Montgomery County Estate Planning Council

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NEWSLETTER

Winter, 2021, Issue 60

Greetings from our President

Leslie K. Heffernen, Esq., LL.M (tax), CPA

Fellow Members of the Montgomery County Estate Planning Council:

As we approach the Spring, I am excited by the prospects of what the remainder of our 2020-2021 year will bring.

Without question, COVID 19 has posed new and previously unimaginable challenges this year. However, within every challenge is perhaps an even greater opportunity. Our Board rose to the occasion and ensured that our meetings not only continued but expanded to include lunch and learns and no-cost seminars. I am incredibly inspired by how not just our Board but our members have adapted and responded to COVID-19. I have enjoyed connecting with my fellow members in a new way by hosting our meetings from our homes.

As we gear up for our annual meeting and seminar, I ask that you keep June 10, 2021 12:00pm to 4:00pm on your calendars. Our seminar will be remote and we will be offering 3 continuing education credits. As always, we continue to rely upon, with much gratitude, your continued participation and sponsorship.

Be well, be safe, and we look forward to "seeing" everyone at our meetings.

Sincerely,

Leslie K. Heffernen

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In This Issue:

WELCOME NEW MEMBERS AND THANK YOU TO OUR REFERRING MEMBERS!!

Keith Eby—Membership Chair

We extend a warm welcome to our newest members as well as a big THANK YOU to our members who referred them! Please continue to spread the word about the great benefits of MCEPC membership – education, networking, camaraderie!

Bonnie L. Butler—The Haverford Trust Company

Susan T. Gillespie—Truist

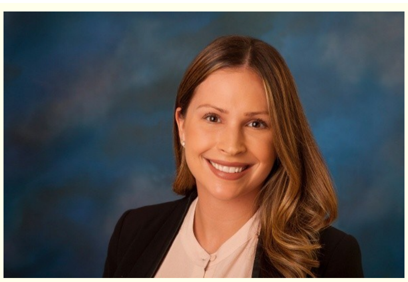
Paula M. Jones, Esq.—Paula M. Jones Law Offices, LLC

Kristen M. O'Connor—The Haverford Trust Company

New Member Spotlight

Meet new member Bonnie L. Butler, Senior Trust Administrator, The Haverford Trust Company

I have been working in banking for nearly 12 years and have held positions in Default, Treasury Management, Operations, Compliance, and I found my home in Trust in 2014. I am a new addition to the Haverford Trust Company's Trust Administration team and am responsible for administering individual trusts, estates, and foundations. Previously, I was with Wilmington Trust specializing in Delaware Directed Asset Protection Trusts. I love the intellectual challenges that every day brings in this line of business and one of my absolute favorite things about working in Trust is the relationships I develop with my clients and their families.



Meet new member Kristen M. O'Connor, Senior Trust Administrator, The Haverford Trust Company

Q. Why did you join the MCEPC?

A. I wanted to become a member of the MCEPC because I believe there is value in knowing and understanding the community I serve. Throughout my fiduciary roles, I was afforded the pleasure to get to know my clients and professional contacts on a personal level and I believe that is where true value is found. When we have a strong base of professionals to surround us, we are much more beneficial to serve clients and their unique set of financial needs.

Q. As I understand it, you provide Trust services. What do you like about that role in client relationships?

A. By far, my favorite part about my role in client relationships is developing my network. Frequently during discussions with clients, questions and input is asked outside of my realm of trust services. When these times arise, it is beneficial to have resource options to provide my client when I am able. This connection enhances trust and strengths the bond between me and my client. In working in the trust business, it is important to listen, strategize and implement long-term goals to preserve generational wealth to provide younger generations. Doing so is no easy task and it takes experts from various fields to deliver an exceptional plan to a client.

The Snowball Effect on Independence

Bode Hennegan

The spring is an exciting time: One of new beginnings and the opportunity for change. The flowers start to grow and bloom. The days get longer and the sun shines more brightly.

Now is a good time to take stock of all areas of your life or your elderly loved ones' lives to make sure they're prepared for life's unknowns, especially if they want to continue living independently in their home. After last year and the pandemic that ensued, we've learned from that experience that it's important to be ready for anything.

And while spring is not a time when we typically think of snowballs, there is one kind of snowball that you should keep in mind during this time of fresh starts. It's what we call the Snowball Effect that may occur affecting independence.

But What Is the Snowball Effect?

It happens when one area of our life might be problematic and then it "snowballs" influencing many other areas of our life. If not caught in its tracks, it can become an avalanche where we need a lot of help managing life's responsibilities eventually leading to complete dependence on others.

Imagine how it would feel if you broke your hip. You'd be in a lot of pain and you'd be physically limited anywhere from a month to a year. When you're in significant pain, it's hard to function in all the other aspects of your life.

- The pain is so bad, which makes it hard to think straight temporarily affecting your cognitive ability.
- This impact on cognitive ability may make you not want to do something enjoyable with friends, which could then affect your social health.
- You may be too physically limited to do your volunteering that you enjoy, which then affects your sense of purpose.
- Then being way from friends and volunteering may make you feel more stressed and isolated and you start to feel worse emotionally.
- Finally, the cost of care with an ongoing illness could be a financial burden.

This is the snowballing that happens when one area of our life goes awry and then influences many other areas of our life.

But worry not: If the Snowball Effect is recognized early, it can be stopped. All that's required is a little awareness and asking for help from others.

Independence Can Be Tenuous

To further explain: A similar effect happens with our independence as we age. If we start to lose our cognitive abilities, for instance, it can affect all other areas of our life making us depressed and ultimately isolated.

At that point, we can become less active, lose track of our bills, piles of paper mount, our house becomes unclean and unsafe. We become stuck and more and more dependent on others. It is at that point that we lose our ability to stay safely in our homes.

However, the stage between independence and being reliant on others is called interdependence. This is when we can remain in our homes but might need help with home organization, making and keeping doctor's appointments, bill paying, housecleaning or coordinating with contractors to do house repairs, to name a few examples.

This interdependence stage is when we (or our loved ones) can stay in our homes but need help with everyday tasks to stay safe — helping to avoid any Snowball Effect.

The take home message is this: Notice when a potential snowball starts to form. At that point, you (or your loved ones) can ask for help from friends, family or others and remain in your home much longer and avoid the avalanche of complete dependence on others.

Life Managers & Associates manages the details of life with the same care as a loving family member to enable clients to live independently. We help them feel safe and supported — saving money and alleviating stress for all.

Basis for U.S. Estate Tax in the Cross-Border Context

Paula M. Jones, Esquire

Since most of us are not traveling these days, perhaps we can live vicariously through the increasing number of cross-border individuals and families we encounter in our professional lives. Professionals should be familiar with the exposure of multinational clients to the U.S. estate tax system, especially as the predicted decrease in the U.S. estate tax exemption amount will impact a greater number of individuals. These are the basis on which an individual is subject to the U.S. estate tax.

1. U.S. Citizens. U.S. citizens, regardless of where they reside in the world, are subject to the U.S. estate tax, upon their death. The gross estate of a U.S. citizen includes "all property wherever situated" to the extent of the decedent's interest.[i] This means that a decedent's property, regardless of where it is located in the world, is includible for U.S. estate tax purposes. U.S citizens have a U.S. estate tax exemption amount of $11.7 MM (in 2021) against their worldwide property.[ii] The Biden administration has suggested they might seek to lower this exemption amount to $3.5 MM, however, even if the law stays as is, on January 1, 2026 it will automatically revert to the previous exemption amount of $5 MM. [iii]

2. U.S. Residents. U.S. residents, regardless of citizenship, are subject to the U.S. estate tax upon their death. The gross estate of U.S. residents includes all property, wherever situated in the world. U.S. residents have the same U.S. estate tax exemption amount as U.S. citizens, outlined in paragraph 1, above.[iv]

The legal definition of "resident" for U.S. estate tax purposes is vastly different than the definition of residency for U.S. income tax purposes. A "resident" for U.S. estate tax purposes is, a "decedent, who at the time of death, had domicile in the United States." A person acquires domicile by living in a particular location, "for even a brief period of time, with no definite present intention of later removing therefrom."[v] With no quantifiable way to evidence one's intentions, the U.S. looks at a number of factors related to the decedent's financial and personal ties to any one jurisdiction.[vi] [vii]

3. U.S. Situs Assets. Individuals who are neither U.S. citizens nor U.S. residents may be outside the U.S. estate tax system jurisdiction, however, if they own property deemed to have a U.S. situs, they are still subject to the U.S. estate tax – but only on those U.S. situs assets. [viii] U.S. situs property, for U.S. estate tax purposes only, includes real estate and tangible personal property physically located within U.S. borders, as well as stock held in U.S. corporations. Unlike the high exemption amount for U.S. citizens and residents, the U.S. estate tax exemption amount for noncitizen nonresidents is only $60,000, a level that has remained the same for decades. [ix]

4. Former U.S. Citizens and U.S. Residents. Beneficiaries of individuals deemed 'covered expatriates' who have either renounced their U.S. citizenship or residency may still be responsible for paying U.S. estate tax on a portion or all of their inheritance.[x] The current law applies to those covered expatriates who renounced on or after June 17, 2008 and who had either i) a worldwide net worth of $2 million or ii) an average annual net income tax of $172,000 (in 2021) for the five years preceding their expatriation.[xi] It also includes those individuals who failed to meet the IRS reporting requirements regarding their expatriation.[xii]

The basis of how an individuals is brought into the U.S. estate tax system is the best way to begin one's analysis of how to advise these complex and interesting clients. Professionals should keep an eye out for non-U.S. components to a client's situation and advise accordingly.

[i] IRC §2031
[ii] *Id.*
[iii] IRC §2010(c)(3)
[iv] IRC §2056(d)
[v] Treas. Reg. §20.0-1(b)(1)
[vi] Paquette v. Commissioner, T.C. Memo 1983-571
[vii] Estate of Kahn, v Commissioner, T.C. Memo 1998-22
[viii] IRC §2101(a), IRC §2103
[ix] IRC §2102(c)(1)
[x] IRC §2801
[xi] IRC §877A(g)(1), §877(a)(2)
[xii] *Id.*

Paula M. Jones, Esquire has over twenty years of experience advising clients on all aspects of domestic and international estate law for moderate to high net worth individuals and business owners. She lectures frequently and has authored several articles in respected industry journals. Access more resources at her web site at www.paulajoneslaw.com or read her blog on the personal side of practice at www.paulamjones.com.

Mentoring and How to Do It at Home

Robert H. Louis, Esquire

A much older lawyer once told me that he was famous at his law firm for "chewing up and spitting out associates." Some might call this mentoring, others a form of psychosis. By contrast, a now deceased partner in my firm supervised three associates. On a particular transaction, one of them made a significant but reparable mistake. The older lawyer called the client and took responsibility for the error, then met with the associate and calmly explained the error to her and how to avoid it in the future. Everyone involved with this matter, and everyone who heard what had occurred, learned something about positive mentoring.

At its simplest level, mentoring is a process by which an older, more experienced person gives guidance to someone who is new to whatever work they are doing, whether it's practicing law or accounting or working in banking, insurance or various types of consulting. It's a teaching process in part: keep deadlines in mind; ask questions if you don't know something; speak up immediately if you make a mistake; don't wear seersucker after Labor Day. But it's much more than that. It's helping someone to understand how to be a lawyer or an accountant or whatever they are doing. It is creating a positive relationship between the mentor and the mentee, so that the younger person will feel comfortable in asking questions and seeking advice, often on very basic matters.

The Characteristics of a Good Mentor

Those of us who are older lawyers will recollect tough-as-nails law professors and senior lawyers whose idea of training was to scare us witless. Another former colleague once said: "I called a young associate into my office and then yelled at her for not bringing a yellow pad and a pen." Perhaps this attitude still prevails in some stone age offices, but a different and healthier (for all parties) mentoring is now more prevalent.

There are a few basic rules that should be the starting point for any good mentor:

1. Make the first approach to a mentee. Do not wait for him or her to come to you. No matter how friendly and open you might think yourself, younger people will likely see you as less approachable. Don't assume the attitude that you are too busy (and important) and that the other person should initiate the relationship. Some will, but others will hesitate.
2. Keep your door open. This sounds simple, but it's more than just not closing it. You should make it clear to younger lawyers (or accountants, etc.) that your door is open for many purposes: to ask technical questions; to discuss strategies; to discuss personal issues; or to talk about other non-business matters. One of my younger colleagues liked to come to my office to discuss whether there are alternate universes, in any of which he wouldn't have to fill out timesheets (he found one).
3. Three (or more) are not a crowd. Sometimes, it's helpful to have a couple of younger people come in together when they wish to, making the process less one on one and more like a group discussion/learning discussion. A wonderful mentor of mine would call all of his colleagues into his office on most Fridays at 5 or so, open a bottle of wine and sit around and talk to us. This certainly made all of us more likely to come to see him about business issues.

Younger people who join a law or accounting firm, bank or other form of business are responsible for their own success (or lack of it) and need to make their own decisions and find the training they need. A mentor can be very helpful in making that process a successful one, and for that reason effective mentoring should be considered a good and essential business practice. Larger organizations will have committees and more formal structures for training and helping new people begin a successful career. But individual mentoring can add a more personal touch that can almost always be helpful. This is especially true in dealing with office politics. New lawyers, accountants, etc. may know the tax laws or the federal and state rules of civil procedure, but to my knowledge, few law or professional schools offer courses on the office world. So that will be an important series of lessons that a mentor/protector will want to impart.

Mentoring People Who Don't Look Like You

A famous story about Erwin Griswold, Dean of the Harvard Law School, was that each year he would invite the few women in each law school class to dinner and ask them why they were taking the place of a man at the law school. I assume the current Dean, and all of his predecessors since Griswold,

Mentoring cont...

did not continue this practice. The composition of law school graduates, as well as those in business schools and similar institutions, looks very different today than it did in my law school class (1972). A determined commitment to diversity on the part of many institutions and businesses has resulted in a significant change in those who will become mentees. In short, younger professionals often do not look like their older colleagues. If diversity and inclusion are to be successful, this must be accepted and encouraged. Older professionals also need to learn how to mentor a changing generation. In some respects, this mentoring will be similar to that done in past years, but also different. The challenge to professional businesses of all kinds is to learn the mentoring needs of people of color, LGBTQ+ professionals and others with different backgrounds and lives. And while the older generation might feel uncomfortable with being asked to mentor in different ways and to people with very different life experiences, it is the right thing to do. It should appeal to the older generation to know that diverse workplaces are good for business.

Mentoring While Working At Home

A few weeks ago, I mentioned to another senior lawyer that working from home seems to have been a successful, efficient and profitable development, very much contrary to the dire predictions of March and April of 2020. Consequently, we can expect remote work to continue in some respects indefinitely. It might be that lawyers and others will work in their offices two or three days a week and from home the rest of the week. His comment to me in response was to ask how young lawyers will learn to practice if they are at home most of the time. That's a good question, and to this point we can only suggest possible solutions:

1. There will surely be some days spent in the office, even under the changed conditions. Mentoring has to be high on the list of activities while in the office; not formal meetings, but informal gatherings when it's safe to have them. Some real estate lawyers in my firm had a practice of meeting in a kitchen area every Monday morning to discuss work they were doing in a very informal setting. That's a good example.
2. Older practitioners need to encourage regular contact, through telephone, email, texts and even the ubiquitous zoom calls, to maintain regular contacts and provide a venue for informal teaching and discussion.
3. It's probably appropriate as well to make a greater effort to plan social events outside of the office. This was more prevalent when law firms (etc.) were smaller, and it needs to be revived.

Mentoring while working at home will occur if there is a will to promote it. It will happen in ways that we expect and in unexpected ways. A recognition that mentoring is a vital part of a successful younger generation is the starting point for this process, in whatever and various forms it takes.

While I was writing this article, I learned of the death of Herbert S. Riband, Jr., a former partner in my firm and a well-respected trusts and estates lawyer in Philadelphia. Tributes from his former colleagues all referred to his excellent mentoring skills: taking an interest in younger lawyers, discussing not just business matters but also more general topics (like office politics), involving them in interesting work and explaining it in detail. This type of personal interest/mentoring was remembered by Herb's colleagues as long as forty years after it occurred. Nothing shows the value of mentoring more.

Robert H. Louis is of counsel to Saul Ewing Arnstein & Lehr, LLP. He is a former Chair of the Probate and Trust Law Section of the Philadelphia Bar Association, former President of the Philadelphia Volunteer Lawyers for the Arts, and current Chair of the Financial Services and Retirement Planning Committee of the American Bar Association. He writes and speaks frequently on lawyer succession planning and retirement.

Power of Appointment – Best Thing Since Sliced Bread

Joel S. Luber, Esq.

Introduction. The power of appointment is a staple of modern estate planning practice. With the repeal or extension of the rule against perpetuities in many states, and the ability of grantors to create trusts invoking the law of those states, there has been much written and discussed about perpetual trusts or dynasty trusts. But in crafting such trusts for our clients, are we not, on some level, just trying to predict the future? The very first rule in creating trusts is flexibility; and the most common method to create flexibility is the use of a power of appointment. With a power of appointment, a trust may, effectively, be re-examined at every generation. In the prefatory note to the Uniform Powers of Appointment Act ("Uniform Act") promulgated by the National Conference of Commissioners in 2013, there is this quote from Professor W. Barton Leach, who described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." 24 A.B.A. J. 807 (1938). Curiously, the Uniform Act has been adopted and enacted into legislation in only 10 states so far (Pennsylvania is not one of them). However, Chapter 76 of the Probate, Estate and Fiduciaries Code of the Commonwealth of Pennsylvania (the "PEF Code") does provide some statutory guidance.

The Basics. A power of appointment is a nonfiduciary power of disposition over property. The power is granted by the owner of property—the "donor"—in a will or trust and is given to a person traditionally called the "donee" in the Restatements of Property but called the "powerholder" in the Uniform Act. A powerholder appoints property to an appointee who must be a "permissible appointee," and the person who would receive the property if no appointment is made is the "taker in default."

There are both general and non-general powers of appointment. The latter are sometimes referred to as "special" or "limited" powers of appointment. The PEF Code uses the term "broad power of appointment" for a general power. A general power is exercisable in favor of any one or more of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate. A non-general power of appointment is a power of appointment that is not a general power. A right to withdraw assets from a trust is considered a general power of appointment because withdrawing assets is the equivalent of appointing those assets to the powerholder.

The Relation Back Doctrine. As a technical matter of property law, a powerholder is not the owner of the appointive assets. Upon the exercise of a power of appointment, the doctrine of relation back provides that the appointed property passes directly from the donor to the appointee. As a result, the powerholder's appointment is deemed to relate back to and become part of the donor's original instrument. The powerholder is viewed as akin to the donor's agent, as it were; an appointment retroactively fills in the blanks in the original instrument. Technical ownership aside, when it comes to federal taxation and the rights of the powerholder's surviving spouse and creditors, the law does not always follow the relation-back doctrine.

Applicable Tax Provisions. The following are many of the tax provisions one must keep in mind when the scrivener adds powers of appointment to any trust document, and when advising powerholders whether to exercise them or to allow them to lapse.

Section 2041 of the Internal Revenue Code of 1986, as amended (the "Code"), defines a general power in the manner described above. There are numerous cases and rulings dealing with whether powers are general. However, Section 2041 excepts three circumstances from the definition of general power:

- if the powerholder's authority is limited by an ascertainable standard relating to the powerholder's health, education, support or maintenance (See Treas. Reg. § 20.2041-1(c)(2) for further discussion on what is, and is not, an ascertainable standard);
- if the power is exercisable only in conjunction with the donor of the power; or
- if the powerholder can exercise the power only in conjunction with a person holding an adverse interest in the property (typically the takers in default) (See Rev. Rul. 79-63 and Greve v. Commissioner, TC Memo 2004-91, for a discussion of this issue).

Section 2041 of the Code requires the estate of a powerholder to include all property over which the powerholder has at death a general power of appointment. Mere existence of the power is sufficient, even if the powerholder does not know about the power or is incapable of exercising it at death (for instance, due to incapacity). See Estate of Freeman v. Commissioner, 67 T. C. 202 (1976).

Section 2207 of the Code provides that a powerholder's estate may recover transfer taxes from the recipient of property subject to a general power of appointment unless that right of recovery is waived by the powerholder/decedent. This mitigates the unfairness of including property in a powerholder's estate if the powerholder did not know of or could not exercise the power.

Section 2514 of the Code provides that the exercise or release of a general power of appointment is deemed to be a transfer of the property by the powerholder. If the power expires by its terms, rather than by an action of the powerholder, then the

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power is said to lapse, and Section 2514(e) of the Code provides that the lapse of a power during the life of the powerholder is considered a release of the power—and thus a transfer of property—but only to the extent the amount of property subject to the release exceeds the greater of $5,000 and 5% of the aggregate value of the assets (the "5 and 5 Power") out of which the exercise of the lapsed powers could be satisfied.

Crummey withdrawal rights are often structured to lapse within the limits of a 5 and 5 Power. These are commonly referred to as "hanging" powers. The reason the power needs to "hang," even though the right to withdraw is set for a limited period of time (for example, 30 days), is that there could be a lapse in excess of the 5 and 5 power. For example, the annual exclusion amount is $15,000 per year, and if the value of the trust assets from which the withdrawal power is granted is less than $300,000 [$15,000 = 5% of $300,000], there will be a lapse in excess of the 5 and 5 Power. The usual solution is to provide that the power may carry over ("hang") for several years until each lapse is fully protected by the 5 and 5 Power. There are both potential gift tax and estate tax consequences when there is a lapse without the exercise of a power to withdraw assets that exceeds the 5 and 5 Power.

The transfer tax effects of non-general powers of appointment are variable. The exercise or release of a non-general power has no transfer tax effect. However, if the exercise or release has an effect on the powerholder's other interests in the trust, there may be a transfer tax. For example, a powerholder is entitled to receive all the income from a trust during her life and also has a presently exercisable power to appoint the trust property to her children. If she exercises that power, by vesting a portion of trust property in her children, she will reduce the income interest to which she is entitled. Thus, the powerholder has made a gift. See TAM 9419007.

<u>Section 2042 of the Code</u> says a power of appointment will be an incident of ownership over a life insurance policy. See PLR 201327010.

<u>Section 678 of the Code</u> states that there are income tax consequences to powerholders. In particular, Section 678(a)(1) of the Code provides that a powerholder will be treated as the owner for income tax purposes of any portion of a trust from which the powerholder has the power, exercisable by himself, to vest the corpus or income in himself unless the grantor of the trust is treated as the owner for income tax purposes. If a power is released or lapses, whether the powerholder is treated as the owner of the portion over which the power existed depends on whether the powerholder would have been treated as the owner of the trust were the powerholder the grantor of the trust.

<u>Section 1014 of the Code</u> deals with the income tax consequences to those who receive assets either by the exercise of a general power of appointment or the takers in default if a general power is not exercised. In particular, Section 1014(b)(9) of the Code provides that property required to be included in a powerholder's estate by reason of the existence of a power of appointment will be deemed to have been acquired from the decedent powerholder and thus will have, in the hands of the recipients, basis equal to the fair market value of the property at the decedent's death as a result of Section 1014(a) of the Code.

Common Uses of Powers of Appointment.

<u>Second Look.</u> As first described above, the most important use of powers of appointment is to create the flexibility to address changes in circumstances not originally envisioned by the grantor of a trust, especially when the grantor is no longer alive, or has not otherwise reserved a power for herself to revise trust terms. The powerholder may be able to appoint the assets of a trust to an entirely new trust with different administrative provisions (e.g., governing law; situs; or the spendthrift or investment provisions or provisions for investment or distribution committees that advise or direct the trustee) or dispositive provisions (e.g., removing existing beneficiaries and adding new ones, or changing the terms under which income and principal may be distributed to one or more beneficiaries). Many decanting statutes do not allow trustees to change the dispositive provisions of a trust but do allow the creation of powers of appointment which the powerholder may then use to change the trust's dispositive provisions. There are similar limitations with non-judicial settlement agreements. See PEF Code §7740.1.

<u>Power to Disappoint.</u> Senior generation grantors who are married most often want to leave assets to each other, first, before directing assets to children or more remote issue; and most often, they do so with a QTIP trust, which avoids the need to give the surviving spouse a general power of appointment and the risk that assets will leave the family line, or become subject to the creditor claims of the surviving spouse. But even with a QTIP trust (and every other trust) there will be an onus on the trustee to fulfill its duty of impartiality, which creates the prospect of children complaining of "lifestyle" choices of the surviving spouse and proposed discretionary principal distributions to the spouse. Enter the special testamentary power of appointment. The ability of the surviving spouse to reallocate the remaining assets among children and/or to skip children and distribute everything to grandchildren may be a powerful inducement for the children to remind the living parent of their love and affection, and maybe more importantly, to keep their

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opinions to themselves.

Trigger Transfer Tax and Income Tax. General powers of appointment can be used to ensure that assets in trust are included in a powerholder's estate, which may have the effect of preventing a generation skipping transfer tax, and achieving a new basis at the powerholder's death. The latter has become significantly more popular with the increase in federal estate tax exclusion amount (the "exclusion amount"). In many situations, trust beneficiaries do not have taxable estates. As a result, using a general power of appointment to cause inclusion in a beneficiary's estate will create an estate tax-free basis increase whether the power is granted in the original instrument, created through exercise of a trustee's specified authority to do so or through decanting or amending the trust.

Create Incomplete Gifts. Non-general powers of appointment have an important use in making gifts to trusts incomplete to reduce income taxes (but not transfer taxes). Incomplete gifts may be helpful for many purposes but a common one is the transfer of assets to a trust that is not a grantor trust (an "ING") for income tax purposes. If the grantor is domiciled in a high income-tax state, and the transfer can be made to a trust that will be taxed in a low or no income-tax state, then use of the trust may achieve income tax savings for the trust. In order to avoid gift tax, the grantor must retain a lifetime and testamentary power of appointment, but the powers of appointment must be sufficiently limited to avoid the grantor trust rules of §§ 671–677 of the Code. Powers of appointment can be used to move trusts from one taxing jurisdiction to another in order to accomplish such planning. In Linn v. Department of Revenue, 2013 WL 6662888 (Ill. App. 4 Dist.), the court held that Illinois could not tax an intervivos trust created by an Illinois resident where the trust assets were moved via power of appointment to a Texas trust with a Texas trustee and no Illinois trust beneficiaries.

Upstream Planning (Caution Advised). Upstream planning, to shift values to a higher generation family member not subject to the estate tax, has been discussed by any number of commentators. This type of planning has been given considerable attention in light of the current large exclusion amount. Clients who have a net worth substantially in excess of the $23.4 million per couple exemption (as of 2021), might consider upstream planning if, for example, one of the spouse's parents has a combined net worth well under the current exemption.

One approach to upstream planning is to create an irrevocable trust with a general power of appointment given to a person living in a non-decoupled state who has a modest estate of their own. The presence of that general power should cause estate inclusion of trust assets in that person's estate, generating no estate tax but an adjustment of tax basis at death. However, this type of planning raises a host of questions.

How can one protect against an unintended or undesirable exercise of the power granted? Possible solutions include (i) conditioning the exercise of the general power upon the consent of a non-adverse party; or (ii) instead of a general power, using a limited power of appointment and granting the power to another person, in a non-fiduciary capacity, to convert the limited power of appointment into a general power of appointment before the powerholder's death; or (iii) limiting the scope of the general power to the right to appoint to the creditors of the powerholder's estate, only, and/or to the descendants of the grantor of the power or trusts for their benefit. If creditor issues are a real risk, then one might consider conditioning the exercise of the power on the powerholder being solvent. One other risk for someone who qualifies for Medicaid – a general power may also subject the assets to a parent's or other powerholder's Medicaid claim for reimbursement.

Although many practitioners have touted the use of "upstream" planning to salvage otherwise unusable or lost exemptions that elderly relatives of clients have, the planning is not assuredly beneficial. Consider the consequences of upstream planning if the new Congress is able to enact those parts of President Biden's tax proposals that call for a reduction of the exemption amount. For example, if a parent had an estate of only $4 million, and the child created a trust with $7 million and gave his or her parent a general power of appointment over that trust. The intent of the plan was that the parent's estate would include those assets in the trust and those assets would garner an estate tax free adjustment (hopefully step-up) in income tax basis at the parent's death. But if the exclusion amount is reduced to the $3.5 million as in the Biden proposals, the plan intended to garner a basis step-up at no tax cost may instead trigger an unintended estate tax. A possible fix for this issue may be to use a formula general power of appointment.

Clients who only recently had planning updated to address the inclusion of general powers to a senior generation are likely fretting now over the prospect of yo-yo tax law changes that may be on the horizon very soon. Practitioners should be carefully reviewing those plans now to see if, for example, any general powers of appointment can be converted to special powers in the event such changes in the law occur.

Conclusion. Whether planning for one generation or six generations, powers of appointment must be considered the prime ingredient in every trust document presented to a client.

Joel S. Luber, Esquire, is chair of the Estates & Trusts Group at Reger Rizzo Darnall LLP. Joel concentrates his practice in sophisticated estate planning for high-net-worth individuals, asset protection planning, estate administration, Orphans' Court practice, and general corporate and income tax planning.

Consolidated Appropriations Act of 2021 Update: Your Clients May Call You About These Changes

Rachel M. Kieser, CPA, MT

Introduction

The Consolidated Appropriations Act of 2021 (the "CAA"), signed into law on December 27, 2020, included a much-anticipated $900 billion second COVID-19 stimulus relief package and a 2021 federal fiscal-year spending bill. Included in the CAA were many tax law changes affecting both businesses and individuals. While not an exhaustive list of all tax law changes in the CAA, this article aims to highlight various provisions about which accountants and other trusted advisors can expect to receive questions from clients.

Business Provisions

Deductibility of PPP Expenses – Congress codified in the CAA its original intention that expenses paid for with forgiven Paycheck Protection Program ("PPP") loan proceeds would be deductible. This is in addition to forgiven PPP proceeds being excluded from taxable income and is contrary to the guidance previously issued by the IRS in Notice 2020-32 that expenses paid for with forgiven PPP funds would be nondeductible. This was a big win for businesses still struggling with the cash flow impact of the COVID-19 pandemic.

Despite the significant tax benefit of both the potential loan forgiveness and deductibility of related expenses, close attention should be paid to owners' tax basis in their interests in passthrough entities if their business had a taxable loss for 2020 after deducting the PPP expenses. The owners must have sufficient tax basis in their interests to deduct these losses. Under the CAA, owners are allowed a basis increase for the nontaxable cancellation of debt income from their PPP loan forgiveness. However, this increase is not allowed until the year in which the loan is legally forgiven. For many borrowers, their forgiveness applications were outstanding at the end of 2020 or they have not yet applied for forgiveness, which means their basis increase will occur in 2021. This mismatch in timing between the payment of expenses with PPP funds and the recognition of nontaxable income for the forgiveness may create tax basis issues for some borrowers and limit the availability of special net operating loss ("NOL") provisions found in the Coronavirus Aid, Relief and Economic Security ("CARES") Act passed in 2020.

PPP Round 2 – While the CAA made several changes to the existing PPP, clients are likely most focused on whether they qualify for a second round of PPP funding.

To qualify for PPP Round 2, eligible businesses must meet these criteria:

1) They were in operation on or before February 15, 2020;

2) They have 300 or fewer employees (or no more than 300 employees per location for businesses in the hospitality industry with multiple locations); and

3) They experienced at least a 25% reduction in gross receipts during a quarter in 2020 compared to the same quarter in 2019.

Like in PPP Round 1, a borrower must certify that current economic uncertainty makes the loan necessary to support its ongoing operations. This certification may have legal ramifications and should be reviewed carefully by borrowers and their advisors. Other facts and circumstances of a borrower's current financial position may need to be considered in addition to a reduction in gross receipts.

Eligible PPP Round 2 borrowers can apply for the same loan amount they received in Round 1, as the computation remains based on 2.5 times 2019 average monthly payroll costs for most borrowers. However, the CAA reduced the maximum allowable loan amount for Round 2 from $10 million to $2 million.

Businesses in the hospitality industry with NAICS codes starting with 72 can calculate their maximum loan based on 3.5 times their 2019 average monthly payroll costs. Each location must apply for a separate PPP loan up to a maximum loan of $2 million each, but the CAA caps the allowable aggregate loan for all locations at $4 million.

Employee Retention Credit – Due to changes in the CAA, certain employers may now be able to claim the Employee Retention Credit retroactively back to March 2020. PPP borrowers were previously precluded from claiming this credit provided by the CARES Act. The CAA has now made the credit available for PPP borrowers, and it is possible for them to claim the credit for qualified wages paid going back to March 12, 2020.

To qualify for the 2020 Employee Retention Credit, an employer must meet one of these tests:

1) Their business operations were fully or partially suspended because of a government order in connection with COVID-19 during any quarter; or

2) Their business experienced a 50% reduction in revenue in a quarter in 2020 as compared to the same quarter in 2019.

If an employer meets one of these tests, they may claim a credit for 50% of the wages paid to individuals up to $10,000 in qualified wages, for a maximum credit of $5,000 per individual employee in 2020.

The definition of qualified wages depends on whether the taxpayer has more or less than 100 full-time employees. In addition, PPP borrowers cannot "double dip" with the wages they used toward their PPP loan forgiveness applications. Any wages used to apply for forgiveness cannot also be used for claiming the Employee Retention Credit. Thus, careful analysis will be required to determine eligibility.

For 2021, the CAA extended the Employee Retention Credit through June 30, 2021 and made additional favorable changes. To qualify for

Appropriations cont...

the 2021 credit, an employer must have experienced a full or partial suspension of business operations due to a government order related to COVID-19 or a 20% reduction in revenue in the first or second quarter of 2021 as compared to the same quarter in 2019 (rather than a 50% reduction as required for the 2020 credit).

In addition, the 2021 credit is increased to 70% of qualified wages up to the first $10,000 in wages per quarter for each individual. Accordingly, for 2021, an employer may claim a credit of up to $14,000 per individual employee.

Individual Provisions

Recovery Rebate Credit – As we head into tax season, the COVID-19 "stimulus checks" may be on the minds of many clients. The CAA provides a refundable credit of $600 per family member for eligible individuals subject to Adjusted Gross Income ("AGI") limitations based on filing status. This is in addition to the $1,200 refundable credit per taxpayer plus $500 per qualifying child provided by the CARES Act.

The stimulus checks were advance payments of the Recovery Rebate Credit. The first round was sent based on taxpayers' 2018 or 2019 AGI; the second round was based on 2019 AGI. If taxpayers end up not qualifying due to AGI limitations when filing their 2020 tax return, they will not be required to return the advance payments they received. Conversely, if taxpayers did not receive stimulus checks but now qualify based on their 2020 AGI, they can claim the refundable Recovery Rebate Credit on their 2020 tax return.

Charitable Contribution Deductions – The CAA made two changes that will affect charitable gift planning in 2021. First, the CAA extended the 100% AGI limitation for cash contributions through the end of 2021. To qualify for the increased AGI limitation, contributions must be made in cash directly to a public charity. Donations of property or cash to private foundations, donor advised funds, or charitable trusts do not qualify and continue to be subject to the regular AGI limitations. Any prior year charitable contribution carryovers remain subject to the applicable AGI limitations in effect during the year of the original contribution.

Planning with this increased AGI limitation can be beneficial if a taxpayer will be selling their business or plans to execute a Roth IRA conversion in 2021. A philanthropic-minded taxpayer could offset the taxable income from a Roth IRA conversion with a charitable contribution of the same amount or make a larger charitable contribution upon the sale of their business than they would have under the regular AGI limitations.

The CAA also extended through 2021 the $300 above-the-line deduction for cash charitable contributions made by non-itemizers provided under the CARES Act and allows up to $600 for married couples.

Qualified Disaster-Related Retirement Distributions – The CAA did not extend the exception to the 10% early withdrawal penalty for COVID-19 related retirement plan distributions. Instead, the CAA created a similar exception called the Qualified Disaster Distribution. This provision allows for distributions up to $100,000 per qualified disaster through June 25, 2021 without being subject to the additional 10% penalty. Like COVID-19 related distributions, Qualified Disaster Distributions are included in taxable income over a three-year period, unless the taxpayer elects to recognize the full amount in the first year. Qualified Disaster Distributions can also be repaid and treated as a rollover during the three-year period beginning on the day after the distribution.

Employer Student Loan Repayments – Employers historically have been able to provide up to $5,250 per year in educational assistance to employees tax-free. The CARES Act provided that student loan repayments made by employers on behalf of employees from March 27 to December 31, 2020 would qualify for this exclusion. The CAA extended this provision through the end of 2025.

Discharge of Principal Residence Indebtedness Exclusion – The CAA has extended through 2025 the ability to exclude the discharge of qualified principal residence debt from taxable income. However, the CAA has reduced the maximum amount allowed to be excluded to $750,000 for married couples and $375,000 for single and married filing separate taxpayers. The previous limits were $2 million and $1 million, respectively.

Treatment of Mortgage Insurance Premiums as Qualified Residence Interest - Subject to AGI limitations, under the CAA, taxpayers can continue to treat mortgage insurance premiums as qualified residence interest for itemized deduction purposes through the end of 2021.

Medical Expense Floor Reduction – Taxpayers may claim an itemized deduction for medical expenses if they exceed 7.5% of their AGI. The floor was set to revert to 10% of AGI at the end of 2020, but the CAA has made the reduced 7.5% floor permanent.

Conclusion

As clients complete their 2020 record keeping and begin to gather their tax documents, accountants and other trusted advisors should prepare for increased inquiries about the changes included in the CAA. The more advisors understand about recent and proposed future tax law changes, the better they can answer their clients' questions and propose beneficial tax planning strategies for the future.

Rachel M. Kieser is a shareholder at Drucker & Scaccetti, P.C. where she leads the Firm's Wealth Transfer Group. Rachel's practice focuses on assisting high-net-worth family groups with individual tax and financial planning, family business tax planning, trust and estate taxation issues, family succession planning, and private foundation compliance and consulting. She uses a holistic approach to tax and wealth planning to ensure all aspects and needs of the client's family are considered.

A Wait-and-See Legacy Planning Approach: Maintain Flexibility While Getting a Foot in the Door

One of the key challenges to legacy planning for clients and their advisors is designing and implementing long term strategies based on current laws that are subject to change without any further legislation. As seems to have been the case since 2010, we are now faced with more uncertainty on the future of tax law - especially as it pertains to the estate tax exclusion amount (and the potential change to the step-up in basis rules).

The Exemption

The Tax Cuts and Jobs Act of 2017 (the "TCJA") increased the federal estate, gift and generation-skipping transfer ("GST") tax exemptions from $5,000,000 (indexed for inflation) per person to $10,000,000 (indexed for inflation) per person beginning on January 1, 2018. To comply with certain budgetary constraints, the TCJA contains a "sunset," or expiration date, of December 31, 2025, at which time the previously listed exemptions are set to expire and revert back to the previous $5,000,000 (indexed for inflation) levels.

While it may appear that there's a legislative pathway of understanding how these exemptions are set to change, there are several examples over the last 20 years of how this might not happen. The Economic Growth and Tax Relief Reconciliation Act of 2001 gradually raised the exemption amount from $675,000 to $3.5 million in 2009. Without legislative action, the estate tax was temporarily eliminated in 2010. Then in 2011 in a somewhat unexpected manner, the exemption did not revert to a prior level but instead was raised to $5,000,000 (inflation adjusted). In early 2013, when that law was set to expire, Congress instead made the increase permanent and enacted law changes to raise it annually with inflation. For 2013, the exemption was $5,250,000.

With the Democrats now in control of both houses of Congress and the Executive Branch, the chances for tax legislation increase significantly. The Federal government will at some point need to raise revenue to offset the expenditures related to the stimulus to combat the economic hardship of the COVID-19 pandemic. President Biden has discussed several proposals that contain language to reduce the exemption levels down to $3,500,000 per individual.

Based on the current sunset language of the TCJA and the change in government control, there is reason to believe a reduction in exemption levels will occur at some point in the next few years. With all this uncertainty, flexibility is a key aspect of planning. Clients with assets below the current exemption levels may not know if they have or will have an estate tax liability or how big it will be. Further, gifting significant assets either in a lump sum or through annual giving may not be desirable, perhaps because of cash flow issues and/or a hesitancy to lose control over assets during life.

The Concept

A potential solution to this quandary is a "Wait-and-See" approach using a permanent survivorship insurance policy paid for by a single premium designed to fund the policy for a limited time to lock in current insurability and pricing. At some future point, depending upon changes to tax laws and/or the clients' net worth and/or family situation, the insureds will determine whether to pay future premiums to increase the coverage, lapse or surrender the policy, or reduce and maintain some form of coverage.

This asset can be held in the estate and, if it is to be maintained for legacy purposes, transferred into an Irrevocable Life Insurance Trust ("ILIT") at a later date. By owning the policy outright, the insureds have access to the cash value during their lifetimes if they need it. This helps to further increase the flexible nature of this design. If and when there is a change to exemption levels, the policy can be transferred to an ILIT (gifted or sold but if gifted, the donor must survive three years after the gift) moving the death benefit (and cash value) out of the estate for transfer tax planning purposes.

Depending upon the age and insurability of the individuals, it is possible to combine a cash accumulation policy (such as a Variable Universal Life, Indexed Universal Life or Current Assumption Universal Life policy) with a limited or lifetime contractual death benefit guarantee. The secondary guarantee can provide death benefit protection for a set amount of time based on the planned premium schedule to guarantee the policy will remain inforce independent of external economic factors or changes to underlying insurance costs. Continued low interest rates have negatively impacted the pricing of these types of guarantees and we anticipate that this will continue in the future.

Incorporating permanent life insurance along with liquid assets (stock and bonds) can improve the risk and return characteristics of a portfolio under Modern Portfolio Theory ("MPT"). The performance of the policy, measured by the Internal Rate of Return ("IRR"), is contingent upon mortality – the stated death benefit in a level design is paid at the time of death of the insured(s) – and not upon a valuation subject to change, such as

Flexibility cont...

equity prices.

In this way, the primary factor in improving overall risk-adjusted returns for the portfolio is the low-risk characteristic of life insurance. This risk can be further lowered by the use of the secondary guarantees through expected mortality that were mentioned above. While the lowered risk component is the driver of an improved efficient frontier, the tax-free IRRs illustrated are favorable comparable to similar low risk or risk-free fixed income alternatives.

The additional advantage to adding life insurance as part of a portfolio is the balancing of "bet to live" and "bet to die." Asset growth is dependent on two primary factors: the rate of return and time. For marketable securities, projections of asset growth will perform better over a longer period of time assuming continued positive returns. The returns on life insurance are generally at their highest earlier on in the policy, when less premiums have been paid and the full death benefit is inforce.

The Wait-and-See approach allows for investible assets to continue to be active in the market (bet to live) over an extended period of time while reallocating a small portion of the portfolio – most likely from fixed income or cash holdings – as a potentially high return asset should an early mortality occur. (Nobody volunteers for this, but the returns are quite attractive.) During the period of time between the initial premium and the resumption of insurance funding in the future, current cash flow and/or existing assets can be allocated to a more aggressive risk model since the insurance now acts as super-charged fixed income holding.

The SECURE Act

This Wait-and-See design can be particularly attractive to clients in their 40's and 50's due to the changes for IRAs and Defined Contribution Plans after the passing of the SECURE Act. The benefits of the SECURE Act were allowing contributions to traditional IRAs after Age 70 ½ and pushing back the Required Beginning Date ("RBD") of Required Minimum Distribution (RMDs) from 70 ½ to 72.

To offset the future cost of delaying income tax revenue through these changes, the SECURE Act essentially eliminated the Stretch IRA as a legacy planning tool. Unless one of the limited exemptions apply, benefits generally must be fully distributed from Inherited IRAs to Designated Beneficiaries within 10 years of the account owner's death. This change may dramatically impact the income tax burden on a beneficiary receiving a substantial inherited IRA.

Combining the Wait-and-See concept with IRA tax-planning, clients can "seed" the policy with an initial premium from taxable savings or current cash flow and design the policy to remain inforce until qualified money can be accessed without penalty. This technique creates a secondary benefit of recharacterizing dollars that would be taxable to beneficiaries into a tax-free death benefit.

Applications

The overarching concept of implementing survivorship permanent insurance focuses on flexibility and is applicable to multiple planning scenarios. A version of the strategy can be used in several different situations, such as:

• Married couple in their mid-40's with robust cash flow and significant retirement assets that will continue to grow through contributions to their Profit Sharing and Defined Benefit Plan. Secured $5,000,000 of death benefit with a single premium designed to guarantee coverage for 17 years, when funding will resume at a point after the 10% early withdrawal penalty no longer applies.

• Individual with several overfunded existing individual life contracts looking to change focus from protection to legacy planning. Repurposing the cash value in the individual policies over a three-year period as funding for a survivorship policy. Premiums resume after 10 years when RMDs will be mandatory. In this example, the main asset of the client is a large illiquid business holding. If sold prior to the RBD, the proceeds may be used to accelerate life insurance funding.

• Using life insurance as a funding source for special needs planning. Current income is being used for lifestyle needs and tax management. Funding insurance held within a Special Needs Trust with a single premium and delaying funding until Age 72.

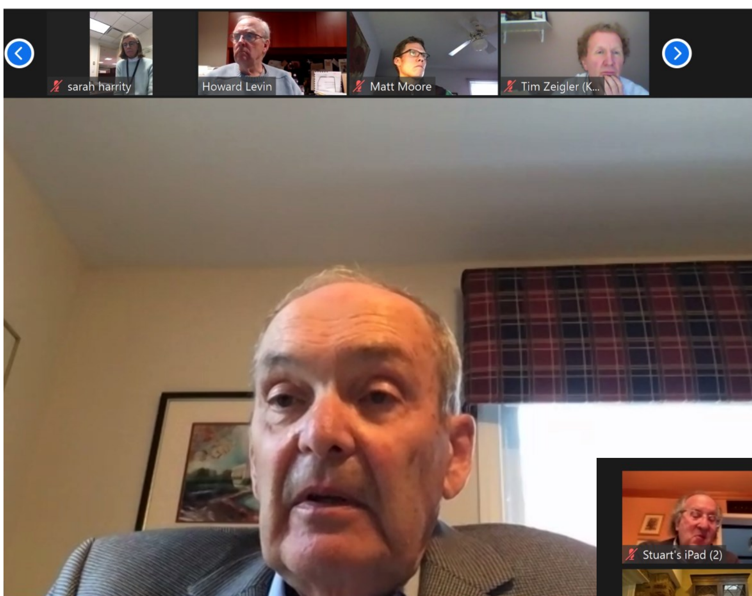
The Wait-and-See approach bridges the gap between current favorable insurability and the timing of a tax-efficient future funding source. In the interim, investible assets can continue to be active within a portfolio and not used to support insurance costs. Should there be a significant reduction in the estate tax exclusion amount, either by sunset of current law or new legislation, the life insurance can be transferred into a trust as an estate planning tool.

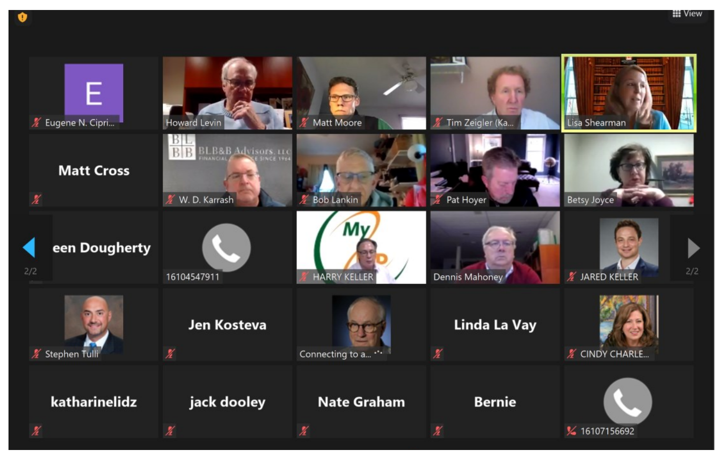
Beyond the IRR at mortality, life insurance provides other key benefits to an overall plan, including liquidity almost immediately upon death, income tax-free benefits, the ability to add contractual death benefit guarantees, a hedge against premature death and an asset that does not require valuation or that is subject to volatility.

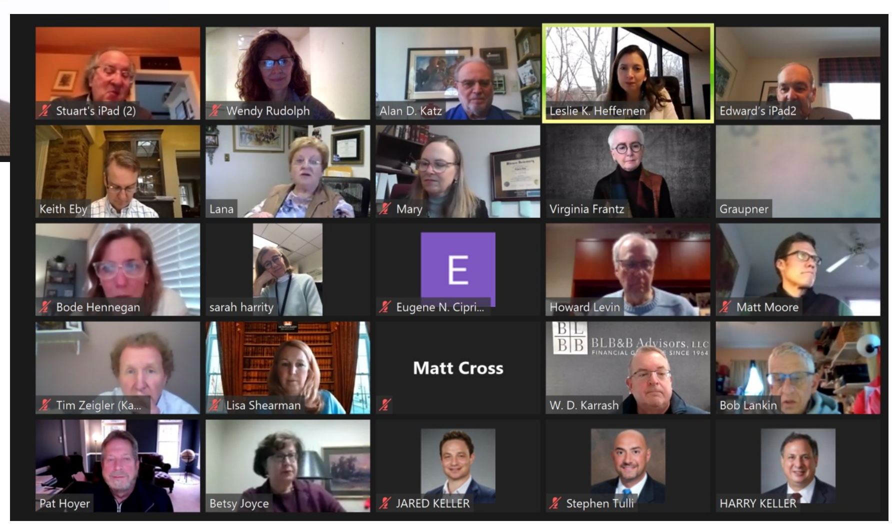
Michael C. DeFillipo, CLU, ChFC, is a Partner of 1847 Private Client Group, in Conshohocken, PA. Michael has 15 years of experience working with high-net-worth clients and their advisors designing, implementing and monitoring sophisticated life insurance portfolios. 1847 Private Client Group is an owner firm of Lion Street – an exclusive national network of elite financial firms.

December Holiday Networking Mixology Trivia Event

January Meeting







February Meeting

March Meeting

Speaker Honorable Judge Lois Murphy of the Montgomery County Orphan's Court

Virginia Frantz, President & CEO of sponsor the Montgomery County Foundation, Inc.

Speaker Honorable Judge Gail Weilheimer of the Montgomery County Orphan's Court

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MCEPC MEETINGS
2020-2021
Via Zoom 4:00-5:30pm

April 27, 2021...Using CRUT to SECURE the benefits of a stretch IRA trust

May 17, 2021...Important Issues in Modern Trust Design

June 10, 2021 (12:00-4:00pm) ...Annual Seminar - Business Succession Planning

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If you have moved or will be making any changes to your membership information (address, email, phone, fax, professional designations, etc.) please notify the office as soon as possible.

More information about the website… We have received a few requests from our members for their "access code" to the MCEPC website. To view and access information on the Council website : http://www.mcepc-pa.org, you **DO NOT** need a login name or password. We currently do not have privileged information on our site and browsing it does not require a login name or password. Only administrative access is password restricted.

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