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### In The Spotlight:

Moses & Singer LLP is pleased to announce that the firm has been named Private Client/Wealth Management Firm of the Year, USA, for 2011 by *Finance Monthly Magazine*.

For a third consecutive year, **Gideon Rothschild** and **Daniel S. Rubin** have been recognized by their peers for inclusion in the 2012 edition of *The Best Lawyers in America*®.

The August 2011 edition of *Avenue Magazine* lists **Alan H. Kupferberg**, **Gideon Rothschild**, and **Daniel S. Rubin** as "Avenue's Legal Elite" in the area of Trust & Estates.

**Gideon Rothschild** has been elected Vice-Chair of the American Bar Association's Real Property, Trust & Estate Law Section.

### The Time is Now to Take Advantage of Tax Saving Opportunities

As you may recall from our prior communications, on December 17, 2010, The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "2010 Act") was signed into law by President Obama. The 2010 Act extended the sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") for 2 years and made significant changes to the estate, gift and generation-skipping transfer tax laws. The legislation provided, in part, that for 2011 and 2012, the total lifetime gift tax and generation-skipping transfer tax exemptions increased from \$1,000,000 to \$5,000,000. Unless Congress acts to extend the provision, the exemptions will return to \$1,000,000 (indexed for inflation) with a 55% tax rate as of January 1, 2013.

While you may still have more than one year to take advantage of the new gift tax exemption, we do not necessarily recommend waiting until the last minute to take advantage of your increased exemption for a number of reasons. In particular, once a gift is made, the gifted property plus any appreciation will escape future transfer taxes. Moreover, we are also concerned that future legislation could limit your opportunity to utilize the increased exemption in the most beneficial manner. In fact, on August 2, 2011, the Budget Control Act of 2011 was signed into law. The Act calls for a new Joint Committee to consider year-end tax legislation. The proposed changes that have been discussed in the past, and that are likely to be discussed again, include (i) eliminating discounts for partnerships and other closely held businesses; (ii) prohibiting short term Grantor Retained Annuity Trusts ("GRATs"); and (iii) limiting the benefits of long term dynasty trusts, to name a few. Given the current budget crisis, it is also conceivable that the Committee will recommend a reduction in the exemption amount prior to 2013. For those in a position to do so, we strongly recommend that you take advantage of your gift tax planning opportunities sooner rather than later.

## Reversing a Roth IRA Conversion

By Ira W. Zlotnick

For those who converted a traditional IRA into a Roth IRA in the 2010 calendar year, a unique planning opportunity is available for a limited period of time. In particular, as a result of your conversion you will be paying income tax on the value of your IRA as of the date of conversion. The problem, however, is that due to the recent drop in the stock market your IRA is likely to have gone down in value considerably since the conversion and you will thus be paying tax on monies that are no longer in your account. Until October 17, 2011 (if an extension has been filed, or October 31st if you are eligible for the extended deadline relief as a result of Hurricane Irene), however, you have the opportunity to "recharacterize" your IRA back into a traditional IRA. This will negate the need to pay tax on the conversion of assets that are no longer worth the amount on which the tax would be assessed. This strategy of recharacterizing your IRA might make sense even if you did not see a significant drop in the value of your IRA post-conversion because it will enable you to defer the payment of tax until 2012 (by waiting 30 days from the recharacterization and then reconverting your traditional IRA into a Roth IRA). This strategy is also available to those who have already filed their 2010 tax returns by filing an amended return by October 17, 2011 (or possibly October 31st) and seeking a refund.

## Planning in a Low Interest Rate Environment

By Jenna R. Millman

Every month, the Internal Revenue Service issues its "Applicable Federal Rates" for the following month. These rates are a key component in many estate planning strategies and, as a general rule, lower rates provide for significant opportunities to shift wealth to junior generations. The Applicable Federal Rates for the current month are at a historic low. For example, the current rate for a loan of three years or less is a mere 0.16%!

What do these historically low interest rates mean for you? It means that now is the time to:

1. Transfer assets to a grantor retained annuity trust (GRAT).
2. Make an "intra-family" loan to your children or grandchildren.
3. Make loans to trusts for the benefit of your descendants.
4. "Refinance" existing intra-family notes or trust notes that bear a higher rate.

### Transfers to GRATs

By way of brief background, a grantor retained annuity trust (or "GRAT") is a statutorily sanctioned type of trust whereby the grantor transfers property in trust but retains the right to receive payments from the trust for a predetermined period of years. Most commonly, the payments are structured such that, after accounting for a federally mandated rate of return on the property transferred into the GRAT (called the "\$7520 Rate" and based on the Applicable Federal Rates for the month in question), the present

value of the payments will equal the value of the property transferred into the GRAT. When the annuity payments are structured in this manner, the GRAT is often referred to as being "zeroed-out" because the remainder interest has no value for gift tax purposes; thus, no gift tax is payable and no gift tax exemption is used in connection with the funding of the GRAT. To the extent that the investment return on the GRAT property exceeds the \$7520 Rate, value will remain in the trust after all annuity payments are made thereby effecting a tax free gift of the excess return.<sup>1</sup> The \$7520 Rate for October is only 1.4%. Accordingly, to the extent that an investment return in excess of 1.4% is achieved, there will be a tax-free transfer of assets to the ultimate beneficiaries of the GRAT (typically the grantor's spouse and children).

### Intra-Family Loans

As a result of the historically low interest rates, it's also a good time to loan money to younger family members. As noted above, the minimum interest rate in October for a loan of up to three years is 0.16% and loans between three and nine years carry a minimum interest rate of only 1.19%. To the extent that the loan recipients are able to invest the borrowed funds and generate a return greater than the minimum interest rate, wealth will have been successfully transferred without any gift tax.

By way of example, if a loan of \$1 million were made to a child for 3 years at 0.16% and the child invests the proceeds in an

<sup>1</sup> Note, however, that the grantor's death during the annuity payment period will cause all of the GRAT property to be included in the grantor's estate for tax purposes.

investment earning 5% after taxes, the excess after 3 years of \$152,581 will have been transferred to the child gift tax-free.

### Loans to Trusts

Instead of making loans directly to family members, another option is to make loans to a "grantor trust" for their benefit. A grantor trust is a type of trust in which all income is taxable to the grantor individually. This in effect permits additional "gifts" to the beneficiaries (in an amount equal to the income tax) without the grantor being considered to have made any further taxable gifts.

Similarly, it may also be appropriate to sell assets to a grantor trust in exchange for a promissory note. Again, assuming the assets that are sold to the trust appreciate at a rate that exceeds the Applicable Federal Rate, wealth will be passed on to the next generation without the imposition of a gift tax.

### Refinancing Existing Notes

If you currently hold an outstanding promissory note from a family member or grantor trust that has an interest rate higher than current interest rates, it may be advisable to refinance that note now.

Please contact us if you wish to explore any of these opportunities.

### Fixing "Broken" Trusts: Decanting Under the Revised New York Statute

By Vanessa L. Kanaga

A significant tool in estate planning is the irrevocable trust. Irrevocable trusts can facilitate lifetime gifts and remove assets from one's estate while providing creditor protection and asset management

for the beneficiaries. However, with very limited exception, irrevocable trusts cannot be amended or revoked. This can lead to problems in administering an irrevocable trust where changed circumstances may make modifications to the irrevocable trust desirable.

In order to effectuate changes to an irrevocable trust, estate planners often employ a technique commonly referred to as "decanting," in which the trustees of the existing trust (referred to as the "invaded trust") transfer the assets of the invaded trust to a new trust that incorporates the desired changes. There are limitations on the changes which can be made through decanting, and not every trust may be decanted.<sup>2</sup> It is also critical that the potential tax consequences of decanting be considered. Notwithstanding these limitations, decanting remains an important and effective technique in estate planning. The following are a few examples of the reasons why an irrevocable trust might be decanted:

- To extend the term of the trust.<sup>3</sup>
- To remove beneficiaries.
- To change the governing law.
- To change administrative provisions.<sup>4</sup>

<sup>2</sup> For example, under the New York decanting statute (discussed below), the power to decant may not be exercised to reduce, limit or modify a right to mandatory distribution of income or principal, a mandatory annuity or unitrust interest, or a right to withdraw a percentage of the value of the trust or a specified dollar amount which has come into effect, unless the trust to which the assets are decanted is a supplemental needs trust under New York law.

<sup>3</sup> For example, a trust may terminate once the beneficiary reaches a particular age, such as 25, 30 or 35, but, as the beneficiary approaches that age, the trustee may prefer to extend the term of the trust for various reasons, including asset protection.

- To consolidate two or more trusts or create separate trusts.
- To correct drafting errors.
- To segregate assets subject to state income tax.

Sometimes, the trust agreement will include a provision specifically authorizing the trustees to decant the trust. Absent such a provision, a trust may be decanted if the trust is governed by the law of a state which has enacted a statute authorizing decanting.

New York was the first state to enact a decanting statute. The New York decanting statute (Estates, Powers and Trusts Law § 10-6.6), enacted in 1992, was substantially amended this past August. The amendments clarify and broaden the application of the statute. The following is a summary of some of the more significant changes:

- Unlimited discretion to distribute principal is no longer required.<sup>5</sup>

<sup>4</sup> For example, the new trust may provide the trustees with additional administrative powers, or provide different provisions governing the appointment of co-trustees or successor trustees.

<sup>5</sup> Prior to the amendments, the New York statute permitted decanting only where the trustees of the invaded trust had "absolute discretion" to distribute principal. The amended statute permits decanting if the trustees have the power to distribute principal, regardless of whether such discretion is absolute. For example, under the amended statute, a trustee with discretion to distribute principal for a beneficiary's health, education, maintenance and support may still be permitted to decant to a new trust (referred to as the "appointed trust"). However, where a trustee's power to distribute principal is not unlimited, the appointed trust must have the same beneficiaries as the invaded trust, and must include the same language regarding the distribution of principal (i.e., the same restrictions).

- A power of appointment may be granted to a current beneficiary of the invaded trust.
- Makes the decanting subject to a fiduciary duty.
- Eliminates the court filing requirement for inter-vivos trusts.
- Notice must be given to all those interested in the invaded

trust and the appointed trust, as well as the grantor, if living, and any person who has the power to remove or replace the trustee.

- The decanting is not effective until 30 days after notice is given, unless all persons entitled to notice consent to an earlier date, and any interested person may object to the

decanting by serving notice on the trustee prior to the effective date.

If you are the grantor, beneficiary or trustee of an outdated irrevocable trust, we encourage you to reach out to us to review the terms of the trust and determine whether decanting should be considered.

Lawyers in Moses & Singer's **Trusts and Estates** and **Asset Protection** practice groups are internationally recognized for their considerable skill and extensive experience in the fields of estate planning and wealth preservation. Our lawyers provide a full range of tax and estate planning services to corporate executives, entrepreneurs, and other high-net-worth individuals. In addition to experience in the traditional areas of will and trust drafting and estate administration, our attorneys excel in the latest techniques to effectively plan for business succession while minimizing taxes and preserving and protecting clients' wealth from potential creditor risks. The client's personal objectives and wealth preservation goals are integrated into the estate planning process.

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# MOSES & SINGER LLP

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