dispense with future annual administrative hassles. If future laws lower the exemption or reduce annual gift exclusions, such as the proposals in the Act, this kind of simplification likely would not be possible. If the Act removes the ability to use Crummey powers, clients will not be able to fund this type of trust the way they have in the past. Suggest to clients that they implement simplifying steps while they still can. In addition, practitioners might want to consider suggesting to clients decanting (merging) the existing old Crummey trust into a new trust that provides more flexibility.

- **Split-Dollar/Note Sales**: Many wealthy taxpayers, who can barely be considered wealthy now relative to the high temporary exemptions, engaged in split-dollar life insurance plans, note sale transactions, and other techniques to shift wealth out of their estates. The result is an existing trust that owes money to those clients for the purchase of assets (e.g., an interest in a family business), or on a note secured by life insurance. A simple gift to the trust within the parameters of the current high exemption might be used to unwind that old plan and simplify ongoing plan administration. But keep in mind that Sanders' Act, if enacted as proposed, might clawback these 2019 transfers. While no one can determine what future legislation might do, it may well prove advantageous to have clients make these transfers and unwind the planning by using exemption while they still have it.
- **DAPTs/SLATs**: Domestic asset protection trusts ("DAPTs") are trusts the client creates that they are a beneficiary of. Spousal lifetime access trusts ("SLATs") are trusts the client creates that their spouse is a beneficiary of. The key of these trusts for planning now is that clients may still benefit from assets they shift out of their estate. There are lots of options (and risks) with either of these techniques, but the key is that for most clients, access is critical to have the ability to gift away sufficient assets to use most/all of their exemption. Both of these types of trusts, if they succeed, might provide the client with access to the assets transferred. If the techniques are successful,

assets might be moved outside the client's estate and be out of the reach of their creditors, but they may benefit from the trust if they need to.

Ancillary Planning Considerations Favoring Earlier Planning

In formulating planning for clients, practitioners may consider some of the following concepts:

- **Step-Transaction Doctrine:** If there are a sequence of steps in a plan that are not independent, the IRS might try todisregard them and collapse the plan into a single event, potentially causing an adverse result inconsistent with why the planning was initially completed. Although one court approved a short time period between transfers[xxii] it is certainly preferable to begin planning earlier and have more time, and independent economic events, between transfers.
- **Example**: Wife gives $5 million of assets to her husband, who the next day gifts those assets to a trust that benefits the donor/wife (e.g., a spousal lifetime access trust or SLAT). The IRS might disregard the intervening steps of the gift to the husband, and the husband's gift to the trust, therefore just treating the transaction as if the wife gave the assets directly to the trust. If she has already used her gift tax exemption, that could trigger a gift tax. If instead of the clients waiting to the last minute to complete planning, consider if the wife gave the gift to husband now in early 2019. Those funds are then commingled with the husband's assets and invested perhaps even using a different asset allocation. Then, more than a year from now in 2020, husband makes a gift to the trust. The intervening time, the fact that the transfers occurred in different tax years, and the investment with other funds, might all serve to reduce the risk that a step-transaction challenge can be successfully argued by the IRS. Waiting might harm the client's planning.
- **Reciprocal Trust Doctrine**: One of the factors that can serve to differentiate trusts each spouse creates for the other is creating them at different times. The earlier the planning process is begun, the more time remains to differentiate the two trusts by time. For clients waiting until the last minute (however that may be determined) this differentiating feature will be sacrificed.
- **Asset Protection**: Every doctor, attorney, accountant, and really every professional, board of director member, real estate developer,

etc. should be concerned about liability exposure. Society seems to be getting meaner and more litigious as time progresses. The current large gift and estate tax exemptions make it easy for clients to transfer assets into protective irrevocable trust structures (whichever trust "flavor" that is chosen). If clients do not take advantage of the current exemptions while they are still in effect, the opportunity might be lost and at that point only more complex, costly and risker options may remain to shift wealth into protective structures.

- **Suboptimal Trusts:** Many old trusts are not optimally drafted, some have mistakes, many were created when planning styles were different (e.g. distribute assets at age 30 outright instead of keeping in long term trusts), they may not have allocated GST exemption, and so on. Suggest to clients that they allow you to do housekeeping now, while there's large gift and GST exemptions in case you need them in the cleanup. For example, if clients decant (merge) an old suboptimal trust into a better drafted more modern trust consider making a late allocation of GST exemption to that trust. That means allocating some of the clients $11.4 million GST exemption to that trust now (rather than when a gift was first made years ago to the old trust). This late allocation might enhance the overall benefits of the trust in that it may then be outside the transfer tax system for as long as the trust lasts.

Conclusion

While the Act proposed by Sanders is unlikely to be enacted for a sometime, or ever, it is a clear indication of the direction in which Sanders and perhaps others in the Democratic party might wish to see the estate taxation system move. You can advise your clients that they can either wait and see and hope, or they can act now and take proactive steps in case any of the concepts proposed in the Act become reality. The latter certainly may prove more prudent.

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

Martin Shenkman
Thomas Tietz
Jonathan Blattmachr

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[i] See *U.S. v. Grace*, 395 US 316 (1969); See Steiner and Shenkman, "Beware of the Reciprocal Trust Doctrine," Trusts & Estates, Apr 2012, p.14.

[ii] See: PLR 200944002. Self-settled trust jurisdictions now include Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

[iii] O'Connor, Gans & Blattmachr, "SPATs: A Flexible Asset Protection Alternative to DAPTs," 46 Estate Planning 3 (Feb 2019).

[iv] See, e.g., Rev. Rul. 2004-64, 2004-27 I.R.B. 7.

[v] S. 309 §2(b)(1).

[vi] S. 309 §2(b)(2).

[vii] S. 309 §2(a).

[viii] Linton v. US, U.S. District Court, W.D. Washington, 2009-2 U.S.T.C. ¶60,575, (Jul. 1, 2009).

[ix] S. 309 §2(c).

[x] S. 309 §2(b)(3)(B).

[xi] See Glazier, Shenkman and Gassman "DAPTs & Klabacka - At the Intersection of Estate Planning and Family Law," LISI Asset Protection Planning Newsletter #357 (February 1, 2018).

[xii] S. 309 §8(a).

[xiii] S. 309 §8(a), amending IRC. Sec. 2901(a)(3).

[xiv] S. 309 §9(a).

[xv] S. 309 §7(a) and (b).

[xvi] S. 309 §7(a)(4).

[xvii] S. 309 §6(a).

[xviii] S. 309 §6(b).

[xix] E.g. Estate of Powell v. Commr., 148 T.C. (slip op. at 16) (May 18, 2017), and Estate of Cahill v. Commissioner, T.C. Memo. 2018-84 (June 18, 2018).

[xx] S. 309 §10(a).

[xxi] Code Sec. 2519.

[xxii] T. Holman, Jr., 130 TC 170, Dec. 57,455, aff'd CA-8, 2010-1 ustc ¶60,592.