

Handling Postmortem Trust Administration: A Checklist

Paul J. Barulich
Randolph B. Godshall
Ann C. Harris
James E. Lauth
Sandra B. Price

SEPTEMBER 2009

Scope of Guide

This Action Guide sets forth lists of suggested steps to accomplish the various tasks required when administering a trust following the death of the settlor when no probate proceeding is anticipated. The Action Guide provides a checklist for attorneys advising the trustee with respect to: identifying all assets of the decedent; bringing trust assets under the control and management of the trustee or the trustee's agents; determining how to deal with nontrust assets; identifying all debts and liabilities, including taxes, and making sure that they are paid; and finally, distributing the remaining property to the trust beneficiaries or to proper subtrusts. This Action Guide is not intended to provide substantive legal information or to explain why each step is necessary. The authors specifically acknowledge that the use of this checklist in administering trusts following the death of a settlor is not the current standard of practice in California. Indeed, none of the coauthors follows every aspect of the checklist in his or her own practice. Because many specialized legal issues are discussed only briefly in this Action Guide, the practitioner should retain expert counsel to handle those specialized issues.

Abbreviations

AMT	alternative minimum tax
DOD	date of death
DHS	Department of Health Services
DNI	distributable net income
EGTRRA-2001	Economic Growth and Tax Reconciliation Act of 2001
ERISA	Employee Retirement Income Security Act
ESBT	electing small business trust
ESOP	employee stock ownership plan
FMV	fair market value
FTB	Franchise Tax Board
GST	generation-skipping transfer
IRD	income in respect of a decedent
ISO	incentive stock option
LLC	limited liability company
LLP	limited liability partnership
NOL	net operating loss
NPS	nonparticipant spouse
POD	pay-on-death
PS	participant spouse
QFOBI	qualified family-owned business interest
QDRO	qualified domestic relations order
QDOT	qualified domestic trust
QSST	qualified Subchapter S trust
QTIP	qualified terminable interest property
TIN	taxpayer identification number

About the Authors

PAUL J. BARULICH is certified as a specialist in Estate Planning, Trust and Probate Law by the State Bar of California Board of Legal Specialization, is a Fellow of the American College of Trust and Estate Counsel, and maintains offices in Redwood City. Mr. Barulich received his A.B. degree from the University of California, Berkeley, and his law degree from Golden Gate University School of Law. Mr. Barulich currently serves as an advisor to the Executive Committee for the Estate Planning, Trust and Probate Law Section of the California State Bar.

RANDOLPH B. GODSHALL is a partner in the Orange County office of Sheppard, Mullin, Richter & Hampton LLP, where his practice is devoted to estate planning, trust and estate administration, and fiduciary litigation. Mr. Godshall received his B.A. magna cum laude from Yale University, and his J.D. from the University of California, Berkeley, School of Law, where he was a member of the Order of the Coif. He is past chair of the Executive Committee of the Trusts and Estates Section of the State Bar of California. He is a Fellow of the American College of Trust and Estate Counsel, former Adjunct Professor of Law in Estate Planning at the University of San Diego School of Law, past president of the Orange Coast Estate Planning Council, and a member of the planning committee of the UCLA/CEB Estate Planning Institute. Mr. Godshall is a frequent lecturer for the California Continuing Education of the Bar and other organizations on estate planning topics.

ANN C. HARRIS received her J.D. in 1980 from the University of San Diego and her LL.M. in Taxation in 1981 from Boston University. She is an Adjunct Professor of Law at the University of San Diego and has taught Federal Income Taxation of Trusts and Estates and Federal Gift, Estate and Generation Skipping Transfer Taxation. She has authored various articles for the American Bar Association, the Practising Law Institute, and Estate Planning Magazine, and is a contributing author to CEB's Drafting California Irrevocable Trusts and the West Group's California Transaction Forms, Estate Planning set.

JAMES E. LAUTH is a member of the law firm of Beamer, Lauth, Steinley & Bond, LLP, in San Diego. He is certified by the California State Board of Legal Specialization as a specialist in Estate Planning, Trust and Probate Law. He is a member of the San Diego County Bar Association and the Estate Planning Council of San Diego. He received his B.A. degree from the University of Michigan and his J.D. degree from Columbia University.

SANDRA B. PRICE is certified as a specialist in Estate Planning, Trust and Probate Law by the State Bar of California Board of Legal Specialization and is a Fellow of the American College of Trust and Estate Counsel (ACTEC). She practices with Cooley Godward Kronish LLP in its San Francisco office. Ms. Price is a former member and advisor (1996-2002) to the Executive Committee of the Trusts and Estates Section of the State Bar and is the Chair-elect of the Bar Association of San Francisco's Estate Planning, Probate and Trust Section. Ms. Price received her law degree from the University of San Francisco and her master's degree (Taxation) from Golden Gate University.

Acknowledgments

Originally created as a project of the Executive Committee of the Estate Planning, Trust and Probate Law Section (now Trusts and Estates Section) of the State Bar of California, this Action Guide was first published by CEB in 1997. We gratefully acknowledge the contributions of the original authors: John W. Ambrecht, Frayda L. Bruton, James B. Ellis, Dibby Allan Green, John A. Hartog, Geoffrey W. Phillips, and Robert E. Temmerman, Jr.

The authors of the 2009 revision were Paul J. Barulich, Randolph B. Godshall, Ann C. Harris, James E. Lauth, and Sandra B. Price.

CEB Attorney Editor Kevin Urbatsch and Legal Editor Alice Kostin contributed to this title. Administrative support was provided by Debby Harrison and Nila Kanzaria. Dorie Riepe handled copyediting and production. Composition was performed by CEB's Electronic Publishing staff.

Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of June 15, 2009, and monitored developments through June 25, 2009.

CEB Citation

Cite this publication as: Handling Postmortem Trust Administration: A Checklist (Cal CEB Action Guide September 2009).

This Action Guide supersedes Handling Postmortem Trust Administration: A Checklist (Cal CEB Action Guide September 2007).

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 1.
OBTAIN, REVIEW, AND SUMMARIZE ESTATE PLANNING DOCUMENTS

Initial Steps

STEP 1. OBTAIN, REVIEW, AND SUMMARIZE ESTATE PLANNING DOCUMENTS

REVIEW PLAN, PREPARE EXPLANATION, FIND DOCUMENTS

- a. Review all relevant estate planning documents, if available, and prepare a written or visual explanation of the estate plan for client; and
- b. Ask about the location of all relevant original documents.

CONSIDER IMPACT OF EGTRRA-2001

NOTE

Practitioners should be certain to be up to date on late-breaking legislative changes concerning transfer tax issues and the Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38). At the time this update to the guide was being prepared, it was widely anticipated that significant legislative changes to EGTRRA-2001 would occur before 2010 concerning the estate tax repeal, generation-skipping transfer tax repeal, and modified carry-over basis requirements.

When analyzing documents, keep in mind that under EGTRRA-2001:

- a. The exemption equivalent for the estate tax is \$1.5 million in 2004 and 2005, \$2 million in 2006-2008, and \$3.5 million in 2009. IRC §2010(c). In the year 2010, the estate tax is scheduled to be repealed. IRC §2210(a).
- b. The exemption for the generation-skipping transfer (GST) tax is the same as the exemption equivalent for the estate tax. IRC §2631(c). In the year 2010, the GST tax is repealed. IRC §2664.
- c. The law will automatically allocate GST exemption to any transfer to a trust created during grantor's lifetime that is an "indirect skip" (IRC §2632(c)), and will permit a "qualified severance" of a trust into an "exempt" trust and a "nonexempt" trust. IRC §2642(a)(3).
- d. The top marginal estate tax rate is 48 percent in 2004, 47 percent in 2005, 46 percent in 2006, and 45 percent in 2007-2009. IRC §2001(c).
- e. The "qualified family-owned business interest" (QFOBI) deduction (IRC §2057) was effectively repealed in 2004. IRC §2057(j).
- f. The credit for state death taxes was reduced to 25 percent of the statutory amount for decedents dying in 2004, and replaced by a deduction for state death taxes paid starting in 2005. IRC §§2011(b)(2), 2058. (Since California is a "piggy-back" state that collects the federal state death tax credit amount, there is effectively no California estate tax starting in 2005.)
- g. The gift tax exemption is \$1 million, without any increases or changes. IRC §2505(a)(1).
- h. Although the estate tax and generation-skipping transfer tax are scheduled to be repealed in 2010, the gift tax will continue, with a top marginal rate of 35 percent. IRC §2502.
- i. In 2010, the basis for assets owned by a decedent will be "carry-over" basis, subject to a modified step-up. IRC §1022.

NOTE

Absent further legislation, all of the provisions implemented by EGTRRA-2001 will end December 31, 2010, and pre-EGTRRA-2001 law will once again be effective beginning January 1, 2011.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 2.
PREPARE FOR FIRST MEETING WITH CLIENT

STEP 2. PREPARE FOR FIRST MEETING WITH CLIENT

PREPARE TO ESTABLISH CLIENT RELATIONSHIP

- a. Identify client or clients;
- b. Evaluate conflicts in representation, including (in-house) conflict of interest in representing the successor trustee or trustees as clients, and evaluate the need for signed conflict waivers; and
- c. Prepare an engagement letter.

PREPARE FOR MEETING

- a. Prepare an agenda;
- b. Prepare any needed authorizations to obtain records or information;
- c. Review known asset data; and
- d. Check cost-of-living adjustments and determine amounts as of the date of death (DOD) for:
 - (1) Applicable credit amount (IRC §2010(c));
 - (2) GST exemption amount (currently the same as IRC §2010(c) applicable exclusion amount) (IRC §2631);
 - (3) IRC §2032A aggregate decrease in value amount, if applicable (for farming or other qualified use property); and
 - (4) Gift to noncitizen spouse exclusion amount. IRC §2523(i).

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 3.
ADVISE CLIENT OF ITEMS TO BRING TO FIRST MEETING

STEP 3. ADVISE CLIENT OF ITEMS TO BRING TO FIRST MEETING

ASK CLIENT TO BRING DOCUMENTS

Ask client to bring the following documents:

- a. Original estate planning documents, if available;
- b. At least 12 death certificates (certified copies), if available; and
- c. Asset and liability information, including copies of account statements and other asset documents through the date of death, if available.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 4.
FIRST MEETING WITH CLIENT

STEP 4. FIRST MEETING WITH CLIENT

CONFIRM CLIENT RELATIONSHIP

Present engagement letter and review it with client.

IDENTIFY OVERALL PLAN

a. Identify the following:

- (1) Decedent's family members and heirs, including a surviving registered domestic partner (Prob C §§6401-6414).
- (2) Trust beneficiaries.
- (3) Other interested persons such as putative spouses; foster children, stepchildren, or potential posthumously conceived children (Prob C §§249.5, 6450); or caregivers who might be claimants.
- (4) Donative transfers to prohibited transferees (Prob C §§21350-21356). See Rice v Clark (2002) 28 C4th 89, 120 CR2d 522; see also Bernard v Foley (2006) 39 C4th 794, 47 CR3d 248.

b. Ascertain citizenship of surviving spouse.

c. Determine title to assets.

d. Identify and illustrate overall plan and distribution scheme.

e. Review checklist/questionnaire from client, or give to client to complete, if you choose to use a questionnaire.

f. Gather a preliminary estimate of asset values and liabilities.

g. Discuss income tax basis adjustment of assets. IRC §1014.

h. Determine whether decedent made taxable gifts after 1976.

i. Discuss adequacy of insurance coverage on real and personal property.

j. Discuss trustee's exercise of discretionary powers. Prob C §§16080-16082.

k. Determine if there are any qualified conservation easements. IRC §2031(c).

l. Identify potential problems, *e.g.*, family concerns, potential litigation.

m. If an IRC §6166 election for a closely held business is anticipated, discuss the rate of interest on payment of the estate tax in installments.

IDENTIFY ISSUES THAT REQUIRE IMMEDIATE ACTION

a. Advise client of trustee's duty to serve statutory "Notification by Trustee" and of trustee's liability if this is not done. Prob C §16061.7.

b. Advise client to notify Social Security, Department of Veterans Affairs, pension plans, retirement account administrators, annuity companies, and other payers of lifetime benefits of decedent's death.

c. Advise client to arrange for safekeeping of any assets at risk (*e.g.*, personal property).

d. Ascertain whether there is:

- (1) An S corporation and whether the trust has qualified Subchapter S trust (QSST) provisions. Consider electing small

business trust (ESBT).

- (2) Any partnership, LLC, or LLP interest for which an IRC §754 election should be made.
- (3) A need to make an election to continue the partnership regarding income and property tax issues if decedent was a general partner. See Corp C §§16801(2)(A), 16601(7)(A).
- (4) Any out-of-state real estate or other assets subject to administration or taxation in another jurisdiction.
- (5) Any potential IRC §2032A (farming or other qualified use) asset.
- (6) Any toxic waste issue with any real property.
- (7) Any outstanding option, escrow, or unexecuted contract.
- (8) Any guaranty or foreclosure.
- (9) Any wasting asset, business, or profession needing immediate attention.
- (10) Any outstanding qualified or nonqualified stock option.
- (11) An employee stock ownership plan (ESOP).
- (12) Any doubt about the validity of the trust or any of its amendments.
- (13) A no-contest clause in the trust or any of its amendments.

NOTE

In 2008, the legislature enacted SB 1264 (Stats 2008, ch 174), repealing the existing no-contest clause statutory scheme, Prob C §§21300-21322, and adopting a new one, Prob C §§21310-21315. The new statutory scheme will not become operative until January 1, 2010. Stats 2008, ch 174, Prob C §3. Beginning then, it will apply to all instruments that became irrevocable on or after January 1, 2001, but not to instruments that became irrevocable before that date, which will still be governed by former law. Prob C §21315.

- (14) A need to file gift tax returns on time for allocation of GST exemption. See step 33, below.

ADVISE CLIENT OF FIDUCIARY DUTIES

- a. Discuss client's fiduciary duties generally.
- b. Discuss confidentiality and discovery issues. See Wells Fargo Bank v Superior Court (2000) 22 C4th 201, 91 CR2d 716; Moeller v Superior Court (1997) 16 C4th 1124, 69 CR2d 317; Eddy v Fields (2004) 121 CA4th 1543, 18 CR3d 487.
- c. Discuss whether to acquire errors and omissions fiduciary insurance for trustee, if such insurance is available. Determine if premiums are chargeable against the trust estate.
- d. Discuss client's compensation as trustee and maintenance of time records.
- e. Discuss trust accounting requirements. See Prob C §§16060-16064.

REVIEW DOCUMENTS FOR DRAFTING ERRORS AND TAX LAW CHANGES

- a. Determine whether any drafting errors or changes in the law can be cured by or would benefit from disclaimers.
- b. Determine whether any drafting errors or changes in the law require a court petition for modification or construction of the trust instrument. See Prob C §§15400-15414, 17200-17211.
- c. Evaluate whether any bypass trust allocation (*e.g.*, an estate tax credit shelter trust) uses a formula clause that will be sufficient under current law and qualify the excess of decedent's trust interest for the IRC §2056 estate tax marital deduction, if applicable.
- d. If the family-owned business deduction (IRC §2057) applies (eliminated by EGTRRA-2001 for decedents dying in years 2004-2010):

- (1) Check to make sure that the bypass trust may be divided into GST-exempt and GST-nonexempt trusts.
 - (2) If the documents require that family-owned business interests be allocated to and fund a specific trust, check that the trust may be divided into:
 - (a) A trust holding assets (or a portion of the business interest) subject to the §2057 deduction; and
 - (b) A trust for assets (or a portion of the business interest) that is subject to estate taxes.
 - (3) Review GST provisions and evaluate whether a formula clause, and not a specific amount, is used for the GST exemption adjustment. See IRC §2631.
- e. Evaluate compliance with charitable remainder trust qualifications, if applicable. See IRC §664.

IDENTIFY DECEDENT INVOLVEMENT IN OTHER TRUSTS

If decedent was a trustee, beneficiary, or powerholder for any other trust, or a trustee of a qualified plan, request copies of all relevant documents.

DETERMINE WHETHER NONPROBATE ADMINISTRATION IS AVAILABLE FOR NONTRUST ASSETS

Determine whether decedent's will "pours over" to the trust. If it does, and if there are assets subject to the will, determine whether trustee can undertake a nonprobate administration of such nontrust assets by use of:

- a. An affidavit procedure if the gross value of decedent's assets is \$100,000 or less. See Prob C §§13100-13116, 13050.
- b. A petition for a court order to determine succession to property if decedent leaves real property in California and the real and personal property in California has a gross value of \$100,000 or less. Prob C §§13150-13158. See also Prob C §13050.
- c. An affidavit for real property of small value if the gross value of all real property in California does not exceed \$20,000 (excluding Prob C §13050 property). Prob C §§13200-13210.
- d. An affidavit and conveyance for community or quasi-community real property. Prob C §13540.
- e. A *Heggstad* petition for any assets effectively declared by decedent to be held in the trust but not formally retitled into the trust upon the decedent's death. See Estate of Heggstad (1993) 16 CA4th 943, 20 CR2d 433.

DETERMINE WHETHER PROBATE IS NECESSARY FOR NONTRUST ASSETS

- a. If summary administration is not available, a probate could be required for nontrust assets.
 - (1) If trustee is also named in decedent's will to serve as executor, open a probate as a separate representation with the nominated executor as client; and
 - (2) Evaluate need for conflict waivers.
- b. If decedent's will is not a pour over will, and trustee is not named in the will to serve as executor, determine what role (if any) trustee appropriately has in the administration of nontrust assets.

REVIEW CASH REQUIREMENTS

Determine:

- a. Preliminary estate tax estimate and any other applicable transfer tax estimates;
- b. Estimates of liabilities and claims;
- c. Trust distribution requirements (*e.g.*, specific gifts, pecuniary gifts);
- d. Beneficiaries' cash needs (*e.g.*, support for surviving spouse or registered domestic partner and other surviving dependents); and
- e. Administration expense estimate.

OTHER MATTERS

- a. Have client sign any necessary authorizations to obtain records or information.
- b. Have client locate and inventory contents of all safe deposit boxes. See Prob C §331.
- c. Arrange disposition of depreciating assets; determine whether any action is needed to protect investment portfolio assets (*e.g.*, stock market risk) and whether a securities analyst is needed to monitor securities. Note applicability of Uniform Prudent Investor Act (UPIA) (Prob C §§16045-16054).
- d. Discuss trustee's ability to convert income interests to unitrust interests or make adjustments between principal and income with respect to determination of "trust accounting income" distributable to an income beneficiary under the Uniform Principal and Income Act (Prob C §§16320-16375).
- e. Have client determine all outstanding liabilities of decedent.
- f. Discuss:
 - (1) Optional notice to creditors procedure (Prob C §§19000-19054);
 - (2) 1-year statutes of limitations (CCP §§366.2, 366.3); and
 - (3) Procedure to determine whether a debt of the settlor encumbers trust property (Prob C §850(a)(3)(C)).
- g. Evaluate whether "notice of proposed action by trustee" should be served before taking or not taking any particular action. Prob C §§16500-16504.
- h. Evaluate whether trustee should petition for court approval before taking or not taking any particular action. Prob C §17200.
- i. Discuss attorney compensation and fee estimates.
- j. Have trustee change mailing address for decedent to forward decedent's mail to trustee or arrange for trustee to collect decedent's mail from decedent's residence.
- k. Schedule a follow-up meeting with trustee.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 5.
CALENDAR IMPORTANT DEADLINES

STEP 5. CALENDAR IMPORTANT DEADLINES

CALENDAR TAX AND TRUST DEADLINES

Calendar the following tax and trust deadlines:

- a. "Custodian" of will must deliver all original wills and codicils of decedent to the court clerk within 30 days of the DOD, Prob C §8200(a)(1), and mail a copy of the relevant instrument to the nominated executor, also within 30 days. Prob C §8200(a)(2).
- b. Serve statutory "Notification by Trustee" (Prob C §16061.7) on each trust beneficiary and heir of decedent within 60 days from DOD, occurrence of contingency, or change of trustee if:
 - (1) Trust becomes irrevocable on death of a settlor; or
 - (2) Trust becomes irrevocable by the express terms of the trust, within 1 year of the death of a settlor because of a contingency related to the death of one or more of the settlors; or
 - (3) Trustee of an irrevocable trust changes.
- c. Prob C §13100 affidavits (not sooner than 40 days after DOD).
- d. Estate tax returns: IRS Form 706, California Form ET-1, and corresponding forms for any other states in which the decedent owned property subject to tax in that jurisdiction are due 9 months from date of death (DOD) for the IRS and California forms. However, California does not currently require the filing of Form ET-1 for decedents dying from 2005 through 2010, since due to EGTRRA-2001, by definition there will not be any California estate tax due for decedents dying during those years. However, it was widely anticipated at the time of the preparation of this year's update that significant legislative changes to the transfer tax law might occur at any time. The practitioner should be certain to be up to date on such legislative changes.
- e. IRS Form 4768, estate tax extension deadlines (if filed):
 - (1) To file Form 706 (maximum 6 months); and
 - (2) To pay tax (maximum 12 months, but subject to accrual of interest on deferral of tax payment).
- f. Alternate valuation date (6 months after DOD). IRC §2032.
- g. Disclaimer (9 months from DOD). IRC §2518; Prob C §§260-295.
- h. IRS Form 709, gift tax and generation-skipping transfer (GST) tax return for the decedent (the earlier of (1) April 15 in year following gift (or earlier if GST events occur), or (2) the due date, with extension, of the estate tax return).
- i. IRS Form 1040 and FTB Form 540, final personal income tax returns (April 15 or extension date in year following death).
- j. IRS Form 1041 and FTB Form 541, fiduciary income tax returns (April 15 or extension date in year following tax period; if IRC §645 election to combine with estate income tax return is made, 15th day of fourth month following end of fiscal year of estate; see step 27, below):
 - (1) Consider 65-day distribution after December 31 (or last day of fiscal year if IRC §645 election is made) (IRC §§644, 663(b));
 - (2) Review trust income distribution terms and calendar any mandatory distribution dates; and
 - (3) Estimated tax payments dates.
- k. Grantor trust as shareholder (allowed for 2 years after DOD; see IRC §1361(c)(2)); qualified subchapter S trust (QSST) election filed within 16 days and 2 months from transfer (see IRC §1361(d)).
- l. IRS Form 1065, including IRC §754 election to adjust basis of partnership property (first partnership return after year of death; 15th day of fourth month following end of tax year of partnership, generally April 15 in year following year of death).

- m. 90 days from DOD for majority interest of a general partnership to elect to continue partnership (see Corp C §§16801(2)(A), 16601(7)-(9)), absent contrary provisions in partnership agreement; timely election may prevent property tax reassessment.
- n. Notify plan administrator of qualified retirement plans of new beneficiaries and provide trust documentation before September 30 of calendar year after calendar year of decedent's death (the "Beneficiary Finalization Date"). Treas Reg §1.401(a)(9)-4, Q&A-4(a).
- o. Federal/state payroll tax reporting (IRS Circular E; California Employee Development Department Forms).
- p. IRC §6501(d) and Rev & T C §19517 prompt assessment of tax letters.
- q. Medi-Cal notice to California Department of Health Services (DHS) (90 days from DOD; see Prob C §§215, 19202) if applicable to decedent or decedent's predeceased spouse.
- r. Notice to the Director of the California Victim Compensation and Government Claims Board (90 days from DOD; see Prob C §216) if the decedent has an heir who is confined in a prison under the supervision of the Department of Corrections or otherwise incarcerated.
- s. Change of Ownership forms:
 - (1) Preliminary Change of Ownership Report (PCOR) to county assessor's office (Rev & T C §480(e)); and
 - (2) Statement of Change in Control and Ownership of Legal Entity (Form BOE-100-B) to State Board of Equalization (Rev & T C §§480.1-480.2).
- t. Real property tax installment payments (due November 1 and February 1; see Rev & T C §§2605-2606; delinquent after December 10 and April 10; see Rev & T C §§2704-2705).
- u. Surviving spouse individual retirement account (IRA) rollover.
- v. Exercise of options (buy-sells, stock options, or others).
- w. Escrow closing dates.
- x. First trust accounting due.
- y. Status letters to beneficiaries.
- z. Periodic client meetings.

CALENDAR OTHER REMINDER DATES

Calendar these additional dates:

- a. Engagement letter (and waivers of conflict if appropriate) executed and placed in client file.
- b. Any checklist or questionnaire returned by client.
- c. Trust assets determined.
- d. Appraisals received.
- e. Form 706 first draft completed, if required.
- f. State death tax return drafts completed, if required.
- g. Estimate of death tax liability prepared.
- h. Any noncitizen spouse deadlines.
- i. Disclaimer plan developed.
- j. Trust funding plan developed.

- k. Trustee's trust asset review under prudent investor standards (Prob C §16047(c)) completed.
- l. Tax refunds received.
- m. Actions filed. Wrongful death action to be filed within 2 years after DOD (CCP §335.1); suits in favor of decedent to be filed within the later of 6 months after DOD or otherwise applicable statute of limitations if decedent had not died (CCP §366.1).
- n. Creditor claims acted on. See step 18, below.
- o. Contest of trust within shortened limitations period under Prob C §16061.8 when notice pursuant to Prob C §16061.7 and a copy of "terms of trust" served on heirs and beneficiaries.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 6.
PREPARE TO HANDLE CLIENT'S AFFAIRS

STEP 6. PREPARE TO HANDLE CLIENT'S AFFAIRS

OPEN FILE

- a. Open a file for client.
- b. Segregate office billing for services to:
 - (1) Decedent before the DOD (decedent's debt);
 - (2) Successor trustee following the DOD (trust's administrative expenses); and
 - (3) Surviving spouse or surviving registered domestic partner.
- c. Segregate office billings for any probate court matter for nontrust assets, which generally require court approval, and divide the billings between ordinary and extraordinary services.
- d. Update the office database for the deceased client.
- e. Calendar any additional dates after client meeting (see [step 5](#), above).
- f. Consider opening a secondary file to contain privileged attorney work product, which should be protected from disclosure to beneficiaries and successor trustees. See *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716; *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317; *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487.

NOTE

All fees for work performed for the trustee that are intended to be protected from disclosure should be separately billed and paid by the trustee from the trustee's separate (nontrust estate) funds.

COMMUNICATIONS WITH CLIENT

- a. Send to client:
 - (1) Revised engagement letter if necessary in light of information subsequently received;
 - (2) Allocation of responsibilities letter;
 - (3) Client's fiduciary duties letter; and
 - (4) Disclaimer letter.
- b. Consider whether you need to advise trustee to consult an independent attorney about possible trust litigation issues or other legal matters not within your area of practice.

COMMUNICATIONS WITH OTHERS

Prepare and mail any of the following, if appropriate:

- a. If the trust became irrevocable, or if trustee of an irrevocable trust has changed, serve a "Notification by Trustee" on trust beneficiaries and heirs of decedent under [Prob C §16061.7](#).
- b. A nonrepresentation letter to the beneficiaries.
- c. A letter to the accountant providing information and allocating responsibility for action items and tax filings.
- d. A letter to financial, investment, or other special advisors.

- e. A letter to out-of-state counsel.

DELIVER WILL

Have "custodian" deliver all original wills and codicils of decedent to the court clerk within 30 days of the DOD (Prob C §8200(a)(1)), and mail a copy of the relevant instrument to the nominated executor, also within 30 days of the DOD. Prob C §8200(a)(2).

DELIVER TRUST

Deliver a copy of the "terms of the trust" (defined in Prob C §16060.5) to each trust beneficiary or heir who requests a copy.

OBTAIN DEATH CERTIFICATES

Have trustee obtain certified copies of the death certificate (*e.g.*, one for IRS Form 706, one for each joint tenancy or trustee affidavit) and copies for others as appropriate (*e.g.*, for Medi-Cal notice to DHS).

OBTAIN TAX RETURNS

Obtain copies of:

- a. Income tax returns for prior 3 years and for any open taxable year (*i.e.*, 3 years from the date the return was filed);
- b. All gift tax returns (IRS Form 709) since 1976 for decedent;
- c. All GST tax returns for trusts; and
- d. Form 706 for estates in which decedent was a beneficiary (*e.g.*, if Form 706 was filed for the decedent's predeceased spouse or predeceased registered domestic partner).

NOTE

Use IRS Form 4506 to request copies if client cannot provide copies of tax returns from decedent's papers and records.

DETERMINE ADMINISTRATIVE MATTERS

- a. Review title of assets; determine whether:
 - (1) Any change is required in the estate administration plan;
 - (2) Summary procedures are available to collect nontrust assets; or
 - (3) Probate is required, because of title vesting problems.
- b. Prepare Prob C §18100.5 certifications of trust as needed and record certifications, if appropriate.
- c. Send Notice Concerning Fiduciary Relationship (IRS Form 56) to the IRS, if applicable.
- d. Determine whether decedent held any powers of appointment and request copies of appropriate documents.
- e. Obtain name, address, phone number, date of birth, and taxpayer identification number for each trust or estate beneficiary.
- f. Determine whether any trust beneficiary is a skip person for GST tax purposes.
- g. Determine whether use of an administrative trust is appropriate (see step 24, below). If so, obtain a taxpayer identification number.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 7.
REVIEW ESTATE PLAN OF SURVIVING SPOUSE OR SURVIVING REGISTERED DOMESTIC PARTNER

STEP 7. REVIEW ESTATE PLAN OF SURVIVING SPOUSE OR SURVIVING REGISTERED DOMESTIC PARTNER

CONFIRM REPRESENTATION

If representing the surviving spouse or surviving registered domestic partner, execute a separate engagement letter for that estate planning.

REVIEW ESTATE PLAN

- a. Review the trust, will, powers of attorney, advance health care directive, and other documents, and determine whether any changes need to be made in the survivor's estate plan.
- b. Evaluate potential conflicts of interest and obtain any necessary conflict waivers.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Initial Steps/STEP 8.
REVIEW BENEFICIARIES' POWERS OF APPOINTMENT

STEP 8. REVIEW BENEFICIARIES' POWERS OF APPOINTMENT

REVIEW POWERS OF APPOINTMENT

- a. Determine whether trustee (or special trustee) has the power to expand a beneficiary's power of appointment over a nonexempt trust from a limited power to a general power for GST tax planning purposes; notify trustee in writing.
- b. Determine whether a beneficiary has powers of appointment that can or should be exercised, evaluate the possible methods of exercise, and determine whether the beneficiary should be notified in writing.
- c. Determine whether any powers of appointment should be disclaimed.
- d. Evaluate potential conflicts of interest and obtain any necessary conflict waivers.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 9. DETERMINE AMOUNT OF CASH

Inventorying, Valuing, and Managing Trust Assets

STEP 9. DETERMINE AMOUNT OF CASH

DETERMINING AMOUNT OF CASH

- a. Obtain copies of, *e.g.*, bank account statements, certificates, passbooks, for each cash account (include money market cash held in brokerage accounts).
- b. Advise client to confirm that bank or savings association at which the funds are held is insured by the Federal Deposit Insurance Corporation (FDIC) and that the accounts are within the insurance limit.

NOTE

Formerly, the basic insurance limit was \$100,000 per depositor, per insured institution and insurance was per "ownership category," not per account. Therefore, it was possible to have deposits of more than \$100,000 in several accounts at one insured bank and still be fully insured (*e.g.*, individual accounts, joint accounts, retirement accounts, revocable trust accounts, irrevocable trust accounts). Under certain circumstances, *e.g.*, for revocable trusts, certain "qualified" beneficiaries' interests would not be aggregated. See former version of 12 CFR §330.10. See also 12 USC §§1817(i), 1821(a).

However, the insurance limit is a moving target as this guide goes to press. Interim rules set to expire on December 31, 2009 amended the 12 CFR §330.10 deposit insurance rules for revocable trust accounts." The amendment provides that if a settlor's revocable trust distributes even nominal amounts of deposited funds to at least five named individuals and/or charities on the settlor's death, the insurance limit for the trust's bank account will be \$500,000. If the trust has two settlors, the coverage limit is \$1 million. The interim rules were issued by the FDIC on September 26, 2008, RIN 3064-AD33, 73 Fed Reg 56706 (2008).

It is not known whether these interim rules will expire or whether the former rules will be reinstated, continue without change, or be modified. Please refer to the FDIC's website at <http://www.fdic.gov/deposit> for up-to-date and additional "plain English" information. Also see the article *New FDIC Interim Regulations Facilitate \$500,000 Depositor Coverage for Many Living Trusts*, 30 CEB Est Plan Rep 2 (Oct. 2008).

- c. Advise client to confirm that sufficient insurance is in place for any money market funds held at a brokerage firm, because these are not insured by FDIC.
- d. For accounts paying interest, send letters requesting exact principal balance and accrued interest as of the DOD if statements are insufficient.
- e. For checking accounts, deduct from the DOD balance all checks written but not cleared.
- f. Obtain a list of all checks received but not deposited by the DOD.
- g. Determine the amount of cash on decedent's person, or in decedent's car, residence, business, or safe deposit box, including foreign money or coin collections:
 - (1) Obtain the DOD exchange rate of foreign money; and
 - (2) Obtain an appraisal of valuable coins or collection.
- h. Obtain a list of any expectancies of cash due at the DOD (*e.g.*, income tax refunds, medical insurance reimbursements, deposits or refunds due, wages due).

TRACKING CASH AND OTHER ONGOING CASH CONSIDERATIONS

- a. Follow up 3 months later by a review of account records for cash items due but unpaid at death.
- b. Keep an inventory list of cash held outside of the trust (*e.g.*, custodial, joint tenancy, or pay-on-death (POD) accounts) for

Form 706 purposes.

- c. File Report of Foreign Bank and Financial Accounts (Treasury Department Form TD F 90-22.1) by June 30 each year to report a financial interest in or authority over bank accounts, securities accounts, or other financial accounts in foreign countries that total more than \$10,000. 31 CFR §103.24.
- d. Deposit cash found and received in interest-bearing trust accounts.

NOTE

The surviving spouse's interest in cash accounts must ultimately be separated from decedent's interest in cash accounts. Consider establishing separate accounts as soon as possible following death.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 10. HANDLE REAL PROPERTY INTERESTS

STEP 10. HANDLE REAL PROPERTY INTERESTS

HANDLING TITLE ISSUES

- a. Record "Affidavit—Death of Trustee" or similarly worded document to clear title to the successor trustee (see Prob C §§210, 18105); include a Preliminary Change of Ownership Report form. A certified copy of the death certificate should be attached. See Note below regarding possible county fee. For an Affidavit of Death of Trustee form, see California Trust Administration §14.108 (2d ed Cal CEB 2001).
- b. Prepare a certification of trust in the event a third party dealing with the property requests additional information about the trust terms. See Prob C §18100.5.
- c. Record the certification of trust, if appropriate. Probate Code §18100.5(b)(8) expressly permits inclusion of the legal description of any interest in real property held in the trust as part of the certification, and Prob C §18100.5(i) expressly permits recordation of a certification of trust.
- d. Determine any encumbrances of record.
- e. Consider ordering a property profile, preliminary title report, litigation guaranty, title insurance, or other report to determine and identify problems with the condition of title.
- f. Determine whether there are any chain-of-title problems to resolve or correct (*e.g.*, vesting, gaps in title chain, erroneous legal descriptions).
- g. File a Prob C §850 petition to determine title, if necessary.

HANDLING ENCUMBRANCES AND RESTRICTIONS

- a. Inventory and determine the DOD balance on any notes secured by deeds of trust:
 - (1) Keep loans current;
 - (2) Examine documents for any loan terms triggered by decedent's death; and
 - (3) Determine whether a lender requires notice of death.
- b. Inventory other encumbrances of record (*e.g.*, judgment liens and tax liens, lis pendens) and determine amount of liability and whether decedent's death requires any action.
- c. Identify other transfer or use restrictions, *e.g.*, covenants, conditions, and restrictions (CC&Rs) for condominiums, cotenancy agreements, options, grazing rights, transfer restrictions, oil and gas (mineral right tenancies), conditions, land use restrictions, conservation easements. Determine whether decedent's death requires any action.
- d. Review co-op agreements and restrictions on use and transfers and determine any notices or actions required by decedent's death.
- e. Determine whether decedent/cotenant owes or is entitled to contribution from other cotenants.
- f. Examine transfer or sale documents for executory contracts and pending escrows, and determine:
 - (1) Whether any action is required;
 - (2) Contractual escrow deadlines;
 - (3) Whether income-in-respect-of-a-decedent (IRD) treatment can be avoided and basis adjustment claimed (IRC §1014).
- g. If there are any pending foreclosures or defaults, determine what immediate and long-term steps are required to protect equity.

h. Determine whether land is subject to a Williamson Act (Govt C §§51200-51295) agricultural preserve contract. If so, determine:

- (1) The duration of the contract; and
- (2) Whether the process was begun to terminate or modify the contract, or to qualify the property.

HANDLING PROPERTY OPERATION AND MANAGEMENT

a. Advise client to take the following steps:

- (1) Maintain adequate fire and casualty insurance.
- (2) Advise insurance company of property vacancy, if applicable, and determine whether vacancy may cause cancellation of insurance. Generally, insuring vacant property is more expensive than insuring occupied property.
- (3) Secure improvements and contents and arrange for maintenance of the structure and landscaping.
- (4) Examine any existing management contract and notify and work with the property manager. If there is no property manager, consider hiring one.
- (5) Determine whether notice to tenants is necessary or advisable and whether a change in rental payment arrangements is needed.
- (6) Account for rental and security deposits, and pursue any delinquent rent.
- (7) Determine and maintain payment for all property expenses and segregate expenditures for property improvements.
- (8) Determine requirements for weed and brush abatement program, and arrange for compliance.

b. Review leases to determine whether decedent's death requires action and whether any leases are due to end or be renewed and calendar dates of future rent increases due under leases that are not expiring.

c. Conduct an initial review for risk of toxic contamination and determine:

- (1) Whether a Phase I environmental report is needed; and
- (2) Exposure to responsibility for cleanup.

d. Determine whether ownership and management of the property will qualify as a closely held business under IRC §6166 for estate tax deferral.

e. Determine whether income should be transferred to principal as a depreciation reserve if allowed by Prob C §16372(b).

HANDLING LEASEHOLD INTEREST

a. If decedent or the trust was a tenant in residential property, examine decedent's residential lease and:

- (1) Terminate any obligation;
- (2) Secure the contents of the residence; and
- (3) Collect the security deposit.

b. If decedent or the trust was a tenant in commercial property, review commercial leases and determine whether:

- (1) Notice to the landlord is required;
- (2) Recording an Affidavit—Death of Trustee is required; and
- (3) Decedent's death requires any other action.

c. Arrange for payments of required rents.

d. Examine and determine whether any action on mineral leases is required.

HANDLING REAL PROPERTY TAXES

NOTE

The practitioner is encouraged to review the article by Gilbert & Galusha, *Understanding Property Tax Treatment of Trusts*, 12 Cal Trusts & Est Q 4 (Winter 2007) for a more in-depth discussion of these issues. The practitioner is also encouraged to consult two recent Letters to Assessors from the State Board of Equalization (BOE) (available at www.boe.ca.gov), which provide a wealth of information on real property change-in-ownership issues that affect real property taxes:

- (1) Letter to Assessor No. 2008/018 titled *Revenue and Taxation Code Section 63.1: Parent-Child and Grandparent-Grandchild Exclusion Questions and Answers*.
- (2) Letter to Assessor No. 2008/043 titled *Assessor's Handbook Section 401, Change in Ownership*, provides a draft of the BOE's Assessor's Handbook relative to changes in ownership of property under Prop 13.

Assessor Parcel Numbers

Obtain assessor parcel numbers.

Determine When Due

Determine and pay real property taxes when due (November 1 and February 1 (see [Rev & T C §§2605-2606](#)); delinquent after December 10 and April 10 ([Rev & T C §§2704-2705](#))).

Consider Options if Property Will Be Reassessed

Review the assessed value versus the DOD fair market value:

- a. If death triggers a change in ownership that will result in reassessment at a lower assessed value due to depreciating values, file a change of ownership report as soon as practicable (see discussion below) and contact the local Assessor to determine how to claim any refund for paid property taxes that may be due.
- b. If death triggers a change in ownership resulting in reassessment at a higher assessed value, determine if any exclusions are available and file timely claims for exclusion (if required). Possible exclusions include:
 - (1) Leasehold exclusion (more than 35 years remaining in term, including options). [Rev & T C §§61\(c\), 62\(g\)](#).
 - (2) Spousal exclusion. [Rev & T C §63](#). If a surviving spouse is the sole beneficiary of a trust, change in ownership will be deferred until the death of the surviving spouse. However, if a trust has sprinkling powers (discretionary distributions), all potential beneficiaries must have an available exclusion to avoid a change in ownership. 18 Cal Code Regs §462.160(b)(1)(A).
 - (3) Transfer to a registered domestic partner. [Rev & T C §62\(p\)](#).

NOTE

The State Board of Equalization has given informal advice that the regulation applies to any transfer of property between registered domestic partners at death. The enabling legislation came in two steps:

- (a) In 2005, SB 565 (Stats 2005, ch 416) stated that transfers between registered domestic partners occurring on or after January 1, 2006 qualified for exclusion; and
- (b) In 2007, "catch-up" legislation (SB 559 (Stats 2007, ch 555)) changed the effective date of the exclusion from January 1, 2006 to January 1, 2000 and provided that any registered domestic partner transferee whose property was reassessed for a transfer between January 1, 2000 and January 1, 2006 shall obtain a reversal of that reassessment if the appropriate application is submitted to the assessor along with the required documentation. The application must be made on Form BOE-62-DP "Claim for Reassessment Reversal for Registered Domestic Partners" which must be submitted to the county assessor for the county in which the property is located no later than June 30, 2009.
- (4) Parent-child, or, if parents are deceased, grandparent-grandchild exclusion; unlimited exclusion for residence; exclusion for first \$1 million of assessed value for other property. [Rev & T C §63.1](#). See below re filing claim.

NOTE

If two or more children are entitled to equal shares of the trust assets but trustee desires that one child receive the real property, trustee should encumber the property before distribution and use proceeds to equalize shares among the children as needed. If instead trustee distributes fractional interests in the property and one child acquires the interests of the other children, those interests will not be excluded. See Letter to Assessor No. 91/08 and Letter to Assessor No. 2008/043.

(5) Dwelling of a minor or disabled child after the death of parents. Rev & T C §62(m).

(6) An interest less than 5 percent of the total property value and less than \$10,000. Rev & T C §65.1(a); 18 Cal Code Regs §§462.020(b)(2), 462.040(b)(6).

(7) Transfer from or to an employee benefit plan. Rev & T C §66.

(8) Termination of a joint tenancy when original joint tenant remains an owner. Rev & T C §65(c).

c. If no exclusion is available, consider assessment appeal and calendar appropriate deadline to file:

(1) Deadline varies depending on the circumstances, *i.e.*, whether or not it is a regular assessment, the form of notification, the county, and whether or not there has been an error in determining the base year value. See Rev & T C §1603(b) (regular assessments), Rev & T C §§73.1(c), 1605(b)-(c) (assessments outside of the regular assessment period), Rev & T C §51.5 (errors in determining base year value).

(2) Appeal of assessment does not toll time for filing a claim for refund. See *Mission Housing Dev. Co. v City & County of San Francisco* (1997) 59 CA4th 55, 69 CR2d 185. A claim for refund is not retroactive, but applies only for the year of appeal; a claim for refund must be timely filed (Rev & T C §5097; *Metropolitan Culinary Servs., Inc. v County of Los Angeles* (1998) 61 CA4th 935, 71 CR2d 859) and it may be included in the appeal or filed separately.

Deferred or Delinquent Property Taxes

a. Determine whether any deferred or delinquent property taxes are due; and

b. Check the title report for tax liens.

Change in Ownership—Death of Real Property Owner Form

File a change in ownership statement form with the assessor's office, due within 150 days of death. Rev & T C §480(b):

a. Obtain form from county:

(1) Most counties have their own form for this purpose, entitled Statement of Death of Real Property Owner, but forms and procedures vary by county.

(2) Some counties (*e.g.*, Alameda) require that their Preliminary Change of Ownership Report be attached to a separate Statement of Death of Real Property Owner form.

b. Check appropriate box for any applicable exclusions from reassessment. See Rev & T C §§62-63, 63.1, 65. See also Note below regarding possible county fee.

NOTE

If 35 years or more remain on the term (including options) of a leasehold estate, determine whether a change in ownership statement form must be filed. See Rev & T C §§61(c), 62(g).

c. Note any trust terms that might trigger a change in ownership, *e.g.*, sprinkling powers (discretionary distributions) given when not all potential beneficiaries have an available exclusion. See 18 Cal Code Regs §462.160(b)(1)(A).

NOTE

The death of a decedent who is not the owner of property but who is the beneficiary of a trust owning real property may have change-in-ownership and property tax consequences that are required to be reported to the assessor. See *e.g.*, Marin County's "Statement of Change of Beneficial Ownership" form.

Parent-Child, Grandparent-Grandchild Exclusions

a. Prepare and file the parent-child or grandparent-grandchild exclusion claim form, due (Rev & T C §63.1(e)):

- (1) Within 3 years of death or before a subsequent transfer to a third party after death, whichever is earlier; or
- (2) Within 6 months of the assessor mailing a supplemental or escape assessment.

NOTE

Some counties charge a fee if the parent-child or grandparent-grandchild claim is not submitted to the Recorder with a Preliminary Change of Ownership Report form reflecting such transfer.

b. If appropriate, file a protective claim by citing the trust distribution terms and leave open for future distribution or subtrust funding adjustments. However, some counties may charge each time a later adjustment is required.

c. Apply the \$1 million exclusion for nonresidential real property (Rev & T C §63.1(a)(2)) first to the property with the lowest base year intended to be held by beneficiaries the longest. See Rev & T C §63.1(a)(2).

d. Obtain information about the unused balance of the \$1-million exclusion from the State Board of Equalization. The letter must state the relationship to the transferor and provide the transferor's name and Social Security number. See Letter to Assessor No. 2008/018, Question 19.

e. Late claims may be filed at any time (provided property has not been sold to a third party; transfer of real property to a parent or child of the transferor is not considered a transfer to a third party), with tax benefits applied only as of the lien date (January 1) preceding the filing, but not retroactively to the date of transfer. See Rev & T C §631.1(e)(2), (4); see also Letter to Assessor No. 2008/018.

HANDLING APPRAISALS

a. Interview and retain qualified appraisers:

- (1) Consider hiring the appraisers directly as the attorney's expert for purposes of litigation to protect a claim of work product.
- (2) Hiring for purposes of completing the tax return may not come within the realm of work product; see *U.S. v Frederick* (7th Cir 1999) 182 F3d 496.
- (3) Ensure that the appraiser is a "qualified appraiser" under IRC §170(f)(11)(E).

b. Determine the effect of a high or low value on income tax basis, estate tax, GST tax, and property taxes.

c. Determine the DOD and alternate valuation (if applicable) values.

d. Determine whether farmland or a closely held real estate business will qualify for estate tax special use valuation and the aggregate decrease in value per inflation adjustments (IRC §2032A).

e. Determine whether any property is subject to a qualified conservation easement (IRC §2031(c)), and have the appraiser refer to the easement in the report.

f. Consider applicable discounts and determine whether a separate appraisal is required to value the discount.

g. For Form 706 purposes, value and keep an inventory of property discovered that is not in the trust.

h. Send an instruction letter and documentation to the appraiser:

- (1) Send copies of deeds and leases.
- (2) Identify the percent of ownership interest being appraised, and identify all other owners; if less than 100 percent, discuss basis for fractional interest discounts.
- (3) Identify the nature of the interest being appraised (*e.g.*, fee simple, leased fee, ground lease, mineral leases, leasehold estate).
- (4) If the property produces income, provide financial statements for the previous 3 years, or as otherwise requested by the appraiser.
- (5) Discuss any pending or threatened litigation that might affect value. See, *e.g.*, *Estate of Samuel I. Newhouse* (1990) 94 TC 193, nonacq 1991-2 Cum Bull 1; *Estate of Bessie I. Mueller*, TC Memo 1992-284.

(6) Discuss environmental concerns and whether the appraiser is to consider them.

NOTE

Valuation should include costs of remediation, which costs must be substantiated and reported in decedent's estate tax return. If the costs are not reported, the estate runs a serious risk of overstating value and paying excess estate taxes. See *Estate of Eleanor O. Pillsbury*, TC Memo 1992-425.

(7) Instruct the appraiser to value items as of the DOD (plus alternate valuation date and/or special use value under IRC §2032A, when applicable).

(8) Instruct the appraiser to use the IRS definition of "fair market value." See Treas Reg §20.2031-1(b).

(9) Request oral or draft reports before making final ones.

(10) Instruct the appraiser not to communicate with the IRS without authorization from counsel.

i. Calendar the date for completion of the appraisal.

j. Review appraisals for sufficiency.

k. Forward copies to trustee.

HANDLING OUT-OF-STATE REAL PROPERTY

Determine whether:

a. Out-of-state counsel is needed to handle title transfers or any other issues and confirm responsibility in writing.

b. Any out-of-state proceedings or compliance steps are needed.

c. Any out-of-state, county, or local property, transfer, or other real property-related taxes apply.

d. Any tax lien release documents must be recorded or filed.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 11. EVALUATE CLOSELY HELD BUSINESSES: GENERAL CONSIDERATIONS

STEP 11. EVALUATE CLOSELY HELD BUSINESSES: GENERAL CONSIDERATIONS

CHECK FOR COMPLIANCE WITH ORGANIZATIONAL FORMALITIES

- a. Confirm that all required filings have been made with the California Secretary of State, and if appropriate, the governing bodies of other jurisdictions in which the entity does business.
- b. Confirm that interests in the entity have been properly issued, registered with the appropriate governmental authorities, and that, if applicable, notice of exemption from registration in California has been issued. See, *e.g.*, Corp C §25102(h), (f); 10 Cal Code Regs §§260.102.8, 260.102.14.
- c. Obtain copies and review all income tax returns (including IRS Form 1065 for partnerships, limited partnerships, or limited liability companies, 1120 for sub-chapter C corporations or 1120S for sub-chapter S corporations and any Schedules K-1 (IRS Form 1065 or 1120S) for entities taxed as partnerships and/or S corporations), employee payroll, business property, and other applicable tax returns.
- d. Consult appropriate corporate counsel for assistance and assist in taking action to cure defects in compliance with organizational formalities.

ANALYZE IRC CHAPTER 14 ISSUES: PART I (IRC §2701)

Determine Whether IRC §2701 Applied to Inter Vivos Transfer

Determine whether decedent made an inter vivos transfer of stock of a corporation or interests in a partnership or LLC to which IRC §2701 applied. If the answer to all four of the following questions is yes, §2701 applied.

- a. Did decedent transferor transfer an equity interest in a corporation, partnership, or LLC that was junior to the interest retained by the transferor and for which there is no publicly traded market price? See Treas Reg §25.2701-1(a)(1), (c).
- b. Was that junior interest transferred to members of the transferor's family as defined in IRC §2701(e)(1)?
- c. Did the transferor or "applicable family members" (see IRC §2701(e)(2)) retain a senior interest (*i.e.*, an interest with a priority for the distribution of income and/or capital of the entity)?
- d. Did decedent transferor or decedent's family control the entity whose interests were being transferred? See IRC §§2701(b)(2), 2701(e)(3).

Analyze the Impact of IRC §2701 at Death

- a. Determine whether distributions relating to the senior interest retained by decedent transferor have not been made when due or within the 4-year grace period of IRC §2701(d)(2)(C).
- b. Determine whether the "compounding rule" will apply to the valuation of the interest. Treas Reg §§25.2701-2(b)(6), 25.2701-2(c)(2). See Treas Reg §25.2701-4(c).

ANALYZE IRC CHAPTER 14 ISSUES: PART 2 (IRC §§2703-2704)

- a. Review all agreements, including the following, that affect decedent's right to acquire, own, hold and possess, and/or sell, exchange, or otherwise dispose of an interest in a business and/or real property used in the operation of a business:
 - (1) Buy-sell agreements with respect to stock of a corporation owned by decedent at his or her death.
 - (2) Stock option plans, including provisions applicable to options still held by decedent at the time of his or her death, and stock purchase and employee stock ownership plans.
 - (3) Articles of incorporation, bylaws, partnership agreements, limited partnership agreements, operating agreements for LLCs, other agreements with respect to stock or partnership/membership interest affording special voting rights, liquidation rights, and/or "applicable restrictions."

- (4) Partnership agreements (or limited partnership agreements).
- (5) Operating agreements of LLC or LLP and employment agreements of LLP.
- (6) Leases and/or options to purchase real property.

b. Summarize the provisions of agreements that affect the value of the interest, including whether those provisions apply only at death, and when compliance is discretionary or mandatory.

c. Confer with the appraiser regarding what legal effect the agreement, right, or restriction will have in the valuation process, and make sure that appropriate authority is included in the appraiser's report to support that legal effect.

Determine Whether IRC §2703 Applies

a. If the interest owned by decedent is subject to any agreement or restriction in connection with decedent's ability to buy, sell, exchange, or otherwise dispose of that interest and the restriction was created after the effective date of IRC §2703 (October 8, 1990) or the agreement was "substantially modified" (Treas Reg §§25.2703-1(c)(1), (c)(2)) after October 8, 1990, IRC §2703 applies; *i.e.*, the agreement or restriction will be disregarded.

b. If §2703 does not apply and the conditions of Treas Reg §20.2031-2(h) (regarding stocks and bonds) or §25.2703-1(b)(1) (regarding options and agreements) are met, the agreement or restriction will be considered in establishing the asset's value for federal estate tax purposes.

Analyze the Impact of IRC §2703

a. If less than 50 percent of the value of the property that is subject to the right or restriction is owned by persons who are not members of the transferor's family, IRC §2703 applies; *i.e.*, the agreement or restriction will be disregarded except as indicated in (b), below. Treas Reg §25.2703-1(b)(3).

b. If the right or restriction contained in the option or agreement meets the requirements set out in Treas Reg §25.2703-1(b)(1), the agreement or restriction will be considered for purposes of valuing the interest that is subject to that agreement or restriction.

c. If real property is subject to a lease that is not comparable to leases for similar properties entered into by unrelated parties, the lease may be a restriction on the use of the property that will be disregarded when valuing the property for federal estate tax purposes. Treas Reg §25.2703-1(d), Example 1.

Determine Whether IRC §2704 Applies

a. If the interest held by decedent has a voting or liquidation right, determine if and when that right lapses:

(1) If that right was created before October 9, 1990, or does not lapse at the deceased interest-holder's death (see Treas Reg §§25.2704-1(b), (c)(1), and (f)), IRC §2704 will not apply.

(2) If that right was created after October 8, 1990, decedent (and members of his or her family) own 50 percent or more of the entity (see Treas Reg §25.2704-1(a)(2)), and none of the circumstances described in Treas Reg §25.2704-1(c)(2)(i)-(iii) apply, that right will be subject to IRC §2704(a).

(3) If that right was created after October 8, 1990, but either (a) decedent (and members of his or her family) own less than 50 percent of the entity (see Treas Reg §25.2704-1(a)(2)), or (b) any one or more of the circumstances described in Treas Reg §25.2704-1(c)(2)(i)-(iii) apply, IRC §2704 will not apply.

b. If there is an "applicable restriction" (see Treas Reg §25.2704-2(b)) on the interest held by decedent at the DOD, determine the impact of the "applicable restriction" on the value of the interest.

Analyze the Impact of IRC §2704

a. If IRC §2704(a) applies, the amount included in decedent's estate as a result of the lapse will be the difference between:

(1) The value of all interests in the entity that are held by decedent, determined immediately before the lapse and determined as if the right is nonlapsing; and

(2) The value of all interests in the entity that are held by decedent's estate immediately after the lapse. See IRC §2704(a)(2); Treas Reg §25.2704-1(d).

b. If IRC §2704(b) applies, the applicable restriction will be disregarded for purposes of valuing the interest; rather, decedent's rights will be determined under applicable state law. Treas Reg §25.2704-2(c); see also Treas Reg §25.2704-2(d).

Other Issues Related to Agreements Affecting Value

- a. Calendar required exercise and due dates regarding elections and actions.
- b. Review pertinent estate planning documents for conflicts with terms and conditions of agreement(s) affecting value.

HANDLING APPRAISALS

Initiate Appraisal Process

- a. Select the business appraiser; determine whether the appraiser is properly qualified and whether the appraisal methodology to be used is acceptable for IRS and court purposes.
- b. Consider whether the attorney should contract with the appraiser to preserve valuation options under the attorney-client and attorney work-product privileges.
- c. Obtain separate appraisals of underlying assets owned by the entity (*e.g.*, real property).
- d. Calendar the completion date of the appraisal, request and review a draft of the report before it is finalized, and instruct the appraiser not to communicate with the IRS without the attorney's authorization.

Obtain Information

Obtain information and business history of entity to be valued for completion of the appraisal report, including:

- a. Financial statements and income tax returns for 3 years, and copies of all appraisals for the business over the past 10 years.
- b. Summary of ownership interests of all shareholders, partners, and members (including decedent) and their relationship to decedent; percentage of decedent's interest in the entity, and laws applicable to the valuation process.
- c. Information about any pending or threatened litigation that might affect value.
- d. Future business projections and information about competitors.
- e. Copies of all agreements affecting valuation and the attorney's summary of provisions of the agreement that affect the value of the interest, including whether those provisions apply only at death, and the circumstances under which compliance is discretionary or mandatory.
- f. Copies of leases or other significant contracts.
- g. Copies of shareholder, stock purchase, partnership and LLC operating agreements; articles of incorporation and bylaws; documents describing any restrictions on transfer of ownership interests.

Make Sure Appraiser Considers Applicable Estate Tax Laws

Consult with and advise appraiser regarding all estate tax laws applicable to the valuation process, including:

- a. Chapter 14 issues;
- b. Alternate valuation date (IRC §2032); and
- c. Special use valuation (IRC §2032A) issues.

NOTE

IRC §2032A special use valuation and valuation discounts may be used together. See *Hoover v Commissioner* (10th Cir 1995) 69 F3d 1044, acq 1999-1 Cum Bull 5.

- d. Other valuation discounts or premiums, such as:

- (1) Fractional interest discounts for real property used in operation of a business but not owned by the entity (see *Samuel J. Lefrak*, TC Memo 1993-526);
 - (2) Minority interest discounts (see *Propstra v U.S.* (9th Cir 1982) 680 F2d 1248; *Estate of Bright v U.S.* (5th Cir 1981) 658 F2d 999);
 - (3) Lack of marketability discounts (see *Bernard Mandelbaum*, TC Memo 1995-255, aff'd (3d Cir 1996) 91 F3d 124);
 - (4) Discounts for family limited partnership assets (see *Kimbell v U.S.* (5th Cir 2004) 371 F3d 257; but see *Strangi Estate v CIR*, 115 TC 478 (2000), aff'd in part and rem'd in part 293 F3d 279 (5th Cir 2002) and *Strangi II*, TC Memo 2003-145, aff'd 417 F3d 468 (5th Cir 2005); *Estate of Theodore H. Thompson*, TC Memo 2002-246, aff'd sub nom *Turner v Commissioner* (3d Cir 2004) 382 F3d 367; see also *Estate of Wayne C. Bongard* (2005) 124 TC 95);
 - (5) Blockage discounts (Treas Reg §§20.2031-2(e), 25.2512-2(e));
 - (6) Control premiums (Treas Reg §§20.2031-2(f), 25.2512-2(f));
 - (7) "Swing vote" premiums (see *Estate of Clara S. Roeder Winkler*, TC Memo 1989-231);
 - (8) Discounts for built-in capital gains (see *Estate of Dunn v Commissioner* (5th Cir 2002) 301 F3d 339; *Eisenberg v Commissioner* (2d Cir 1998) 155 F3d 50, acq 1999-1 Cum Bull xix; *Estate of Artemus D. Davis* (1998) 110 TC 530; *Estate of Frazier Jelke III*, TC Memo 2005-131);
 - (9) Discounts for environmental liabilities (see *Estate of William J. Desmond*, TC Memo 1999-76); and
 - (10) Market absorption discounts (see *Estate of Eldon L. Auker*, TC Memo 1998-185).
- e. IRS definition of "fair market value." Treas Reg §20.2031-1(b).

Actions to Take When Final Appraisal Is Received

When final version of appraisal has been received:

- a. Review appraisals and send a copy of the appraisal to trustee.
- b. Determine eligibility for IRC §303 redemption for corporate stock.
- c. Determine eligibility for IRC §2032A special use valuation, IRC §2057 deduction for "qualified family-owned business interests" (QFOBI) (not applicable to estates of decedents dying after December 31, 2003), and IRC §6166 extension of time for payment of estate tax attributable to a closely held business or farm. In each case, consider a protective election if the value is close but not quite sufficient. See Treas Reg §20.2032A-8(b); IRC §2057(i)(3)(H); Treas Reg §§20.6166-1(d), 20.6166A-1(e)(3).

HANDLING PROPERTY TAXES

- a. Determine whether a change in ownership occurs for purposes of reassessing real property owned by:
 - (1) The business entity (see Rev & T C §64); or
 - (2) A subsidiary entity owned by the parent entity (*Title Ins. & Trust Co. v County of Riverside* (1989) 48 C3d 84, 255 CR 670).
- b. Review rules and take steps necessary to prevent future reassessment of real property owned by a business entity, if possible.
- c. Indicate change of ownership of entity on California income tax return filed by the entity. If so indicated, the FTB must furnish the names and addresses of that entity and of the ownership interest transferees to the BOE. Rev & T C §64(e).
 - (1) The BOE then will request a signed change in ownership statement from the transferees (Statement of Change in Control and Ownership of Legal Entities (Form BOE-100-B)).
 - (2) Although the change in ownership statement is due 45 days from the date of the change in control of the entity, no penalty will be assessed unless Form BOE-100-B is not returned within 45 days from the written request by the BOE. Rev & T C §§480.1(b), 480.2(b).

NOTE

Parent-child and grandparent-grandchild exclusion from reassessment is not available for transfers of interests in business entities. *Penner v County of Santa Barbara* (1995) 37 CA4th 1672, 44 CR2d 606.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 12. EVALUATE CORPORATIONS

STEP 12. EVALUATE CORPORATIONS

REVIEW WITH CORPORATE COUNSEL

Review the following with corporate counsel:

a. Compliance with corporate formalities:

- (1) Make sure that minutes of meetings of shareholders and directors, especially annual meetings, are current.
- (2) Elect new director(s) and officer(s) to replace decedent.
- (3) Make sure filings of annual statements with the Secretary of State are current and update filing to reflect the change of directors and officers as a result of decedent's death.
- (4) Update business license(s), *e.g.*, real estate broker, contractor, or other professional license, to reflect decedent's death.

b. Banking issues, including:

- (1) Status of corporate loans (is there an acceleration of a due date as a result of decedent's death?);
- (2) Guaranties; and
- (3) Signature authority.

c. Determine unusual corporate liabilities and discuss:

- (1) Potential or actual litigation;
- (2) Workers' compensation claims; and
- (3) Bankruptcy or insolvency of a major customer.

REVIEW AGREEMENTS AFFECTING VALUE

a. Review all agreements regarding decedent's rights and articles of incorporation, bylaws, and other agreements affording special voting rights or liquidation rights and applicable restrictions. See [step 11](#), above.

b. Calendar due dates per any agreement.

c. Review pertinent estate planning documents for conflicts with buy-sell or other agreements (*e.g.*, employee stock ownership plans (ESOPs), "incentive stock options" (ISOs), nonqualified stock options (NQSOs), or stock appreciation rights (SARs)), concerning ownership interests and transfers of those interests.

d. Identify and review all life insurance policies on decedent's life that are owned by and payable to the corporation, and consider whether death benefits are includable in decedent's gross estate.

e. If a buy-sell agreement calls for payment of the purchase price for stock in installments:

- (1) Consider the application of IRC §1274 (imputed interest); and
- (2) Determine whether amounts to be paid under the agreement will be sufficient to meet decedent's estate tax liability.

f. If a buy-sell agreement affects a stock redemption:

- (1) Identify any limitations on the corporation's ability to redeem its stock. (see [Corp C §§500-503.1](#));
- (2) Determine whether IRC §303 applies; and

(3) Consider what effect the redemption will have on control of the corporation and consider redeeming less than decedent's entire interest to protect control.

g. Consider whether the purchase price will fix estate tax value. IRC §2703.

S CORPORATION CONSIDERATIONS

Estate as Shareholder

An estate may be a shareholder of an S corporation during the period of administration without loss of subchapter S status. IRC §1361(b)(1)(B). Consider:

a. Whether the estate holds business interests that should be incorporated and for which an S corporation election should be made. See IRS Letter Ruling 7951131.

b. If the estate holds S corporation stock, whether the S election should be revoked. If yes, obtain necessary consents to revocation. See IRC §1362(d)(1)(B).

Trust as Shareholder

a. Determine whether S corporation stock passes to one of the following types of trusts permitted to hold S corporation stock:

(1) A testamentary trust (IRC §1361(c)(2)(iii)) or a revocable trust that becomes irrevocable at the grantor's death (IRC §1361(c)(2)(ii)), neither of which qualifies as a qualified subchapter S trust (QSST) or an electing small business trust (ESBT), for a period not to exceed 2 years.

NOTE

A trust can convert from a QSST to an ESBT and vice versa. Treas Reg §1.1361-1(j)(12), (m)(7).

(2) A QSST, which must meet the requirements of IRC §1361(d)(3)(A). Note that the S election must be made by each beneficiary of the QSST.

(3) An ESBT, which must meet the requirements of IRC §1361(e)(1)(A). Note that the S election must be made by the trustee, not the beneficiaries (IRC §1361(e)(3); Treas Reg §1.1361-1(m)(2)).

b. The QSST or ESBT election must be made within 2 months and 16 days following the transfer to the trust (Treas Reg §1.1361-1(j)(6)(iii)(A) (QSST); Treas Reg §1.1361-1(m)(2)(iii) (ESBT)).

NOTE

If the QSST or ESBT election is not timely filed, consider automatic waiver relief under IRC §1361(f). See Rev Proc 2003-43, 2003-1 Cum Bull 998.

Inadvertent Loss of S Corporation Status

Be aware that loss of S corporation status will occur if:

a. The number of shareholders of the S corporation exceeds 100 by virtue of disposition of S stock owned by decedent. IRC §§1361(b)(1)(A), 1362(d)(2), Treas Reg §1.1361-1(e)(1). All members of a family are treated as one shareholder. IRC §1361(c)(1), Treas Reg §1.1361-1(e)(3).

b. Administration of the estate has been unduly prolonged and the estate therefore ceases to exist. Treas Reg §1.641(b)-3(a).

NOTE

If a valid IRC §645 election has been made, the estate will not terminate under Treas Reg §1.641(b)-3(a) before termination of the IRC §645 election period.

c. S corporation stock passes to a testamentary trust (IRC §1361(c)(2)(iii)) or to a revocable trust that becomes irrevocable at the grantor's death (IRC §1361(c)(2)(ii)), neither of which qualifies as a QSST or an ESBT, and that trust holds S corporation stock for more than 2 years. IRC §1362(d)(2).

d. S corporation stock passes to a nonresident alien. IRC §1361(b)(1)(C).

Termination of S Corporation Taxable Year

Consider whether to:

- a. Elect to terminate the S corporation taxable year for income tax purposes as of the DOD of decedent (IRC §1377(a)(2)) and secure necessary shareholder consent to termination of the taxable year; or
- b. Prorate S corporation income for the year under IRC §1377(a)(1) (no shareholder consent required).

TAX PLANNING ISSUES

- a. If the terms of the trust allow (see Prob C §§16200(b), 16222(a)), consider:
 - (1) Transfer of unincorporated business interests held by the trust to a newly created S corporation;
 - (2) Whether a QSST or ESBT election may be made; and
 - (3) Whether there will be any adverse income tax consequences of an ESBT election (see IRC §641(c)(2)).
- b. If the trust terms allow, consider liquidating the existing corporation held as an asset of a trust:
 - (1) To obtain a basis step-up for depreciable assets owned by the corporation. However, consider IRC §336 issues (taxation of gain at corporate level).

NOTE

Under current law, the basis of shares of stock of a corporation owned by decedent (or by decedent and spouse, as community property) is "stepped-up"; however, basis of assets owned by corporation ("inside basis") is not. Consider impact of no "inside basis" step-up on any proposed liquidation of a corporation; also consider effect of changes under EGTRRA-2001 eliminating estate taxes (only) in the year 2010 and replacing, in that year only, modified carryover basis provisions.

- (2) To avoid accumulated earnings and personal holding company problems.
 - (3) Consider that a posttermination transition period is available if a corporation terminates its S status (IRC §1371(e)), but is not available if a shareholder terminates his or her interest in an S corporation (IRC §§1362, 1377).
- c. If business activities will continue, consider a change of form of the entity from a C corporation to an S corporation, partnership, or LLC to avoid double income taxation on earnings of a C corporation that are distributed to shareholders as dividends (IRC §301) and not as deductible compensation or reimbursement of deductible business expenses (IRC §162).
 - (1) For change of form of an entity to an S corporation, consider the impact of:
 - (a) IRC §1374 (built-in gains tax);
 - (b) IRC §1375 (passive investment income tax);
 - (c) IRC §1362(d) (termination rules);
 - (d) IRC §1363(d) (LIFO recapture tax);
 - (e) IRC §1371(b) (attribute carryovers);
 - (f) IRC §§1363(b)(4) and 291 (corporate preference addbacks);
 - (g) IRC §56(b)(2)(D) (effect of conversion on research and experimental expenditures with respect to AMT of shareholders); and
 - (h) IRC §469 (suspended passive activity losses).
 - (2) For change of form of an entity to a partnership, consider impact of IRC §336 and see Corp C §§1100, 15677.8, 16908.
 - (3) For change of form of an entity to an LLC, consider impact of IRC §336 and see Corp C §§1100, 17540.8.
 - (4) Be sure to consider IRC §1(h)(11), which limits the income tax rate that applies to dividends paid by domestic corporations

to 15 percent.

NOTE

Exchange of stock of a C corporation for an interest in a partnership or LLC will be a taxable event.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 13. EVALUATE PARTNERSHIPS

STEP 13. EVALUATE PARTNERSHIPS

REVIEW PARTNERSHIP AGREEMENT

- a. Determine whether to elect to continue a general partnership or limited partnership:
 - (1) If a majority in interest of the partners do not agree to continue the general partnership within 90 days following the deceased partner's death (Corp C §§16601(7)(A), 16801(2)(A)), unless other terms in the partnership agreement supersede, the partnership will be dissolved.
 - (2) Consider that an election to continue may be necessary to prevent a real property tax reassessment.
- b. A general partner's death will cause dissolution of a limited partnership unless the requirements of Corp C §15681 are met.
- c. Advise partnership counsel of partner's death.
- d. Determine existence of any benefits or entitlements resulting from the partner's death.
- e. Determine existence of any obligations resulting from the partner's death.
- f. If the partnership agreement calls for mandatory sale of the partnership interest to the partnership or other partners, determine whether payment of the purchase price for the interest is to be made in installments:
 - (1) Consider the application of IRC §1274 (imputed interest).
 - (2) Determine whether amounts to be paid under the agreement will be sufficient to meet decedent's estate tax liability, as and when due.
- g. If the partnership agreement does not call for mandatory sale of the partnership interest, review the partnership agreement for any limitations on the deceased partner's right to dispose of the partnership interest.
- h. Review estate planning documents for inconsistencies with the partnership agreement.

IDENTIFY AND REVIEW LIFE INSURANCE POLICIES

Identify and review all life insurance policies on decedent's life that are owned by the partnership. Consider whether death benefits are includable in decedent-insured's gross estate.

- a. If a partnership (including an LLC or LLP) owns the policy and the death benefits are paid to the partnership, none of those death benefits will be included in decedent's gross estate.
- b. However, those death benefits will be assets of the partnership (LLC/LLP) for purposes of determining the date-of-death value of decedent's interest in the partnership. IRC §2042; Rev Rul 83-147, 1983-2 Cum Bull 158.

UPDATE FILINGS

- a. For general partnerships, update filing of partnership documents and:
 - (1) Determine whether a Statement of Partnership Authority (Form GP-1) was previously filed with the Secretary of State; or if none is on file, whether Form GP-1 should be filed showing the new partners;
 - (2) If changes are needed regarding currently filed Form GP-1, file a Statement of Amendment/Cancellation (Form GP-7); and
 - (3) File a Statement of Dissociation (Form GP-3).
- b. For limited partnerships, if decedent's death caused a change in the general partners or other representations in the previously filed Certificate of Limited Partnership (Form LP-1), file an Amendment to Certificate of Limited Partnership (Form LP-2).

c. If any recorded Secretary of State forms or statement of partnership authority (Corp C §16303) must be updated, record updated forms in the county of the principal place of administration and in each county where the partnership owns real property.

CONSIDER IRC §754 ELECTION

Communicate with the general partner of the limited partnership or tax matters partner of the general partnership about an election under IRC §754 to adjust decedent's "inside basis" for partnership assets:

- a. Determine whether prior IRC §754 elections have been made.
- b. If it is determined that an IRC §754 election is advisable, calendar the date to make the election. Make the election on the partnership's informational tax return (Form 1065) for the taxable year in which decedent's death occurs. Treas Reg §1.754-1(b).
- c. Determine who will make the adjustment calculation and maintain separate bookkeeping records for adjusted property.
- d. Confirm in writing assignment of responsibility for adjustment calculation and for maintenance of records.
- e. Advise trustee that each distributee of partnership assets with respect to distributions made within 2 years of decedent's DOD may make the basis adjustment on the distributee's income tax return. Treas Reg §1.732-1(d).

REVIEW OTHER INCOME TAX ISSUES

Perform, or assign to the income tax return preparer, the following:

- a. Calculation of the increase to basis of the partnership interest as a result of decedent's death. Treas Reg §1.742-1.
- b. Determination of suspended passive losses and deductibility on decedent's final income tax return. See IRC §469(g).
- c. Determination of income tax due to other states if partnership activities cross state lines.
- d. Determination of impact of distribution of the partnership interest (*e.g.*, distribution of the partnership interest in satisfaction of a pecuniary bequest (see Treas Reg §1.661(a)-2(f)(1)) or "in kind" distribution not in satisfaction of a pecuniary bequest (IRC §643(e)) on the taxable income of the trust and the distributee.
- e. Determination of decedent's distributive share of partnership income (constitutes IRD) as of decedent's DOD, including decedent's share of any accounts receivable:
 - (1) Report or advise the estate tax return preparer to report IRD as an asset on the estate tax return (Form 706); and
 - (2) Compute the IRC §691(c) deduction for the IRD item and advise the successor in interest (trust or distributee-beneficiary) of the IRC §691(c) deduction.
- f. Determination of the deceased partner's share of partnership income as of the taxable year end in the year of decedent's death. The taxable year end for the deceased partner will be the deceased partner's DOD. IRC §706(c)(2)(A).

CONSIDER SALE, LIQUIDATION, OR CONVERSION

- a. Consider whether to structure withdrawal of trustee as successor in interest to the deceased partner's interest as a sale of the partnership interest to the remaining partners or as liquidation of the partner's interest in the partnership:
 - (1) Review the terms of the trust to determine whether any limitation is placed on trustee's power to effect incorporation, dissolution, or other change in the form of the business. Prob C §§16200(b), 16222(a).
 - (2) Engage expert counsel as necessary.
 - (3) Compare the income tax consequences of a sale versus a liquidation, or retain appropriate tax counsel to provide the comparison.
 - (4) If trustee is also a partner of the partnership (conflict of interest), consider obtaining a court order approving the sale or liquidation. Prob C §17200.
 - (5) If a complete liquidation of the partnership is necessary, consider an in-kind distribution of partnership assets versus a sale of assets by the partnership, and analyze the income tax consequences to the trust.

- (6) Consider a sale or liquidation of the partnership interest if the interest is not a permitted investment under the trust terms.
 - (7) Consider whether a sale or liquidation of the partnership interest will trigger reassessment of real property owned by the partnership.
- b. Consider transfer of unincorporated business interests held by the trust to a newly created partnership:
- (1) Review the trust to determine if the terms of the trust allow a transfer (Prob C §§16200(b), 16222(a)); and
 - (2) Analyze the impact of formation of a partnership on future planning opportunities for family members, *e.g.*:
 - (a) Valuation discount planning;
 - (b) Special use valuation (IRC §2032A);
 - (c) Installment payment of estate taxes (IRC §6166);
 - (d) Reassessment of real property; and
 - (e) Income tax consequences to current and future partners of formation, operation, and termination.
- c. If business activities will continue, consider a change in the form of the entity, especially if trustee cannot or will not assume management responsibility or liability:
- (1) From a general partnership to a limited partnership (Corp C §16902) to convert a trust's interest to a limited partnership interest; or
 - (2) From a partnership to an LLC (see Corp C §16902 for general partnership; Corp C §15677.2 for limited partnership).

NOTE

A reduction of a partner's share of partnership liability is considered a cash distribution to the partner. IRC §752(b). Also consider the impact of IRC §2704 on the possible lapse of a general partner's voting or liquidation rights as a result of the conversion. See step 11, above.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 14. EVALUATE OTHER BUSINESS ENTITIES

STEP 14. EVALUATE OTHER BUSINESS ENTITIES

LIMITED LIABILITY COMPANIES

Review:

- a. Operating agreement for an LLC with respect to the nature of the interest in the LLC held by the trust following decedent's death (assignee or substituted member) and with respect to issues discussed in [step 13](#), above, concerning partnerships.
- b. Organizational formalities with counsel for the LLC, and arrange for necessary filings with the Secretary of State, including updating the Statement of Information (Form LLC-12) or amending the Articles of Organization on a Certificate of Amendment (Form LLC-2).

See discussion in [step 13](#), above, regarding tax and other considerations.

PROFESSIONAL ORGANIZATIONS

- a. Review or consult experienced counsel to review rules of appropriate governing body (*e.g.*, State Bar Association, State Medical Board) regarding ownership of stock of a professional corporation or an interest in an LLP, and duties and responsibilities when concluding the business and dissolving the entity when no professionals remain to operate the entity.
- b. Determine whether immediate transfer to another professional is required. See [Corp C §13407](#). For attorneys, see [Prob C §17200\(b\)\(23\)](#). For dentists, see [Bus & P C §§1625.3-16.25.4](#).

NOTE

A corporation's status as a professional corporation will be suspended or revoked if a deceased shareholder's stock is not redeemed or transferred to another licensed professional within 6 months following the deceased shareholder's death for professionals other than dentists, and within 12 months following the deceased shareholder's death for dentists. See [Corp C §13407](#).

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 15. EVALUATE PUBLICLY TRADED SECURITIES

STEP 15. EVALUATE PUBLICLY TRADED SECURITIES

DETERMINE TITLE TO FINANCIAL INSTRUMENT

In evaluating publicly traded securities, first examine title and:

- a. If held directly, obtain a copy of the actual security (certificate); or
- b. If held in nominee form, obtain a copy of the brokerage statement.

VALUE SECURITY

- a. In general, the mean between the highest and lowest quoted selling prices on the valuation date (DOD or alternate valuation date) is the fair market value per share of stock or value of the bond. Treas Reg §20.2031-2(b).
- b. If the alternate valuation date is used and the shares of stock or the bond are sold within the 6-month period following DOD, the sales price is the fair market value for estate tax purposes. IRC §2032(a)(1).
- c. Determine the ex-dividend date. Treas Reg §20.2031-2(i).
- d. Determine accrual of dividends or interest.

NOTE

Consider using an online or other security valuation service. If CUSIP numbers are needed, they can be researched on the Internet at, *e.g.*, <http://activequote.fidelity.com/mmnet/SymLookup.phtml>. Other sites (such as Edgar resources on different sites) can provide ticker symbols and SEC filings.

REVIEW TYPES OF SECURITIES

Review types of securities, *e.g.*:

- a. Master limited partnerships;
- b. Common and preferred stocks;
- c. Corporate and or municipal bonds (bearer or registered);
- d. Treasury bills and notes;
- e. Mutual funds;
- f. Real estate investment trusts (REITs) and real estate mortgage investment contracts (REMICs); and
- g. Derivatives.

REVIEW MANAGEMENT OF SECURITIES

Review management of securities, *e.g.*:

- a. Consider cessation of automatic dividend reinvestment plans for simplification of trust accounting.
- b. For brokerage accounts, discuss with the broker the status of insurance available through the Securities Investment Protection Corporation (SIPC).
- c. Encourage transfer of securities held in certificate form to a brokerage account for later ease of transfer.

NOTE

Maintain a separate inventory list of securities not in the trust for Form 706 purposes.

REVIEW FOR SALE OR TRANSFER TO SUBTRUSTS

Provide the broker or transfer agent with the following documentation necessary to transfer or sell securities (check with broker):

- a. Prob C §18100.5 certification of trust (signature guaranteed);
- b. Death certificate;
- c. Letter of instructions (signature guaranteed);
- d. Affidavit of domicile; and
- e. IRS Form W-9.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 16. HANDLE PROFESSIONAL BUSINESSES, FRANCHISES, AND LICENSES

STEP 16. HANDLE PROFESSIONAL BUSINESSES, FRANCHISES, AND LICENSES

REVIEW DOCUMENTS

- a. Be aware that many professional licenses and businesses cannot be transferred to a revocable trust and that coordination with an executor or administrator may be necessary.
- b. Review the trust for language regarding the duty to continue a business. If trustee is directed to continue a business, look for a hold harmless clause; if there is no such clause, either petition the court for modification to add a hold harmless clause or seek permission to sell the business.
- c. Review agreements regarding management or disposition of a professional practice and calendar applicable deadlines. Review lease requirements.
- d. Review franchise agreements about provisions on death, and calendar applicable deadlines.
- e. Obtain copies of business, professional, liquor, or other licenses:
 - (1) Notify issuing agency of the death and intended transferee;
 - (2) Comply with the requirements of the issuing agency; and
 - (3) Meet Business and Professions Code requirements, if any.

NOTIFY PROFESSIONAL ORGANIZATIONS

- a. Check mail for newsletters and other professional publications to identify possible professional affiliations; and
- b. Notify all professional associations and organizations in which decedent was a member.

REVIEW INSURANCE

Review existing professional liability insurance to determine whether:

- a. It can be extended to cover future or contingent claims;
- b. It is prudent to purchase additional coverage; and
- c. A probate or trust creditor claim procedure is appropriate for shortening the statute of limitations on professional negligence. Note that CCP §366.2 may extend an expiring negligence statute.

DISPOSITION

- a. Arrange for disposition of the records of a professional practice (*e.g.*, see Prob C §§700-735 for attorneys).
- b. See Prob C §§9764, 17200(b)(22) for procedures for appointment of a practice administrator authorized to wind up the practice of a deceased attorney.
- c. For California notaries:
 - (1) The Secretary of State must be notified;
 - (2) The notary seal should be destroyed; and
 - (3) The notary journal must be filed with the county clerk's office where the oath is on file within 30 days of the DOD (see Govt C §8209(b)). Coordinate responsibility with personal representative, if any.

NOTE

Keep an inventory list of assets discovered that are not in the trust for Form 706 purposes.

ARRANGE FOR SALE, IF NECESSARY

Arrange for the sale of the interest if trustee is not a qualified owner (or if the beneficiaries will not be) or if otherwise appropriate in light of circumstances. Work with a qualified business attorney regarding the sale arrangements, if necessary.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Trust Assets/STEP 17. DETERMINE NATURE AND EXTENT OF MORTGAGES AND NOTES RECEIVABLE

STEP 17. DETERMINE NATURE AND EXTENT OF MORTGAGES AND NOTES RECEIVABLE

REVIEW DOCUMENTS

- a. Request copies of all loan documents and security documents.
- b. Determine whether security interests have been recorded; record Affidavit—Death of Settlor/Trustee (to show successor trustee of decedent as beneficiary of deed of trust).
- c. Advise trustee to inform the payer of trustee's address for payment of future loan installments.
- d. When ready to distribute, prepare and record an Assignment of Beneficial Interest Under Deed of Trust, or a similarly-worded document, to complete the distribution of the beneficial interest.
- e. If there is a subordinated deed of trust or mortgage, advise client to determine status of senior loans.
- f. Determine payment status of loans; calendar balloon payment dates; calendar statutes of limitations on notes in default.

NOTE

Watch for conflicts among family members or beneficiaries regarding repayment of a beneficiary debt.

DETERMINE VALUES

- a. Determine value of mortgages, promissory notes, or contracts to sell land; presumed value will be amount of unpaid principal plus interest accrued to the DOD (Treas Reg §20.2031-4):
 - (1) A note canceled at death is included in the gross estate (Treas Reg §20.2033-1(b)).
 - (2) A self-canceling installment note is not included in the gross estate (*Frane v Commissioner* (8th Cir 1993) 998 F2d 567); it is treated as a disposition for income tax purposes.
- b. Order appraisals and calendar due dates.
 - (1) If valued at less than unpaid principal plus interest accrued to DOD, document the lower value or worthlessness. Treas Reg §20.2031-4.
 - (2) Review appraisals for sufficiency.
 - (3) Send a copy to trustee.

Trust Liabilities

STEP 18. DETERMINE NATURE AND EXTENT OF LIABILITIES, CLAIMS, AND DEBTS

INVENTORY AND VALUE LIABILITIES, CLAIMS, DEBTS

- a. Inventory all debts, claims, liabilities, guaranties, obligations, and liens of the settlor and settlor acting as trustee.
- b. Review all loan, security, and other related documents and determine whether action can be taken to limit or eliminate matured or contingent liabilities.
- c. Determine if a petition for court action is necessary. Prob C §850.

CONSIDER CREDITOR'S CLAIMS PROCEDURE

- a. Advise trustee of the elective trust creditor's claim procedure and its impact on statutes of limitations. Prob C §§19000-19403.
- b. Consider the practical impact of 1-year statute of limitations when dealing with claims and other liabilities. CCP §§366.2, 366.3.

NOTE

The CCP §366.2 statute of limitations is not tolled by the trustee's failure to use the creditor's claim procedure. Levine v Levine (2002) 102 CA4th 1256, 126 CR2d 255.

MANAGING AND PAYING DEBTS AND CLAIMS

- a. Consider notifying secured creditors of decedent's death to avoid missing notices of delinquency or default.
- b. Determine which debts or claims must be paid, request a payment history, set up a payment plan, and keep payments current.
- c. Determine who is liable for the payment:
 - (1) Review the trust agreement and documents creating liability;
 - (2) Consider a Prob C §850 petition; and
 - (3) Consider rules regarding allocation of debts between the trust and surviving spouse (Prob C §19324) and whether a Prob C §19320 petition should be filed.
- d. Determine cash needs to pay debts and claims and arrange for the sale or lease of assets to raise necessary cash.
- e. Determine the priority of debts and claims if the trust is insolvent, make a plan for payment, work out arrangements, and consider retaining insolvency counsel.

HANDLING TRUST LITIGATION

- a. Coordinate trust administration with litigation counsel if trustee or settlor is a party to litigation.
- b. Retain litigation counsel if trustee becomes a defendant in a lawsuit.
- c. Discuss attorney-client privilege issues. See Wells Fargo Bank v Superior Court (2000) 22 CA4th 201, 91 CR2d 716; Moeller v Superior Court (1997) 16 CA4th 1124, 69 CR2d 317; Eddy v Fields (2004) 121 CA4th 1543, 18 CR3d 487.
- d. Note 1-year statute of limitations from the DOD (which may extend otherwise applicable limitations period) for a person making a claim arising from decedent's promise to distribute from an estate or trust. CCP §366.3.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Nontrust Assets/STEP 19. DETERMINE LIFE INSURANCE PROCEEDS AND OTHER DEATH BENEFITS

Inventorying, Valuing, and Managing Nontrust Assets

STEP 19. DETERMINE LIFE INSURANCE PROCEEDS AND OTHER DEATH BENEFITS

NOTE

See also Transferring Property Without Probate (Cal CEB Action Guide September 2008).

ASSESS LIFE INSURANCE

- a. Obtain all original life insurance policies.
- b. Review ownership and beneficiary designations and determine whether:
 - (1) The proceeds are payable to or for the benefit of decedent's estate (Treas Reg §20.2042-1(b));
 - (2) Decedent possessed incidents of ownership (Treas Reg §20.2042-1(c)); or
 - (3) Decedent owned a policy on the life of another (Treas Reg §20.2031-8(a)).
- c. Determine the type of policy, *e.g.*, term, group term, whole life, universal life, accidental death.
- d. Determine whether community funds were used to pay premiums; if the policy is a community property asset, determine whether the beneficiary designation is ineffective under Prob C §§5000-5032.
- e. Determine whether there were any transfers within 3 years of DOD. IRC §2035.
- f. Determine whether there were any transfers for value. IRC §101(a)(2).
- g. If client is a beneficiary:
 - (1) Request claim forms from life insurance companies (if client has not already done so);
 - (2) Have client obtain one certified copy of the death certificate for each insurance policy;
 - (3) Review claim forms to determine the appropriate method of distribution;
 - (4) Consider fiduciary responsibilities when proceeds are payable to trustee; and
 - (5) Before allowing automatic investment of proceeds with the insurance company, consider the prudence of the investment.
- h. If client will be responsible for filing the estate tax return (see step 31, below):
 - (1) Request a Life Insurance Statement (IRS Form 712) from the insurer for each insurance policy; and
 - (2) Determine whether additional valuation information is required, *e.g.*, interpolated terminal reserve for policies on other than decedent's life.
- i. Determine whether any steps are required under a split-dollar agreement.
- j. Determine whether decedent applied GST tax exemption to transfers of life insurance policies or to any irrevocable life insurance trusts created by decedent.
- k. Advise client to update the beneficiary designation for policies owned by client in which decedent is a named beneficiary.

ASSESS HEALTH AND ACCIDENT INSURANCE

- a. Health and accident insurance proceeds to cover the cost of the insured's last illness are not life insurance but are includable under IRC §2033.
- b. Accident or no-fault insurance unconditionally payable to the estate solely by reason of death is life insurance.

HANDLE SOCIAL SECURITY AND VETERANS' BENEFITS

- a. Remind the surviving spouse to apply for the one-time Social Security lump-sum death benefit.
- b. Remind trustee to notify the Social Security Administration (SSA) of the death of decedent to terminate monthly benefits.
- c. Apply for veterans' benefits, if applicable.

HANDLE MEDI-CAL AND MEDICAID BENEFITS

If decedent or decedent's predeceased spouse (or prior spouse) received Medi-Cal or out-of-state Medicaid benefits:

- a. Notify California DHS within 90 days of death with a copy of the death certificate (Prob C §§215, 19202).
- b. Notify other state Medicaid agencies, if applicable.
- c. Ascertain whether the state has rights as a creditor of decedent and determine priority and amount of payment.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Nontrust Assets/STEP 20. DETERMINE EMPLOYEE BENEFITS

STEP 20. DETERMINE EMPLOYEE BENEFITS

OBTAIN AND REVIEW DEATH BENEFICIARY DESIGNATIONS AND PLAN INFORMATION

a. Some of the more common benefit arrangements include:

- (1) Defined benefit pension plans, money purchase pension plans, and profit-sharing plans;
- (2) Federal, state, or local plans (for employees);
- (3) Union or guild plans (for members);
- (4) IRC §401(k) plans and §403(b) plans;
- (5) Employee stock ownership plans (ESOPs) (IRC §4975(e)(7));
- (6) IRAs and SEP-IRAs (IRC §§408(a), (k)), Roth IRAs (IRC §408A), and education savings accounts (ESAs) (IRC §530);
- (7) Tax-sheltered annuities;
- (8) Deferred compensation plans;
- (9) Nonqualified stock option plans (nonqualified for income tax purposes) and incentive stock options (ISOs) (IRC §422) (which qualify for special income tax treatment):
 - (a) Calendar deadline to exercise (often 90 days; check plan); and
 - (b) Determine whether any lifetime transfers of stock options were made (donor still responsible for income tax);
- (10) IRC §125 cafeteria plans (benefits may be earned but not yet applied for);
- (11) Medical reimbursement plans (benefits may be earned but not yet applied for);
- (12) Variable Employee Benefit Associations (VEBAs);
- (13) SIMPLE plans (IRC §408(p)); and
- (14) Death benefit plans, such as a multiple of salary; incentive compensation plans (decendent may have earned compensation based on performance standards, but employer may not acknowledge that these exist).

b. Request a letter from the employer, plan administrator, IRA sponsor, or insurance company setting forth:

- (1) Designated beneficiaries, including alternates (request copies of designation statements);
- (2) Elections available to the beneficiaries, if any, and the deadlines;
- (3) For qualified plans, whether the plan permits the beneficiary to make a direct trustee-to-trustee transfer of the benefits to a newly created inherited IRA;
- (4) Description and DOD value of the benefits;
- (5) Procedures and time limits for obtaining benefits; and
- (6) For stock options, request a letter from the employer's general counsel to assist in analysis of the cash necessary to exercise the options, withholding tax requirements, expiration periods, party responsible for exercising options, and any "insider" restrictions. For valuing stock options, see IRS Letter Ruling 9616035; Rev Proc 98-34, 1998-1 Cum Bull 983.

c. Advise the plan administrator of the death of the participant and termination or continuation of plan.

d. Determine whether the employer requires a probate court order to allow decedent's estate to exercise stock options. Stock options are normally not transferable to a living trust.

e. Determine whether the employer's stock owned by decedent is subject to a legend restriction, or other restrictions under "insider" securities laws, such as SEC Rule 144 (17 CFR §230.144).

EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA) CONSIDERATIONS

Determine if the plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461) and, if so, whether it is a "50 percent" plan or a "100 percent" plan.

a. Determine whether:

- (1) Any portion of the beneficiary designation is ineffective because of ERISA, absent a waiver and consent; and
- (2) Whether any waiver and consent complies with ERISA requirements.

b. Determine whether any portion of the beneficiary designation is ineffective under Prob C §§5010-5032 (consent of spouse to nonprobate transfer of community property). If the plan is an ERISA 50-percent plan, determine whether:

- (1) The other 50 percent passes per beneficiary designation by operation of ERISA; or
- (2) Passes under state law principles. (If state law principles, does the nonparticipant spouse receive 75 percent?)

TRUST AS DESIGNATED BENEFICIARY

a. To qualify the trust as a "see-through" trust, allowing trust beneficiaries to be treated as designated beneficiaries for minimum distribution purposes, comply with Treas Reg §1.401(a)(9)-4, Q&A-6(b) documentation requirements. By October 31 of the calendar year after the DOD, deliver a copy of the trust (or a list of beneficiaries, with an agreement to provide a copy of the trust on demand) to the custodian of the plan.

b. If a QTIP trust is the named beneficiary, verify that QTIP requirements are satisfied. See Rev Rul 2000-2, 2000-1 Cum Bull 305.

c. Provide guidance to trustee regarding income tax treatment and UPIA rules for plan distributions.

YEAR OF DEATH CONSIDERATIONS

Identify the required minimum distribution (RMD), if any, for the year of death (YOD). If the participant died after his or her required beginning date (RBD), the beneficiary must still take the participant's RMD for the YOD (if not already taken by the participant):

a. This YOD RMD (none if participant died before his or her RBD) will be based on the Uniform Lifetime Table (see Treas Reg §1.401(a)(9)-9, Q&A-2) and the participant's birthday in the YOD. Treas Reg §1.401(a)(9)-5, Q&A-4(a).

b. If the beneficiary fails to take this YOD RMD, the beneficiary will be liable for the 50-percent excise tax. IRC §4974(a).

NOTE

If the initial beneficiary takes a YOD RMD to avoid the 50-percent excise tax, but then later makes a timely disclaimer in favor of younger contingent beneficiaries, the initial beneficiary must also receive the income attributable to the YOD RMD or the disclaimed amount before the September 30 of YOD + 1 deadline to avoid being a designated beneficiary as discussed below. This will maximize the "stretch-out" opportunities discussed below for the contingent beneficiaries. See Rev Rul 2005-36, 2005-1 Cum Bull 1368.

SPOUSAL ROLLOVER CONSIDERATIONS

a. Determine whether a spousal rollover should be made in the year of death.

Warning: RMDs cannot be rolled over. If the IRA is rolled over in the year of death, only the portion of the IRA in excess of the YOD RMD can be rolled over. IRC §402(c)(4)(B); IRS Letter Ruling 9005071.

b. If the client is the spouse, have client decide whether to roll over or not, and assist client in:

- (1) Documenting the decision; and
- (2) If rolling over, making an effective rollover and designating beneficiaries for a spousal rollover IRA.

NON-SPOUSAL ROLLOVER CONSIDERATIONS FOR QUALIFIED PLANS

a. The Pension Protection Act of 2006 added IRC §402(c)(11), which allows non-spouse, designated beneficiaries of qualified plans to make direct trustee-to-trustee rollover of eligible benefits to a newly created inherited IRA.

b. This enables non-spouse designated beneficiaries the opportunity to obtain the benefit of "stretch-out" distributions discussed below.

c. See IRS Notice 2007-7 for additional guidance on this direct rollover option.

RMD IN NONROLLOVER SITUATIONS

For nonrollover situations, determine required minimum distributions for the beneficiary:

Time for Determining Beneficiaries

a. The existence and identity of the designated beneficiaries (DBs) is determined as of September 30 of the year following the participant's DOD (*i.e.*, September 30 of YOD + 1). Treas Reg §1.401(a)(9)-4, Q&A-4(a).

b. This regulation permits postmortem "cleanups" to alter the identity of the DBs via distributions and disclaimers before the September 30 deadline. See 66 Fed Reg 3928, 3931 (2001) (preamble to regulation as proposed).

Determining Applicable Minimum Distribution Rules (MDRs)

a. If there is no DB:

(1) If pre-RBD death, payout must be completed by December 31 of the fifth year following the participant's DOD. Treas Reg §1.401(a)(9)-3, Q&A-4(a)(2).

(2) If post-RBD death, "mini-stretch-out" distributions may be taken based on the participant's remaining single life expectancy based on the participant's birthday in the YOD (not YOD + 1). Treas Reg §1.401(a)(9)-5, Q&A-5(c)(3).

b. If there is a DB:

(1) "Stretch-out" distributions may be taken over the DB's single life expectancy (or, if longer, over the participant's remaining single life expectancy). Treas Reg §1.401(a)(9)-5, Q&A-5(a)(1).

(2) The age of the DB is based on the DB's birthday in the calendar year after the participant's DOD. Treas Reg §1.401(a)(9)-5, Q&A-5(c).

(3) Single life expectancies are determined using the Single Life Table in Treas Reg §1.401(a)(9)-9, Q&A-1. Treas Reg §1.401(a)(9)-5, Q&A-6.

(4) No recalculation of DB's life expectancy is allowed; in subsequent years, the DB's RMD denominator will be the prior year's denominator minus one.

(5) RMD installments must begin by December 31 of YOD + 1 (this becomes DB's RBD).

NOTE

Under Treas Reg §54.4974-2, Q&A-7(b), if the DB misses this December 31 of YOD + 1 deadline, DB has two choices:

- Pay the 50-percent excise tax on the late RMD; or
- Qualify for a so-called "automatic" waiver of the 50-percent excise tax by electing the 5-year payout.

c. If there are multiple DBs:

(1) As long as separate sub-IRAs for each DB are created by the December 31 of YOD + 1 deadline, each DB can take distributions based on his or her own life expectancy, regardless of whether the participant died pre-RBD or post-RBD. Treas Reg §1.401(a)(9)-3, Q&A-1 (pre-RBD death), Treas Reg §1.401(a)(9)-5, Q&A-5(a)(1) (post-RBD death).

(2) If the December 31 of YOD + 1 deadline for creating shares for multiple DBs is missed, the oldest DB's life expectancy must be used for all DBs. Treas Reg §1.401(a)(9)-5, Q&A-7(a)(1).

(3) If a trust is named as beneficiary, even if it qualifies as a see-through trust, the separate account rules are not available to the trust beneficiaries. Even if separate sub-IRAs are created for each trust beneficiary, RMDs must be calculated based on the single life expectancy of the oldest beneficiary. Treas Reg §1.401(a)(9)-4, Q&A-5(c).

NOTE

In IRS Letter Ruling 200537-044, separate share treatment is available for subtrusts if the IRA beneficiary designation named the specific subtrusts (versus the "master" trust) as the IRA beneficiaries.

Applicable Rules if Nonparticipant Spouse Is DB in Nonrollover Situations

If the nonparticipant spouse (NPS) is the DB in nonrollover situations, the following special rules apply:

a. For pre-RBD death, the NPS may delay taking RMDs until the later of (1) December 31 of YOD + 1 deadline, or (2)

December 31 of participant's 70½ year. Treas Reg §1.401(a)(9)-3, Q&A-3(b).

b. During the NPS's lifetime, the RMD denominator will be based on the NPS's birthday in the year the NPS must begin taking RMDs, and (unlike other DBs) is recalculated annually. After the NPS's death, the remaining RMDs must be paid out over the NPS's remaining (fixed) life expectancy based on the NPS's birthday in the year of death. Treas Reg §1.401(a)(9)-5, Q&A-5(c)(2).

Keep Account in Decedent-Participant's Name

In nonrollover situations, the account may be moved in institution-to-institution transfers or be divided into multiple accounts corresponding to multiple beneficiaries, but the account(s) must stay in decedent-participant's name or otherwise be clearly identified as an inherited IRA.

ESTATE AND INCOME TAX ISSUES

- a. Determine whether plan benefits will be needed to administer decedent's estate and pay taxes.
- b. Determine whether qualified retirement plan benefits may be excluded from the gross estate under:
 - (1) Pre-1985 former IRC §2039 (\$100,000 exclusion); or
 - (2) Pre-1983 former IRC §2039 (unlimited exclusion).
- c. Determine the proper valuation of decedent's interest in plans for purposes of Form 706.
- d. If the estate tax is paid at the death of the participant, consider the IRD deduction under IRC §691(c). The DB gets the benefit of the IRC §691(c) income tax deduction, regardless of who actually pays the estate tax attributable to the plan benefits.
- e. Regarding retirement plan benefits, consider protecting income tax deferral rights (see terms of the plan, IRC §401(a)(9)); *e.g.*, paying transfer taxes from other sources.

BENEFICIARY ISSUES

Determine:

- a. Whether there are any conflicts of interest;
- b. The income tax consequences to the recipients of such benefits; and
- c. Whether a disclaimer of benefits should be evaluated and how to prevent the client from accepting any interest in the benefits pending evaluation.

NOTE

A disclaimer that satisfies IRC §2518 will be recognized to determine required minimum distributions. A qualified disclaimer can change the life expectancy used to calculate minimum distributions, because a postdeath disclaimer can result in a change of the designated beneficiary and therefore change the identity of the person whose life expectancy will be used to determine minimum distributions. See Treas Reg §1.401(a)(9)-4, Q&A-4(a). Per Rev Rul 2005-36, 2005-1 Cum Bull 1368, a DB who takes the YOD RMD (to avoid the 50 percent penalty) can still disclaim the balance of the IRA (and thereby change the identity of the DBs by the September 30 of YOD + 1 deadline for determining the identity of the DBs). Care must be taken to comply with Rev Rul 2005-36's rules regarding the income attributable to the YOD RMD or to the disclaimed amount.

- d. Determine whether beneficiaries may benefit from planning to minimize IRD.
- e. Determine whether beneficiaries need to review or revise beneficiary designations for their inherited IRAs (to avoid probate) or need to sign other estate planning documents to coordinate plan benefits with their estate plans. If a DB dies before withdrawing the entire balance of an inherited IRA, the DB's successors-in-interest (either the named beneficiaries of the inherited IRA or DB's executor (and the distributees of DB's estate)) will step into DB's shoes for MDR purposes and have the balance of the DB's "stretch-out" period over which to take their RMDs from the inherited IRA.
- f. Advise beneficiaries of any IRC §691(c) deduction and that they may need income tax planning to make adjustments for changes in the amount of taxable income, IRA minimum distribution requirements, and other related issues.

FORMER OR CURRENT SPOUSE ISSUES

- a. Confirm the existence of qualified domestic order rights, if any.
- b. If the participant spouse (PS) predeceased the nonparticipant spouse (NPS), and the PS's beneficiary designation names someone other than the NPS, review federal and California laws that may establish certain interests in favor of the NPS.

c. If the NPS predeceased the PS, determine whether subsequent death beneficiary changes made by the PS are effective under federal and California laws. See *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754; *Marriage of Shelstead* (1998) 66 CA4th 893, 78 CR2d 365.

d. Evaluate whether the residue clause in the NPS's will passes his or her portion of a plan not preempted by ERISA. See *Estate of MacDonald* (1990) 51 C3d 262, 272 CR 153.

e. Do not forget the surviving spouse's rollover option.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Nontrust Assets/STEP 21. EVALUATE HOUSEHOLD AND PERSONAL EFFECTS

STEP 21. EVALUATE HOUSEHOLD AND PERSONAL EFFECTS

DETERMINE OWNERSHIP

- a. Determine whether tangible personal property is trust or nontrust property. By virtue of a general assignment or bill of sale, these assets may be held as trust assets.
- b. For nontrust assets, coordinate with the executor to assure that valuation and management issues are addressed. If there is no executor and the tangibles and other assets are less than \$100,000, use a declaration/affidavit under Prob C §13100. See step 4, above.

VALUE HOUSEHOLD AND PERSONAL EFFECTS

- a. Retain expert to appraise items of artistic or intrinsic value (*e.g.*, jewelry, furs, silverware, paintings, antiques, books, vases, rugs, coins, or stamp collections) if:
 - (1) The value of one item is over \$3000 or if the value of a collection of items is over \$10,000 (Treas Reg §20.2031-6); or
 - (2) The item is a specific bequest under the will or trust.
- b. If there are large art collections, consider valuation discounts. *Estate of David Smith* (1972) 57 TC 650, aff'd (2d Cir 1975) 510 F2d 479; *Estate of Georgia T. O'Keeffe*, TC Memo 1992-210.
- c. Review riders on homeowner's insurance policy for rough gauge of value, and to identify valuable household items. Insurance records may also contain purchase receipts or recent appraisals.
- d. In general, see Treas Reg §20.2031-6 regarding valuation of tangibles for estate tax purposes.

ADDRESS MANAGEMENT OF HOUSEHOLD AND PERSONAL EFFECTS

- a. Consider safekeeping, security (*e.g.*, change locks), or storage requirements;
- b. Review adequacy of insurance coverage;
- c. Consider a preliminary distribution to reduce storage and insurance costs and to please the beneficiary;
- d. Consider a garage sale or donation to charity for less valuable items;
- e. Consider videotaping or photographing assets;
- f. Order appraisals as necessary and calendar anticipated completion date;
- g. Review appraisals for sufficiency; and
- h. Send copies of appraisals to trustee.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Nontrust Assets/STEP 22. EVALUATE ANNUITIES, LIFE ESTATES, TERMS FOR YEARS, REMAINDERS, AND REVERSIONS

STEP 22. EVALUATE ANNUITIES, LIFE ESTATES, TERMS FOR YEARS, REMAINDERS, AND REVERSIONS

HOW TO VALUE

- a. For annuities, request Life Insurance Statement (IRS Form 712) from insurer.
- b. Determine the value of annuities, life estates, terms of years, income interests, remainder, or reversion interests using present value tables. See Treas Reg §§20.2031-7(d), 20.2031-7A, 20.2031-7T, 20.7520-1 (valuation of interest before May 1, 2009) and 20.7520-1T (valuation of interest from May 1, 2009 through May 1, 2012). Many software programs are available to calculate these values easily.
- c. When death is imminent, tables cannot be used. See Treas Reg §20.7520-3(b)(4), Example 1.
- d. Value commercial annuities or insurance policies on the life of persons other than decedent. Treas Reg §20.2031-8(a).

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Inventorying, Valuing, and Managing Nontrust Assets/STEP 23. EVALUATE OTHER ASSETS

STEP 23. EVALUATE OTHER ASSETS

TYPES OF ASSETS

Other types of assets that must be valued for estate tax purposes include:

- a. Airplanes, boats, mobilehomes, automobiles, and other automotive equipment;
- b. Business interests, other than those discussed in steps 11-14, above;
- c. Debts owed to decedent, other than notes and mortgages;
- d. Farm products, growing crops, timber;
- e. Income tax refunds (see Treas Reg §20.2053-6(f));
- f. Intellectual property (*e.g.*, patents, copyrights, trade secrets, trademarks);
- g. Judgments (see *Estate of Ann Marie Lennon*, TC Memo 1991-36 and *Estate of Sharp*, TC Memo 1994-636);
- h. Leasehold interests;
- i. Livestock, show, or breeding animals;
- j. Lottery winnings (see IRS Notice 89-60, 1989-1 Cum Bull 700) (see *Shackleford v U.S.* (9th Cir 2001) 262 F3d 1028);
- k. Machinery;
- l. Medical insurance reimbursements;
- m. Mineral rights;
- n. Qualified dividends under IRC §2701;
- o. Products of the mind, *e.g.*, authorship, invention rights, personality rights (see CC §§990-998);
- p. Accrued but unpaid royalties;
- q. A share of a trust created by another person included in decedent's estate under IRC §§2033, 2035-2038 (IRS TAM 8614005; Rev Rul 67-370, 1967-2 Cum Bull 324; but see Rev Rul 55-438, 1955-2 Cum Bull 601); attach copy of trust to Form 706; and
- r. United States savings bonds.

NOTE

Keep an inventory list of assets not in the trust for Form 706 and estate administration purposes.

HOW TO VALUE

- a. Obtain personal property appraisals; California probate referees may be used.
- b. Use the sale price, if the item is sold.
- c. Review Internet auction sales of similar items.
- d. The IRS test for fair market value (Treas Reg §1.170A-1(c)(2)) is not limited by a state restriction on sale or inability of taxpayers themselves to sell. See *Robson v Commissioner* (9th Cir 1999) 99-1 USTC ¶50,390, 83 AFTR2d 1880.

Administering Trust

STEP 24. DETERMINE NEED FOR AND ESTABLISH ADMINISTRATIVE TRUST

DETERMINE WHETHER ADMINISTRATIVE TRUST NEEDED

Establish a formal administrative trust (unless the trust administration does not warrant a formal approach – see [California Trust Administration, chap 14 \(2d ed Cal CEB 2001\)](#)) and undertake the following steps:

- a. Obtain a taxpayer identification number (IRS Form SS-4) for the new administrative trust; and
- b. Advise client to open a separate bank account for all receipts and disbursements from the administrative trust.

NOTE

If property is specifically devised under the trust instrument, *e.g.*, real property, consider establishing separate bank accounts for such property in order to more easily account for income and expenses.

- c. Consider making an election under IRC §645 to combine with the estate income tax return.
- d. Calendar April 15, the fiduciary income tax return deadline (see [step 27](#), below); if an IRC §645 election is made, calendar the deadline of the 15th day of the fourth month following fiscal year end.
- e. Advise client whether to retitle assets in the name of the trustee of the administrative trust.
- f. For real property assets, if any, record Affidavit of Change of Trustee. [Prob C §18105](#). See [step 10](#), above.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 25. HANDLE ACCOUNTINGS, IF REQUIRED

STEP 25. HANDLE ACCOUNTINGS, IF REQUIRED

HANDLE ACCOUNTINGS, IF REQUIRED

Determine whether accountings are required (see Prob C §§16060-16064 and terms of the trust instrument) and, if required:

- a. Calendar due date(s) for periodic accounting(s).
- b. Note the 3-year statute of limitations (Prob C §16460) or other shorter limitation (not less than 180 days) as may be provided in the trust instrument (Prob C §16461).
- c. Determine whether court approval of accountings is desirable (*e.g.*, to protect from later claims of remainder beneficiaries, and to shorten statute of limitations); file Prob C §17200 petition (see Prob C §§16060-16064 and 1060-1064 for form; see also Prob C §§16460 and 17211); calendar next accounting/petition date.
- d. Send a confirming letter to client and accountant (if applicable) about responsibility for preparation of accountings, the form of accountings, and enclose an example of the format.
- e. Advise client of California Uniform Principal and Income Act (Prob C §§16320-16375); check the trust instrument for other directions regarding principal and income.
- f. Remind the individual trustee to deposit all income and receipts in an insured trust bank account (Prob C §16225) and to write all trust checks from the same bank account to simplify accounting.
- g. Obtain written waivers of accounting if desired (except when trustee is a disqualified person under Prob C §§16062(e), 16064(a)).
- h. Make sure accounting records provide clear tracing of assets, income, and disbursements for later subtrust funding.
- i. Consider a depreciation reserve for depreciable assets (Prob C §16372), or as required by the trust instrument.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 26. HANDLE PERSONAL INCOME TAXES

STEP 26. HANDLE PERSONAL INCOME TAXES

INITIAL TASKS

- a. Obtain copies of income tax returns filed by decedent for all open taxable years (*i.e.*, in general, 3 years from the date the return was filed; however, be aware of possible 6-year statute of limitations for "substantial omission of items" under IRC §6501(e) and no statute of limitations for false returns under IRC §6501(c)(1)).
- b. Determine whether there are any years for which an income tax return was due from (see IRC §6012(a)(1)(A)) but not filed by decedent.
- c. Determine whether there were any estimated income tax payments due from decedent that were not timely made.

NOTE

Decedent's obligation to make estimated tax payments terminates at death. Treas Reg §1.6153-1(a)(4) (pre-Tax Reform Act of 1984); see IRS Letter Ruling 9102010 for applicability after 1984. Decedent's estate is not obligated to make estimated tax payments for tax years ending before 2 years after DOD. IRC §6654(l) (applicable to trusts making IRC §645 election).

d. Calendar due dates:

- (1) If death occurred before the due date (plus extensions) of the income tax return for the taxable year immediately preceding the year of death, diary the due date (plus extensions) for the income tax return for the preceding taxable year.
- (2) Calendar the due date (April 15, plus extensions, of the calendar year following the year in which death occurs) for the final taxable year (January 1 through the DOD).

NOTE

Decedent's final IRS Form 1040 must be filed with the district director of the district where the executor or administrator (or other person filing the return) resides, not where decedent resided at the time of death.

ALLOCATE RESPONSIBILITY FOR PREPARATION OF RETURNS

- a. Consider the qualifications of existing tax preparer and, in appropriate circumstances, recommend a tax preparer with more experience if there are complicated issues.

NOTE

Because of his or her familiarity with decedent's tax information, the tax preparer who prepared the returns before decedent's death is usually the best choice to prepare all returns still due from decedent.

- b. Coordinate with tax preparer the preparation and filing of any and all late returns.
 - (1) Request a waiver of penalty for failure to file (IRC §6651(a)(1)) and, if applicable, for failure to pay the tax shown to be due on a late return (IRC §6651(a)(3)). See Treas Reg §301.6651-1(c).
 - (2) Request a waiver of addition to tax (interest) if there are any late or unpaid quarterly estimated tax payments and there are unusual circumstances, which may include the death or serious illness of decedent, that would make imposition of the addition to tax inequitable and against good conscience. IRC §6654(e)(3).
- c. If decedent is survived by a spouse, assist spouse or have tax preparer assist spouse in determining estimated taxes due following decedent's death.

- d. Send a confirming letter to tax preparer and to client about preparation of all required income tax returns.

DETERMINE WHO WILL FILE THE RETURNS

a. The person authorized to file the returns is decedent's executor or administrator, and if no executor or administrator has been duly appointed by the time the return is due, any person "charged with the property" of decedent. IRC §6012(b)(1).

NOTE

The authority of a conservator under a conservatorship terminates at the death of the conservatee (Prob C §1860(a)), but the conservator may qualify as a person charged with the care of the property of decedent. IRC §6012(b)(2).

b. When it is determined who will sign the returns, file Notice Concerning Fiduciary Relationship (IRS Form 56) (IRC §6903) with the district director where decedent's final income tax return must be filed, *i.e.*, based on the residence of the person filing the return, rather than the residence of decedent.

c. If decedent is survived by a spouse and an executor has been appointed, only the executor may execute a joint return on behalf of decedent (IRC §6013(a)(3)).

d. If decedent is survived by a spouse, provided the spouse has not remarried on or before December 31 of the year in which decedent dies (IRC §6013(a)(2)), and an executor has not been appointed, the surviving spouse may make and file a joint return on behalf of both parties. IRC §6013(a)(3); Treas Reg §1.6013-1(d)(3).

e. However, review IRC §§6012(b)(1) and 6013(b) and Treas Reg §1.6013-1(d)(4) for limitations on the surviving spouse's ability to file a joint return.

CONSIDER ISSUES

Coordinate consideration of the following issues with the tax preparer preparing decedent's final income tax return:

a. Capital losses and net operating loss (NOL) deduction carrybacks (Rev Rul 74-175, 1974-1 Cum Bull 52);

b. Suspended passive losses or credits allowable on decedent's final income tax return (IRC §469(g)(2));

c. Estimated tax payments not due after the DOD for income earned before death (Treas Reg §1.6153-1(a)(4));

d. Alternative minimum tax (AMT) implications of elections available on final return;

e. Accrued but undistributed net income that is required to be distributed to decedent "currently" (*i.e.*, not less frequently than annually) from another trust (IRC §§652(a), 662(a)(1));

f. Stock options, including incentive stock options (ISOs) (IRC §422) and nonqualified stock options (IRC §83), and stock purchase plans (IRC §423);

g. Cancellation of indebtedness as a result of decedent's death;

h. Deduction for unrecovered investment in any annuity contract(s) (IRC §72(b)(3)(A)); and

i. Closing of the partnership taxable year with respect to decedent-partner. IRC §706(c)(2)(A).

j. Proration of income earned by decedent who was a shareholder of an S corporation through his or her date of death under IRC §1377(a)(1).

CONSIDER POSSIBLE ELECTIONS

Coordinate consideration of the following elections with decedent's income and estate tax return preparers:

a. Joint return with decedent's surviving spouse, provided the spouse has not remarried on or before December 31 of the year in which decedent died. IRC §6013(a)(2). Consider impact of joint and several liability for payment of income taxes due from the surviving spouse's share of reportable income.

b. Acceleration of deferred interest or continued deferral of interest on series E or EE bonds, which may be reported:

(1) On decedent's final income tax return (IRC §454(a); Rev Rul 68-145, 1968-1 Cum Bull 203); or

(2) By the trust or the beneficiary succeeding to the bonds.

c. If all of the S corporation shareholders consent, an election can be made that decedent's death terminates the S corporation's

taxable year with respect to decedent. IRC §1377(a)(2).

d. If decedent made an installment sale in the year death occurs, decedent's representative may elect out of installment basis reporting (IRC §453(d); IRS Letter Ruling 9243005), which would otherwise be mandatory (IRC §453(a)).

e. Medical expenses incurred and not paid by decedent, but paid from decedent's estate within 1 year of decedent's DOD may be deducted on either one, but not both, of the following (IRC §213(c); see step 31, below):

(1) Decedent's final income tax return (IRS Form 1040); or

(2) Decedent's estate tax return (IRS Form 706).

NOTE

While the amount of the income tax deduction is limited, there is no limit on the amount of the deduction allowable for estate tax purposes.

f. Proceeds from an involuntary conversion (*e.g.*, natural disaster, condemnation) received by decedent before death. The IRS position is that nonrecognition under IRC §1033 is available only if decedent had acquired the replacement property before death. Rev Rul 64-161, 1964-1 Cum Bull 298. But see *Estate of John E. Morris* (1971) 55 TC 636, nonacq 1978-2 Cum Bull 4, aff'd (4th Cir 1972) 454 F2d 208, and *Estate of Harry A. Gregg* (1977) 69 TC 468 for opposite position.

INFORM TAX RETURN FILER OF NATURE OF LIABILITY AND HOW TO LIMIT LIABILITY FOR INCOME TAXES DUE FROM DECEDENT

a. Inform client that any executor (or other person in possession of decedent's property, such as a trustee) who distributes assets of decedent before he or she satisfies and pays all taxes, interest, and penalties due from decedent to the United States will be personally liable to the extent that the amount due to the United States remains unpaid. 31 USC §3713(b).

b. To limit liability, the executor (trustee) may:

(1) Make a written request (by certified mail) with a Request for Discharge From Personal Liability (Note: old IRS Form 5495 has been eliminated; currently, requests for relief under IRC §6905 may be made by letter) for discharge of personal liability under 31 USC §3713 for income and gift taxes due from decedent. IRC §6905. If the IRS does nothing, at the end of 9 months the executor (or trustee) is automatically discharged from any personal liability for decedent's income and gift taxes.

(2) After filing the income tax return, make a written request (by certified mail) with a Request for Prompt Assessment (IRS Form 4810) for prompt assessment of income and/or gift tax due from decedent. IRC §6501(d). The request accelerates the statute of limitations on assessments from 3 years to 18 months:

(a) Filing Form 4810 may trigger an audit; consider what impact an audit would have on all open taxable years (3 years from date of filing for all eligible filed returns).

(b) Relief under IRC §6501(d) will not apply if (1) the income or gift tax return was filed and fraudulent; (2) no return was filed; or (3) there was a "substantial omission" (25 percent or more of the gross income or the value of the gift is omitted). IRC §6501(c), (e).

(3) Send a letter to the Franchise Tax Board (FTB) to limit the assessment period to 18 months. Rev & T C §19517(a).

(4) Notify the district director of the termination of the fiduciary relationship regarding decedent by filing documentation of the discharge from responsibility. Personal liability of the executor (or trustee) will continue until the IRS receives notice of discharge of fiduciary responsibility.

NOTE

There is no form to notify the IRS of the discharge of responsibility, but a letter or a copy of the court order for discharge should suffice.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 27. HANDLE FIDUCIARY INCOME TAX RETURNS

STEP 27. HANDLE FIDUCIARY INCOME TAX RETURNS

INITIAL TASKS

Determine Whether Fiduciary Income Tax Returns Are Required

a. If the trust is a nongrantor trust (typically a credit shelter trust, disclaimer trust, and QTIP trust):

(1) A federal return (IRS Form 1041) is required if the trust has a nonresident alien beneficiary, any taxable income, or \$600 or more of gross income.

(2) A California return (FTB Form 541) is required if the trust has \$100 or more of net income or \$10,000 or more of gross income or an alternative minimum tax liability. Rev & T C §18505(e)-(f).

(3) Check the requirements of other states where returns might be required.

(4) Copies of all Schedule K-1s, which must also be filed with the trust's Form 1041, must be delivered to beneficiaries who have received distributions from the trust during the taxable year in question.

b. If the trust remains a grantor trust following decedent's death (typically, the survivor's trust (see IRC §§676, 678)), or is a trust that vests absolute ownership of the entire trust or separate share(s) following decedent's death in the beneficiary of such trust or separate share (see IRC §678):

(1) All items of income, gain, loss, deduction, and credit of the grantor portion flow through to and are reportable by the beneficiary.

(2) No Form 1041 will be required if the deemed owner (see IRC §671) is serving as a trustee; if the deemed owner is not serving as a trustee, Form 1041 must be filed and a Schedule K-1 delivered to the deemed owner, but all items of income, gain, loss, deduction, and credit will be reflected on that Schedule K-1 and will flow through to the deemed owner's personal income tax return (IRS Form 1040). See Treas Reg §1.671-4(b)(2).

Obtain Taxpayer Identification Number(s) if Required

File IRS Form SS-4 to obtain a taxpayer identification number (TIN) for decedent's estate, the administrative trust (if one is used), and one for each successor subtrust, if any, that becomes a nongrantor trust at decedent's death (*e.g.*, credit shelter trust, QTIP trust, disclaimer trust, and trust(s) for children or grandchildren). Treas Reg §301.6109-1(a)(1).

NOTE

Every "qualified revocable trust" (QRT) must obtain a TIN, regardless of whether there is an executor for a related estate and whether an IRC §645 election will be made. Treas Reg §§1.645-1(d), 301.6109-1(a)(3)–(4). However, a TIN is not required for the estate unless a probate is required. If no probate is required, the TIN for the QRT is used to file the estate's income tax returns. When the "applicable period" terminates, the QRT may need to obtain a new TIN. See Treas Reg §1.645-1(h)(3).

Determine Who Will Prepare the Fiduciary Income Tax Returns

Most of the considerations mentioned in step 26, above, regarding decedent's final income tax return, apply to the fiduciary income tax return.

NOTE

Make sure that IRS Form 56 has been filed by each fiduciary.

THE IRC §645 ELECTION

a. Consider an irrevocable election under IRC §645 to treat a "qualified revocable trust" (QRT, defined in IRC §645(b)(1)), or a portion thereof, created by a decedent that becomes irrevocable at decedent's death to be treated as part of decedent's estate for income tax purposes:

(1) If no election is made under IRC §645, an irrevocable trust must report on a calendar-year basis (IRC §644(a)); calendar the due date of the first return (April 15, plus extensions, of the calendar year following the year of decedent's death).

(2) A probate estate need not exist to make the election.

(3) Consider the advantages of a §645 election, which permits the trust making the election:

(a) To report on a fiscal-year basis, rather than a calendar year, until the "applicable date" (see d., below);

(b) To take a charitable deduction for amounts "permanently set aside" for charity (see IRC §642(c) and Treas Reg §1.642(c)-1(b));

(c) To avoid the application of the active participation requirement when applying passive loss rules under IRC §469; and

(d) To qualify for IRC §194 amortization of reforestation expenses.

(4) If the election is made, the estate and trust will be treated as separate shares for income tax purposes. IRC §663(c).

b. See Treas Reg §1.645-1 for specifics on:

(1) How to make the election;

(2) TINs that must be applied for and used;

(3) Mechanics of reporting income of the estate during the "applicable period"; and

(4) Tax reporting after the applicable period ends.

c. Consult with tax preparer on the selection of the fiscal year for the estate and diary the fiscal year end (FYE) selected.

d. Calendar the "applicable date" (when the fiscal year will no longer be available), determined as follows (Treas Reg §1.645-1(f)):

(1) 2 years after the date of decedent's death, if no estate tax return (IRS Form 706) is required; or

(2) 6 months after the final determination of decedent's estate tax liability if an estate tax return is required.

e. If payments over \$600 (other than distributions to trust beneficiaries) are made from the trust to noncorporate persons, issue IRS Form 1099 to each such payee by January 31 of the year following the year in which the payment was made. IRC §6041.

NOTE

Regarding payments other than distributions to trust beneficiaries, the trust must file IRS Form 1096, with copies of all Forms 1099, with the IRS and FTB by February 28 of the year following the year in which payment was made. IRC §6041; Treas Reg §§1.6041-1(a), 1.6041-6; Rev & T C §18631(b), (c)(4).

ESTIMATED TAX PAYMENTS

a. A QRT will not be required to make quarterly estimated tax payments for the first 2 taxable years following decedent's death. See IRC §6654(l)(2). Responsibility for estimated tax payments for a grantor trust falls on the beneficiary who is the deemed owner under IRC §§671-679.

b. Determine in consultation with the tax preparer the date of commencement and amounts of quarterly payments due from any nongrantor trust. See IRS Notice 87-32, 1987-1 Cum Bull 477.

c. Once estimated tax payments become due, assist trustee in planning for liquidity to make quarterly payments.

AUTOMATIC EXTENSION OF FILING OF INCOME TAX RETURN

There is an automatic 5-month extension of time for a trust to file its federal income tax return by filing Form 7004. Prop Treas Reg §1.6081-6T. An extension of time to file the fiduciary return does not extend the time for the payment of any tax due on the return. Prop Treas Reg §1.6081-6T(d).

OTHER PLANNING ISSUES

Consider DNI Issues

a. Consider quarterly meetings with trustee and tax preparer to determine "distributable net income" (DNI) (IRC §643(a)) and the amounts of discretionary distributions that should be made to beneficiaries in order to reduce or eliminate income tax.

NOTE

If all DNI is distributed by the last day of the trust's taxable year, or within the first 65 days of the following year if an appropriate election is made (see IRC §663(b)), the trust will owe no income tax as of its taxable year end, but it still must make estimated tax payments beginning 2 years after DOD if not all DNI is distributed as of the end of each quarter.

b. Consider the impact of "equitable adjustments" between income and principal or determination of "trust accounting income" under "uni" approach pursuant to Prob C §§16336.4-16336.6. Allocation of gains to "trust accounting income" (TAI) under an equitable adjustment power will be respected for federal income tax purposes as long as the allocation of gains to TAI under that adjustment power is exercised reasonably and impartially. However, if the "unitrust" approach is used, gains must be allocated to TAI "consistently" and the amount of gains so allocated may not be greater than the excess of the unitrust amount over the amount of DNI determined without regard to this special allocation of gains to TAI (Treas Reg. §1.643(a)-3(b)(1)) in order for gains to be included in DNI. IRC §643(b); Treas Reg §1.643(b)-1.

Consider Rules for Simple Trusts

Consider the rules for "simple trusts" (see IRC §§651-652):

a. If the trust does not distribute trust assets in excess of the amount determined to be income as defined in IRC §643(b), the distribution of what might otherwise constitute principal will not cause the trust to lose its status as a simple trust. Treas Reg §1.651(a)-2(d).

b. To the extent property is distributed in kind to satisfy the requirement that the trust distribute currently all of its income, that in-kind distribution will be treated as if the trust sold the property for its fair market value on the date of distribution. Treas Reg §1.651(a)-2(d).

c. Capital gains that are allocated to trust accounting income under the equitable adjustment power or uni approach, including gains attributable to the deemed sale of the property distributed in kind, will be included in the DNI of a simple trust under IRC §643(a). Treas Reg §1.643(a)-3(b)(1).

Consider Rules for Complex Trusts

Consider the rules for "complex trusts" (see IRC §§661-662):

a. To the extent that property is distributed in kind to satisfy the requirement that the trust distribute income as defined under IRC §643(b), that in-kind distribution will be treated as if the trust sold the property for its fair market value on the date of distribution. Treas Reg §1.661(a)-2(f).

b. Capital gains that are allocated to trust accounting income under an equitable adjustment power or uni approach, including gains attributable to the deemed sale of the property distributed in kind, will be included in the DNI of the complex trust under IRC §643(a). Treas Reg §1.643(a)-3(b)(1).

Consider Proper Treatment of IRD

a. If IRD is retained by the trust through the date of payment, compute the IRC §691(c) deduction and advise the tax preparer to take the deduction on the trust's income tax return (Form 1041) for the year in which the IRD was received.

b. Consider distribution of IRD "in-kind" to a residuary beneficiary to remove income attributable to IRD from the trust. Remember, however, that use of IRD to satisfy a pecuniary formula bequest will trigger immediate recognition of IRD by the trust as of the date of distribution (Treas Reg §§1.661(a)-2(f)(1), 1.1014-4(a)(3); Rev Rul 60-87, 1960-1 Cum Bull 286).

Consider Creation of Depreciation Reserve

Determine whether to create a reserve for depletion or depreciation to capture a depreciation deduction and how to allocate receipts and deductions:

- a. Consider Prob C §§16335(a)(1) and 16372(b), which, in the absence of a trust provision to the contrary, prohibit creation of a depreciation reserve in various situations.
- b. Review the Uniform Principal and Income Act (UPAIA) (Prob C §§16320-16375) for required allocation of receipts from depletable assets in the absence of a trust provision to the contrary. See Prob C §§16335(a)(1), 16363-16364.
- c. If a reserve is not created, the depreciation deduction (see IRC §167(d)) and depletion deduction (see IRC §611(b)(3)) must be allocated between the trust and its beneficiaries on the basis of TAI retained by the trust or distributed to its beneficiaries.
- d. If trustee is required or permitted to create a reserve, allocate the depreciation deduction (Treas Reg §1.167(h)-1(b)) or depletion deduction (Treas Reg §1.611-1(c)(4)):
 - (1) First to the trust, up to the amount of TAI allocated to the reserve; and
 - (2) Allocate any excess deduction between the trust and its beneficiaries, based on TAI retained by the trust and/or distributed to the beneficiaries.

Consider Related Taxpayer Issues

Consider whether there are any losses on transactions between related taxpayers that will be disallowed under IRC §267.

ELECTIONS

- a. Consider whether to elect to treat distributions made by a complex trust within the first 65 days of the next following year as if made in the immediately preceding taxable year. IRC §663(b).

NOTE

If a return is required, the election must be made on Form 1041; if a return is not required, the election is made by filing a statement indicating the election with the IRS office where Form 1041 for the trust would have been filed if required. Treas Reg §1.663(b)-2(a)(2).

- b. Determine whether to take administration expenses and losses incurred during the administration period as an income tax deduction on Form 1041 (IRC §642(g)) or an estate tax deduction on Form 706 (IRC §§2053-2054). Consider the impact of the *Hubert* regulations on the payment of administration expenses from income earned by the marital share (Treas Reg §20.2056(b)-4) or by any share passing to a charity (Treas Reg §20.2055-3(b)). See also Field Service Advice 199921004.
- c. Consider an election to treat a portion of the estimated tax payments made by the trust as if made by a beneficiary of that trust where estimated payments exceed taxes due from trust (IRC §643(g)). The election must be made by filing Allocation of Estimated Tax Payments to the Beneficiaries (IRS Form 1041-T) on or before the 65th day following the end of the trust's taxable year. IRC §643(g)(2).

LIMITING LIABILITY FOR INCOME TAXES DUE FROM TRUST

Inform the tax return filer of the nature of liability and what steps may be taken to limit liability. The steps outlined in [step 26](#), above, also apply to limiting liability for income taxes due from the trust, except that relief under IRC §6905 is available only for income and gift taxes due from decedent, not for income taxes due from the trust following decedent's death.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 28. HANDLE COURT PROCEEDINGS

STEP 28. HANDLE COURT PROCEEDINGS

GENERAL CONSIDERATIONS

- a. Always check local rules for court proceedings.
- b. Appoint a guardian ad litem if necessary for minor, unborn, or unascertained beneficiaries. See Prob C §§1003, 15405.
- c. Thoroughly review the trust instrument (and will); consider a petition for instructions under Prob C §17200(b) to obtain court review of document interpretation issues.

NOTE

Only trust beneficiaries have standing to file a declaratory relief action under Prob C §21320 to determine if a pleading may invoke a no-contest clause. Trustee should exercise caution in proceeding under Prob C §17200 if trustee is also a beneficiary. Note however that the safe harbor procedures of Prob C §§21320-21322 were repealed by SB 1264 (Stats 2008, ch 174) and not replaced. Thus, beginning January 1, 2010, for instruments that became irrevocable on or after January 1, 2001 (Prob C §21315), the safe harbor procedures will not apply except as may be provided in Prob C §3, which specifies general rules for the applicability of repealed Probate Code sections. Under §3, if new law does not apply to a matter that occurred before the operative date, old law continues to govern, notwithstanding its repeal. For a full discussion of the effect of a no-contest clause see California Trust and Probate Litigation, chap 5 (Cal CEB 1999).

DECEDENT'S ESTATE

- a. Lodge the original will with the court clerk (Prob C §8200(a)) and mail a copy to the nominated executor within 30 days. See discussion of delivery of will in step 6, above.
- b. Consider whether special administration is necessary. Prob C §§8540-8547.
- c. Determine whether probate is necessary after verifying title to assets:
 - (1) Consider filing a Prob C §850 petition (as directed by Prob C §17200.1) to confirm assets owned by trustee as an alternative to probate (*Estate of Heggstad* (1993) 16 CA4th 943, 20 CR2d 433). Also, make sure the petition does not violate a trust's no-contest clause. See Note below concerning changes to the no-contest law;
 - (2) Note the \$100,000 exclusion from probate by declaration (Prob C §13100); see also Prob C §§13150-13158 by court order; and the \$20,000 exclusion for real property (Prob C §13200) by affidavit.
- d. Determine whether to admit the will to probate when a power of appointment is exercised in the will.
- e. Determine the applicability of a spousal property petition or Prob C §13600 affidavit.

TRUST PROCEEDINGS

- a. If an issue is raised by an interested party to the trust, assure the validity of the trust and any trust amendments:
 - (1) Consider filing a Prob C §17200 proceeding to confirm the validity of trust instruments.

NOTE

Consider the effect, application and cross-over considerations of Prob C §16061.7 (Trustee's notice provisions and the 120-day limitation period imposed upon beneficiaries).

NOTE

Consider a trust's no-contest provision. A "no-contest clause" is defined in new Prob C §21310(c) as a provision that would penalize a beneficiary for filing a pleading in any court. New Prob C §21311(a) (effective January 1, 2010) provides that a no-contest clause shall be enforced only against (1) a direct contest that is brought without probable cause, (2) a pleading to

challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer, or (3) the filing of a creditor's claim or prosecution of an action based on it. Probable cause exists if the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery under Prob C §21311(b). Direct contests are limited to six specified grounds as defined in new Prob C §21310(b). A "contest" is defined in new Prob C §21310(a) as a pleading filed with the court by a beneficiary that would result in a penalty under a no-contest clause.

(2) Analyze issues relating to decedent's intentions expressed under the trust instrument, interpretation of documents and dispositive plan, and gifts to potentially disqualified persons (Prob C §21350).

b. Determine whether an irrevocable trust should be modified (Prob C §§15403, 17200(b)) to:

- (1) Resolve ambiguities;
- (2) Qualify for the marital deduction (see Prob C §§21520-21526);
- (3) Qualify for the charitable deduction (see Prob C §§21540-21541);
- (4) Appoint a successor trustee;
- (5) Eliminate a general power of appointment;
- (6) Qualify for qualified domestic trust (QDOT) treatment;
- (7) Divide the trust for GST tax or other purposes (see Prob C §15412; see also IRC §2642(a)(3) regarding "qualified severance" for GST tax purposes);
- (8) Qualify as a QSST or an electing small business trust;
- (9) Terminate the trust; or
- (10) Change the tax apportionment clause.

c. Determine whether other trust petitions are appropriate under Prob C §17200 to:

- (1) Instruct trustee;
- (2) Prevent a later possible surcharge action;
- (3) Resolve conflicting claims to property possessed or claimed by trustee, or to clarify ownership of property;
- (4) Determine if trust property is subject to creditors of decedent; or
- (5) Construe a tax apportionment clause.

CIVIL LITIGATION

a. Determine whether decedent or the surviving spouse is a party to any existing litigation.

b. Determine whether any claims may have arisen as a result of decedent's death, *e.g.*, wrongful death, workers' compensation:

- (1) Advise client to retain litigation counsel;
- (2) Consider use of the optional creditor claims procedure for living trusts (see Prob C §§19000-19403), which essentially mirrors the creditor claims procedure applicable to a probate (Prob C §§9000-9399); and
- (3) Ascertain and calendar statutes of limitation.

c. Consider the tax consequences of a settlement of trust litigation.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 29. HANDLE DISPOSITION OF NONTRUST ASSETS

STEP 29. HANDLE DISPOSITION OF NONTRUST ASSETS

NOTE

See Transferring Property Without Probate (Cal CEB Action Guide September 2008).

TRANSFER NONTRUST ASSETS

a. For joint tenancy property:

(1) Determine whether there is a true joint tenancy. Examine any community property agreement, *e.g.*, for statements regarding community property characterization of assets even if held in joint tenancy form. If community property treatment is appropriate:

(a) File spousal or registered domestic partner property petition (Prob C §13650); or

(b) Consider commencing formal probate proceedings if creditor issues are apparent.

(2) Terminate and change title to all joint tenancy assets into the name of the surviving tenant(s).

b. For retirement accounts:

(1) Ensure minimum distribution taken for year of death;

(2) September 30 deadline for curing nonqualified (charity) beneficiaries;

(3) October 31 deadline (calendar year after year of death) for providing trust documentation to custodian;

(4) December 31 deadline (calendar year after year of death) for beneficiary to commence distributions and establish separate shares (charity or individual); and

(5) Consider not completing surviving spousal rollover (very young or older spouse).

c. For community property with right of survivorship, prepare an affidavit to terminate and change title from community property with the right of survivorship into the name of the surviving spouse or domestic partner per CC §682.1.

d. To use the affidavit procedure for small estates:

(1) Complete a Prob C §13101 affidavit as needed to transfer property (do not deviate from the statutory format, because some institutions, such as banks, may require notarization of the affidavit even when not required by statute);

(2) If necessary, attach evidence of decedent's ownership of the property;

(3) Attach "[r]easonable proof of the identity of each person executing the affidavit" (Prob C §13104(a));

(4) When using an affidavit to transfer property, attach a certified copy of the death certificate to each affidavit or declaration presented to a transfer agent (Prob C §13101(d); if a death certificate is not available, see Prob C §§200-204).

e. Change title to the beneficiary of:

(1) Pay-on-death (POD) accounts (see Prob C §5403); and

(2) Transfer-on-death (TOD) accounts (see Prob C §§5500-5512) (*e.g.*, annuities, United States savings bonds, mobilehomes (Health & S C §18080.2)).

f. Change title of Totten trust accounts to the beneficiary, if an adult, or to a custodial account if a minor. Prob C §5404.

g. If decedent owned a life estate, record an affidavit of death or other documentation to remove decedent's name.

h. Record an affidavit of death of life tenant.

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Administering Trust/STEP 30. HANDLE SALE OF TRUST ASSETS

STEP 30. HANDLE SALE OF TRUST ASSETS

DETERMINE WHETHER SALE REQUIRED

- a. Consider need for liquidity (income taxes, estate tax, cash bequest, claims, debts, and administrative costs).
- b. Consider whether cash distribution is preferable to in-kind distribution (*e.g.*, beneficiaries do not want assets; beneficiaries need cash or should not have particular assets; beneficiaries as co-owners may lead to conflict).
- c. Determine whether a sale is required by contract (*e.g.*, buy-sells or similar agreements; executory contracts).
- d. Ascertain whether an asset can be held in trust (*e.g.*, whether trust language prohibits; professional business requires specialized license; trust not qualified S corporation shareholder).
- e. Determine whether a sale is necessary under Uniform Prudent Investor Act (UPIA) (Prob C §§16002(a), 16003, 16045-16054) (*e.g.*, considering diversification, income production). Will an adjustment between principal and income under Prob C §16336 address the problem? Will a sale be consistent with investment objectives and not violate a specific bequest under the trust?
- f. Evaluate income and estate tax consequences of a sale by the trust or by beneficiaries after distribution (see issues below).
- g. Coordinate the choice of real property sold with tax planning (*e.g.*, use of parent-child exclusion for property tax purposes, capital gains, special use valuation; see tax issues below).

REVIEW POWER TO SELL

Ascertain whether:

- a. The power to sell is granted in the trust agreement or whether the trust instrument limits the statutory power to sell. Prob C §16226.
- b. There are any restrictions on sale in documents or in other agreements (*e.g.*, buy-sells, leases, recorded covenants or restrictions, rights of first refusal).

HOW TO SELL

- a. Determine whether sale might be controlled by preexisting arrangements (*e.g.*, trust agreements; executory contracts; partnership, LLC, LLP, or corporate agreements; options).
- b. If there are no preexisting arrangements:
 - (1) Advise trustee of the duty to obtain the best price and terms, unless waived by beneficiaries or approved by court;
 - (2) Determine the listing or sale price;
 - (3) Determine authority to hire professional agents (*e.g.*, realtors, auction houses, business brokers, investment bankers); and
 - (4) Determine whether informal notice, consents, or waivers regarding proposed sale should be provided to and received from the beneficiaries in advance. Consider notice of proposed action under Prob C §§16500-16504.
- c. When sales to interested parties (*e.g.*, trustee, beneficiary, or other related party) are contemplated, watch for conflicts of interest and proceed under court supervision of the sale to avoid appearance of, *e.g.*, breach of duty of loyalty (see Prob C §§16002(b), 16004).
- d. Consider whether continuation of business or property "tail insurance" coverage is necessary to provide protection to the trust postsale.

ACCEPTING OFFER AND CLOSING SALE

In considering accepting an offer and closing a sale, determine:

- a. Whether this is the best deal for the trust and the beneficiaries;
- b. Whether special advisers are needed (*e.g.*, real estate or tax counsel; business advisers) and prepare necessary documentation;
- c. Whether court approval or instructions are needed to protect trustee (see step 28, above) in absence of any notice of proposed action issued by trustee (Prob C §§16500-16504);
- d. Whether to seek written consent of all beneficiaries if sale must be completed sooner than the 45 days allowed for objection following a notice of proposed action;
- e. Whether to escrow the sale;
- f. The effect of a subsequent disposition of an installment note taken in the sale (IRC §453B); and
- g. Whether trustee can sell "as is" and avoid giving representations and warranties. See residential real estate sale disclosure exceptions in CC §§1102, 1102.1, and 1102.2.

ESTATE TAX/GST TAX ISSUES

- a. Consider effect of sale on the alternate valuation election. If assets are sold:
 - (1) Within 6 months of the DOD, the alternate value will be the sale price (IRC §2032(a)(1));
 - (2) More than 6 months after the DOD, the alternate value will be the value as of 6 months after the DOD (IRC §2032(a)(2)).
- b. Consider the effect of the sale price on the value for estate tax and GST tax purposes in the event of a direct skip at death (fair market value on DOD or alternate valuation date).
- c. Consider potential impact of a sale of interests under:
 - (1) IRC §2032A(c) (imposition of recapture tax on elected special use valuation property);
 - (2) IRC §2057(f)(1) (imposition of recapture tax on qualified family-owned business interests (QFOBIs) for which estate tax deduction was taken; applies only if DOD was before January 1, 2004); or
 - (3) IRC §6166(g)(1)(A) (acceleration of balance of federal estate tax on closely held business interests for which installment payment of estate tax was elected).
- d. Consider impact of a sale of property used in a business or sale of a business interest, by the survivor's trust or marital deduction trust, on the ability of the surviving spouse to use IRC §§2032A and 6166.
- e. Consider granting a conservation easement on property to be held by the survivor's trust or marital deduction trust to afford the opportunity for a deduction in the surviving spouse's estate (see IRC §2031(c)); and the potential impact on the deduction of a retained development right (IRC §2031(c)(5)).
- f. Consider the effect of a sale of a business interest under a buy-sell agreement/right of first refusal on valuation of that interest for estate tax purposes.
- g. Determine the deductibility of sale expenses for estate tax purposes. See Treas Reg §20.2053-3(d)(2). If the assets being sold are owned by an entity (*e.g.*, a corporation), consider having the trust pay sale expenses to obtain an estate tax deduction.

INCOME TAX ISSUES

- a. Involve the tax preparer in planning and reporting and work with him or her to determine whether sale costs could or should be deducted for estate tax purposes. See step 27, above.
- b. If proceeds of a sale of a business interest were received under the terms of a buy-sell agreement (Treas Reg §1.691(a)-2(b), Example 4) or an executory sales contract entered into by decedent (see *Commissioner v Linde* (9th Cir 1954) 213 F2d 1, cert denied (1954) 348 US 871, 99 L Ed 686, 75 S Ct 107; *Estate of Charley W. Peterson* (1980) 74 TC 630, aff'd (8th Cir 1981) 667 F2d 675), determine whether IRD treatment can be avoided.

- c. Consider that distribution of an IRD item in satisfaction of a pecuniary bequest will cause acceleration of recognition of income by the trust. Treas Reg §§1.661(a)-2(f)(1), 1.1014-4(a)(3); Rev Rul 60-87, 1960-1 Cum Bull 286.
- d. Consider and plan for timing the year in which to close a transaction and receive the proceeds of sale, and plan for the use of installment reporting (IRC §453) if appropriate.
- e. Consider granting a conservation easement by the trust to afford an income tax deduction. See IRC §170(h).

BUSINESS-RELATED INCOME TAX ISSUES

- a. Consider the effect of an income tax basis adjustment.
- b. Determine the income tax impact of a partnership sale or liquidation, or confirm with other tax advisers that they will make this assessment.
- c. If complete liquidation of a partnership is necessary, consider an in-kind distribution of partnership assets versus a sale of partnership assets, and analyze the income tax impact to the trust.
- d. Determine the timing and amount of income flow-through on sales of partnerships, LLCs, and S corporations.
- e. Determine whether to elect to close the books as of the time of sale for S corporations and how to prorate income. IRC §1366(a)(1).
- f. Determine the advantages of a stock sale versus an asset sale for C corporations.

OTHER TAX ISSUES

Consider and address other taxes, including:

- a. Other business-related income tax issues. See steps 11-14, above.
- b. Property tax issues, including:
 - (1) Proration;
 - (2) Preparation and filing of a Preliminary Change of Ownership Report or Statement of Change in Control and Ownership of Legal Entities (Form BOE-100-B), if applicable; and
 - (3) Preparation and filing of any forms required to support an exemption from reassessment (*e.g.*, parent-child).
- c. Sales tax issues.
- d. Documentary transfer tax issues (Rev & T C §§11901-11934), including county and city.

© The Regents of the University of California

STEP 31. PLAN TO PREPARE AND FILE ESTATE TAX RETURNS AND PAY ESTATE TAXES

COORDINATE ROLES OF ATTORNEY AND ACCOUNTANT

a. Discuss with client who will be responsible for estate tax return (attorney or accountant). Make sure that everyone understands their responsibilities regarding collecting information, preparing and filing the return, and arranging for payment.

b. **Warning:** If the accountant prepares the return, determine whether the attorney will review it before it is filed. This will largely depend on the attorney's level of expertise and the fact that he or she may take on the liability of a "preparer" (both in its usual sense and in the IRS definitional sense) by taking on the obligation of review:

(1) If an attorney undertakes a task in a specialized area of the law, he or she must exercise the degree of skill and knowledge possessed by attorneys who practice in that specialty. Cal Rules of Prof Con 3-110(C).

(2) Tax preparer penalties may now be imposed on attorneys (even if they do not sign the return) if the return results in an underpayment of tax that was without "reasonable belief" or "reasonable basis." IRC §6694(a)(2)(B), (a)(2)(C). Congress amended this section in May 2008 by extending the application of the income tax return preparer penalties to all tax returns and by raising the standard that preparers must meet to avoid a penalty. Several IRS notices have been issued in order to provide interim guidance regarding implementation of the tax return preparer penalty provisions until final regulations are published. See Notice 2008-13, 2008-3 Int Rev Bull 282, Notice 2008-46, 2008-1 Cum Bull 868, and Notice 2009-5, 2009-3 Int Rev Bull 309.

COLLECT FURTHER INFORMATION

NOTE

At the time of preparation of this updated guide, the federal estate tax is to be repealed beginning January 1, 2010 but would be reinstated (at the 2001 level) in 2011. It is widely anticipated that this will be changed in some fashion before January 1, 2010. Therefore for decedents dying after December 31, 2009, practitioners should check carefully to confirm that the information below concerning the filing and tax thresholds, credits, and exemptions remains correct.

a. Double check the DOD amounts of credits, deductions, exemptions, and exclusions, and any adjustments for inflation, *e.g.*:

(1) Applicable credit amount (IRC §2010(c));

(2) IRC §2057 QFOBI deduction amount for decedents who died before January 1, 2004;

(3) Amount of aggregate decrease in value of qualified conservation easement (IRC §2031(c));

(4) GST exemption amount (IRC §2631(c));

(5) Amount subject to 2-percent interest rate under IRC §6166 election. IRC §6601(j).

b. Determine whether estate or inheritance tax returns for states other than California will be required (*e.g.*, for out-of-state real property interests). Consider effect of state death tax credit phased out for decedents dying in 2001-2004; replaced by estate tax deduction for decedents dying in 2005-2010. IRC §§2011, 2058.

c. Review previously filed Form 709s:

(1) Note the following available exclusions and deductions:

(a) Annual exclusion of \$3000 for years 1977-1981 (Pub L 97-34, §441(a), 95 Stat 319), and \$10,000 for post-1981 years, adjusted for inflation in years following January 1, 1999 (\$11,000 in 2002-2005) (IRC §2503(b)(2));

(b) \$100,000 annual exclusion on post-July 14, 1988 gifts to a noncitizen spouse, adjusted for inflation in years following

January 1, 1999 (IRC §2523(i) (incorporating IRC §2503)); and

(c) Unlimited marital deduction on post-1981 gifts to a spouse, except for gifts to a noncitizen spouse after July 14, 1988 (IRC §2523(a)).

(2) Determine whether a reduction in adjusted taxable gifts is warranted to prevent double taxation on a lifetime transfer that must be included in decedent's gross estate, *e.g.*:

(a) Gift of an interest in a corporation or partnership that is valued under IRC §2701 (see Treas Reg §25.2701-5);

(b) Transfer in trust that was valued under IRC §2702; or

(c) Transfer subject to IRC §§2036-2038, §2040, or §2042.

(3) Calculate all gift taxes paid or payable on all post-1976 gifts of decedent to reduce tentative estate tax.

d. Review for property received by taxpayer within the past 10 years previously taxed and to determine credit available (IRC §2013) and obtain copies of necessary Form 706 returns.

e. Obtain a certified copy of the will, death certificate, and letters testamentary (if applicable).

f. Obtain tax identification numbers of beneficiaries.

g. Obtain copies of pertinent documents, *e.g.*, trusts for which decedent was trustee, settlor, beneficiary, power holder, or disclaimer documents (if a disclaimer made by any beneficiary).

REVIEW FOR TRANSFERS AND POWERS

Review the following for Form 706 inclusion, if not otherwise inventoried as assets:

a. Transfers and releases made within 3 years of DOD (IRC §2035) of the following interests:

(1) Retained interests under IRC §2036;

(2) Transfers taking effect at death under IRC §2037;

(3) Revocable transfers under IRC §2038, *e.g.*, transfers made from a revocable trust directly to a donee;

(4) Interests transferred in life insurance policies subject to IRC §2042; and

(5) Gift taxes paid on gifts made within 3 years of DOD (IRC §2035(b)).

b. Transfers with retained interests (IRC §2036), *e.g.*:

(1) Transfer of remainder interest with retained life estate (other than an IRC §2702 transfer);

(2) Retention of beneficial use or enjoyment of transferred property;

(3) Retention of right to designate persons to possess or enjoy transferred property; and

(4) Gifts made under California Uniform Transfers to Minors Act (Prob C §§3900-3925) when deceased donor was custodian.

c. Transfers taking effect at death (IRC §2037);

d. Life insurance (IRC §2042);

e. Revocable transfers (IRC §2038) (*e.g.*, assets held in decedent's revocable living trust or gifts made with defective power of attorney);

f. Nonparticipant spouse's (NPS) community property interest in qualified Employee Retirement Income Security Act of 1974 (ERISA) plan benefits, if any (see *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754; *Egelhoff v Egelhoff* (2001) 532 US 141, 149 L Ed 2d 264, 121 S Ct 1322), and other nonprobate transfers (Prob C §§5010-5032):

(1) If the NPS predeceases the participant spouse (PS), consider the effect of including the NPS's community property interest

in the gross estate (and then taking a marital deduction) on IRC §§303, 2032A, 6166; and

(2) Under IRC §2056(b)(7)(C), the NPS's survivorship interest attributable to community property laws may qualify for qualified terminable interest property (QTIP) treatment if the NPS predeceases the PS.

g. Joint tenancies (IRC §2040);

h. Powers of appointment (IRC §2041), *e.g.*:

(1) "5 and 5" power not exercised at death;

(2) "Hanging" *Crummey* withdrawal rights (*Crummey v Commissioner* (9th Cir 1968) 397 F2d 82);

(3) Power to invade or appoint trust principal on a nonascertainable standard; and

(4) Power to use property to discharge an obligation of support (*e.g.*, custodial account).

i. Property for which the marital deduction was previously allowed (IRC §2044);

j. Unpaid qualified payments on equity interest valued for previous transfers under IRC §2701 (see step 11, above); and

k. Lapsing voting rights, liquidation rights, and restrictions (IRC §2704). See step 11, above.

INCLUDE ALL ASSETS

Make sure that all assets, trust and nontrust, are identified for inclusion on the appropriate Form 706 Schedules A-I.

DETERMINE DEDUCTIONS

a. Review the election to deduct administration expenses for estate taxes versus income taxes (IRC §§2053, 642(g)), and determine the impact on the marital deduction and credit shelter trust when a marital deduction formula exists.

b. Determine whether payment of expenses may be made from trust income, and the effect on marital or charitable deductions. See Prob C §16340(c)(2); Treas Reg §§20.2055-3(b), 20.2056(b)-4(a), (d); see also Field Service Advice 199921004.

c. Review the election to deduct medical expenses paid within 1 year of DOD on decedent's estate tax return versus on decedent's final income tax return. IRC §§213(c), 2053.

d. Review the election to deduct state and foreign death taxes or to claim them as a credit. IRC §§2011(d), 2014(f), 2053(d). Note, California has no estate tax after 2004.

e. Review the election to deduct casualty losses for estate taxes (IRC §2054) versus deducting them for income taxes (IRC §642(g)).

f. If DOD is after December 31, 2004, and before January 1, 2011, determine deduction for state death taxes paid. IRC §2058. Note, California has no estate tax after 2004.

g. Review charitable gifts (IRC §2055), *e.g.*, conditions on gifts, intervening (split) interests. If necessary and possible, seek modification of the trust document.

h. Review qualifications of each charity and obtain an IRS determination letter, review IRS Publication 78, or review guidestar at <http://www.guidestar.com>.

i. Review postmortem expenditures made by client for deductibility, *e.g.*:

(1) Funeral expenses;

(2) Fees (*e.g.*, attorney, trustee/executor, accountant);

(3) Administration expenses (*e.g.*, appraisal fees, cost to maintain trust property); and

(4) Expenses of sale.

j. Review all debts of decedent, liens, contingent liabilities, and outstanding tax liabilities of decedent for deductibility.

k. If the DOD is before January 1, 2004, determine eligibility for QFOBI deduction (IRC §2057); see Schedule T.

REVIEW MARITAL DEDUCTION ISSUES

a. Determine property passing directly from decedent to a United States citizen surviving spouse, *e.g.*, specific devises of tangible personal property, joint tenancy property, life insurance payable to the spouse, decedent NPS's community property interest in the surviving spouse's qualified ERISA plan.

b. Review and include a disclaimer with Form 706 if property passes as a result of a disclaimer.

c. If the document predates September 12, 1981, the transitional rules of IRC §2056 apply to the marital deduction. See Prob C §21523 (savings statute for pre-September 12, 1981, documents).

d. Determine whether the requirements of IRC §2056(b)(5) are met for a power of appointment trust for the surviving spouse, if applicable.

e. Determine whether the requirements of IRC §2056(b)(7) are met for a QTIP trust for the surviving spouse, if applicable.

f. Make the QTIP election on Form 706 (see Schedule M; see IRC §2056(b)(7)(B)(v)) in whole or in part (formula for partial election should be included on Form 706, if applicable).

g. Consider that automatic QTIP treatment is available for a survivor annuity under IRC §2056(b)(7)(C)(ii) unless a contrary election is made on Form 706. See Schedule M.

h. Make the reverse QTIP election for allocation of decedent's GST tax exemption to a QTIP trust (Treas Reg §26.2652-2) if applicable. See Schedule R.

i. If surviving spouse is not a United States citizen:

(1) Determine whether surviving spouse will become a citizen before filing Form 706, and whether the survivor was a United States resident at all times since decedent's death. If so, advise surviving spouse of the need to file a notice of termination of QDOT on Form 706-QDT by April 15 of year following DOD or apply for extension.

(2) Consider making an election to obtain a marital deduction for property passing to a QDOT on Form 706 (see Schedule M; Treas Reg §20.2056A-3). Determine whether the qualifications of IRC §2056A(a) are met and determine whether security arrangements for a QDOT are met (Treas Reg §20.2056A-2(d)(1)).

(3) If a QDOT does not meet the qualifications of IRC §2056A(a), implement a modification proceeding before the due date of Form 706, including extensions (Treas Reg §20.2056A-4(a)).

(4) If a QDOT exists but property passes directly to the surviving spouse, consider having the survivor irrevocably assign the property to a QDOT before filing Form 706 (Treas Reg §20.2056A-4(b)).

(5) If no QDOT exists, consider that:

(a) A marital deduction will apply to an outright transfer to the noncitizen spouse if (1) the transfer would have qualified for the marital deduction if the spouse had been a U.S. citizen, and (2) the noncitizen spouse transfers or irrevocably assigns the transferred property to a QDOT before filing Form 706 for decedent (Treas Reg §§20.2056A-2(b)(2), 20.2056A-4(b)).

(b) A marital deduction will apply to a transfer to a trust that is not a QDOT if (1) that trust would otherwise have qualified for the marital deduction if the spouse had been a U.S. citizen, and (2) the requirements of Treas Reg §20.2056A-4(c) are satisfied, even if payments to be made under that trust are not assignable or transferable (*i.e.*, "spendthrift"). (Treas Reg §20.2056A-2(b)(3)).

(6) Include an agreement to remit deferred estate tax with Form 706 if nonassignable interests in annuities, qualified plans, or other payments exist (Treas Reg §20.2056A-4(c)).

(7) Calendar annual reporting, if applicable (see Treas Reg §20.2056A-2(d)(3)).

j. Determine the value of property qualifying for the marital deduction and any offsetting liabilities.

REVIEW FOR POSSIBILITY OF OTHER ELECTIONS

Review:

- a. The election by a recipient of a lump-sum benefit from a qualified plan not to take 10-year averaging if decedent retired before 1985, and exclusion from gross estate under former IRC §2039(f)(2).
- b. Special use valuation of certain farm and business real property (IRC §2032A):
 - (1) Determine whether qualified use requirements are met.
 - (2) Make the election, if applicable, on Form 706 (Schedule A-1), including a notice of election and agreement signed by each person with an interest in the property. See IRC §2032A(d)(3) re modification of election and agreement.
 - (3) Make a protective election, if appropriate, on Form 706.
- c. Determine eligibility for exclusion for qualified conservation easement (IRC §2031(c); see Schedule U).

NOTE

The Natural Heritage Preservation Tax Credit Act of 2000 authorizes an income tax credit equal to 55 percent of the fair market value of a qualified donation, with credit carried over to the succeeding 7 years, if necessary, until credit is exhausted. Rev & T C §17053.30.

- d. Determine whether alternate valuation date is applicable. IRC §2032.
- e. If time for making a certain election has passed, an automatic 12- or 6-month extension to remedy the election may apply, or a request for an extension can be made under Treas Reg §§301.9100-1 – 301.9100-3.

DETERMINE AVAILABLE CREDITS

Determine available credit for:

- a. State death taxes actually paid for decedents dying before 2005 (IRC §2011) (proof of payment attached to Form 706);
- b. Gift tax on certain pre-1977 gifts (IRC §2012);
- c. Applicable credit amount (IRC §2010);
- d. Tax on prior transfers received by decedent within 10 years after decedent's death (IRC §2013; see Schedule Q); and
- e. Foreign death taxes (IRC §2014; see Schedule P).

EXTEND TIME FOR FILING RETURN AND PAYING TAX

Consider the following extensions if needed and if they apply:

- a. A 6-month extension of time to file a return (*i.e.*, extends deadline from 9 months after DOD to 15 months after DOD). IRC §6081. File IRS Form 4768 with the IRS office where the return is to be filed on or before 9 months after the DOD (Treas Reg §20.6081-1(b)).

NOTE

This extension is considered "automatic" because no showing of good cause is required; however, Form 4768 must be timely filed to obtain the extension. Treas Reg §20.6081-1(a)-(b).

- b. A 12-month extension of time to pay tax (21 months after DOD) on showing of reasonable cause (IRC §6161). File Form 4768 with the IRS office where the return is to be filed on or before 9 months after the DOD (Treas Reg §20.6161-1(b)); interest on tax liability is not relieved (Treas Reg §20.6161-1(c)). Consider amending Form 706 to deduct the interest.
- c. Extension of time to pay tax on the value of a remainder or reversionary interest until 6 months after termination of the preceding interests (IRC §6163). Make the election on Form 706 and file notice of election. Bond may be required.
- d. Election of installment payment of taxes related to a closely held business (see IRC §6166) for period not to exceed 10 years. The first installment may be deferred for a period of up to 5 years. Make the election on Form 706, file the notice of election, and attach additional necessary information to Form 706:

- (1) Determine 2-percent interest rate portion as adjusted by IRS for inflation (IRC §6601(j)).
- (2) Determine ownership attribution (IRC §6166(b)(2)).
- (3) File a protective election, if applicable.
- (4) After notification from the IRS, complete agreement for consent to creation of lien under IRC §6324A. See Treas Reg §301.6324A-1(b)(1)–(2).
- (5) Calendar installment payments.
- (6) Advise client of acceleration of installments for certain dispositions of business (IRC §6166(g)(1)(A)).

NOTE

The maximum installment period for payments related to lending and finance companies is 5 years, with no 5-year deferral available (IRC §6166(b)(10)(A)(ii), (iii)) and maximum installment period for payments related to holding companies is 5 years (IRC §6166(b)(8)(B)(ii)).

ALLOCATE TAX LIABILITY

- a. Determine whether terms of the trust allocate payments of the tax, review the trust document, particularly regarding the QTIP trust, and follow terms when applicable.
- b. Review proration statutes of Prob C §§20100-20117 and allocate tax liability accordingly, if applicable.
- c. Take necessary measures provided under federal and state law to collect reimbursement of taxes from responsible parties.

FILE RETURN AND PAY TAX

- a. File return with appropriate IRS service center:

- (1) Pay any tax due with the return.
- (2) Send a copy of Form 706 to client and CPA (assuming attorney has prepared return; if not, make sure CPA sends copy after filing).
- (3) Obtain postal return receipt and file; copy to client, if desired.

- b. Consider applying for discharge from personal liability of client for payment of:

- (1) Estate tax, see IRC §2204.
- (2) Income, gift, or other taxes, see IRC §2204(b).
 - (a) Ensure that trustee has made a reasonable investigation to determine whether decedent owed income, gift, or other taxes, and that such taxes have been paid or provided for.
 - (b) Ensure that trustee is released before making distributions. There is no release from personal liability for trustee (as opposed to personal representative) to the extent of distributions made. IRC §6905(b).

- c. If an IRC §6166 election is made, have a written agreement under IRC §6324A (consenting to IRS lien on business assets) filed so that the executor/trustee may be discharged regarding §6166 tax payments under IRC §2204.

- d. Consider an IRC §303 stock redemption to pay estate taxes:

- (1) Pay the expenses of redemption from the trust to obtain an estate tax deduction (not income tax deductible for corporation; see IRC §162(k)).
- (2) Consider the effect on percentages of corporate ownership interests.

- e. Determine a sufficient reserve to be held by client until a favorable estate tax closing letter is received.

- f. When the closing letter is received, send a copy to client with an explanation letter.

FILE CALIFORNIA ET-1

For decedents dying before 2005, file California Form ET-1 return with the State Controller (if state tax credit payable; Rev & T C §13501):

- a. Pay any tax due with the return.
- b. Attach a copy of Form 706 to the ET-1 (Rev & T C §13501(b)).
- c. Send a copy of the return to client and CPA (assuming attorney has prepared return; if not, make sure CPA sends copy after filing).
- d. Obtain postal return receipt and file; copy to client, if desired.
- e. Forward any Form 706 amendments (Rev & T C §13503), IRS audit adjustments (Rev & T C §13504), or IRS closing letter to the state controller.

FILE OTHER STATE RETURNS

- a. Determine whether other states have inheritance or estate tax.
- b. Prepare and file return, or confirm preparation by another.
- c. Prorate state death tax credit, if applicable.

© The Regents of the University of California

STEP 32. DETERMINE GIFT TAXES

DETERMINE AMOUNT OF POST-FOURTH-QUARTER 1976 GIFTS

- a. Obtain copies of previously filed gift tax returns of decedent; if unavailable, request copies from the IRS (Request for Copy or Transcript of Tax Form (Form 4506)) beginning with return for fourth quarter of 1976.
- b. Determine total amount of decedent's adjusted taxable gifts for post-1976 gifts. See [step 31](#), above, discussing estate taxes for purposes of completing Form 706.

FILE RETURNS FOR UNREPORTED GIFTS

- a. File gift tax returns for taxable gifts of decedent for which returns have not yet been filed (IRC §6019), determine whether filing an amended Form 709 is appropriate, and pay any gift tax due for gifts often overlooked during lifetime, *e.g.*, for:
 - (1) A bargain sale between family members;
 - (2) Adding names to ownership documents, *e.g.*, title on deeds;
 - (3) Payment by decedent of someone else's expenses; and
 - (4) Interest-free or below-market-rate loans.
- b. Avoid, if possible, incorrect valuation penalties on gift tax returns due after 1989 when the valuation of a substantial asset is uncertain; use a qualified expert. IRC §6664(c). For gifts made after August 5, 1997, see IRC §2001(f) and determine whether the statute of limitations has expired.
- c. Determine whether gift tax returns filed on time are necessary to make the most effective allocation of GST exemption. See Treas Reg §26.2632-1(b).
 - (1) Allocate GST exemption between gift and estate tax returns. See [step 33](#), below.

REQUEST PROMPT ASSESSMENT OR RELEASE FROM PERSONAL RESPONSIBILITY

- a. Consider request to IRS for prompt assessment of gift taxes due from decedent, including penalties. IRC §6501(d). Use Form 4810 to make the request for prompt assessment and transmit to IRS separately from other documents. Treas Reg §301.6501(d)-1(b).
- b. Consider request to IRS for discharge of executor or administrator from personal liability for gift taxes. IRC §6905. Use Form 5495 to make request for discharge.
- c. Determine availability of similar state releases, if appropriate, and use as needed.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Transfer Taxes/STEP 33. DETERMINE WHETHER GST TAX APPLIES

STEP 33. DETERMINE WHETHER GST TAX APPLIES

REVIEW: TESTS FOR A GENERATION-SKIPPING TRANSFER (GST)

- a. GST tax applies to inter vivos transfers made after September 25, 1985, and transfers on death. See Treas Reg §26.2601-1.
- b. To determine whether an inter vivos gift or a transfer on the death of decedent caused a GST, there are generally two criteria that must be considered:
 - (1) Whether a donee or trust beneficiary is a skip person (IRC §§2613(a), 2651); and
 - (2) The identity of the "transferor" (IRC §2652(a)).

DETERMINE WHETHER DONEE OR TRUST BENEFICIARY IS A "SKIP PERSON"

- a. Obtain the following information for all persons (*i.e.*, direct transfers at death), trusts, and trust-like arrangements (*e.g.*, life estates and remainders or "transferees") who may receive an "interest in property" (IRC §§2612, 2652(c)) directly or indirectly as a result of the death of decedent:

- (1) Names of persons;
- (2) Names of trusts;
- (3) Names of all trust beneficiaries;
- (4) Dates of birth for direct transfers and for trust beneficiaries;
- (5) Respective relationships to transferor;
- (6) Social Security numbers for direct transferees and trust beneficiaries; and
- (7) Trust taxpayer identification numbers.

- b. Check whether decedent was the beneficiary of a QTIP trust that will benefit skip persons and for which no IRC §2652(a)(3) reverse QTIP election was made.

- c. Determine whether the transferee (including beneficiaries of trusts or other arrangements (see Treas Reg §26.2652-1(b)(1))) is a skip person (see IRC §2651; Treas Reg §26.2612-1(d), (e)) by learning if the transferee is one of the following:

- (1) Grandchild or other relative two or more generations below decedent; also consider (IRC §2651(e); Treas Reg §26.2651-1(a)(2), (3)):

- (a) If the "predeceased parent" rule applies to change the generation assignment of the transferee if the parent of transferee died before decedent; and

- (b) If the "predeceased parent" rule applies if the parent of transferee died within 90 days after decedent.

- (2) Nonrelative more than 37½ years younger than decedent.

- d. If a trust has beneficiaries in more than one generation, determine whether the interests of nonskip beneficiaries may be disregarded, thereby defining the trust as a skip person (IRC §2652(c); Treas Reg §26.2612-1(e)(2)).

IDENTIFY TRANSFEROR

Identify the transferor (Treas Reg §26.2652-1(a)) of the interest in the property transferred as a result of the settlor's death:

- a. Generally, decedent will be the transferor if the property would be included in decedent's gross estate. Treas Reg §26.2652-1(a)(1), (2).

- b. Determine whether there are any split gifts under IRC §2513. See IRC §2652(a)(2); Treas Reg §26.2652-1(a)(4), (5), Examples 2 and 9.
- c. Determine whether there are multiple transferors. Treas Reg §26.2654-1(a)(2).
- d. Determine whether the multiple skip rule changed the identity of the transferor. See Treas Reg §26.2653-1(a).
- e. Determine whether decedent-transferor was a nonresident alien. See Treas Reg §26.2663-2 for special rules for nonresident aliens.

DETERMINE TYPE OF TAXABLE EVENT

If a GST has occurred, determine the type of GST event:

- a. Direct skip (IRC §2612(c); Treas Reg §26.2612-1(a));
- b. Taxable distribution (IRC §2612(b); Treas Reg §26.2612-1(c); consider verifying that IRS Form 706GS(D) is being filed); or
- c. Taxable termination (IRC §2612(a); Treas Reg §26.2612-1(b); consider verifying that IRS Form 706GS(T) is being filed).

DETERMINE EXCLUSIONS

Determine whether any exclusions apply to the GST, *e.g.*:

- a. Special rule for educational and medical expenses for gifts made during life (IRC §§2642(c)(1), (3), 2503(e)).
- b. Annual exclusion gifts made during life (IRC §§2642(c)(1), (c)(3), 2503(b)).

Warning: The IRC §2503(b) annual gift tax exclusion does not apply for GST purposes in any case in which a trust has more than one beneficiary who is not fully vested in that trust. IRC §2642(c).

- c. Transfers subject to prior GST tax if the prior transferee was in the same generation as or generation below the current transferee.
- d. \$2-million exclusion (the "Gallo Amendment") for property transferred outright or to a qualified trust before January 1, 1990. Pub L 99-514, §1433(b)(3), 100 Stat 2731. Verify that trust is qualified.
- e. GST from a trust that was irrevocable on or before September 25, 1985. Treas Reg §26.2601-1(b)(1).

Warning: Be sure to ascertain whether there were any actual or constructive additions made to a pre-September 26, 1985, irrevocable trust (Treas Reg §26.2601-1(b)(1)(iv)-(v), (b)(5)) or substantial modifications made to the trust after September 25, 1985 (Treas Reg §26.2601-1(b)(4)). Review any releases, exercises, or lapses of a power of appointment for that trust. Treas Reg §26.2601-1(b)(1)(v)(B).

- f. Was decedent incompetent on or before October 22, 1986? If so, a revocable trust created by decedent will not be subject to GST tax at death even if a conservatorship was established for the settlor, and the conservator under California law could have changed the terms of the trust. Treas Reg §26.2601-1(b)(3).

DETERMINE AVAILABLE GST EXEMPTION

- a. For decedents dying on or after January 1, 2004, the GST exemption is equal to the applicable exclusion amount under IRC §2010(c) (\$2 million for decedents dying in 2006 or 2007 and, \$3.5 million for decedents dying in 2009). IRC §2631(c).

- b. Review inter vivos transfers for allocation of exemption:

- (1) Identify transfers for which the automatic allocation of GST exemption to lifetime "direct skips" applies and identify lifetime transfers to "GST trusts." IRC §§2631, 2632.
- (2) Determine whether decedent made any inter vivos gifts that might not receive an automatic allocation (*e.g.*, gifts to trusts that are not "GST trusts," such as trusts benefiting both skip and nonskip persons or "trust arrangements," such as a transfer of a life estate to a child and a remainder to a grandchild). See IRC §2632(c)(3)(B).
- (3) If decedent made lifetime transfers to which there was no automatic allocation, determine whether decedent filed a gift tax return with an attached "Notice of Allocation" to allocate GST exemption to the transfer. See Treas Reg §26.2632-1(b)(4); IRS

Form 709 Instructions.

(4) If decedent made any transfers to which the GST exemption was not fully allocated, either automatically or with the filing of a gift tax return (IRS Form 709), determine whether the recipient trust or trust arrangement can still make distributions to skip persons.

c. If decedent allocated any GST exemption during life:

(1) Verify the amount used by reviewing copies of all gift tax returns (IRS Form 709) filed since 1985 (Treas Reg §26.2601-1(a)(2)); note that all inter vivos gift transfers made after September 25, 1985, but before October 23, 1986, are deemed made on October 23, 1986.

(2) Consider confirming in writing which Form 709s are being relied on by the tax preparer.

(3) Identify all transfers involving automatic allocation of the GST exemption (IRC §§2631-2632) and determine whether the transferor elected to opt out of automatic allocation. IRC §2632(b)(3), (c)(5).

(4) Determine the effective date of the GST and consider reviewing the inclusion ratio of the trust for accuracy as of that date. Verify the reported values on the effective date (check appraisals) and the proposed GST exemption allocation. Was the GST exemption allocation done by formula to ensure that the transfers had a zero inclusion ratio? Treas Reg §26.2632-1(b)(4).

NOTE

Any GST exemption allocated to a gift is void to the extent the amount allocated exceeds the amount necessary to obtain a zero inclusion ratio for the trust. Treas Reg §26.2632-1(b)(4)(i).

d. Determine whether decedent made any lifetime gifts to trusts benefiting skip persons to which there was no automatic allocation without properly allocating GST exemption:

(1) Obtain copies of all inter vivos trust documents in which decedent (or decedent's spouse) made gifts and skip persons were actual or potential beneficiaries.

(2) Determine whether gifts to the trust are exempt from GST to the extent of the gift tax annual exclusion (IRC §2642(c)(2)).

(3) Determine the effect of the automatic GST exemption allocation rule for lifetime transfers to GST trusts after December 31, 2000 (IRC §2632(c)).

e. Determine whether decedent made any direct gifts to skip persons in excess of the annual exclusion amount without making the correct GST exemption allocation (check values). If so, determine the effect of the automatic GST exemption allocation rule for direct skips (IRC §2632(b); Treas Reg §26.2632-1(b)(1)(i)).

NOTE

Annual gift tax exclusion exempts a transfer to the extent of the exclusion only in the case of outright transfers to individuals, and transfers to trusts with only one beneficiary when the assets of the trust are includable in the beneficiary's estate if he or she dies before termination of the trust (*e.g.*, if the beneficiary has a general power of appointment) (IRC §2642(c)).

f. If decedent-transferor made a gift of property that would have been included in the gross estate of decedent or the transferor's spouse for a period after the gift, determine whether the estate tax inclusion period (ETIP) rules were properly applied for the GST exemption allocations that were made (Treas Reg §26.2632-1(c)).

g. If decedent was a nonresident alien at the time of the taxable event, transfers are subject to the GST tax rules only if the transfer is subject to federal estate or gift taxes. Treas Reg §26.2663-2(b). Determine the impact of the automatic allocation rules. See Treas Reg §§26.2663-2(a), 26.2632-1(b)(1).

ALLOCATION OF REMAINING GST EXEMPTION

a. Generally, any trust or transfer should be made completely exempt from GST tax (have an inclusion ratio of zero) or completely nonexempt.

NOTE

Trusts can be split to accomplish this. If the trust instrument does not provide for division of the trust, the court may be petitioned

to divide the trust. Prob C §15412. Splits must be completed before making the allocation of the GST exemption to result in a "zero" trust. Treas Reg §26.2654-1; Proposed Treas Reg §26.2642-6(b). The exemption can be allocated using a formula. The trust must be divided on a fractional basis. See IRC §2642(a)(3).

- b. Consider first exempting transfers that are not direct skips if a high portion of the trust will pass to skip persons.
- c. Determine the need to fund a pecuniary gift in a particular manner or within 15 months of death. Treas Reg §26.2642-2(b)(2) – (4).
- d. Make sure the allocation is made on Schedule R of a timely estate tax return. For applicable rules, see Treas Reg §26.2632-1(d). No allocation can be made after the due date of the estate tax return (with extensions). On that date any remaining GST exemption is irrevocably allocated as provided in IRC §2632(e).
- e. Determine applicability of a reverse QTIP election strategy (not applicable for most decedents dying on or after January 1, 2004) (see California Trust Administration, chap 14 (2d ed Cal CEB 2001); Marital Deduction Subtrust Funding (Cal CEB Action Guide April 2009)):

(1) Unless the strategy applies, no GST exemption can be allocated to a QTIP trust at the death of the first spouse because later inclusion of the trust in the surviving spouse's estate under IRC §2044 will cause the surviving spouse to be the GST transferor.

(2) If there is no other suitable use for a decedent's unused GST exemption, it can be allocated to a QTIP trust by dividing the trust into two trusts, one of which is equal in value to the remaining GST exemption.

f. Allocate GST exemption to inter vivos transfers, if desirable:

(1) File gift tax returns (IRS Form 709) for the purpose of allocating GST exemption to the trusts and trust arrangements receiving inter vivos transfers that did not receive an automatic allocation of decedent's GST exemption.

NOTE

A late allocation can also be made on the estate tax return, but this may result in a highly undesirable delay in the effective date of the allocation.

(2) For gifts made in the calendar year before death, the due date for the gift tax return is the earlier of:

(a) April 15 in the year following the gift or the extension date; or

(b) The due date of the estate tax return.

(3) If the allocation is made on a late return, the value of the transferred property for purposes of determining the denominator of the applicable fraction will be the value of that property when the return is filed (rather than its value on the date of the transfer). Further, late allocations are not retroactive to the date of the transfer and therefore risk the possibility of a GST tax being triggered before the allocation is effective.

(4) No allocations can be made after the due date of the estate tax return (with extensions).

g. Consider always using a formula to allocate decedent's GST exemption. Treas Reg §26.2632-1(d)(1).

DETERMINE AMOUNT OF TAX

Determine the amount of GST tax. The amount of tax is equal to the taxable amount (depending on the type of taxable event) multiplied by the applicable rate (IRC §2602):

a. The applicable rate is equal to the maximum federal estate tax rate (47 percent for decedents dying in 2005) multiplied by the inclusion ratio. IRC §2641(a).

b. The inclusion ratio is equal to one minus the applicable fraction. IRC §2642(a). In most cases, the inclusion ratio should be either one (for nonexempt transfers) or zero (for exempt transfers).

(1) The numerator of the applicable fraction is the amount of GST exemption allocated to the transfer.

(2) The denominator of the applicable fraction is the value of the transferred property reduced by the amount of federal estate tax attributable to that property and any charitable deduction allowed with respect to that property.

DETERMINE THE DENOMINATOR OF THE APPLICABLE FRACTION

To calculate the denominator of the applicable fraction, determine the value of the property transferred or the value of all the trust assets on the effective date of the transfer:

- a. For lifetime transfers, the effective date will depend on whether a properly completed Form 709 has been filed on time:
 - (1) If Form 709 was filed on time, the effective date for determination of the denominator is the date of the property transfer (Treas Reg §§26.2632-1(b)(1)(ii), 26.2642-2(a)(1)), and the denominator will be the value as finally determined for gift tax purposes.
 - (2) Except as provided in Treas Reg §26.2642-2(a)(2), if Form 709 was not filed on time or was improperly completed, the effective valuation date for all of the trust assets for the denominator will be the date Form 709 is actually filed (postmarked) with the IRS, and the denominator will be the value of the transferred assets on that date. Treas Reg §26.2632-1(b)(4).
- b. For transfers at death, the effective date for the determination of the denominator will be the DOD value (Treas Reg §26.2642-2(b)), unless:
 - (1) The special rules for pecuniary payments apply; or
 - (2) The rule for residual transfers after a pecuniary payment applies.

NOTE

If property other than cash is used to satisfy a pecuniary payment, the value of the denominator of the applicable fraction will be based on the estate tax value of the transferred property, provided that the formula for determining the pecuniary and residual shares follows the "fairly representative" formula. Treas Reg §26.2642-2(b)(2).

DETERMINE THE NUMERATOR OF THE APPLICABLE FRACTION

To calculate the numerator of the applicable fraction, determine the amount of GST exemption allocated to the transfer:

- a. Consider verifying the accuracy of the applicable fraction for all trusts if transfers were previously made to determine whether any additional GST tax exemption allocations should be made to such trusts. Look for:
 - (1) Whether any actual or constructive additions to the trust have occurred that may affect the applicable fraction (see, *e.g.*, Treas Reg §26.2652-1(a)(5), Examples 5, 7-8).
 - (2) Incorrect allocation of the GST exemption amounts due to errors in valuing the property transferred, or utilization of the wrong effective valuation dates. Treas Reg §26.2632-1(b)(4)(ii).

NOTE

In the case of a direct skip that must bear the GST tax, the value of the taxable transfer will be reduced by the tax. IRS Form 706, Schedule R-1 applies a factor to the skip gift.

(3) Incorrect redetermination of the applicable fraction after any additional GST tax exemption is allocated to a trust or when certain changes occur with respect to the principal of the trust. Treas Reg §26.2642-4.

- b. Decedent's unused GST tax exemption may be allocated by decedent's executor or trustee, if applicable (Treas Reg §26.2652-1(d)), at any time on or before the date prescribed for filing IRS Form 706, Form 706-NA, or Form 709 (filed on or before the due date of the transferor's estate tax return), including extensions. Treas Reg §26.2632-1(d)(1).

Warning: An automatic irrevocable allocation rule will apply for failure to allocate on time the entire GST tax exemption on Form 706. Treas Reg §26.2632-1(d)(2).

GST TAX COMPLIANCE

- a. File the appropriate return or schedule. Treas Reg §26.2662-1(b).
- b. Pay the tax when due unless an extension to pay is requested. IRC §6161; IRS Letter Ruling 9314050.

STEP 34. HANDLE DISCLAIMERS

WHEN TO USE DISCLAIMERS

Consider using disclaimers to:

a. Reduce or eliminate the marital deduction gift to fully use decedent's applicable credit amount:

(1) Use caution in disclaiming specific trust assets while continuing to accept income from the remaining trust property (see Treas Reg §§25.2518-3(a)(2), 25.2518-2(e)(5), Example 4).

(2) Suggest use of a fractional interest disclaimer stated in terms of a formula or as a percentage disclaimer (see Treas Reg §25.2518-3(b)).

(3) Disclaim a specific bequest to the surviving spouse.

b. Obtain a marital deduction:

(1) Use disclaimer by beneficiaries other than the spouse to pass property to the spouse; consider formula disclaimer to pass assets to the spouse to eliminate an estate tax.

(2) Use disclaimer to qualify trust for QTIP election (*e.g.*, if trust distributes income to children and surviving spouse, children could disclaim their right to any income).

NOTE

Be sure to conform the disclaimer to both state and federal law (Prob C §§260, 295; IRC §2518). Don't overlook possible application of intestate succession rules (Prob C §§240, 6400-6455).

c. Perfect or increase a charitable deduction gift; if a nonqualified split interest charitable trust is created, the disclaimer may accelerate the charitable remainder.

d. Avoid unintended general powers of appointment (*e.g.*, if a beneficiary is given a power to distribute corpus not limited by an "ascertainable standard," or the beneficiary/trustee is given the power to invade principal of the trust for "comfort," "welfare," or "happiness").

e. Skip a generation and subject property to GST tax to utilize any unused GST tax exemption (*e.g.*, a financially secure child might disclaim in favor of grandchildren).

f. Avoid a GST (*e.g.*, a grandchild or more remote descendant can disclaim to prevent imposition of GST tax).

g. Correct a GST tax problem involving powers or interests a beneficiary may have. See Treas Reg §26.2612-1(e)(3).

h. Qualify for stock redemption under IRC §303.

i. Eliminate nonqualified heirs in order to qualify for special use valuation under IRC §2032A and/or installment payment of estate tax under IRC §6166.

j. Avoid multiple administrations and unnecessary death taxes when a beneficiary dies within 9 months of decedent.

k. Terminate a trust when both the life interest and remainder interest beneficiaries disclaim.

l. Avoid income tax (*e.g.*, the holder of a power to vest income or corpus in a holder may disclaim to avoid application of IRC §678(a); an income beneficiary might disclaim an income interest).

m. Accelerate estate tax to qualify for previously taxed property (PTP) credit. IRC §2013.

BE ALERT TO CONFLICTS OF INTEREST

- a. Be particularly alert to conflicts of interest in advising different parties regarding disclaimers.
- b. Obtain written waivers of conflict or refer a potential disclaimant to independent counsel.

REVIEW TECHNICAL REQUIREMENTS (IRC §2518)

a. A qualified disclaimer must:

- (1) Be irrevocable and unqualified;
- (2) Be in a writing signed by the disclaimant;
- (3) Identify the property interest being disclaimed; and
- (4) Be delivered to trustee or other appropriate party not later than 9 months after the DOD or within 9 months after the disclaimant attains age 21 (IRC §2518(b)(2)(B)).

b. The disclaimant cannot:

- (1) Have accepted the benefits of the disclaimed property (see Treas Reg §25.2518-2(d)); or
- (2) Redirect the property (disclaim a special power of appointment in the disclaimer trust).

DETERMINE TO WHOM THE DISCLAIMED PROPERTY WILL PASS

- a. Review the trust instrument for disclaimer directions; and
- b. Review the disclaimant's family circumstances.

© The Regents of the University of California

STEP 35. EVALUATE INCOME TAX ISSUES

RECOGNIZE INCOME TAX ISSUES

- a. Determine taxable income of the administrative trust; determine whether any distributions should occur before the end of the taxable year (note IRC §663(b) regarding 65-day election), and calendar these.
- b. If trust distributions are not made before the end of the taxable year, consider creating a depreciation reserve if permitted by the trust instrument (Prob C §16335(a)(1)) or applicable law (Prob C §16372).
- c. Review whether there are any required distributions of income, and advise beneficiaries of DNI that must be reported whether or not actual distributions of income are made. IRC §§652(a), 662(a)(1).
- d. Determine allocation of depreciation and depletion deductions. IRC §§167(d), 611(b)(3).
- e. Determine whether any distribution will include IRD and plan for the timing of income realization. If an IRC §691(c) deduction exists, compute deduction and advise IRD recipient(s) of its amount.

STEP 36. UNDERSTAND CONTINGENCIES BEFORE MAKING DISTRIBUTIONS

SURVIVORSHIP PERIOD; ASSURE VALIDITY OF THE TRUST

Determine survivorship period before making distributions to beneficiaries:

- a. If challenged by an interested party to the trust, assure the validity of the trust and any trust amendments *before* any trust distributions occur (see [step 28](#), above).
- b. Consider liability of trustee if assets are distributed to the wrong beneficiaries. See [Prob C §16440](#).
- c. Consider delaying distribution if the proposed distribution could be affected by the birth of posthumously conceived children of decedent. See [Prob C §§249.5-249.8](#).
- d. Consider isolating problem assets in one or more subtrusts or single-purpose entities (*e.g.*, corporation, LLC) to protect estate assets. Also consider further isolating active trade or business, and high-risk properties in corporate or limited liability type entities to be held by the trust(s).

CONSIDER OTHER ISSUES

- a. Review the following to determine whether distribution of assets triggers income:
 - (1) Distribution of IRD items;
 - (2) Funding of pecuniary gifts with appreciated assets, *e.g.*, formula pecuniary marital deduction or bypass gifts;
 - (3) Certain distributions of installment obligations; and
 - (4) Realization of gain resulting from nonprorata distribution.
- b. Review trustee's discretionary powers and make sure that trustee has exercised powers reasonably. See [Prob C §§16080-16082](#).
- c. Determine whether court confirmation of distribution or subtrust funding is desirable (*e.g.*, to protect trustee from later claims of remainder beneficiaries, intestate heirs). See [Prob C §17200](#).
- d. Consider timing issues affecting income taxation of the trust estate as it affects beneficiaries.
- e. Calculate and set aside the reserve amount.
- f. Are there other transferee liability issues, *e.g.*, receipt of contaminated property?

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Distribution and Subtrust Funding/STEP 37. MAKE OUTRIGHT DISTRIBUTIONS

STEP 37. MAKE OUTRIGHT DISTRIBUTIONS

ANALYZE DISTRIBUTIONS

Determine whether:

- a. Distribution passes free of or subject to taxes, claim, or contributions for administrative expenses.
- b. Distribution carries interest 1 year after the DOD, or carries income earned. Prob C §16340(a)-(b).
- c. Any DNI, or depreciation or depletion, will pass to the beneficiary. Note IRC §643(e) election. Advise the beneficiary and the accountant.
- d. IRS Form 1099 needs to be issued regarding interest paid; calendar the due date to issue the form.
- e. Change in ownership for real property tax purposes will be triggered on distribution (resulting in change of title) and can be avoided through exceptions and exemptions to reassessment. Rev & T C §§61-63.1.

NOTE

Establish a reserve for any potential escape assessment taxes for the period that commences with the DOD and ends on the date of distribution or sale.

- f. IRC §691(c) deduction for estate taxes attributable to IRD applies and advise the beneficiary.
- g. Election is required by a majority in interest to continue a general partnership (see Corp C §16601(8)):
 - (1) It may be necessary to prevent property tax reassessment;
 - (2) Election must be made within 90 days of distribution (see Corp C §16801(2)(A)).

VALUE ASSETS

Obtain valuation of assets to be distributed as of distribution date, if needed.

COMPLETE DISTRIBUTION

- a. Consider providing all beneficiaries with the proposed plan of final distribution with acknowledgments before actual distribution of trust estate.
- b. Make outright cash distributions, or transfer title to noncash assets. If distribution is in kind to satisfy a pecuniary amount, see Treas Reg §1.661(a)-2(f)(1) regarding gain or loss.
- c. If distributed asset is encumbered, have the beneficiary formally assume liability, and advise the beneficiary and the accountant that the beneficiary may be entitled to an income tax deduction for payment of interest. IRS Letter Ruling 8334025.
- d. Obtain written receipts; include distributees' taxpayer identification numbers.

NOTE

Consider attaching an allocation schedule to IRS Form 706 as an exhibit referenced in Schedule M of the estate tax return.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/Distribution and Subtrust Funding/STEP 38. HANDLE SUBTRUST FUNDING

STEP 38. HANDLE SUBTRUST FUNDING

REVIEW SUBTRUSTS

- a. Review the trust instrument, Form 706 values, and identities of beneficiaries to determine what subtrusts are needed:
 - (1) Determine if further division of any subtrust into GST exempt and GST nonexempt trusts is required.
 - (2) For estates of decedents dying before January 1, 2004, determine if further division is required of any subtrust into portions of family business interests to which the IRC §2057 deduction applied, and portions containing qualified family-owned business interests to which the §2057 deduction did not apply (noting any potential for recapture of taxes for disqualified owners).
 - (3) For trust assets other than those in GST exempt trusts, determine whether physical segregation into separate trusts is required or advisable.
- b. List the names for each subtrust to be created (note whether the name of subtrust is stated in instrument):
 - (1) Provide exact subtrust names to trustee, accountant, brokerage house, and other advisors to maintain consistency of use.
 - (2) Review with the accountant accounting for beneficiary interests that are not physically segregated into separate subtrusts.
- c. If an administrative trust was used, consult with other advisers regarding the date of termination of the administrative trust and communicate this information to trustee and accountant.
- d. Obtain tax identification number for each new sub-trust, except when a surviving spouse's sub-trust (*e.g.*, Survivor's Trust) remains revocable and the surviving spouse continues to serve as trustee.
- e. Determine whether prospective annual reviews of subtrusts with trustee and accountant are warranted to ensure, *e.g.*, integrity of reported trust allocation and segregation of trust assets.

REVIEW ISSUES IN FUNDING THE MARITAL DEDUCTION GIFT

- a. Review the type of formula in the trust instrument to determine the required funding method for the marital deduction gift. See Rev Proc 64-19, 1964-1 Cum Bull 1.
- b. Avoid distribution of:
 - (1) Property eligible for foreign death tax credit (will be lost);
 - (2) Flower bonds (use to pay estate tax);
 - (3) Stock eligible for IRC §303 redemption (proceeds of earlier redemption may be used to fund marital deduction gift);
 - (4) IRC §2032A property if it is likely that there will be a recapture of the estate tax saved during the surviving spouse's lifetime;
 - (5) Appreciated assets to satisfy pecuniary marital deduction gifts; and
 - (6) IRD items to satisfy pecuniary gifts.

SELECT DATE FOR FUNDING SUBTRUSTS

- a. Allocations to subtrusts will be considered effective as of the distribution date, unless the instrument provides otherwise. See Rev Proc 64-19, 1964-1 Cum Bull 1.
- b. Obtain valuation of trust assets as of the distribution date.
- c. Complete allocations and transfers of title within a reasonable period of time.

d. Note that distributions that occur more than 15 months after the DOD may cause GST tax problems. See Treas Reg §26.2642-2(b)(4)(ii)(A).

PREPARE WRITTEN SCHEDULE OF SUBTRUST ASSETS

Prepare a written schedule of assets, with values, allocated to each subtrust.

- a. Note if any DNI is distributed, or depreciation and depletion allocated.
- b. If the trust has multiple beneficiaries, review the trust instrument to determine whether a prorata allocation is required, or whether a nonprorata allocation is permissible, to avoid a taxable sale or exchange (when not dividing community assets with surviving spouse). *Mark Bixby* (1972) 58 TC 757, acq 1975-2 Cum Bull 1; Prob C §16246.
- c. Determine the proper allocation of taxes and expenses to avoid underfunding. See *Estate of Gertrude Hoffman* (1982) 78 TC 1069.
- d. Review the allocation with trustee and the accountant; consider review by the beneficiary, if appropriate.
- e. Review the allocation with the accountant concerning any income tax issues.
- f. If an administrative trust was not used, account for all income, sales, other receipts, and disbursements from the DOD through funding date (or send letter to accountant allocating responsibility to do so).
- g. Review if a "change in ownership" for property tax purposes will be triggered and could be avoided. See Rev & T C §§61-63.1.

NOTE

To avoid potential issues upon later subtrust terminations, provide trust binders to both the trustee and to the accountant which include asset allocation schedules for the subtrusts and their tax identification numbers.

TRANSFER TITLE TO TRUSTEE OF SUBTRUST

Transfer title of all assets to trustee of subtrusts (prepare Prob C §18100.5 certifications and Prob C §18105 affidavits as needed):

- a. Instruct trustee to change bank account titles, or open new accounts, as required.
- b. Record real property deeds; assume mortgages. Note exclusion from Documentary Transfer Tax. Rev & T C §11930. Record affidavit of change of trustee if necessary. Prob C §18105. See step 10, above.
- c. Execute an assignment of stock and issue new share certificates for closely held corporation; if S corporation, make sure the trust qualifies for QSST election or electing small business trust. IRC §1361(e).
- d. Following review of the partnership agreement for assignment restrictions and procedures, execute assignments of partnership interests for private partnerships and deliver to general partner(s):
 - (1) Record amended Statement of Partnership (if general partnership).
 - (2) File amended Certificate of Limited Partnership (Form LP-1) with Secretary of State if trustee is a general partner of a limited partnership (not required if trustee is a limited partner).
- e. For LLCs and LLPs (following review of the operating agreement for assignment restrictions and procedures):
 - (1) Execute and deliver assignments of interests.
 - (2) File amended certificate with the Secretary of State.
 - (3) For LLP, meet other professional notification requirements, *e.g.*, State Bar for attorneys.
- f. For publicly traded securities (stock, bonds, mutual funds, partnerships), execute and deliver to transfer agent:
 - (1) Stock powers (signature guaranteed);
 - (2) Affidavit of domicile (notarized); and

- (3) Letter of instructions (signature guaranteed).
- g. Change title of brokerage accounts.
 - h. Transfer treasury notes, United States savings bonds.
 - i. Record assignment of a beneficial interest of a deed of trust, and send the recorded assignment and note secured by it to the maker/trustor.
 - j. Execute assignments of unsecured notes and send a copy to the maker.
 - k. Execute assignments of assets of sole proprietorships and amend outstanding UCC financing statements.
 - l. Complete assignments of other personal property.
 - m. After review of viability and current rating of policy, assign insurance policy (general and property) contracts to appropriate subtrust that received the insured property.
 - n. Assign pending claims, contracts, or litigation to trustee of subtrust.

WHEN ASSET IS ENCUMBERED

If distributed asset is encumbered, have trustee of the subtrust formally assume liability.

UPDATE INVESTMENT OBJECTIVES

Consider investment objectives for each subtrust and consider reducing these to a writing. See Prob C §§16045-16054. Consider and discuss adjustments to income and principal for investments in capital growth types of investments. See Prob C §16336.

© The Regents of the University of California

Final Review

STEP 39. REVIEW FINAL CONSIDERATIONS

REVIEW CHECKLIST OF FINAL CONSIDERATIONS

- a. Note when 1-year statutes of limitations on claims against a decedent expire. CCP §§366.2, 366.3.
- b. Review cash needs and cash flow of the estate or trust (*e.g.*, when there is a Form 706 extension).
- c. Confirm that claim(s) for parent-child or grandparent-grandchild exclusion from property tax reassessment have been filed with the county assessor(s). See step 10, above, for discussion and filing deadlines.
- d. If a property tax change in ownership has occurred, follow up on notices of reassessment, supplemental assessment, or escape assessment, and file any appropriate appeals or claims for refund. See step 10, above, for discussion and filing deadlines.
- e. Review with trustee the system established for trust administration (*i.e.*, bookkeeping, accounts, and other records) and verify segregation of trust accounts.
- f. Review fiduciary duties with trustee, such as investment duties, regular review of performance by investment managers, accountings, fiduciary income tax returns, distribution requirements, and other duties.
- g. Review future exercise of discretionary powers. See Prob C §§16080-16082.
- h. Review with trustee right to and procedure to claim and report trustee's fees. Consider making a fee adjustment for personal counsel for trustee to preserve attorney-client confidentiality for trustee (see *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716; *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317; *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487).
- i. Determine whether trustee should submit the trust accounting to court for approval.
- j. Review any bonding requirement and renewal of bond.
- k. Evaluate any need for an ongoing reserve; distribute any excess reserve amount held back from distribution if the trust does not continue.
- l. Send closing letter, including final instructions to trustee on any ongoing administration of the trust.

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

CALIFORNIA

Statutes

BUSINESS AND PROFESSIONS CODE

1625.3-16.25.4: [Step 14](#)

CIVIL CODE

682.1: [Step 29](#)

990-998: [Step 23](#)

1102: [Step 30](#)

1102.1: [Step 30](#)

1102.2: [Step 30](#)

CODE OF CIVIL PROCEDURE

335.1: [Step 5](#)

366.1: [Step 5](#)

366.2: [Steps 4, 16, 18, 39](#)

366.3: [Steps 4, 18, 39](#)

CORPORATIONS CODE

500-503.1: [Step 12](#)

1100: [Step 12](#)

13407: [Step 14](#)

15677.2: [Step 13](#)

15677.8: [Step 12](#)

15681: [Step 13](#)

16303: [Step 13](#)

16601(7)-(9): [Step 5](#)

16601(7)(A): [Steps 4, 13](#)

16601(8): [Step 37](#)

16801(2)(A): [Steps 4-5, 13, 37](#)

16902: [Step 13](#)

16908: [Step 12](#)

17540.8: [Step 12](#)

25102(f): [Step 11](#)

25102(h): [Step 11](#)

GOVERNMENT CODE

51200-51295: [Step 10](#)

8209(b): [Step 16](#)

HEALTH AND SAFETY CODE

18080.2: [Step 29](#)

PROBATE CODE

3: [Steps 4, 28](#)

200-204: [Step 29](#)

210: [Step 10](#)

215: [Steps 5, 19](#)

216: [Step 5](#)

240: [Step 34](#)

249.5: [Step 4](#)

249.5-249.8: [Step 36](#)

260: [Step 34](#)

260-295: [Step 5](#)

295: [Step 34](#)

331: [Step 4](#)

700-735: [Step 16](#)

850: [Steps 10, 18, 28](#)

850(a)(3)(C): [Step 4](#)

1003: [Step 28](#)

1060-1064: [Step 25](#)

1860(a): [Step 26](#)

3900-3925: [Step 31](#)

5000-5032: [Step 19](#)

5010-5032: [Steps 20, 31](#)

5403: [Step 29](#)

5404: [Step 29](#)

5500-5512: [Step 29](#)

6400-6455: [Step 34](#)

6401-6414: [Step 4](#)

6450: [Step 4](#)

8200(a): [Step 28](#)

8200(a)(1): [Steps 5-6](#)

8200(a)(2): [Steps 5-6](#)

8540-8547: [Step 28](#)

9000-9399: [Step 28](#)

9764: [Step 16](#)

13050: [Step 4](#)

13100: [Steps 5, 21, 28](#)

13100-13116: [Step 4](#)

13101: [Step 29](#)

13101(d): [Step 29](#)

13104(a): [Step 29](#)

13150-13158: [Steps 4, 28](#)

13200: [Step 28](#)

13200-13210: [Step 4](#)

13540: [Step 4](#)

13600: [Step 28](#)

13650: [Step 29](#)

15400-15414: [Step 4](#)

15403: [Step 28](#)

15405: [Step 28](#)

15412: [Steps 28, 33](#)

16002(a): [Step 30](#)

16002(b): [Step 30](#)

16003: [Step 30](#)

16004: [Step 30](#)

16045-16054: [Steps 4, 30, 38](#)

16047(c): [Step 5](#)

16060-16064: [Steps 4, 25](#)

16060.5: [Step 6](#)

16061.7: Steps 4-6, 28

16061.8: Step 5

16062(e): Step 25

16064(a): Step 25

16080-16082: Steps 4, 36, 39

16200(b): Steps 12-13

16222(a): Steps 12-13

16225: Step 25

16226: Step 30

16246: Step 38

16320-16375: Steps 4, 25, 27

16335(a)(1): Steps 27, 35

16336: Steps 30, 38

16336.4-16336.6: Step 27

16340(a)-(b): Step 37

16340(c)(2): Step 31

16363-16364: Step 27

16372: Steps 25, 35

16372(b): Steps 10, 27

16440: Step 36

16460: Step 25

16461: Step 25

16500-16504: Steps 4, 30

17200: Steps 4, 13, 25, 28, 36

17200-17211: Step 4

17200.1: Step 28

17200(b): Step 28

17200(b)(22): Step 16

17200(b)(23): Step 14

17211: Step 25

18100.5: Steps 6, 10, 15, 38

18100.5(b)(8): Step 10

18100.5(i): Step 10

18105: [Steps 10, 24, 38](#)

19000-19054: [Step 4](#)

19000-19403: [Steps 18, 28](#)

19202: [Steps 5, 19](#)

19320: [Step 18](#)

19324: [Step 18](#)

20100-20117: [Step 31](#)

21300-21322: [Step 4](#)

21310: [Step 28](#)

21310-21315, operative January 1, 2010: [Step 4](#)

21311: [Step 28](#)

21315: [Steps 4, 28](#)

21320: [Step 28](#)

21320-21322: [Step 28](#)

21350: [Step 28](#)

21350-21356: [Step 4](#)

21520-21526: [Step 28](#)

21523: [Step 31](#)

21540-21541: [Step 28](#)

REVENUE AND TAXATION CODE

51.5: [Step 10](#)

61-63.1: [Steps 37-38](#)

61(c): [Step 10](#)

62-63: [Step 10](#)

62(g): [Step 10](#)

62(m): [Step 10](#)

62(p): [Step 10](#)

63: [Step 10](#)

63.1: [Step 10](#)

63.1(a)(2): [Step 10](#)

63.1(e): [Step 10](#)

64: [Step 11](#)

64(e): [Step 11](#)

65: [Step 10](#)

65.1(a): [Step 10](#)

65(c): [Step 10](#)

66: [Step 10](#)

73.1(c): [Step 10](#)

480.1-480.2: [Step 5](#)

480.1(b): [Step 11](#)

480.2(b): [Step 11](#)

480(b): [Step 10](#)

480(e): [Step 5](#)

631.1(e)(2): [Step 10](#)

631.1(e)(4): [Step 10](#)

1603(b): [Step 10](#)

1605(b)-(c): [Step 10](#)

2605-2606: [Steps 5, 10](#)

2704-2705: [Steps 5, 10](#)

5097: [Step 10](#)

11901-11934: [Step 30](#)

11930: [Step 38](#)

13501: [Step 31](#)

13501(b): [Step 31](#)

13503: [Step 31](#)

13504: [Step 31](#)

17053.30: [Step 31](#)

18505(e)-(f): [Step 27](#)

18631(b): [Step 27](#)

18631(c)(4): [Step 27](#)

19517: [Step 5](#)

19517(a): [Step 26](#)

ACTS BY POPULAR NAME

Natural Heritage Preservation Tax Credit Act of 2000: [Step 31](#)

Uniform Principal and Income Act (UPAIA): [Steps 4, 25, 27](#)

Uniform Prudent Investor Act (UPIA): [Steps 4, 20, 30](#)

Uniform Transfers to Minors Act: [Step 31](#)

Williamson Act: [Step 10](#)

PROPOSED LEGISLATION

SB 1264: [Steps 4, 28](#)

SB 565: [Step 10](#)

SB 559: [Step 10](#)

Regulations

CALIFORNIA CODE OF REGULATIONS

Title 10

260.102.8: [Step 11](#)

260.102.14: [Step 11](#)

Title 18

462.020(b)(2): [Step 10](#)

462.040(b)(6): [Step 10](#)

462.160(b)(1)(A): [Step 10](#)

Rules

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

3-110(C): [Step 31](#)

Rulings

STATE BOARD OF EQUALIZATION LETTERS TO ASSESSORS

2008/043: [Step 10](#)

2008/018: [Step 10](#)

91/08: [Step 10](#)

UNITED STATES

Statutes

UNITED STATES CODE

Title 12

1817(i): [Step 9](#)

1821(a): [Step 9](#)

Title 29

1001-1461: [Step 20](#)

Title 31

3713: Step 26

3713(b): Step 26

INTERNAL REVENUE CODE

1.1361-1(e)(1): Step 12

1.1361-1(e)(3): Step 12

1(h)(11): Step 12

56(b)(2)(D): Step 12

72(b)(3)(A): Step 26

83: Step 26

101(a)(2): Step 19

125: Step 20

162: Step 12

162(k): Step 31

167(d): Steps 27, 35

170(f)(11)(E): Step 10

170(h): Step 30

194: Step 27

213(c): Steps 26, 31

267: Step 27

291: Step 12

301: Step 12

303: Steps 11-12, 31, 34, 38

336: Step 12

401(a)(9): Step 20

401(k): Step 20

402(c)(11): Step 20

402(c)(4)(B): Step 20

403(b): Step 20

408(a): Step 20

408(k): Step 20

408(p): Step 20

408A: Step 20

422: Steps 20, 26

423: Step 26

453: Step 30

453(a): Step 26

453(d): Step 26

453B: Step 30

454(a): Step 26

469: Steps 12, 27

469(g): Step 13

469(g)(2): Step 26

530: Step 20

611(b)(3): Steps 27, 35

641(c)(2): Step 12

642(c): Step 27

642(g): Steps 27, 31

643(a): Step 27

643(b): Step 27

643(e): Steps 13, 37

643(g): Step 27

643(g)(2): Step 27

644: Step 5

644(a): Step 27

645: Steps 5, 12, 24, 26-27

645(b)(1): Step 27

651-652: Step 27

652(a): Steps 26, 35

661-662: Step 27

662(a)(1): Steps 26, 35

663(b): Steps 5, 27, 35

663(c): Step 27

664: Step 4

671: Step 27

671-679: [Step 27](#)

676: [Step 27](#)

678: [Step 27](#)

678(a): [Step 34](#)

691(c): [Steps 13, 20, 27, 35, 37](#)

706(c)(2)(A): [Steps 13, 26](#)

752(b): [Step 13](#)

754: [Steps 4-5, 13](#)

1014: [Steps 4, 10](#)

1022: [Step 1](#)

1033: [Step 26](#)

1274: [Steps 12-13](#)

1361(b)(1)(A): [Step 12](#)

1361(b)(1)(B): [Step 12](#)

1361(b)(1)(C): [Step 12](#)

1361(c)(1): [Step 12](#)

1361(c)(2): [Step 5](#)

1361(c)(2)(ii): [Step 12](#)

1361(c)(2)(iii): [Step 12](#)

1361(d): [Step 5](#)

1361(d)(3)(A): [Step 12](#)

1361(e): [Step 38](#)

1361(e)(1)(A): [Step 12](#)

1361(e)(3): [Step 12](#)

1361(f): [Step 12](#)

1362: [Step 12](#)

1362(d): [Step 12](#)

1362(d)(1)(B): [Step 12](#)

1362(d)(2): [Step 12](#)

1363(b)(4): [Step 12](#)

1363(d): [Step 12](#)

1366(a)(1): [Step 30](#)

1371(b): [Step 12](#)

1371(e): Step 12

1374: Step 12

1375: Step 12

1377: Step 12

1377(a)(1): Steps 12, 26

1377(a)(2): Steps 12, 26

2001(c): Step 1

2001(f): Step 32

2010: Step 31

2010(c): Steps 1-2, 31, 33

2011: Step 31

2011(b)(2): Step 1

2011(d): Step 31

2012: Step 31

2013: Steps 31, 34

2014: Step 31

2014(f): Step 31

2031(c): Steps 4, 10, 30, 31

2031(c)(5): Step 30

2032: Steps 5, 11, 31

2032(a)(1): Steps 15, 30

2032(a)(2): Step 30

2032A: Steps 2, 4, 10-11, 13, 30-31, 34, 38

2032A(c): Step 30

2032A(d)(3): Step 31

2033: Steps 19, 23

2035: Steps 19, 31

2035-2038: Step 23

2035(b): Step 31

2036: Step 31

2036-2038: Step 31

2037: Step 31

2038: Step 31

2039 (former): Step 20

2039(f)(2) (former): Step 31

2040: Step 31

2041: Step 31

2042: Steps 13, 31

2044: Steps 31, 33

2053: Step 31

2053-2054: Step 27

2053(d): Step 31

2054: Step 31

2055: Step 31

2056: Steps 4, 31

2056(b)(5): Step 31

2056(b)(7): Step 31

2056(b)(7)(B)(v): Step 31

2056(b)(7)(C): Step 31

2056(b)(7)(C)(ii): Step 31

2056A(a): Step 31

2057: Steps 1, 4, 11, 31, 38

2057(f)(1): Step 30

2057(i)(3)(H): Step 11

2057(j): Step 1

2058: Steps 1, 31

2204: Step 31

2204(b): Step 31

2210(a): Step 1

2502: Step 1

2503: Step 31

2503(b): Step 33

2503(b)(2): Step 31

2505(a)(1): Step 1

2513: Step 33

2518: Steps 5, 20, 34

2518(b)(2)(B): Step 34

2523(a): Step 31

2523(i): Steps 2, 31

2602: Step 33

2612: Step 33

2612(a): Step 33

2612(b): Step 33

2612(c): Step 33

2613(a): Step 33

2631: Steps 2, 4, 33

2631-2632: Step 33

2631(c): Steps 1, 31, 33

2632: Step 33

2632(b): Step 33

2632(b)(3): Step 33

2632(c): Steps 1, 33

2632(c)(3)(B): Step 33

2632(c)(5): Step 33

2632(e): Step 33

2641(a): Step 33

2642(a): Step 33

2642(a)(3): Steps 1, 28, 33

2642(c): Step 33

2642(c)(1): Step 33

2642(c)(2): Step 33

2642(c)(3): Step 33

2651: Step 33

2651(e): Step 33

2652(a): Step 33

2652(a)(2): Step 33

2652(a)(3): Step 33

2652(c): Step 33

2664: Step 1

2701: Steps 11, 23, 31

2701(b)(2): Step 11

2701(d)(2)(C): Step 11

2701(e)(1): Step 11

2701(e)(2): Step 11

2701(e)(3): Step 11

2702: Step 31

2703: Steps 11-12

2703-2704: Step 11

2704: Steps 11, 13, 31

2704(a): Step 11

2704(a)(2): Step 11

2704(b): Step 11

4974(a): Step 20

4975(e)(7): Step 20

6012(a)(1)(A): Step 26

6012(b)(1): Step 26

6012(b)(2): Step 26

6013(a)(2): Step 26

6013(a)(3): Step 26

6013(b): Step 26

6019: Step 32

6041: Step 27

6081: Step 31

6161: Steps 31, 33

6163: Step 31

6166: Steps 4, 10-11, 13, 30-31, 34

6166(b)(10)(A)(ii), (iii): Step 31

6166(b)(2): Step 31

6166(b)(8)(B)(ii): Step 31

6166(g)(1)(A): Steps 30-31

6324A: [Step 31](#)

6501(c): [Step 26](#)

6501(c)(1): [Step 26](#)

6501(d): [Steps 5, 26, 32](#)

6501(e): [Step 26](#)

6601(j): [Step 31](#)

6651(a)(1): [Step 26](#)

6651(a)(3): [Step 26](#)

6654(e)(3): [Step 26](#)

6654(l): [Step 26](#)

6654(l)(2): [Step 27](#)

6664(c): [Step 32](#)

6694(a)(2)(B): [Step 31](#)

6694(a)(2)(C): [Step 31](#)

6903: [Step 26](#)

6905: [Steps 26-27, 32](#)

6905(b): [Step 31](#)

26422503(b): [Step 33](#)

26422503(e): [Step 33](#)

ACTS BY POPULAR NAME

Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA-2001): [Steps 1, 5, 12](#)

Employee Retirement Income Security Act of 1974 (ERISA): [Steps 20, 31](#)

Gallo Amendment: [Step 33](#)

Pension Protection Act of 2006: [Step 20](#)

Tax Reform Act of 1984: [Step 26](#)

SESSION LAWS

Pub L 107-16, 115 Stat 38: [Step 1](#)

Pub L 99-514, §1433(b)(3), 100 Stat 2731: [Step 33](#)

Pub L 97-34, §441(a), 95 Stat 319: [Step 31](#)

Regulations

CODE OF FEDERAL REGULATIONS

Title 12

330.10: [Step 9](#)

Title 17

230.144: [Step 20](#)

Title 31

103.24: [Step 9](#)

FEDERAL REGISTER

73 Fed Reg 56706 (2008): [Step 9](#)

66 Fed Reg 3928, 3931 (2001): [Step 20](#)

TREASURY REGULATIONS

1.1014-4(a)(3): [Steps 27, 30](#)

1.1361-1(j)(6)(iii)(A): [Step 12](#)

1.1361-1(j)(12): [Step 12](#)

1.1361-1(m)(2): [Step 12](#)

1.1361-1(m)(2)(iii): [Step 12](#)

1.1361-1(m)(7): [Step 12](#)

1.167(h)-1(b): [Step 27](#)

1.170A-1(c)(2): [Step 23](#)

1.401(a)(9)-3, Q&A-1: [Step 20](#)

1.401(a)(9)-3, Q&A-3(b): [Step 20](#)

1.401(a)(9)-3, Q&A-4(a)(2): [Step 20](#)

1.401(a)(9)-4, Q&A-4(a): [Steps 5, 20](#)

1.401(a)(9)-4, Q&A-5(c): [Step 20](#)

1.401(a)(9)-4, Q&A-6(b): [Step 20](#)

1.401(a)(9)-5, Q&A-4(a): [Step 20](#)

1.401(a)(9)-5, Q&A-5(a)(1): [Step 20](#)

1.401(a)(9)-5, Q&A-5(c): [Step 20](#)

1.401(a)(9)-5, Q&A-5(c)(2): [Step 20](#)

1.401(a)(9)-5, Q&A-5(c)(3): [Step 20](#)

1.401(a)(9)-5, Q&A-6: [Step 20](#)

1.401(a)(9)-5, Q&A-7(a)(1): [Step 20](#)

1.401(a)(9)-9, Q&A-1: [Step 20](#)

1.401(a)(9)-9, Q&A-2: [Step 20](#)

1.6013-1(d)(3): [Step 26](#)

1.6013-1(d)(4): [Step 26](#)

1.6041-1(a): [Step 27](#)

1.6041-6: [Step 27](#)

1.611-1(c)(4): [Step 27](#)

1.6153-1(a)(4): [Step 26](#)

1.641(b)-3(a): [Step 12](#)

1.642(c)-1(b): [Step 27](#)

1.643(a)-3(b)(1): [Step 27](#)

1.643(b)-1: [Step 27](#)

1.645-1: [Step 27](#)

1.645-1(d): [Step 27](#)

1.645-1(f): [Step 27](#)

1.645-1(h)(3): [Step 27](#)

1.651(a)-2(d): [Step 27](#)

1.661(a)-2(f): [Step 27](#)

1.661(a)-2(f)(1): [Steps 13, 27, 30, 37](#)

1.663(b)-2(a)(2): [Step 27](#)

1.671-4(b)(2): [Step 27](#)

1.691(a)-2(b), Example 4: [Step 30](#)

1.732-1(d): [Step 13](#)

1.742-1: [Step 13](#)

1.754-1(b): [Step 13](#)

20.2031-1(b): [Steps 10-11](#)

20.2031-2(b): [Step 15](#)

20.2031-2(e): [Step 11](#)

20.2031-2(f): [Step 11](#)

20.2031-2(h): [Step 11](#)

20.2031-2(i): [Step 15](#)

20.2031-4: [Step 17](#)

20.2031-6: [Step 21](#)

20.2031-7A: [Step 22](#)

20.2031-7T: [Step 22](#)

20.2031-7(d): [Step 22](#)

20.2031-8(a): [Steps 19, 22](#)

20.2032A-8(b): [Step 11](#)

20.2033-1(b): [Step 17](#)

20.2042-1(b): [Step 19](#)

20.2042-1(c): [Step 19](#)

20.2053-3(d)(2): [Step 30](#)

20.2053-6(f): [Step 23](#)

20.2055-3(b): [Steps 27, 31](#)

20.2056(b)-4: [Step 27](#)

20.2056(b)-4(a): [Step 31](#)

20.2056(b)-4(d): [Step 31](#)

20.2056A-2(b)(2): [Step 31](#)

20.2056A-2(b)(3): [Step 31](#)

20.2056A-2(d)(1): [Step 31](#)

20.2056A-2(d)(3): [Step 31](#)

20.2056A-3: [Step 31](#)

20.2056A-4(a): [Step 31](#)

20.2056A-4(b): [Step 31](#)

20.2056A-4(c): [Step 31](#)

20.6081-1(a)-(b): [Step 31](#)

20.6081-1(b): [Step 31](#)

20.6161-1(b): [Step 31](#)

20.6161-1(c): [Step 31](#)

20.6166-1(d): [Step 11](#)

20.6166A-1(e)(3): [Step 11](#)

20.7520-1: [Step 22](#)

20.7520-1T: [Step 22](#)

20.7520-3(b)(4), Example 1: [Step 22](#)

25.2512-2(e): [Step 11](#)

25.2512-2(f): [Step 11](#)

25.2518-2(d): [Step 34](#)

25.2518-2(e)(5): [Step 34](#)

25.2518-3(a)(2): [Step 34](#)

25.2518-3(b): [Step 34](#)

25.2701-1(a)(1): [Step 11](#)

25.2701-1(c): [Step 11](#)

25.2701-2(b)(6): [Step 11](#)

25.2701-2(c)(2): [Step 11](#)

25.2701-4(c): [Step 11](#)

25.2701-5: [Step 31](#)

25.2703-1(b)(1): [Step 11](#)

25.2703-1(b)(3): [Step 11](#)

25.2703-1(c)(1): [Step 11](#)

25.2703-1(c)(2): [Step 11](#)

25.2703-1(d), Example 1: [Step 11](#)

25.2704-1(a)(2): [Step 11](#)

25.2704-1(b): [Step 11](#)

25.2704-1(c)(1): [Step 11](#)

25.2704-1(c)(2)(i)-(iii): [Step 11](#)

25.2704-1(d): [Step 11](#)

25.2704-1(f): [Step 11](#)

25.2704-2(b): [Step 11](#)

25.2704-2(c): [Step 11](#)

25.2704-2(d): [Step 11](#)

26.2601-1: [Step 33](#)

26.2601-1(a)(2): [Step 33](#)

26.2601-1(b)(1): [Step 33](#)

26.2601-1(b)(1)(iv)-(b)(5): [Step 33](#)

26.2601-1(b)(1)(iv)-(v): [Step 33](#)

26.2601-1(b)(1)(v)(B): [Step 33](#)

26.2601-1(b)(3): [Step 33](#)

26.2601-1(b)(4): [Step 33](#)

26.2612-1(a): [Step 33](#)

26.2612-1(b): [Step 33](#)

26.2612-1(c): [Step 33](#)

26.2612-1(d): [Step 33](#)

26.2612-1(e): [Step 33](#)

26.2612-1(e)(2): [Step 33](#)

26.2612-1(e)(3): [Step 34](#)

26.2632-1(b): [Step 32](#)

26.2632-1(b)(1): [Step 33](#)

26.2632-1(b)(1)(i): [Step 33](#)

26.2632-1(b)(1)(ii): [Step 33](#)

26.2632-1(b)(4): [Step 33](#)

26.2632-1(b)(4)(i): [Step 33](#)

26.2632-1(b)(4)(ii): [Step 33](#)

26.2632-1(c): [Step 33](#)

26.2632-1(d): [Step 33](#)

26.2632-1(d)(1): [Step 33](#)

26.2632-1(d)(2): [Step 33](#)

26.2642-2(a)(1): [Step 33](#)

26.2642-2(a)(2): [Step 33](#)

26.2642-2(b): [Step 33](#)

26.2642-2(b)(2): [Step 33](#)

26.2642-2(b)(2)-(4): [Step 33](#)

26.2642-2(b)(4)(ii)(A): [Step 38](#)

26.2642-4: [Step 33](#)

26.2651-1(a)(2): [Step 33](#)

26.2651-1(a)(3): [Step 33](#)

26.2652-1(a): [Step 33](#)

26.2652-1(a)(1): [Step 33](#)

26.2652-1(a)(2): [Step 33](#)

26.2652-1(a)(4): [Step 33](#)

26.2652-1(a)(5), Example 5: [Step 33](#)

26.2652-1(a)(5), Examples 7-8: [Step 33](#)

26.2652-1(b)(1): [Step 33](#)

26.2652-1(d): [Step 33](#)

26.2652-2: [Step 31](#)

26.2653-1(a): [Step 33](#)

26.2654-1: [Step 33](#)

26.2654-1(a)(2): [Step 33](#)

26.2662-1(b): [Step 33](#)

26.2663-2: [Step 33](#)

26.2663-2(a): [Step 33](#)

26.2663-2(b): [Step 33](#)

54.4974-2, Q&A-7(b): [Step 20](#)

301.6109-1(a)(1): [Step 27](#)

301.6109-1(a)(3)-(4): [Step 27](#)

301.6324A-1(b)(1)-(2): [Step 31](#)

301.6501(d)-1(b): [Step 32](#)

301.6651-1(c): [Step 26](#)

301.9100-1 – 301.9100-3: [Step 31](#)

PROPOSED TREASURY REGULATIONS

1.6081-6T: [Step 27](#)

1.6081-6T(d): [Step 27](#)

26.2642-6(b): [Step 33](#)

Rules

SECURITIES AND EXCHANGE COMMISSION RULES

144: [Step 20](#)

Rulings

REVENUE RULINGS

2005-36: [Step 20](#)

2000-2: [Step 20](#)

83-147: [Step 13](#)

74-175: [Step 26](#)

68-145: [Step 26](#)

67-370: [Step 23](#)

64-161: [Step 26](#)

60-87: [Steps 27, 30](#)

55-438: [Step 23](#)

REVENUE PROCEDURES

2003-43, 2003-1: [Step 12](#)

98-34, 1998-1: [Step 20](#)

64-19, 1964-1: [Step 38](#)

Internal Revenue Service

FIELD SERVICE ADVICE

199921004: [Steps 27, 31](#)

LETTER RULINGS

9616035: [Step 20](#)

9314050: [Step 33](#)

9243005: [Step 26](#)

9102010: [Step 26](#)

9005071: [Step 20](#)

8334025: [Step 37](#)

7951131: [Step 12](#)

200537-044: [Step 20](#)

NOTICES

2009-5: [Step 31](#)

2008-46: [Step 31](#)

2008-13: [Step 31](#)

2007-7: [Step 20](#)

89-60: [Step 23](#)

87-32: [Step 27](#)

TECHNICAL ADVICE MEMORANDUM

8614005: [Step 23](#)

© The Regents of the University of California

Source: Estate Planning/Handling Postmortem Trust Administration: A Checklist (Action Guide)/TABLE OF CASES

TABLE OF CASES

A

Ann Marie Lennon, Estate of, TC Memo 1991-360: [Step 23](#)

Artemus D. Davis, Estate of (1998) 110 TC 530: [Step 11](#)

Auker, Eldon L., Estate of, TC Memo 1998-185: [Step 11](#)

B

Bernard Mandelbaum, TC Memo 1995-255, aff'd (3d Cir 1996) 91 F3d 124: [Step 11](#)

Bernard v Foley (2006) 39 C4th 794, 47 CR3d 248: [Step 4](#)

Bessie I. Mueller, Estate of, TC Memo 1992-284: [Step 10](#)

Bixby, Mark (1972) 58 TC 757, acq 1975-2 Cum Bull 1: [Step 38](#)

Boggs v Boggs (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754: [Steps 20, 31](#)

Bongard, Wayne C., Estate of (2005) 124 TC No. 8: [Step 11](#)

Bright, Estate of v U.S. (5th Cir 1981) 658 F2d 999: [Step 11](#)

C

Charley W. Peterson, Estate of (1980) 74 TC 630, aff'd (8th Cir 1981) 667 F2d 675: [Step 30](#)

Clara S. Roeder Winkler, Estate of, TC Memo 1989-231: [Step 11](#)

Commissioner v Linde (9th Cir 1954) 213 F2d 1, cert denied (1954) 348 US 871, 99 L Ed 686, 75 S Ct 107: [Step 30](#)

Crummey v Commissioner (9th Cir 1968) 397 F2d 82: [Step 31](#)

D

David Smith, Estate of (1972) 57 TC 650, aff'd (2d Cir 1975) 510 F2d 479: [Step 21](#)

Davis, Artemus D., Estate of (1998) 110 TC 530: [Step 11](#)

Desmond, William J., Estate of, TC Memo 1999-76: [Step 11](#)

Dunn, Estate of v Commissioner (5th Cir 2002) 301 F3d 339: [Step 11](#)

E

Eddy v Fields (2004) 121 CA4th 1543, 18 CR3d 487: [Steps 4, 6, 18, 39](#)

Egelhoff v Egelhoff (2001) 532 US 141, 149 L Ed 2d 264, 121 S Ct 1322: [Step 31](#)

Eisenberg v Commissioner (2d Cir 1998) 155 F3d 50, acq 1999-1 Cum Bull xix: [Step 11](#)

Eldon L. Auker, Estate of, TC Memo 1998-185: [Step 11](#)

Eleanor O. Pillsbury, Estate of, TC Memo 1992-425: [Step 10](#)

Estate of (*see* name of decedent)

F

Frane v Commissioner (8th Cir 1993) 998 F2d 567: [Step 17](#)

Frederick, U.S. v (7th Cir 1999) 182 F3d 496: [Step 10](#)

Frazier Jelke III, Estate of, TC Memo 2005-131: [Step 11](#)

G

Georgia T. O'Keeffe, Estate of, TC Memo 1992-210: [Step 21](#)

Gertrude Hoffman, Estate of (1982) 78 TC 1069: [Step 38](#)

Gregg, Harry A., Estate of (1977) 69 TC 468: [Step 26](#)

H

Harry A. Gregg, Estate of (1977) 69 TC 468: [Step 26](#)

Heggstad, Estate of (1993) 16 CA4th 943, 20 CR2d 433: [Steps 4, 28](#)

Hoffman, Gertrude, Estate of (1982) 78 TC 1069: [Step 38](#)

Hoover v Commissioner (10th Cir 1995) 69 F3d 1044, acq 1999-1 Cum Bull 5: [Step 11](#)

J

Jelke, Frazier III, Estate of, TC Memo 2005-131: [Step 11](#)

John E. Morris, Estate of (1971) 55 TC 636, nonacq 1978-2 Cum Bull 4, aff'd (4th Cir 1972) 454 F2d 208: [Step 26](#)

K

Kimbell v U.S. (5th Cir 2004) 371 F3d 257: [Step 11](#)

L

Lennon, Ann Marie, Estate of, TC Memo 1991-360: [Step 23](#)

Levine v Levine (2002) 102 CA4th 1256, 126 CR2d 255: [Step 18](#)

M

MacDonald, Estate of (1990) 51 C3d 262, 272 CR 153: [Step 20](#)

Mandelbaum, Bernard, TC Memo 1995-255, aff'd (3d Cir 1996) 91 F3d 124: [Step 11](#)

Mark Bixby (1972) 58 TC 757, acq 1975-2 Cum Bull 1: [Step 38](#)

Marriage of Shelstead (1998) 66 CA4th 893, 78 CR2d 365: [Step 20](#)

Metropolitan Culinary Servs., Inc. v County of Los Angeles (1998) 61 CA4th 935, 71 CR2d 859: [Step 10](#)

Mission Housing Dev. Co. v City & County of San Francisco (1997) 59 CA4th 55, 69 CR2d 185: [Step 10](#)

Moeller v Superior Court (1997) 16 C4th 1124, 69 CR2d 317: [Steps 4, 6, 18, 39](#)

Morris, John E., Estate of (1971) 55 TC 636, nonacq 1978-2 Cum Bull 4, aff'd (4th Cir 1972) 454 F2d 208: [Step 26](#)

Mueller, Bessie I., Estate of, TC Memo 1992-284: [Step 10](#)

N

Newhouse, Samuel I., Estate of (1990) 94 TC 193, nonacq 1991-2 Cum Bull 1: [Step 10](#)

O

O'Keeffe, Georgia T., Estate of, TC Memo 1992-210: [Step 21](#)

P

Penner v County of Santa Barbara (1995) 37 CA4th 1672, 44 CR2d 606: [Step 11](#)

Peterson, Charley W., Estate of (1980) 74 TC 630, aff'd (8th Cir 1981) 667 F2d 675: [Step 30](#)

Pillsbury, Eleanor O., Estate of, TC Memo 1992-425: [Step 10](#)

Propstra v U.S. (9th Cir 1982) 680 F2d 1248: [Step 11](#)

R

Rice v Clark (2002) 28 C4th 89, 120 CR2d 522: [Step 4](#)

Robson v Commissioner (9th Cir 1999) 99-1 USTC ¶150,390, 83 AFTR2d 1880: [Step 23](#)

S

Samuel I. Newhouse, Estate of (1990) 94 TC 193, nonacq 1991-2 Cum Bull 1: [Step 10](#)

Samuel J. Lefrak, TC Memo 1993-526: [Step 11](#)

Shelstead, Marriage of (1998) 66 CA4th 893, 78 CR2d 365: [Step 20](#)

Smith, David, Estate of (1972) 57 TC 650, aff'd (2d Cir 1975) 510 F2d 479: [Step 21](#)

Strangi, Estate of v CIR, 115 TC 478 (2000), aff'd in part and rem'd in part 293 F3d 279 (5th Cir 2002): [Step 11](#)

Strangi II, TC Memo 2003-145, aff'd 417 F3d 468 (5th Cir 2005): [Step 11](#)

T

Theodore H. Thompson, TC Memo 2002-246, aff'd sub nom Turner, Estate of v Commissioner (3d Cir 2004) 382 F3d 367: [Step 11](#)

Thompson, Theodore H., TC Memo 2002-246, aff'd sub nom Turner, Estate of v Commissioner (3d Cir 2004) 382 F3d 367: [Step 11](#)

Title Ins. & Trust Co. v County of Riverside (1989) 48 C3d 84, 255 CR 670: [Step 11](#)

U

U.S. v Frederick (7th Cir 1999) 182 F3d 496: [Step 10](#)

W

Wayne C. Bongard, Estate of (2005) 124 TC No. 8: [Step 11](#)

Wells Fargo Bank v Superior Court (2000) 22 C4th 201, 91 CR2d 716: [Steps 4, 6, 18, 39](#)

William J. Desmond, Estate of, TC Memo 1999-76: [Step 11](#)

Winkler, Clara S. Roeder, Estate of, TC Memo 1989-231: [Step 11](#)

© The Regents of the University of California