Speaker 1 (00:03):

Welcome to the Vanda neck Weaver legal visionaries podcast brought to you by interactive legal here's your host Mary Vanden at

Speaker 2 (00:12):

Welcome to today's episode of fantastic Weaver, legal visionaries, a weekly podcast discussing updated legal news, evolving methods of providing legal service and law practice issues. My name is Mary Vandag founder and managing partner at vandak Weaver, LLC. I'll be your host. As we talk to experts from around the country about closely held business tax trusts and estates, legal technology, law firm, leadership and wellbeing. Before we start today's episode, I want to thank our sponsor. Here's the message from interactive legal.

Speaker 3 (00:51):

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Speaker 2 (01:40):

On today's episode. I am Marty Shenkman and Jonathan bought mocker. Neither actually requires any introduction, but just in case Marty Shenkman is an attorney practicing in New York city and New Jersey in estate planning, tax planning, and closely held business planning. Marty is a prolific speaker and frequent author in substantive areas, as well as on technology and law practice issues. Jonathan is well-known for being one of the most creative trust and estate lawyers in the country. He's a principal at pioneer wealth partners, editor in chief at interactive legal and director of estate planning at peak trust company. Jonathan is, Jonathan is also well-known for his pioneering approach to technology, Marty and Jonathan. I appreciate you being here today.

Speaker 4 (02:26):

Pleasure Marriott. I'm just a little surprised I've never seen you so serious.

Speaker 2 (02:31):

That's true. I'm not serious that often, but wait, I'm talking to you guys, right? So I have to be today

Speaker 4 (02:38):

Trying to put on a serious face to match your introduction. Okay. I'm serious. Let's go.

Speaker 2 (02:43):

Okay. That's good. All you for several months this year, we've been dealing with legislative proposals that have that may impact year end tax planning. As of today, we're recording. We don't have any definitive legislation at this moment, but what are your thoughts on what we

Speaker 4 ([03:01](https://www.rev.com/transcript-editor/Edit?token=)):

Might see at this year? Jonathan,

Speaker 5 (03:04):

Marty take it away

Speaker 4 (03:06):

MI so I know you're not recording, so I'll be honest for a second. We all know the, the, the, the reality is where we're sitting right now. We have no clue what will happen. There were incredibly harsh, restrictive tax proposals made throughout the year. And the house ways and means proposal included, not all, but many of them some of Senator Sanders restrictive proposals in terms of the reduction of the exemption and crummy powers, et cetera, were not in the house proposal, but the house proposal decimated the foundation a much of a state planning, which was grant is big, has been grant or trusts and included an array of very harsh proposals. And then because of the political situation in Washington, the latest variations, the last two versions of what the tax legislation might emphasize might cause we still don't know, look like eliminated virtually all the estate tax changes and just had some harsh income tax rules for high-income individuals, flesh and blood individuals that for trust supplied at a fairly low level, I actually got an email just last night from a well-known colleague saying, Hey, Marty, I just heard from somebody and we know how reliable somebody is.

Speaker 4 (04:28):

That's like research on the internet, right? And his somebody, whoever that may be, cause he kept it top secret, told him that all the original harsh proposals that were in the house bill they're now back on the table in the latest back door discussions, how he can know. I don't know. So my response was Tim. I I've heard nothing. I have no idea, but I wouldn't be surprised what happens. I think it's a total wild card. And I think that's what Jonathan, you and I are going to talk about, given that we just don't know anything. What do you do to tell clients practical things, to take steps now in light of that incredible uncertainty. Jonathan, can you, can you elaborate?

Speaker 5 (05:07):

You know, let me mention what supposedly is going to happen under the constitution. All tax bills have to originate in the house of representatives. They can't originate in this Senate. And typically what happens is the house will pass a bill and then it goes over to the Senate and the Senate will pass its own bill. And then those two bills or basically reconciled. And they have representatives of both parties from both the house and the Senate get together and they can come up with proposed provisions. Those provisions may be the ones, the house that they may be, the ones the Senate had, or they can be somewhat different. And we simply don't know. It is surprising that even though president Biden wanted a number of changes that would drastically affect estate planning, none made it into the current version of the house bill, but keep in mind that the house bill has not yet been finalized.

Speaker 5 (06:03):

They've still got a number of things to write about. And maybe the guy who called Marty and said, Hey, I've heard this rumor that they're going to put all those adverse changes back. Some of which Marty and I shouldn't discuss may come back and maybe they won't come back, but even if they don't make it in the house, bill is going to go to the Senate and you've got some people there who just simply are not going to swallow hook, line and sinker with the house that Bernie Sanders has tried to make his career

on taxing wealthy people more. He's had many proposals, including a reduction in the estate tax exemption, not down to 5 million as has been in one of the versions of the house bill and what was proposed by, you know, many, many people, but his would go down to three and a half million and

Speaker 4 (06:51):

Then one for gift tax, just

Speaker 5 (06:53):

1 million for gift tax and 1 million for gift tax. And that could like some of the other changes really, really curb the ability to do lifetime estate planning. As Marnie said, some of the proposals and these have been in many, many areas would be to change the rules or the respect to grant toward trusts. Probably the two most important ones are one. If you have a branch or a trust, it will be includable in the gross estate of the grant for when she dies. Now, there may be an exception except for additional contributions. And we just don't know what that is. In fact, some people feel well, our contribution might be the fact that the grand tour has to pay the income tax on the income, which the trust receives, which is probably the most important factor in all of lifetime planning, because it allows the trust to grow on an entirely income tax free basis.

Speaker 5 (07:49):

You have tax free compounding, probably the most important factor in all the financial planning, the other big change that would be made. And this was in the house and it's been proposed in the Senate as well is to say that we're no longer going to disregard the existence of grant or trust for income tax purposes, which means if there's a transaction between the grant or the grant or trust such as a sale or purchase of appreciated assets, that would be recognized for income tax purposes and many, many of the lifetime estate planning techniques, including note sales or installment sales to grant or trust would go away again. We don't know what kind of quote grandfathering close quote would be there, but there you have it. And then as Marty has said, several times, we simply don't know what will happen, but don't think it's over because it ain't over till it's over as you'll be bare on one set back to you, Mary.

Speaker 2 (08:45):

So when we had the proposals come out in September, I mean, there's been proposals all year, but in September was when a lot of us

Speaker 4 (08:52):

Even engaged all these proposals and no one's engaged.

Speaker 2 (08:55):

Right? And so we started w but when the grantor

Speaker 4 (08:58):

Schumer, Mary,

Speaker 2 (09:01):

Okay. When the grantor trust issues

Speaker 4 (09:06):

Look like, they're trying to make Jonathan smile, but I'm not doing well. You

Speaker 2 (09:09):

Can't meet a smile though. Okay. So when we were looking at the possibility that the exemption was going to sunset early, so early in the year, I'll be honest. I was like, well, they're not going to use the political capital to sunset set that exemption this year. Cause we have the mid-term elections coming up next year. And then all of a sudden that got dropped into one of the proposals. So I like many others was looking at, okay, do we need to have everybody that use their exemption before the end of the year? And now we know that's been taken out of current proposals, but are very aware as Jonathan noted that that could get dropped in yet before year end. So we're in November. What should clients be doing? Should they be using their exemption or who should be

Speaker 5 (09:53):

Well, Mary, it always makes sense as early as possible. One reason as you indicated is it may go away. The other one is if you believe that the assets which have been transferred are going to grow and value that growth through the income, which those assets attract will be excludable from the tax estate of the current property owner. Now, if you think your assets are going to go down in value, that would be a mistake. But if you believe that maybe you want to take other actions, do some sort of sale where you don't have gain recognition, but you get the assets, basically the value today, back into your name. Now that's very hard to predict, but historically assets have tended to grow in value. So using an exemption as early as possible. Makes great sense. The real question and mourning. Maybe you can tell us what people can do suppose. Okay. I believe I should move my exemption as early as I can, but I can't afford to give away 11.7 million Marty, can I give away 3 million? And then if the exemption is dropped, say under Bernie's proposal to three and a half million, I'd still have that.

Speaker 4 (11:05):

There's three different avenues. I'd like to answer the question. First, one of the points Jonathan's getting at which clients really don't understand. And it's really important for practitioners to explain if you give away 3 million of exemption and they lower it to 5 million inflation adjusted, which is 6 million and change next year, you haven't done beans to safeguard your exemption because you only got 3 million left. You have to give more of your exemption or use more of your exemption than what it's being lowered to. Or you haven't been safeguarded at any of the extra. In fact, there's a lot of people non-reciprocal spousal lifetime access trusts are like the, the hot tomato of, of, of, of 20, 20 and 2021. And I I've had calls from general practitioners. You know, I got to do these slats. Like, what do I do? The big, a big mistake on honestly is, is they're not as simple as, as all the talk makes them seem in how ubiquitous they become belies th th the complexity, but if husband and wife or spouse, one spouse to each gave away 3 million, it's really a dumb plan because now they've each kind of wasted.

Speaker 4 (12:12):

Half their exemption you've preserved nothing. You'd be better off with one spouse gave away seven or 8 million, and then the other spouse, nothing. So the exemption drops. You have the, the, the, the non-donor spouse exemption. So that's avenue of attack. One second avenue of attack. I think it makes a world of sense, echoing Jonathan's comment to do your planning now, and I'm going to come back to that cause that's the third point, but you need to do it in a way for the vast majority of even wealthy clients, not super wealthy. And I know there's a vague terms, but wealthy clients need access to the

money they transfer. So if you set up a spousal lifetime access, trust a spa, a special, special power of appointment trust where somebody has the power to point assets back to a self settled trust or domestic asset protection, trust the dat or a hybrid adapt where Mary can add me or descendants.

Speaker 4 (13:03):

My grandparents back has beneficiaries. If you build in a structure where you can access it, there's less reason not to, to, to plan now. And that brings me to the third point, which I think is the most important point for planning. I think people are approaching this the wrong way. Everyone's digging out their Weegee board and their crystal ball. Mine are both broken and trying to see gee, what's going to happen so I can figure out what to tell clients to do. There's a much simpler approach. If you do really good planning, regardless of what happens in Washington, you've done really good planning. So why not do really good planning with part of your eye on gee? What have all these terrible restrictions? And I don't mean terrible because, you know, from a societal perspective, maybe they're positive. I'm not being judgmental, but from a tax perspective, harsh provisions are enacted.

Speaker 4 (13:55):

Why not just do solid, good planning, right? The good fundamental planning, because then whatever happens, you've done good planning. And that sounds simplistic, but it's really important instead of trying to forecast, what's going to happen because as the year has marched on, we know no more than we did January 1st, 2021. We know no more than we did in early 2020, trying to predict what might happen with the election, but what's good planning. We all know making transfers of assets into entity structures owned by trusts is good asset protection planning. We know doing that in a prudent calculated way, where you document with a Solomon C affidavit and all the good stuff we can do. That's good. Asset protection planning. We live in the most litigant society in the history of this planet. Nothing that happens with Washington is going to change the culture of litigation in our society.

Speaker 4 (14:47):

So if you're moving assets into a trust, why not? Jonathan? The point, which is really important. If you use your exemption assets tend to grow and over time, maybe they don't. If you're in retirement and spending down for moderate while fine, but generally assets grow. So putting it no trust, getting asset protection, planning, locking those benefits in is long as you maintain access where the client might need it through spats and slats and dabs and combinations through loan provisions, all the other things we can craft into a trust document to provide access. We are only helping the client. So why not go back to the fundamentals and do really good planning, keeping an eye on gee, all those harsh provisions may come back, but if you do really good planning, that makes sense for the client. The buyer's remorse. It's so many clients had in 2012, and I'm sure many will have it after 2020 and 2021, when the dust settles shouldn't happen because it was good planning. That's where I think the focus should be. That was long-winded. I apologize.

Speaker 5 (15:47):

Let

Speaker 4 (15:47):

Me go ahead,

Speaker 5 (15:49):

But let me emphasize a couple of things that Mara, you said you can't effectively use only part of your existing exemption. For example, you might say, well, if they're going to lower the exemption to basically $6 million, I'll make it give to 5.7 million. Now I'll use the amount above that 6 million, which would be 5.7 million. And I'll preserve that $6 million exemption. If it's lower to that, doesn't work that way. What the IRS has stated, and this will come out in its regulations, which have the force of law. When you say you wind up having a $6 million exemption, but you've made that $5.7 million gift. What they're going to do is to subtract from your $6 million exemption, the amount of exemption you previously used. So your 6 million would be reduced by the 5.7. You've used down to $300,000. That's the plan that the treasury says it's going to enact.

Speaker 5 ([16:48](#)):

The other thing is, is that Marty is absolutely correct. You need some way to ensure that the client can come back and get the benefit of what she's given away. One thing is you can create a non-marital at auction trust for your spouse. Your spouse will benefit from that trust for the rest of his or her lifetime. And you can indirectly benefit and your spouse is going to have, for example, a special power of appointment to continue the property in trust for the donor or grant or spouse when the beneficiary spouse dies. And that seems like it makes a lot of sense, but keep in mind that if you created a trust for your spouse, even if it doesn't qualify for the marital deduction, it is almost invariably going to be a grand tour trust, which means that the income is going to be taxed back to the grand tour.

Speaker 5 ([17:37](#)):

Now, as long as you have a happy marriage, that's great because that trust is there. You use the exemption and it's not going to have to pay any income tax. So it has the possibility of growing entirely to income tax for you on a compounded basis. But the grantor trust status, unless you do something special will continue. Even if you and your spouse get divorced. And you can imagine how upset a client would be. If Mary goes to her and says, Doris, you created this trust for your husband, Tom, you and Tom are now divorced, but you still Doris have to pay the income tax on the income, which is now being paid to your ex spouse. So you can, there are things you can do. And Marty and I have written about these to turn off grant or trust status. For example, you can say, if my spouse and I get divorced, or we separate, my spouse is no longer a beneficiary of the trust.

Speaker 5 ([18:30](#)):

The other thing you can do is to provide that if we get divorced or separated, then distributions can be made to my then ex or separated spouse only with the consent of an adverse party. Those are complex things to really, to try to coordinate and use, but you have to think it through Marty mentioned, you could go to a self settled trust jurisdiction like Alaska or South Dakota or Nevada, and create a trust for your own benefit. And there's a private letter ruling 2009, 4 4 0 0 2 2009 4 4 0 0 2. At least I believe that's the number, which says basically, if you create an Alaska self settled trust, it will not be included in your estate when you die. If you retain no other interest in a discretionary as a discretionary beneficiary, but those are the things as Marty, you said, you have to offer it to your clients. Now, if you look at the February, 2019 issue of a state planning magazine and Mary, I know you keep a company right on your night table and you and your husband, you and your husband looked at it all the time.

Speaker 5 ([19:41](#)):

There's an article in that issue by Abby, O'Connor from Anchorage, my dear friend, Mitchell Gans of Hofstra law school and NYU master's in tax program. And me about something we've developed called a

spat, a special power of appointment trust. One of the problems with having a hybrid DAP domestic asset protection trust is that there's a case in New York, which says if the grand tour can be added back in as a beneficiary, we will consider itself settled from inception. Even if she's not added back in as a beneficiary, but with dispatch, she can never be added. In fact, the terms of the trust, prohibit the trustee from ever making a discretionary distribution to the grand tour. However, as Marty indicated, you're going to have one person or three people. As many as you want have a lifetime non-video Sherry's special power of appointment to appoint any assets of the trust, to any descendant of say the grand tours mother that obviously would include the grand tour, or you could expand it, make it broader, the tours Moran mother. And by the way, I'm not trying, at least I'm not trying to be sexist on this cause I've had a couple of cases involving this, that if you if we always know, or virtually always know who was the mother of someone, we don't always know who the father is. So you're better off saying it's to a a female ancestor whose descendants could be appointed the property rather than the paternal.

Speaker 2 (21:17):

We are going to take a brief break from our episode for a word from one of our sponsors, Carson, private client

Speaker 6 (21:24):

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Speaker 2 (22:24):

Okay. Let's continue our episode. So I'm going to take, I've heard a lot of the strategies that we really love. I just want to give listeners a little bit of break down if I can. So I'm going to put you guys on the spot with a couple of questions. So let's

Speaker 4 (22:37):

Just

Speaker 2 (22:38):

Let's well, okay. But I don't think it's too simple yet. So we'll, we'll try and make it a little simpler, but let's say that, you know, we've, I've heard a lot of this strategies that you use for married couples, but there's a high percentage of single individuals in this country and with a fair amount of wealth. And I know that I represent several, but let's just say that there's a single individual who has 14 million and about half of that is liquid. And half of it's in business from an estate planning perspective this year. Well, we talk about good planning, Marty, what might that person be considering?

Speaker 4 (23:16):

So first of all, your, your right, too many of the planning discussions presume a married couple, in fact, too many of the planning discussions presume the Cleaver family is your hypothetical client. And we all know that in this day and age, about 20% of total family units. So yes all the planning that we talked about works for single individuals. You may have to modify it a tad, but it works jeez

Speaker 4 (23:46):

It's off because it doesn't, it doesn't have to be a spousal lifetime access trust. That's just a silly moniker acronym that, that some advisers made up. It could be a sibling, right? We've done comparable planning for siblings. We've done comparable planning for non-married partners. One of the key cases on the reciprocal trust doctrine, involved brothers, not spouses. So th the moniker that people used in the profession is just forgive me for saying this while we are all trying to be DEI. We're still sort of mired in, in past mindsets. So, so everything we talked about can be tweaked and used for single individuals all just the same.

Speaker 2 (24:33):

So my guy, Marty with 15 million could create what we refer to as a spousal access, but it's not necessarily spousal access. That's what,

Speaker 4 (24:43):

Well, I mean, let, let's, let's get rid of the, let's get rid of the acronyms. I can create a trust if I were single. And if, if, if, if I were close to an and, and, and felt comfortable with my siblings and felt that if I needed a little slack, I could put siblings in. If I really loved them and wanted to benefit, I could put siblings in, I could use a floating spouse clause, so I'm not married today, but maybe I get married to somebody male, female, or otherwise in the future, I can have a floating spouse Plaza, whomsoever I should be married to can be a beneficiary. I can build into that trust. The spat provision that Jonathan talked about, I can have in that trust, a loan provision, where I give married abandon neck as a, non-fiduciary a friend of mine, not a beneficiary, the power to loan me any portion of the trust assets without adequate security, which gives me the ability to get money out of the trust.

Speaker 4 (25:42):

If I need it for living expenses as alone. And what do I care by die? Only my trust money. So I can build in a loan provision. I can not give the trustee the power to reimburse me for income taxes. I can have the trust permitted to own personal use assets that others who I may be living with. I could list partners as beneficiaries, although the definitional problems with that have to be addressed. So clearly what you want to do, if somebody is single, you need to, you need to address who the beneficiaries are, but conceptually it's no different than planning for a married couple, given a potential for 50% divorce rate and something that the profession doesn't really talk enough about in the context of married couples, you have a very high growing rate of divorce among older married couples.

Speaker 4 (26:36):

Now for this single individual, what you might do is gift the business interest to the trust. If it's an act of real business, you may not have the words to the Powell and more case that the donor in conjunction with others could control so long as there's reasonable compensation paid. The, the, the individual single friend of yours could, could gift say that $7 million to the trust. I think it makes a lot of sense, even if more is not given why, because you're still over the exemption, what it may be reduced to you're growing the value of the business out of the estate. The business is worth 20 million, 10 years from now,

and the state exemption is kept or reduced. They brought all that growth out it's good asset protection planning. How can that single individual benefit income tax reimbursement, loan provision, spat provision hybrid DAP provision sibling has the benefit of free floating spouse clause.

Speaker 4 (27:27):

You can even do all of the above, which gives you myriads of ways to get access to the money. Yet, if it's done prudently and carefully and properly administered that single individual should have achieved a great deal of asset protection planning and whether the tax law changes this year, or the exemption is reduced as it is according to the law, as it now is in 2026 or by some future administration, because G doesn't doesn't the tax law change every time somebody else gets in control of Washington, what a great plan. So I don't think that single individual should have any hesitation to plan. Now, what I would recommend they do, and I recommend it to everyone is they should have their wealth advisors. Sometimes some attorneys like you may be, you know, capable enough of doing it, but sometimes it's a wealth advisor, the accountant do some financial modeling so they can see how it plays out so they can make sure that they're not infringing on their ability to support their lifestyle expenses in the future.

Speaker 2 (28:26):

And that's one of the things that Jonathan mentioned, Abigail O'Connor, who does mathematical modeling, which I think is phenomenal. That's one of my favorites. She is amazing thing. I think you introduced me recently and I really enjoy chatting with her. So let's say that I'm single individual. What I heard you mentioned in discussing that strategy was the asset protection planning feature of some of these trusts, a really important feature. One of the discussions I've had with clients this year is the concept that, well, exactly what you just said is right now, we have this move to tax the rich. And we read when we read the build back better act, we're like, wow, we really hate people that have, have any money at all. And we hate everything about trust, and we're just gonna totally destroy this, but you have midterm elections next year, and that could totally swing. And we might have the estate tax haters in office and be with talking about rebill instead of a reduced exemption. So what strategies would you design and say that single person we talk, come up with a trust strategy that makes sense for that person? Is it necessarily, necessarily that they want to have an exit strategy to pull those assets back out? If the estate tax gets repealed or those other benefits of the trust, significant enough to keep that in place?

Speaker 4 (29:41):

Why wouldn't the plan that I proposed for your single friend of transferring, perhaps some or all of his or her business interests their business interests into this irrevocable trust with all these different ways to access it that provides asset

Speaker 2 (29:57):

Protection. Voids probate on those assets creates a structure for succession plan through successor, investment trustees, checks, and balances for when they get older. Why would you change that plan? No matter what they do in Washington, I was looking for, cause I think people think about taxes only.

Speaker 4 (30:18):

That's a terrible mistake. That's why I said, and maybe I wasn't clear. So thank you for clarifying my point. Do good fundamental planning. If you do good fundamental planning to give asset protection planning, succession planning protection from elder abuse, which is rampant in our country, avoids

probate. You have all these tremendous benefits. Why would you unwind the planning? The reason we talked, Jonathan, I so frequently this year about unwind in planning the primary reason. And I'll give you a second one real quick. But the primary reason was we were afraid of a retroactive tax chase that could make a transfer subject to income tax or trigger gift tax that was not anticipated. So for those reasons you wanted to build it in. I don't think generally you want to build in a, a safety valve to unwind planning the exception for that though this year, because of the tremendous pressure on clients to complete planning, maybe you give them the safety valve. So they have buyer's remorse. They're not left behind. Right, Jonathan, I didn't mean to cut you off. Forgive me.

Speaker 5 (31:18):

Well, that's okay. Won't you keep in mind that one of the factors you have to consider is that any trust you create in which the grand tour can get property back is almost certainly going to be a grant or trust. Now, what you can do is to provide that at least the trustee can require, or the people holding the special power of appointment can require that it only be made with the consent of an adverse party. Many of the grand tort trust rules do not apply if the, either distribution or the power, which would cause the trust to be a branch work trust may only be exercised with the consent of an adverse party. Now, the definition of adverse party under section 6 72 a seems to be very clear, but the case law suggests that it's not, that it's dependent upon the particular facts involved.

Speaker 5 (32:10):

And as a consequence, you can't be certain, but one of the things you can put in your document, if you want it is that distributions are, the power can only be exercised with the consent of an adverse party. And if there is no adverse party, cause you might think that the successor beneficiaries are at first, but again, this case law would suggest that in some circumstances they're not. But to say that it can only be done with the consent of an adverse party. And if there is no adverse party, it can't be made. So that would provide you with a safety net, because I can tell you that some people get very upset when they're presented with a very, very large tax bill and they don't want to pay it, but yet they are can't get the distribution out of the trust. As Marty said, you can put in something like a tax reimbursement clause and you know, that will probably work for a state tax purposes.

Speaker 5 (33:04):

There's a revenue ruling 2040 or 64, which says if you have a tax reimbursement clause, that's not going to cause the trust to be included in the grant towards a state, unless creditors can attach it. And unfortunately there's virtually no law out there developed to say, what in creditor is may or may not attach assets in a trust, putting in a tax reimbursement law. I can provision. I can certainly tell you Mike. And the judgment of some judges say, I'm going to hold that you're a beneficiary of this trust at New York creditors can attach it well, if that's the case, you are back to having a grant for trust. So that's one of the things that you really need to negotiate very, very carefully in your drafting.

Speaker 2 (33:48):

So I am seeing this year and I'm gonna go back to the tax issues, but I do want to emphasize that while tax planning is important, the point here is that good estate planning is an overall plan that considers business succession, asset protection, probate, avoidance, disposition of assets among other things, right? So, but I am going to go back to a tax issue. So one of the proposals that still go ahead

Speaker 4 (34:12):

In fairness to all of us practitioners who are working 26 hours a day, right? Cause we all got an extension on the clock for 2021. Those are things that are part of a comprehensive incorrect estate plan and why doing good, fundamental planning makes sense what I'm telling a lot of clients and I suspect you and Jonathan, lots of others are telling people they're working with is listen, we got to get the planning done fast because if they change the law and like Jonathan explained earlier, all those bad provisions that are so harsh may still be thrown into the mix. We got to get the planning done quickly. So we're all telling clients, listen, we're going to focus on the things that should be done now, but all these other pieces will be fit in and address later. So we're going to all circle back.

Speaker 4 (34:55):

We should circle back. My hope is that the clients actually come back and let us do the rest of it. But I just don't want anyone to feel that they're expected to, to address all those things today when you're under pressure to get the tax piece done. So for example, much of this year, I've been trying to get grant or trust in place and gifting in place or note sales in place before changing the law because it's been so fluid in Washington and we tell everyone, come back next year, we're circled back and we'd even started booking appointments in January for this to pick up those pieces. So I just, I wanted to clarify that. Thank you. Sorry.

Speaker 5 (35:28):

Well, it's also keep in mind that I do not believe any of these harsh changes, harsh in the sense that they would adversely affect people trying to do upstate tax planning. I don't think any of those are going to be made retroactive. It's just too late in the year. Yeah. I mean, here, here it is November 13th and the house comes back this week and they're hoping to get it done this week, but they may not. Especially if it's morally suggests there's been some backroom negotiations where they're going to put some of these harsher provisions back in the law, then they're going to break for Thanksgiving. Then they'll come back for another week. Keep in mind that even with a Republican president, Donald Trump, a Republican house and a Republican Senate in 2017, it wasn't until December 15th that you've got the 2017 tax act. Even though they control everything, but just their own internal bickering within the party, even though they controlled everything that just couldn't get done until the middle of December.

Speaker 5 (36:34):

And I don't think these things are going to happen until the middle of December. And again, even if the house acts this week and I think there's a very good chance that it will not act this week. Remember it will go to the Senate and the Senate, I don't think is going to go quietly. So Marty is right. Have your clients come back next year. And if you're in a state which permits decanting, or if the trust instrument itself permits de canting, you can basically do a rewrite of the trust next year, or at least once we know what is going to happen and what is not going to happen.

Speaker 4 (37:08):

So footnote on that, the deemed realization changes could have, and we weren't sure made decanting itself a taxable event, but those seem to be off the table for a while. Now, I don't know that those are going to get thrown back in,

Speaker 5 (37:23):

But we just don't know. I mean, there have been proposals that would say Senator van Hollen who's the senior Senator from Maryland came up with something. He called the step act S T E P. And basically it

would provide that any transfer of an appreciated asset other than to a fully revocable trust or perhaps to a disregarded entity, like a single member LLC, or to your spouse, either outright or in the form of what today would be a marital deduction trust. That would be a taxable event. Very similar to what Canada has capital gains upon death, capital gains upon gift. He proposed is actively effective January 1st, 2021, the beginning of this year, that almost certainly is not going to happen. I say almost certainly none of us can be absolutely sure, but I think any of those kinds of really radical changes will be effective next year. It's just going to be too late in the year to say, well, we're going to go back 11 and a half months. And people who've tried to do planning, following the rules that were in the law at the time they did it are going to be chopped up

Speaker 4 (38:34):

Marry the, the, the implication of what Jonathan said to the question you pose. What do you tell people now, plan, try to get your planning done before the law changes. If you still can build in safeguards, because if even, you know, we don't know, we, we, I agree with Jonathan. I think it's highly unlikely this late in the year to get anything retroactive,

Speaker 5 (38:54):

But why not build in disclaimers consider or maybe drafting rescission provisions use a marital trust structure, build in the ability to get the assets back around wine, the transfer just in case it's not hard to do. Why not build that in and do your planning and just try to get it done. Marnie, let me expand on what you just said. If your spouse,

Speaker 4 (39:17):

She can't get a word in

Speaker 2 (39:20):

Because I haven't asked one question that I want you to build into your elaboration, which is while none of us think we're going to get retroactive changes at this point, there'd still be the possibility drop this estate tax exemption, sunset it and make it effective. January one, right?

Speaker 5 (39:37):

Well, January 1st, 2022, not even Bernie Sanders came out with a proposal to reduce the exemption retroactively. It would all be effective January one of next year. So you still have time to use that exemption. Now there are

Speaker 4 (39:53):

The grantor trust proposals were effective date of enactment. So don't take the foot off the pedal, keep the pedal to the floor and get the planning to

Speaker 5 (40:02):

Yeah. One of the things that clients can do is to have their attorneys set up everything. So it can be enacted real, literally in an hour. In fact, I've had transactions where we've had all the documents, including transfer documents signed, but the client said, Jonathan, hold these until I give up my power to terminate everything. So what will happen is the house will pass a bill. The Senate will pass a bill and then it will go to reconciliation. Once it goes to reconciliation and they agree they'll come out. And this

is, this is true with a bill that's pending right now, Joe, Biden's still hasn't signed. As far as I'm aware of the infrastructure bill, it's been either on a Twain to him or sitting on his desk for a few days. You'll have at least a couple of days between the time that the reconciliation between the house and Senate versions are there.

Speaker 5 (40:56):

And once you know, and it's a good idea to go forward, client can stay, let's make it effective, which would be for the date of enactment. If it turns out it would be very adverse, the client will never let it go forward. That's something you could do, but don't think that if we find out on December 12, what these changes are going to be, and you say, gee, I wish I had had a VA. Gee, I wish I had done that sledge. Gee, I wish I had done that domestic asset protection drug. You're not going to have time to do it. So you've got to get everything done today. The trusts set up the trusts signed the transfer documents, all sign, but noting the bays will not be effective until the client says so, so that's very, very important.

Speaker 2 (41:39):

So are there any other of the proposed tax changes that our listeners should be thinking about? So there's some income, the likelihood of income tax rates going up. I don't think that's dropped out capital gain rates have been affected.

Speaker 5 (41:54):

Well, w w you know, and there was a, there was a proposal by president Biden that the capital gains tax rate on a mounts above a million dollars would be taxed at the top income tax rate. And he, and many others wanted it to go to 39.6, which is where it was before the 2017 act. But Senator cinema of Arizona said, no, I will not agree to any increase in rates either for individuals or for corporations. Now, it's interesting. She said, however, I will let you do a couple of things. I will let you put in a minimum corporate tax, which basically is a new tax on corporations. So for argument, that this would adversely affect American businesses that are in the form of cooperation. That's kind of fall by the wayside. She's indirectly allowing it to happen. The other thing is, is that she said, well, I won't allow individual rates increase, but apparently she's not opposed to some surcharges. And the surcharges, you know, bearing for someone like you, who makes more than, than $10 million a year, you would wind up paying an extra 5% on your income above 10000008% on your income above 25 million. Now the truth is, is not.

Speaker 4 (43:07):

And your lifestyle, Mary, at 8%, surtax over 25 million. You're going to get rid of, you're going to have to get rid of one of your yachts.

Speaker 5 (43:15):

Yeah. Or one of your private jets, but here's the, here's the problem for a trust. That's not a grant or a trust. Those surcharges click and nod at 10,000,020 5 million, but at 200,000 and 500,000 and as Marty and I have discussed, it doesn't mean that you'd gotten an enormous trust, which is going to produce 200,000 or 500,000 of income. It could be you for example, that you get distributions from a qualified plan or an IRA, all of which will be taxable income. And because we now have a rule that those distributions, as a general matter, have to come out within 10 years of the death of the owner, of the IRA or participant in the plan, you may well exceed that $200,000 level. In addition, maybe you've had an assets that's appreciated in the trust. Remember the trust could have been around for 15, 20, 50 years and may have a lot of inherent gain in it.

Speaker 5 (44:14):

Well, when, and if that asset is sold and you have at least 200,000 of gain or 500,000 of gain, now you're going to have to pay that surcharge on the amounts above 200,000 or $500,000. This will really hurt things. Now, Marty and I are in the process of having an article published, which talk about ways in which you can take action to try to reduce the amount of taxable income at an estate, a decedent's estate or a non-grantor trust has by the way, this may mean that in a lot of circumstances where you say, I wouldn't want a grant or trust, maybe you do because even with having the income attributed back to the grand tour of the grand tour may not exceed the 10,000,020 $5 million threshold. But if the trust for a non-grantor trust, it would easily exceed the 200,000 and or $500,000 thresholds.

Speaker 4 (45:09):

Some of the things that practitioners can do right now, Mary in light of all this stuff we're talking about when you draft a trust, put in a disclaimer, so make somebody a primary beneficiary, give them a right to disclaim assets. So you can only find the planning when you're doing a non-grantor trust or even for grantor trust, but on death becomes, non-grantor broadened the class of beneficiaries, add that elderly aunt or uncle that somebody's caring for, because it just gives you another person to shift income down to it at a lower bracket, and perhaps avoid some of the cert taxes, give the ability to a trustee to include capital gains in income. So you can get it out of the trust, not have the trust stuck with it. And as Jonathan said, just to illustrate, it's not just Uber wealthy clients with big, giant trusts that are going to be nailed by this.

Speaker 4 (45:57):

You know, a husband dies and a surviving wife has a house and it's in a credit shelter trust. And the credit shelter trust goes to sell the house and you have a $250,000 gain. She's hit with a, that that trust is built with a 5% surtax. So this is going to hit a lot of smaller unexpecting client unsuspecting clients that are not even used to talking to their attorney or their account. So, so build in more beneficiaries build in the ability to include cap gains in income. Also included trusts that are grant or trust, consider an overarching power for somebody to turn off grantor trust status. Why not? It's in a replicable trust throw in a mechanism, make sure there's a way to turn off grantor trust status, because we've seen constantly with tax law changes that if they don't go through this year, the next administration or the one after that may bring back and resurrect it. And re-enact it. So why not throw in all those flexible mechanisms into the trust you're drafting right now today?

Speaker 2 (47:01):

One other thing I do want to highlight and ask you guys about is we have kind of a unique opportunity for charitable planning this year in terms of the amount that you can deduct. Can you give us some, give some input on that?

Speaker 5 (47:14):

Yeah, I mean this year and I believe last year you could get a deduction for contributions to charity of up to 100% of your income, historically, depending upon the type of property involved and the type of charitable organization you're giving to, you could only reduce your taxable income by 20%, 30% and 50%, or recently now 60%, if you give away cash, not, not just on appreciated assets, but cash to a punk, we support a charity like a university or a hospital or the cancer society or the heart fund. You can go ahead and do that. That's going to end apparently this year. And I don't think there's anything in there to say you can't do it. One of the reasons you might want to do it, let's say you have an asset. Would you

think you're going to sell? And there's going to be a lot of gain there, and you may be pushed into the $10 million or $25 million threshold.

Speaker 5 (48:11):

Well, if you're charitably inclined, maybe what you want to do is to sell it this year and to give that make a donation again, it would have to be in cash to get the 100% deduction, but you could protect that entire income from tax. Now that may or may not make sense. Could you do it to a trust and get the deduction or through say a charitable lead trust? Well, again, keep in mind that it's gotta be to a publicly supported charity in order to reach that a hundred, a hundred percent deduction threshold, which you could go up to 30% by creating a charitable lead trust that might make some sense and do the balance to another one. It, it really is worthwhile thinking about it. And there's one other thing. There are very, very Horace proposals and we're told that there's a good chance.

Speaker 5 (49:02):

They will go through with respect to qualified, defined contribution plans, not benefit plans, but defined contribution plans. An IRA, basically, if the plan or the IRA combined is at least $10 million, you're not going to be able to make additional contributions. In addition, if you are over 10 million, one proposal would say, you have to take out half right away. This will be next year, half of the difference between what you were having the plan, let's say you have 18 million and the $10 million threshold. So you would have to take out half of that $8 million access above 10 million and put it in your income today. And even more stark. Is that anything above 20 million you'd have to take out and pay included as a required minimum distribution at the beginning of next year. So if you would have someone who has a very, very large IRA, let's say like, Marty, I think has told me he has one that's $40 million. Well, let's just keep it at 40, hang out with Mary and her yachts. [inaudible]

Speaker 5 (50:11):

Million, the difference between 10,000,020. So you'd have to take fine and then you'd have to take the other 20, which would bring you up to 40. Well, now you're over that $25 million threshold. So what you might want to do is not wait till next year, if you think this is going to happen, and you can take it out very rapidly, but go ahead and take it out by the end of this year and then donate it to charity because you could protect a hundred percent of it. So that's something that if you have a client who has a very, very large IRA or a very, very large defined contribution plan combined of over 10 million, you really need to start planning for that now. So, you know, w what charity is going to get it. What am I going to do? Remember you can go up to 30% for a contribution to a charitable lead trust, which may also produce very good estate planning and estate tax planning, as well as income tax planning. But if you have stumbling with a very, very large IRA or defined again, contribution plan, you really need to start looking at that now, because that's been in virtually all of the bills. Now, maybe it will come out. Maybe no bill will be passed at all, but they're pretty serious about that because the very bad publicity that has been given to large IRAs and defined contribution plans

Speaker 4 (51:36):

And the American ask you a very important question. You can, have you ever done a podcast where you've spoken less than this one? No.

Speaker 2 (51:47):

Sorry. I'm going to say one other thing. One of the other set of facts where I've used, you know, we've all seen the private equity throwing, incredible multiples at businesses. And so a lot of clients have sold this year. And one of the other areas we've used the charitable deduction. As an example, I had a client who had fan Phantom stocks. It was all ordinary income to her, but she also received a significant Harrington's she's charitably inclined. So we use that charitable deduction to reduce the significant income. That's all gonna come in in this one year. And that charitable deduction is going to one of the other discussions on that has been, should you, you know, with the possibility of increased tax rates while I use the charitable deduction this year, and I think it's, you know, fact-based, but there's good reasons to, anyway, we're getting to the end of our time. So I'm just going to ask each of you, if you have any last thoughts.

Speaker 4 (52:34):

I think that one point we didn't make maybe indirectly a few times, but it's really important practitioners. If you're listening as practitioners, not as, as taxpayers, you need to be very protective of yourselves because there is tremendous pressure for people to move very quickly and make complex decisions about a lot of money under tremendous time pressure, make sure you offer options to people, send a letter caveating that you have no way of predicting. No one can predict what's going to happen. Try to protect yourself, make sure you alert clients. And if you can, I know you're always all in tremendous time pressure, at least get a letter out that in addition to the things I just mentioned, just list bullet list. If nothing else, some of the many different issues that could arise there was just recently a that came out where I think it was husband gave wife interest in an entity and the next day wife gave it to a trust.

Speaker 4 (53:35):

And the court attributed that to being from the husband step transaction, not enough time, not held in her name, integrated plan and so on. You gotta be very careful. There's a lot of risks with this. We can't differentiate whether it's a sibling lifetime access, trusts, spousal, lifetime access trust, or whatever variant to trust you're doing. If you have multiple people doing trust, we used to love to do them in different tax years to help differentiate them. We don't have that luxury protect yourself. And if you're a taxpayer listening to this, these risks are significant, but the way to address them is not, not planning the way in my view to address the risk is cautious thinking things through and lots and lots of flexibility and lots of, lots of access to the assets and trust. And we've talked about all those things in this program. So whether you're a taxpayer or a practitioner, be careful be prudent and, and make sure that you take the steps that we've talked about to protect yourself,

Speaker 2 (54:36):

Jonathan.

Speaker 5 (54:37):

Yeah. Thank you, Mary. There are two things online to kind of repeat that we went through. One is you can't do nonreciprocal trusts for a husband and wife for, for you know a sisters or brothers or a brother and sister, because you're going to be caught up in the reciprocal trust doctrine. You're going to have to have only one to it. As Marty said, you've may be better off unless you're going to use the full exemptions of both, because at least that way you could preserve more of the exemption for the spouse or for the sibling who doesn't make the large transfer. So keep that in mind, if you're going to do one for each other, you do one perhaps as a traditional so-called spousal lifetime access trust. Remembering

you're going to want a mechanism to turn off grant or trust status. And the other one might be a spat of special power of appointment trust, which could benefit the spouse who created the slat for his or her spouse.

Speaker 5 (55:35):

Keep that in mind. Very, very important. The other thing is I said, and some of you will be caught up in this. You're going to get a call after we know what it is and say I now want to implement the plan. You're not going to have time to do that. In fact, I know a number of practitioners to have sent letters out to their clients. I, as of November 1st, for example, we will not do any planning for you. We're just to inundate it. So if you have a client who might want to act, get permission to put everything into effect documents, sign transfer documents, also executed, but held by the attorney and not to be effective until the client says go,

Speaker 2 (56:14):

Thanks Jonathan. Thanks Marty and Jonathan for being here today, as we reached the end of our episode, I want to thank our sponsors, interactive, legal, and Carson, private client. Well, that's all for now. Thanks for listening to today's episode and stay tuned for our weekly releases

Speaker 7 (56:35):

Hood at media production.