

# Southern Arizona Estate Planning Council

3900 E. Timrod St  
TUCSON, ARIZONA 85711-4170  
admin@saepc.org  
www.SAEPC.org

**PRESENTS**

## *The State of Estate Planning*

**October 28, 2014**

**Arizona Inn  
Tucson, AZ**



# THE STATE OF ESTATE PLANNING

Shelley B. Thompson  
Seyfarth Shaw LLP

John T. Rogers, Jr.  
Seyfarth Shaw LLP

SAEPC  
October, 2014

---

---

---

---

---

---

---

---

## OVERVIEW

1. Past: Reflections on 10 (or 50) Years
2. Present: Tax Today
3. Future: What to Do Now?
4. Some Case Studies
5. Lessons from the Sterling Saga
6. Final Thoughts

---

---

---

---

---

---

---

---

## PAST: REFLECTIONS ON 10 (OR 50) YEARS OF GIFT AND ESTATE TAX

---

---

---

---

---

---

---

---





### Where are we, now?

- Gift and estate tax unlikely to come back as major force
  - Also unlikely to just go away
    - Dynasty trust crowd wins
- Other taxes become more of a concern
  - E.g., capital gains, taxes on interest and dividends
    - It's all about basis
- (Still) wealth – U.S. personal wealth at all time high – so planning focuses on:
  - Intra-generational security
    - E.g., health care
  - Asset protection
    - Capital flight from US?
  - Succession planning without estate tax
    - More litigation?

---

---

---

---

---

---

---

---

### What to Expect Going Forward

- Deficit-driven tax policy
  - Locking for low salience taxes
  - General theme of base broadening/rate lowering
- Look for:
  - Continued attack on personal deductions under income tax
    - Charitable contributions, state and local taxes, mortgage interest?, employer provided health insurance?
  - Corporate tax reform
    - Domestic and International
  - More miscellaneous "small" taxes and tax increases
  - State and local taxes increasing
  - Nothing on gift and estate tax

---

---

---

---

---

---

---

---

### FUTURE: WHAT TO DO NOW?

---

---

---

---

---

---

---

---

**What to do Now, Part A: Go Back to Basics: Tax Planning 101**

- Review:
- Buy
- Borrow
- Die

---

---

---

---

---

---

---

---

**Tax Planning 101**

- **The Practical Significance**
  - Buy low yield, highly capital appreciating assets
    - Realization requirement
    - Buy and hold investing
    - Sell losers, hold winners
    - Now more than ever
      - High taxes on capital gains, dividends etc
  - Borrow
    - Non taxation of debt under income/estate taxes
    - More to come on gift and estate
  - Die
    - Continued stepped-up basis, for all assets and estates
      - For most Americans, even wealthy Americans, 2013 and beyond better than 2010 (no estate tax but carry over basis); see McCaffery, Tax Notes, February 2013

---

---

---

---

---

---

---

---

**Tax Planning 101**

- **Untouched by tax reform, 1913-2013**
  - Happy birthday, income tax
- **ATRA (and TRA 2010) keep stepped-up basis in place**
  - Very sacred cow

---

---

---

---

---

---

---

---

### What to do Now, Part B: Planning after ATRA 2012

- Estate Tax Exemption levels
  - \$5.34M/10.68M for couples
  - Inflation adjustments to come
    - And come and come .....
  - 99.7% out of estate tax
- Rates
  - Estate tax 40%
  - Capital gains in high tax states close to 40% (Obama-care, phase-outs, etc)
- Resulting Planning Advice:
  - Don't gift low basis/high value assets!
    - But have more such assets (Buying still works)
    - Hold on for/rebalance after 1<sup>st</sup> death (Dying still works)

---

---

---

---

---

---

---

---

---

---

### So .....

- Borrow!
- Borrowing generally good tax planning (buy/borrow/die), now more so than ever
- Plus .....

---

---

---

---

---

---

---

---

---

---

### Low Interest Rates

- 2014 AFRs:

	Primary	Residual
Short (up to 3 years)	.25	.35
Mid (up to 9 years)	1.75	1.86
Long	3.49	2.97

---

---

---

---

---

---

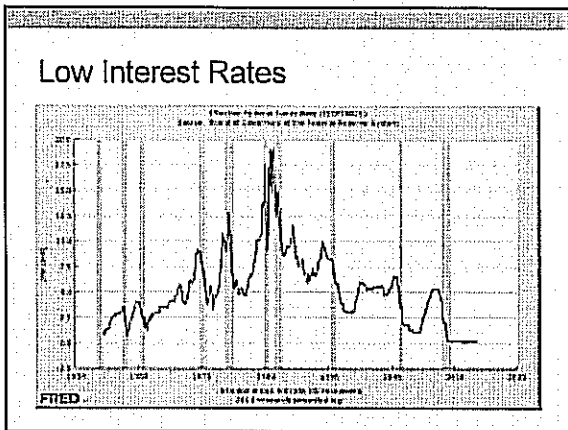
---

---

---

---






---

---

---

---

---

---

---

---

---

---

---

---

### Planning with Low Interest Rates

- Families with Cash can give away Cash
  - Annual gifts
  - Insurance trusts
  - Dynasty game still big!
- For Families without Cash, Borrow:
  - Debt reduces net taxable estate tax
  - Partial freeze
    - Interest payments to 3P lender reduce estate
    - Growth of capital at G-2 or below level
  - Lie in wait for step up
    - 1<sup>st</sup> to die in community property state like California and Arizona
      - Consider transmuting . . .

---

---

---

---

---

---

---

---

---

---

---

---

### Planning with Low Interest Rates

- Families without Exemption can Borrow *and* Lend
  - Debt reduces net taxable estate tax
  - Proceeds of debt can be lent to kids/grandkids for AFR notes
    - Interest payments to 3P lender reduce G1 estate
    - Notes from G-2 or below level can be *discounted*
    - Capital appreciation at G2 or lower level

---

---

---

---

---

---

---

---

---

---

---

---

### One more note . . .

- It's all about basis
- But no longer strong incentive to *undervalue*
- Nontaxable estates – 99.7%! – have tax reasons to over-state basis
  - Shift in focus for IRS, appraisers, others

---

---

---

---

---

---

---

---

## SOME CASE STUDIES

---

---

---

---

---

---

---

---

### Case Study 1

- Case 1: Couple under \$10M, house and appreciated assets
- Don't gift assets!
- Incentive to overvalue in first to die estate
  - E.g., 6M couple:
    - Could say 2.3's, portability gives 7M exemption to survivor
    - Or could say 2.5's, survivor gets "extra" 4M basis (in California or Arizona, community property) to depreciate/offset capital gains etc.
    - Non pro rata allocations shift depreciation to survivor.
- Way to pass wealth to kids now:
  - Borrow and give

---

---

---

---

---

---

---

---

### Case Study 2

- Couple at 15M, full exemption, house plus appreciated assets
  - Facing 2M tax (40% over 10M)
  - Borrow 15M, buy investment real estate, etc.
  - Create FLPs with 15M, high basis recent purchases
  - Gift FLPs to kids, using 10M exemption and 33% discount
- Zeroed out estate:
  - Original 15M of assets, minus
  - 15M of debt

---

---

---

---

---

---

---

---

### Case Study 3

- Couple, no exemption, 50M, appreciated assets
  - Facing 20M tax
  - Borrow 50M
  - Loan to kids/grandkids for AFR Notes
  - Notes get 40% discount in estate
- Estate now 50M assets – 50 M debt + 30M fmv of notes
  - 12M, savings of 8M
- Note, various further steps, such as using notes with GRATs, charitable, or insurance trusts possible

---

---

---

---

---

---

---

---

## LESSONS FROM THE STERLING SAGA

---

---

---

---

---

---

---

---

### The Sterling Saga: Notes on Probate Litigation and Competency Issues

- A Timeline (all dates 2014):
  - April 25: TMZ releases audiotape of Donald making racist comments
  - April 29: NBA Commissioner Adam Silver announces Donald banned from NBA, fined \$2.5 M, and that league would move to force sale
  - Sometime in early-mid May: Shelly has two neurologists examine Donald, and find him to lack capacity
  - May 15: Donald retains lawyer, Maxwell Blecher, to sue NBA
  - May 22: Donald's attorney sends letter to NBA Commissioner stating that Donald has authorized Shelly to sell team, Donald initials
  - May 29: Shelly removes Donald as co-Trustee and announces sale of Clippers to Steve Ballmer for \$2 Billion
  - May 30: Donald files suit in federal court (anti-trust) against NBA
  - June 8: Donald revokes trust

---

---

---

---

---

---

---

---

---

---

### Moving to Probate Court

- Shelly brings ex-parte petition under PC 17200 to (a) confirm Trustee's acts (removal of Donald and sale of team) and instruct Trustee and (b) obtain Order directing Trustee under PC 1310(b) to prevent injury or loss to Trust
- Preliminary rulings:
  - Shelly's move for TRO to prevent Donald from "intimidating witnesses" denied
    - Judge Levanas tells parties to chill out
  - Donald's move to stay proceedings for federal court denied (in Probate and fed courts)
  - Ballmer given standing to appear in court and with counsel
  - Scope of trial limited to propriety of removal of Donald under Family Trust and sale of team/PC 1310(b), NOT capacity per se

---

---

---

---

---

---

---

---

---

---

### The Capacity Component

- Terms of private trust versus statute
  - What are the different standards?
  - How to make determinations safe from challenge
- Were proper protocols followed?
- Was Shelley right to "hedge her bets" with May 22 letter?
- Lessons for "regular" capacity issues?

---

---

---

---

---

---

---

---

---

---

### Probate Code 17200

- 17200. (a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.
- (b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes: . . .  
[23 specific subsections omitted]

---

---

---

---

---

---

---

---

---

---

---

---

### Probate Code 1310(a) and (b)

- 1310. (a) Except as provided in subdivisions (b), (c), (d), and (e), an appeal pursuant to Chapter 1 (commencing with Section 1300) stays the operation and effect of the judgment or order.
- (b) Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate, or both, or a special administrator or temporary trustee, to exercise the powers, from time to time, as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.

---

---

---

---

---

---

---

---

---

---

---

---

### Judge's Ruling (July 28) . . .

- Shelly wins, on all counts
  - acted properly in removing Donald
    - more credible testimony
    - Doctors credible
    - no evidence of "master plan"
      - who cares?
- Sale of team proper
  - got an "amazing" price/deal
- PC 1310(b) granted
  - ruling "appeal proof"
  - in fact, subsequent appeal denied
    - Donald left to seek monetary damages
      - what are they?

---

---

---

---

---

---

---

---

---

---

---

---

### Lessons?

- Lessons for Trust drafting
  - role of language of capacity/protocols in estate plan
- Lessons for capacity
  - form and substance in capacity decisions
- Lessons for litigating in Probate Court
  - good outcome?
  - can decisions always be this quick?

---

---

---

---

---

---

---

---

### CONTACT US

SBThompson@seyfarth.com  
JTRogers@seyfarth.com

---

---

---

---

---

---

---

---