

Using Charitable Planned Gifts in Estate Planning to Maximize Tax-Efficient Results

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Planned giving—sometimes referred to as deferred giving—offers alternatives for those who would like to make a charitable gift during life but wish to retain the income or use of the property until death or for a term of years. A comparison of the available options, both as to features and potential results—is the only way to achieve the best tax results for the donor and the donor's family.

Planned gifts that allow the donor to retain an income stream for life or a term of years include charitable remainder trusts, charitable gift annuities, and pooled income funds (collectively, charitable life income plans).¹ A related technique is the gift of a remainder interest in a house or farm, which allows the donor to retain the use of the house or farm for life or a term of years.

In evaluating these techniques and how they work, practitioners must consider how the income from the charitable life income plans is taxed to the donor, the gift and estate tax consequences arising when the donor names another as the income or life estate beneficiary, and what factors to weigh in evaluating the benefits of each type of planned gift for a particular client.

OVERVIEW

A charitably inclined client generally will be able to choose any of the various types of charitable life income plans, or a gift of a remainder in a house or farm, for making a gift to a well-established public charity. Such charities may include, for example, a university, hospital, or medical foundation; a national religious organization; or even a local community foundation if it is sufficiently large and its management sufficiently sophisticated to offer all of them.

The participation required from the charity will vary with the type of gift—for a charitable remainder trust (CRT) or the gift of a remainder interest in a house or farm, the charity need only be willing to accept the gift at the end of the retained term. (For the CRT, however, the client probably also will be interested in whether the charity will serve as trustee and what, if any, fees will be charged for trustee, management, or investment services.) By contrast, for a charitable gift annuity (CGA) or a pooled income fund (PIF), the first question will be whether the chosen charity offers these gifts since both must be provided by the charity itself. In recent years CGAs have become increasingly popular with donors, prompting more charities to offer them, while PIFs have declined in popularity to the point where some charities have ceased accepting new PIF donations because participation has not justified the administrative costs.

Charitable Remainder Trusts

A CRT is an irrevocable testamentary or inter vivos trust that pays income at least annually to one or more noncharitable beneficiaries for life or a term of years (not to exceed 20). At the end of the CRT's term, the charitable remainder beneficiary will receive the remaining assets of the CRT.² CRTs are divided into two major categories: charitable remainder annuity trusts (CRATs), which pay a fixed dollar amount annually to the noncharitable beneficiary, and charitable remainder unitrusts (CRUTs), which pay a variable amount annually equal to a fixed percentage of the value of the trust's assets as recalculated each year as of a specified date.

The property remaining at the CRT's termination passes to charity, so the CRT is not a device for reducing estate taxes on property passing to noncharitable beneficiaries. The CRT is useful for buying and selling assets without immediate capital gains tax because the CRT is exempt from income tax. The trustee's ability to invest and reinvest on a tax-deferred basis is particularly important when the property funding the CRT is highly appreciated.

The income tax deduction available for an inter vivos CRT gives it an advantage over a testamentary CRT. An income tax charitable deduction is allowed for the donation to an inter vivos CRT for the actuarially determined present value of the charity's remainder interest in the year of the contribution (subject to applicable percentage limitations), which is computed using Treasury tables.³ The present value of the charity's interest is based on the age of the noncharitable beneficiary (if the trust lasts for the noncharitable beneficiary's lifetime) or the period of the noncharitable beneficiary's interest (if the trust lasts for a term of years), the fixed or percentage payment to be received by the noncharitable beneficiary, the frequency and timing of the payments, and the federal discount rate.

The discount rate used is 120% of the applicable federal mid-term rate (the "charitable federal midterm rate," or CFMR) for the month of the gift or either of the two preceding months. Because the federal rates for the next month are published by the 20th of the current month, as a practical matter the donor—from then until the end of the current month—actually has the choice of four CFMRs. If the donor uses the CFMR for a month other than that of the gift, an explicit election statement must be filed with the income tax return claiming the deduction. The value of the unitrust or annuity decreases, and the value of the charity's remainder interest increases, as the CFMR increases, so the higher the CFMR, the larger the charitable deduction (although the difference will be much more substantial for a CRAT than for a CRUT).

CRTs must meet certain requirements, and their governing instruments are required to include specific provisions, for the CRT to qualify for the charitable deductions from federal income, gift, and estate taxes. Payments to the noncharitable beneficiary are required to equal at least 5% of the net FMV of the assets transferred to the CRT, but may not be more than 50% of such value.⁴ The CRT's instrument must specifically prohibit distributions to or for the benefit of the noncharitable beneficiaries other than any resulting from payment of the unitrust or annuity amount.⁵ If the donor names a noncharitable beneficiary other than himself or herself, the donor may reserve the right to revoke or terminate the interest of that noncharitable beneficiary. The power may be exercisable only by will. The charitable interest must be irrevocable and must be at least 10% of the net FMV of the property on the date of contribution.⁶

Rev. Proc. 2005-24, 2005-16 IRB 909, added the requirement that CRT instruments include a spousal waiver of any right of election against the CRT's assets that might be

exercisable by the donor's spouse against the donor's estate. IRS concern apparently arose in response to the broadened definition of "estate" being enacted in some states that would allow a surviving spouse the right to elect against not only assets of the probate estate but nonprobate assets as well, which might include assets previously donated by the deceased spouse to an inter vivos CRT. ⁷ Rev. Proc. 2005-24 concludes that if a surviving spouse may exercise a right of election that could reach the assets of the CRT, then the requirement that no amounts other than the annuity or unitrust amount be paid to any person other than a qualified charity would not be met.

To qualify for the "safe harbor" offered by Rev. Proc. 2005-24, the donor's spouse must irrevocably waive the right of election as it pertains to the CRT's assets. Exceptions to this requirement include any CRT created before 6/28/05 and CRTs established after that date if applicable state law would not allow the surviving spouse such a right of election. The Procedure includes specific requirements for the waiver. Rev. Proc. 2005-24 has been widely criticized as unnecessarily complicating the CRT rules, creating a trap for the unwary, and providing an inappropriate "solution" that potentially causes more harm than any problem that it purportedly addresses. ⁸

CRAT and CRUT rules. In addition to the rules generally applicable to CRTs are those specifically applicable to CRATs and CRUTs. The IRS has recently issued sample forms for both types of CRT that reflect these requirements. ⁹ The fixed dollar amount that a CRAT pays annually to the noncharitable beneficiary must be at least 5% of the CRAT's initial value. No subsequent donation may be made to a CRAT after the initial donation, and the governing instrument must so provide. ¹⁰ The IRS has further ruled that a CRAT will not qualify for the charitable deduction if there is a greater-than-5% probability that the annuity payments will exhaust the trust corpus (the "5% exhaustion test"), though the validity of this requirement has been questioned. ¹¹

The percentage paid annually by a CRUT must equal at least 5% of the FMV of the trust's assets, which will be recalculated annually on a specified valuation date. The IRS has not applied the 5% exhaustion test to CRUTs, which theoretically cannot be exhausted because of the annually recalculated value. CRUTs, unlike CRATs, can receive unlimited additional donations. ¹² As with the initial donation, the value of the charitable remainder interest in each subsequent donation must be at least 10% of the value contributed. ¹³

In addition to the standard CRUT are several variations, sometimes collectively referred to as the "income exception CRUTs." The net-income CRUT pays the income beneficiary the lesser of the CRUT's net income or the designated percentage payout. The net-income-with-makeup provision CRUT (nimcrut) does the same but also provides that if the CRUT's income in a given year is less than the percentage payout, the difference may be made up in future years if the trust income later exceeds the payout percentage. ¹⁴ A flip CRUT is initially a nimcrut that switches to a standard CRUT in the year following a qualifying triggering event or date specified in the trust instrument. ¹⁵ Any makeup amount is forfeited at the time of the conversion. ¹⁶

Charitable Gift Annuities

A CGA is a simple contract between a donor and a charity in which the donor contributes cash or other property acceptable to the charity in exchange for fixed annuity payments to one or two designated individual beneficiaries, guaranteed by the charitable organization. No trust is involved. The annuity payments usually may be made monthly, quarterly or annually.

The transaction is part purchase and part gift—the donor is eligible for a charitable income tax deduction for the difference between the value of the contribution and the value of the annuity, computed under Treasury tables.¹⁷ As with lifetime CRTs, the deduction is based on the age(s) of the annuitant(s), the rate of return to be paid, the frequency and timing of the payments, and the CFMR. Also as with CRTs, the CFMR for the month of the gift or either of the two preceding months may be used. Selecting a lower CFMR will reduce the charitable income tax deduction.¹⁸

The rules applicable to CGAs are those governing debt-financed income; the charity must meet these requirements in Section 514(c)(5) to avoid incurring unrelated business taxable income (UBTI) on its CGAs. The CGA must be payable over the life of one or two individuals in being at the time the annuity is issued (no term-of-years annuities and not more than two annuitants). The value of the projected residue must exceed 10% of the value of the property contributed (that is, the value of the annuity must be less than 90% of the value of the contribution). The CGA contract may not specify a maximum amount of payments and may not provide for any adjustment of the amount of the payments by reference to the income received from the transferred property or any other property.

Unlike CRTs, CGAs are not required to pay out any minimum or maximum rates. Most charities follow the annuity rates recommended by the American Council on Gift Annuities, which sets rates designed to leave the charity with an amount equal to 50% of the contribution at the annuitant's death.¹⁹

Capital gain on CGAs is determined under the bargain sale rules, and the property's adjusted basis is allocated pro rata between the gift portion and the value of the annuity.²⁰ The capital gain is reportable ratably over the annuitant's life expectancy if the annuity is nonassignable and the donor is the sole annuitant or the first annuitant with a designated survivor annuitant. An annuity will be considered nonassignable even if the donor retains the right to revoke a survivor annuitant's interest or to relinquish to the charity the donor's right to receive future payments.²¹ If the donor transfers encumbered property to the charity, however, all of the gain attributable to the encumbrance must be recognized in the year of transfer rather than ratably.²² If a donor names another person as annuitant and is not the primary annuitant, the capital gain is required to be reported in the year of the transfer rather than ratably.²³

As an alternative to a CGA with annuity payments beginning immediately, charities generally also offer deferred-payment CGAs that begin annuity payments more than one year after the transfer to the charity. Charities have used deferred CGAs to further broaden the arrangements that may be made with their donors.

Ltr. Rul. 200449033 approved a CGA that allowed the donor to delay or accelerate the date, within a specified time period, that the annuity payments began; the donor could elect the starting date of the payments at any time during an eight-year period. Once the election was made, the annuity payments were to be based on the donor's age at the time the payments began (the older the donor, the larger the payment). The rates payable at different starting dates were specified in the CGA agreement. The value of the CGA would vary depending on the starting date chosen, and because it was not determined as of the date of funding, the donor used the highest possible value of the annuity in calculating the charitable deduction (yielding the smallest charitable deduction).

Similarly, Ltr. Rul. 9743054 approved a single-life annuity that allowed the annuitant to begin payments at any time after attaining a specified age. The amount of the annuity was stated in the contract and based on the annuitant's age on the elected starting date.

The donor's charitable income tax deduction was based on the smallest deduction that could possibly result from the elected starting date.

In several rulings, the IRS has also approved deferred CGAs that allowed the annuitant to elect, before the annuity starting date, to receive a lump sum or fixed number of installment payments in lieu of the annuity.²⁴ These have been marketed by charities as "College Annuities," though the CGA contract does not require that the donee use the funds to pay college tuition expenses. The rulings held that the annuity would be considered to be payable over the annuitant's lifetime for purposes of the requirement under Section 514(c)(5). A drawback of this planning is that any lump sum or installment payment received by the student in lieu of the annuity would be subject to the 10% early withdrawal penalty applicable to annuities under Section 72(q).

Pooled Income Funds

A PIF is a trust maintained by a charitable organization that pools gifts of multiple donors.²⁵ Each donor contributes an irrevocable remainder interest to the charity and retains an income interest for the life of one or more beneficiaries. Income from the fund is distributed to the fund's beneficiaries according to their share of the fund. After the death of the beneficiary, the beneficiary's share of the fund is severed and transferred to the charitable organization.

A PIF may be established only by a public charity as defined in Section 170(b)(1)(A). A gift to a qualified PIF will be eligible for a charitable income, gift, and estate tax deduction. The deduction is allowed for the value of the remainder interest on the date of contribution, computed under the Regulations.²⁶

Although PIFs seem to fill a niche by allowing relatively small donations and an alternative to the fixed payments of CGAs, they have generally declined in popularity over the years compared with other techniques. Some charities have terminated their PIFs, or have closed them to new donors and plan to terminate them as soon as the remaining individual interests terminate. Other charities that have not previously established a PIF now consider it unlikely that they will do so.

Remainder Interest in Home or Farm

A donor may make a charitable gift of the remainder interest in a personal residence or farm and retain the right to use the property for one or more lifetimes or for a term of years.²⁷ The gift of the remainder interest must be irrevocable; imposing a condition on the gift could disqualify it for the charitable deduction unless the possibility that the condition could defeat the charity's interest is so remote as to be negligible (a 5%-or-less probability of occurring).²⁸

To qualify for the charitable deduction, the gift of the remainder interest in the home or farm cannot be in trust.²⁹ This is consistent with the provisions mandating that gifts of remainder interests in trust qualify for a deduction only if they meet the requirements of a CRT, which of course would be impossible for the gift of the remainder interest in a home or farm—there would be no funds for the required income payments, and the retained use of the home or farm would constitute self-dealing.³⁰

Suppose the donor, after donating the remainder interest, decides to make and pay for improvements to the property. If such improvements would be considered part of the real

property under state law, the donor should be eligible for an additional charitable deduction for the FMV of the charity's remainder interest in the improvements.³¹

Homes. "Personal residence" is defined under the Code as a dwelling used for personal purposes for a number of days that exceeds the greater of 14 days or 10% of the days during the year for which the unit is rented at a fair rental.³² To qualify as a personal residence, the home need not be the donor's primary residence.³³ A donor's vacation home can qualify, as can stock that a donor owns as a tenant-stockholder in a cooperative housing corporation, if the donor uses the dwelling as a personal residence.³⁴

The gift of the remainder interest need not include the entire residential property. For example, Ltr. Rul. 8202137 approved the gift of the remainder interest in 77 acres of a 174-acre residential property—the 77 acres included the main dwelling, and the excluded acreage was open pastures and woodlands.

Farms. A "farm" is defined as any land used by a donor or a donor's tenant for the production of crops, fruits, or other agricultural products, or for the sustenance of livestock, including the improvements thereon.³⁵ The gift of the remainder interest need not be in the entire farm acreage, but may be in any part of the total acreage used as a farm. A gift of a remainder interest in half of a farm's pastureland, for example, was found qualified.³⁶

Tax treatment. The donor receives a current income tax deduction for the present value of the remainder interest passing to charity.³⁷ The charitable income tax deduction (but not the gift tax deduction) is reduced to reflect depreciation (computed on the straight-line method) and depletion.³⁸ To calculate the deduction, the following facts must first be determined:

- The FMV of the property allocated between the land and improvements.
- The estimated useful life of the structure.
- The value of the structure at the end of its estimated useful life.

As with other split-interest gifts, donors are allowed to choose the CFMR for the month of the gift or either of the previous two months in calculating the charitable deduction. But unlike other split-interest gifts, the higher the CFMR, the smaller the charitable deduction for the remainder interest.

The charitable deduction does not extend to gifts of furniture, furnishings, or other personal property included with the home or farm.³⁹ If a donor wishes to give such items to the charity, the donor should consider bequeathing them. The charity will then receive them at the donor's death (which could coincide with its receipt of the home or farm), and the donor's estate would receive a charitable estate tax deduction for the FMV of the items at date of death.

INCOME TAXATION OF CHARITABLE LIFE INCOME PLANS

Of interest to clients will be how the payments that they receive from charitable life income plans will be subject to reporting and income taxation on their personal returns. This is not a concern for the remainder gift in a house or farm since the donor of that type of gift is retaining the right to use the property rather than to receive cash payments.

Charitable Remainder Trusts

Because CRTs are generally tax-exempt entities, a donor can transfer appreciated assets to the CRT and the trustee may sell the assets without incurring capital gains tax on any gain realized by the trust.⁴⁰ In any year that the CRT has UBTI, however, the CRT will be subject to tax on all of its income earned that year.

The annuity or unitrust payment is taxable to the donor under the four-tier ordering system for CRTs.⁴¹ Generally payments to the donor will be classified into four broad categories or tiers:

- (1) Ordinary income to the extent of the CRT's ordinary income for the current year and all previous years, less any prior deemed distributions of ordinary income.
- (2) Capital gains, to the extent of the CRT's capital gains for the current year and all prior years, less any prior deemed distributions of capital gains.
- (3) Other income (e.g., tax-exempt interest), to the extent of the CRT's other income for the current year and all prior years, less any prior deemed distributions of other income.
- (4) Return of corpus.

The unitrust or annuity amount is deemed distributed first from tier one until all ordinary income is distributed, and so on through each of the first three tiers before reaching the fourth tier (return of corpus). Each tier includes not only income earned in the current year, but all income earned that was not deemed distributed in prior years.

Within the first two tiers (ordinary income and capital gains), items are also assigned to different classes based on the income tax rate applicable to each type of income in the category in the year the items are required to be taken into account by the trust. For tier one, all ordinary income is separated into two classes, qualified dividends (taxed at 15%) and other ordinary income. For tier two, all capital gains are separated into as many classes as are needed for short-term capital gain and the different categories and rates for long-term capital gains (28%, 25%, and 15%/5%). Income at the highest rate within each tier is always deemed distributed first until it is exhausted, just as each tier is deemed distributed until it is exhausted.⁴²

The Regulations provide for netting different classes of capital gains and losses. For each year, current and undistributed gains and losses within each class are netted to determine the net gain or loss for that class, and the classes of capital gains and losses are then netted against each other in the order specified in the Regulations.⁴³ The character of amounts distributed (or deemed distributed) is determined as of the end of the tax year.⁴⁴ The tax rates applicable to a distribution or deemed distribution from a CRT to a recipient are those applicable to the classes of income from which the distribution is derived in the year of distribution, not the rates that applied to the income in the year that the CRT received it.⁴⁵

Charitable Gift Annuities

The income taxation to the donor of CGA payments is basically the same for immediate and deferred CGAs. The important difference is that the tax deferral will be longer for the latter.

Immediate CGAs. If the donor contributes cash for an immediate CGA, part of each annuity payment will be considered a return of capital and therefore not taxable. If the donor contributes long-term appreciated property, and the donor is the sole or a primary annuitant of a nonassignable annuity, part of each payment will be taxed as ordinary income, part as capital gain, and part may be tax free.

The percentage that is tax free is based on the present value of the annuity payments when the annuity is purchased (the "investment in the contract") divided by the number of years remaining in the annuitant's life expectancy. To determine the percentage of each payment that is a tax-free return of capital, the "expected return multiple" is used from tables in the income tax Regulations that base the multiple on the annuitant's life expectancy.⁴⁶ After the investment in the annuity contract has been fully recovered, each annuity payment is 100% taxable as ordinary income. If the annuitant dies before the investment in the contract is fully recovered, the balance is allowed as a deduction on the annuitant's final income tax return.⁴⁷

If the donor contributed appreciated property for the CGA, the transaction is treated as a bargain sale for income tax purposes.⁴⁸ The gain is prorated between the investment in the contract (value of the annuity) and the value of the gift to the charity. The gain on the gift portion is not recognized and is never taxed. If the donor is the only or primary annuitant, and the CGA is nonassignable, the gain will be recognized ratably over the life expectancy of the annuitant or annuitants. Otherwise, the entire gain must be recognized in the year the CGA contract is entered into.⁴⁹ The same income tax tables used to determine the expected return multiple for annuities are used in calculating the gain to report.⁵⁰

If gain recognition is deferred, the donor recognizes a ratable portion of the gain each year on the portion of the payment classified as a return of capital until the total long-term gain has been recognized.⁵¹ The part of the annuity taxable as ordinary income is the same whether cash or appreciated property was contributed—but part of what constitutes the tax-free portion when cash is contributed will be taxable as capital gain when long-term appreciated property is contributed.

Deferred CGAs. Deferred CGAs allow the donor to accumulate value on a tax-deferred basis. Once the annuity payments begin, their taxation to the donor is basically the same as for an immediate CGA. The donor receives the charitable income tax deduction in the year that the CGA is funded and is allowed to recover the tax-free return of capital over the expected life of the annuity. Although the Regulations and published Rulings do not address the capital gain treatment of a deferred CGA, if the donor is the sole or primary annuitant of a nonassignable CGA, the gain should not be reportable until payments begin and should then be reportable ratably over the annuitant's life expectancy determined as of the annuity's starting date.

Pooled Income Funds

Income taxation of PIFs is determined under the rules for complex trusts and does not follow the four-tier system used for CRTs. Also unlike CRTs, PIFs are not tax-exempt.⁵²

PIFs are required to distribute their net income each year to their beneficiaries and are allowed a deduction for these distributions.⁵³ PIFs are also allowed a charitable contribution deduction for long-term capital gains because those amounts are permanently set aside for charitable purposes.⁵⁴ Short-term capital gains are taxed to the PIF unless such gains are allocated to income and therefore distributed to the income

beneficiaries (specific requirements must be met for short-term capital gains to be part of distributable net income (DNI)).⁵⁵

PIF income is allocated to the beneficiaries by dividing the PIF's income for the year by the number of PIF units outstanding at the end of the year. Each beneficiary's share of income is then determined by multiplying the number of units owned by the income per unit. The amounts are adjusted for units that have been held less than an entire year.⁵⁶ Distributions to beneficiaries are deemed to include proportionately the types of income included in the PIF's total DNI. PIFs are not permitted to hold tax-exempt securities, so DNI does not include any tax-exempt income. Beneficiaries include in their gross income all amounts paid, credited, or required to be distributed to them during the PIF's tax year ending within or with the beneficiary's tax year.⁵⁷

GIFT AND ESTATE TAXES

Each charitable life income plan and the gift of a remainder in a home or farm has transfer tax implications that may affect the donor's planning.⁵⁸

CRTs, PIFs, and CGAs

Transfer taxation of CRTs, PIFs, and CGAs must be considered in terms of both the federal gift tax when the plan is initially funded and the federal estate tax that may apply at the death of the donor or donor's spouse.

Gift tax. When a CRT or CGA is funded, or PIF units purchased, there is always a gift to the charitable beneficiary, and the charitable deduction is always available to offset the present value of the charitable gift. There also may be a taxable gift if the gift is made during the donor's lifetime, the donor names another person as income beneficiary or annuitant, and the gift is not eligible for the marital deduction and exceeds or is ineligible for the annual exclusion from gift taxes.

For CRTs and PIFs, the donor is always required to file a gift tax return, even if the charity is the sole beneficiary other than the donor, because the gift of the remainder interest to charity is not the donor's entire interest in the property, and the gift to charity is a gift of a future interest.⁵⁹ For CGAs, a gift tax return is probably not required if the donor is the sole annuitant since the charity receives the donor's entire interest in the funding assets immediately. If the donor names another annuitant other than a spouse, a return will be required if the interest is ineligible for or exceeds the annual exclusion amount. If the donor names a spouse as annuitant, a return will be required if the interest is not eligible for the marital deduction.

Marital deduction. Section 2523(g) specifically makes the gift tax marital deduction available for a citizen spouse who is the only noncharitable beneficiary of a CRT (other than the donor). No specific Code section addresses the marital deduction for spousal interests in CGAs, however, and the general marital deduction rules therefore must be applied. Under these, the marital deduction is available for an immediate annuity interest given to a spouse, but not for a successor interest.⁶⁰ For a deferred CGA, the availability of the marital deduction is unclear. For joint-and-survivor CGAs naming only the donor and the donor's spouse as annuitants, the gift tax marital deduction is available under Section 2523(f)(6), applicable to annuities.

For PIFs, a gift tax marital deduction is available if the spouse has the sole or primary income interest and the QTIP election is made; the gift tax deduction is not available for a successor or survivorship interest.⁶¹

For noncitizen spouses, the gift tax marital deduction is generally not allowed.⁶² An exception that applies to CGAs allows the gift tax marital deduction for joint-and-survivor annuities having only the donor and spouse as annuitants.⁶³ The annual exclusion applies to qualifying gifts to noncitizen spouses (\$120,000 in 2006); these gifts must qualify as a present interest and meet the general marital deduction rules.⁶⁴

Annual exclusion. In addition to the marital deduction, whether a gift of an income interest qualifies for the annual exclusion from federal gift taxes also has to be considered. To qualify for the annual exclusion, the gift must constitute a present interest (right to current enjoyment), and therefore only a sole or primary income interest in a charitable life income plan will qualify—a successor or survivorship interest will not.⁶⁵

Some doubt was cast on the availability of the gift tax annual exclusion for CRTs by *Estate of Kolker*, 80 TC 1082 (1983). The Tax Court disallowed the annual exclusion for a trust income interest of fixed annual payments, treating the interest as only an expectation of a sum certain in the future rather than as a right to current enjoyment. Private letter rulings since then, however, have affirmed the availability of the annual exclusion for current income beneficiaries of CRTs.⁶⁶ Separate annual exclusions should be available for the interests of multiple CRT income beneficiaries in proportion to each interest.⁶⁷ No annual exclusion is allowed for "sprinkle" CRTs.⁶⁸ A gift to a primary or sole beneficiary of a net-income CRUT or a nimbcrut should qualify if the CRUT is funded with income-producing property.⁶⁹

For CGAs, the interest of a sole or primary annuitant of an immediate CGA is probably eligible (*Kolker* and the lack of authority raise doubts, but the consensus is that the interest qualifies). No annual exclusion is allowed for a deferred CGA or for a successor annuitant's interest.

For PIFs, the annual exclusion is available if the PIF income interest begins immediately; no annual exclusion is available for a secondary or survivorship interest.

Donor's right to revoke. If the donor wishes to avoid making a taxable gift, he or she may consider retaining the right to revoke a beneficiary's interest in the plan. The general gift tax Regulations provide that retaining the right to revoke or terminate the recipient's interest makes the gift incomplete.⁷⁰ The CRT Regulations specifically allow the donor to retain a testamentary right to revoke the interest of a noncharitable beneficiary.⁷¹

Because the donor may retain only a testamentary right to revoke, commentators have questioned whether the right to revoke an interest that begins during the donor's lifetime can make the entire gift incomplete—it has been suggested that the gift of the interest during the actuarial period of the donor's lifetime is complete, and therefore taxable, because it may not be revoked under the testamentary power allowed.⁷² If the gift is complete for the actuarial period of the donor's life expectancy, then the gift's value might be measured by the actuarial value of the beneficiary's right to receive income during the donor's life expectancy,⁷³ or a completed gift might occur only when each payment is actually received by the beneficiary during the donor's lifetime, rather than a single completed gift arising when the CRT is funded.⁷⁴ If each gift is completed only on funding, the annual exclusion should be available for each year's payments.⁷⁵

There also is concern that retaining a right to revoke a beneficiary's lifetime interest could disqualify a CRT since the Regulations specify that a lifetime interest must be given solely for the life of the beneficiary, and the donor's exercise of a testamentary right to revoke could be viewed as potentially cutting off the lifetime beneficiary's interest at the donor's death rather than the beneficiary's death.⁷⁶ For CRTs, this issue may be avoided by either retaining the right to revoke only for an income interest succeeding the donor's interest (which would begin only at the donor's death) or for a term-of-years interest. Another alternative is to characterize the donor's exercise of the right to revoke as a qualified contingency permitted under Section 664(f)(2).⁷⁷ For example, the CRT instrument could provide for termination on the first-to-occur of the income beneficiary's death or the donor's testamentary revocation of the beneficiary's income interest.

For PIFs, Reg. 1.642(c)-5(b)(2) permits the donor to retain the testamentary power to revoke the interest of any beneficiary other than the charity that maintains the PIF. The same issue arises regarding whether retaining a testamentary right to revoke makes the entire gift incomplete if the income interest begins during the donor's lifetime (when it cannot be revoked). The other issue—whether retaining the right could disqualify the plan—is less troublesome for PIFs than for CRTs. For PIFs, neither the Code nor the Regulations prohibit creating an income interest potentially measured by a lifetime other than the beneficiary's. In addition, the IRS sample instrument of transfer for a one-life PIF interest specifically gives the donor the option of retaining a testamentary right to revoke.⁷⁸

For CGAs, nothing in the Code or Regulations specifically allows retention of the right to revoke, but it is generally assumed that a donor may retain either an inter vivos or testamentary right to revoke. The right to revoke a CGA interest is referred to only in the Regulations dealing with the treatment of capital gain, which state that retaining the right will not prevent capital gain from being reported over the donor's life expectancy.⁷⁹ Because CGA donors are not limited to a testamentary right to revoke, the issue of whether retaining the right makes the entire income interest incomplete does not arise for CGAs if the donor retains an inter vivos right to revoke, which would allow the donor to revoke the interest during life rather than only at death.

Estate tax. If the donor is the only income beneficiary, only the remainder interest in a CRT or PIF will be includable in the donor's taxable estate, and the federal charitable estate tax deduction will offset that value. If the donor is the sole annuitant of a CGA, nothing will be included in the donor's estate because the annuity interest terminates at death and there is no true remainder since the assets contributed for the CGA become wholly the charity's property when the contract is executed.⁸⁰ If persons other than the donor are the only income recipients, and the donor has not retained the right to revoke, nothing will be included in the donor's taxable estate because the donor will have made a completed gift with no retained interest.

If the donor is an income beneficiary of a successive life income plan or a joint-and-survivor plan, all or part of the plan may be includable in the donor's taxable estate. The entire value of a CRT or PIF units will be included in the donor's estate if the assets were the donor's separate property and half of the value if the funding assets were jointly owned or community property contributed by spouses.⁸¹ If the other income recipient survives the donor, all of the survivor's interest (if the donor contributed separate property) or half (if the donor contributed jointly owned or community property), plus the charitable remainder interest, will be included in the taxable estate. If the other income recipient does not survive, only the charitable remainder interest will be included and that will be offset by the charitable deduction.⁸²

If the donor contributed separate or jointly owned or community property to a CGA naming the donor and another person as successive or joint-and-survivor annuitants, and the donor is survived by the other annuitant, all (for separate property) or half (for community or jointly owned property) of the value of the survivor's annuity interest will be included in the donor's taxable estate, but no charitable interest is included because there is no true remainder interest. If the other annuitant has predeceased, nothing remains to be included in the estate of the second annuitant to die. ⁸³

Marital deduction. The estate tax marital deduction may be available for spousal interests included in a donor's estate. For CRTs, the marital deduction is specifically allowed for a citizen spouse who is the only noncharitable beneficiary. ⁸⁴

For CGAs, marital deduction issues are more complex because of the lack of a specific Code section addressing them. The estate tax marital deduction is available for immediate spousal interests in CGAs, but not for a spouse's successor interest that is preceded by another interest. ⁸⁵ For a joint-and-survivor CGA naming only the donor and the donor's spouse as annuitants, the interest of a surviving spouse will be included in the donor's estate, but will be eligible for the marital deduction. ⁸⁶

For PIFs, the estate tax marital deduction is available if the spouse has the sole income interest and the QTIP election is made. The marital deduction is not available for a successor interest preceded by another interest. ⁸⁷

For noncitizen spouses, an estate tax marital deduction is allowed only if specific requirements are met that coordinate with the QDOT requirements. ⁸⁸

Remainder Interest in House or Farm

Possible gift and estate tax consequences also must be considered in planning for a gift of a remainder interest in a house or farm.

Gift tax. If the donor of a remainder interest in a house or farm retains the life interest only for himself or herself, the only gift is that to the charity, which will be eligible for the charitable deduction. A federal gift tax return is required for the gift of the remainder (regardless of size because it is a gift of a future interest and is not a gift of the donor's entire interest in the property). ⁸⁹

If the donor gives two or more other persons successive life estates, the gift of the primary interest will qualify for the annual exclusion, but the successor interest will not because it will be a future interest. ⁹⁰ If the donor gives the initial life estate to a spouse, the entire value of the property (not just the spouse's interest) will qualify for the marital deduction under the QTIP rules. ⁹¹ Neither a term-of-years interest nor a successor life interest given to a spouse will qualify for the marital deduction.

To avoid making a taxable gift, the donor may wish to retain the right to revoke the gift of a life interest that does not qualify for the marital deduction or that is ineligible for or exceeds the annual exclusion amount. Unlike CRTs and PIFs, the right to revoke is not limited to a testamentary one. If, for example, spouses donate the remainder interest in their jointly owned or community property home to charity and retain a joint-and-survivor life estate, then the actuarially older spouse will make a gift of one-half of the value of the survivorship interest to the actuarially younger spouse. This gift will not qualify for either the QTIP marital deduction or the annual exclusion. To avoid making a taxable gift, the older spouse could reserve the right to revoke the survivorship interest

given to the younger spouse, or, if they prefer for nontax reasons, both spouses could reserve the right to revoke the other's survivorship interest.

Estate tax. If the donor retains a life interest in the home or farm for himself or herself, or retains the right to revoke the life interest of another, the entire value of the property contributed by the donor will be includable in the donor's estate under Section 2036. The donor's estate will be eligible for a charitable deduction for the value of the remainder,⁹² and the value of any successor interest will be taxable in the donor's estate. If the donor gave the successor lifetime interest to a spouse, the QTIP election will be available for the entire value of the property included in the donor's estate.⁹³ After the spouse's death, the property will pass to the charity and will be includable in the spouse's estate, but the charitable deduction will offset the remaining value.⁹⁴

If the donor did not retain a life interest for himself or herself, but gave it to another without retaining the right to revoke, then neither the remainder interest nor the value of the life estate would be included in the donor's estate (because the donor made a completed gift and did not retain any interest).

SELECTING THE BEST PLANNED GIFT

The facts of the donor's individual situation must be considered, including whom the donor wishes to benefit, the value and type of property the donor wishes to contribute, and what benefits are particularly important to the donor. All of these factors, of course, often will be interrelated.

Whom Does the Donor Wish to Benefit?

The tax consequences will depend on whether the person to be benefitted is the donor's spouse, child, or someone else.

Spouses. If a citizen spouse will be the only beneficiary, or the only one other than the donor, the marital deduction will be available for a gift of an income interest in a CRT.⁹⁵ The marital deduction also will be available for a gift of a PIF interest if the spouse has the sole or primary interest and the QTIP election is made.⁹⁶

For a CGA, the marital deduction will be available only if the spouse is the sole annuitant of an immediate CGA or has a joint-and-survivor immediate CGA with the donor.⁹⁷ If the spouse is not a U.S. citizen, the gift tax marital deduction will be allowed for joint-and-survivor annuities having only the donor and the spouse as annuitants,⁹⁸ and the special gift tax annual exclusion for lifetime gifts to noncitizen spouses (\$120,000 in 2006) will be available to the extent that the gift qualifies as a present interest and meets the general marital deduction rules under Section 2523.⁹⁹

An estate tax marital deduction will be available for gifts to noncitizen spouses only if specific requirements are met that coordinate with the QDOT requirements.¹⁰⁰

Children. If a child is the intended beneficiary, there will be other considerations. If the child is young, it will be particularly important to be sure that the 10% remainder requirement applicable to CRTs and CGAs is met. For CRATs, the 5% exhaustion test should also be checked. For CRTs, the lowest annuity or unitrust payment rate allowed is 5%.

These restrictions interact with the CFMR to limit the minimum age possible for an income beneficiary. For example, at a CFMR of 4.8%, the youngest beneficiary a lifetime CRAT can have and still meet the requirements is age 35. CRUTs are more flexible because their payouts fluctuate; at the same CFMR of 4.8%, a CRUT could have a beneficiary as young as 25.

CGAs are not restricted to the 5% minimum payout—their payout percentages are based on the age of the beneficiary. Many charities, though, impose their own minimum age requirement on the CGAs they offer; for example, the minimum age for the annuitant of an immediate CGA might be age 50. Charities also often have a maximum number of years that they will allow annuity payments to be deferred (e.g., 15-20 years), and the annuitant might be required to have attained the minimum age by the end of the deferral period, or the minimum age might be lower than for an immediate annuity, but not as much lower as the minimum age for an immediate CGA minus the maximum deferral period. Nevertheless, a CGA must meet the 10% remainder test, and if the CFMR falls low enough, it is possible to fail it. If the child is too young for a lifetime gift of an income interest in a CRT or CGA, another alternative would be a term-of-years CRT.

Disabled individuals. If the donor wishes for income payments to be made to a trust for the life of a disabled individual rather than paid directly to the beneficiary, a CRT may be the best option.

The IRS has ruled that CRTs will qualify under Section 664 if the unitrust or annuity amounts will be paid for the life of a financially disabled individual to a separate trust that will administer the payments on behalf of that individual, and on the individual's death will distribute the remaining assets either to the individual's estate or, after reimbursing the state for any Medicaid benefits provided to the individual, subject to the individual's general power of appointment.¹⁰¹ The Ruling cites Section 6511(h)(2)(A) in defining "financially disabled" as unable to manage one's own financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. The Ruling was issued to clarify the qualification of such a CRT because the Regulations provide that only an individual or an organization described in Section 170(c) may receive an amount for the life of an individual.¹⁰²

A "special needs" trust established for a beneficiary receiving public assistance such as Medicaid or Supplemental Security Income (SSI) could be easily drafted to comply with these requirements.¹⁰³ Alternatively, if the donor is less interested in having the CRT last for the disabled beneficiary's lifetime than in preserving the assets of a third-party special needs trust for remainder beneficiaries, a term-of-years CRT could be used without requiring that the special needs trust reimburse the state for Medicaid payments.¹⁰⁴

What Does the Donor Wish to Contribute?

Both the value and type of property that the donor wishes to contribute affect which plan will best meet the donor's goals.

CRTs have relatively higher costs of administration than CGAs or PIF units and are not generally feasible for smaller gifts. Most charities require that the CRT be funded with property valued at a minimum of \$50,000 or \$100,000 if the charity is to serve as trustee of the CRT. The donor often will want this, since the charity commonly will not charge a fee for its trustee service and typically will have professional investment management services available for the trust's assets (for which a relatively small fee may be charged to the trust).

If the donor has less to contribute, a CGA may be more appropriate—minimum donations for a CGA may be as low as \$10,000, although some charities have higher minimums (e.g., \$25,000 or \$50,000). Some donors will prefer the flexibility of making a series of smaller gifts by entering into a new annuity contract each year rather than making one large gift in a single year. This may allow the donor to better judge personal needs before an irrevocable gift is made and perhaps to also take advantage of an increase in annuity rates.

If the donor wishes to retain the use of a home or farm for life or a term of years, and does not wish to bequeath the property to a particular family member or friend, the gift of the remainder interest often will be the best choice. If the donor also wishes to receive an income stream, the charity may be willing to give the donor a CGA in exchange for the gift of the remainder interest. Whether the charity will agree to this probably depends on factors such as the donor's age, the charity's interest in the particular property or confidence in its marketability, and the charity's ability to pay the annuity before receiving anything in return.

If the donor is planning to contribute highly appreciated assets, capital gains treatment will be an important factor for consideration. If the donor will be the sole or primary annuitant of a CGA, the portion of the gain allocated to the value of the donor's annuity will be distributed ratably over the donor's life expectancy, and the portion of the gain allocated to the charity's interest will never be subject to tax. Alternatively, if appreciated assets are contributed to a CRT, the trustee can sell them without incurring immediate capital gains tax, regardless of whether the donor is the sole or primary income beneficiary, and the gains will be distributed to the income beneficiary over the years through the four-tier system. If the asset is both highly appreciated and illiquid, the donor might consider a flip CRUT that will distribute only net income until the asset has been sold and then become a standard CRUT at the beginning of the tax year following the sale.

If the donor wishes to contribute Subchapter S stock, a gift to a CRT will not be possible because the CRT will not qualify as an eligible shareholder.¹⁰⁵ Since 1998, though, charities have been eligible S corporation shareholders, so contributing the stock in exchange for a CGA should be possible. Such a gift should be first discussed with the charity since owning the S corporation stock will subject the charity to UBTI.¹⁰⁶ If the charity will be able to sell the stock quickly, this may be less of an issue.

If the donor has received a lump-sum distribution from a qualified retirement plan that includes stock in the donor's employer, and the plan's basis in the stock is less than the stock's value on distribution, using all or part of the employer stock to fund a CRT or CGA will allow the donor an income tax charitable deduction greater than the taxable income that the donor must report for the distribution in the year that it is received.¹⁰⁷ (The published rulings have approved only contributions of such stock to CRTs, but the same results should apply to CGAs.)

To qualify for this favorable treatment, the lump-sum distribution must be (1) from an employer's qualified retirement plan (not from an IRA or Section 403(b) plan), (2) a distribution of the entire balance of a participant's account within one tax year, and (3) payable either on account of the participant's death, attainment of age 59½, separation from service, or disability.¹⁰⁸ The employee receiving such a distribution is required to include only the stock's basis (the price paid by the qualified retirement plan) in taxable income for the year in which the distribution is received. The stock's net unrealized appreciation does not have to be reported until the employee recognizes the gain by selling or otherwise disposing of the stock in a taxable transaction, and then it will be

treated as long-term capital gain even if the employee has held it less than a year since receiving the distribution.¹⁰⁹

But if the donor contributes the employer stock to charity, the current FMV of the stock, less any short-term depreciation, is used in calculating the donor's charitable deduction.¹¹⁰ Through the CRT, the stock can be sold without incurring capital gains tax and the proceeds used to purchase other assets for diversification or to increase income. If the donor instead contributed the stock in exchange for a CGA with the donor as the sole or primary annuitant, only the portion of the capital gains allocable to the donor's annuity interest would be taxable to the donor ratably over the donor's life expectancy. The donor need not contribute the entire lump sum distribution—for example, the donor might contribute the stock to a CRT and roll over the cash from the distribution into an IRA.¹¹¹

What Benefits Are Most Important to the Donor?

How long the donor will need the income stream or wants to retain use of the home or farm, how dependent the donor will be on receiving a minimum amount of income, and how important the charitable income tax deduction is to the donor all will affect the donor's choice of plan.

If the donor or the intended beneficiary will need the income or life estate for only a certain period, then retaining the interest for a term of years may be more attractive than a lifetime plan and generally will yield a higher charitable income tax deduction. CRTs and gifts of remainder interests can be limited to a term of years, but CGAs are required to be issued for the annuitant's lifetime (though favorable rulings have been issued for "flexible CGAs" that may be commuted after a certain period). Alternatively, if the donor does not need the income to begin until a future date, but prefers to make the gift now and receive the charitable income tax deduction, a deferred CGA may be the best plan (and the deferral period will increase the donor's income tax charitable deduction).

If predictability and security of the income stream are important to the donor, a CGA with a well-established charity may be the best plan. The payments will be guaranteed by the charity's assets to last the donor's lifetime, and the payments will not fluctuate with interest rates or stock prices. If the donor is elderly, the interest rates offered for CGAs generally will be quite attractive. A CRUT, in contrast, may be more appealing to a donor who wishes to benefit from any appreciation in the assets contributed and is comfortable with the risk of a decline in value, and the corresponding decline in payments. A CRAT offers the certainty of fixed payments, but there is no guarantee that the CRAT will not be depleted before the income beneficiary's death if investment losses and falling interest rates prevent asset growth from keeping pace with the annuity amount.

CASE STUDIES

The following case studies illustrate the factors that can make one planned gift more advantageous than another for particular donors who wish to make a charitable gift while also retaining lifetime benefits for themselves or another person.

Funding a Planned Gift with a Collectible

Victoria recently celebrated her 85th birthday and is a proud member of Friends of the Museum. She wishes to donate a very valuable painting to the Museum, which has been

hoping to receive it from Victoria for years. Victoria, however, is concerned about her financial security and future income stream, and on top of everything else, her accountant, Bill, has warned her that she will have a large income tax liability this year because of capital gain incurred when she sold some stock. Victoria knows she could bequeath the painting to the Museum and still have it during her lifetime if the need arose to sell it, but she would enjoy seeing her name on the Museum's "Donor Wall," reading the feature article about herself in the Museum's annual report, and being honored at the annual Donors' Banquet.

Using a CGA. Victoria could donate the painting to the Museum in exchange for a CGA if the Museum has the funds to make the annuity payments. Considering Victoria's age, the Museum may consider this a wise investment. Because the use of the painting will be related to the Museum's exempt function (the Museum would be delighted to display this particular painting as part of its collection), Victoria's charitable deduction for the gift will be based on its FMV rather than on Victoria's low basis in the painting.

Bill runs the numbers and is happy to tell Victoria that her charitable deduction will be \$525,590, based on her age and the painting's value of \$1 million (and the current CFMR of 5%). He further explains that from the date of her gift in October 2005, through the end of 2011, about 70% of the annuity payments she receives will be classified as capital gain rather than as ordinary income, which also will help out with her tax bills. Victoria is delighted to learn that the CGA she will receive will give her \$95,000 in additional annual income, payable in quarterly installments of \$23,750. She begins shopping for her gown for the Donors' Banquet the next day.

Using a CRT. Bill initially considered a CRT, but realized that the CRT would have to sell the painting to make the payments to Victoria. Because the sale would not be a use related to a charity's exempt purpose, Victoria's charitable deduction would be based only on her basis in the painting, which is next to nothing (the painting was a gift from her grandfather, who bought it many years ago for only \$1,000). ¹¹²

To make matters worse, Bill realized that under Section 170(a)(3), no charitable income tax deduction is available to a donor of tangible personal property items until all intervening interests held by the donor have expired. Victoria therefore would receive no immediate charitable income tax deduction for giving the painting to a CRT, although she should be allowed a deduction when the CRT sold the painting—but with the uncertainty of the art market, that might be too late to offset Victoria's capital gain in the current year, and the deduction would be minimal since the value of the painting would be deemed to be only Victoria's basis in it.

Even with the CRT, though, Victoria would have had the advantage of not having to immediately pay all of the capital gains tax incurred at the sale (and therefore not losing the full amount from principal) as she would if the painting were sold outside of a CRT. She would be taxed on the gain only as it was passed out to her through her payments under the four-tier system (but the gain would be at the 28% rate since this is tangible personal property).

Using Planned Gifts for Tuition Expenses

Uncle Henry wishes to make a charitable gift, but also wishes to assist his sister with college expenses for his two nephews. He would like for them to attend Harvard, as he did, and he wants to retain sufficient funds to help them do so. Uncle Henry would also like to lower his current income tax bill, and he does not want to incur any gift tax or use

any of his lifetime exemption from gift taxes. Can a planned gift address all of these goals?

Uncle Henry, who receives newsletters from Harvard's office of planned giving, recently read an article on a "college deferred CGA" that would allow him to purchase a deferred CGA with the option of receiving a lump-sum or installment payments during the period when one or both nephews will be in college, thereby increasing income in those years, as well as giving Uncle Henry a charitable income tax deduction the year of the gift. But if Uncle Henry designates one or both nephews as the annuitants, then the nephews would be the owners of the payments and might not use them for college—his sister has been woefully unsuccessful in instilling the values of deferred gratification and a good work ethic.

Uncle Henry would not be an annuitant, so the capital gains attributable to any appreciated property given in exchange for the annuity would not be spread ratably over his lifetime. He is hesitant to lose this benefit of a CGA, particularly because his lifetime of skilled investing has resulted in a large proportion of his assets being highly appreciated.

If Uncle Henry did not retain the right to revoke his nephews' annuity interest, he would make a completed gift to them in the year that the CGA was purchased, and since payments would be deferred the gift would not be eligible for the annual exclusion. If he retained the right to revoke the gift, the payments would be taxable gifts when made and should be eligible for the annual exclusion in those years. Considering that Harvard's tuition currently runs over \$30,000 a year, however, Uncle Henry realizes that the gifts could well exceed the annual exclusion amount for each nephew. Knowing that his sister has put aside little for her sons' education, he fears that all of their education expenses, including books, room and board, as well as tuition, are likely to fall to him.

If Uncle Henry designates himself as the annuitant, he will receive the payments and can control how they are spent, i.e., make sure they go toward college expenses. Uncle Henry can use part of the payments to pay the tuition directly to the school without gift tax consequences¹¹³ and still have his full annual exclusion amount available to cover the remaining amounts that he plans to give his nephews for other education-related expenses. Uncle Henry realizes that he would be subject to income tax on the payments when they are made, and that he would also be subject to a penalty for early withdrawal from the annuity under Section 72(q) if he takes advantage of the option of commuting the annuity in exchange for increased payments during the nephews' college years (as the nephews also would be if they were the annuitants and took payments earlier than over their life expectancy).

If Uncle Henry decides to name himself as the annuitant, then he can guard against the possibility that he could die before the nephews complete college by purchasing two CGAs and naming one nephew as successor annuitant of each (and retaining the right to revoke that interest). But the thought of the nephews having not only full control of the funds, but full control without his guiding hand there to ensure that they spent the money wisely, is more than he wants to contemplate.

If the nephews are close to college age (so that the benefit of deferral for the CGA would be minimized), and Uncle Henry wishes to contribute appreciated property, he also might consider establishing a term-of-years CRT to provide payments to the nephews. The CRT will be able to sell the appreciated property without immediate imposition of capital gains tax. Uncle Henry may retain a right to revoke the payments from the CRT so that they become present-interest taxable gifts only in the years that they are made (assuming

that his retained testamentary right to revoke does in fact make the gifts incomplete during his actuarial life expectancy), although the amount that can be covered by his annual exclusion is likely to be less than the full amount needed. Alternatively, to better avoid making taxable gifts to the nephews, Uncle Henry could make himself the beneficiary of the CRT, pay the income tax on the payments, use all or part of them to pay tuition directly, and make annual exclusion gifts with the balance or other funds.

If the nephews are young, a further alternative would be to establish a longer term-of-years (up to 20) flip CRUT funded with growth stock with the flip occurring when the nephews were ready to begin college.

Employer Stock Funding a CRT or CGA

Ann is age 65 and is retiring from a company listed on the New York Stock Exchange. She plans to take a lump-sum distribution of her entire balance in the company's qualified retirement plan, which was solely funded by her employer and includes employer stock, and to then roll over all or part of it into an IRA that will be managed by her investment advisor, James.

Ann has volunteered for many years with her city's Community Foundation and currently serves on its board. She would like to make a gift to the Foundation to be used to promote animal welfare and prevent cruelty to animals in her community. Ann has volunteered with several local animal welfare organizations over the years and although she has met many committed fellow volunteers, she has observed that the organizations are small and not always well managed—in fact, several have disappeared and others have appeared during the 25 years she has been actively volunteering. Ann has more confidence in the stability and leadership of the Foundation, which has served the community for many years, steadily increasing its endowment and becoming more sophisticated in its staff's management and investment expertise. Ann believes that she can use some of her lump-sum distribution to accomplish her charitable goals and still have enough for a comfortable retirement. She makes an appointment with her attorney, Jane, and brings along James and information from the Community Foundation on the alternatives for planned gifts.

Jane, Ann, and James discuss Ann's retirement plans and charitable goals. As part of the lump-sum distribution, Ann will receive employer stock worth \$400,000, which she and James agree is about the value that she could use for a charitable life income plan. The retirement plan's basis in this stock is \$40,000, which Ann will have to report as part of her taxable income for the year that she receives the distribution.

Using a CRUT. Jane explains that if Ann then contributes the stock to a CRUT, her charitable deduction will be based on the current FMV of the stock of \$400,000 rather than the \$40,000 she reports as income. If Ann contributes the stock to a CRUT paying her a unitrust amount of 6% a year in quarterly installments, she would be eligible for a charitable deduction of \$163,260. ¹¹⁴

Ann and James appreciate the fact that the CRUT's holdings can be diversified without incurring immediate capital gains tax—ever since the Enron debacle, Ann has been nervous about the concentration of employer stock in her plan. The \$360,000 difference between the price the retirement plan paid for the stock and its value on distribution to Ann will qualify for long-term capital gain treatment regardless of whether it is held for a year after distribution. The gain will be distributed and taxable to Ann through the four-tier system as the unitrust payments are made. Ann's unitrust payments would fluctuate with the annual value of the CRUT so that she would receive the benefit of any increase

in value (James likes this aspect), and Ann would also bear the risk of a decrease in the payments if the asset value decreases.

Using a CGA. Another alternative for Ann to consider is contributing the employer stock in exchange for a CGA, which also would pay 6% under current rates recommended by the American Council on Gift Annuities, which the Foundation follows. Ann would be eligible for a charitable income tax deduction of \$142,116 for the CGA and would receive fixed annual payments of \$24,000 for life, guaranteed by all the assets of the Foundation (which Ann knows to be substantial and well managed). With the CGA Ann would not benefit from any increase in the asset value, but she also would not have to worry about fluctuations or decreases in her payments.

Jane further points out that with a CGA, Ann's \$360,000 gain from the employer stock would be allocated between the value of Ann's annuity and the value of the Foundation's remainder interest, resulting in total reportable gain of \$232,095.60 that would be reported over 19.9 years, Ann's life expectancy (since Ann would be the donor and sole annuitant). Of Ann's annual payments of \$24,000, for the first 18 years of the contract \$11,664 of each year's payments would be long-term capital gains and \$1,296 would be tax-free, leaving only \$11,040 a year taxable as ordinary income.

Donor-designated funds. Ann wants to discuss further with James and her accountant which alternative is best for her, but decides that she will contribute the employer stock to either a CRUT or a CGA with the Foundation. Ann has confirmed that the Foundation allows donors to designate a particular fund for contributions made in exchange for CGAs, and Ann has already established a donor-designated fund with the Foundation to benefit animal welfare organizations in her area. Ann also can designate the Foundation and this particular fund as the beneficiary of her CRUT if she decides on that alternative.

Gift of Remainder Interest in Farm and Deferred CGA

Edna, age 73, and Sam, age 75, have lived for nearly 50 years on the farm that they purchased together (as community property) the year after they married. They have one child, Betty, who lives in the city, where she works for a large corporation. Sam has shrewdly invested over the years, and has begun to shift his and Edna's investments from growth to income production in expectation of their scaling back production on the farm and taking more time to enjoy their "golden years." In rebalancing the investment portfolio, Sam has incurred large capital gains this year and dreads the tax, even if it is reduced to 15%.

Edna and Sam have set aside funds that they would like to donate to a large nonprofit health care organization (HCO), where Edna was successfully treated for breast cancer and Sam had bypass surgery after a heart attack. Both are grateful for the care they received from the HCO, and the HCO's director of planned giving has visited with them and explained some of the alternatives for planned gifts. Sam was intrigued by the descriptions of charitable remainder trusts and the opportunity to escape immediately incurring capital gains tax and obtain a charitable deduction to offset gains. Edna was interested in the "naming opportunities" for the new wing that the hospital is building. Both would like to make a substantial donation and perhaps have one of the new rooms named for them.

Edna and Sam are also concerned about their daughter Betty and her future. Betty has been twice divorced, is now age 50 and single, with no children. In spite of their oft-repeated advice, she has contributed little to her company's Section 401(k) plan or otherwise saved for her retirement.

Edna and Sam go to see their attorney, Jane, bringing their accountant, Bill, a conservative and trusted advisor who has prepared their income tax returns and counseled them on farm and personal finances for many years. Bill understands that Edna and Sam would like to make a substantial donation to the HCO of funds or stock, but is concerned about their overall financial picture given their past health problems, lack of any employer-sponsored retirement plan, and the rising cost of living.

Edna and Sam first ask about establishing a joint-and-survivor CRUT for themselves. They are considering adding Betty as a beneficiary to receive the unitrust amount for her lifetime after their deaths. Bill is concerned about the fact that Sam and Edna would not have access to the CRUT principal if they need it, but would be limited to the unitrust payments. He would prefer for them to hold onto more of their liquid assets and perhaps leave a bequest to the HCO after the death of the second of them to die. Bill admits that this plan would not allow Sam and Edna the benefit of the charitable income tax deduction, which he agrees that they could use this year to offset substantial capital gains and probably during the five-year carryover period as well. Edna also observes that although a bequest still might put their names on one of the new rooms, they would not be there to see it.

Jane first explains that the marital deduction will be available only if Edna and Sam are the sole beneficiaries of a CRUT. Adding Betty as a beneficiary will make the gift ineligible for the marital deduction. There would be a taxable gift by Sam to Edna of half of the value of Edna's survivorship interest in the CRUT, and each of them would make a taxable gift of half of the value of Betty's interest in the CRUT. Bill asks whether it would help if they each retained the right to revoke the other's survivorship interest and Betty's interest, and Jane agrees that by doing that they could avoid making a taxable gift, but at the first spouse's death, half of the value of both the surviving spouse's interest and Betty's interest would be included in the taxable estate, and the marital deduction would not be available.

Jane reviews the material that Edna has brought on the planned giving program at the HCO and discusses with them further their assets and goals. Together they decide that a better plan for them would be to make a gift of the remainder interest in their farm to the HCO. Edna and Sam plan to live on the farm for the rest of their lives, but they know that Betty has no interest in it. They would like to see the land either used for the HCO's planned expansion, or sold and the funds used to support the HCO's research on breast cancer.

Edna and Sam will each retain the right to revoke the other's survivorship interest in the farm to avoid making a taxable gift (though only Sam, the older spouse, would be making a taxable gift of half of the survivorship interest, they prefer to have the same right included for each of them). They will receive the charitable gift tax and income tax deductions for the value of the charity's remainder interest. At the death of the first of them to die, the marital deduction will be available for the value included in that spouse's estate. At the death of the second spouse, the charitable deduction will offset the value included.

Jane explains that if they are concerned about maintaining a larger income stream for themselves, the HCO probably would agree to give them a CGA in exchange for the remainder interest in the farm. The HCO is well-established and funded and the property valuable enough that the HCO probably would be willing to pay the annuity amount even though it would not receive any property until after the second death. Receiving the CGA would decrease the size of the charitable income tax deduction, however, and even Bill agrees that Edna and Sam do not really need the additional income since they will be retaining most of their cash and securities by giving the remainder interest rather than

establishing the CRUT. The income tax charitable deduction is more valuable to them at this point in their lives.

But what about Betty? She is currently earning a good salary, and unlikely to need any additional income until she retires. Sam and Edna decide to contribute \$100,000 cash for a deferred CGA for Betty that would begin paying her \$12,300 annually at age 65; they will receive an immediate charitable income tax deduction of \$45,271.¹¹⁵

They decide against contributing securities because the gain would not be spread ratably over the term of the annuity. They will each retain an inter vivos and testamentary right to revoke Betty's interest in the deferred CGA to avoid making a taxable gift. If they do not revoke the gift, then for any time that they are still alive when Betty begins receiving payments, they will be able to apply their annual gift tax exclusions to the payments (and the survivor can continue to apply his or her single exclusion after the death of the first of them). At the death of each, if that spouse has not revoked Betty's interest, half of its value will be included in the deceased spouse's taxable estate. Sam is comfortable with this because he fully expects that the government will have thrown out the estate tax by then, or at least enacted a permanent exclusion exceeding the \$1 million gift tax exclusion. Both also like the flexibility of retaining the right to revoke—if Betty doesn't need the money, they can revoke her interest, leaving nothing in either estate and allowing more to go to the HCO sooner. Alternatively, they can purchase an additional CGA for Betty if they wish to further increase her retirement income (and benefit the HCO).

Because the farm's value has increased greatly since Edna and Sam bought it 50 years ago, the gifts' combined value is enough to assure them of having one of the new waiting rooms named for them. Edna calls the HCO's planned giving director as soon as she gets home.

Planned Gift for a Noncitizen Spouse

Patrick, age 63, is a prominent professor of international economics and business at a respected university and also much in demand as a consultant and speaker. He is married to Angelique, age 52, a Spanish citizen with no intention of applying for U.S. citizenship, although she has lived in America since her marriage to Patrick ten years ago. Patrick has two adult children from a prior marriage and four grandchildren.

Patrick calls his attorney, Jane, to discuss planning lifetime gifts that will further his goals of providing for Angelique and making a substantial gift to the university, while preserving his lifetime exclusion from federal gift and estate taxes for gifts and bequests to his children and grandchildren. Patrick's will includes a qualified domestic trust (QDOT) for Angelique, but she would prefer to have some property of her own outside of the QDOT, which will be managed by Patrick's oldest son as trustee. Patrick proposes making lifetime gifts that would allow Angelique, who has become quite skilled as a day trader on the U.S. stock market, to build her own asset base.

Patrick also feels that he owes a debt to the university. During his 30-year tenure, he's watched it develop into a fine academic institution, and he believes that the support he's received from the university has substantially aided his own meteoric rise in the world of international finance.

Finally, Patrick understands that there is no unlimited gift tax marital deduction for gifts to noncitizen spouses, but he is firm in his decision not to invade his applicable exclusion amount for anyone other than his children and grandchildren. He notes that even with all

the talk of estate tax repeal, the gift tax has never been repealed, and the lifetime gift tax exemption has remained frozen at \$1 million. Even if the estate tax is repealed, he wishes to give substantial assets to his children during his lifetime and does not want to pay gift tax, particularly if the property might not be taxed in his estate.

Jane is familiar with the university's planned giving program and knows CGAs are available, and that the program is well managed. She tells Patrick that joint-and-survivor annuities are an exception to the general lack of a gift tax marital deduction for noncitizen spouses. He could purchase a CGA naming himself and Angelique as annuitants without making a taxable gift, but unfortunately no corresponding estate tax marital deduction is available—generally only property left to a QDOT will qualify for the estate tax marital deduction for a noncitizen spouse. The Regulations do provide two alternatives for nonassignable annuities benefitting noncitizen spouses. Basically, after Patrick's death Angelique would have to pay annually the deferred estate tax on the "corpus portion" of each annuity payment or to transfer the corpus portion of each payment to the QDOT.¹¹⁶ Angelique finds neither of these alternatives attractive. Another option would be to allocate part of Patrick's applicable exclusion amount to her annuity interest.

Patrick is not willing to gamble on repeal of the estate tax, or even that the estate tax exclusion will increase to a size large enough to cover his entire estate (he's done very well with the consulting), and he assumes that Angelique will outlive him, so he finds this option unacceptable. Jane then suggests that he consider purchasing a single-life immediate CGA for Angelique within the value of the annual exclusion amount applicable to noncitizen spouses (\$120,000 in 2006). For example, at the current CFMR of 5%, and the American Council on Gift Annuities rate applicable to Angelique's age of 52, he could contribute \$150,000, receive a charitable income and gift tax deduction of \$36,051 (leaving Angelique's interest well within the annual exclusion amount), and Angelique will receive an annuity of \$8,100 a year for life. For the first 30 years that she receives the annuity, \$3,653 will be tax free—only the remaining \$4,447 will be taxable as ordinary income.

Patrick can then purchase an additional CGA each year, applying a new annual exclusion, until he has given Angelique the amount that he wishes to transfer to her, and he will have made substantial gifts to the university as well. Patrick knows that Angelique will enjoy having the extra income to invest, as well as the security of a continuing annuity, and he is pleased to be giving something back to the university.

CONCLUSION

Charitable life income plans and gifts of remainder interests offer a broad range of possibilities for donors who wish to benefit a particular charity, obtain an immediate charitable income tax deduction, and retain income or the use of a home or farm. The client's individual goals and situation will determine which alternative will lead to the best results.

Practice Notes

If the donor has received a lump-sum distribution from a qualified retirement plan that includes stock in the donor's employer, and the plan's basis in the stock is less than the stock's value on distribution, using all or part of the employer stock to fund a charitable remainder trust or charitable gift annuity will allow the donor an income tax charitable deduction greater than the taxable income that the donor must report for the distribution

in the year that it is received. (IRS rulings have approved only contributions of such stock to CRTs, but the same results should apply to CGAs.)

To qualify for this favorable treatment, the lump-sum distribution must be (1) from an employer's qualified retirement plan (not from an IRA or Section 403(b) plan), (2) a distribution of the entire balance of a participant's account within one tax year, and (3) payable either on account of the participant's death, attainment of age 59½, separation from service, or disability. The employee receiving such a distribution is required to include only the stock's basis (the price paid by the qualified retirement plan) in taxable income for the year in which the distribution is received. The stock's net unrealized appreciation does not have to be reported until the employee recognizes the gain by selling or otherwise disposing of the stock in a taxable transaction, and then it will be treated as long-term capital gain even if the employee has held it less than a year since receiving the distribution.

[1](#)

"Income" is used broadly in this article to refer to distributions from charitable plans that may actually include principal as well as accounting income, depending on the plan's terms.

[2](#)

Section 664.

[3](#)

Section 170(f)(2)(A). For unitrusts, see Regs. 1.664-3(d) and 1.664-4(d), and IRS Pub. 1458; for annuity trusts, see Regs. 1.664-2(c) and (d), Section 7520(a), Reg. 20.2031-7(d)(7), and IRS Pub. 1457.

[4](#)

Sections 664(e) and 664(d)(1).

[5](#)

Regs. 1.664-2(a)(4) and 1.664-3(a)(4).

[6](#)

Sections 664(d)(1)(D) and 664(d)(2)(D).

[7](#)

For example, the Uniform Probate Code allows the surviving spouse the right of election against a percentage of the "augmented estate," which could include the assets of a CRT.

[8](#)

See, e.g., "Revenue Procedure 2005-24: Ask IRS to Withdraw the Waiver of Spousal Right of Election Requirement for CRUTs and CRATs," *Taxwise Giving*, May 2005, pages 1-5; "CRT Planning Gets More Difficult," *Trusts & Estates* (May 2005), pages 18-22; Katzenstein, "Rev. Proc. 2005-24 CRT Could Lose Exempt Status Because of Tax Trap," *Steve Leimberg's Charitable Planning Newsletter #73* (4/1/05) at www.leimbergservices.com; "Inter Vivos CRUTs and CRATs—IRS Opens Pandora's Box with Spousal 'Right of Election,'" *Taxwise Giving*, April 2005, pages 1-11.

[9](#)

The guidance providing sample forms is very helpful and also includes general explanations, annotations, and alternate provisions. Those for CRATs appear in Rev. Proc. 2003-53, 2003-2 CB 230; Rev. Proc. 2003-54, 2003-2 CB 236; Rev. Proc. 2003-55, 2003-2 CB 242; Rev. Proc. 2003-56, 2003-2 CB 249; Rev. Proc. 2003-57, 2003-2 CB 257; Rev. Proc. 2003-58, 2003-2 CB 262; Rev. Proc. 2003-59, 2003-2 CB 268; and Rev. Proc. 2003-60, 2003-2 CB 274. Those for CRUTs appear in Rev. Proc. 2005-52, 2005-34 IRB 326; Rev. Proc. 2005-53, 2005-34 IRB 339; Rev. Proc. 2005-54, 2005-34 IRB 353; Rev. Proc. 2005-55, 2005-34 IRB 367; Rev. Proc. 2005-56, 2005-34 IRB 383; Rev. Proc. 2005-57, 2005-34 IRB 392; Rev. Proc. 2005-58, 2005-34 IRB 402; and Rev. Proc. 2005-59, 2005-34 IRB 412.

[10](#)

Reg. 1.664-2(b).

[11](#)

Rev. Rul. 77-374, 1977-2 CB 329; Reg. 20.2055-2(b)(1); see Lemann, "Tear It Down," *Trusts & Estates*, March 2005, pages 30-35.

[12](#)

Reg. 1.664-3(a)(2).

[13](#)

Section 664(d)(2)(D); Reg. 1.664-3(b).

[14](#)

Section 664(d)(3); Reg. 1.664-3(a)(1)(i)(b).

[15](#)

Regs. 1.664-3(a)(1)(i)(c) and (d).

[16](#)

Reg. 1.664-3(a)(1)(i)(c)(3).

[17](#)

Section 170(f)(10)(D); Regs. 1.170A-1(c) and (d); Rev. Rul. 84-162, 1984-2 CB 200.

[18](#)

Sections 7520 and 1274(d)(2).

[19](#)

See www.acga-web.org.

[20](#)

Reg. 1.1011-2(a)(4).

[21](#)

Reg. 1.1011-2(a)(4)(ii).

[22](#)

Reg. 1.1011-2(a)(3).

[23](#)

Reg. 1.1011-2(a)(4)(ii).

[24](#)

Ltr. Ruls. 9527033, 9407008, 9108021, and 9042043.

[25](#)

Section 642(c)(5).

[26](#)

Section 642(c)(5); Reg. 1.642(c)-6.

[27](#)

Section 170(f)(3)(B)(i); Regs. 1.170A-7(b)(3), 1.170A-7(b)(4), and 25.2522(c)-3(c)(2).

[28](#)

Rev. Rul. 85-23, 1985-1 CB 327.

[29](#)

Regs. 20.2055-2(e)(2)(ii) and (iii), 1.170A-7(b)(3) and (4), 25.2522(c)-3(c)(2)(ii) and (iii).

[30](#)

Sections 170(f)(2)(A), 2055(e)(2)(A), and 2522(c)(2)(A).

[31](#)

Ltr. Rul. 8529014.

[32](#)

Section 280A(d)(1).

[33](#)

Section 170(f)(3)(B)(i); Reg. 1.170A-7(b)(3).

[34](#)

Sections 216(b)(1) and (2); Reg. 1.170A-7(b)(3). See also Rev. Rul. 74-241, 1974-1 CB 68, providing that all that is required for something to qualify as a personal residence is that it contain facilities for cooking, sleeping, and sanitation.

[35](#)

Reg. 1.170A-7(b)(4).

[36](#)

Rev. Rul. 78-303, 1978-2 CB 122.

[37](#)

Section 170(f)(3)(B)(i).

[38](#)

Section 170(f)(4); Reg. 1.170A-12(b)(2).

[39](#)

Rev. Rul. 76-165, 1976-2 CB 448.

[40](#)

Section 664(c).

[41](#)

Section 664(b); Reg. 1.664-1(d).

[42](#)

Regs. 1.664-1(d)(1)(i) and (ii).

[43](#)

Reg. 1.664-1(d)(1)(iv).

[44](#)

Reg. 1.664-1(d)(1)(ii)(a).

[45](#)

Id.

[46](#)

Reg. 1.1011-2(c).

[47](#)

Section 72(b)(3).

[48](#)

Reg. 1.1011-2(a)(4).

[49](#)

Regs. 1.1011-2(a)(4)(ii) and 1.1011-2(c), Example 8.

[50](#)

Reg. 1.1011-2(c), Example 8.

[51](#)

Id.

[52](#)

Section 661; Reg. 1.642(c)-5(a)(2).

[53](#)

Section 661(a)(1).

[54](#)

Section 642(c)(3).

[55](#)

Reg. 1.643(a)-3(a).

[56](#)

Reg. 1.642(c)-5(c)(2)(i)(c).

[57](#)

Section 662(a); Reg. 1.642(c)-5(b)(7).

[58](#)

The generation-skipping transfer tax is beyond the scope of this article. For an in-depth discussion of the transfer tax implications of charitable life income plans, see Hester and Turner, "Navigating the Transfer Tax Maze of Charitable Life Income Plans," 32 Estate Planning No. 5 (May 2005), pages 32-38, and "Retaining a Right to Revoke an Interest in a Charitable Plan," 32 Estate Planning No. 6 (June 2005), pages 26-32.

[59](#)

Sections 6019(a)(3) and 2503(b).

[60](#)

Section 2523(a); Reg. 25.2523(b)-1(c)(2).

[61](#)

Section 2523(f).

[62](#)

Section 2523(i).

[63](#)

Section 2523(f)(6).

[64](#)

Sections 2523(i)(2) and 2503(b).

[65](#)

Section 2503(b); Reg. 25.2503-3(a).

[66](#)

Ltr. Rul. 8637084, Ltr. Rul. 8932018, and Ltr. Rul. 7914045.

[67](#)

See Rosepink, 865 T.M. (BNA), *Charitable Remainder Trusts and Pooled Income Funds*, page A-59 (2000, updated 5/5/2003), citing Ltr. Rul. 7929040.

[68](#)

Reg. 25.2503-3(c), Example 3; Rev. Rul. 55-303, 1955-1 CB 471.

[69](#)

Reg. 25.2503-3(b).

[70](#)

Reg. 25.2511-2(c).

[71](#)

Regs. 1.664-2(a)(4) and 1.664-3(a)(4).

[72](#)

See, e.g., *Charitable Giving Tax Service* (R&R Newkirk, 2001) (CGTS), page 7-26; *Charitable Giving and Solicitation* (RIA 1990) (CGS), ¶¶23,090, 24,009; Rev. Rul. 79-243, 1979-2 CB 343; Ltr. Rul. 8949061.

[73](#)

Id.

[74](#)

CGTS, *supra* note 72, pages 7-26 (2001), 9-33 (1994); CGS, *supra* note 72, ¶23,086 (1990).

[75](#)

In Ltr. Rul. 8949061, the donor's retained testamentary right to revoke the interests of the income beneficiaries was held to make the gifts incomplete, only the annual payments (when paid) were held to be completed gifts, and each payment was held eligible for the annual exclusion.

[76](#)

Regs. 1.664-2(a)(5)(i) and 1.664-3(a)(5)(i); see Ltr. Ruls. 8120056 and 200414011. For a discussion of this issue, see Teitell, *Deferred Giving: Explanation, Specimen Agreements, Forms* (2002) (DG), Vol. 1, ¶2.11[F]; Toce et al., *Tax Economics of Charitable Giving* (Warren, Gorham & Lamont, 2005), ¶19.04[3].

[77](#)

CGTS, *supra* note 72, pages 7-116(a) (1995) and 7-116(b) (1995).

[78](#)

Rev. Proc. 88-53, 1988-2 CB 712.

[79](#)

Reg. 1.1011-2(a)(4)(ii).

[80](#)

Sections 2036 and 2039.

[81](#)

Section 2036.

[82](#)

Sections 2036, 2040(b), and 2055; Rev. Rul. 69-577, 1969-2 CB 173.

[83](#)

Section 2039.

[84](#)

Section 2056(b)(8).

[85](#)

Sections 2056(a) and 2056(b)(7).

[86](#)

Section 2056(b)(7)(C).

[87](#)

Section 2056(b)(7).

[88](#)

Section 2056A; Regs. 20.2056A-4(c)(2) and 20.2056A-4(c)(3).

[89](#)

Section 6019(a)(3).

[90](#)

Section 2503(b).

[91](#)

Section 2523(f); Reg. 25.2523(f)-1(f), Example 1.

[92](#)

Section 2055(a)(2); Regs. 20.2055-2(e)(2)(ii) and 20.2055-2(e)(2)(iii).

[93](#)

Sections 2044 and 2056(b)(7).

[94](#)

Section 2055(a)(2).

[95](#)

Sections 2523(g) and 2056(b)(8).

[96](#)

Sections 2523(f) and 2056(b)(7).

[97](#)

Sections 2523(a) and 2523(f)(6).

[98](#)

Sections 2523(i) and 2523(f)(6).

[99](#)

Sections 2503(b) and 2523(i)(2); Reg. 25.2523(i)-1(c)(1).

[100](#)

Section 2056A; Regs. 20.2056A-4(c)(2) and 20.2056A-4(c)(3).

[101](#)

Rev. Rul. 2002-20, 2002-1 CB 794, amplifying and superseding Rev. Rul. 76-270, 1976-2 CB 194.

[102](#)

Reg. 1.664-3(a)(5)(i).

[103](#)

For a complete discussion of "special needs" trusts, sometimes also referred to as "supplemental needs" trusts, see Kruse, *Third-Party and Self-Created Trusts: Planning for the Elderly and Disabled Client* (3d ed., ABA, 2002).

[104](#)

Sandoval, "Tax-Efficient Funding of a Lifetime Special Needs Trust," 32 Estate Planning No. 10 (October 2005), pages 32-38.

[105](#)

See Section 1361(e)(1)(B)(iii).

[106](#)

Finestone, "Charitable Gift Annuities," 29 ACTEC Journal 37-50 (2003). This article also includes other valuable insights on the practical uses of CGAs.

[107](#)

Ltr. Ruls. 200335017, 200302048, 200215032, 200202078, 200038050, and 199919039. See also Hoyt, "Gifts from Retirement Plans: Laws, Opportunities, and Pitfalls," Proceedings of the National Conference on Planned Giving, Kissimmee, Fla., Sept. 28- Oct. 1, 2005, Vol. 1, pages 91-110; Hester and Morton, "Using Retirement Plans to Make Charitable Gifts," Louisiana Bar J. 50(4), Dec. 2002/Jan. 2003, pages 269-273.

[108](#)

Section 402(e)(4)(D); accumulated deductible employee contributions under Section 72(o)(5) are excluded from lump-sum distribution treatment. The five-year plan participation requirement for lump-sum distributions is not applicable for these purposes.
[109](#)

Section 402(e)(4)(B); Reg. 1.402(a)-1(b)(2)(i); Notice 98-24, 1998-1 CB 929.
[110](#)

Section 170(e)(1)(A).
[111](#)

Hoyt, *supra* note 107, page 100.
[112](#)

Section 170(e)(1)(B)(i).
[113](#)

See Section 2503(e).
[114](#)

This assumes a CFMR of 5% and quarterly payments.
[115](#)

This assumes a CFMR of 5% and quarterly payments.
[116](#)

Reg. 20.2056A-4(c).

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