



FEATURE: ESTATE PLANNING & TAXATION

By **Charles A. Granstaff** & **Roy A. Jeffries**

Spotting Hidden Raptors in Estate Administration

A checklist for practitioners

“Clever girl...”

— Muldoon’s final words

As estate planners, we can learn a lot from the experience of iconic *Jurassic Park* game warden, Robert Muldoon. You’ll remember his last moments in the film—grim-faced, kneeling quietly after following one of the escaped raptors to a stopping point in the island’s thick jungle. He’s raised his gun, sights on the tracked reptile, finger on the trigger, when it happens: the sudden revelation of the larger female raptor in Muldoon’s periphery and the sick realization that the hunter has actually been the hunted all along. If only he’d seen her before it was too late!

Like Muldoon, we estate-planning attorneys often tread a landscape spotted with potential dangers. Yet, despite our experience and knowledge, the failure to actively seek out sometimes camouflaged issues in the estate administration context can result in serious harm. We’ve catalogued some “hidden raptors” in a checklist format for practitioners and their staff to review after meeting with a client so they can figure out what next steps they should take. While much more broad than deep, and not an exhaustive list of all issues to consider, it should, nonetheless, serve to heighten awareness of certain potential threats and help reduce casualties. A check in the final column of any of the tables below would warrant additional follow-up. “D” refers to the

decedent, “PR” refers to D’s personal representative/trustee and “SS” refers to D’s surviving spouse.

General Tax Matters

Questions presented

Did D make any transfers and retain any interests or powers that would cause estate inclusion under Internal Revenue Code Section 2036? Or, release or relinquish any interests or powers within three years of death that would trigger inclusion under IRC Section 2035?

If D was predeceased by a spouse and no Form 706 was filed but the deceased spouse’s unused exemption (DSUE) is needed to eliminate/reduce estate taxes, can DSUE still be claimed (see Revenue Procedure 2017-34)?

If estate tax is imposed on any income in respect of decedent (IRD) items, does IRC Section 691(c) income tax deduction availability still need to be relayed to IRD beneficiaries?

Were any assets in D’s estate already taxed as part of someone else’s estate within the 10 years prior to D’s death? (IRC Section 2013 credit available.)

If D settled a grantor retained annuity trust (GRAT)/qualified personal residence trust (QPRT) and died during the term, does the amount

N/A	No	Yes
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	N/A	No	Yes		N/A	No	Yes
includible in D's estate still need to be calculated?				Did D fail to file Form 709 for any lifetime taxable gifts?			
Did D possess any interests in or powers over, including any general powers of appointment (GPOAs), any assets not owned by D that cause inclusion of those assets in D's estate?				Were transfer-for-value rules ever triggered for any life insurance policies on D's life?			
Do D's documents or applicable law provide that estate tax will be paid out of marital/charitable deduction property? If so, interrelated computation will result in more estate tax paid.				Is any portion of any life insurance policy not owned by D, nonetheless, included in D's estate by virtue of IRC Sections 2035, 2042(2), etc.?			
Did D's death cause a generation-skipping transfer (GST) taxable termination?				Did D pay any gift tax within three years of death?			
Do any inter vivos trusts settled by D need allocation of all/a portion of D's remaining GST tax exemption to alleviate GST tax concerns?				Will assets that have appreciated in value since D's death or IRD items be used to satisfy any pecuniary bequests? If so, relay any income tax consequences.			
Did D make any binding charitable pledges that aren't reflected in D's dispositive documents?				Should administration expenses be taken on the estate tax return for D's estate instead of on the fiduciary income tax return? (For example, if it would prevent payment of additional estate tax now or later.)			
Does (non-)responsibility for filing any federal tax returns still need to be documented?				Are any of D's beneficiaries or fiduciaries non-U.S. citizens or nonresidents? (Remember, for example, that neither a nonresident alien (NRA) nor a qualified subchapter S trust having an NRA beneficiary is an eligible S corporation shareholder, but an electing small business trust with an NRA beneficiary is under the 2017 Tax Act.)			
If D settled a qualified revocable trust, do potential advantages of making an IRC Section 645 election need to be relayed to the return preparer?				Will D's assets (or any trust involving D) be subject to tax in any jurisdiction			



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outside of D's place of domicile?				provisions of any documents limit what would otherwise benefit SS? Or, stop SS from serving as a fiduciary? (In some jurisdictions, even agreements between divorcing parties before the divorce is finalized might be enough to remove spouse as beneficiary/fiduciary.)			
Do potential pros/cons of electing fiscal year treatment for the estate/trust need to be relayed to the income tax return preparer?				Is SS likely to take an elective share or claim other spousal protections or rights that may not expressly appear in D's estate-planning documents? If so, does this still need to be relayed to PR?			
Should PR make a request for prompt assessment and/or discharge from personal liability under IRC Sections 6501(d), 6905 or 2204?				Regarding D's retirement benefits—does ERISA pre-empt provisions of state law or beneficiary designations made by D?			
If D had retirement benefits but died on/after D's required beginning date (RBD), did D fail to withdraw D's full required minimum distribution for year of death? (If so, beneficiary should finish withdrawal before Dec. 31.)				If D had community property interest in SS' retirement benefits and if D's documents purport to leave that interest to someone other than SS, is the testamentary transfer pre-empted by ERISA?			
If an individual other than D owned a policy on D's life and a non-owner of the policy was a beneficiary, are there negative gift/estate tax consequences to the owner that should be avoided or relayed?				Did D own any interest in any assets titled solely in SS' name (for example, SS' "sole management" community property) that should be considered probate assets or includible in D's estate?			
Should alternate valuation be recommended?				If D named SS as beneficiary of retirement benefits, should SS leave some/all in an inherited plan/individual retirement account instead of rolling them over? (For example, if D died before D's RBD and SS is older, or if SS is under age 59½ and wants penalty-free distributions.)			
If D was Survived by Spouse							
Questions presented							
Did D/SS sign any agreements (for example, prenup or postnup) that alter the rules otherwise applicable to married individuals? (Watch for contractual obligations that survive death, characterization of assets, liability for debts and waivers of Employee Retirement Income Security Act (ERISA) or state-specific spousal rights.)							
If a divorce petition was filed, or if spouses were separated, do express							

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If D didn't name SS as beneficiary of D's retirement benefits, should disclaimers by beneficiaries/fiduciaries or other actions be explored to secure spousal rollover (as in Private Letter Rulings 200505030 (Nov. 12, 2004), 200935045 (June 1, 2009) or 200210066 (Dec. 11, 2001))?				Shall SS individually pay for estate/inheritance tax return preparation if not required to be filed?			
Should SS consider disclaiming one or more assets or interests or survivorship features for estate/inheritance tax planning purposes?				Does any property passing for SS' benefit automatically receive estate tax marital deduction treatment without a QTIP election (for example, via a GPOA trust or estate trust)?			
Should disclaimer by a fiduciary be explored (if allowed under applicable document and applicable law) to potentially obtain benefits? (For example, the trustee of an upfront bypass disclaims all trust assets to allow them to pass to residuary qualified terminable interest property (QTIP) and thus be eligible for additional basis adjustment at SS' death and/or simplified presentation on Form 706 for portability only.)				Do potential disadvantages of electing full QTIP treatment for "QTIP-able" trusts or life estates still need to be relayed, or if not, does PR's final decision on this still need to be documented?			
If Form 706 for D's estate isn't required to be filed, do the potential benefits of filing nonetheless still need to be relayed (for example, for portability or statute of limitations), or if not, does PR's final decision on this still need to be documented?				Is it required or advisable for SS to waive the IRC Section 2207A right of recovery for any QTIP assets passing from D? (Particularly important if SS received DSUE.)			
If filing estate/inheritance tax return is desired but the due date has passed, can special relief be obtained (for example, under Rev. Proc. 2017-34)?				Should no/partial QTIP election be made to intentionally trigger payment of estate tax now to avoid assets' appreciation being subject to estate tax at SS' later death?			
Should probate proceedings or other actions be accelerated to make sure SS is considered to survive D for portability or for other purposes?				Should no/partial QTIP election be made to intentionally trigger payment of estate tax now to potentially take advantage of Section 2013 credit at SS' later death? (This decision is easier if SS survived D but passed away before the QTIP election was made.)			
				Should the QTIP election be delayed until the extended due date? (For example, to see if SS' health changes after the original due date so as to be able to explore Section 2013 credit? Once made, QTIP election is irrevocable.)			



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<p>If a QTIP election was missed or erroneously made on a filed return and the due date of return hasn't yet passed, should the mistake be corrected on an amended return?</p>				<p>due because of transfers to non-spouses? (Consider D's lifetime gifts, D's specific bequests, non-probate assets and trusts included in D's estate because of a prior QTIP election or a GPOA, etc., that don't pass from D to SS in qualifying format.)</p>			
<p>Should a partial QTIP election be made to take advantage of an alternate valuation? (If funding using alternate valuations could save tax later.)</p>				<p>Is post-mortem gift splitting for any inter vivos gifts still possible/advisable? If yes, determine whether SS is amenable to or contractually bound (for example, in a prenup) to gift split.</p>			
<p>If there's QTIP safety net language in any trust settled by D but intended to be excluded from D's estate, should a corresponding contingent QTIP election be made on estate/inheritance tax return?</p>				<p>If named as a fiduciary in D's documents, should SS consider declining/resigning to avoid tensions with other beneficiaries?</p>			
<p>If D created a life estate for SS, is additional research needed to determine whether the arrangement qualified for marital deduction?</p>				<p>Do any trusts cease to be grantor trusts as to SS because of D's death (for example, because D was trustee and no other grantor trust rules apply)?</p>			
<p>Is a reverse QTIP election advisable?</p>				<p>If any reciprocal-type trusts were created by D and SS, does the potential applicability of Section 2036 still need to be relayed to PR/beneficiaries?</p>			
<p>If a large farm/ranch is involved and the formula is pick-and-choose true-worth pecuniary, should IRC Section 2032A valuation be considered to fund upfront QTIP? (Allowable marital deduction would be the funding assets' fair market value (FMV), not their special use value, which could save tax later.)</p>				<p>If community property was transferred to a trust of which D was a beneficiary, does the potential applicability of Section 2036 still need to be relayed?</p>			
<p>Should the trustee of a QTIP trust consider "freezing" the value of the QTIP assets by selling them to a bypass trust shortly after funding? (Avoid IRC Section 2519.)</p>				<p>Is SS a non-U.S. citizen or nonresident?</p>			
<p>If a marital deduction formula is included in D's documents, is it possible that estate tax is nonetheless</p>				<p>Might SS have any rights in any jurisdiction other than D's domicile that could affect disposition or taxation of D's estate?</p>			

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For any ethical conflicts of interests—do disclosure notices or acknowledgments still need to be sent or obtained?				continue operating the business, are additional licenses required now that D is deceased?			
<p>If D Owned an Interest in a Closely Held Business</p> <p>Questions presented</p> <p>Were provisions of any buy-sell agreement triggered on D's death? If yes, identify any associated deadlines.</p> <p>Was D's death an event triggering the business' dissolution under governing documents or default state law?</p> <p>Will income tax classification of the business change now that D is deceased?</p> <p>Are D's beneficiaries prohibited transferees under the entity's governing documents or applicable state law?</p> <p>Should the business be reorganized now that D is deceased (for example, should sole proprietorship be incorporated)? If yes, is PR authorized to do that (either under D's will or otherwise)?</p> <p>Should PR consider a quick distribution of D's business interest(s) to beneficiaries or a quick entity dissolution to curtail allegations of breach of fiduciary duties for diminution in business value?</p> <p>If PR desires to continue operating the business, does PR still need to find authority to do that (either under D's will or otherwise)?</p> <p>If PR or D's beneficiaries will</p>				<p>If PR will continue operating the business, is there a business cash shortage to pay upcoming salaries, expenses, etc.?</p> <p>Must any documents be filed with the Secretary of State of D's domicile or in any other state to reflect D's death?</p> <p>Are there any agreements in place providing for continued benefits from the business (for example, salary continuation) even after D's death?</p> <p>If D's business interest will be sold by PR, does PR still need to find authority to sell to identified purchaser (either under will or otherwise)?</p> <p>Should a securities law specialist be engaged to provide guidance with respect to any post-death transfers of business interests?</p> <p>Should an international tax specialist be engaged to provide guidance with respect to foreign business entities or foreign business owners?</p> <p>Is the business delinquent in paying any state or Federal Insurance Contributions Act withholding taxes?</p> <p>Is the business insolvent? If yes, consider retaining bankruptcy attorney.</p> <p>Did D personally guarantee any business debt? If yes, secure terms.</p> <p>Were there any outstanding loans</p>			



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between D individually and the business at the time of D's death?				or casualty insurance coverage or bonding coverage protecting the business or its assets be reevaluated?			
If D (or a grantor trust as to D) held an interest in a business taxed as an S corporation (remember, this wouldn't necessarily be limited to state law corporations, but could also include limited liability companies (LLCs), limited partnerships and professional associations (PAs)), should any special elections or other actions be recommended now?				Is all or any portion of any life insurance proceeds receivable by the business includible in D's estate for estate/inheritance tax purposes?			
For any business taxed as a partnership for federal income tax purposes, should an IRC Section 754 election be recommended?				Will D's business interest be subject to estate or inheritance tax in a jurisdiction outside of D's place of domicile?			
Should the business terminate any of its retirement plans now and make distributions to any plan participants? (Forms 5310, 5500.)				Should PR pursue any federal estate tax deferral provisions like IRC Section 6166 (or any state law equivalents) for closely held business interests?			
Is all or a portion of D's business interest passing to a private foundation? If yes, consider ways to avoid self-dealing transactions and excise taxes.				If D owned a non-controlling interest, will provisions of business governance documents or buy-sell agreements likely negate any traditional lack of marketability or lack of control valuation discounts?			
Did D's death have a meaningful effect on the business' FMV?				If D made any inter vivos transfers, does potential applicability of <i>Estate of Nancy H. Powell v. Commissioner</i> (148 T.C. No. 18, 2 (2017)) still need to be relayed to PR and D's beneficiaries?			
Should releases/indemnities be pursued by PR for D's involvement with business?				Was D a party to any business nondisclosure agreement that PR should be mindful of while fulfilling PR's duties?			
Was the business a professional entity (for example, PA/professional corporation/professional LLC) governed by special state rules?				For any ethical conflicts of interests—do disclosure notices or acknowledgments still need to be sent or obtained? 			
Should any existing general insurance							