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th ANNUAL CHESAPEAKE TAX CONFERENCE

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Sept. 17 - Day Two

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Dear Participant:

Welcome to the **40th Annual Chesapeake Tax Conference**. Now that you have completed registration, you should have the materials containing biographies of speakers, outlines of presentations, and an evaluation form for the day. If you are missing any of these items, please notify the conference registration desk.

Remember, in order for MACPA to document your attendance in accordance with the provisions of Maryland's mandatory CPE law, you must check in at the registration desk each morning and turn in your *signed* confirmation slip at the end of this event. This conference is recommended for **16** hours of CPE credit, *if you leave early on either day please be sure to adjust your hours appropriately.*

An MACPA representative will be on duty at the conference registration desk during the event. At the conclusion of the conference, we would appreciate your evaluation of the program. Your comments will help us improve future programs.

Sessions will start promptly as scheduled. We hope you find the conference to be an interesting and rewarding program.

Sincerely,

Nancy Beimel, CPA and Melanie Kletz, CPA
Chesapeake Tax Conference Committee Co-Chairs



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40th ANNUAL CHESAPEAKE TAX CONFERENCE

Thursday, September 17, 2009 - Day Two

7:30 - 8 a.m. - Registration and continental breakfast

8 – 9 a.m.

Planning for the Married Couple: Making Sure the Bypass Trust is Funded at the First Death

Speaker: John P. Edgar, Esq., Ober Kaler

9 – 10:15 a.m.

2010 Sunset Provisions

Speaker: Jeffrey S. Glaser, Esq., Saul Ewing, LLP

10:15 - 10:30 a.m. - Break

10:30 - 11:45 a.m.

Special Needs Planning

Speaker: Gina Shaffer, Esq., Shaffer Law Office, LLC

11:45 a.m. - 12:45 p.m. - Lunch

12:45 – 2 p.m.

Two of the Hottest Topics for Real Estate Owners

Speaker: Roger D. Upton, MS Consultants, LLC

2 - 3:30 p.m.

Retirement Planning

Speaker: Lyle Benson, Jr., CPA, PFS, CFP, L.K. Benson & Company, P.C.

Conference Adjourns

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Planning for the Married Couple:
Making Sure the Bypass Trust is Funded
at the First Death

8:00am-9:00am

Speaker: John P. Edgar, Esq., Ober
Kaler

Planning for the Married Couple: Making Sure the Bypass Trust Is Funded at the First Death

John P. Edgar, Esq.
September 17, 2009

1) Explanation of Bypass Trust Planning

- a) Purpose. Married couples with combined assets in excess of the federal estate tax exemption and applicable state estate tax exemptions must plan to avoid the payment of estate tax. Because assets passing to a surviving spouse qualify for the marital deduction, the estate tax is easily avoided at the death of the first spouse, often with no planning at all. However, at the death of the surviving spouse, the combined estate will be subject to estate tax. Because only the surviving spouse's estate tax exemption will be available, estate tax will be owed if the estate exceeds that amount.
- b) Terms and Assumptions. For convenience, the following terms and assumptions are used throughout this outline.
 - i) The first spouse to die is referred to as the "first spouse" or by the male pronoun. The second spouse to die is referred to as the "surviving spouse" or by the female pronoun.
 - ii) If one spouse has assets in excess of the estate tax exemption, and the other spouse has assets of less than the estate tax exemption, the spouse with more assets will be called the "wealthier spouse" or by the male pronoun, and the spouse with fewer assets will be called the "poorer spouse" or by the female pronoun.
 - iii) Both spouses are assumed to be U.S. citizens.
 - iv) The term "federal estate tax exemption" is used to refer to the applicable exclusion amount, which in 2009 is \$3.5 million. On January 1, 2010, under current law, the estate tax will be repealed for one year. On January 1, 2011, the estate tax will be reinstated as it existed prior to the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16), when it had a maximum rate of 55% and an exemption of \$1 million. §2010(c).
 - v) The term "Maryland estate tax exemption" is used to refer to the amount specified in Md. Tax-General Code §7-309(b)(3)(i), currently \$1 million.
 - vi) All section references are to the Internal Revenue Code and the regulations thereunder, unless specified otherwise.
- c) Bypass Trust Plan. The usual plan to avoid or at least reduce the estate tax at the second death is for the married couple to execute wills (or revocable trust agreements) that set up one or more trusts for the surviving spouse, often called "bypass" trusts or "credit shelter" trusts (see flowchart at Exhibit A). The surviving spouse is a beneficiary of the bypass trust. The first spouse to die leaves assets equal to his estate tax exemptions to the bypass trust, instead of leaving assets directly to the surviving spouse. The bypass trust is

included in the first spouse's estate, and does not qualify for the marital deduction, but his estate tax exemptions cover any estate tax. The property in the bypass trust at the surviving spouse's death is not includible in her estate at her death. Only her remaining property is subject to estate tax, and her estate tax exemptions apply.

- d) Decoupling. The 2009 federal estate tax exemption is \$3.5 million, and the current Maryland estate tax exemption is \$1 million. This requires married couples in Maryland with assets over \$3.5 million to set up two bypass trusts.
- i) The first bypass trust ("residuary trust") is funded with the Maryland estate tax exemption, or \$1 million. The residuary trust also uses \$1 million of the federal estate tax exemption.
 - ii) The second bypass trust ("Maryland QTIP trust") is funded with the balance of the federal estate tax exemption, or \$2.5 million. This trust is subject to Maryland estate tax at the first death. However, a Maryland QTIP election is typically made for this trust to defer the payment of Maryland estate tax until the death of the surviving spouse.
 - iii) At the death of the surviving spouse, the residuary trust is not subject to federal or state estate tax. The Maryland QTIP trust is subject to Maryland estate tax but not to federal estate tax.
- e) Estate Tax Savings. The estate tax savings of using a bypass trust can be enormous. Compare the following couples with \$7 million of combined assets:
- i) Al and Barb Client leave all their assets to each other at the first death. No estate tax is owed at the first death. At the second death, all their assets pass to their kids. The surviving spouse's estate owes \$1,287,900 in federal estate tax and \$638,000 in Maryland estate tax (see calculation at Exhibit B). The kids get \$5,074,100.
 - ii) Chuck and Diane Client set up their estate plan to leave assets to trusts that utilize the first spouse's \$1 million Maryland estate tax exemption and \$3.5 million federal estate tax exemption. No estate tax is owed at the first death. At the second death, all their assets pass to their kids. The surviving spouse's estate owes no federal estate tax and \$510,800 in Maryland estate tax (see calculation at Exhibit C). The kids get \$6,489,200.
 - iii) Thus, Chuck and Diane (or their kids) save \$1,415,100 in estate tax.
 - iv) The "cost" of achieving this estate tax savings is minimal.
 - (a) The bypass trusts will incur some administrative costs, such as tax return preparation and possible trustee fees.
 - (b) Trust income will be taxed at a more steeply graduated income tax rate schedule than if the income were taxable to an individual.
 - (c) Trust assets will not receive a step-up in basis at the second death. However, their basis will have been adjusted at the first death.
 - v) An extra benefit of using a bypass trust is that any appreciation after the first death will avoid federal estate tax (and state estate tax with respect to the residuary trust).

2) Importance of Asset Titling

- a) Definition. In order to achieve these tax savings, it is critical to title the couple's assets properly so that the right amount passes to the bypass trusts at the first death. "Asset titling" refers to current ownership of assets and, in some cases, beneficiary designations for property that passes at death. In general, "asset titling" is used in this outline to mean anything affecting how property passes at death.
- b) How Property Passes At Death. It is a useful rule of thumb (i.e., a learning device, not an actual rule) to remember that property generally passes at death in the following order of priority: first by contract, then by deed, and then by will.
 - i) "Contract" refers to agreements entered into by the decedent, including property subject to beneficiary designations, such as life insurance policies, retirement accounts such as IRA's and 401(k)'s, annuities, and similar assets. It also refers to other contracts that provide benefits that survive death, such as employment-related death benefits.
 - ii) "Deed" refers to forms of ownership, such as joint ownership with right of survivorship (generally referred to as "tenants by the entirety" for married couples). This form of ownership can apply to real estate, bank accounts, brokerage accounts, closely-held business interests, and similar assets. It also can refer to trust ownership, including interests in both revocable and irrevocable trusts, or to transfer-on-death (TOD) accounts.
 - iii) Finally, "will" refers to any property not passing under the first two ownership forms, i.e., property that is not subject to a beneficiary designation, other contract, right of survivorship, trust, etc. In other words, it refers to property that is owned solely by the decedent. This is referred to in this outline as "separate" property.
 - (1) The term separate property in the estate planning context should not be confused with the divorce concept of separate property versus marital property, which is entirely different.
 - (2) After death, separate property becomes "probate" property and passes by the decedent's will.
 - (3) In a plan using a revocable trust, separate property passes by a "pour-over" will to a revocable trust. It is then disposed of by the trust agreement.
- c) Separate property is the only property that is available, without further planning or action, to fund the bypass trust at the death of the first spouse. Therefore, if either spouse has less than \$3.5 million of separate property, the bypass trust could be under-funded, unless additional steps are taken.

3) Define the Goals.

- a) The goals depend on the size of the combined estates. Of course, we are planning for the future, so we must also consider the fact that asset values will not stay the same.
- b) For combined estates of more than \$7 million, the first spouse's estate must have at least \$3.5 million available to fund a bypass trust, so that federal estate tax is avoided on that amount at the second death.
 - i) This \$3.5 million bypass trust will also avoid Maryland estate tax on \$1 million of the first spouse's estate at the second death.
 - ii) It is not possible, with bypass trust planning alone, to avoid all federal estate tax at the second death for combined estates in excess of \$7 million. Additional planning, such as gifting, is needed.
- c) For combined estates of at least \$3.5 million, but less than \$7 million, it is a little more complicated.
 - i) There are two goals:
 - (1) The first spouse's estate must have at least \$1 million available to fund a bypass trust so that Maryland estate tax is avoided on that amount at the second death.
 - (2) It is not necessary for the first spouse's estate to have at least \$3.5 million available to fund a bypass trust, in order to avoid federal estate tax at the second death. Rather, the surviving spouse's estate must have less than \$3.5 million, in order to avoid federal estate tax at the second death.
 - ii) How much less than \$3.5 million should be in the surviving spouse's estate depends on several factors.
 - (1) It may be desirable for the first spouse's estate to have at least \$3.5 million available to fund a bypass trust, and for as little as possible to be included in the surviving spouse's estate, because her estate could grow to more than \$3.5 million, or the federal estate tax exemption could decrease below \$3.5 million.
 - (2) On the other hand, "overfunding" the bypass trust can be a problem.
 - (a) As noted above, assets in the bypass trust do not receive a step-up in basis at the second death.
 - (b) This may be fixable if the trustee of the bypass trust can make a discretionary distribution of trust assets to the surviving spouse before her death, so that the assets are includible in her estate and receive a step-up in basis.
 - (3) It is always important to weigh the "cost" of the various techniques available to fund the bypass trust against the advantage of using them, but this is particularly true when determining how much less than \$3.5 million should be in the surviving spouse's estate, because the benefits of doing so are uncertain, i.e., they depend on whether her estate grows to more than \$3.5 million, or the federal estate tax exemption decreases below \$3.5 million.
- d) For combined estates between \$2 million and \$3.5 million, the first spouse's estate must have at least \$1 million available to fund a bypass trust so that Maryland estate tax is

avoided on that amount at the second death. This will reduce Maryland estate tax as much as possible by using the exemption to the maximum extent permitted by law. No federal estate tax will be owed (unless the estate increases or the exemptions decrease).

- e) For combined estates between \$1 million and \$2 million, the analysis is similar to that for estates between \$3.5 million and \$7 million, except that instead of the federal estate tax, the Maryland estate tax at the second death is the controlling factor. It is not necessary for the first spouse's estate to have at least \$1 million available to fund a bypass trust, in order to avoid Maryland estate tax at the second death. Rather, the surviving spouse's estate must have less than \$1 million, in order to avoid Maryland estate tax at the second death.
- f) For combined estates of less than \$1 million, no estate tax planning is needed. No federal or Maryland estate tax will be owed (unless the estate increases or the exemptions decrease).

4) Planning Steps

- a) Meet with couple.
- b) Get information:
 - i) List of assets (see Exhibit D)
 - ii) Asset titling information
 - iii) Beneficiary designations
 - iv) Estate planning documents are critical, too, but that is not the subject of this outline. This outline presumes that the couple has appropriately-drafted estate planning documents that provide for bypass trusts as needed.
- c) Determine the goal for funding the bypass trust based on the size of the combined estates (see section 3).
- d) Run two scenarios
 - i) One scenario for each spouse dying first (see Exhibit E)
 - ii) See how each estate would fund its bypass trust with no further planning.
 - iii) Re-evaluate each surviving spouse's estate (assets, trusts, beneficiary designations).
- e) Determine shortfall, if any.
 - i) The "shortfall" is the difference between what would be available to fund the bypass trust at the first death, and the goal for funding that trust.
- f) Develop plan to meet shortfall.
- g) Continue to monitor plan going forward.
 - i) Clients' assets will change in value over time.
 - ii) Many clients make changes in their asset titling without realizing the effect on their estate plan.
 - iii) Tax laws have been known to change.

- h) Make sure planning steps are actually carried out.
- i) In developing a plan to meet the shortfall, see the topic headings below:
 - i) Divide joint property (section 5)
 - ii) Designate bypass trust as beneficiary (section 6)
 - iii) Disclaimers (section 7)
 - iv) Inter vivos QTIP trusts (section 8)
 - v) Taxable gifts and bequests (section 9)
 - vi) General power of appointment revocable trust (section 10)
 - vii) Wait for portability? (section 11)

5) Divide Joint Property

a) In General.

- i) As noted above, separate property is owned by just one spouse and is not subject to any beneficiary designation, right of survivorship, or trust.
 - (1) At the owner's death, separate property becomes probate property, which passes by will.
 - (2) Separate property is the simplest way to fund the bypass trust. Assuming the spouses have wills that establish bypass trusts, separate property will be available automatically to fund the first spouse's bypass trust.
- ii) Many married couples hold significant amounts of their combined estates, such as their residences, brokerage accounts, and bank accounts, as tenants by the entirety. As noted above, this property does not pass through probate and is not available to fund the first spouse's bypass trust.
- iii) To fund the bypass trust, property held as tenants by the entirety can be divided into separate property. For example, all of it can be put into one spouse's name, part can be put in each spouse's name, or it can be held as tenants in common.
 - (1) Transfers between spouses for no consideration, such as dividing property held as tenants by the entirety, are not taxable gifts.
 - (2) Dividing property held as tenants by the entirety will have non-tax consequences with respect to control, creditors, and divorce. Before advising clients to divide property held as tenants by the entirety, be sure they understand the non-tax consequences as well as the tax consequences (see below).
- iv) Often, a superior alternative to dividing property held as tenants by the entirety is to leave it alone and plan for the surviving spouse to disclaim her survivorship interest in the first spouse's share (see section 7(b), below). If this alternative may be appropriate for the spouses, then be sure they understand it as well.

- v) The next four sub-sections will discuss separate property and the four types of joint property in more detail:
 - (1) Separate property
 - (2) Tenants in common
 - (3) Tenants by the entirety
 - (4) Community property
- vi) The following two sub-sections will discuss special issues that arise in this area:
 - (1) Using the residence to fund the bypass trust
 - (2) Using an FLP/LLC to divide property
- b) Separate Property.
 - i) Separate property is legally subject to the control of only the spouse who owns it. Obviously, the practical consequences of this control depend on the relationship between the two spouses.
 - ii) Upon divorce, separate property generally is presumed to be separate property for property division purposes. However, it is possible to overcome this presumption, and some separate property is considered marital property for property division purposes.
 - iii) Separate property is subject to creditors of the owner. In other words, it is subject to attachment and to proceedings such as bankruptcy.
 - iv) Separate property is includible in the owner's taxable estate for estate tax purposes.
 - v) Separate property receives a full basis adjustment at the owner's death (i.e., a "step-up" or "step-down" in basis).
 - (1) The basis is adjusted to: (1) the property's fair market value on the date of death, (2) in the case of an election under §2032, the property's value on the alternate valuation date, (3) in the case of an election under §2032A, the property's value determined under that section, or (4) to the extent of the applicability of the exclusion described in §2031(c), its basis in the hands of the decedent. §1014(a).
 - (2) The basis adjustment does not apply to property which constitutes a right to receive income in respect of a decedent (IRD) under §691. §1014(c).
 - (3) The basis adjustment does not apply to appreciated property that is given to the decedent and then passes back to the donor (or the donor's spouse) within one year after the gift. §1014(e).
 - (a) This rule can apply to transfers between spouses. For example, if one spouse gives appreciated property to another spouse, who then dies within one year, leaving the appreciated property back to the first spouse, the property does not receive a basis step-up in the hands of the first spouse.
 - (b) The rule does not apply, however, if one spouse gives appreciated property to another spouse, who then dies within one year, leaving the appreciated property back to a bypass trust for the benefit of the first spouse.

- c) Tenants in common. Persons, including spouses, who own property jointly without right of survivorship are known as “tenants in common,” and such property is referred to as “TIC” property.
- i) Tenants in common have equal ownership rights in a single undivided property while all are living. When one owner dies, his share is treated as separate property, and it becomes probate property, which passes by his will. It is then available to fund his bypass trust.
 - ii) The term “separate property,” as used in this outline, includes each spouse’s interest in TIC property.
 - iii) In Maryland, if spouses own property jointly, they generally are presumed to hold the property as “tenants by the entirety,” not as tenants in common, unless otherwise specified. It is possible, however, to specify that two spouses own property as tenants in common, in order to avoid the presumption that they are tenants by the entirety. The spouses should be listed as “tenants in common” on the deed, account agreement, account title, or other document evidencing their ownership of the property.
 - iv) Tenants in common ownership is useful where both spouses desire to have exactly equal access to, use of, and rights over the property, but do not want a right of survivorship.
 - (1) Tenants in common ownership is often used in real property deeds, because real property is not divisible.
 - (2) For bank and brokerage accounts, the spouses may prefer simply to divide the assets in half, and add them to their own respective accounts.
- d) Tenants by the Entirety. Separate property does not include property held as tenants by the entirety (also known as “T by E” property).
- i) This is a form of joint ownership with right of survivorship. At the death of one tenant by the entirety, the surviving spouse automatically becomes the sole owner, and the property becomes the separate property of the surviving spouse.
 - ii) The first spouse’s interest in the property does not pass through probate. It is not available to fund his bypass trust.
 - iii) In Maryland, property owned jointly by spouses is presumed to be held as tenants by the entirety.
 - iv) As is the case with tenants in common ownership, tenants by the entirety have equal access to, use of, and rights over the property. However, neither spouse may act unilaterally with respect to T by E property.
 - v) Spouses must act jointly with respect to tenants by the entirety property.
 - (1) For example, both tenants by the entirety must sign a deed to convey real property, or an account agreement to open a bank or brokerage account.
 - (2) As a practical matter, tenants by the entirety often allow each other to act for both of them with respect to the property. For example, they may allow either spouse

to give administrative instructions regarding joint bank or brokerage accounts, to make investment decisions, to sign checks, and even to withdraw funds.

- vi) Upon divorce, property held as tenants by the entirety is presumed to be marital property for property division purposes.
- vii) Property held as tenants by the entirety is not subject to creditors of a single spouse.
 - (1) This rule provides significant asset protection for married clients. As such, it is a major factor in considering whether to divide T by E property into separate property.
 - (2) T by E property is subject to creditors of both spouses, however (such as lenders who obtain the signatures of both spouses on loan documents, or other contract claimants who obtain the signatures of both spouses on the contract documents).
- viii) One-half of property held as tenants by the entirety is includible in the first spouse's taxable estate for estate tax purposes, §2040(b), and receives a basis adjustment at the first spouse's death (i.e., a "step-up" or "step-down" in basis). §1014. This value is generally the property's fair market value on the date of death, or the alternate valuation date if applicable. The other half retains its original basis.
 - (1) Exception: §2040(b) does not apply to joint property acquired by spouses before 1977. Instead, §2040(a) applies, providing that the estate of the first spouse to die includes that portion of joint property for which he provided consideration. Gallenstein v. U.S., 975 F.2d 286 (6th Cir. 1992); Hahn v. Com'r, 110 T.C. 140 (1998), acq. 2001-42 I.R.B. 319; AOD 2001-06.
 - (a) This is a favorable result if the first spouse to die provided more than one-half of the consideration. The portion of the property for which the first spouse provided the consideration is included in his estate, with no adverse estate tax effect due to the marital deduction. The surviving spouse takes the property with a corresponding basis step-up.
 - (b) For example, if the first spouse provided 100% of the consideration, then 100% of the value of the property is included in his taxable estate, and the surviving spouse takes the property with a 100% basis step-up.
 - (c) This is an unfavorable result if the first spouse to die provided less than one-half of the consideration.
 - (2) Exception: If the surviving spouse disclaims her interest in T by E property, the basis step-up will be computed differently (see section 7(b)(ii)).
 - (3) The one-half step-up in basis creates an issue with respect to shares of stock: does each individual share receive a one-half step-up in basis, or may all identical shares (or all identical lots) be divided into halves, with one half receiving a basis step-up and the other half receiving no basis step-up?
 - (a) The latter method would be more favorable, as it would permit the surviving spouse to sell the half that received the step-up in basis immediately without capital gain. This appears to be the method followed by most practitioners.

(b) Under the former method, it would be impossible to sell any shares without capital gain, because each and every share would have received a one-half step-up in basis. This method appears to have more logical support.

e) Community Property.

- i) Community property is not common in Maryland. Maryland married couples will have community property only if they have previously lived in one of the nine community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin). Also, the Alaska Community Property Act, enacted in 1998, allows residents or non-residents of Alaska to opt in to Alaska's community property system for some or all of their property.
- ii) Each spouse's interest in community property is included in the spouse's probate estate at death, unless held as "community property with right of survivorship." Each spouse's interest in community property is also included in the spouse's taxable estate for estate tax purposes. Therefore, it is available to fund the bypass trust.
- iii) Community property enjoys a special benefit compared to separate property, because both halves of community property receive a 100% basis step-up at the death of the first spouse. §1014(b)(1); §1014(b)(6).
- iv) Some community property states allow married couples to agree that their assets are "aggregate" community property and to transfer such property to a joint trust. At the death of one spouse, the surviving spouse can choose which property is her share. This can be useful if the couple has enough non-retirement account assets to fund one bypass trust, and one spouse has a large retirement account. The couple transfers all assets to the joint trust and names the joint trust as the beneficiary of the retirement account. At the death of the first spouse, the surviving spouse claims the retirement account as her share, so the other assets are available to fund the bypass trust.
- v) When planning for married couples living in non-community property states with previously-acquired community property, the laws of the community property state must be consulted.

f) Using the Residence to Fund the Bypass Trust.

- i) All or a portion of the spouses' residence may be used to fund the bypass trust in certain situations:
 - (1) If the spouses hold the residence as tenants by the entirety, but the surviving spouse disclaims the first spouse's one-half interest in the residence (see section 7(b) below). This is a very common approach, both in planning situations, and in "fixing" estate plans after one spouse dies without adequately funding his unified credit.
 - (2) If the spouses hold their residence as separate property, i.e., all in one spouse's name, or in both spouses' names, as tenants in common.
 - (3) If the residence is used to fund an inter vivos QTIP trust (see section 8 below).
- ii) Married couples sometimes find that transferring interests in the residence between themselves or into trusts is more comfortable than transferring other assets. For

example, the wealthier spouse may wish to transfer a residence that is owned as tenants by the entirety, or even entirely by the wealthier spouse, into the poorer spouse's name.

iii) As a result, the surviving spouse may end up living in a residence that is owned partly by her and partly by the first spouse's bypass trust, or entirely by the first spouse's bypass trust.

iv) Using a residence to fund the bypass trust is generally not a problem.

(1) The surviving spouse must be included as at least a permissible recipient of income of the bypass trust. Typically, this is what the spouses want anyway. For trust law purposes, an income beneficiary is allowed to use the residence.

(2) Use of the residence does not carry out distributable net income of the trust.

(3) For purposes of the §121 exclusion of gain from sale, the surviving spouse is not treated as the owner of the portion of the residence that is owned by the trust. However, the portion that is owned by the trust would have received a §1014 basis adjustment at the first spouse's death.

g) Using an FLP/FLLC to Divide Joint Property. One advantage of holding property in a family limited partnership or family limited liability company is ease of transfer of ownership interests between partners or members.

i) No third parties are involved, and there are no documents to record or file to make the transfer effective. Typically, all that is required to transfer an interest in an FLP/FLLC is an executed assignment, delivery to the recipient, and possible amendment of the governing agreement.

ii) Thus, spouses can easily and quickly transfer interests in an FLP/FLLC back and forth between themselves. This can be useful if death of the first spouse is imminent, and he does not have sufficient assets to fund his estate tax exemption. However, it may be unwise to rely on this as a planning strategy, as it is risky to wait until death is imminent before making transfers.

6) Designate Bypass Trust as Beneficiary.

a) In General. One way to fund the bypass trust is to designate the trust as the beneficiary of assets such as retirement accounts, life insurance, and annuities. Such assets then will be payable to the bypass trust at the death of the first spouse, even though the assets do not pass through probate. As a result, the assets will not be included in the surviving spouse's estate.

b) Retirement Accounts.

i) For many married couples, retirement accounts form a large portion of their wealth. It may be impossible to fund the first spouse's bypass trust without using retirement accounts.

ii) One way to fund the bypass trust is to designate the trust as the beneficiary of the first spouse's retirement accounts. As used in this outline, the term "retirement accounts" includes accounts in a qualified retirement plan under §401(a) (other than defined

benefit plans), qualified retirement annuities under §403(a) or §403(b), and individual retirement accounts (“IRA’s”) under §408(a).

- iii) Funding a bypass trust with retirement accounts has several disadvantages. Some of these disadvantages occur by comparison to leaving the retirement accounts outright to the surviving spouse. Another disadvantage is that retirement accounts are subject to income tax, making them a poor choice to fund a trust that is supposed to grow in value. Other disadvantages occur as a result of naming a trust, instead of an individual, as the beneficiary of a retirement account.
 - (1) Funding a bypass trust with retirement accounts has disadvantages by comparison to leaving the retirement accounts outright to the surviving spouse because the surviving spouse, but not a bypass trust, may “roll over” an inherited retirement account into her own IRA, obtaining income tax advantages not available to the bypass trust. These income tax advantages result from the required minimum distributions (“RMD’s”) from the account.
 - (a) The surviving spouse can defer taking any RMD’s until her required beginning date (“RBD”), generally April 1 of the year following the year in which she attains age 70½. §401(a)(9)(C); §408(a)(6).
 - (i) A trust would have to begin taking RMD’s beginning in the year following the first spouse’s death.
 - (ii) The loss of this potential deferral is not a factor if both spouses already have attained their RBD.
 - (b) The surviving spouse’s RMD’s will be determined using the Uniform Lifetime Table, which means that they are based on the joint life expectancy of the spouse and a person 10 years younger.
 - (i) This results in lower RMD’s than the Single Life Expectancy Table, which applies to trusts (assuming that the trust qualifies as a “designated beneficiary” as discussed below).
 - (ii) The effect of this potential deferral, as well as the potential deferral available to a younger spouse who defers taking any RMD’s until her RBD, can be estimated by making assumptions about the tax rates applicable to the trust and to the surviving spouse, as well as the rate of growth of the assets within the retirement account and after being paid out to the surviving spouse.
 - (c) Upon the surviving spouse’s death, the next beneficiary’s RMD’s start again, based on that beneficiary’s age using the Single Life Expectancy Table. A trust’s RMD’s never change.
 - (2) Retirement accounts are taxable when distributed, which makes them a poor choice to fund a bypass trust. Because of the income tax liability, retirement accounts are “wasting” assets.
 - (a) Bypass trusts generally should be invested for appreciation, and earnings should be re-invested, rather than distributed. The surviving spouse should

live off of assets that will be taxable in her estate, such as her own assets or a marital trust, in order to allow the bypass trust to grow as much as possible.

- (b) Retirement accounts, however, have a built-in tax liability because they consist of pre-tax dollars. As a result, retirement accounts are not really worth as much as they appear.
- (3) Other disadvantages occur because of the use of a trust as beneficiary of a retirement account, rather than an individual.
- (a) Trust income tax brackets are more compressed than individual income tax brackets, so trusts tend to pay income taxes at a higher rate than individuals. Thus, retirement accounts payable to trusts often will be taxed at a higher rate. The trust may be able to lessen this impact by distributing income to the beneficiary so that it is taxed on her income tax return. However, this depletes the bypass trust and increases the beneficiary's taxable estate.
 - (b) The bypass trust must meet certain technical qualification requirements to be treated as a "designated beneficiary" in order to use its beneficiaries' life expectancies to calculate required minimum distributions. Treas. Reg. §1.401(a)(9)-4, A-5(b). Such a trust is called a "see-through" trust because the trust beneficiaries, rather than the trust itself, will be treated as the designated beneficiary of the retirement account for purposes of calculating RMD's.
 - (i) Depending on the situation, qualifying a trust as a see-through trust can have favorable consequences with respect to RMD's. Nevertheless, no trust, whether treated as see-through or not, is treated as favorably as a surviving spouse.
 - (ii) Qualifying the bypass trust as a see-through trust is important if the first spouse has not attained his RBD.
 - 1. If the trust does not qualify as a see-through trust, then the 5-year rule for distributions applies. §401(a)(9)(B)(ii); Treas. Reg. §1.401(a)(9)-3, A-4. The entire account must be distributed by December 31 of the fifth full year after the first spouse's death.
 - 2. If the trust qualifies as a see-through trust, and the plan permits, distributions may be taken over the life expectancy of the designated beneficiary. Treas. Reg. §1.401(a)(9)-3, A-4(c).
 - (iii) Qualifying the bypass trust as a see-through trust is not important if the first spouse has attained his RBD and the spouses are roughly the same age, because if the trust is not a see-through trust, the trust uses the life expectancy of the first spouse to determine the distribution period.
 - 1. If the surviving spouse is the same age as or older than the first spouse, the distribution period will be the same.
 - 2. Similarly, if the surviving spouse is just a little younger than the first spouse, the distribution period will be slightly longer if the trust qualifies as a see-through trust, but not significantly longer.

- (iv) One example of a see-through trust is a “conduit trust,” which is a trust that requires the trustee to distribute to the beneficiaries any distribution the trustee receives from the retirement account. Treas. Reg. §1.401(a)(9)-5, A-7(c)(3), Ex. (2).
1. A conduit trust is not very useful as a bypass trust. This is because a conduit trust must take all its RMD’s and pay them out to the beneficiary. Over the surviving spouse’s life, most of the bypass trust will be paid out to her. Thus, the assets will not be in the bypass trust, and will be subject to estate tax at her death.
 2. The surviving spouse is treated as the sole beneficiary of a conduit trust for her benefit. Thus, the trust is subject to more favorable rules than an accumulation trust.
 - a. The surviving spouse’s RMD’s are calculated using the recalculation method, although still using the Single Life Table. Treas. Reg. §1.401(a)(9)-5, A-5(c)(2).
 - b. If the first spouse had not reached his RBD, distributions may be delayed until the surviving spouse’s own RBD. Treas. Reg. §1.401(a)(9)-5, A-5(c)(2).
- (v) If the bypass trust is not a conduit trust, then it may qualify as a see-through trust as an “accumulation trust.”
1. In order for a bypass trust to qualify as an accumulation trust, the trust must contain provisions ensuring that no retirement account assets can be paid to a non-individual or to an individual with a shorter life expectancy than the surviving spouse.
 2. For example, the trust instrument must limit powers of appointment so that beneficiaries may appoint retirement assets only to individuals (or trusts for individuals) who were born in the same year as, or a later year than, the beneficiary whose life expectancy is being used to calculate distributions from the retirement account.
 3. The tax clause and other administrative provisions must provide that retirement assets may not be used to pay estate taxes or satisfy other cash needs of the estate.
 4. Other technical provisions that are required of an accumulation trust are easier to meet, though equally important. The trust must be valid under state law, it must be or become irrevocable at the death of the participant, the beneficiaries must be identifiable from the trust instrument, and certain documentation must be provided to the plan administrator. Treas. Reg. §1.401(a)(9)-4, A-5(b).

- (vi) Often the retirement account owner will want to leave the retirement accounts to the surviving spouse in a trust anyway, i.e., in a QTIP trust, in order to control what happens to the accounts after his death.
 - 1. The first spouse may leave his retirement accounts to his trustees, without specifying whether the trustees are to allocate the accounts to the marital trust or the bypass trust. In such a case, the retirement accounts will be divided in accordance with the will or trust's funding provision. Such provisions fall into two categories: pecuniary or fractional. If the retirement account is used to fulfill a pecuniary funding provision, the IRS position is that the trust recognizes income in respect of a decedent under §691(a)(2). Chief Counsel Memorandum 2006-44020. Thus, only fractional funding formulas should be used, if the trustee will be required to divide retirement accounts.
 - 2. Note that a QTIP trust that contains retirement assets also must provide that the spouse will have the right to require the trustee to withdraw and distribute all income earned within the account. Rev. Rul. 2006-26, 2006-22 I.R.B. 939; Rev. Rul. 2000-2, 2000-1 C.B. 231.
- (vii) The terms of the retirement account must be considered before making it payable to a bypass trust.
 - 1. For example, some qualified plans permit only lump-sum payouts after the death of the participant. If the entire account benefit is paid out immediately, then it does not matter if the trust qualifies as a see-through trust.
 - 2. In such a case, the only tax deferral option available is for the surviving spouse to take the distribution and roll it over into her own IRA.
- (c) When naming a trust as beneficiary of a retirement account, rather than an individual, it is advisable to include a provision in the trust instrument that defines income from the retirement account to be equal the income earned on the assets held by the retirement account. Otherwise, the Maryland Principal and Income Act will classify 10% of distributions from the account as income, and the rest as principal. Md. Est. & Tr. Code §15-516(c).
- iv) Retirement account assets often are used as a back-up plan to fund the bypass trust, in conjunction with a disclaimer (see section 7(c) below).
 - (1) The account owner names the spouse as primary beneficiary.
 - (2) The bypass trust is named as contingent beneficiary. If the spouse disclaims the account, it will pass to the bypass trust.
 - (3) This plan does not eliminate the disadvantages of funding a bypass trust with retirement accounts. Instead, this plan shifts the decision to the surviving spouse to make after the first spouse's death. Deferring this decision until after the first

spouse's death may be helpful because the surviving spouse's financial situation, as well as the tax laws, may be different at that time.

- (4) The surviving spouse also will be able to decide exactly how much of the retirement account to disclaim. The surviving spouse can roll over the portion of the retirement account that she does not disclaim into her own IRA.
 - v) If the surviving spouse does not need the retirement accounts to live on, then it can be more tax-efficient to skip the bypass trust altogether, and to "stretch" the payout by naming younger beneficiaries, such as the couple's children, as the beneficiaries. This will use a portion of the first spouse's estate tax exemption, and as such it is the equivalent of funding a bypass trust. This is a type of "taxable bequest" for retirement accounts (see section 9).
- c) Life Insurance.
- i) The clients may fund their bypass trusts by naming the trusts as the beneficiaries of the clients' life insurance policies. The proceeds of the first spouse's life insurance policies then will be used to fund his bypass trust.
 - ii) Although the client may have considered transferring the life insurance policy to a life insurance trust, the client may prefer not to do so for various reasons:
 - (1) The client may have concerns about giving up control or concerns about irrevocability.
 - (2) The policy's value may be too large to give away.
 - (3) A life insurance trust may not be needed, if the combined estate is less than twice the estate tax exemption amount, and if the surviving spouse's estate can be made less than her estate tax exemption amount by making the policy payable to the first spouse's bypass trust.
 - iii) The bypass trust will receive the life insurance proceeds income tax-free, allowing the full amount to be invested.
- d) Other Beneficiary Designation Assets.
- i) The clients may fund their bypass trusts by naming the trusts as the beneficiaries of the clients' other beneficiary designation assets, such as annuities or transfer-on-death accounts. The death benefits of the annuities or the contents of the transfer-on-death accounts then will be used to fund the bypass trust.
 - ii) Annuities.
 - (1) Annuities can be made payable to the bypass trust instead of one or more individual beneficiaries.
 - (2) Because annuity benefits are subject to income tax, however, the amount passing to the bypass trust will be diminished by the amount of tax that must be paid. For this reason, annuities are not an optimal asset to use to fund a bypass trust.

iii) Transfer-on-Death Accounts.

(1) Maryland permits transfer-on-death accounts (“TOD accounts”). Md. Est. & Tr. Code §16-101 et seq.

(2) Such accounts can be made payable to the bypass trust.

e) Form of Beneficiary Designation.

i) Whether the account is a retirement account or some other form of account subject to a beneficiary designation, the client must name the bypass trust as the beneficiary on the beneficiary designation form provided by the account administrator (e.g., IRA custodian or trustee, retirement plan administrator, life insurance company, annuity sponsor, or TOD account custodian).

ii) There is no single way to name a trust as designated beneficiary.

(1) The designation can be general, such as “Trustees under my Last Will and Testament.” It would then be up to the trustees to allocate the proceeds to the bypass trust.

(2) The designation can be specific, such as “Trustees of the Bypass Trust under my Last Will and Testament.”

(3) There is no need to name the trustees, or to include the date of the Will, as these may change if the Will is re-done.

(4) If the trustees are serving under a revocable trust agreement, as opposed to a will, then the beneficiary designation should include the date of the revocable trust agreement, but also incorporate subsequent amendments, as follows: “Trustees under my Revocable Trust Agreement dated 1/1/01, as amended.”

iii) The client can change the beneficiary designation at any time.

iv) If the client’s spouse predeceases the client, the client does not have to change the beneficiary designation, because the bypass trust contains provisions for the client’s children or other remainder beneficiaries.

v) Beneficiary designations are as important as Wills. Clients must take them seriously, obtain advice before filling them out, file them as required, and keep copies in a secure place.

vi) Beneficiary designations also must be reviewed periodically. New forms must be completed if the client opens a new account, changes IRA providers, changes life insurance policies, acquires new annuities, etc.

7) Disclaimers.

a) In General.

i) Definition. A “disclaimer” is a legally effective renunciation or refusal to accept an interest in property that otherwise would pass at death (or by gift, but that is not relevant in bypass trust planning). Maryland has enacted the Uniform Disclaimer of Property Interests Act. Md. Est. & Tr. Code §9-201 et seq.

- ii) Use. Disclaimers can be used to fund bypass trusts in two situations.
 - (1) Disclaimers can be used with property held as tenants by the entirety to cause the first spouse's interest in such property to pass to his bypass trust instead of to the surviving spouse. Such disclaimers also can cause the basis adjustment at death for such property to be larger than if no disclaimer were made.
 - (2) Disclaimers can be used with property passing by beneficiary designation to cause the property to pass to the first spouse's bypass trust instead of to the surviving spouse.
- iii) Effect. Disclaimed property passes as if the person who disclaimed it predeceased the prior owner, i.e., as if the surviving spouse died before the first spouse. Md. Est. & Tr. Code §9-203(d).
- iv) Timing and other requirements. In the context of funding a bypass trust, disclaimers can be made only after the death of the first spouse. To be effective for federal estate tax purposes, disclaimers must be made within nine months after the first spouse's death, among other technical requirements. §2518(b)(2).
- v) No Power of Appointment Over Disclaimed Property. The disclaimer will not be effective for federal estate tax purposes if the surviving spouse has a power of appointment (even a limited power of appointment) over the bypass trust. Treas. Reg. §25.2518-2(e)(5).
 - (1) If the estate planner anticipates the surviving spouse will fund the bypass trust through a disclaimer, then it is advisable for the bypass trust to be drafted without a power of appointment.
 - (2) If the bypass trust gives the surviving spouse a power of appointment, she can disclaim this power. This will enable her to disclaim property that passes to the bypass trust in a tax-effective manner.
 - (3) If the estate planner is unsure whether the surviving spouse will fund the bypass trust through a disclaimer, and the clients want the surviving spouse to have a power of appointment over the bypass trust, it is possible to leave the option open. The plan can include the power of appointment, as long as the surviving spouse understands that she must disclaim the power if she also wants to disclaim property that will pass to the trust. Both disclaimers must be made within nine months after the first spouse's death.
- b) Disclaimer of Property Held as Tenants by the Entirety. As noted above, property held as tenants by the entirety passes outright to the surviving spouse at the death of the first spouse. However, the surviving spouse can disclaim the first spouse's interest in the property. This interest is then treated as if the surviving spouse predeceased the first spouse, so this interest becomes part of the first spouse's probate estate. It is then available to fund the bypass trust.
 - i) How Much of the Property May Be Disclaimed.
 - (1) The Maryland Uniform Disclaimer of Property Interests Act permits a surviving spouse to disclaim the greater of one-half of jointly held property, or all of such

property except that part of the value attributable to consideration furnished by the surviving spouse. Md. Est. & Tr. Code §9-204(a).

- (2) Internal Revenue Code §2518 provides that a disclaimer is not a gift if certain requirements are met.
- (a) One of the requirements is a 9-month time limit. Oddly, and for historical reasons, the section of the regulations concerning the time limit also contains rules limiting the amount of joint property that may be disclaimed.
 - (b) First, the general rule of the regulations is that a surviving spouse may disclaim a one-half interest in the property. Treas. Reg. §25.2518-2(c)(4)(i).
 - (i) This rule clearly applies to real property. Thus, a surviving spouse may disclaim a one-half interest in real property after the first spouse's death.
 - (c) However, a special rule provides that a surviving spouse may not disclaim any portion of "a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant, such that the transfer is not a completed gift under §25.2511-1(h)(4)," that is "attributable to consideration furnished by the surviving spouse." Treas. Reg. §25.2518-2(c)(4)(iii).
 - (i) This special rule limits use of disclaimers in many cases. Often, the poorer spouse, i.e., the spouse with fewer assets outside the joint account, also did not furnish any consideration to the joint account, and as a result would not be able to disclaim any portion of the account.
 - (ii) The special rule enhances the use of disclaimers in cases where the first spouse furnished most or all of the consideration to the joint account.
 - (iii) The special rule may not be applicable in Maryland. Maryland law does not provide that "a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other cotenant." Rather, Maryland law provides that the consent of both spouses is required for any transfers from an account held as tenants by the entirety.
 - (iv) If the surviving spouse disclaims a portion of the joint account in excess of her contribution (which state law permits her to do), so that such portion passes to the bypass trust, and the regulation applies, then presumably the surviving spouse will be treated as having made a taxable gift of the excess to the bypass trust.
 - (v) Some believe it is better to avoid the special rule.
 1. Converting T by E accounts into separate property avoids the special rule, but also has the non-tax consequences discussed above.
 2. Perhaps the special rule would not apply if the couple converted a T by E account to a TIC account, waited a brief period of time, and then converted the TIC account back to a T by E account. The surviving spouse then could take the position that she furnished one-half of the

consideration for the T by E account. This position would be supported by the fact that during the period of time when the account was held as TIC, she could have withdrawn her one-half of the account.

ii) Cost Basis.

(1) In the event of a disclaimer of property held as tenants by the entirety, the disclaimed portion becomes part of the first spouse's taxable estate under §2033 and receives a full basis adjustment. The balance of such property is includible in the first spouse's taxable estate under §2040 and receives a one-half basis adjustment. See Treas. Reg. §25.2518-2(c)(5), Ex. 14.

- (a) Assuming the property has appreciated, the disclaimer will increase the basis of the property compared to not disclaiming.
- (b) For example, if the surviving spouse disclaims one-half of the account, the disclaimed one-half receives a full basis step-up, and the other one-half receives a one-half basis step-up, for a total basis step-up of three-quarters.
- (c) The same result occurs whether the disclaimed property passes under the first spouse's will to the bypass trust or even back to the surviving spouse pursuant to an outright bequest.
- (d) The disclaimed portion of the property is reported on the first spouse's estate tax return as if the surviving spouse had predeceased the first spouse. The balance of the property is reported on the first spouse's estate tax return as if the surviving spouse had not disclaimed.
 - (i) Thus, for example, if the surviving spouse disclaims real estate held as tenants by the entirety, the disclaimed one-half of the property will be reported on Schedule A (Real Estate), and the other one-half of the property will be reported on Schedule E (Jointly Owned Property).
 - (ii) All of the disclaimed one-half will be included in the taxable estate, will receive a basis step-up, and will not qualify for the marital deduction, as it passes to the bypass trust.
 - (iii) One-half of the other one-half will be included in the taxable estate, will receive a basis step-up, and will qualify for the marital deduction, as it passes outright to the surviving spouse.

c) Disclaimer of Property Passing by Beneficiary Designation. Some property is payable to the surviving spouse by beneficiary designation, such as retirement accounts, life insurance, annuities, or TOD accounts. The surviving spouse can disclaim her right to receive such property.

- i) Such property is then treated as if the surviving spouse predeceased the first spouse, so it is paid to the next beneficiary. Md. Est. & Tr. Code §9-203(d).
- ii) The next beneficiary may be determined in a variety of ways: it may be listed on the beneficiary designation, it may be provided in the default provisions of the account agreement, or it may be specified in the default provisions of applicable state law.

- (1) The next beneficiary may be the estate, in which case the property will be available to fund the bypass trust.
 - (2) The next beneficiary may be the bypass trust, if the beneficiary designation was written with this in mind.
 - (3) The next beneficiary may be another individual or trust that achieves the goal of getting the property out of the surviving spouse's estate, even though it does not get the property into the bypass trust where it remains available to the surviving spouse as beneficiary for the rest of her life.
- d) Make Sure Surviving Spouse Will Be Willing and Able to Disclaim.
- i) Willing. A surviving spouse may not be in the right frame of mind to execute a disclaimer within 9 months of the first spouse's death. The disclaimer does not benefit the surviving spouse, it only benefits the next beneficiary by saving estate taxes that will not be owed until after the surviving spouse's death.
 - ii) Able. The surviving spouse may be disabled, or she may die shortly after the first spouse. In such cases, only her fiduciaries would be able to disclaim on her behalf.
 - (1) Under Maryland law, an attorney-in-fact under a durable power of attorney may disclaim on behalf of the principal, a guardian of the property may disclaim on behalf of the disabled person, and a personal representative may disclaim on behalf of the decedent. Md. Est. & Tr. Code §9-202(b)(1).
 - (2) If the real property that will be disclaimed is located in another state, then that state's law should be reviewed to determine whether a fiduciary may disclaim on behalf of another person. For example, Florida law provides that a fiduciary may disclaim only with court approval or if the instrument creating the fiduciary relationship explicitly grants the fiduciary the right to disclaim. Fla. Stat. §739.104.
- 8) Inter Vivos QTIP Trust.
- a) The wealthier spouse may be reluctant to transfer assets to the poorer spouse outright. An alternative is to transfer assets to an "inter vivos QTIP trust" for the benefit of the poorer spouse.
 - b) An inter vivos QTIP trust is an irrevocable marital trust established by the wealthier spouse during his lifetime for the poorer spouse. "Inter vivos" means the trust is established during lifetime. "QTIP" stands for "qualified terminable interest property." See §2056(b)(7).
 - c) As with any other QTIP trust, the spouse must be entitled to receive all income from the trust, and no principal may be paid to anyone other than the spouse. These rights must continue for the spouse's life, and cannot terminate even if she remarries.
 - d) The wealthier spouse must make a QTIP election on a gift tax return. §2523(f).
 - e) The poorer spouse may be given a power of appointment, although this may be inconsistent with the purpose of the trust, which is to control the disposition of the property. To address this concern, the power of appointment may be limited to the wealthier spouse and his descendants.

- f) The trust will be included in the poorer spouse's estate at her death. At that time, if the wealthier spouse is not then living, the trust will continue for the benefit of (or be distributed to) beneficiaries named in the trust agreement by the wealthier spouse, e.g., his descendants.
- g) After the poorer spouse's death, if the wealthier spouse is still living:
 - i) The trust may continue for his benefit for his lifetime. Thus, it will be similar to a bypass trust created by the poorer spouse, except that its terms are determined by the wealthier spouse.
 - (1) Even though the wealthier spouse is both grantor and beneficiary, the trust assets will not be included in his estate under §2036 or §2038, under an explicit exception in the gift tax regulations. Treas. Reg. §25.2523(f)-1(d)(1), (2); Treas. Reg. §25.2523(f)-1(f) Ex. (10), (11); PLR 200406004.
 - (2) Similarly, the trust assets should not be included in the wealthier spouse's estate under §2041, as long as distributions from the trust to the wealthier spouse are limited to an ascertainable standard. Although the IRS could argue that §2041 applies because the trust assets will be subject to the claims of the wealthier spouse's creditors (see below), this should not be the case if distributions from the trust to the wealthier spouse are limited to an ascertainable standard, because creditors also would be limited to such a standard. Restatement (3d) Trusts, §60, comment f.
 - (3) Alternatively, the trust could omit any provisions for the wealthier spouse. This would avoid any issue of estate tax inclusion in the wealthier spouse's estate. This might be appropriate if (a) the wealthier spouse did not need the trust, or (b) the trust included a limited power of appointment for the poorer spouse exercisable in favor of the donor spouse and/or his descendants, and she was expected to exercise it in an appropriate manner.
 - ii) Any property in the trust in excess of the amount needed to use the poorer spouse's estate tax exemption can pass to a marital trust for the wealthier spouse, or directly back to the wealthier spouse.
 - iii) The trust assets will be subject to the claims of the wealthier spouse's creditors, as a self-settled trust, unless the trust qualifies as an asset protection trust under the law of a state such as Delaware that permits such trusts. Ordinarily, the fact that the trust assets will be subject to the claims of the wealthier spouse's creditors would cause the trust assets to be includible in his estate, but this result is overridden by the above-described exception in the gift tax regulations. Treas. Reg. §25.2523(f)-1(d)(1), (2); Treas. Reg. §25.2523(f)-1(f) Ex. (10), (11).
- h) The trust will be a wholly grantor trust as to the wealthier spouse during the poorer spouse's lifetime because the trust provides that the income must be distributed to the grantor's spouse. §672(e); §677.

- i) The trust will continue as a wholly grantor trust as to the wealthier spouse after the poorer spouse's death, if the wealthier spouse survives her, assuming the trust provides that the income must be distributed to the grantor's spouse (or at least that the income may be distributed to the grantor's spouse).
 - i) Such a provision will cause the trust to be treated as a grantor trust. §672(e); §677.
 - ii) This remains true even though the trust was included in the poorer spouse's estate at his death. Treas. Reg. §1.671-2(e)(5) (no change in identity of the grantor unless someone exercises a general power of appointment over the trust).
 - iii) Grantor trust treatment yields two income tax benefits.
 - (1) First, the wealthier spouse will have to pay, from his own assets, the income tax on the income earned within the trust. This will not be considered a taxable gift by the wealthier spouse. Rev. Rul. 2004-64, 2004-2 C.B. 7. Having the wealthier spouse pay the income tax on the income earned within the trust is a significant income tax benefit after the poorer spouse's death because it allows the trust to grow in value faster than it would if it had to pay its own income tax.
 - (2) Second, the wealthier spouse will be able to exchange his own high-basis assets (such as cash or bonds) for trust assets at any time. He may do this shortly before his death, for example. The assets transferred from the trust to his estate will receive a step-up in basis at his death. The high-basis assets in the trust do not need a step-up in basis. Thus, this exchange will result in an effect similar to a step-up in basis for the assets in the trust at the wealthier spouse's death.
 - (3) Neither of these benefits would occur with respect to a standard, testamentary bypass trust.
 - (4) At least some commentators have argued that these income tax benefits constitute a good reason to use inter vivos QTIP trusts even where both spouses already have enough assets to fund their bypass trusts. "Supercharged Credit Shelter Trust," Prof. Mitchell M. Gans, Jonathan G. Blattmachr and Diana S. C. Zeydel, 21 Probate & Property 52 (July/August 2007).
 - (5) These income tax benefits certainly should be considered when deciding whether to use an inter vivos QTIP trust over a different asset titling strategy.
- j) The wealthier spouse may wish to retain a limited power of appointment. Such a retained limited power of appointment may cause the gift to the trust to fail to qualify for the gift tax marital deduction as a terminable interest, even if a QTIP election is made. §2523(b)(2); Treas. Reg. §25.2523(f)-1(a)(1). This rule was not followed in two private letter rulings. PLR 200406004; PLR 9437032. It has also been criticized and questioned by commentators. See, e.g., Gans, et al. at 60-61.

- k) To be safe, the wealthier spouse should not serve as trustee, because if he predeceases the poorer spouse, there is a risk that he will be deemed to have retained too much control over the trust assets, causing them to be included in his taxable estate under §2036 or §2038.
 - i) This risk may be foreclosed by the above-mentioned gift tax regulation that provides an exception to §2036 and §2038. Treas. Reg. §25.2523(f)-1(d)(1), (2); Treas. Reg. §25.2523(f)-1(f) Ex. (10), (11).
 - ii) This risk can be avoided if the wealthier spouse's powers as trustee are sufficiently limited.
 - iii) Any advantage of the wealthier spouse serving as trustee is generally not worth the risk. To be safe, the wealthier spouse should appoint a trusted person or institution as trustee instead.
 - l) Deferred Inter Vivos QTIP Trust. The IRS has ruled favorably on an inter vivos QTIP trust in which the wealthier spouse retained a limited power of appointment over the trust until the earlier of (1) his death, (2) the poorer spouse's death, (3) his written release of the power of appointment, or (4) 20 years and two months from the date of the trust. PLR 200413011.
- 9) Taxable Gifts and Bequests.
- a) Taxable gifts and bequests refer to transfers to persons or trusts other than the surviving spouse or charities. For example, gifts and bequests to children and grandchildren, or trusts for their benefit, are taxable. Such transfers use a portion of the first spouse's estate tax exemption.
 - i) Taxable bequests use a portion of the estate tax exemption because they do not qualify for the marital or charitable deduction.
 - ii) Similarly, adjusted taxable gifts ("taxable gifts") are added back in to the taxable estate at death, at least for federal estate tax purposes. Thus, they effectively use a portion of the federal estate tax exemption.
 - b) As a result of taxable gifts and bequests, the bypass trust will be funded with a smaller amount of property. This should be considered in planning for the funding of the bypass trust. Effectively, the target amount will be lower.
 - c) Lifetime taxable gifts can be planned in such a way as to help the poorer spouse fund her bypass trust.
 - i) If the couple desires to make taxable gifts, they can transfer assets to the poorer spouse and then arrange for her to make the gifts.
 - ii) Alternatively, the wealthier spouse can make the gifts, with the couple electing to split the gifts so that they are treated as having been made one-half by each spouse for transfer tax purposes.

- d) Taxable gifts have an additional advantage in Maryland. Such gifts are not added back in to the taxable estate at death for Maryland estate tax purposes. Thus, they do not use a portion of the Maryland estate tax exemption. As a result, the entire Maryland estate tax exemption will be available at the first death.
- i) For example, if the first spouse has made \$500,000 of taxable gifts and dies in 2009, he will have \$3 million of federal estate tax exemption remaining and \$1 million of Maryland estate tax exemption remaining. His residuary trust would receive \$1 million, thus using both his Maryland estate tax exemption and \$1 million of his federal estate tax exemption. His Maryland QTIP trust would receive the balance of his federal estate tax exemption, or \$2 million.
 - ii) Note that this reduces the amount subject to Maryland estate tax at the second death from \$2.5 million (if he had made no taxable gifts) to \$2 million (with the \$500,000 of taxable gifts).
 - iii) This is not just an asset titling issue. Anyone can reduce Maryland estate tax by making taxable gifts. Again, this is because taxable gifts are not added back in to the taxable estate at death for Maryland estate tax purposes. Thus, they escape Maryland estate tax.
 - (1) This can be a useful planning technique for pre-mortem planning or at any other time, and whether one or both spouses is living, if the clients are willing to make taxable gifts.
 - (2) As with all gift strategies, this strategy is especially useful with high-basis property, such as cash or bonds, because the gifted property will not be included in the donor's estate and will not receive a step-up in basis.
 - (3) It can be done immediately before death and still be effective.
 - (a) Note that the gift will be subject to Maryland inheritance tax if made "in contemplation of death" (generally, within two years of death) to a person who is not exempt from inheritance tax. Md. Tax-General Code §7-201(d)(1)(iii).

10) General Power of Appointment Revocable Trust.

- a) The general power of appointment revocable trust ("GPRT") refers to a strategy in which the wealthier spouse transfers assets equal to the estate tax exemption (or more) to a revocable trust, and gives the poorer spouse a testamentary general power of appointment over the trust (or at least assets equal to the estate tax exemption amount). Upon the death of either spouse, the trust becomes irrevocable.
 - i) If the wealthier spouse dies first, the trust is included in his estate because of the revocation power. The trust assets pass in accordance with his typical estate plan, i.e., trust assets equal to his estate tax exemption pass to a bypass trust, and the balance of the trust assets pass to a marital trust or to the poorer spouse outright.
 - ii) If the poorer spouse dies first, the assets subject to the general power of appointment are included in her taxable estate under §2041 and reported on Schedule H of her Form 706. Trust assets equal to her estate tax exemption pass to a bypass trust, and the balance of the trust assets pass to a marital trust, back to the wealthier spouse

outright, or remain in the trust where they continue to be subject to the wealthier spouse's revocation power.

- iii) The GPRT is sometimes referred to as a joint revocable trust. This outline does not use the term joint revocable trust, because the essential element of the plan is the general power of appointment, the trust does not have to be joint, and joint revocable trusts are often used for other purposes.
- b) The GPRT is also very useful if the couple has non-retirement assets equal to one spouse's estate tax exemption, as well as substantial retirement assets. Because the spouses do not know which of them will die first, they do not know which spouse should hold title to the non-retirement assets. If the non-retirement assets are put into a general power of appointment revocable trust, it will not matter which spouse dies first. The GPRT assets will be used to fund the first spouse's bypass trust. The retirement assets will pass outright to the surviving spouse.
- c) The GPRT is risky because it involves several unresolved tax issues, the most difficult of which are as follows:
 - i) First, does the transfer from the wealthier spouse at the death of the poorer spouse qualify for the gift tax marital deduction?
 - ii) Second, are the assets treated as passing from the poorer spouse to the bypass trust so that the bypass trust is not included in the estate of the surviving spouse under §2036?
- d) The IRS has ruled favorably on these issues in at least four private letter rulings. PLR 200101021; PLR 200210051; PLR 200403094; PLR 200604028.
- e) However, the IRS has yet to issue a published ruling or other guidance on which taxpayers may rely. The ABA and ACTEC have asked for such guidance without success.
- f) The GPRT is also risky because it may subject the property to the claims of the poorer spouse's creditors and because the poorer spouse may exercise the general power of appointment in an unfavorable manner, either intentionally or unintentionally. Bergner, John F., "Waste Not, Want Not – Creative Use of General Powers of Appointment to Fund Tax-Advantaged Trusts," 2007 Heckerling Institute on Estate Planning 14.
- g) If the poorer spouse dies first, the assets in the GPRT will not receive a basis step-up, even though included in the poorer spouse's estate.

11) Wait for Portability?

- a) "Portability," which has not been enacted into law, refers to proposed statutory provisions that would allow the first spouse's unused estate tax exemption to be transferred to the surviving spouse. No bypass trust would be necessary.
- b) Portability has been included in recent estate tax reform bills. Taxpayer Certainty and Relief Act of 2009 (S. 722, 111th Cong., 1st Sess. (2009), introduced by Sen. Max Baucus (D-Montana); Capital Gains and Estate Tax Relief Act of 2009 (H.R. 498, 111th Cong., 1st Sess. (2009), introduced by Rep. Harry Mitchell (D-Arizona).

- c) Portability, if enacted, would allow the first spouse's personal representative to elect on an estate tax return to allow the surviving spouse to use the first spouse's unused federal estate tax exemption.
- d) For example, Al and Barb Client have combined assets of \$7 million at Al's death.
 - i) At Al's death, all the assets pass directly to Barb, either by will, beneficiary designation, joint ownership, or other reason. No trust is established. No estate tax is owed at the first death.
 - ii) Using portability, Al's personal representative elects on Al's federal estate tax return to allow Barb to use Al's unused federal estate tax exemption, or \$3,500,000.
 - iii) At Barb's death, all the assets pass to the kids. Barb's estate is worth \$7 million. Barb has her entire federal estate tax exemption of \$3,500,000 remaining, as well as Al's unused federal estate tax exemption, or \$3,500,000, for a total of \$7 million. Her estate owes no federal estate tax and \$638,000 in Maryland estate tax. The kids get \$6,362,000.
 - iv) This would represent an enormous tax savings compared to current law, under which Barb's estate would owe \$1,287,900 in federal estate tax, as well as the same \$638,000 in Maryland estate tax (see section 1(e)).
 - v) In addition, further tax savings would be available, because the entire \$7 million estate would be included in Barb's taxable estate at her death, and thus will receive a 100% step-up in basis, assuming asset values have increased. By contrast, assets inside a bypass trust are not included in the surviving spouse's estate, so such assets do not receive a step-up in basis.
 - vi) The cost and complexity of estate planning also would be significantly reduced with portability.
- e) Under versions proposed so far, a surviving spouse with multiple predeceased first spouses would be limited to using her prior spouses' unused estate tax exemptions in an amount no greater than the federal estate tax exemption in effect at her death.
- f) Portability would not eliminate the use of bypass trusts completely.
 - i) First, a couple with more than \$7 million (or who expect to have more than \$7 million by the second death) would be well-advised to fund a bypass trust with the maximum estate tax exemption at the first death. This is because any growth and appreciation inside the bypass trust will escape the estate tax at the second death. By contrast, using portability, the amount of the first spouse's estate tax exemption transferred to the surviving spouse is fixed at the time of the first death.
 - ii) Second, portability would not apply for Maryland estate tax purposes. Thus, a couple with more than \$2 million might wish to fund a bypass trust with the maximum Maryland estate tax exemption at the first death. In the above example, had Al set up a \$1 million residuary trust to use his Maryland estate tax exemption, Barb's estate would have owed only \$510,800 of Maryland estate tax, instead of \$638,000.

Estate Plan with Bypass Trust and Maryland QTIP Trust

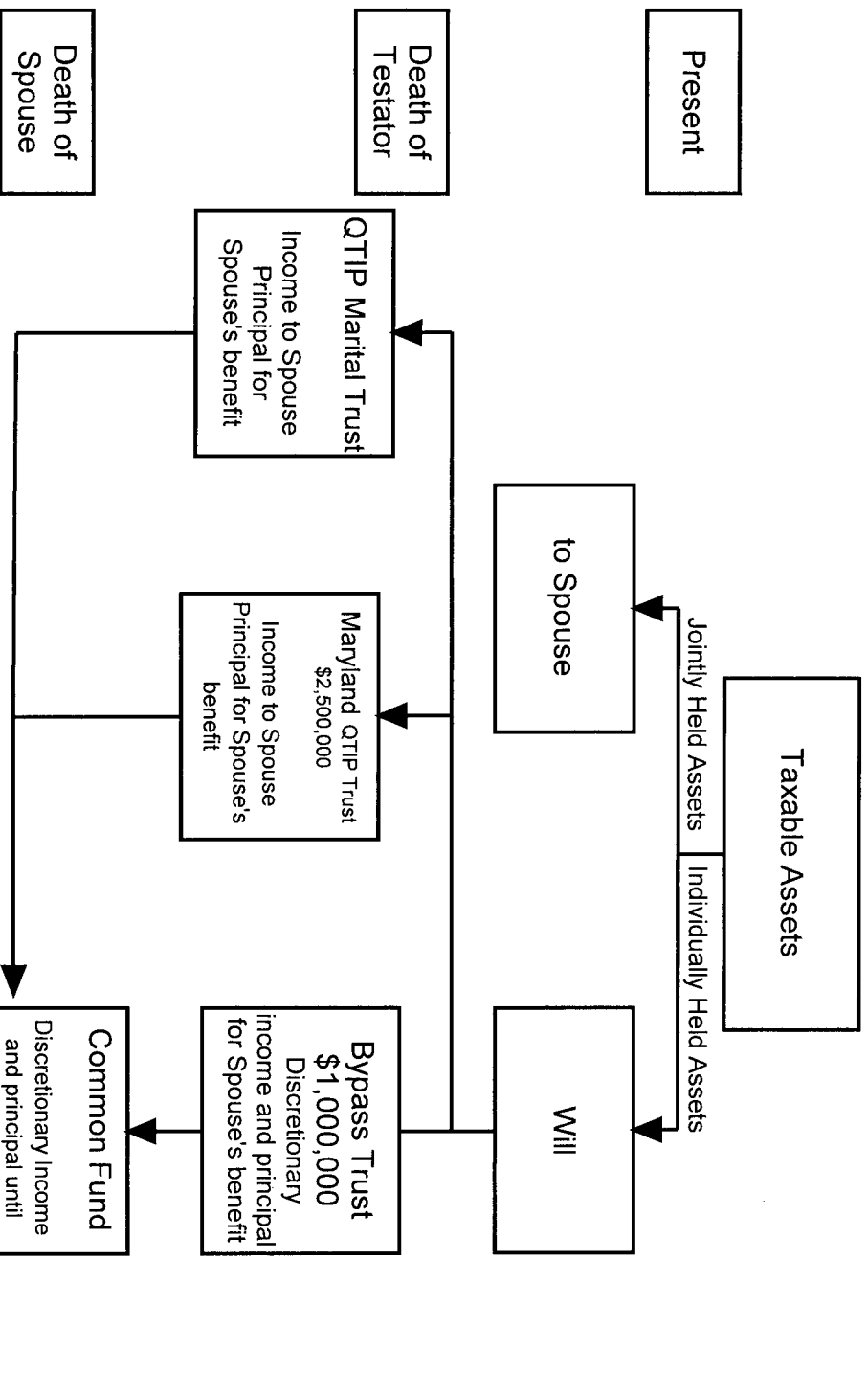


EXHIBIT A

Income to each child. Discretionary Principal. Each child may terminate his or her trust, 1/2 at age 25 and the balance at age 30.

EXHIBIT B

Estate Tax Calculation

8/28/2009

Al and Barb Client

Year of Death:	2009
Adjusted Gross Estate:	\$7,000,000
Pre-1977 Taxable Gifts:	\$0
Adj. Taxable Gifts (After '76):	\$0
Unified Credit Used by Gifts:	\$0
State:	MD
Recipient Class:	0
Retirement Plans Excluded:	
Insurance Excluded:	

State Tax Calculations (MD)

Exclusion Amount for Pickup Tax:	\$1,000,000
Inheritance Recipient	
Class ID: 0	
Description: Spouse, Child, or Other Lineal	
Descendant, Spouse of a Child or Lineal	
Descendant, Parent, Grandparent, Stepchild,	
Stepparent, Siblings	
Taxable Estate for MD Inheritance Tax:	\$7,000,000
Inheritance Tax:	\$0
Estate Tax:	\$638,000
State Death Tax:	<u>\$638,000</u>

Federal Tax Calculations

Taxable Estate (2009):	\$7,000,000
Deduction for State Death Tax (MD):	\$638,000
Tentative Tax Base:	\$6,362,000
Tentative Tax:	\$2,743,700
Gross Federal Estate Tax:	\$2,743,700
Unified Credit:	\$1,455,800
Net Federal Estate Tax:	\$1,287,900
Assumed State Death Tax:	<u>\$638,000</u>
Total Federal and State Tax Payable:	<u>\$1,925,900</u>

EXHIBIT C-1

Estate Tax Calculation
Chuck and Diane Client

8/28/2009

Year of Death:	2009
Adjusted Gross Estate:	\$6,000,000
Pre-1977 Taxable Gifts:	\$0
Adj. Taxable Gifts (After '76):	\$0
Unified Credit Used by Gifts:	\$0
State:	MD
Recipient Class:	0
Retirement Plans Excluded:	
Insurance Excluded:	

State Tax Calculations (MD)

Exclusion Amount for Pickup Tax:	\$1,000,000
Inheritance Recipient	
Class ID: 0	
Description: Spouse, Child, or Other Lineal	
Descendant, Spouse of a Child or Lineal	
Descendant, Parent, Grandparent, Stepchild,	
Stepparent, Siblings	
Taxable Estate for MD Inheritance Tax:	\$6,000,000
Inheritance Tax:	\$0
Estate Tax:	\$510,800
State Death Tax:	\$510,800

EXHIBIT C-2

Estate Tax Calculation
Chuck and Diane Client

8/28/2009

Year of Death:	2009
Adjusted Gross Estate:	\$3,500,000
Pre-1977 Taxable Gifts:	\$0
Adj. Taxable Gifts (After '76):	\$0
Unified Credit Used by Gifts:	\$0

Federal Tax Calculations

Taxable Estate (2009):	\$3,500,000
Deduction for State Death Tax:	\$510,800
Tentative Tax Base:	\$2,989,200
Tentative Tax:	\$1,225,940
Gross Federal Estate Tax:	\$1,225,940
Unified Credit:	\$1,455,800
Net Federal Estate Tax:	\$0
Assumed State Death Tax:	\$510,800
Total Federal and State Tax Payable:	\$510,800

ASSET LIST

EXHIBIT D

Asset	Husband	Wife	Joint	Trust ¹	
Home					
Vacation Home					
Other Real Estate					
Tangibles					
Art/Collections					
Bank Accounts					
Investment Accounts					
Business Interests					
					Primary Beneficiary
					Contingent Beneficiary
Life Insurance					
Retirement Accounts					
Total	0	0	0	0	Grand Total
					0

ASSET LIST AFTER FIRST DEATH

Asset	Present				If Wife Survives				If Husband Survives			
	Husband	Wife	Joint	Trust1	Wife	Bypass	Trust1	Husband	Bypass	Trust1		
Home					0	0	0	0	0	0		
Vacation Home					0	0	0	0	0	0		
Other Real Estate					0	0	0	0	0	0		
Tangibles					0	0	0	0	0	0		
Art/Collections					0	0	0	0	0	0		
Bank Accounts					0	0	0	0	0	0		
Investment Accounts					0	0	0	0	0	0		
Business Interests					0	0	0	0	0	0		
Life Insurance					0			0				
Retirement Accounts					0			0				
Total	0	0	0	0	0	0	0	0	0	0		

AL AND BARB CLIENT

ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Barb Survives		If Al Survives	
	Al	Barb	Joint	Barb	Residuary/ Marital	Al	Residuary/ Marital
Home			450,000	450,000	0	450,000	0
Vacant Lot		100,000		100,000	0	0	100,000
Real Estate		150,000		150,000	0	0	150,000
Investment 1	504,726	3,418,000		3,418,000	504,726	504,726	3,418,000
Bank 1	326,000	225,000	50,000	275,000	326,000	376,000	225,000
Investment 2	57,000	49,000		49,000	57,000	57,000	49,000
Investment 3	674,000	369,000		369,000	674,000	674,000	369,000
Investment 4	40,000			0	40,000	40,000	0
Life Insurance	25,000			25,000		25,000	0
Life Insurance		95,000		95,000	0	95,000	
Total	1,626,726	4,406,000	500,000	4,931,000	1,601,726	2,221,726	4,311,000
			<u>6,532,726</u>		<u>6,532,726</u>		<u>6,532,726</u>

AL AND BARB CLIENT ASSET LIST AFTER FIRST DEATH (AFTER PLANNING)

Asset	Present			If Barb Survives		If Al Survives	
	Al	Barb	Joint	Barb	Residuary/ Marital	Al	Residuary/ Marital
Home	450,000			0	450,000	450,000	0
Vacant Lot	100,000			0	100,000	100,000	0
Real Estate		150,000		150,000	0	0	150,000
Investment 1	504,726	3,418,000		3,418,000	504,726	504,726	3,418,000
Bank 1	326,000	225,000	50,000	275,000	326,000	376,000	225,000
Investment 2	57,000	49,000		49,000	57,000	57,000	49,000
Investment 3	1,043,000			0	1,043,000	1,043,000	0
Investment 4	40,000			0	40,000	40,000	0
Life Insurance	25,000			0	25,000	25,000	0
Life Insurance		95,000		95,000	0	0	95,000
Total	2,545,726	3,937,000	50,000	3,987,000	2,545,726	2,595,726	3,937,000

6,532,726

6,532,726

6,532,726

CHUCK AND DIANE CLIENT

ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Diane Survives		If Chuck Survives	
	Chuck	Diane	Joint	Diane	Residuary/Marital	Chuck	Residuary/Marital
Home			1,100,000	1,100,000	0	1,100,000	0
Bank Accounts	398,521	22,924		22,924	398,521	398,521	22,924
Bank Accounts	222,987	59,111	188,211	247,322	222,987	411,198	59,111
Investment Accounts	3,121,548		275,174	275,174	3,121,548	3,396,722	0

Life Insurance							
Retirement Accounts	1,913,258			1,913,258		1,913,258	
Retirement Accounts		114,587		114,587		114,587	

Total	5,656,314	196,622	1,563,385	3,673,265	3,743,056	7,334,286	82,035
			<u>7,416,321</u>		<u>7,416,321</u>		<u>7,416,321</u>

CHUCK AND DIANE CLIENT ASSET LIST AFTER FIRST DEATH (AFTER PLANNING)

Asset	Present				If Diane Survives		If Chuck Survives	
	Chuck	Diane	Joint	Inter Vivos QTIP Trust	Diane	Residuary/ Marital/ Inter Vivos QTIP	Chuck	Residuary/ Marital/ Inter Vivos QTIP
Home		1,100,000			1,100,000	0	0	1,100,000
Bank Accounts	398,521	22,924			22,924	398,521	398,521	22,924
Bank Accounts	222,987	59,111	188,211		247,322	222,987	411,198	59,111
Investment Accounts	921,548		275,174	2,200,000	275,174	3,121,548	1,196,722	2,200,000

Asset	Chuck	Diane	Joint	Inter Vivos QTIP Trust	Diane	Residuary/ Marital/ Inter Vivos QTIP	Chuck	Residuary/ Marital/ Inter Vivos QTIP
Life Insurance								
Retirement Accounts	1,913,258					1,913,258	1,913,258	
Retirement Accounts		114,587			114,587			114,587

Total	3,456,314	1,296,622	463,385	2,200,000	1,760,007	5,656,314	3,919,699	3,496,622
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7,416,321

7,416,321

7,416,321

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Wife Survives		If Husband Survives	
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass
Home			1,000,000	1,000,000	0	1,000,000	0
Vacation Home			800,000	800,000	0	800,000	0
Bank Accounts			200,000	200,000	0	200,000	0
Investment Accounts			500,000	500,000	0	500,000	0
Life Insurance				0		0	
Retirement Accounts	2,500,000			2,500,000		2,500,000	
Total	2,500,000	0	2,500,000	5,000,000	0	5,000,000	0
				<u>5,000,000</u>		<u>5,000,000</u>	<u>5,000,000</u>

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (AFTER PLANNING)

Asset	Present			If Wife Survives		If Husband Survives	
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass
Home		1,000,000		1,000,000	0	0	1,000,000
Vacation Home		800,000		800,000	0	0	800,000
Bank Accounts			200,000	200,000	0	200,000	0
Investment Accounts			500,000	500,000	0	500,000	0
Life Insurance				0		0	0
Retirement Accounts	2,500,000			1,000,000	1,500,000	2,500,000	
Total	2,500,000	1,800,000	700,000	3,500,000	1,500,000	3,200,000	1,800,000

5,000,000

5,000,000

5,000,000

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (DISCLAIMER PLAN)

Asset	Present		If Wife Survives		If Husband Survives		
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass
Home			1,000,000	500,000	500,000	500,000	500,000
Vacation Home			800,000	400,000	400,000	400,000	400,000
Bank Accounts			200,000	100,000	100,000	100,000	100,000
Investment Accounts			500,000	250,000	250,000	250,000	250,000
Life Insurance				0	0	0	0
Retirement Accounts	2,500,000			2,250,000	250,000	2,500,000	
Total	2,500,000	0	2,500,000	3,500,000	1,500,000	3,750,000	1,250,000
				<u>5,000,000</u>		<u>5,000,000</u>	<u>5,000,000</u>



Planning for the Married Couple: Making Sure the Bypass Trust Is Funded at the First Death

John P. Edgar, Esq.
September 17, 2009

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Explanation of Bypass Trust Planning

- Purpose. Married couples with combined assets in excess of the federal estate tax exemption and applicable state estate tax exemptions must plan to avoid the payment of estate tax.

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Explanation of Bypass Trust Planning

- Terms and Assumptions.
 - “first spouse”
 - “surviving spouse”
 - “wealthier spouse”
 - “poorer spouse”
 - “federal estate tax exemption” - \$3.5 million
 - “Maryland estate tax exemption” - \$1 million

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Explanation of Bypass Trust Planning

- Bypass Trust Plan. The usual plan is to execute wills (or revocable trust agreements) that set up “bypass” trusts or “credit shelter” trusts.

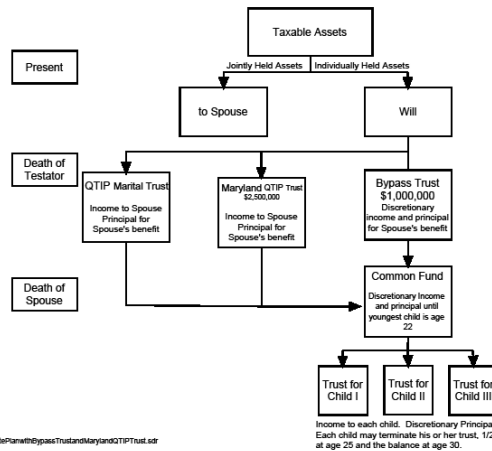
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Explanation of Bypass Trust Planning

- Decoupling. Requires married couples in Maryland to set up two bypass trusts.
 - “residuary trust”
 - “Maryland QTIP trust”

Exhibit A

Estate Plan with Bypass Trust and Maryland QTIP Trust



EstatePlanwithBypassTrustandMarylandQTIPTrust.doc

Exhibit B

Estate Tax Calculation

9/16/2009

Year of Death: 2009
 Adjusted Gross Estate: \$7,000,000
 Pre-1977 Taxable Gifts: \$0
 Adj. Taxable Gifts (After '78): \$0
 Unified Credit Used by Gifts: \$0
 State: MD
 Recipient Class: 0
 Retirement Plans Excluded:
 Insurance Excluded:

State Tax Calculations (MD)

Exclusion Amount for Pickup Tax: \$1,000,000
 Inheritance Recipient
 Class ID: 0
 Description: Spouse, Child, or Other Lineal
 Descendant, Spouse of a Child or Lineal
 Descendant, Parent, Grandparent, Stepchild,
 Stepparent, Siblings
 Taxable Estate for MD Inheritance Tax: \$7,000,000
 Inheritance Tax: \$0
 Estate Tax: \$638,000
 State Death Tax: \$638,000

Federal Tax Calculations

Taxable Estate (2009): \$7,000,000
 Deduction for State Death Tax (MD): \$638,000
 Tentative Tax Base: \$6,362,000
 Tentative Tax: \$2,743,700
 Gross Federal Estate Tax: \$2,743,700
 Unified Credit: \$1,455,800
 Net Federal Estate Tax: \$1,287,900
 Assumed State Death Tax: \$638,000
 Total Federal and State Tax Payable: \$1,925,900

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Exhibit C-1

Estate Tax Calculation

9/16/2009

Year of Death: 2009
 Adjusted Gross Estate: \$8,000,000
 Pre-1977 Taxable Gifts: \$0
 Adj. Taxable Gifts (After '78): \$0
 Unified Credit Used by Gifts: \$0
 State: MD
 Recipient Class: 0
 Retirement Plans Excluded:
 Insurance Excluded:

State Tax Calculations (MD)

Exclusion Amount for Pickup Tax: \$1,000,000
 Inheritance Recipient
 Class ID: 0
 Description: Spouse, Child, or Other Lineal
 Descendant, Spouse of a Child or Lineal
 Descendant, Parent, Grandparent, Stepchild,
 Stepparent, Siblings
 Taxable Estate for MD Inheritance Tax: \$8,000,000
 Inheritance Tax: \$0
 Estate Tax: \$510,800
 State Death Tax: \$510,800

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Exhibit C-2

Estate Tax Calculation

9/16/2009

Year of Death:	2009
Adjusted Gross Estate:	\$3,500,000
Pre-1977 Taxable Gifts:	\$0
Adj. Taxable Gifts (After '78):	\$0
Unified Credit Used by Gifts:	\$0

Federal Tax Calculations

Taxable Estate (2009):	\$3,500,000
Deduction for State Death Tax:	\$510,800
Tentative Tax Base:	\$2,989,200
Tentative Tax:	\$1,225,940
Gross Federal Estate Tax:	\$1,225,940
Unified Credit:	\$1,455,800
Net Federal Estate Tax:	\$0
Assumed State Death Tax:	\$510,800
Total Federal and State Tax Payable:	\$510,800

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Explanation of Bypass Trust Planning

- Al and Barb Client
 - All assets to each other.
 - \$1,287,900 in federal estate tax.
 - \$638,000 in Maryland estate tax.
 - Kids get \$5,074,100.

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Explanation of Bypass Trust Planning

- Chuck and Diane Client
 - Assets to trusts.
 - No federal estate tax.
 - \$510,800 in Maryland estate tax.
 - Kids get \$6,489,200.

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Explanation of Bypass Trust Planning

- Chuck and Diane (or their kids) save \$1,415,100 in estate tax.

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Importance of Asset Titling

- Definition.
 - Current ownership.
 - Beneficiary designations.
- How Property Passes at Death.
 - “Contract”
 - “Deed”
 - “Will”

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Importance of Asset Titling

- Separate property is the only property to fund the bypass trust. If either spouse has less than \$3.5 million of separate property, the bypass trust could be under-funded.

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Goals Depend on the Size of Combined Estates

- More than \$7 million
- \$3.5 million to \$7 million
- \$2 million to \$3.5 million
- \$1 million to \$2 million
- Less than \$1 million

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Planning Steps

- Meet with couple.
- Get information.
- Determine the goal.
- Run two scenarios.
- Determine shortfall.

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Exhibit D

ASSET LIST

Asset	Husband	Wife	Joint	Trust1		
Home						
Vacation Home						
Other Real Estate						
Tangibles						
Art/Collections						
Bank Accounts						
Investment Accounts						
Business Interests						
Life Insurance					Primary Beneficiary	Contingent Beneficiary
Retirement Accounts						
Total	0	0	0	0	Grand Total	0

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Exhibit E

ASSET LIST AFTER FIRST DEATH

Asset	Present				If Wife Survives			If Husband Survives		
	Husband	Wife	Joint	Trust1	Wife	Bypass	Trust1	Husband	Bypass	Trust1
Home					0	0	0	0	0	0
Vacation Home					0	0	0	0	0	0
Other Real Estate					0	0	0	0	0	0
Tangibles					0	0	0	0	0	0
Art/Collections					0	0	0	0	0	0
Bank Accounts					0	0	0	0	0	0
Investment Accounts					0	0	0	0	0	0
Business Interests					0	0	0	0	0	0
Life Insurance					0			0		
Retirement Accounts					0			0		
Total	0	0	0	0	0	0	0	0	0	0

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Planning Steps (cont.)

- Develop plan.
- Continue to monitor plan.
- Make sure planning steps are actually carried out.

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Options

- Divide joint property.
- Designate bypass trust as beneficiary.
- Disclaimers.
- Inter vivos QTIP trusts.
- Taxable gifts and bequests.
- General power of appointment revocable trust.
- Wait for portability?

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Divide Joint Property

- Separate property is the simplest way to fund the bypass trust.
- Many married couples own property as “tenants by the entirety.”
- Property held as tenants by the entirety can be divided into separate property to fund the bypass trust.

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Four Types of Property

- Separate property.
- Tenants in common.
- Tenants by the entirety.
- Community property.

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Separate Property

- Control.
- Divorce.
- Creditors.
- Taxable estate.
- Basis adjustment.

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Tenants in Common

- Joint without right of survivorship.
- Treated as separate property.
- Available to fund bypass trust.

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Tenants by the Entirety

- Joint ownership with right of survivorship.
- Not available to fund bypass trust.
- Equal access.
- Must act jointly.
- Divorce.
- Creditors.
- One-half includible in taxable estate.
- One-half basis adjustment.

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Other Issues

- Community Property.
- Using the Residence to Fund the Bypass Trust.
- Using an FLP/FLLC to Divide Joint Property.

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Designate Bypass Trust as Beneficiary

- Retirement Accounts.
- Life Insurance.
- Annuities.
- Transfer-on-death Accounts.

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Designate Bypass Trust as Beneficiary

- Retirement Accounts.
 - Large portion of wealth.
 - Designate trust as beneficiary.
 - Several Disadvantages.
 - Subject to income tax.
 - Naming a trust as beneficiary.
 - By comparison to surviving spouse.

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Designate Bypass Trust as Beneficiary

- Taxable when distributed.
 - “Wasting” assets.
 - Not worth as much as they appear.

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Designate Bypass Trust as Beneficiary

- Trust as beneficiary.
 - Trust income tax brackets more compressed.
 - Bypass trust as “designated beneficiary”
 - Required minimum distributions (“RMD’s”).
 - Required beginning date (“RBD”).
 - “See-through” trust.
 - “Conduit trust”.
 - “Accumulation trust”.
 - “QTIP Trust”.

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Designate Bypass Trust as Beneficiary

- Outright to surviving spouse.
 - “Roll over”.
 - Defer taking RMD’s.
 - Uniform Lifetime Table.
 - Next beneficiary’s RMD’s.

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Designate Bypass Trust as Beneficiary

- Back-up Plan with Disclaimer.
 - Spouse as primary beneficiary.
 - Bypass trust as contingent beneficiary.
 - Shifts decision to surviving spouse.
- Skip bypass trust and “stretch” the payout.

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Designate Bypass Trust as Beneficiary

- Life Insurance.
- Other Beneficiary Designation Assets.
 - Annuities.
 - Transfer-on-Death Accounts.

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Designate Bypass Trust as Beneficiary

- Form of Beneficiary Designation.
 - “Trustees under my Last Will and Testament.”
 - As important as Wills.
 - Must be reviewed periodically.

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Disclaimers

- Legally effective renunciation.
- Two situations.
 - Property held as tenants by the entirety.
 - Property passing by beneficiary designation.
- Effect.
- Nine month deadline.
- No Power of Appointment.

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Disclaimers

- Property Held as Tenants by the Entirety.
 - How much?
 - Maryland Uniform Disclaimer of Property Interests Act.
 - Internal Revenue Code §2518.

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Disclaimers (cont.)

- § 2518 Regulations.
 - General Rule – surviving spouse may disclaim one-half interest.
 - Special Rule – joint bank, brokerage, or other investment account.

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Disclaimers (cont.)

- Special Rule.
 - If a transferor may unilaterally regain the transferor's own contributions to the account.
 - "Attributable to consideration furnished by the surviving spouse."
 - Limits use of disclaimers.
 - May not be applicable in Maryland.
 - Avoid the special rule.
 - TIC account.

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Disclaimers (cont.)

- Cost Basis.
 - Disclaimer will increase basis.
 - Disclaimed portion: full basis adjustment.
 - Balance: one-half basis adjustment.
 - Total basis step-up: three-quarters.

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Disclaimers (cont.)

- Property Passing by Beneficiary Designation.
 - Retirement accounts.
 - Life insurance.
 - Annuities.
 - TOD accounts.
 - Next beneficiary may be bypass trust.

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Disclaimers (cont.)

- Make Sure Surviving Spouse Will Be Willing and Able to Disclaim.
 - Frame of mind.
 - Disability.
 - May die.
 - Maryland law.
 - Real property in another state.

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Inter Vivos QTIP Trust

- Established during lifetime.
- “Qualified terminable interest property.”
- All income.
- No principal to anyone other than the spouse.
- Cannot terminate.
- Included in poorer spouse’s estate at her death.

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Inter Vivos QTIP Trust (cont.)

- If the wealthier spouse is still living:
 - May continue for his benefit.
 - Can pass to a marital trust or directly back to the wealthier spouse.
 - Subject to claims of wealthier spouse's creditors.

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Inter Vivos QTIP Trust (cont.)

- Wholly grantor trust.
 - During the poorer spouse's lifetime.
 - After poorer spouse's death.
 - Two income tax benefits.
 - Wealthier spouse pays income tax.
 - Wealthier spouse exchanges high-basis assets shortly before death.
 - “Supercharged Credit Shelter Trust”

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Inter Vivos QTIP Trust (cont.)

- Retain limited testamentary power of appointment?
 - Risky.
- Serve as trustee?
 - Should be safe.

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Taxable Gifts and Bequests

- Bequests use first spouse's estate tax exemption.
- Gifts are added back into the taxable estate at death.
- Bypass trust becomes smaller.
- Gift techniques.
 - Poorer spouse makes the gifts.
 - Both spouses split the gifts.

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Taxable Gifts and Bequests (cont.)

- Additional advantage in Maryland
 - Not added back in to estate.
 - Entire Maryland estate tax exemption available.
 - Reduces the amount subject to Maryland estate tax.

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Taxable Gifts and Bequests (cont.)

- Not just an asset titling issue.
 - Pre-mortem planning.
 - Any other time.
 - Whether one or both spouses is living.
 - High-basis property.

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General Power of Appointment Revocable Trust

- “GPRT” – wealthier spouse transfers assets to a revocable trust, poorer spouse has testamentary general power of appointment.
 - If the wealthier spouse dies first.
 - If the poorer spouse dies first.
 - Joint revocable trust.
- Substantial retirement assets.

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General Power of Appointment Revocable Trust (cont.)

- Several unresolved tax issues.
 - Gift tax marital deduction?
 - Not included under §2036?
- IRS has ruled favorably.
- No published ruling.

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Other GPRT Issues

- Subject to claims of poorer spouse's creditors.
- Poorer spouse may exercise the general power of appointment.
- Assets will not receive basis step-up.

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Wait for Portability?

- Proposed statutory provisions allow first spouse's unused estate tax exemption to be transferred to surviving spouse.
- No bypass trust would be necessary.
- Included in at least five recent estate tax reform bills.

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Wait for Portability? (cont.)

- 100% step-up in basis.
- Cost and complexity significantly reduced.
- Not eliminate bypass trusts completely.
 - Growth and appreciation.
 - Maryland estate tax.

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Exhibit F-1

AL AND BARB CLIENT ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Barb Survives			If Al Survives		
	Al	Barb	Joint	Barb	Residuary/ Marital	Al	Residuary/ Marital		
Home			450,000	450,000	0	450,000	0		
Vacant Lot		100,000		100,000	0	0	100,000		
Real Estate		150,000		150,000	0	0	150,000		
Investment 1	504,726	3,418,000		3,418,000	504,726	504,726	3,418,000		
Bank 1	326,000	225,000	50,000	275,000	326,000	376,000	225,000		
Investment 2	57,000	49,000		49,000	57,000	57,000	49,000		
Investment 3	674,000	369,000		369,000	674,000	674,000	369,000		
Investment 4	40,000			0	40,000	40,000	0		
Life Insurance	25,000			25,000		25,000	0		
Life Insurance		95,000		95,000	0	95,000			
Total	1,826,726	4,406,000	500,000	4,831,000	1,601,726	2,221,726	4,311,000		
			<u>6,532,726</u>		<u>6,532,726</u>		<u>6,532,726</u>		

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Exhibit G-1

CHUCK AND DIANE CLIENT ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Diane Survives		If Chuck Survives	
	Chuck	Diane	Joint	Diane	Residuary/Marital	Chuck	Residuary/Marital
Home			1,100,000	1,100,000	0	1,100,000	0
Bank Accounts	398,521	22,924		22,924	398,521	398,521	22,924
Bank Accounts	222,987	59,111	188,211	247,322	222,987	411,198	59,111
Investment Accounts	3,121,548		275,174	275,174	3,121,548	3,396,722	0
Life Insurance							
Retirement Accounts	1,913,258			1,913,258		1,913,258	
Retirement Accounts		114,587		114,587		114,587	
Total	5,656,314	196,622	1,563,385	3,673,265	3,743,056	7,334,286	82,035
			<u>7,416,321</u>		<u>7,416,321</u>	<u>7,416,321</u>	

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Exhibit G-2

CHUCK AND DIANE CLIENT ASSET LIST AFTER FIRST DEATH (AFTER PLANNING)

Asset	Present				If Diane Survives		If Chuck Survives	
	Chuck	Diane	Joint	Inter Vivos QTIP Trust	Diane	Residuary/ Marital/ Inter Vivos QTIP	Chuck	Residuary/ Marital/ Inter Vivos QTIP
Home		1,100,000			1,100,000	0	0	1,100,000
Bank Accounts	398,521	22,924			22,924	398,521	398,521	22,924
Bank Accounts	222,987	59,111	188,211		247,322	222,987	411,198	59,111
Investment Accounts	921,548		275,174	2,200,000	275,174	3,121,548	1,196,722	2,200,000
Life Insurance								
Retirement Accounts	1,913,258					1,913,258	1,913,258	
Retirement Accounts		114,587			114,587			114,587
Total	3,456,314	1,296,622	463,385	2,200,000	1,780,007	5,656,314	3,919,699	3,496,622
				<u>7,416,321</u>		<u>7,416,321</u>	<u>7,416,321</u>	

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Exhibit H-1

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (BEFORE PLANNING)

Asset	Present			If Wife Survives			If Husband Survives	
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass	
Home			1,000,000	1,000,000	0	1,000,000	0	
Vacation Home			800,000	800,000	0	800,000	0	
Bank Accounts			200,000	200,000	0	200,000	0	
Investment Accounts			500,000	500,000	0	500,000	0	
Life Insurance				0		0		
Retirement Accounts	2,500,000			2,500,000		2,500,000		
Total	2,500,000	0	2,500,000	5,000,000	0	5,000,000	0	
			<u>5,000,000</u>		<u>5,000,000</u>		<u>5,000,000</u>	

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Exhibit H-2

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (AFTER PLANNING)

Asset	Present			If Wife Survives			If Husband Survives	
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass	
Home		1,000,000		1,000,000	0	0	1,000,000	
Vacation Home		800,000		800,000	0	0	800,000	
Bank Accounts			200,000	200,000	0	200,000	0	
Investment Accounts			500,000	500,000	0	500,000	0	
Life Insurance				0		0		
Retirement Accounts	2,500,000			1,000,000	1,500,000	2,500,000		
Total	2,500,000	1,800,000	700,000	3,500,000	1,500,000	3,200,000	1,800,000	
			<u>5,000,000</u>		<u>5,000,000</u>		<u>5,000,000</u>	

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Exhibit H-3

ED AND FERN CLIENT ASSET LIST AFTER FIRST DEATH (DISCLAIMER PLAN)

Asset	Present			If Wife Survives			If Husband Survives	
	Husband	Wife	Joint	Wife	Bypass	Husband	Bypass	
Home			1,000,000	500,000	500,000	500,000	500,000	
Vacation Home			800,000	400,000	400,000	400,000	400,000	
Bank Accounts			200,000	100,000	100,000	100,000	100,000	
Investment Accounts			500,000	250,000	250,000	250,000	250,000	
Life Insurance				0		0		
Retirement Accounts	2,500,000			2,250,000	250,000	2,500,000		
Total	2,500,000	0	2,500,000	3,500,000	1,500,000	3,750,000	1,250,000	
			<u>5,000,000</u>		<u>5,000,000</u>		<u>5,000,000</u>	

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Conclusion / Q&A

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2010 Sunset Provisions

9:00am-10:15am

Speaker: Jeffrey S. Glaser, Esq., Saul
Ewing, LLP

Will The Estate Tax Sunset As Planned?

Remembering Yesterday, Forecasting Tomorrow

September 17, 2009

Maryland Association of CPA's

Presented by:

Jeffrey S. Glaser, Esquire

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I. REMEMBERING YESTERDAY: TRANSFER TAXES IN 2001.

The federal Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) was signed into law on June 7, 2001. EGTRRA made numerous and substantial changes to federal transfer taxes. Prior to the enactment of EGTRRA, highlights of the federal transfer tax scheme could be summarized as follows:

A. Estate Taxes

1. Tax Rates. For estates over \$3,000,000, the marginal tax rate reached 55%. In addition, a 5% surtax was imposed on estates between \$10,000,000 and \$17,184,000. The effect of the surtax was to phase out the benefit of graduated rates. Estates over \$17,184,000 were, effectively, taxed at a flat rate of 55%.
2. Applicable Exclusion Amount. For death in 2001, \$675,000 was excluded from the estate tax. This exclusion amount was slated to gradually increase to \$1,000,000 per person by 2006, and remain at this level thereafter. Between spouses, in 2001 it was possible to shelter \$1,350,000 of assets from the estate tax. By 2006, the total sheltered amount increased to \$2,000,000 per couple.
3. State Death Taxes. To the extent a state imposed a death tax, the federal estate tax was reduced dollar for dollar, up to a formula cap. This credit had been in effect since 1924.
4. Family Owned Business Deduction. In determining the value of a decedent’s estate, a deduction of up to \$675,000 against the gross estate could be taken for the value of a qualified family owned business.
5. Basis of Assets. Other than assets that are deemed to constitute income in respect of a decedent, assets that are subject to an estate tax received an adjustment to the basis equal to the date of death (or alternate valuation date) value of that asset.

B. Gift Taxes

1. Applicable Exclusion Amount and Tax Rates. In 2001, the gift tax and estate tax were unified. The lifetime exclusion from the gift tax was \$675,000 and was slated to gradually increase to \$1,000,000 per person by 2006, and remain at this level thereafter. These exemptions were identical to the estate tax exemptions. Similarly, the gift tax rates were in lockstep with the estate tax rates.

C. Generation-Skipping Transfer Taxes

1. Exemption Amount. Prior to EGTRRA, the Generation-Skipping Transfer Tax (“GSTT”) was not unified with the federal estate and gift tax.

Beginning in 1999, the GSTT exemption was \$1,000,000 with an inflation indexed adjustment. By 2001, the GSTT exemption was \$1,060,000. This exemption was not slated to increase as were the estate and gift tax exemptions, except to the extent of inflation.

2. Tax Rates. The GSTT rate is equal to the highest marginal estate tax rate, multiplied by the “inclusion ratio”. The inclusion ratio is a number between 0 and 1 and generally represents the fraction of the property to which GSTT exemption has been allocated. An inclusion ratio of 0 indicates that sufficient GSTT exemption has been allocated to the property so that all of the property is exempt from GSTT. An inclusion ratio of 1 indicates that no GSTT exemption has been allocated to the property. In 2001, the GSTT rate was 55% multiplied by the inclusion ratio. The 5% estate tax surtax on estates between \$10,000,000 and \$17,184,000 was not applicable to generation skipping transfers
3. Automatic GSTT Exemption Allocation. Prior to EGTRRA, when an individual made a gift to a trust, that individual was generally required to file a gift tax return in order to allocate his or her GSTT exemption. This was true even if the entire gift qualified for the annual gift tax exclusion. This would typically be accomplished by giving the trust beneficiary a right to withdraw the gift. Except in very limited circumstances, there was no automatic allocation of GSTT exemption for gifts to a trust
4. Retroactive Allocation of GSTT Exemption. Prior to EGTRRA, if an individual made a gift to a trust and did not allocate GSTT exemption and there was a death of a beneficiary that resulted in a “taxable termination”, a GSTT would be triggered, even if the individual who made the original gift had unused GSTT exemption. In other words, retroactive allocation of GSTT was not permissible. For example, it was common for an individual not to allocate GSTT exemption for a gift to a trust in which the trust beneficiary was a “non-skip” person and it was expected that the trust would distribute all its assets to that non-skip person before his or her death. The GSTT would be triggered if there was an out of order death and the non-skip person died before expected, or died before the individual who made the original gift
5. Severance of Trust. Prior to EGTRRA, once a trust with a positive inclusion ratio was established, it was not possible to sever that trust into two separate trusts, in order to create a trust with an inclusion ratio of 0 and another with an inclusion ratio of 1.
6. Relief for Late Election to Allocate GSTT Exemption. GSTT Exemption is allocated on a timely filed gift tax return. Prior to EGTRRA, late allocation of GSTT exemption was not subject to any statutory or regulatory framework that specifically recognized late allocation. Late

allocation was made under the rules set forth in Treasury Regulations §301.9100.

II. TRANSFER TAXES TODAY.

EGTRRA substantially altered the federal transfer tax scheme. Highlights of the transfer tax scheme for 2009 are summarized as follows:

A. Estate Taxes

1. Tax Rates. The highest marginal estate tax rate is now 45%. Because of the increase in the applicable exclusion amount, the federal estate tax is now effectively a flat tax of 45% of the estate over the applicable exclusion amount.
2. Applicable Exclusion Amount. The applicable exclusion amount is now \$3,500,000 per person. Between spouses, it is possible to shelter \$7,000,000 of assets from the estate tax.
3. State Death Taxes. The state death tax credit has been repealed and replaced by a deduction. Instead of the state death taxes reducing the federal estate tax dollar for dollar, state death taxes are now deducted against gross estate before the federal estate tax is calculated. The effect of this change has been monumental for a variety of reasons, including the effective repeal of many states' death taxes and the implementation by many states of their own separate estate tax. In Maryland, the repeal of the state death tax credit resulted in the enactment of a separate Maryland estate tax with an exclusion amount of \$1,000,000 per person. The Maryland estate tax and the federal estate tax are now "decoupled". Other local jurisdictions with a separate estate tax are Washington, D.C. and Delaware. Neither Virginia nor Pennsylvania have a separate estate tax.
4. Family Owned Business. The family owned business deduction has been repealed.
5. Basis of Assets. The law regarding adjustment to assets in an estate remains the same in 2009 as pre-EGTRRA.

B. Gift Taxes

1. Applicable Exclusion Amount and Tax Rates. In 2009, the gift tax and estate taxes have been decoupled. The lifetime exclusion from the gift tax is now \$1,000,000 per person, substantially lower than the estate tax exclusion amount. The gift tax rates remain identical to the estate tax rates: gifts over the lifetime exclusion are taxed at a flat rate of 45%.

C. **Generation-Skipping Transfer Taxes**

1. Exemption Amount. The GSTT and estate tax are now unified. In 2009, the GSTT exemption is \$3,500,000 per person. There is no inflation indexed adjustment.
2. Tax Rates. In 2009, the GSTT rate remains equal to the highest marginal estate tax rate (45%), multiplied by the “inclusion ratio”.
3. Automatic GSTT Exemption Allocation. As a result of EGTRRA, gifts to a trust that are deemed to be a “GST Trust” result in the automatic allocation of the donor’s GSTT exemption. There is no need to file a gift tax return in order to allocate GSTT exemption (although good record keeping is extremely important). The definition of a GST Trust is complex. Generally, a trust is not a GST Trust if a non-skip trust beneficiary is entitled to at least 25% of the corpus before age 46 or the trust assets are included in the non-skip beneficiary’s estate at death.
4. Retroactive Allocation of GSTT Exemption. If a GSTT is triggered because of a “taxable termination” arising from an out of order death and the donor is still living and has unused GSTT exemption, it is now possible to allocate that exemption retroactive so as to avoid the GSTT. The trust beneficiary who dies out of order must meet certain requirements for retroactive allocation to apply.
5. Severance of Trust. It is now possible to sever a trust with a positive inclusion ratio into two separate and identical trusts, in order to create one trust with an inclusion ratio of 0 and another trust with an inclusion ratio of 1.
6. Relief for Late Election to Allocate GSTT Exemption. Late allocation of GSTT exemption is now recognized by statute. The Department of the Treasury is tasked with enacting regulations within this framework. To date, the regulations (published in April 2008) are simply proposed and have not been finalized.

III. **FORECASTING TOMORROW’S TRANSFER TAXES**

A. **EGTRRA in 2010**

1. Federal Estate Tax. The federal estate tax is scheduled to be repealed one year, for deaths in 2010. EGTRRA, by its own terms, sunsets after December 31, 2010. Consequently, the federal estate tax will be resurrected in 2011 if Congress does not act.
2. Maryland Estate Tax. Under Maryland law, if repeal of the federal estate tax becomes a reality in 2010, Maryland’s estate tax will continue as

though the federal tax had not been repealed. Maryland's estate tax will NOT be repealed.

3. Basis Rules. If the federal estate tax is repealed, assets that would otherwise be included in a decedent's estate will no longer receive an adjustment to basis equal to the date of death (or alternate valuation date) value. Instead, EGTRRA provides for a modified carryover basis regime. Generally, this can be summarized as follows:
 - a. These rules apply to property acquired from a decedent. Essentially, this is the property that would be included in the decedent's federal gross estate if the estate tax were in force
 - b. The property's basis is carried over from the decedent
 - c. The decedent's Personal Representative is given the authority to allocate up to \$1,300,000 of basis over and above the carry over basis, but not in excess of the value of the property on the date of death
 - d. The \$1,300,000 is increased by the decedent's unused capital losses and NOLs
 - e. In addition, the Personal Representative can allocate up to an additional \$3,000,000 for property passing outright to a surviving spouse or to a QTIP qualifying trust
 - f. The basis allocation is subject to an inflation adjustment
 - g. Certain property is not eligible for the adjustment, including property acquired from the decedent within 3 years of death and property that is IRD
 - h. Under the Tax Reform Act of 1976, Congress adopted a carryover basis scheme which, 4 years later, was repealed retroactive to the date of enactment because it proved to be difficult, if not impossible, to ascertain the decedent's basis
4. GST Tax. As with the estate tax, the GSTT is scheduled to be repealed for one year, 2010, and then return in 2011 if Congress does not act. Thus, there will be no GSTT imposed if there is a direct skip, a taxable distribution or taxable termination in 2010 unless Congress acts.
5. Gift Tax. The gift tax is NOT scheduled to be repealed in 2010. Taxable gifts must still be reported, and the \$1,000,000 lifetime exemption remains in effect. If a taxable gift is made in 2010 that results in all of the donor's lifetime exemption being used, then the taxable gift in excess of \$1,000,000 will be taxed at the top individual rate in effect.

B. What Happens in 2011 if Congress Does Nothing?

1. All of the provisions under EGTRRA that relate to transfer taxes are scheduled to sunset after December 31, 2010. In other words, if Congress does not act, effective January 1, 2011, the federal estate tax, generation-skipping transfer tax, and gift tax scheme that was in effect *before* EGTRRA will be resurrected. There may be some inflation adjustments, such as the GSTT exemption, but otherwise the provisions in effect prior to EGTRRA will be identical.

C. What Is Up Congress' Sleeve?

1. My crystal ball is no better than the old Magic Eight Ball toy which randomly gave positive, negative and non-committal answers. But there are some clues as to what is likely to occur. In any case, the events of the past 12 months reflect
 - a. government revenues are significantly below what was projected when EGTRRA was enacted
 - b. government expenditures have ballooned
 - c. the national debt has skyrocketed
2. A political band-aid. Congress may enact a one year extension of 2009 estate tax exemption and estate tax rates rather than hammer out an agreement for a more permanent solution. The one year solution could simply expire on December 31, 2010, as does EGTRRA. Congress could not act. The pre-EGTRRA provisions are resurrected without repeal
3. Many bills have been introduced that attempt a permanent solution. Here are some that are possible contenders to make it out of committee: S. 722, H. R. 436, H. R. 498, and H. R. 2032
 - a. Senate Bill 722 would:
 - (i) Make the \$3,500,000 exclusion permanent and the 45% tax rate permanent. The exemption would be indexed for inflation
 - (ii) reunify the estate and gift tax applicable exemption amount, meaning the lifetime gift tax exemption would be \$3,500,000 and indexed for inflation
 - (iii) allow the surviving spouse to inherit the unused gift tax exemption and estate tax exemption of the first spouse to die (known as "portability")

- (iv) increase the special use valuation reduction to \$3,500,000

This bill is sponsored by Max Baucus (D, MT) with John Rockefeller (D, WV) and Charles Schumer (D, NY) as cosponsors. The bill also addresses AMT and income tax rates.

b. House Bill 436 would:

- (i) Make the \$3,500,000 estate tax exemption and GSTT exemption permanent and the 45% tax rate permanent.
- (ii) reunify the estate and gift tax applicable exemption amount
- (iii) limit the valuation discount for certain family limited partnerships and the like
- (iv) provide strict valuation rules for transfer of non-business assets

This bill is sponsored by Earl Pomeroy (D, ND). No cosponsors. This is the 3rd time Mr. Pomeroy has introduced this bill. This bill has never before made it out of committee, but the chatter surrounding the valuation issues makes it a bill of interest. It is unlikely to make it out of committee.

c. House Bill 498 would:

- (i) Reunify the lifetime gift tax exemption to equal the estate tax exemption
- (ii) Increase the estate tax exemption between 2010 to 2015, from \$3,500,000 to \$5,000,000, by \$250,000 annually. The \$5 million exemption would become permanent, but subject to an inflation adjustment after 2015
- (iii) The estate and gift tax rates would be based upon the capital gains tax rate
- (iv) restore the state death tax credit
- (v) Provide for estate tax exemption portability to the surviving spouse

This bill is sponsored by Harry Mitchell (D, AZ) along with 7 other cosponsors

- d. House Bill 2023 would:
- (i) make permanent the exemption level at \$2 million, indexed for inflation
 - (ii) establish progressive tax rates: 45% for estates between \$2 million and \$5 million; 50% for estates between \$5 million and \$10 million; and 55% for estates over \$10 million
 - (iii) reunify the estate and gift tax
 - (iv) create exemption portability
 - (v) restore the state death tax credit

This bill is sponsored by James McDermott (D, WA). There are no cosponsors

4. Other significant developments and points to note:
- a. The Obama Administration, in the 2009 Green Book, stated that an objective was to require that any Grantor Retained Annuity Trust have a minimum term of 10 years. Currently, it is common to create a GRAT with a 2 year term. The Obama Administration stated that GRATs “have proven to be a popular and efficient technique for transferring wealth while minimizing the gift tax cost of transfers. . . .Taxpayers have become more adept at maximizing the benefit of this technique”
 - b. Also in the 2009 Green Book, the Administration supported extension of the 2009 estate tax exemption into 2010 at the same 45% tax rate. The Joint Committee on Taxation estimated that this proposal, if made permanent and with an additional inflation index, would result in a revenue loss of \$256 Billion between fiscal years 2010 and 2019, as compared to the current law (one year repeal in 2010 and reinstatement of the \$1,000,000 exemption with rates up to 55%).
 - c. Be cautioned: Just because Congress doesn’t act before December 31, 2009 does NOT mean that repeal is a certainty. The Supreme Court has ruled that a retroactive change to the estate tax is permissible and is not unconstitutional. In the case, *Carlton v. U.S.*, 114 S. Ct. 2188 (1994), the Court held that a statute that allowed an estate tax deduction could be retroactively changed to disallow the deduction. As such, it is possible for Congress to act sometime in 2010 and enact some form of estate tax, and provide that the tax is retroactive for decedents dying after December 31, 2009.

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Baltimore Estate Planning Council



The Council is seeking new, qualified members. If your practice includes **Estate Planning** you will benefit from our networking and educational programs. Members include **CPAs, trust officers, attorneys, non-profit professionals**, and an expanded section of **Qualified Financial Advisors** including CFPs, CLUs, ChFCs and others. Definitions of QFAs are listed the BEPC website (www.BaltimoreEPC.org).

The upcoming 2009-2010 BEPC year includes the following programs:

<i>Date</i>	<i>Speaker</i>	<i>Presentation</i>	<i>Location</i>
Tuesday September 22, 2009	Susan Porter	Exercising Discretion and Managing Intergenerational Conflicts	Crowne Plaza Timonium
Tuesday October 27, 2009	Robert Keebler	Planning Opportunities in the Retirement Marketplace	Hilton Pikesville
Tuesday December 3, 2009	Lawrence Brody	Top 10 Insurance Mistakes	Hilton Pikesville
Thursday January 7, 2010	Jeffrey Pennell	Annual Estate Planning Update	Crowne Plaza Timonium
Thursday February 25, 2010	Anirban Basu	Annual Economic Update	Crowne Plaza Timonium
Tuesday May 6, 2010	Larry Katzenstein	Annual Charitable Update	Crowne Plaza Timonium

Programs generally are accredited for continuing education for CPA's, CFP's, CLUs and ChFCs. Details on these programs as well as on-line registration is posted on the BEPC website. Another membership benefit includes access to the premier estate planning website—the Leimberg Information Services (LISI).

For details on membership review the information at our website: www.BaltimoreEPC.org or contact BEPC Headquarters at 410-465-7011 or by e-mail at becp@rxassociationmgt.com.



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Special Needs Planning

10:30am-11:45am

Speaker: Gina Shaffer, Esq., Shaffer
Law Office, LLC

SUPPLEMENTAL NEEDS TRUST

- I. What is it?
 - A. Trust used to supplement benefits of a beneficiary
 - B. Protected from being counted as an available resource for public benefit eligibility purposes
- II. Who may create one?
 - A. Disabled individual - self-settled
 - B. Third party
- III. How is it created?
 - A. *Inter Vivos* Trust Agreement per 42 U.S. C. 1396p (d)(4)(A)
 - B. Testamentary Trust - no specific statutory authority
- IV. When is it created/effective?
 - A. At signing of Trust Agreement or upon funding?
 - B. Effective date is directly related to who created it and how
- V. Pooled trusts



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FALL WEBCAST SCHEDULE

- | | | | |
|--------|---|--------|--|
| Sep 25 | Blue Ocean Innovation: Market-Taker to Market-Maker
Event code: 17W090 | Oct 22 | Best Practices in Accounting and Finance Writing: Being Clear and Accurate
Event code: 17W097 |
| Oct 6 | Form 990 Preparation - Compensation to Managers
Event code: 17W095 | Oct 23 | Ethics, Leadership and the Role of the CPA
Event code: 17W094 |
| Oct 8 | Form 990 Preparation—Reporting on the Board and on Governance Overall (A.M. Session)
Event code: 17W102 | Oct 29 | FASB Codification: What It Means to You Is ...
Event code: 17W092 |
| Oct 8 | Form 990 Preparation—Application of the Newly-revised “Public Support Tests” (A.M. Session)
Event code: 17W103 | Nov 6 | Leadership and Generations: What Are They Thinking?
Event code: 17W098 |
| Oct 20 | Best Practices in Accounting and Finance Writing: Putting Ideas In Order
Event code: 17W096 | Nov 11 | IFRS for Small- and Medium-Sized Entities
Event code: 17W093 |

To register or see the full schedule, visit www.macpa.org/webcast

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CPA Day in Annapolis
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Two of the Hottest Topics for Real Estate Owners

12:45pm-2:00pm

Speaker: Roger D. Upton, MS
Consultants, LLC



Two of the Hottest Topics for Real Estate Owners

12:45pm-2:00pm

Speaker: Roger D. Upton, MS
Consultants, LLC

The Q's – Qualified Leasehold Improvements, Restaurant Property and Retail Property

Speaker – Roger Upton, CPA
Director, MS Consultants, LLC

“Some observers have argued that special rules should apply to real property improvements. Among those proposals are establishing separate asset classes for building improvements . . . and modifying recovery periods to account for improvements. . . . Objections may be made to each of these proposals. . . . Such a scheme creates new administrative complexities. If improvements were given a shorter tax life, taxpayers would be tempted to shift greater amounts of investment from the original investment to the subsequent “improvements,” and the IRS would need to seek constraints on the taxpayer’s ability to accelerate deductions in this manner.” – MISC-DOC, 200ARD 147-1, Treasury Department: Report to Congress: Depreciation Recovery Periods and Methods

“The avoidance of taxes is the only intellectual pursuit that carries any reward.” -
John Maynard Keynes, British Economist

The Opportunity to Revisit Repair vs. Capitalization before the Rules Change

Speaker – Roger Upton, CPA
Director, MS Consultants, LLC

“Some items are clearly capital and other items are clearly expense, but between the two extremes a point is approached at which it is difficult to determine whether the expenditure is capital or expense” - *Libby & Blouin, LTD.*, 4 BTA 910 (1926)

“Confusion is good for business” – Roger Upton (2003)

CURRENT INCOME TAX REGULATIONS

You are required to capitalize expenditures that:

- 1) Materially increase the value of the property
- 2) Substantially prolong the useful life of the property, or
- 3) Adapt the property to a new or different use

Excerpted from Reg. 1.263(a)-1(b)

“The cost of **incidental repairs** which neither materially add to the value of the property nor appreciably **prolong its life**, but keep it in an ordinarily efficient operating condition, may be deducted as an expense . . . Repairs in the nature of **replacements**, to the extent that they **arrest deterioration** and appreciably prolong the life of the property, shall . . . be capitalized and depreciated.”

Reg. 1.162 -4

AND REMEMBER YOU CANNOT WRITE OFF THE STRUCTURAL COMPONENT BEING REPLACED

“The abandonment or retirement of a structural component of a building generally does not constitute a disposition. Accordingly, no loss deduction is allowed on the retirement of such property. The taxpayer continues to recover the cost of such property through ACRS or MACRS deductions.” - IRS Field Service Advice 200001005 (1999)

“For example, the replacement of a roof results in a new asset being depreciated over either 27.5 or 39 years, while depreciation of the initial roof (and any subsequent roof replacement) is continued. Consequently, **there can be a “cascading” effect, where several roofs are being depreciated at the same time, even though only one is physically present.**” - MISC-DOC, 2000ARD 147-1, Treasury Department: Report to Congress: Depreciation Recovery Periods and Methods

THE COURT CASES

“In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. **To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair** is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It **merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired**” – *Illinois Merchants Trust Co., Executor.*, 4 BTA 103 (1926)

“**An expenditure which returns property to the state it was in before the situation prompting the expenditure arose, and which does not make the relevant property more valuable, more useful, or longer-lived, is usually deemed a deductible repair.** A capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property.” – *Plainfield Union Water Co.*, 39 TC 333 (1962)

“**Deductions are exceptions to the norm of capitalization and are allowed only if there is clear provision for them in the Code and the taxpayer has met the burden of showing a right to the deduction.**”

Although the presence of an incidental future benefit may not warrant capitalization, a **taxpayer's realization of benefits beyond the year in which the expenditure is incurred is important in determining whether the appropriate tax treatment is immediate deduction or capitalization.**” – *Indopco, Inc.*, Cite as 69 AFTR 2d 92-694 (1992)

“There is no unique aspect or requirement in the Supreme Court's INDOPCO opinion that pertains specifically to the issue we consider. Likewise, petitioners confirm **that the INDOPCO holding did nothing to change the standards established by the pre-INDOPCO body of law that deals with repair and maintenance expenses.**” – *Ingram Industries Inc.*, 2000 TC 2000-323 (2000)

FEDERAL EXPRESS CORP., DC-TN, 2003-2 USTC

“When, as in the case at bar, a repair is made to a discrete component part of a larger item of property, the court must determine whether to apply the Repair Regulations to the component part or to the larger item of property. Otherwise stated, the court must identify which “unit of property” is being “repaired” and whether the repair materially adds to the value or appreciably prolongs the life of that unit of property.”

Four Factor Test to Determine the Proper Unit of Property

- 1) As a matter of taxpayer or industry practice, is the component (smaller unit) treated or purchased separately from the building (larger unit)?
- 2) Is the individual component and the building co-extensive? “If an engine is not “regularly and periodically” replaced over the life of the aircraft, then the useful life of the engine is coextensive with the life of the property that it powers.”
- 3) Can the smaller unit and larger unit function without each other? Ie, Functional Interdependence is important
- 4) Must the smaller unit be removed from the larger unit for maintenance to occur?

The answers to these factors are then reviewed to determine the proper Unit of Property – not all factors have to support your determination, and no one factor is more important than another.

PLAN OF REHABILITATION DOCTRINE

“To fix a door or patch plaster might very well be treated as an expense when it is an incidental minor item arising in the use of the property carrying on business, and yet, as here, be properly capitalized when involved in a greater plan of rehabilitation, enlargement and improvement of the entire property.” – *I.M. Cowell*, 18 BTA 997 (1930)

“The fact that **the taxpayer's plan involved no structural improvements** to the Hotel is a significant factor weighing against the application of the rehabilitation doctrine in this case. . . . Indeed, the tax court specifically found that the Hotel had always enjoyed high ratings, was in very good operating condition, and **remained in operation throughout the period of remodeling**. The foregoing facts are certainly not dispositive of whether the rehabilitation doctrine should be applied in a particular case. However, they support our conclusion that the taxpayers' plan in 1976 was consistent with **the type of annual maintenance activities necessary to maintain the Hotel in first-class condition**, and that the tax court erred in applying the rehabilitation doctrine to the facts of this case.” - *Moss*, Cite as 60 AFTR 2d 87-5910 (1987)

See Rev. Rul. 2001-4 for additional guidance. Please remember that while this ruling deals with Airplanes, it preceded the *Federal Ex* case, and therefore some of its findings would change with the application of *Federal Ex*.

WHAT HAS HAPPENED SINCE THE *FEDERAL EX* CASE?

The IRS issued Notice 2004-6, announcing its intentions to issue new regulations regarding this topic, and requested comments from the public regarding the whether the current rules regarding repair vs. capitalization should be changed.

“The Service and the Treasury Department want to provide clear, consistent and administrative rules that will reduce the uncertainty and controversy in this area . . . “

In 2006 the Treasury issued their first set of proposed regulations, and requested commentary. They received several very strong responses regarding these proposals, and in an interesting turn of events, the Treasury withdrew these regulations in 2008 and replaced them with a new set of proposed regulations, once again requesting comments. These new proposed changes are much more favorable to real estate owners than the original set. At this time, the Treasury Department is still reviewing commentary, and has not determined when the regulations will be finalized.



Proposed Regulations CANNOT be relied on until they go final. The concern is when they are finalized; the Service will elect the “cut-off method” – which in general means that taxpayers can follow the new regulations going forward, but cannot adjust for prior repairs that were mistakenly capitalized. Usually, finalized regulations have to be followed for tax years beginning after the date of approval.

So many sophisticated taxpayers are reviewing their past capitalized items to determine if they should take the steps to correct their current accounting method and File Form 3115 “Change in Accounting Method” before the proposed regulations become final. Due to the large amount of Form 3115s being filed, the IRS formed a task committee to best determine how to handle this issue.

And on August 27th, the IRS decided to help taxpayers . . .

Rev. Proc. 2009-39, 2009-38 IRB, 08/27/2009, IRC Sec(s).

The following are EXCERPTS from the Rev. Proc. – please review the whole procedure before making any changes effecting taxpayers

.08. New section 3.06 of the APPENDIX, Repair and maintenance costs.  Section 3 of the APPENDIX of  Rev. Proc. 2008-52 is modified by adding a new section 3.06 to read as follows:

.06. Repair and maintenance costs.

(1) **Description of change.**

(a) **Applicability.** This change applies to a taxpayer that wants to change its method of accounting from capitalizing under § 263(a) costs paid or incurred to repair and maintain tangible property (including network assets) to treating the repair and maintenance costs as ordinary and necessary business expenses under § 162 and § 1.162-4. This change also applies to a taxpayer that wants to change the unit of property it uses to determine the deductibility of repair and maintenance costs to a unit of property that is permissible under applicable legal authority.

(b) **Inapplicability.** This change does not apply to:

(i) A taxpayer that is required under § 263A and the regulations there under to capitalize the costs with respect to which the taxpayer wants to change its method of accounting under section 3.06 of this APPENDIX if the taxpayer is not capitalizing these costs, unless the taxpayer concurrently changes its method to capitalize these costs in conjunction with a change to a UNICAP method under section 11.01 or 11.02 of this APPENDIX (as applicable);

(ii) A taxpayer that wants to change its method of accounting for dispositions of depreciable property, including a change in the unit of property used for such dispositions (but see sections 6.24 and 6.25 of this APPENDIX); or

(iii) Any property subject to the repair allowance under § 1.167(a)-11(d)(2) (including expenditures incurred after December 31, 1980, for the repair, maintenance, rehabilitation, or improvement of property placed in service before January 1, 1981).

(2) **Manner of making change.** A taxpayer making this change must attach to its Form 3115 a statement with the following:

(a) A detailed description of the types of tangible property to which this change applies;

(b) A detailed description of the types of repair and maintenance costs to which this change applies;

(c) If the taxpayer is changing any unit of property determination, a detailed description of the unit(s) of property under its present method of accounting for determining the deductibility of repair and maintenance costs and a detailed description of the unit(s) of property it will use under its proposed method of determining the deductibility of repair and maintenance costs, together with a description of the legal authority supporting the taxpayer's proposed unit(s) of property for determining the deductibility of repair and maintenance costs;

(d) The following statements regarding the costs to which this change applies:

(i) "The taxpayer represents that the repair and maintenance costs are incurred to keep the taxpayer's property in ordinarily efficient operating condition."

(ii) "The taxpayer represents that the repair and maintenance costs do not materially increase the value or substantially prolong the useful life of any unit of property compared to the value or useful life of the property before the general wear or tear or particular event that led to the repairs or maintenance."

(iii) "The taxpayer represents that the repair and maintenance costs do not adapt any unit of property to a new or different use."

(iv) "The taxpayer represents that the repair and maintenance costs do not include costs to replace any unit of property or any major components or substantial structural parts of any unit of property."

(v) "The taxpayer represents that the repair and maintenance costs are not incurred as part of a plan of rehabilitation, modernization, or improvement to any unit of property."

(vi) "The taxpayer represents that the repair and maintenance costs do not result from any prior owner's use of any unit of property."

(3) Additional copy of Form 3115 required. A taxpayer changing its method of accounting under section 3.06 of this APPENDIX must, in addition to the timely duplicate filing requirements in section 6.02(3) of Rev. Proc. 2008-52, send a copy of its completed Form 3115 (including attachments) to the following address on the date the taxpayer files a copy of the Form 3115 with the national office: Internal Revenue Service, 1973 North Rulon White Blvd., Mail Stop 4917, Ogden, UT 84404.

(4) Amounts taken into account. Applicable provisions of the Code, regulations, and other guidance published in the IRB prescribe the manner in which a liability that has been incurred is taken into account. For example, for a taxpayer with inventories, certain repair and maintenance costs must be included in inventory costs and may be recovered through the cost of goods sold. See § 1.263A-1(e)(3)(ii)(E). A taxpayer may not rely on the provisions of section 3.06 of this APPENDIX to take a current deduction.

(5) No ruling on unit of property. The consent granted under this revenue procedure for this change is not a determination by the Commissioner that the taxpayer is using the appropriate unit of property in determining the deductibility of repair and maintenance costs and does not create any presumption that the proposed unit of property is permissible. The director will ascertain whether the taxpayer's determination of its unit of property is correct.

(6) Concurrent automatic change.

A taxpayer that wants to make both this change and a change to a UNICAP method under section 11.01 or 11.02 of this APPENDIX (as applicable) for the same year of change should file a single Form 3115 for both changes and enter the designated automatic accounting method change numbers for both changes on the appropriate line on that Form 3115.

(7) Proposed regulations. The Department of the Treasury has published proposed regulations that address the application of §§ 162 and 263 to expenditures paid or incurred to repair, maintain, or improve tangible property. See Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property, 73 FR 12838-01 (March 10, 2008), 2008-1 C.B. 871.

The proposed regulations are not effective until publication of a Treasury decision adopting them as final regulations in the Federal Register. Thus, taxpayers may not change a method of accounting in reliance upon the rules contained in the proposed regulations until the rules are published as final regulations in the Federal Register. If final regulations are adopted with positions that are inconsistent with the method of accounting implemented by the taxpayer under section 3.06 of this APPENDIX, that method will no longer be regarded as proper. In such event, the taxpayer will be required to follow any instructions in the final regulations or other guidance published in the IRB concerning methods of accounting for the repair, maintenance, or improvement of tangible property for future taxable years.

(8) Designated automatic accounting method change number. The designated automatic accounting method change number for a change in method of accounting under section 3.06 of this APPENDIX is "144." See section 6.02(4) of this revenue procedure.

(9) Contact information. For further information regarding a change under this section, contact Mon Lam at 202-622-4950 (not a toll-free call).

5. Effective Date

.01. In general.

(a) Rev. Proc. 2008-52. Except as provided in section 5.02 of this revenue procedure, this revenue procedure is effective for applications filed under Rev. Proc. 2008-52 on or after August 27, 2009, for a **year of change ending on or after December 31, 2008.**

(b) Rev. Proc. 97-27. This revenue procedure is effective for Forms 3115 filed under Rev. Proc. 97-27, as amplified and modified by Rev. Proc. 2002-19, as amplified and clarified by Rev. Proc. 2002-54, and as modified by Rev. Proc. 2007-67, filed on or after August 27, 2009, for a year of change ending on or after August 27, 2009.

Please Remember the above is an EXCERPT from the Rev. Proc. – please review the whole procedure before making any changes effecting taxpayers

**ITEMS THAT MAY HAVE BEEN CAPITALIZED
THAT CONSIDERATION SHOULD HAVE BEEN GIVEN
TO EXPENSING AS A REPAIR INSTEAD**

ROOFS – why was the work performed?

Individual HVAC units that have been replaced

GARAGE DOORS that have been replaced

OUTSIDE PAINTING or POWERWASHING

PAVING LOTS resurfacing

HOT WATER HEATERS that have been replaced

ELEVATOR maintenance

The best answer to almost any tax situation is planning before the expenditure takes place. Make sure the taxpayer receives invoices/proposals that document what is taking place.

AND ALWAYS REMEMBER THE LEAKING PIPE STORY!!!



QUIZ TIME !! - REPAIR VS. CAPITALIZATION

This past year your Real Estate Client spent the following amounts for these expenditures on one of the Client's commercial rental property

\$20,000 for new shingles and sheathing on the Roof due to leaks

\$7,000 to replace an HVAC roof top unit

\$13,000 to have the parking lot resuraced

1) Under the Current Regulations

2) The client mispoke, . . .

3) After the first two Court Cases

4) After the FedEx. Corp. Case

The Client is planning on spending the following next year to spruce up the property

\$20,000 to update all the kitchenettes in the building

\$5,000 to repaint the common areas

\$10,000 for new front doors to improve its curb appeal

5) After the Plan of Rehabilitation Doctrine

ALWAYS ASK FOR THE REASON FOR THE EXPENDITURE - hopefully before it is incurred

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Cost Segregation Studies & More

COMPARISON OF QUALIFIED LEASEHOLD IMPROVEMENT PROPERTY, QUALIFIED RESTAURANT PROPERTY AND QUALIFIED RETAIL IMPROVEMENT PROPERTY

	QUALIFIED LEASEHOLD IMPROVEMENT PROPERTY (QLI)	QUALIFIED RESTAURANT PROPERTY (QResP)	QUALIFIED RETAIL IMPROVEMENT PROPERTY (QRetI)	ADDITIONAL NOTES
1) Do assets <u>placed in service</u> after 10/22/04 and before 1/1/08 qualify for the <u>15 yr SL depreciation treatment half year/midquarter convention</u> ?	yes	yes	no	- not based on contract date (which is the starting point for bonus depr.)
- Do assets placed in service during 2008 qualify for the 15 yr SL depr?	yes	yes	no	"Qualified Retail Improvement Property" means any improvement to an interior portion of a building which is nonresidential real property if... - such portion is open to the general public and is used in the retail trade... and meets the same definition as for QLI's EXCEPT that with Qualified Retail, the landlord and tenant CAN be related parties
- Do assets placed in service during 2009 qualify for the 15 yr SL depr?	yes	yes	yes	
- Do assets placed in service during 2010 qualify for the 15 yr SL depr?	not yet	not yet	not yet	
2) To qualify, the building itself must be more than 3 years old, measured from the date the building was originally placed in service by the original owner	yes	yes - for 2008 <u>for 2009, building can be new for QRP</u>	yes	
3) Qualifying property is any real property (1250 property) made to commercial property (i.e., nonresidential) by a lessor or lessee	yes	yes	yes	<u>Both lessors and lessees qualify</u>
4) Qualifying property is any <u>improvements</u> real property (1250 property,) including elevators, roofs, HVAC, etc.	no	yes <u>for 2009, building can be new for QRP</u>	no	<u>QResP definition is much broader than the QLI rule.</u> QLI property is improvements to <u>leased tenant space, but not common areas, internal structure escalators, elevators, or building enlargements.</u> <u>QResP is limited to buildings where 50% or more of the building's square footage is devoted to preparation of, and seating for on-premises consumption of, prepared meals.</u>
5) Do assets placed in service from 10/23/04 to 12/31/04 also qualify for bonus depreciation ? (Bonus depreciation did not exist for assets placed in service in 2005, 2006 or 2007)	yes	yes	n/a	Small window of opportunity
Do assets placed in service in 2008 & 2009 qualify for 50% bonus depreciation?	yes	no	no	

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Cost Segregation Studies & More

COMPARISON OF QUALIFIED LEASEHOLD IMPROVEMENT PROPERTY, QUALIFIED RESTAURANT PROPERTY AND QUALIFIED RETAIL IMPROVEMENT PROPERTY

	QUALIFIED LEASEHOLD IMPROVEMENT PROPERTY (QLI)	QUALIFIED RESTAURANT PROPERTY (QResP)	QUALIFIED RETAIL IMPROVEMENT PROPERTY (QRetI)	ADDITIONAL NOTES
6) When bonus depreciation is used for tax purposes, does it also apply for AMT purposes?	yes	yes	yes	The taxpayer must use the bonus for both GDS & AMT.
7) Do the same assets qualify for Section 179?	no	no	no	No, since Section 179 cannot be taken on 1250 property
8) Can a future purchaser of the building use the 15 year life if the property was 15 year property for the former owner/tenant? <u>- If a client buys a restaurant, we will need to ask if the restaurant has any QResP</u>	no	yes	no	<u>QLI has a specific rule which states that the 15 year rule is only available to the lessor/lessee who made the improvement</u>
9) Is 15 year S/L required?	yes	yes	yes	Method is not elective, unless you choose to use an ADS life using a 39 yr life with a half year or mi quarter convention. Any ADS election is irrevocable. Any property depreciated under the ADS is excluded from bonus depreciation.
10) Does this rule apply to related parties? (landlord and tenant)	no	yes	yes	Related parties (see IRS definition) cannot have QLI property

PLEASE REMEMBER - the above rules do not apply to personal property (5 or 7 year assets) or land improvements (15 year assets).

Your specific situation should be discussed with your Tax Advisor

For Further Information, contact Roger Upton - MS Consultants, LLC:

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The Q's – Qualified Leasehold, Restaurant Property and Retail Property Improvements

“The avoidance of taxes is the only intellectual
pursuit that carries any reward.” -
John Maynard Keynes, British Economist

**Speaker – Roger Upton, CPA
Director, MS Consultants, LLC**

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A BRIEF HISTORY OF COMMERCIAL REAL ESTATE DEPRECIATION

- A. 1981 – 15 Year ACRS**
- B. March 15, 1984 – 18 Year ACRS**
- C. May 8, 1985 – 19 Year ACRS**
- D. And during this whole time tenant improve.
lives were allowed to follow the length of the
lease.**

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A BRIEF HISTORY OF COMMERCIAL REAL ESTATE DEPRECIATION

**E. July 31, 1986 – the start of MACRS
with 31.5 years SL**

F. May 12, 1993 – 39 years SL

**G. And since 1986 tenant improve. had
to follow the above lives – no more
following the length of the lease.**

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**“Some observers have argued that special rules
should apply to real property improvements.
Among those proposals are establishing
separate asset classes for building
improvements . . . and modifying recovery
periods to account for improvements. . . .**

**Such a scheme creates new administrative
complexities.”**

**– MISC-DOC, 2000ARD 147-1, Treasury Department:
Report to Congress: Depreciation Recovery Periods
and Methods**

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A BRIEF HISTORY OF COMMERCIAL REAL ESTATE DEPRECIATION

**H. October 22, 2004 – American
Jobs Creation Act of 2004
created a new 15 year
MACRS category.**

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Qualified Leasehold Improvement

- **What is QLI Property?**
- **A. Improvement must be made pursuant to a lease.**
- **B. Lease cannot be between related parties.**
- **C. Space is occupied by tenant.**
- **D. Has to be 1250 property.**
- **E. Building itself has to be more than three years old.**

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Qualified Leasehold Improvement

- **What is NOT QLI Property?**
 - **A. Residential Property**
 - **B. Common Areas**
 - **C. Internal Structural Framework**
 - **D. Building Enlargement – But you can split! Talk to your contractor.**

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Qualified Leasehold Improvement

- **How Does a QLI Work?**
 - **A. Placed in service after 10/22/04 and before 1/1/10.**
 - **B. 15 Year SL**
 - **C. Half Year Convention**
 - **D. 50% bonus is available for 2004 (small window), 2008, & 2009**
 - **E. No AMT adjustment**

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Qualified Leasehold Improvement

- How Does a QLI Work?
- F. No Sec 179 (since it is 1250 property)
- G. Provision is not elective (watch out for ADs Rules).
- H. Applies to both landlords and/or tenants.
- I. Applies to tenant construction allowances.

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Qualified Leasehold Improvement

EXAMPLE

- In 2009 a new Tenant requests:
- A. The side of the Landlord's building to be the entrance to the Tenant's space.
- B. Expand the outer side wall for their new lobby.
- C. Along with new paint, carpet, lighting, re-arrange several walls, and add an em'ee bathroom to the existing space.
- D. Cost to the Landlord- \$400,000.

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YOUR ADVICE TO YOUR CLIENT

- Consider an abandonment deduction of the old improvements.
- Have the contractor split the contract between the work to be performed for the addition (39 year property) and for the original space (QLI).
- Cost segregate the two pieces.
- \$100k QLI less carpeting = 15 year w/ Bonus
- \$300k less land improvements (bonus) – personal property (bonus) = 39 year

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A BRIEF HISTORY OF COMMERCIAL REAL ESTATE DEPRECIATION

I. January 1, 2009 –

“Qualified Retail Improvement”

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Qualified Retail Improvement

- **What is QRI?**
- **A. Similar to QLI property except**
- **B. Only the interior portion of the building that is open to the general public and used in retail trade or selling property to the public is QRI**
- **C. No Bonus**
- **D. No Sec. 179 (since it is 1250 property)**
- **E. No AMT adjustment**
- **F. Only available for calendar year 2009**

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A BRIEF HISTORY OF COMMERCIAL REAL ESTATE DEPRECIATION

J. October 22, 2004 –

“Qualified Restaurant Property”

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Qualified Restaurant Property

- **What is QRP property?**
 - A. Not the same as QLI or QRI!
 - B. Can be between related parties.
 - C. More than 50% of the building's square footage has to be dedicated to the restaurant.
 - D. Watch out for restaurants in plazas!
 - E. No bonus (except for small window in 2004)

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Qualified Restaurant Property

- **What is QRP property?**

October 22, 2004 – December 31, 2008

- A. Building itself must be more than three years old.
- B. Any Improvements to a building – not as restrictive as QLI rules.

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Qualified Restaurant Property

- **What is QRP property?**

For the calendar year 2009

- **A. No more three year waiting period (new is in!)**
- **B. “Improvements” now include the building itself.**

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Qualified Restaurant Property

EXAMPLE

- **Taxpayer buys three free standing fast food restaurants in 2009 for \$1,000,000**
 - **15 Year SL**
 - **Cost segregate the restaurants to identify the five year property**

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**A BRIEF HISTORY OF COMMERCIAL
REAL ESTATE DEPRECIATION**

What does 2010 bring?

THE WAITING GAME

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**The Opportunity to Revisit
Repair vs. Capitalization before
the Rules Change**

**Speaker – Roger Upton, CPA
Director, MS Consultants, LLC**

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**“Some items are clearly capital and
other items are clearly expense, but
between the two extremes a point is
approached at which it is difficult to
determine whether the expenditure
is capital or expense” - *Libby &
Blouin, LTD.*, 4 BTA 910 (1926)**

**“Confusion is good for business” –
Roger Upton (2003)**

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Current Income Tax Regulations

- You are required to capitalize expenditures that:
 - 1) Materially increase the value of the property
 - 2) Substantially prolong the useful life of the property, or
 - 3) Adapt the property to a new or different use

Excerpted from Reg. 1.263(a)-1(b)

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Current Income Tax Regulations

- “The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense . . . Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, shall . . . be capitalized and depreciated.”

Reg. 1.162 -4

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QUIZ TIME: Questions 1 & 2

\$20,000

for new shingles and sheathing on the Roof due to leaks

\$7,000

to replace an HVAC roof top unit

\$13,000

to have the parking lot resurfaced

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AND REMEMBER YOU CANNOT WRITE OFF THE STRUCTURAL COMPONENT BEING REPLACED

- **“The abandonment or retirement of a structural component of a building generally does not constitute a disposition. Accordingly, no loss deduction is allowed on the retirement of such property. The taxpayer continues to recover the cost of such property through ACRS or MACRS deductions.” - IRS Field Service Advice 200001005 (1999)**

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AND REMEMBER YOU CANNOT WRITE OFF THE STRUCTURAL COMPONENT BEING REPLACED

- “For example, the replacement of a roof results in a new asset being depreciated over either 27.5 or 39 years, while depreciation of the initial roof (and any subsequent roof replacement) is continued. Consequently, **there can be a “cascading” effect, where several roofs are being depreciated at the same time, even though only one is physically present.**” - MISC-DOC, 2000 ARD 147-1, Treasury Department: Report to Congress: Depreciation Recovery Periods and Methods

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THE COURT CASES

- “In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. **To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair** is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It **merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired**” – *Illinois Merchants Trust Co., Executor.*, 4 BTA 103 (1926)

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THE COURT CASES

- **“An expenditure which returns property to the state it was in before the situation prompting the expenditure arose, and which does not make the relevant property more valuable, more useful, or longer-lived, is usually deemed a deductible repair.** A capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property.” – *Plainfield Union Water Co.*, 39 TC 333 (1962)

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QUIZ TIME: Question 3

- | | | |
|--|---|---|
| \$20,000 | \$7,000 | \$13,000 |
| for new shingles and sheathing on the Roof due to leaks | to replace an HVAC roof top unit | to have the parking lot resurfaced |

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THE COURT CASES

- **“Deductions are exceptions to the norm of capitalization and are allowed only if there is clear provision for them in the Code and the taxpayer has met the burden of showing a right to the deduction.** Although the presence of an incidental future benefit may not warrant capitalization, **a taxpayer's realization of benefits beyond the year in which the expenditure is incurred is important in determining whether the appropriate tax treatment is immediate deduction or capitalization.**” – *Indopco, Inc.*, Cite as 69 AFTR 2d 92-694 (1992)

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THE COURT CASES

- **“There is no unique aspect or requirement in the Supreme Court's INDOPCO opinion that pertains specifically to the issue we consider. Likewise, petitioners confirm that the INDOPCO holding did nothing to change the standards established by the pre-INDOPCO body of law that deals with repair and maintenance expenses.”** – *Ingram Industries Inc.*, 2000 TC 2000-323 (2000)

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FEDERAL EXPRESS CORP., DC-TN, 2003-2 USTC

- **“When, as in the case at bar, a repair is made to a discrete component part of a larger item of property, the court must determine whether to apply the Repair Regulations to the component part or to the larger item of property. Otherwise stated, the court must identify which “unit of property” is being “repaired” and whether the repair materially adds to the value or appreciably prolongs the life of that unit of property.”**

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FEDERAL EXPRESS CORP., DC-TN, 2003-2 USTC

- **Four Factor Test to Determine the Proper Unit of Property**
- **1) As a matter of taxpayer or industry practice, is the component (smaller unit) treated or purchased separately from the building (larger unit)?**
- **2) Is the individual component and the building co-extensive? “If an engine is not “regularly and periodically” replaced over the life of the aircraft, then the useful life of the engine is coextensive with the life of the property that it powers.”**

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FEDERAL EXPRESS CORP., DC-TN, 2003-2 USTC

- 3) Can the smaller unit and larger unit function without each other? Ie, Functional Interdependence is important
- 4) Must the smaller unit be removed from the larger unit for maintenance to occur?
- The answers to these factors are then reviewed to determine the proper Unit of Property – not all factors have to support your determination, and no one factor is more important than another.

QUIZ TIME: Question 4

\$20,000	\$7,000	\$13,000
for new shingles and sheathing on the Roof due to leaks	to replace an HVAC roof top unit	to have the parking lot resurfaced

PLAN OF REHABILITATION DOCTRINE

- “To fix a door or patch plaster might very well be treated as an expense when it is an incidental minor item arising in the use of the property carrying on business, and yet, as here, be properly capitalized when involved in a greater plan of rehabilitation, enlargement and improvement of the entire property.” – *I.M. Cowell*, 18 BTA 997 (1930)

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PLAN OF REHABILITATION DOCTRINE

- “The fact that **the taxpayer's plan involved no structural improvements** to the Hotel is a significant factor weighing against the application of the rehabilitation doctrine in this case. . . the tax court specifically found that the **Hotel . . . was in very good operating condition, and remained in operation throughout the period of remodeling**. The foregoing facts are certainly not dispositive of whether the rehabilitation doctrine should be applied in a particular case. However, they support our conclusion that the **taxpayers' plan in 1976 was consistent with the type of annual maintenance activities necessary to maintain the Hotel in first-class condition**, and that the tax court erred in applying the rehabilitation doctrine to the facts of this case.” - *Moss*, Cite as 60 AFTR 2d 87-5910 (1987)

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PLAN OF REHABILITATION DOCTRINE

- See Rev. Rul. 2001-4 for additional guidance. Please remember that while this ruling deals with Airplanes, it preceded the *Federal Ex* case, and therefore some of its findings would change with the application of *Federal Ex*.

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QUIZ TIME: Question 5

\$20,000	\$7,000	\$13,000
for new shingles and sheathing on the Roof due to leaks	to replace an HVAC roof top unit	to have the parking lot resurfaced

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WHAT HAS HAPPENED SINCE THE *FEDERAL EX CASE?*

- A. The IRS requested comments:**
“The Service and the Treasury Department want to provide clear, consistent and administrative rules that will reduce the uncertainty and controversy in this area . . .”
- B. In 2006 the Treasury issued their first set of proposed regulations, and requested commentary.**
- C. Treasury withdrew these regulations in 2008 and replaced them with a new set of proposed regulations**
- D. At this time, the Treasury Department is still reviewing commentary, and has not determined when the regulations will be finalized.**

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WHAT HAS HAPPENED SINCE THE *FEDERAL EX CASE?*

- A. Many taxpayers are reviewing their past capitalized items to determine if they should take the steps to correct their current accounting method and File Form 3115 “Change in Accounting Method” before the proposed regulations become final. Due to the large amount of Form 3115s being filed, the IRS formed a task committee to best determine how to handle this issue.**
- B. And on August 27th, the IRS decided to help taxpayers . . .**

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**Rev. Proc. 2009-39, 2009-38 IRB,
08/27/2009**

A. AUTOMATIC APPROVAL

B. DUE W/ TAX RETURN

C. NO FILING FEE

**D. FOR TAX YEAR ENDING ON OR AFTER
DECEMBER 31, 2008**

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**ITEMS THAT MAY HAVE BEEN CAPITALIZED THAT
CONSIDERATION SHOULD HAVE BEEN GIVEN TO
EXPENSING AS A REPAIR INSTEAD**

ROOFS

HVAC

GARAGE DOORS

**OUTSIDE PAINTING
POWERWASHING**

PARKING LOTS

**HOT WATER
HEATERS**

ELEVATOR

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**AND ALWAYS REMEMBER THE
LEAKING PIPE STORY!!!**



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The basic rate of \$100 allows you to select **up to 10 services** and **up to five areas served**. Additional selections cost \$10 a piece. Your enrollment begins the day we receive your completed form and payment and is good for one year from that date.

Firm Information	Payment Information
Firm size (check one): <input type="checkbox"/> sole proprietor <input type="checkbox"/> local <input type="checkbox"/> regional <input type="checkbox"/> national <input type="checkbox"/> other _____ Firm / Name _____ Address _____ City _____ State _____ Zip _____ Contact person for all referrals _____ E-mail address of contact _____ Phone number (include area code) _____	Initial Enrollment Fee = \$100 Additional Services @ \$10 each = _____ Additional Counties @ \$10 each = _____ TOTAL ENCLOSED = _____ Payment Method: <input type="checkbox"/> Check payable to MACPA <input type="checkbox"/> Credit Card: <input type="checkbox"/> VISA <input type="checkbox"/> Mastercard <input type="checkbox"/> AMEX [][][][]-[][][][]-[][][][][]-[][][][][] Credit Card Number [][]-[][]-[][][] Expiration Date _____ Cardholder's Signature _____ Print Cardholder's Name
Agreement We understand that MACPA serves only as an intermediary between prospective clients and participants in the CPA Referral Bureau. Signature _____ Date _____	

SERVICES	Business / Management Consulting Services	Taxation	OTHER
We have sufficient experience in the following fields of practice and can confidently provide services to prospective clients in the following areas: [SELECT UP TO 10. More than 10 cost \$10 a piece.] Accounting & Auditing <input type="checkbox"/> Attestation services <input type="checkbox"/> Audit <input type="checkbox"/> Review & compilation <input type="checkbox"/> Forensic Accounting Assurance Services <input type="checkbox"/> Elder Care <input type="checkbox"/> Performance Measurement Services <input type="checkbox"/> WebTrust <input type="checkbox"/> Other _____	Financial Planning <input type="checkbox"/> CFP (on staff) <input type="checkbox"/> Pension Plans <input type="checkbox"/> PFP <input type="checkbox"/> Retirement Planning Small Business <input type="checkbox"/> Business valuation <input type="checkbox"/> Home-based businesses <input type="checkbox"/> Start-up <input type="checkbox"/> General consulting	Technology <input type="checkbox"/> Internet / E-commerce <input type="checkbox"/> Web development Specialties <input type="checkbox"/> Agri-business <input type="checkbox"/> Auto dealerships <input type="checkbox"/> Banking <input type="checkbox"/> Bankruptcy <input type="checkbox"/> Computer Consulting <input type="checkbox"/> Construction <input type="checkbox"/> Continuing care <input type="checkbox"/> Credit Unions	<input type="checkbox"/> Day Care / Child Care <input type="checkbox"/> Educational Institutions <input type="checkbox"/> Employee benefit plans <input type="checkbox"/> Engineering <input type="checkbox"/> Entertainment <input type="checkbox"/> ERISA audits <input type="checkbox"/> Financial institutions <input type="checkbox"/> Franchisors <input type="checkbox"/> GASB - Yellow book <input type="checkbox"/> Government contractors <input type="checkbox"/> Homeowner's Associations <input type="checkbox"/> Hospitals <input type="checkbox"/> Hotels / Restaurants <input type="checkbox"/> HUD audits <input type="checkbox"/> Import / Export <input type="checkbox"/> Insurance agents / Co. <input type="checkbox"/> Liquidation <input type="checkbox"/> Litigation support <input type="checkbox"/> Local government <input type="checkbox"/> Manufacturing <input type="checkbox"/> Mergers / Acquisitions <input type="checkbox"/> Not-for-profit <input type="checkbox"/> Nursing Homes <input type="checkbox"/> Oil and Gas <input type="checkbox"/> Payroll <input type="checkbox"/> Professionals (Doctor, Lawyers, Architects, etc.) <input type="checkbox"/> Real estate <input type="checkbox"/> Religious institutions <input type="checkbox"/> Savings and loans <input type="checkbox"/> SEC companies <input type="checkbox"/> Self-employed contractors <input type="checkbox"/> Software development <input type="checkbox"/> State government <input type="checkbox"/> Transportation <input type="checkbox"/> Utilities <input type="checkbox"/> Other _____ <input type="checkbox"/> We have CPA(s) on staff who can perform services for foreign language clients. What language(s)? _____ Sign language? <input type="checkbox"/> Yes <input type="checkbox"/> No

AREAS SERVED																												
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DON FARMER'S 2009 TAX SEMINARS

Don Farmer Tax Seminars are presented with a straightforward approach to the audience with comprehensive, timely information, flavored with humor and entertaining dialogue. A comprehensive manual is also provided with each class.

THESE EVENTS HAVE BEEN PRE-APPROVED FOR CE CREDIT BY THE CFP BOARD.

*****ALL CLASSES ARE HELD AT MARTIN'S WEST, BALTIMORE*****

DON FARMER'S CORPORATE / BUSINESS INCOME TAX WORKSHOP

Date: Nov. 6, 2009
Event ID: 111000
Time: 8:30 a.m. - 4:30 p.m. (Registration at 8 a.m.)
Recommended CPE: 8 CFP, 8 Tax
Fees: \$245 (Early Bird) (fee expires 30 days prior to event date)
\$295 Members
\$395 Non-Members

Using a combination of humor and examples, this course will provide a review of corporate and business income taxation including tax developments that affect 2009 return preparation and 2009 tax planning. Current year developments, recurring problems, and planning ideas will be reviewed. We will also look at the major areas of corporate and business taxation to fine tune practitioners for tax season. The course includes an 800-page reference manual containing basic rules, developments, planning ideas, elections and forms.

DON FARMER'S INDIVIDUAL INCOME TAX WORKSHOP

Date: Nov. 19 - 20, 2009
Event ID: 211000
Time: 8:30 a.m. - 4:30 p.m. (Registration at 8 a.m.)
Recommended CPE: 16 CFP, 16 Tax
Fees: \$490 (Early Bird) (fee expires 30 days prior to event date)
\$590 Members
\$690 Non-Members

In this course, we review current year developments, recurring problems, and planning ideas using a combination of humor and examples. We will review tax developments that affect 2009 return preparation and 2009 tax planning, as well as the major areas of individual taxation, to fine tune practitioners for tax season. The course includes an 800-page reference manual containing basic rules, developments, planning ideas, elections and forms, plus a topical index.

DON FARMER'S 2009 TAX UPDATE

Date: Dec. 4, 2009
Event ID: 111001
Time: 8:30 a.m. - 4:30 p.m. (Registration at 8 a.m.)
Recommended CPE: 8 CFP, 8 Tax
Fees: \$245 (Early Bird) (fee expires 30 days prior to event date)
\$295 Members
\$395 Non-Members

Review current year developments and planning ideas affecting individual, corporate and business income taxation using a combination of humor and examples. We will emphasize tax developments that affect 2009 tax return preparation and 2009 tax planning for individuals, corporations, and non-corporate businesses. The course format is designed to update CPAs with various levels of experience, and a 300-400-page reference manual is included.





Retirement Planning

2:00pm-3:30pm

Speaker: Lyle Benson, Jr., CPA, PFS,
CFP, L.K. Benson & Company, P.C

Retirement Planning

By: Lyle K. Benson, Jr., CPA, PFS, CFP
L.K. Benson & Company, P.C

Chesapeake Tax Conference
MACPA
September 17, 2009

1

The CPA as a Financial Planner



2

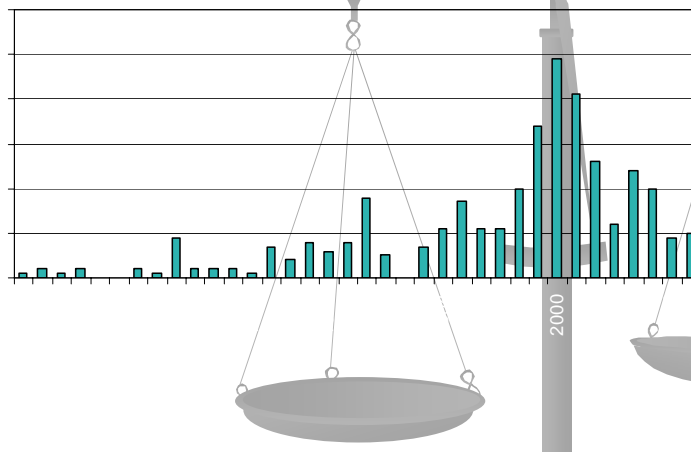
CPAs Are Uniquely Positioned

- Favorable positioning in the growing advice market
- CPAs are the most trusted advisors
 - Ahead of attorneys, bankers and other professionals
- Trust is overwhelmingly the top characteristic clients look for and expect in their advisor
- Existing client base and market presence
- Tax and accounting knowledge of growing importance in the overall planning process

3

CPA Financial Planning Boom

Year in Which Respondents First Offered Financial Planning/Advisory Services



4

Motivations Behind Offering Advice

- Respond to client needs
- Build on existing relationships
- Diversify the service offering of the overall firm
- Increase revenue and profitability



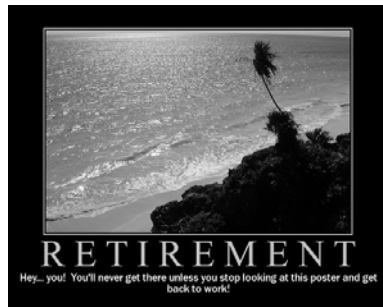
5

Four Models of Delivery

- A preferred **referral partner** or joint venture with a financial planning/advisory firm
- **Solo practitioner** providing both CPA and/or financial planning/advisory services
- **Single entity** with multiple professionals providing both CPA and/or financial planning/advisory services
- **Stand-alone** financial planning/advisory subsidiary (entity or business unit), fully or partially owned by a CPA firm

6

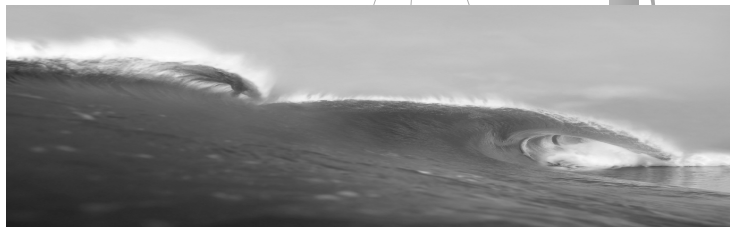
The Changing Definition of Retirement



7

THE AGE WAVE IS COMING ASHORE!

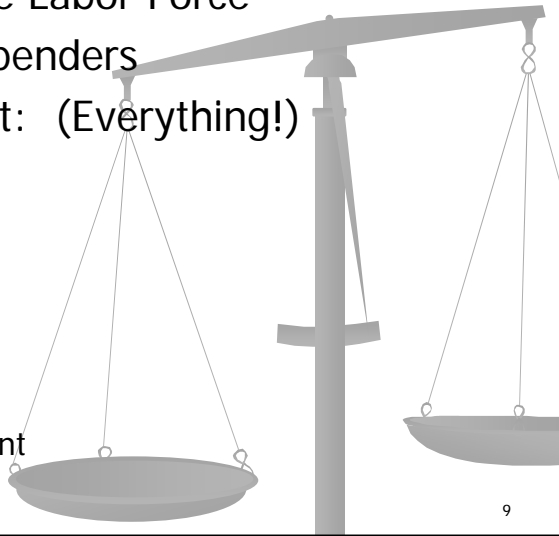
One baby boomer will turn 59
1/2 every seven seconds
between now and 2025.



8

THE BOOMER: BIG BUT DIVERSE

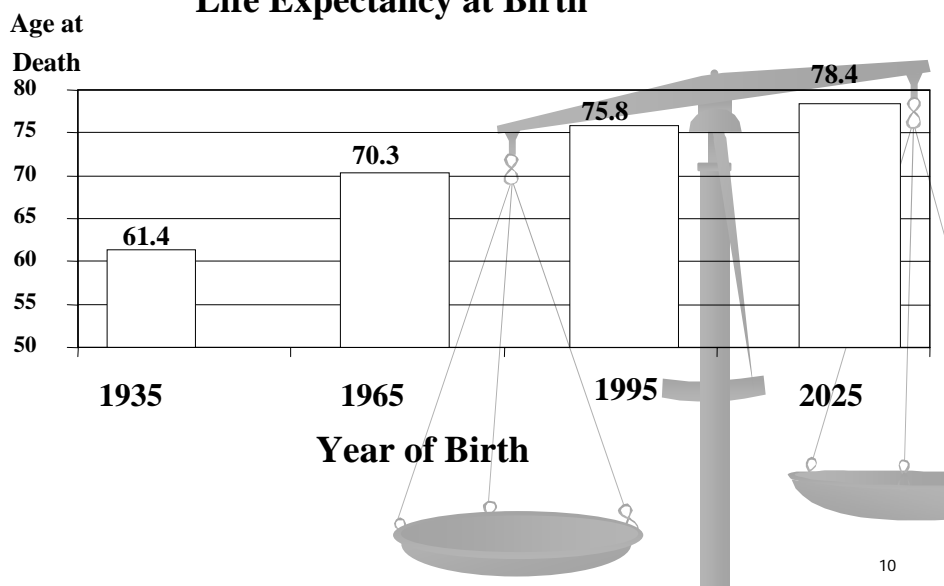
- Large Part of the Labor Force
- History of Big Spenders
- Areas of Interest: (Everything!)
 - Health
 - Lifestyle
 - Nostalgia
 - Family values
 - Relationships
 - Expensive hobbies
 - Money management



9

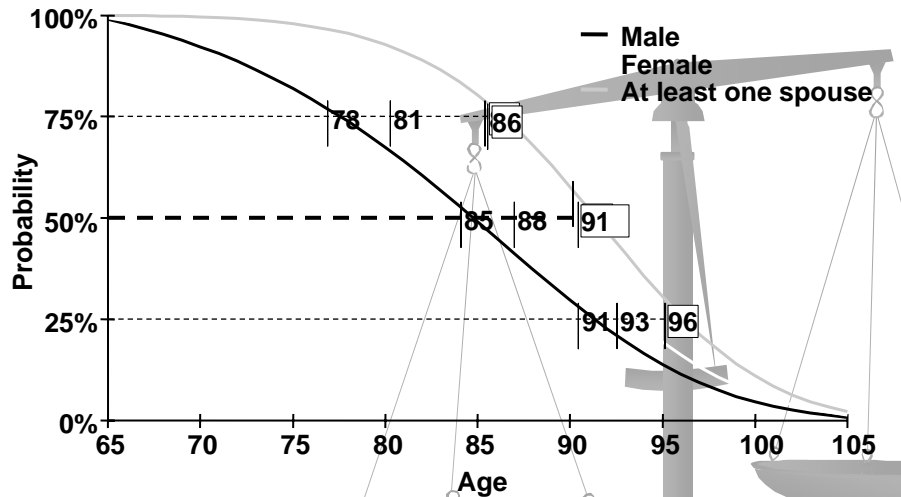
Our Life Expectancy is LONGER

Life Expectancy at Birth



10

Probability of a 65-year-old living to various ages



Source: Annuity 2000 Mortality Tables

11

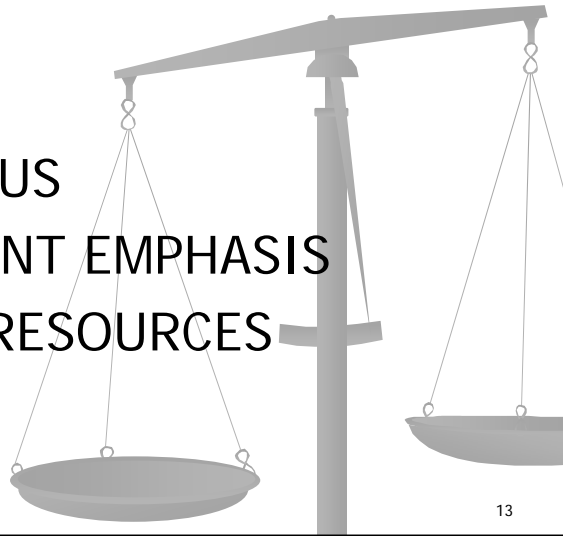
BOOMERS REJECTING “RETIREMENT”

- DESIRE TO STAY MENTALLY ACTIVE
- DESIRE TO STAY PHYSICALLY ACTIVE
- DESIRE TO REMAIN PRODUCTIVE AND USEFUL
- Nobody says “I WANT TO CONTINUE TO WORK SO I CAN AFFORD TO FEED MYSELF,” even if that’s true.

12

REINVENT NOT RETIRE

- LIFESTYLE
- CAREER
- FAMILY FOCUS
- ENVIRONMENT EMPHASIS
- FINANCIAL RESOURCES



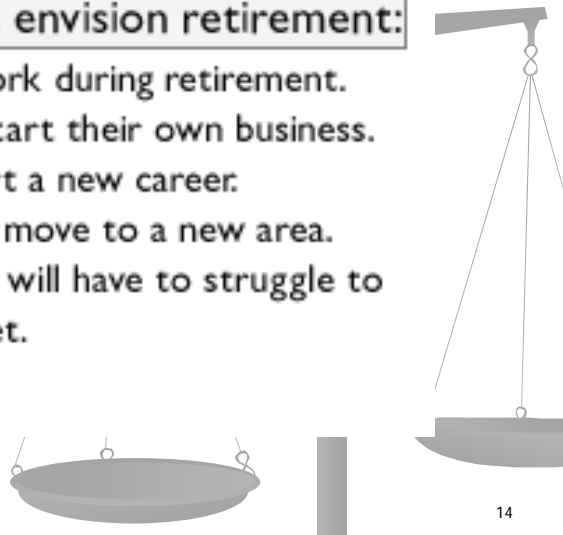
13

WHAT WILL BOOMERS DO?

Baby Boomers envision retirement:

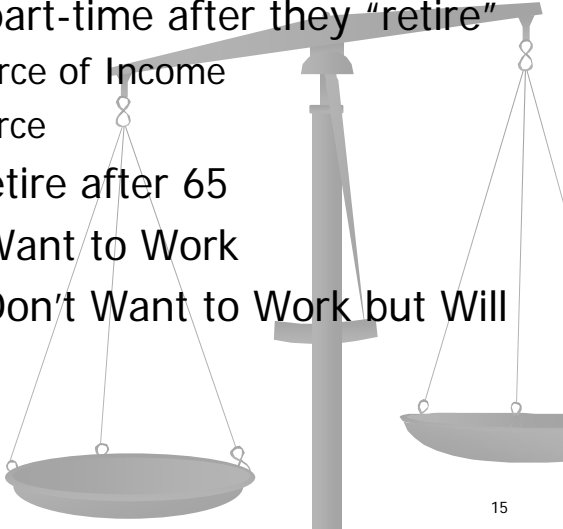
- 80% plan to work during retirement.
- 17% want to start their own business.
- 5% plan to start a new career.
- 21% expect to move to a new area.
- 23% think they will have to struggle to make ends meet.

Source: AARP



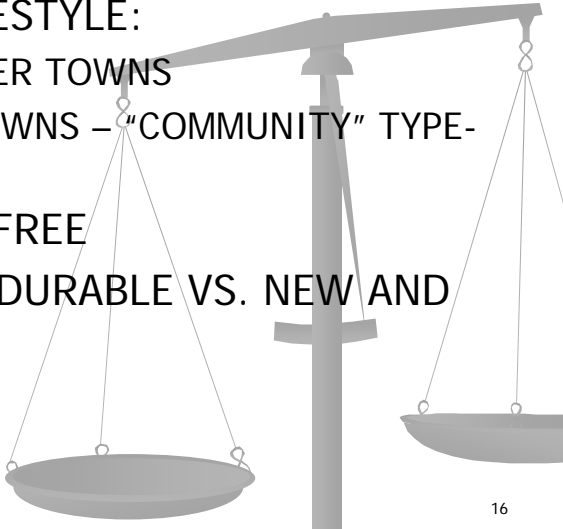
14

2007 Gallup Annual Personal Finance Poll

- 78% will work part-time after they "retire"
 - 21% Major Source of Income
 - 52% Minor Source
 - 57% will fully retire after 65
 - 49% Say they Want to Work
 - 49% Say they Don't Want to Work but Will
- 

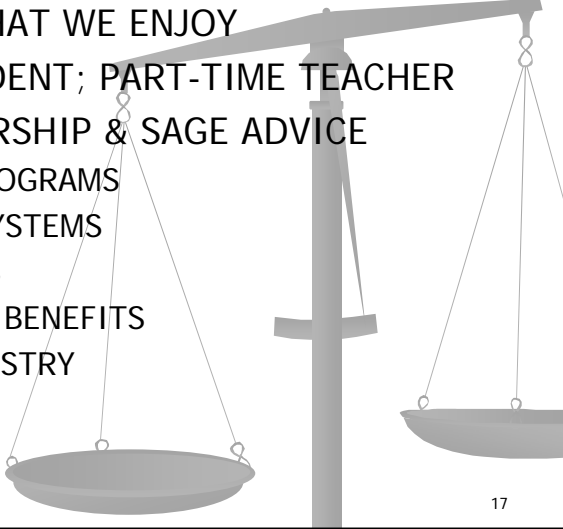
15

LIFESTYLE

- DOWNSIZE LIFESTYLE:
 - LIVE IN SMALLER TOWNS
 - LIVE IN BIG TOWNS – "COMMUNITY" TYPE-HOUSING
 - BECOME DEBT FREE
 - VALUE OLDER, DURABLE VS. NEW AND SHINY
- 

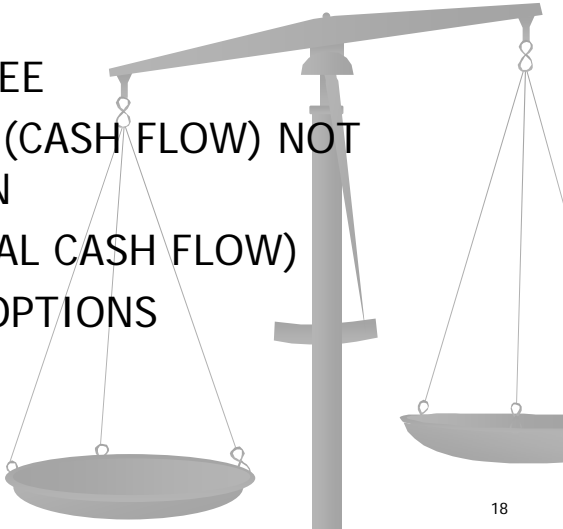
16

CAREER

- DO MORE OF WHAT WE ENJOY
 - PART-TIME STUDENT; PART-TIME TEACHER
 - PROVIDE LEADERSHIP & SAGE ADVICE
 - RETIREMENT PROGRAMS
 - HEALTH CARE SYSTEMS
 - LABOR MARKETS
 - OLDER WORKER BENEFITS
 - FINANCIAL INDUSTRY
- 

17

THE BOOMER FINANCIAL WANTS/NEEDS

- DEBT FREE
 - DEPENDENT FREE
 - DISTRIBUTION (CASH FLOW) NOT ACCUMULATION
 - INFLATION (REAL CASH FLOW)
 - NEXT CAREER OPTIONS
- 

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Example

- Corporate Executive/Doctor
- Career with big pharmaceutical company
- Moved to better geographical area and a public health role.
- Key Planning Points:
 - Cash out or hold options?
 - Asset Sufficiency Analysis
 - Develop and Implement Inv Strategy

19

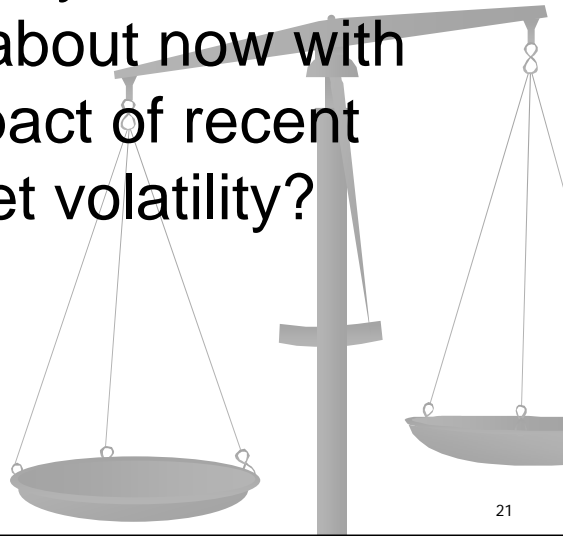
Challenges in the Current Market

What are we telling clients?



20

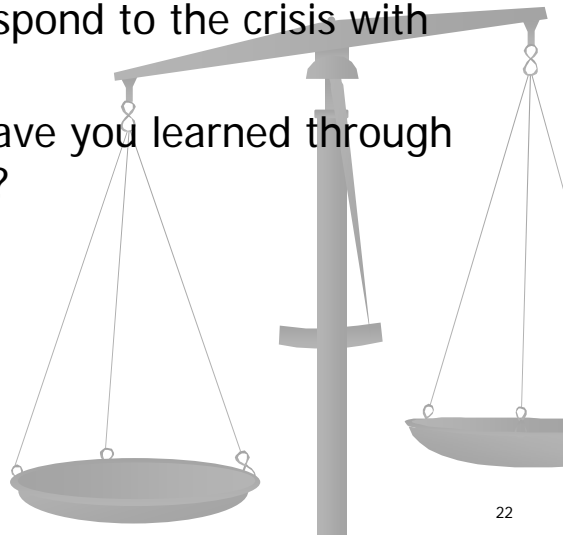
What are your clients worried about now with the impact of recent market volatility?



21

Communicating with Clients

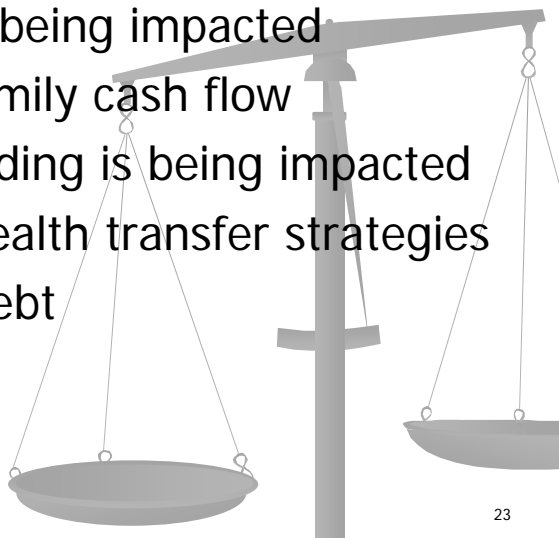
- How did you respond to the crisis with your clients?
- What lessons have you learned through this experience?



22

Market Volatility

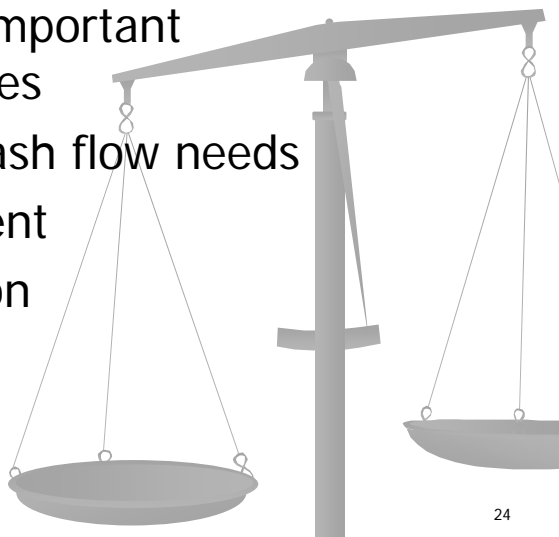
- Retirement is being impacted
- Changes in family cash flow
- Education funding is being impacted
- Gifting and wealth transfer strategies
- Restructure debt



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The CPA/PFS Approach

- Clients most important goals/objectives
- Understand cash flow needs
- Risk assessment
- Asset allocation



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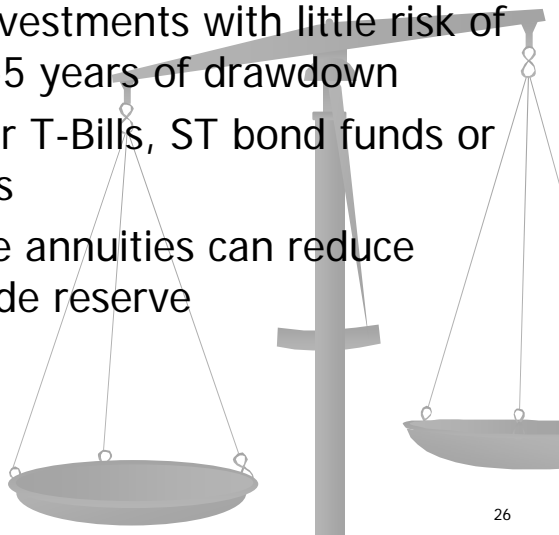
Drawdown Studies and Thoughts



25

Cash Reserves

- Fixed income investments with little risk of loss for up to 3-5 years of drawdown
- Laddered CDs or T-Bills, ST bond funds or cash equivalents
- Fixed immediate annuities can reduce need for set aside reserve



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Cash Reserve Example:

- Mary age 65 has cash needs of \$60,000/yr
- SS of \$20K and employer plan of \$5k/yr
- Needs \$35K from portfolio
- Portfolio income is \$15K so principal need is \$20K
- Five year set aside = $\$20K * 5 = \$100,000$

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Tax Bracket Strategies

- Tax Bracket Strategies
 - Pre-Retirement – Roth vs. regular IRA
 - Early Retirement – Years between retirement and age 70½
 - Later Retirement - RMD's push into higher tax bracket after age 70½
 - Cash Flow Needs > RMD – Use Roth IRA funds; Use fixed immediate annuities
 - Best to have mix of taxable and tax deferred asset pools to draw from.

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Mechanics of Drawdown Studies

- “Initial Withdrawal Rate” (IWR) – The percentage of the portfolio withdrawn in the first year.
 - Safe – Highest IWR that guarantees the required portfolio longevity.; 4-4.5%
 - Practical – IWR that anticipates modest failure(10% or less); 5%
- Simulation Software
 - Monte Carlo Simulations
 - Limited database of return numbers

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Why is IWR important?

Investment related reasons

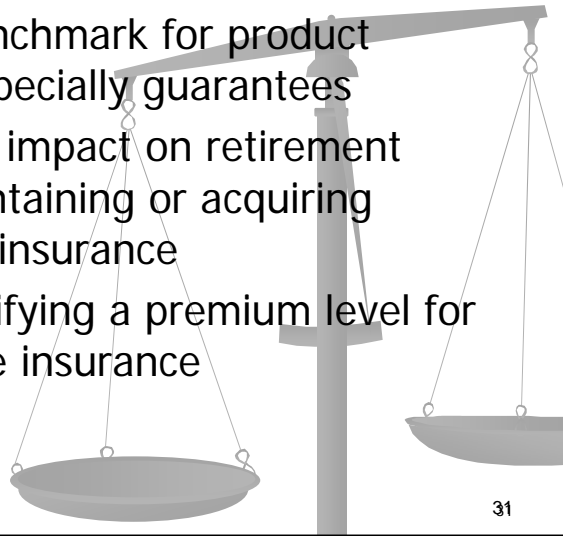
- Establishes a rule of thumb for portfolio withdrawals
- Compare IWR to guaranteed income products
- Simulate impact to IWR when adding asset classes
- Identify costs of investment management relative to IWR

30

Why is IWR important?

Risk Management Reasons

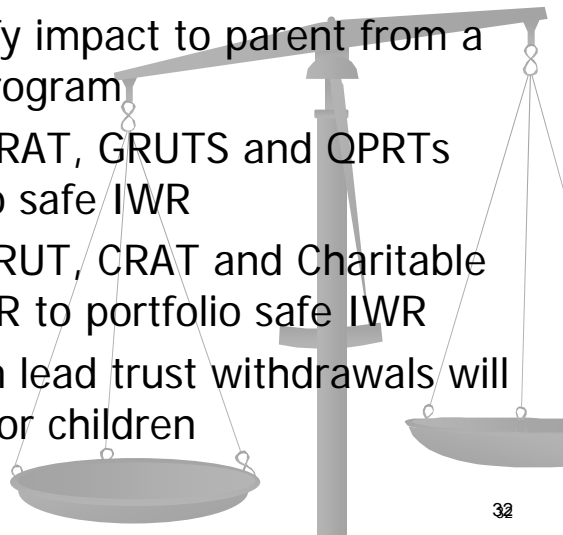
- Provides a benchmark for product solutions – especially guarantees
- Highlights the impact on retirement needs by maintaining or acquiring additional life insurance
- Assist in identifying a premium level for long term care insurance



Why is IWR important?

Estate Planning Reasons

- Can help identify impact to parent from a family gifting program
- Can compare GRAT, GRUTS and QPRTs IWR to portfolio safe IWR
- Can compare CRUT, CRAT and Charitable Gift Annuity IWR to portfolio safe IWR
- Highlights when lead trust withdrawals will exhaust funds for children



Higher IWR can be tolerated when:

- Discretionary share of spending is high
- Fixed income with COLAs as share of total resources is high
- Personal Inflation rate is below CPI
- Risk management coverage is adequate and have inflation protection
- Fixed income or other sources commence after start of projection period
- Expenditures drop off after start of projection

33

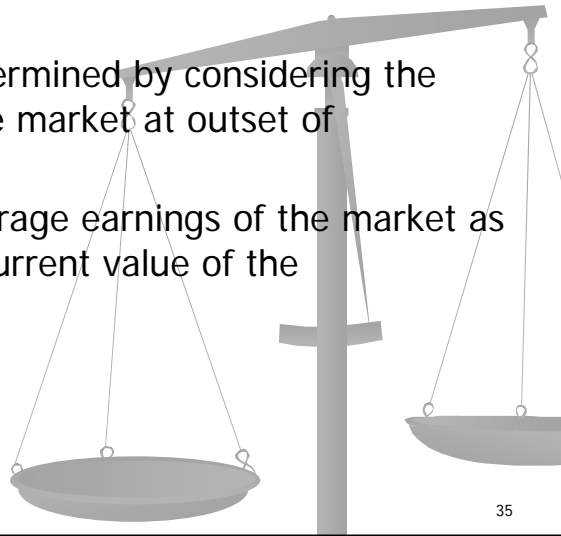
The Drawdown Studies

- Bengen
 - 4% IWR safe for 50/50 stock/bond mix
- Guyton
 - Introduced "Multi Asset Class" (8 different asset classes)
 - Increased IWR to 5% for 80% stock portfolio
- Guyton & Klingler
 - Considered capital preservation and prosperity rules.
 - Monte Carlo analysis

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The Drawdown Studies, ctd.

- Kitces
 - IWR's best determined by considering the valuation of the market at outset of withdrawals.
 - Used 10-yr average earnings of the market as a ratio to the current value of the market (P/E10)



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Safe IWR based on PE10 quintiles for a 60/40 mix

PE10 Quintile	<u>Lower</u> PE10 Range	<u>Upper</u>	Lowest IWR	Highest IWR	Average IWR
1	5.4	12.0	5.7%	10.6%	8.1%
2	12.0	14.7	4.8%	8.3%	6.7%
3	14.7	17.6	4.9%	8.1%	6.3%
4	17.6	19.9	4.9%	7.2%	5.8%
5	19.9	28.7	4.4%	6.1%	5.1%

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Safe IWR based on PE10 quintiles for different mixes

PE10 Quintile	Equities 0%	Equities 20%	Equities 40%	Equities 60%	Equities 80%	Equities 100%
1	2.5%	3.8%	5.2%	5.7%	5.8%	5.8%
2	2.5%	3.5%	4.5%	4.8%	5.0%	5.0%
3	2.4%	3.3%	4.3%	4.9%	5.0%	5.0%
4	2.5%	3.4%	4.2%	4.9%	4.7%	4.5%
5	2.5%	3.2%	3.9%	4.4%	4.3%	4.0%

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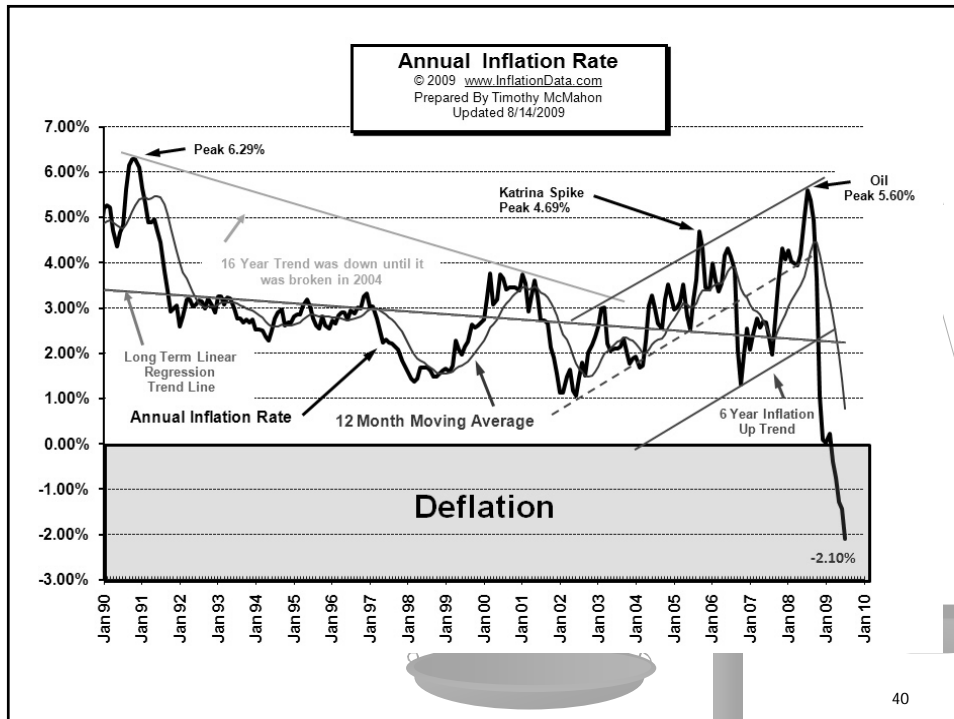
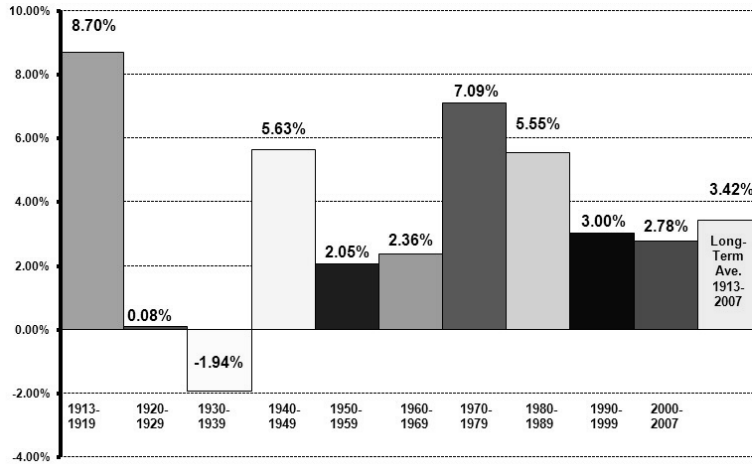
Drawdown Summary

- Drawdown should include portfolio, tax, withdrawal and longevity strategies
- Drawdown studies provide insight into these strategies but should only be used as rules of thumb
- Individual withdrawal strategies should personalize spending behavior and coordinate with set aside reserves, tax management and the IWR

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Impact of Inflation

Average Annual Inflation by Decade
© 2008 InflationData.com



Measuring spending inflation

- Behavioral Finance highlighted the need to understand investing behavior
- The behavioral issues of spending however, have been largely ignored
- Spending inflation is a key component of retirement forecasts
- We have accepted an inappropriate benchmark to measure it?

41

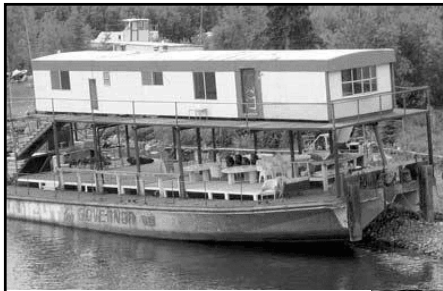
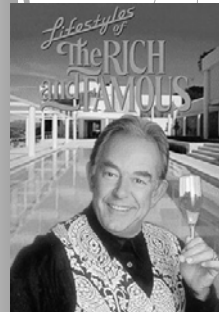
Simulation results

- Real spending inflation of .55% resulted in a reduction of the safe withdrawal rate from 4.5% to 4.19%
- Small errors in understating a client's spending growth rate will understate needs significantly
- Solutions provided to incorporate personalized spending

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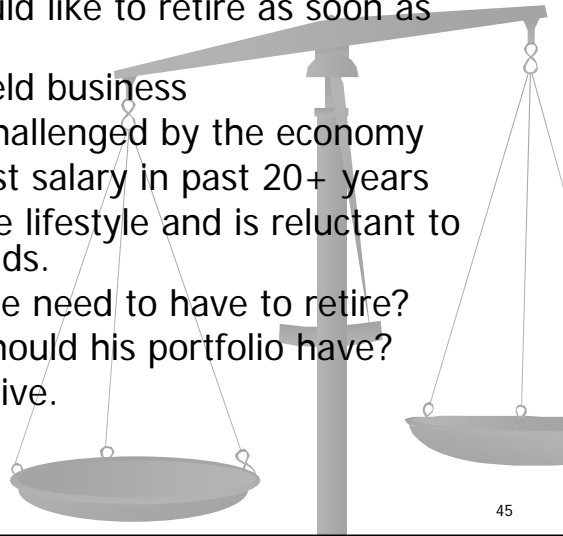
Cash Flow Needs

- A clients' expenses can be the determining factor as to when they can retire and how much they need.
- Some clients have a tough time cutting back expenses even if they wish to retire earlier.
- Good practice to have clients detail their expenses so you can review with them. Often they don't have any idea what they are spending



Example

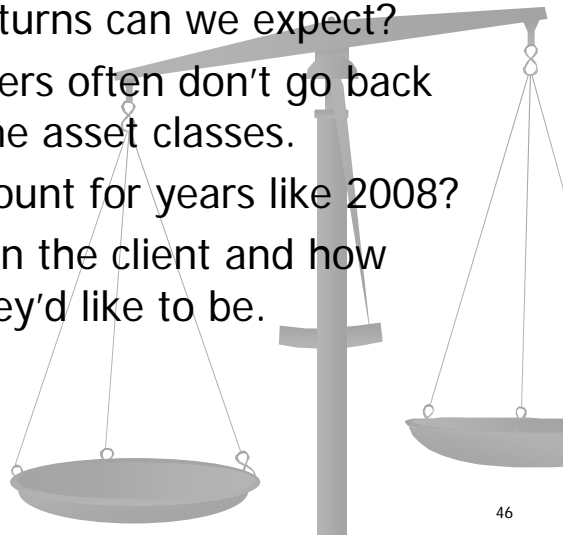
- 54 years old; Would like to retire as soon as possible.
- Sold his closely held business
- Works in a field challenged by the economy
- 2009 will be lowest salary in past 20+ years
- Lives an expensive lifestyle and is reluctant to cut back/cut off kids.
- How much does he need to have to retire?
- What allocation should his portfolio have?
- Give him perspective.



45

Return Assumptions

- What kind of returns can we expect?
- Historical numbers often don't go back very far for some asset classes.
- How do we account for years like 2008?
- Could depend on the client and how conservative they'd like to be.



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Tools

- Excel – Used to give very basic straight return calculations
- Financial Planning Software – Several programs that can run complex analysis.
 - Monte Carlo – most software programs will run these simulations to quantify the chance of success of a portfolio.
 - Worst Case – some software programs will run simulations with bad years occurring at bad times to show a worst case scenario for the portfolio.

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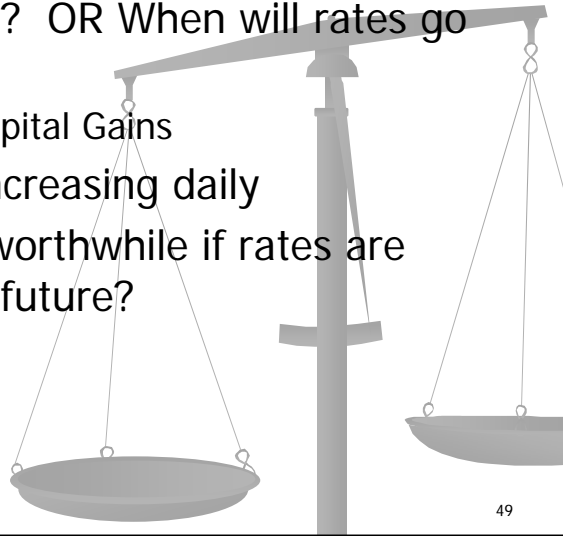
Tax Planning Implications



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Future Tax Rates

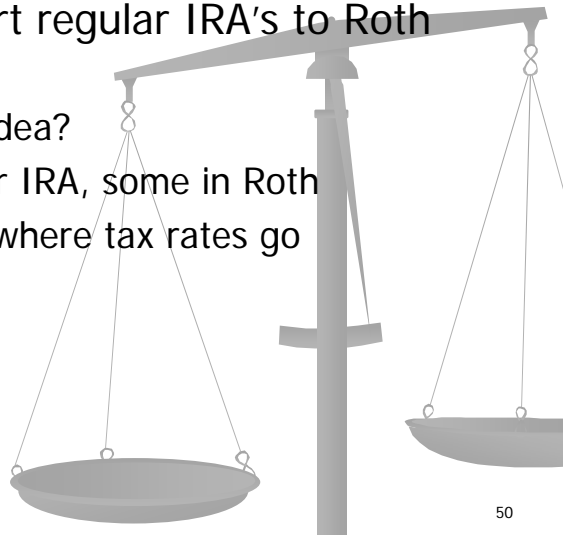
- Will rates go up? OR When will rates go up?
 - Ordinary vs. Capital Gains
- National debt increasing daily
- Is tax deferral worthwhile if rates are much higher in future?



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Roth Decisions

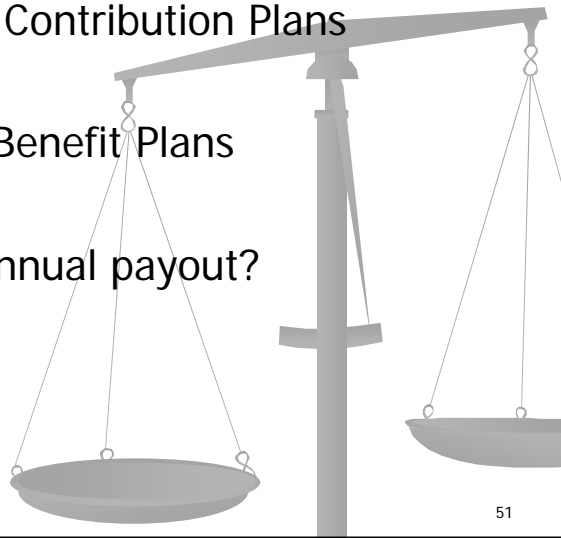
- Ability to convert regular IRA's to Roth IRA's in 2010
 - Is this a good idea?
 - Some in regular IRA, some in Roth
 - Dependent on where tax rates go



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Pension Plans

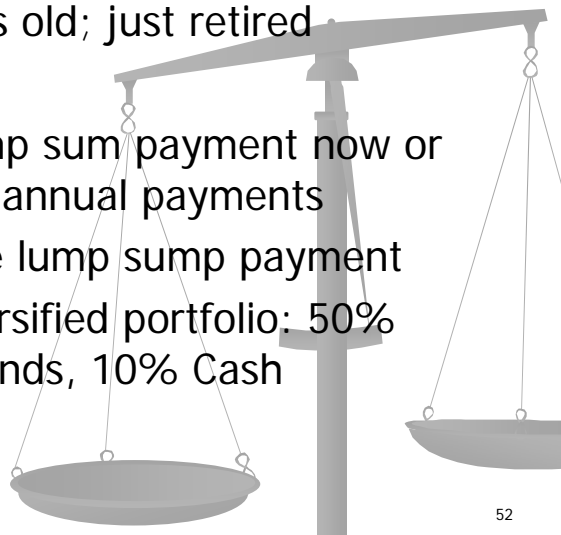
- Rise of Defined Contribution Plans
- Fall of Defined Benefit Plans
- Lump Sum or annual payout?



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Example

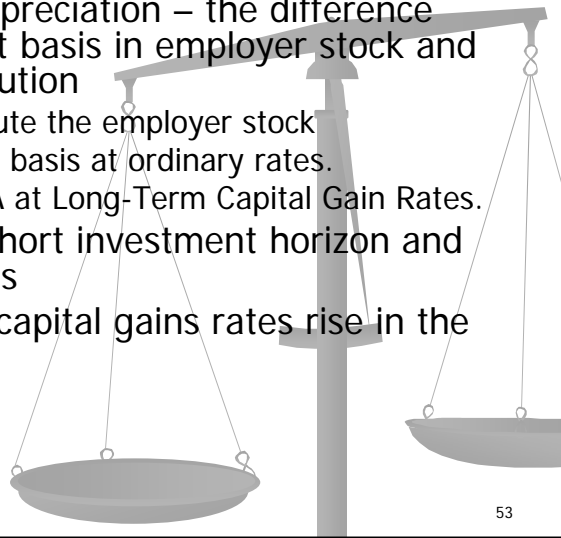
- 61 and 58 years old; just retired
- \$800k portfolio
- \$1.8 million lump sum payment now or \$120k per year annual payments
- Chose to do the lump sum payment
- DCA into a diversified portfolio: 50% Equity, 40% Bonds, 10% Cash



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NUA Election

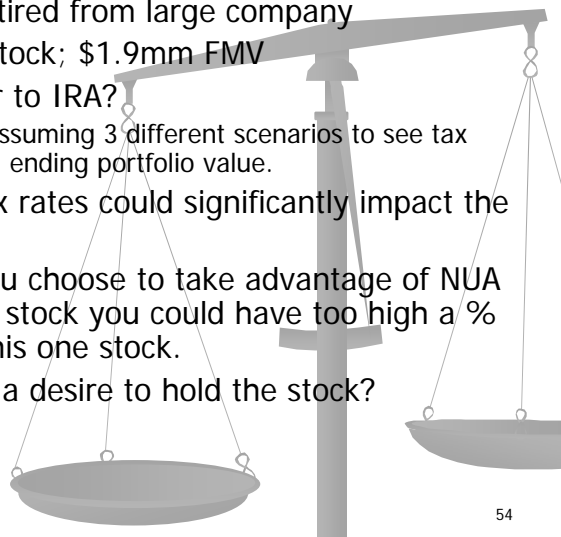
- Net Unrealized Appreciation – the difference between your cost basis in employer stock and the FMV at distribution
 - Election to distribute the employer stock
 - Taxed on the cost basis at ordinary rates.
 - Taxed on the NUA at Long-Term Capital Gain Rates.
- Advantageous if short investment horizon and current cash needs
- Will ordinary and capital gains rates rise in the future?



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Example

- 69 Years old; Just retired from large company
- \$300k cost basis in stock; \$1.9mm FMV
- Distribute or Rollover to IRA?
 - We ran calculations assuming 3 different scenarios to see tax impact and impact on ending portfolio value.
- Changes in future tax rates could significantly impact the analysis
- Diversification – if you choose to take advantage of NUA and distribute all the stock you could have too high a % of your portfolio in this one stock.
- Does the client have a desire to hold the stock?



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Conclusions

- CPA's are uniquely positioned to give good financial advice to clients.
- People are changing their ideas and outlooks for retirement.
- We need to keep in touch with our clients in tough economic times like these.
- It is important to understand drawdown rates and to establish one that works for each individual scenario.
- Inflation is something that cannot be ignored when planning for retirement needs.
- There are many tax planning techniques that can be utilized in retirement planning

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Q&A



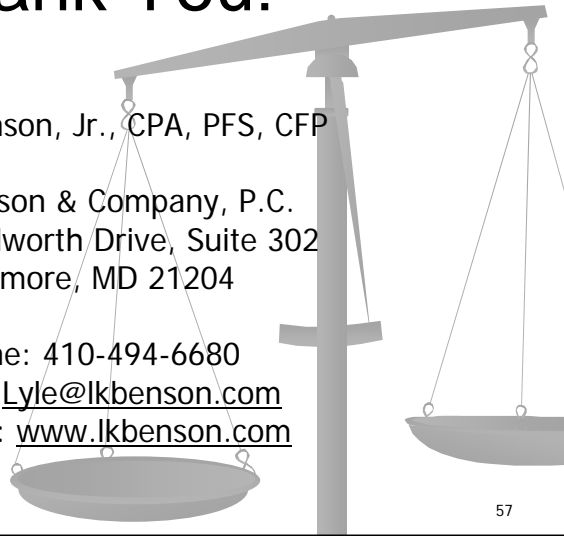
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Thank You!

Lyle K. Benson, Jr., CPA, PFS, CFP

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Phone: 410-494-6680
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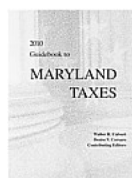
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For more information, contact

CLS Manager Pam Devine
at pam@macpa.org or
(443) 632-2321.



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8 a.m. – noon
Event ID: 141036
- Oct. 2
Rockville, MD
8 a.m. – noon
Event ID: 141033
- Oct. 9
Salisbury, MD
12:30 p.m. - 4:30 p.m.
Event ID: 141040
- Oct. 12
Baltimore, MD
8:30 a.m. – noon
Event ID: 141034
- Oct. 16
Aberdeen, MD
8:00 a.m. – noon
Event ID: 141047
- Nov. 9
Gambrills, MD
2 p.m. – 6 p.m.
Event ID: 141031
- Nov. 12
Frederick, MD
8 a.m. – noon
Event ID: 141035
- Dec. 4
Cumberland, MD
8 a.m. – noon
Event ID: 141038



SPEAKER BIOGRAPHIES

L.K. BENSON & COMPANY, P.C.
FINANCIAL PLANNING, TAX & INVESTMENT ADVISORY SERVICES
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LYLE K. BENSON, JR., CPA, PFS, CFP

Lyle K. Benson, Jr. is the President and Founder of L.K. Benson & Company, a CPA/Financial Planning firm based in Baltimore, Maryland. The firm specializes in personal financial planning, tax and investment advisory services for high income individuals and families as well as corporate executives and entrepreneurial, closely held business owners across the country. Prior to starting the firm in 1994, he was a partner in a local CPA firm, building their financial planning practice over a fifteen year period.

Lyle has a B.A. in Accounting from Loyola College in Maryland, a Masters of Science in Taxation from the University of Baltimore. His profession designations include CPA, PFS (Personal Financial Specialist), and CFP (Certified Financial Planner).

As a leader in the financial planning and accounting professions, he has served in many roles of various professional organizations over the past 25 years including the AICPA PFP Division Executive Committee, National Accreditation Committee (AICPA), and Baltimore Association for Financial Planning. He has also chaired numerous national conferences including the AICPA Personal Financial Planning Investment Conference and AICPA Retirement Planning Conference. Lyle helped to found and is the President of the Association of CPA Financial Planners, (an organization of PFS). Currently, he is chair of the Media Task Force of the AICPA PFP Section. He has taught courses for various state CPA societies, spoken at numerous conferences around the country, and developed and taught a graduate level course in Personal Financial Planning at the University of Baltimore.

His accomplishments include earning the AICPA Personal Financial Division Distinguished Service Award, being named to the *Worth Magazine* Top 250 Financial Advisors, and named as One of the 100 Most Influential People in the Accounting Profession by *Accounting Today*.

Lyle has also been active in numerous civic charitable organizations including: the University of Baltimore Alumni Association, Cloverland Community Association where he serves as president, Baltimore Junior Association of Commerce, and is a past President of the Loyola College Alumni Association.

John P. Edgar, Esq.

Ober Kaler - Principal

jpedgar@ober.com

410-347-7374

Experience

An experienced estates and trusts lawyer, Jack advises a large and diverse group of wealthy clients in estate and trust planning and administration, as well as related tax and business planning issues. His practice includes all aspects of trusts and estates law, including estate planning; advising clients on estate, gift, GST and income tax issues; drafting trusts and other sophisticated planning vehicles; advising trustees and personal representatives; preparing tax returns; administering estates; planning for retirement assets; planning for business succession and other issues for closely held businesses; charitable gift planning; fiduciary litigation and related areas. Jack is a former managing director of the Trust Advisory Group at Legg Mason Investment Counsel & Trust Company, where he supervised the corporate trustee, wealth advisory and custody functions of the organization. He is a frequent author and speaker on estate and trust planning matters.

Admitted

- Court of Appeals of Maryland

Education

- University of Virginia School of Law, J.D., 1990
- Syracuse University, B.A., magna cum laude, 1985
- Honors Program
- Phi Beta Kappa
- Ober, Kaler, Grimes & Shriver | www.ober.com

Honoraries

- List in Maryland Super Lawyers for Estate Planning & Probate, 2008-2009

Professional Background

- Managing Director, Trust Advisory Group, Legg Mason Investment Counsel & Trust Company, N.A.
- Partner, Venable, LLP

Jeffrey S. Glaser, Esq.

Jeffrey S. Glaser is special counsel with the law firm Saul Ewing LLP. His primary areas of practice include estate planning, probate law, charitable giving, family succession planning, tax and corporate. Mr. Glaser has spoken to various business groups, civic groups, and charitable organizations on these matters. Mr. Glaser has lectured for and is co-author of the "Basic Estate Tax Planning" course and the "Using and Drafting Trusts in Estate Planning" course for the Maryland Institute for Continuing Professional Education of Lawyers (MICPEL). He has also authored materials for and lectured to other continuing education organizations and professional organizations, including MACPA. Mr. Glaser earned his B.A. from Boston College, his M.A. from the University of Maryland Graduate School (economics) and his J.D., cum laude, from the University of Maryland School of Law. He is a member of the Baltimore Estate Planning Council, the Maryland State Bar Association (member, Estate and Trust Law section), the Baltimore Charitable Planned Giving Roundtable, and the Maryland State Bar Association Gift and Estate Tax study group.

Gina D. Shaffer, Esquire

Ms. Shaffer is in her eighth year of law practice. She worked for two (2) years at Miles & Stockbridge in its Columbia office. Her focus was estates & trusts and elder law during that time. When she began her solo practice in Harford County in 2003, she continued to work in these areas. She represents all individuals with their estate planning, which often include use of Special Needs Trusts, also known as Supplemental Needs Trusts. She serves on the Maryland State Bar Association Elder Law Section Council and is the Chairperson of MSBA Solo and Small Firm Section Council. She also serves on the Board of Harford Family House, a nonprofit organization that provides transitional housing to homeless families with children and on the Board of the Community Foundation for Harford County.

MS CONSULTANTS, LLC



Roger Upton, CPA co-founded MS Consultants, LLC in 1999 to specialize in Building Cost Segregation Studies (CSS), Fixed Asset Reviews (FAR) and Repair vs. Capitalization Reviews (RCR), along with other innovative tax saving ideas for Real Estate Owners and Developers.

MS Consultants has grown to become one of the largest providers of these services in the country, having performed over 6,000 Studies and Reviews since 1999. MS's client list includes Publicly Traded Companies, members of Retail Traffic's Top 100 Owners, members of foreign royal families, and members of Forbes Top 400 Richest Americans.

When it comes to Real Estate income tax issues, Roger and MS Consultants are strong advocates for Real Estate Owners and Developers, and his "Trusted Advisor" clients frequently use Roger as a Tax Resource for various real estate income tax issues they encounter. He is the co-author for CCH's *Taxes* magazine column, "Concrete Advice & More," an author of articles for the National Association of Industrial and Office Properties (NAIOP) Federal Affairs website, and has published articles and received honorariums for speaking on real estate income tax issues.

In addition, in 2004 when the IRS requested comments and feedback regarding Repairs vs. Capitalization, Roger was the only responding commentator who focused solely on the issues facing Real Estate Owners. In 2006, the IRS issued Proposed Regulations regarding the subject, and asked for additional comments. Once again, Roger was one of a few to respond to the IRS, strongly pointing out the unfair treatment that Real Estate Owners would receive under these proposed rule changes. The IRS listened, and in an unusual move, "recalled" the Proposed Regulations, replacing them in 2008 with a much more favorable proposal.

Professional Involvement

National Association of Industry and Office Property owners (NAIOP)'s Government Affairs Tax and Finance Committee - member and former chairman

Treasurer, Campaign Committee for several United States Congressmen

Columnist, "Concrete Advice & More" in CCH's *Taxes* magazine

Member, American Institute of CPAs and New York State Society of CPAs

Expert Witness - Federal Court - Repair vs. Capitalization

Education

Bachelor of Business Administration - St. Bonaventure University - 1981 - graduated Cum Laude

Certified Public Accountant - Licensed in New York since 1983.

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 - renewable subscriptions
 - basic, intermediate and advanced level courses
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- All for the members-only price of \$165**



UPCOMING MACPA SEMINARS AND CONFERENCES

Crystal Reports XI - Fundamentals of Report Design I (Introduction to Crystal)

Date: 09/18/09

Location: MACPA Columbia Center

Event ID: 173002

Auditing Real-World Frauds: A Practical Case Application Approach

Date: 09/21/09

Location: Sheraton Annapolis Hotel - Annapolis

Event ID: 111048A

Navigating the New FASB Codification: Research Real-Life Accounting Issues

Date: 09/21/09

Location: MACPA Columbia Center

Event ID: 111009

FIN 48-Uncertainty in Income Taxes: A Must Know for Tax CPAs and Accountant

Date: 09/21/09

Location: MACPA Columbia Center

Event ID: 111010

AICPA/AHI Staff Training -- Semi-Senior

Date: 09/21/09

Location: Holiday Inn - Columbia

Event ID: 311000

AICPA/AHI Staff Training -- Basic

Date: 09/21/09

Location: Holiday Inn - Columbia

Event ID: 311001

AACC: Social Security Update

Date: 09/21/09

Location: Kaufmann's - Gambrills

Event ID: 141044

Disaster Recovery for all Computer Users; An Essential Part

Date: 09/22/09

Location: MACPA Columbia Center

Event ID: 182023

Accounting for Income Taxes -- Applying SFAS No. 109/FIN 48: A Whole New Ballgame

Date: 09/22/09

Location: MACPA Columbia Center

Event ID: 111049A

UPCOMING MACPA SEMINARS AND CONFERENCES

Fair Value Accounting -- A Critical New Skill for All CPAs

Date: 09/23/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111051A

The Complete Guide to IRC Section 1031 Tax Deferred Exchanges

Date: 09/23/09

Location: Holiday Inn - Columbia

Event ID: 111050

Are You Ready for IFRS? Moving Beyond the Basics

Date: 09/23/09

Location: MACPA Columbia Center

Event ID: 211007A

CAC: Not-for-Profit Accounting & Auditing Update

Date: 09/25/09

Location: Golden Bull Grand Cafe - Gaithersburg

Event ID: 141049

Webcast! Blue Ocean Innovation: Market-Taker to Market-Maker

Date: 09/25/09

Location: Online Webcast - Internet

Event ID: 17W090

Executive Finance for Operating Leaders: Relating Numbers and Metrics

Date: 09/28/09

Location: MACPA Columbia Center

Event ID: 171044

Real Estate Accounting and Financial Reporting: Tackling the Complexities

Date: 09/29/09

Location: Holiday Inn - Columbia

Event ID: 111054A

Advanced Tax Strategies for LLC & Partnership Transactions

Date: 09/30/09

Location: Clarion Inn & Fundome - College Park

Event ID: 111055A

Everyday Economics

Date: 09/30/09

Location: Holiday Inn - Columbia

Event ID: 171045

UPCOMING MACPA SEMINARS AND CONFERENCES

Keeping Up With Accounting – Professional Issues Update-Fall, 2009

Date: 10/01/09

Location: Sheraton Columbia Hotel - Columbia

Event ID: 141036

Excel 2007 Power User: Macro Programming using Visual Basic for Applications

Date: 10/02/09

Location: MACPA Columbia Center

Event ID: 133019

Keeping Up With Accounting – Professional Issues Update-Fall, 2009

Date: 10/02/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 141033

CAC: The New Form 990 : In Depth Discussions and Lessons Learned

Date: 10/02/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 141045

Accounting & Auditing Current Developments

Date: 10/05/09

Location: Holiday Inn - Columbia

Event ID: 111057

Lean Accounting for Service and Nonmanufacturing Businesses

Date: 10/05/09

Location: MACPA Columbia Center

Event ID: 111058A

Insurance Agencies and Brokerages: Accounting and Tax Issues

Date: 10/06/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111059

Excel 2007 Worksheets Refresher and New Features

Date: 10/06/09

Location: MACPA Columbia Center

Event ID: 133016

Webcast! Form 990 Preparation -- Compensation to Managers

Date: 10/06/09

Location: Online Webcast - Internet

Event ID: 17W095

UPCOMING MACPA SEMINARS AND CONFERENCES

Ethics, Leadership and the Role of the CPA

Date: 10/06/09

Location: The Legacy - Rockville

Event ID: 171013

Corporate Finance Tune-up -- Putting the Right Skills in Your Analytical Toolbox

Date: 10/07/09

Location: MACPA Columbia Center

Event ID: 171046

Form 990: Moving Beyond the Basics

Date: 10/08/09

Location: MACPA Columbia Center

Event ID: 111063A

Webcast! Form 990 Preparation -- Reporting on the Board and on Governance Overall

Date: 10/08/09

Location: Online Webcast - Internet

Event ID: 17W102

Webcast! Form 990 Preparation -- Application of the Newly-Revised "Public Support" Tests

Date: 10/08/09

Location: Online Webcast - Internet

Event ID: 17W103

Excel 2007 Data Analysis Features, Data Functions and Maintaining Data Integrity

Date: 10/09/09

Location: MACPA Columbia Center

Event ID: 133017

CAC: Employment Law Update

Date: 10/09/09

Location: Golden Bull Grand Cafe - Gaithersburg

Event ID: 141026

Listening For Leaders: Ask the Question, Discover the Need, Win the Trust

Date: 10/12/09

Location: Sheppard Pratt Health Systems - Baltimore

Event ID: 171054

Keeping Up With Accounting – Professional Issues Update-Fall, 2009

Date: 10/12/09

Location: Sheppard Pratt Health Systems - Baltimore

Event ID: 141034

UPCOMING MACPA SEMINARS AND CONFERENCES

Sharp-Witted Studies on Single Audit and Yellow Book Snafus

Date: 10/12/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111064A

A Matter of Integrity: CPA Ethics & Leadership Today

Date: 10/13/09

Location: Gateway Building - Columbia

Event ID: 171015

Technology For CPAs: Don't Get Left Behind

Date: 10/13/09

Location: MACPA Columbia Center

Event ID: 111164

Governmental & Nonprofit Annual Update

Date: 10/13/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 111065A

Audits of HUD-Assisted Projects

Date: 10/14/09

Location: Sheppard Pratt Health Systems - Baltimore

Event ID: 111066A

Tech Forum: Elements of an attractive and search optimized website

Date: 10/14/09

Location: MACPA Columbia Center

Event ID: 182017

Partner's Audit Engagement Documentation and Review

Date: 10/16/09

Location: MACPA Columbia Center

Event ID: 111068A

Accounting Services, Compilations and Reviews -- Solving the Documentation Riddle

Date: 10/19/09

Location: Clarion Inn & Fundome - College Park

Event ID: 111070A

QuickBooks new Features from the Accounting Perspective

Date: 10/19/09

Location: MACPA Columbia Center

Event ID: 135010

UPCOMING MACPA SEMINARS AND CONFERENCES

New FASB Developments for Business & Industry

Date: 10/19/09

Location: Handelman Learning Center - Columbia

Event ID: 111011

Public Company Audit Update: PCAOB Developments

Date: 10/19/09

Location: Handelman Learning Center - Columbia

Event ID: 111012

AACC: Forensic Accounting Techniques in Audit Engagements

Date: 10/19/09

Location: Kaufmann's - Gambrills

Event ID: 141017

Webcast! Best Practices in Accounting and Finance Writing: Putting Ideas in Order

Date: 10/20/09

Location: Online Webcast - Internet

Event ID: 17W096

Creative Strategies for Buying, Selling, or Gifting a Business

Date: 10/22/09

Location: Clarion Inn & Fundome - College Park

Event ID: 111075

Webcast! Best Practices in Accounting and Finance Writing: Being Clear and Accurate

Date: 10/22/09

Location: Online Webcast - Internet

Event ID: 17W097

Basis/Distributions for Pass-Through Entities -- An IRS Hot Spot

Date: 10/23/09

Location: Loews Annapolis Hotel - Annapolis

Event ID: 111076A

Webcast! Ethics, Leadership and the Role of the CPA

Date: 10/23/09

Location: Online Webcast - Internet

Event ID: 17W094

Introduction to the Accounting Requirements of Government Contracts

Date: 10/26/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111077

UPCOMING MACPA SEMINARS AND CONFERENCES

Innovative Tax Planning for Small Businesses: Corporations, Partnership

Date: 10/26/09

Location: MACPA Columbia Center

Event ID: 111079A

AICPA/AHI Staff Training -- Beginning In-Charge

Date: 10/26 - 28

Location: Holiday Inn - Columbia

Event ID: 311002

AICPA/AHI Staff Training -- Supervisory

Date: 10/26 - 28

Location: Holiday Inn - Columbia

Event ID: 311003

2009 PRACTITIONERS' CONFERENCE

Date: 10/27/09

Location: Martin's West - Baltimore

Event ID: 121010

Pricing for Profitability (for Industry)

Date: 10/27/09

Location: MACPA Columbia Center

Event ID: 171048

Closely Held Business Taxation: 49 Practical Ways to Cut Taxes

Date: 10/27/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 111080A

Employee Benefit and Retirement Planning: Pension and Deferred Compensation

Date: 10/28/09

Location: Sheraton Columbia Hotel - Columbia

Event ID: 111081

Form 990 -- AICPA's Answer to Unlocking the Tax Complexities

Date: 10/28/09

Location: Sheraton Columbia Hotel - Columbia

Event ID: 111082A

Estate and Financial Planning for the Older Client

Date: 10/29/09

Location: Sheraton Annapolis Hotel - Annapolis

Event ID: 111084

UPCOMING MACPA SEMINARS AND CONFERENCES

Webcast: FASB Codification: What it means to you is...

Date: 10/29/09

Location: Online Webcast - Internet

Event ID: 17W092

24th ANNUAL ADVANCED PERSONAL FINANCIAL PLANNING CONFERENCE

Date: 10/30/09

Location: Martin's West - Baltimore

Event ID: 121007

Malpractice Risks: Navigating The New Frontier

Date: 10/30/09

Location: MACPA Columbia Center

Event ID: 112023

CAC: Forensic Accounting: Current Trends and Hot Topics

Date: 10/30/09

Location: Golden Bull Grand Cafe - Gaithersburg

Event ID: 141046

Accounting & Auditing Current Developments

Date: 11/02/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111089

Estate Planning Essentials: Tax Relief for Your Clients' Estates

Date: 11/02/09

Location: MACPA Columbia Center

Event ID: 111087A

IRAs, ROTH IRAs, SIMPLEs, and SEPs: Contributions, Rollovers, Distribution

Date: 11/03/09

Location: MACPA Columbia Center

Event ID: 111091A

MACPA's 1040 Fast Track - A Comprehensive Individual Tax Seminar

Date: 11/04/09

Location: Columbia Hilton - Columbia

Event ID: 211003

Security for Accountants: New Legal Requirements and Practical Solutions

Date: 11/05/09

Location: MACPA Columbia Center

Event ID: 111167

UPCOMING MACPA SEMINARS AND CONFERENCES

Don Farmer's Corporate/Business Income Tax Workshop

Date: 11/06/09

Location: Martin's West - Baltimore

Event ID: 111000

Word 2007 Document Technology for CPAs - New Document Designs, Formatting Collaboration and Security Features

Date: 11/06/09

Location: MACPA Columbia Center

Event ID: 133020

PowerPoint 2007: Creating Dynamic Financial Presentations Incorporating Data, Graphs & Diagrams

Date: 11/06/09

Location: MACPA Columbia Center

Event ID: 133021

Webcast! Leadership and Generations: What Are They Thinking?

Date: 11/06/09

Location: Online Webcast - Internet

Event ID: 17W098

The Psychology of Planning

Date: 11/09/09

Location: MACPA Columbia Center

Event ID: 111092

AACC: Keeping Up With Accounting – Professional Issues Update-Fall, 2009

Date: 11/09/09

Location: Kaufmann's - Gambrills

Event ID: 141031

A Matter of Integrity: CPA Ethics & Leadership Today

Date: 11/10/09

Location: Sheppard Pratt Health Systems - Baltimore

Event ID: 171018

A Practitioner's Guide to IRAs and Qualified Retirement Plans

Date: 11/10/09

Location: MACPA Columbia Center

Event ID: 111094

What's New for Accounting Professionals from Intuit

Date: 11/11/09

Location: MACPA Columbia Center

Event ID: 111170

UPCOMING MACPA SEMINARS AND CONFERENCES

Webcast: IFRS for Small- and Medium- Sized Entities

Date: 11/11/09

Location: Online Webcast - Internet

Event ID: 17W093

CAC: International Tax Considerations for a Maryland Company Going Global / Taxation and Captives

Date: 11/13/09

Location: Golden Bull Grand Cafe - Gaithersburg

Event ID: 141052

Webcast! Best Practices in Accounting and Finance Writing: Putting Ideas in Order

Date: 11/13/09

Location: Online Webcast - Internet

Event ID: 17W099

Access Level 1: 2007

Date: 11/16/09

Location: MACPA Columbia Center

Event ID: 135015

Webcast! Growing Your Business Through Trusted Relationships

Date: 11/16/09

Location: Online Webcast - Internet

Event ID: 17W104

Tax Update for Pass-Through Entities: S Corporations, Partnerships and LLCs

Date: 11/16/09

Location: The Legacy - Rockville

Event ID: 111096A

4 FOR FALL: Accounting and Auditing Update

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111019

4 FOR FALL: Advanced Issues in Compilation, Review, and Accounting Services

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111020

4 FOR FALL: The Revised Yellow Book for Financial Audits

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111021

UPCOMING MACPA SEMINARS AND CONFERENCES

4 FOR FALL: Annual Update for State & Local Governments and Not-for-Profits

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111022

4 FOR FALL: Hottest Tax Planning Developments for 2009

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111023

4 FOR FALL: S Corporations: Strategies from Formation to Termination

Date: 11/17/09

Location: Gateway Building - Columbia

Event ID: 111024

Access Level 2

Date: 11/18/09

Location: MACPA Columbia Center

Event ID: 135016

4 FOR FALL: Compilation Engagements: Mastering the Fundamentals

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111025

4 FOR FALL: Navigating the New FASB Codification: Research Real-Life Accounting Issues

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111026

4 FOR FALL: Frequent Frauds Found in Not-for-Profits

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111027

4 FOR FALL: AICPA's 2009 Individual Tax Review & Update: Real World Applications

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111028

4 FOR FALL: Preventing Common OMB A-133 & Yellow Book Deficiencies: A Case Study Approach

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111029

UPCOMING MACPA SEMINARS AND CONFERENCES

4 FOR FALL: Innovative Tax Tips for Individuals

Date: 11/18/09

Location: Gateway Building - Columbia

Event ID: 111030

Don Farmer's Individual Income Tax Workshop

Date: 11/19/09

Location: Martin's West - Baltimore

Event ID: 211000

QuickBooks 2009 Comprehensive Training

Date: 11/19/09

Location: MACPA Columbia Center

Event ID: 233001

Webcast! Best Practices in Accounting and Finance Writing: Being Clear and Accurate

Date: 11/20/09

Location: Online Webcast - Internet

Event ID: 17W100

Health Savings Accounts, Health Reimbursement Arrangements, and Flexible Spending Accounts

Date: 11/23/09

Location: MACPA Columbia Center

Event ID: 111116

Webcast! Growing Your Business Through Trusted Relationships

Date: 11/23/09

Location: Online Webcast - Internet

Event ID: 17W105

Strategies for Buying, Selling, and Gifting a Closely Held Business

Date: 11/24/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 111118

Advanced Income Tax Accounting - Including Practical Application Exercises

Date: 11/24/09

Location: MACPA Columbia Center

Event ID: 111117A

Webcast! Getting Things Done - Engaging People to Execute Effectively

Date: 11/24/09

Location: Online Webcast - Internet

Event ID: 17W101

UPCOMING MACPA SEMINARS AND CONFERENCES

Outlook 2007 New Features Update for CPAs: Client Contact, Scheduling and Communication Management

Date: 11/30/09

Location: MACPA Columbia Center

Event ID: 133023

Excel 2007: New Charting Features, Graphs and Diagrams

Date: 11/30/09

Location: MACPA Columbia Center

Event ID: 133024

Webcast! Growing Your Business Through Trusted Relationships

Date: 11/30/09

Location: Online Webcast - Internet

Event ID: 17W106

Excel 2007: Advanced Part 1: Advanced Functions, Pivot Tables and Tips

Date: 12/01/09

Location: MACPA Columbia Center

Event ID: 133031

Crystal Reports XI - Fundamentals of Report Design I (Introduction to Crystal)

Date: 12/02/09

Location: MACPA Columbia Center

Event ID: 173003

Financial Statement Analysis -- Basis for Management Advice

Date: 12/03/09

Location: Bowie Comfort Inn Hotel & Conference Center - Bowie

Event ID: 171049A

Excel 2007: Advanced Part 2: Worksheet Reporting Features and Tips

Date: 12/03/09

Location: MACPA Columbia Center

Event ID: 133036

Don Farmer's 2009 Tax Update

Date: 12/04/09

Location: Martin's West - Baltimore

Event ID: 111001

Internal Control Procedures for QuickBooks Users

Date: 12/04/09

Location: MACPA Columbia Center

Event ID: 133033

UPCOMING MACPA SEMINARS AND CONFERENCES

CAC: Federal Tax Update

Date: 12/04/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 141050

Introduction to Windows: Vista Operating System

Date: 12/07/09

Location: MACPA Columbia Center

Event ID: 133034

2009 TECHNOLOGY CONFERENCE

Date: 12/07/09

Location: Sheraton Columbia Hotel - Columbia

Event ID: 121009

AACC: Federal Tax Update-AM Session

Date: 12/07/09

Location: Kaufmann's - Gambrills

Event ID: 141053

AACC: Federal Tax Update-PM Session

Date: 12/07/09

Location: Kaufmann's - Gambrills

Event ID: 141054

Webcast! Growing Your Business Through Trusted Relationships

Date: 12/07/09

Location: Online Webcast - Internet

Event ID: 17W107

Troublesome Tax Issues for Federal Payroll Taxes, Benefits and Form 1099

Date: 12/07/09

Location: The Legacy - Rockville

Event ID: 111119A

A Matter of Integrity: CPA Ethics & Leadership Today

Date: 12/08/09

Location: Holiday Inn - Columbia

Event ID: 171019

Maryland Sales & Use Tax

Date: 12/08/09

Location: MACPA Columbia Center

Event ID: 111033

UPCOMING MACPA SEMINARS AND CONFERENCES

Cost Allocation in Nonprofits -- Who Gets It?

Date: 12/08/09

Location: Johns Hopkins University - Montgomery County Campus - Rockville

Event ID: 111122A

Accounting and Reporting Practices of Not-for-Profit Organizations

Date: 12/10/09

Location: Sheraton Annapolis Hotel - Annapolis

Event ID: 111124A

Excel 2003 Worksheets Refresher

Date: 12/10/09

Location: MACPA Columbia Center

Event ID: 133035

The CPA's Guide to LLCs and FLPs

Date: 12/10/09

Location: The Legacy - Rockville

Event ID: 111125

Cost Management and Improvement for Accounting and Finance Professionals

Date: 12/11/09

Location: MACPA Columbia Center

Event ID: 173004

Webcast! Growing Your Business Through Trusted Relationships

Date: 12/14/09

Location: Online Webcast - Internet

Event ID: 17W108

Strategies for Dragging your Children into Financial Independence

Date: 12/17/09

Location: MACPA Columbia Center

Event ID: 111130

Social Security Benefits -- Advising Clients

Date: 12/18/09

Location: Sheraton Annapolis Hotel - Annapolis

Event ID: 111137

The Revised Yellow Book -- Government Auditing Standards

Date: 12/18/09

Location: MACPA Columbia Center

Event ID: 111135A

UPCOMING MACPA SEMINARS AND CONFERENCES

International versus U.S. Accounting -- What in the World is the Difference?

Date: 12/18/09

Location: The Legacy - Rockville

Event ID: 111136A

Life Insurance Mysteries: The CPA's Guide

Date: 12/21/09

Location: MACPA Columbia Center

Event ID: 111139

Visual Estate Planning

Date: 12/22/09

Location: MACPA Columbia Center

Event ID: 111140

