



Issue 449  
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# Financial and Estate Planning

*Estate Planning Review*

## DEFECTIVE TRUSTS OFFER UNIQUE PLANNING OPPORTUNITIES

*The use of an income tax defective trust as a tax planning strategy is getting increased attention from estate planners, particularly as a wealth shifting device. When combined with the benefits trusts generally offer, a well designed defective dynastic trust should, for many families be the centerpiece of the family estate plan for years to come. In the following interview, Richard A. Oshins of the Law Offices of Oshins & Associates, Las Vegas, Nevada, discusses some of the benefits and planning opportunities that defective trusts offer. Mr. Oshins comments on the installment note sale to a defective trust and compares it to similar extremely effective estate planning techniques such as the grantor retained annuity trust (GRAT). Mr. Oshins also comments on techniques which enhance defective trust planning, such as opportunity shifting and beneficiary defective trusts both of which may enable the estate planner to avoid the transfer tax system with substantially more wealth than the traditional note sale by a grantor to a defective trust.*

**CCH:** Describe the defective trust concept and the benefits of that planning technique.

**Mr. Oshins:** The defective trust is an irrevocable trust in which, for transfer tax purposes, the trust property is owned by the trust and not includible in the transferor's estate, but for income tax purposes, the trust is a grantor trust and income is taxed to the grantor as if the trust did not exist. A variation of that arrangement is a trust where the beneficiary is treated as the owner of the trust for income tax purposes under Code Sec. 678. Generally, grantor trust status is obtained by intentionally violating one or more of the grantor trust rules under Subchapter J of the Code.

The defective trust offers many planning benefits and opportunities. First, since the grantor, rather than the trust, will be taxed on the income earned by the trust, the

grantor will be making, in essence, the functional equivalent of a tax-free addition to the trust without incurring any gift or GST tax. Second, by paying the tax, the grantor is reducing his or her own taxable estate by the tax paid and any future earnings it would otherwise have generated. Any potential growth on the "tax" money will inure to the benefit of the trust rather than the grantor. Third, the IRS has ruled in Rev. Rul. 85-13 that transactions between the trust and its "owner" are ignored for income tax purposes. This enables the grantor to engage in various value shifting techniques with the trust, income tax free.

**CCH:** What are some of the estate tax planning techniques available using the defective trust?

**Mr. Oshins:** In my experience, the three most productive wealth shifting techniques, particularly for passing on interests in closely held business entities, are opportunity shifting, installment note sales to defective trusts, and GRATs. These last two techniques closely resemble each other, but in my opinion, in most instances, the note sale offers superior results. In each case, in the typical transaction in which our firm is involved, the estate owner transfers a non-controlling interest in the entity in exchange for either a note, in the case of the sale, or an annuity interest, in the case of the GRAT. Opportunity shifting is somewhat different from the other two techniques, so I'll address that technique after I compare the other two.

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The use of an installment sale to a defective trust in exchange for the trust's promissory note has become an increasingly popular and extremely effective wealth shifting strategy. Generally, this technique is used to sell non-controlling interests in closely held entities, options, lettered stock or other assets which have large appreciation potential. The note typically is structured as interest only for a period of time, with a balloon payment at the end of the note term and a right of prepayment. The interest is determined with reference to the rate under Code Sec. 1274. To the extent that the trust assets produce a return in excess of the relatively low Code Sec. 1274 rate, value will be shifted from the estate owner to the trust. The sale is often made of a non-controlling interest in an entity which was part of a controlling interest in the hands of the seller, thus converting the interest sold to one which is entitled to a valuation discount. The ability to achieve the requisite interest rate where an interest in a closely held business entity is being transferred is usually easy, since the interest rate is applied against the value of the interest sold after applying the appropriate valuation discounts, whereas the available cash flow to the trust is based upon a percentage of gross distributable cash flow which is not affected by the valuation discount and which is nearly always controlled by the seller. Thus, for example, an entity which has a cash flow of 10 percent of its value will yield a 16.67- percent cash flow on a transfer which received a valuation reduction of 40 percent.

**CCH:** Would you compare the installment note sale with the GRAT?

**Mr. Oshins:** I believe the installment note sale is superior to the GRAT in most respects.

First, if the grantor dies during the term of his retained interest, it is the IRS's position that all of the trust property will be included in his estate, including post-transfer appreciation. With the installment sale, survivorship is not essential in order to result in a tax benefit. The instant the sale is made, the asset owned by the seller is converted into a long-term installment note with a face amount reflecting the value of a non-controlling interest in a closely held entity and a lower than market interest rate. The low interest rate, long term, and possibly questionable ability to pay would entitle the estate to obtain a valuation discount on its Form 706.

In many instances, the relative tax risk by using a GRAT rather than a note sale is even greater where the interest transferred would be part of a control interest in the hands of the estate owner. For gift tax purposes, the transfer to the GRAT will reflect a valuation discount. However, if the interest is includible in the estate, it will often be converted from a non-controlling interest into one which is valued as part of a control block in the hands of the

estate owner, resulting in significantly larger transfer taxes. By selecting the sale option, the estate owner is assured of obtaining a valuation discount to reflect a non-controlling interest.

A second major drawback of a GRAT as compared to a sale is that generation-skipping transfer (GST) tax exemption cannot be allocated until the grantor's retained interest has ceased because of the estate tax inclusion period (ETIP) rules. Code Sec. 2642(f) provides that GST tax exemption may not be allocated during any period in which the trust would be included in the grantor's estate, other than by reason of the three-year rule of Code Sec. 2035. At that time, the leverage feature of the retained interest is lost and the exemption would have to be allocated against the full value of the property, which is generally regarded as wasteful. In contrast, the sale technique does not include a retained interest which would subject the seller to estate tax inclusion and, consequently, the ETIP problem is finessed.

For those who, like me, believe that virtually all gifts and bequests should be made in trust in order to enhance what the beneficiaries receive, in particular the insulation of the transferred property from creditors and transfer taxes, the inability to use dynastic planning with a GRAT is a particularly meaningful detriment.

Third, the payout in the GRAT is inferior to the note sale alternative in at least three ways: (1) The interest rate for a note sale is determined under Code Sec. 1274, which is generally less than the interest rate for a GRAT which under Code Sec. 7520 is 120 percent of the federal mid-term rate under Code Sec. 1274. The difference in interest rates will cause more to be passed out of the estate by using the sale alternative; (2) In a GRAT, the annuity payments are fixed by the trust document and are thus inflexible; (3) Moreover, the payment schedule cannot exceed 120 percent of the preceding year's payments.

## Financial and Estate Planning

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Because the GRAT payments will include principal and thus, will be larger, earnings from the principal will inure to the benefit of the grantor. That result is contrasted with the fact that the principal is retained by the trust in an interest-only installment sale until the balloon payment, which enables the trust to derive the benefit of the earnings and growth of the unpaid deferred principal, income tax free.

Fourth, it is the position of the IRS that in a GRAT the gift tax cannot be zeroed out. Although most practitioners believe that the IRS's position is incorrect, the risk of gift tax is a negative factor which must be considered. Conversely, the sale will be made for fair market value and, therefore, there is no gift.

Fifth, the Treasury Regulations prohibit anyone other than the owner of the retained interest from participating in the trust until the end of the retained term. Conversely, there is no such prohibition for a trust which acquires an installment note. Therefore, the trust beneficiaries can enjoy the trust property immediately with the sale technique, but must wait until the end of the term of the GRAT to obtain any benefits.

The GRAT, on the other hand, has two features superior to the installment sale. First, if the valuation of the interest transferred is incorrect, there is a much greater gift tax exposure using the note alternative. Moreover, because the sale is treated as having no gift tax element, no GST tax exemption would have been allocated. Although there are several methods which can be used to mitigate the risk, none of them offers the risk avoidance that is inherent in a GRAT in which the annuity interest is expressed as a percentage of the initial value of the asset transferred. With a GRAT, as a condition of qualification, the Regulations require a revaluation provision whereby any shortfall or overpayment must be repaid with interest. This requirement negates the gift tax exposure.

The second benefit that the GRAT offers is that there is specific statutory authority under Code Sec. 2702 and other administrative guidance. The sale alternative, on the other hand, is not specifically authorized under the Code and the structuring of the arrangement is based upon the judgment of the practitioner rather than by following published judicial and administrative guidance.

**CCH:** In addition to the note sale and GRAT, you mentioned the concept of opportunity shifting as a mechanism for funding the defective trust. Would you please explain that technique?

**Mr. Oshins:** I believe that the best and most underused estate planning strategy available is "opportunity shifting," which can be defined as the shifting of the oppor-

tunity to earn income or generate wealth. In its simplest form, a person, generally a parent, will refer business to another person, or give advice to the other person about a favorable business opportunity. In the preferred, more complex version, the opportunity shifter will refer the business or give advice to a defective trust or an entity, such as an LLC or limited partnership in which interests are owned by a defective trust. Because the referring party or advisor never owns the property, there is no transfer that would be subject to the transfer tax system. Thus, when a new business is formed, a product is being developed, or a favorable investment opportunity is available, a new entity should be formed, some or all of which should be owned by a defective trust.

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One variation of this concept, and a planning technique often not considered, is for the individual who has the opportunity to find a third person, such as a parent, who will set up a trust for the primary benefit of the one who has the opportunity, and gift the seed money for the new venture to the trust. I often refer to this approach as "getting an advance on your inheritance." In many instances, a small gift to a dynastic trust which is placed in a favorable business venture or investment opportunity, can mature into a significant fund which, because it is in a trust set up and funded by a third person, will not be subject to the opportunity shifter's transfer tax and will be protected from his or her creditors. Moreover, under this scenario, the person who has the favorable opportunity can be the trustee and the primary beneficiary of the trust. However, in some egregious situations, courts have ignored the trust's spendthrift provisions and have allowed creditors to access trust funds in some egregious situations.

**CCH:** You mentioned a variation of the defective trust arrangement where the beneficiary is treated as the owner. How does that work?

**Mr. Oshins:** Where all transfers to a trust are subject to a power of withdrawal by the beneficiary, and the trust is not defective as to the grantor, the powerholder is treated as the owner of the trust under Code Sec. 678(a)(1) for income tax purposes. The income tax treatment of lapsed powers of withdrawal is not certain. However, the IRS

has consistently ruled that the former powerholder remains the taxpayer after the lapse under Code Sec. 678(a)(2). Thus, a trust that is defective as to the beneficiary can be created by giving the beneficiary the power to withdraw contributions to the trust.

In many respects, the Beneficiary Defective Trust is superior to a trust under which the grantor is taxed. All benefits of the traditional defective trust are also available to the beneficiary of the Beneficiary Defective Trust. In addition, because the trust is set up by a third person, the beneficiary can be the trustee of the trust as well as its primary beneficiary without exposing the trust assets to the transfer tax system. Since the trust, rather than the beneficiary, owns the property, the assets receive protection from creditors, including a spouse in a divorce. These benefits, control and enjoyment of the trust property could not be obtained by a grantor because of Code Secs. 2036 and 2038. Another right that can be given to a beneficiary and not retained by a grantor is the power to control the subsequent disposition of the trust assets.

**CCH:** Would you give us an illustration of how the Beneficiary Defective Trust would work?

**Mr. Oshins:** Assume a client has a new business opportunity which requires a \$100,000 investment. Instead of the client shifting the opportunity, a third party, typically a parent, would set up a trust for the primary benefit of the client and, secondly, for the client's descen-

dants. The client can be selected as the trustee and can be given a broad special power of appointment over the trust assets (we call this a "Beneficiary Controlled Trust"). The client would also be given a power of withdrawal over the \$100,000 which lapses as to the greater of 5 percent or \$5,000 each year.

As a result of the power of withdrawal, the client will be treated as the owner of the trust for income tax purposes, and, therefore, can sell assets to the trust tax free. This will enable the client to access the cash flow of the business for his own personal enjoyment. The client will also be able to shift assets from his taxable estate to the trust. Because he is both the trustee and primary beneficiary, he could continue to use, control and enjoy the transferred assets without them being subject to inclusion in his estate. Code Sec. 2036 would not apply because the assets would be transferred for equal value. The estate tax exposure would be limited to the amount the client could have withdrawn at death, an amount that would be reduced annually by the lapse. If the business opportunity proved to be successful, the value of the trust would grow rapidly, resulting in the amount subject to withdrawal lapsing quickly.

The concept of a Beneficiary Controlled/Beneficiary Defective Trust, combined with opportunity shifting concepts, can significantly erode the transfer tax system, particularly for families that own closely-held businesses.

## Estate Planning

### ACCELERATING THE CODE SEC. 1014 BASIS STEP UP

*Taxpayers holding appreciated assets who are also faced with the tragedy of a seriously ill spouse should consider making an inter vivos transfer of those assets to the spouse. If the spouse survives for more than one year, the assets can be transferred back to the taxpayer at the spouse's death with a stepped-up basis, and there is little, if any, downside risk as compared with holding the property until death. If the spouse does not survive the one-year period, the donor will get the property back with the same basis it had before the transfer and the property will be included in his or her gross estate at the same value.*

One of the more favorable income tax provisions in the Code is the basis step-up (step-down) rule of Code Sec. 1014. Under Code Sec. 1014, the basis of property in the hands of a person acquiring it from a decedent is generally the value of the property for estate tax purposes rather than the property's basis in the hands of the decedent at the time

of death. The tradeoff is that by keeping the property until death, the taxpayer will pay tax at the tax-inclusive estate tax rate rather than at the tax-exclusive gift tax rate.

**Example 1.** Martha Johnson bought 1000 shares of Alliance Corporation stock in 1988 for \$10 per share. By 1998, the value of the stock has increased to \$100 per share. Johnson dies in 1998 and the stock passes to her children. Although Johnson's basis in the stock at the time of her death was only \$10 per share, her children will take a basis of \$100 per share in the stock by operation of Code Sec. 1014. The stock will be subject to the tax-inclusive estate tax rate.

Suppose a taxpayer has highly appreciated assets but wants to dispose of the assets as soon as possible instead of keeping them until death or wants a stepped-up basis without having to pay tax at the tax-inclusive rate. Is there any way to get a stepped-up basis under Code Sec. 1014 without actually possessing the assets

at death? For example, what if the taxpayer transferred the assets to a family member with a serious illness and received the assets back at the family member's death? The taxpayer would receive the assets back with a stepped-up basis and could then give the assets away during life (e.g., to the children) at a lower effective tax rate. Of course, the children would lose the benefit of a stepped-up basis to the extent of any appreciation of the assets between the date of the gift and the date of the taxpayer's death.

### Potential Obstacles

The IRS has two possible weapons it can use to attack this kind of strategy: Code Sec. 1014(e) and the sham transaction doctrine. Extremely unfavorable transfer tax consequences might also occur if the transaction is not properly structured.

**Code Sec. 1014(e).** This section denies the Code Sec. 1014(a) basis step up for assets to their estate tax value if (1) appreciated property is acquired by the decedent by gift during the one-year period ending on the date of the decedent's death, and (2) following the donor's death, the property is reacquired by the donor or the donor's spouse (Code Sec. 1014(e)). If Code Sec. 1014(e) applies, the donor's basis in the property after reacquiring it is equal to the decedent's basis in the property just before death (Code Sec. 1014(e)(1)). The Code Sec. 1014(a) basis step-up is denied regardless of whether the transfer back to the donor is accomplished through a specific bequest, pecuniary bequest, general bequest, or a residuary bequest (Economic Recovery Tax Act of 1981, P.L. 97-34; HR Rep. No. 201, 97th Cong., 1st Session (1981)).

**Example 2.** Ray Smith owns Bailey Corporation stock with a basis of \$10,000 and a fair market value of \$100,000. His father Herb, age 80, has terminal cancer. Ray makes a gift of the stock to his father. Under Herb's will, all of his property passes to Ray. At the time of Herb's death the value of the stock is \$105,000. If Herb lives for less than one year after the transfer, Ray takes a basis of \$10,000 in the Bailey stock. Thus, if Ray sells the stock immediately after receiving it, he will recognize a gain of \$95,000 for income tax purposes.

The rule of Code Sec. 1014(e)(1) cannot be avoided by having the estate of the donee sell the appreciated assets and distribute the proceeds to the donor (Code Sec. 1014(e)(2)(B)). If this is done, the estate is denied a basis step up on the sale to the extent the donor is entitled to the sale proceeds.

**Example 3.** May Cooper owns an asset with a basis of \$20 and a fair market value of \$100. She transfers the asset to her husband Mort within one year of Mort's

death. At the time of Mort's death, the fair market value of the property is \$120. If the estate sells the asset and distributes the proceeds to May, the estate will have a gain of \$100 (\$120 - \$20).

**Sham transaction doctrine.** The sham transaction doctrine may be applied by courts when a taxpayer enters into a transaction with little or no economic significance merely to obtain a tax benefit (See, e.g., *K. Knetsch*, 60-2 USTC ¶9785, 364 US 361). If there is a pre-arranged agreement that the donee will return the property to the donor at death, the IRS may argue that the transfer has no real substance and should be disregarded for tax purposes.

**Unfavorable transfer tax consequences.** Transferring property to a family member and then having the family member transfer the property back to the original donor at death potentially adds two extra layers of transfer tax. The gift tax may be incurred on the transfer to the family member and the estate tax may be incurred on the transfer back to the donor. Note that in Example 2 above, the transfer of stock by Ray to his father would have resulted in a taxable gift of \$100,000 for Ray. Moreover, the \$105,000 date-of-death value of the stock would have been included in Herb's estate. Unless the annual exclusion can be used to cover all the gifts and Herb's estate was small enough so that no estate tax would be payable, the transfer tax disadvantages would reduce and perhaps, outweigh any income tax benefits.

### Avoiding the Potential Obstacles

The key to making the technique work is to make the transfer of assets to the spouse. The unlimited marital deduction can be used to avoid any transfer tax on the gift to the donee or on the retransfer of the assets back to the donor at the donee spouse's death. In addition, there is less need to attach strings to the gift or to enter into an agreement that the property will be returned to the donor at death, as there would be in the case of a transfer to another relative.

Making the transfer to the spouse does not eliminate the potential Code Sec. 1014(e) problem, but there is little downside risk. If the spouse dies within one year after the transfer, the donor will simply get the property back with the same basis he or she had before the transfer.

### Conclusion

Taxpayers with appreciated assets and a seriously ill spouse should consider a spousal transfer of the assets if there is any chance the spouse could live for more than one year. If the spouse survives for more than one year, the donor gets a stepped-up basis. If not, the donor is no worse off from a tax perspective than if nothing had been done.

## Charitable Giving

### GIFT ANNUITIES CLOUD DISSIPATES

The U.S. Court of Appeals for the Fifth Circuit recently dismissed antitrust claims against the American Council on Gift Annuities (the Council) and a number of charities and universities (*Ozee v. The American Council on Gift Annuities, Inc.*, CA-5, 1998-1 CCH TRADE CASES ¶72,177). The plaintiff, a guardian of a purchaser of a charitable gift annuity, argued that the Council and the other defendants conspired to fix the rates of return on such annuities. Although the case was remanded to the district court to determine whether any state law claims survived, the Fifth Circuit's decision appears to end a saga of litigation and lobbying involving a large number of charities, the Texas state legislature, Congress, and the U.S. Supreme Court.

#### Background

Since 1983, the Council has set interest rates for charitable gift annuities—donations to charity in exchange for a fixed income stream for the remainder of the donors' (married or single) lives. Those rates are significantly lower than the applicable government or commercial annuity rates, which results in a substantial charitable deduction for the purchaser of the annuity. The Council's avowed purpose for fixing and policing the annual payout rate is to prevent charities from competing for donors by offering higher charitable gift annuity rates.

#### Litigation and Legislation—Round One

The antitrust litigation was initiated by the guardian of an elderly Texas resident who had used \$200,000 to purchase charitable gift annuities. The guardian alleged that the Council and various charities violated federal antitrust law and several state laws by engaging in a price-fixing conspiracy that harmed charities.

After the defendants' motion to dismiss the suit was denied, the Council successfully lobbied Congress and the Texas legislature to pass legislation that would protect the charities' fixed annuity rates. The Charitable Gift Annuity Antitrust Relief Act of 1995 (P.L. 104-63) provided a retroactive exemption from federal and state antitrust laws for Code Sec. 501(c)(3) organizations that agreed to use fixed annuity rates. The Texas legislature intended to eliminate the plaintiff's state law claims by permitting

nonprofit organizations to sell annuities and to operate trusts.

This legislative response did not put an end to the litigation, however. The U.S. District Court for the Northern District of Texas denied the defendants' motion for summary judgment, holding that, in order to qualify for the 1995 antitrust exemption, charities needed to prove that they in fact met the definition of Code Sec. 501(c)(3) (1996-2 CCH TRADE CASES ¶71,622, 943 FSupp 685). An IRS determination that a charity was tax exempt was insufficient proof. The court also held that, if one of the defendants failed to prove that it qualified for the antitrust exemption, the other defendants would also lose their exemption because, according to the court, the 1995 law did not "authorize conspiracies with nonexempt entities." With regard to the Texas state law amendments, the court dismissed them as "irrelevant" because they were "clarifications," not retroactive changes.

#### Round Two

Following the setback in U.S. district court and an appeal that resulted in sanctions being imposed on one of the not-for-profit defendants, the Council again asked Congress for aid. The result was the Charitable Donation Antitrust Immunity Act of 1997 (P.L. 105-26), which retroactively immunizes any person in any way related to charitable gift annuities, as well as the charitable gift annuities and charitable remainder trusts themselves, from federal or state antitrust claims.

The U.S. Supreme Court subsequently remanded the case for further consideration (*American Bible Society v. Richie*, 118 S.Ct. 596 (1997)), leading to the Fifth Circuit's dismissal of the antitrust claims.

#### Planning Implications

Barring any further adverse determinations on state law grounds, it appears that the Council has successfully defended the status quo and the ability of charities and donors to rely on uniform gift annuity rates. From a planning perspective, fixed rates eliminate the need to "shop" for the best rates and make it easier for a planner to "run the numbers" and determine whether a charitable gift annuity is appropriate for a particular client. By increasing the donor's charitable income tax deduction, the relatively low level of rates can also be regarded as effectively increasing an annuity's yield.

## Retirement Planning

### NEW PUB EXAMINES 401(k) FEES

*With the continuing trend toward participant-directed retirement vehicles such as 401(k) plans, investors now must concern themselves with more than just the vagaries of the stock market. One issue that has garnered considerable attention recently concerns the fees charged by 401(k) plans. A new booklet issued by the Department of Labor's (DOL) Pension and Welfare Benefits Administration (PWBA) helps investors understand these fees and how to obtain further information about fees charged to their own plans.*

Entitled, "A Look at 401(k) Plan Fees," the booklet first examines the impact of fees. Although it may be obvious that fees will reduce overall returns, the long-term effect may not be so obvious. The booklet points out the example of an investor with \$25,000 in a 401(k), earning an average of seven percent, whose account is reduced by fees and expenses of 0.5 percent over a period of 35 years. If this situation is compared to the same account being reduced by fees and expenses of 1.5 percent, the one-percent differential in fees results in a 28-percent difference in account balances at retirement (\$227,000 v. \$163,000).

Also considered are the various types of fees and the payment of them. The booklet points out that these fees fall into three main categories: (1) administration fees; (2) investment fees; and (3) individual service fees. Of these three, investment fees are by far the largest component of 401(k) fees. Because they are deducted from investment returns rather than being specifically identified, they also may not be readily apparent.

With respect to investment-related fees, the booklet includes simple descriptions of the different types of sales charges and other fees associated with various investment vehicles (e.g., mutual funds, collective investment funds, and variable annuities). It also points out that, although some mutual funds may be advertised as "no load" funds, that does not necessarily mean that the fund is not charged a Rule 12b-1 fee.

Finally, the booklet outlines how investors should go about obtaining more information on the specific plan(s) in which they are invested. Included is a handy 10 question checklist for investors to use in evaluating their own plans. Although the booklet provides a good starting point for employees wishing to learn more about this topic, it is only the beginning of the educational process. To learn more, employees should first consult with their plan administrator, and then, with their professional financial advisor. The booklet is available through the DOL's web site at <http://www.dol.gov/dol/pwba> or at their toll-free number (800) 998-7542.

## CFP RETIREMENT SURVEY

*Americans are relying more on employers rather than on themselves or Social Security to finance their retirement years, according to a new survey conducted among 906 Certified Financial Planner licensees nationwide by the Certified Financial Planner Board of Standards (CFP Board).*

CFP licensees surveyed said that 67 percent of their prospective clients consider their employers' retirement plans as their primary source for funding retirement goals, while 15 percent are relying on personal investments and 10 percent on IRA/SEP personal retirement plans. Not surprisingly, a mere three percent mentioned Social Security as the primary source for retirement funds. Given the overwhelming dependence on employers' retirement plans, the percentage of clients who contribute the maximum allowable amounts into such plans is surprisingly small. Only 52 percent of respondents said that half or more of their clients contribute the maximum amount allowed into their employer's retirement savings plans. The good news, however, is that 92 percent of CFP licensees surveyed say that the majority of their clients do participate in employers' retirement plans in some way. To improve their clients' chances of achieving retirement goals, survey respondents most frequently recommend diversifying investments (35 percent) and modifying living expenses (27 percent). Thirteen percent recommend changing life goals, while just six percent advise investing in riskier investments for higher returns.

The top factor given for clients not achieving retirement goals is failing to plan soon enough (81 percent). Although nearly all CFP licensees surveyed (88 percent) said they would prefer their clients to start planning for retirement before age 39, only 13 percent said their clients actually do. The majority of all respondents (56 percent) said their clients typically become concerned about retirement planning between ages 40 and 49, while 29 percent reported their clients focusing on retirement planning between ages 50 and 59.

Employee benefits managers take note: According to the survey, the majority (56 percent) of CFP licensees find information distributed by employers about their retirement plans to be only "somewhat useful" for their clients' planning purposes. Twenty-eight percent describe the information as "useful," while nine percent say it is "not at all useful" because the information is "not understandable to the employee" or is "too generic."

Among the CFP licensees surveyed, 49 percent said they provide retirement planning to more than 75 percent of their clients, and 30 percent said they provide this service to more than half of their clients. Forty-nine percent of respondents said the average age of their client is between 50 and 59, followed by 34 percent who reported that the average age of their clients is between 40 and 49.

The majority of survey participants (59 percent) listed the average gross income of their clients as between \$50,000 and \$99,000, while 30 percent said it falls between \$100,000 and \$199,000. Fifty-four percent said the average net worth of their clients is between \$100,000 and \$499,000, while 42 percent said that, on average, their clients are worth more than \$500,000.

## Brief Ideas

### Microsoft Loses Another Round in ERISA Suit

In the continuing saga involving the rights of contract workers for the software giant, the company has failed to close off an attempt to broaden the class of workers entitled to relief (*D. Vizcaino v. Microsoft Corporation*, DC Wash, 98-2 USTC ¶50,595). The suit is a class action brought by workers who claimed they were common-law employees entitled to participate in the company's retirement, health care, and stock purchase plans. The latest court action concluded that, all workers who, like the named parties, were retroactively reclassified by the company as employees and later transferred to temporary employment agencies were included in the class definition. Other groups of potential claimants who worked for the company in a non-employee capacity but were not reclassified by the IRS or converted by the company to temporary agencies were never involved in the instant case and remain outside the class.

In addition, the workers' motion for partial summary judgment on common-law employee status was granted because there was no issue of material fact that four of the named workers were common-law employees of the company before and after they were transferred from independent contractor status to temporary employment agencies. The workers had no contact with their respective temporary agencies except to receive their paychecks and W-2 forms. They signed agreements with, or involving, a temporary agency at the computer software company's command and at the company's workplace. One worker worked for three temporary agencies at one time but performed all his work for the company. They all worked on various projects both before and after their conversion and their work relationship with the company appeared to be indefinite.

Previously, the U.S. Court of Appeals for the Ninth Circuit, in an *en banc* reversal of the lower court's decision, had determined that the workers were entitled to benefits under the company's Savings Plus Plan (SPP; a retirement plan) and the Employee Stock Purchase Plan (ESPP) (*D. Vizcaino v. Microsoft Corporation*, CA-9, 97-2 USTC ¶50,572, 120 F3d 1006). Earlier this year, the U.S. Supreme Court declined to review that case (1/26/98, 118 S.Ct 899, *cert. denied*).

### Continuing Assault on "Death Taxes"

With time running out for the 105th Congress and no shortage of legislative issues to consider, a number of congressional voices are calling for repeal of the federal estate tax. House Speaker Newt Gingrich (R-Ga.), addressing a June 10 audience at the Associated Building and Contractors conference, referred to the federal estate tax as "a lawyers' and accountants' boon" and called for its repeal before the end of the current session. As recently as August 6, House Ways and Means Committee Chairman Bill Archer (R-Tex.) indicated that he plans to introduce a tax proposal in September that will include some form of estate tax relief.

In the House, a proposal (H.R. 3879) to sunset the estate and gift tax over the next 10 years while reducing rates five percent each year has been introduced by Rep. Jennifer Dunn (R-Wa.). A similar bill (S. 2318) was introduced in the Senate by Sen. Ben Nighthorse Campbell (R-Co.). Other bills would simply end the tax after 2001 (H.R. 3859) or retroactively after 1997 (H.R. 3076). Additional proposals have been introduced to add an inflation adjustment to the unified estate and gift tax credit effective after 2006 (H.R. 3945).