

**USE AND MISUSE OF BUSINESS ENTITIES IN
ESTATE PLANNING: MISCELLANEOUS TAX
ISSUES**

**2019 STANLEY JOHANSON
ESTATE PLANNING WORKSHOP
DECEMBER 6, 2019**

**Richard B. Robinson
Robinson, Diss and Clowdus, P.C.
3200 Cherry Creek South Drive, Suite 340
Denver, CO 80209-3244
Phone: (303) 861-4154
FAX: (303) 860-8654
rbrobinson@lektax.com**

Author/Speaker
RICHARDS B. ROBINSON
Robinson, Diss and Clowdus, P.C.
Denver, Colorado

Richard B. Robinson is a shareholder in the law firm of Robinson, Diss and Clowdus, P.C. in Denver, Colorado. He is the recipient of the 2015 James E. Bye Lifetime Achievement Award presented by the Tax Section of the Colorado Bar Association; a Fellow of the American College of Tax Counsel; a Fellow of the American College of Trust and Estate Counsel; and is listed in *Best Lawyers in America*. He earned his J.D. at the University of Denver and his LL.M. in Taxation at New York University. He is an Adjunct Professor in the Graduate Tax Program at the University of Denver and has lectured for CPE/CLE programs around the country. His articles have appeared in *The Journal of Taxation*; *Estate Planning*; *The Colorado Lawyer*; *Taxes - The Tax Magazine*; *The Practical Accountant*, the *ALI-ABA Course Materials Journal*, the *University of Miami Estate Planning Institute*; and *The Journal of Taxation of S Corporations*. He is also co-author of *Tax Planning for S Corporations*, a treatise, published by Matthew Bender and co-author of *Federal Income Taxation of Corporations*, Sixth Edition, published by The American Law Institute, American Bar Association Committee on Continuing Professional Education. Mr. Robinson has spoken at numerous federal tax institutes including University of Miami Estate Planning Institute, Duke University Estate Planning Institute, Estate Planning for Closely-Held Businesses sponsored by ALI-ABA, University of Denver Tax Institute, Sophisticated Estate Planning Techniques, sponsored by ALI-ABA, Southern Federal Tax Institute, Notre Dame Tax Institute, William & Mary Tax Institute, North Carolina Tax Institute, UMC-Kansas Estate Planning Institute; Heart of America Institute, the Great Plains Federal Tax Institute, and the Southern California Tax Forum.

TABLE OF CONTENTS

	<u>Page</u>
CHAPTER 1: THE INDIRECT GIFT REDEMPTION TRAP	1
I. Problem for Discussion.....	1
II. Discussion.....	1
A. Indirect Gifts	1
B. Taxation of Partnership Distributions.....	2
CHAPTER 2: THE INDIRECT GIFT MERGER TRAP	3
I. Problem for Discussion.....	3
A. Before Merger	3
B. After Merger.....	3
II. Discussion	3
CHAPTER 3: THE MARKETABLE SECURITIES TREATED AS MONEY TRAP	4
I. Problem for Discussion.....	4
II. Discussion.....	4
A. Pro-rata Liquidating Distribution.....	4
B. Non-Pro-rata Liquidating Distribution	4
C. Taxation of Partnership Liquidating Distributions with Marketable Securities.....	5
CHAPTER 4: USING §1202 TO BENEFIT THE FAMILY BUSINESS	6
I. Problem for Discussion.....	6
II. Discussion.....	7
A. Impact of 2017 Tax Act	7
B. The §1202 Exclusion Basics	7
C. Eligible Qualified Small Business Shareholders	8
D. Five Year Holding Period Requirement	8
E. The Active Business Requirement.....	8
F. Qualified Trade or Business.....	9
G. Section 1045: QSBS Rollovers	9
CHAPTER 5: USING A PARTNERSHIP TO DIVIDE A CORPORATION	10
I. Problem for Discussion	10
II. Discussion.....	10
A. Contributions of Property	10
B. Contributions for Services: Capital Interests and Profits Interests	11
C. §2701	12
CHAPTER 6: THE PARTNERSHIP/CORPORATION COMBINATION FREEZE TRANSACTION	13
I. Problem for Discussion.....	13
II. Discussion.....	13
A. §2701 Issues	13
B. The Active Business/Qualified Business Requirements Under §1202	14

TABLE OF CONTENTS

	<u>Page</u>
CHAPTER 7: USING A PARTNERSHIP PROFITS INTERESTS AND DEFERRED COMPENSATION AS PART OF A BUSINESS SUCCESSION PLAN FOR S CORPORATIONS.....	16
I. Problem for Discussion.....	16
II. Discussion.....	16
A. Objectives	16
B. Use Partnership Where Divisive Reorganization Doesn't Work	16
C. Deferred Compensation Will Create Cash Flow for Parents Without Creating a Taxable Asset and Creating a Deduction for the S Corporation	17
D. Preferred Partnership Freeze	18
CHAPTER 8: USING A PARTNERSHIP AS THE REMAINDER BENEFICIARY OF GRAT/CLAT	19
I. Problem for Discussion.....	19
II. Objective	19
III. Discussion.....	19
A. Hurdles to Allocating GST Exemption	19
B. Benefit of Using a Partnership as Remainder Beneficiary of the GRAT/CLAT	20

CHAPTER 1
THE INDIRECT GIFT
REDEMPTION TRAP

I. PROBLEM FOR DISCUSSION.

Family LLC Balance Sheet.

	<u>2010 FMV</u>	<u>2019 FMV</u>
Assets:	\$6,000,000	\$15,000,000
Capital:		
Bob	\$2,000,000	\$5,000,000
Alice	2,000,000	5,000,000
Sara	<u>2,000,000</u>	<u>5,000,000</u>
Total	\$6,000,000	\$15,000,000

On March 31, 2010, Bob gifted a one-third interest in Family LLC to each of his children, Alice and Sara, and fully disclosed the transaction claiming a 40% combined DLOC/DLOM on the gift tax return. Effective December 31, 2019, Bob wants to withdraw his capital from the LLC. How much will Bob receive if Family LLC is liquidated? How much should Bob receive if Family LLC redeems his one-third interest? How does the existence of a §2036 string impact the value of Bob's interest. Does the elimination of a §2036 string cause a taxable gift?

II. DISCUSSION.

A. Indirect Gifts.

1. Where property is transferred for less than full and adequate consideration in money or money's worth, the excess of the value of the property transferred over the value of the consideration received shall be deemed a gift and shall be included in computing the amount of gifts made during the calendar year. For gift tax purposes, the fair market value of property is the price a willing buyer would pay a willing seller, both having reasonable knowledge of all the relevant facts and neither being under compulsion to buy or to sell. *See* §2512(b); Reg. §25.2512-1; eg. §25.2511-1(g)(1); and Reg. §25.2512-8. Special consideration is required for transactions between family members. *See* Reg. §25.2512-8.

2. A transfer of property for less than full and adequate consideration by a corporation to B is a gift to B from the stockholders of the corporation. If B himself is a stockholder, the transfer is a gift to him from the other stockholders, but only to the extent it exceeds B's own interest in such amount as a shareholder. *See* Reg. §25.2511-1(h)(1). This rule applies to partnerships and LLCs, as well as corporations. *See Estate of Mary D. Maggos*, T.C. Memo. 2000-129; *Senda*, T.C. Memo. 2004-160; *Kincaid v. U.S.*, 682 F.2d 1220 (5th Cir. 1982);

Tilton v. Comm'r, 88 T.C. 590 (1987); *Estate of Helen M. Trenchard*, T.C. Memo. 1995-121; and *Linton v. U.S.*, 630 F.3d 1211 (9th Cir. 2011).

B. **Taxation of Partnership Distributions.**

1. In the case of a distribution by a partnership to a partner, gain shall not be recognized by such partner, except to the extent that any money distributed exceeds the adjusted basis of such partner's interest in the partnership immediately before the distribution. §731(a)(1).

2. No gain or loss shall be recognized to a partnership on a distribution to a partnership of property, including money, unless §751 assets, §704(c)(1)(B), §731(c), or §737 apply. §731(b).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Use and Misuse of Business Entities in Estate Planning: Miscellaneous Tax Issues

Also available as part of the eCourse

[Use and Misuse of Business Entities in Estate Planning: Miscellaneous Tax Issues](#)

First appeared as part of the conference materials for the
2019 Stanley M. Johanson Estate Planning Workshop session

"Use and Misuse of Business Entities in Estate Planning: Miscellaneous Tax Issues"