Five Outstanding Questions in the Estate Planning Industry and the Odds That They Will Happen

By Steven J. Oshins, Esq., AEP (Distinguished)

There are always a number of outstanding questions in the estate planning industry, many of which are talked about over and over, seemingly at every large conference and on various listservs. Internet bloggers write about these questions, often making bold statements that sometimes come true, but in most cases turn out to be false.

This article seeks to highlight some of these questions and posts the odds of them happening in this author's opinion. The list is posted in order of those which are most likely to happen in 2016, again in this author's opinion.

1. Will Alaska enact a state income tax that applies to distributions from trusts sitused in Alaska? [Odds of happening = 50%]

It is no secret that oil prices have plummeted. The State of Alaska derives roughly 90% of its revenue from oil. Given the slide in oil prices, Alaska must pass some form of legislation that will raise taxes, cut spending or otherwise find money elsewhere. The Alaska legislature is currently in session and legislation such as Alaska House Bill 365, if passed as currently written, would enact a state income tax equal to 15% of the person's federal income tax on income from an Alaska source (including distributions from an Alaska Trust) plus a more complex computation based on long-term capital gains. This legislation would create state income tax in Alaska for the first time in roughly 35 years. Most notably to estate planners, the tax applies to "income distributed from a trust established under or governed by the laws of the state". Since Alaska is in desperate need of revenue, some form of legislation will pass, although it remains to be seen whether it will be this particular legislation.

2. Will the Treasury announce that there will be no valuation discounts applied to business entities to the extent of any liquid assets? [Odds of happening = 30%]

The Treasury is working on changes to the definition of "applicable restriction" in order to modify the valuation rules for purposes of valuation discount planning. They are doing so via the following language in IRC Section 2704(b)(4): "The Secretary [of the Treasury] may by regulations provide that other restrictions shall be disregarded in determining the value of the transfer of any interest in a corporation or partnership to a member of the transferor's family if such restriction has the effect of reducing the value of the transferred interest for purposes of this subtitle but does not ultimately reduce the value of such interest to the transferee." The big question is exactly what changes will be made and when they will be effective. Will there be certain non-family member loopholes available? How broad will the

definition of "applicable restriction" be? How will estate planners work around the new rules? These questions should soon be answered. Will there be changes? Absolutely! What will the changes be? That remains to be seen.

3. Will at least two states pass decanting legislation this year? [Odds of happening = 25%]

New Mexico recently passed legislation making it the 24th state in the United States to enact a statute allowing trusts to be decanted. Its statute takes effect on January 1, 2017. The year 2015 saw just one single jurisdiction (Minnesota becoming the 23rd state) pass decanting legislation. Thus, it appears that the onslaught of newly-minted decanting statutes has slowed considerably. Other than New Mexico, will we see any new jurisdictions enact decanting statutes in 2016? Maybe, maybe not. The jurisdictions that have these statutes have a significant competitive advantage over those that do not. Therefore, it is unclear why any state would not immediately and quickly pass decanting legislation in order to reduce the number of local trusts that will be heading to a new trust situs in order to take advantage of another state's more flexible laws. Decanting involves a distribution into a new or different trust for the benefit of one or more beneficiaries of the first trust. Thus, it is a method of changing an irrevocable trust. Given that only one jurisdiction was added last year and only one so far this year, this article sets the odds at 25% that we will see another one added during the balance of 2016.

4. Will a Domestic Asset Protection Trust fail for the first time ever because the settlor wasn't a resident of the DAPT jurisdiction? [Odds of happening = 3%]

After roughly 19 years of DAPTs, we still haven't had even one DAPT fail on account of the settlor being a resident of a non-DAPT jurisdiction. We have had minimal case law in this area, most likely because the threat of an uphill battle causes the creditors to settle long before a dispute gets to litigation. There has been a little indication of what a court might do via the *Huber* case and the *Dahl* case, but neither provided a concrete indication. *Huber* was a bankruptcy and fraudulent conveyance case with dicta suggesting that local law should apply, and *Dahl* was a divorce case where the court appeared to maneuver the analysis to arrive at a fair solution despite an obvious drafting error in the document. Given that we still haven't seen a non-bankruptcy, non-fraudulent conveyance case where a plaintiff was able to reach into a DAPT and have the DAPT jurisdiction's court allow it to happen, the odds of this happening in 2016 are very remote. And even if 2016 does bring us such a case, it still doesn't mean that DAPTs don't work; after all, there are roughly ten offshore asset protection trust cases where the judge has thrown the debtor in jail for contempt, yet offshore trusts are still very much alive and well. It will take a large series of bad cases, in this author's opinion, to tarnish DAPTs as a legitimate asset protection vehicle. Maybe 2016 will be the year that we will see the first such case. However, the odds are against this happening.

5. Will the State of Florida enact legislation or new case law overturning the *Berlinger v. Casselberry* holding? [Odds of happening = 1%]

In 2013, the holding in *Berlinger v. Casselberry* shocked estate planners throughout the country as a Florida appellate court held that a writ of garnishment could attach to a third-party discretionary trust for unpaid alimony by a beneficiary of the trust. Thus, Florida became the first and only state to allow a remedy against a discretionary trust. This case was one of the most heavily-discussed cases in 2013 and 2014 given its unique result. The consensus was that anyone who wants to protect trust assets from marital claims should change the situs of any Florida irrevocable trust to another jurisdiction. Still some Florida attorneys held out hope that the Florida legislature would enact new statutory legislation fixing this problem. Time has passed and there has been no legislation or case law doing so to this date. It appears that the litigators got their way in 2006 when the Florida Trust Code was enacted and that they won't be budging anytime soon. Thus, the odds of new legislation appear to be very close to zero, and only a court case interpreting the Florida Trust Code differently can change this.

Conclusion

These are five questions that still have no definitive answer. Will we see answers in 2016? Maybe.

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