

# Estate Planning For Actors And Athletes September 19, 2012

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# Overview

- General Estate Planning Opportunities
- Challenges and Opportunities Relating To Public Persona
- Special Asset Types and Character of Property
- Alternative Family Structure Opportunities
- Cross-Border Issues

# General Estate Planning and Application To Public Persona

- Current Credit/Exemption Levels

Year	Gift/Estate Tax Credit	Gift/Estate Tax Rate	GSTT Exemption	GSTT Rate
2012	\$5.12 Million	35%	\$5.12 Million	35%
Post-2012	\$1 Million	55%	\$1.3 Million	55%

- Risk of clawback
  - Post-gift income and appreciation remain
  - Discounts stand
- Annual Exclusion of \$13,000 / donor / donee / year

# Historically Low Interest Rates

- Intra-family loans to be repaid
- Loans to trusts for beneficiaries
  - For investment
  - Seed money to start business
  - Seed money to purchase assets from client
- Sales to grantor trusts
  - Discounts on assets
  - No recognition/realization of gain on sale
  - No income tax on note payments
  - Client pays income tax liabilities of trust

## September AFRs

	Rate
Short-term	0.21%
Mid-term	0.84%
Long-term	2.17%
§7520	1.0%

# Depressed Real Estate Values

- Gifts of residential real property to trust with lease-back at FMV
- Generally not good in low-interest environment, but QPRTs
- Proposition 13 issues
  - Spousal Exclusion
  - Parent-child exclusion
  - Entity rules

## Additional Opportunities

- Spousal Life Access Trust (SLAT)
- Taxable GRATs (and “zeroed-out GRATs”)
- Life Insurance
  - Leverage credit/exemption and provide money to family if career “dries up.”
  - Liquidity (especially when estate heavy on non-licensed IP)

# Community vs Separate Property

- Understanding Character of Property
  - Pre- and Post-Marital Agreements
  - Source and Tracing
  - Segregation of accounts and trusts
  - Consequences of character
    - Reach of creditors
    - Property disposition
    - Income tax basis
- Preserving Character
  - Marital Property Agreements
  - Transmutations
  - Title only a presumption
  - Community contributions to separate property business
- Special Considerations for Life Insurance trusts
- Gift-Splitting Opportunities

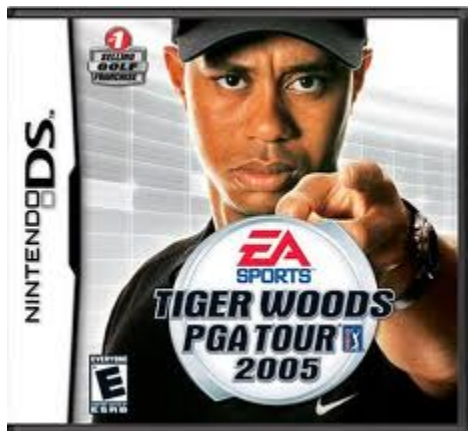
# Challenges Facing Actors/Athletes

- **Public Attention And Privacy Concerns**
  - Media, Fans and Criminals Seeking Them
- **Financially and Legally Under-educated**
  - No prior education or understanding of wealth
- **Wealth-building Phase**
  - Straight out of school or “just made it”
  - Explosive growth in wealth
- **Complex Family Structures**
  - Multiple marriages and blended families
  - Alternative lifestyles
  - Disparate wealth from partner
- **Sources Of Wealth Not Diversified**
  - Athlete’s career tied to physical ability
  - Actor’s career tied to looks/voice
  - Singer’s career tied to voice
- **Perception That Success Lasts Forever**
  - Never expects to become “yesterday’s news”
  - No contingency plan
- **Surrounded By People With Ill Motives**
  - Family and friends ride coat-tails
  - Peddlers of “investment opportunities”
  - Advisors taking advantage



# Special Assets – Right of Publicity

- Right Of Publicity
  - Control ability to profit from name and likeness
  - Patchwork of state laws (plus federal Lanham Act § 43(a))



# Right of Publicity After Death

- Approximately 16 states provide protection
- California (strong protection) vs New York (weak protection)
- California - protection for 70 years after individual's death if domiciled in California at death
- Right is freely transferable and descendible and California provides default descent pattern
- Hard to value for estate tax purposes
- May create liquidity problem

The screenshot displays an e-commerce interface for Marilyn Monroe merchandise. On the left, a navigation menu lists categories such as 'Most Popular Marilyn Monroe' (Films, Photos, Wall Murals) and 'Marilyn Monroe Specialty Products' (3D Posters, Calendars, etc.). The top navigation bar shows 'All Items (1,482)' and filters for 'Poster/Print (626)', 'Pre-Framed (697)', and 'T-Shirt (86)'. Below this, there are options for 'Sort by: Best Seller', 'Views', and a grid view selector. A 'TRY OUR NEW GRID VIEW x' button is also present. The main product grid shows three items:

- Marilyn Monroe-Ballerina Poster - 24 x 36 in**: ~~\$9.99~~ \$8.99 **ON SALE!**
- Marilyn Monroe Poster - 24 x 36 in**: ~~\$9.99~~ \$6.99 **ON SALE!**
- Marilyn Monroe VII In Colour Photographic Print - 12 x 9 in**: \$34.99 ([11 other sizes available](#))

# Trademark Protection

- Protects against consumer confusion
- Protects words, names, symbols of goods and services
- Federal protection (Lanham Act) and common law state protections
- Registration and renewal requirements (fed)
- Must control quality and “use it or lose it”
- Hard to value + liquidity problems

- Blue Ivy Carter

- IC 020. US 002 013 022 025 032 050. G & S: Plastic key chains and plastic key rings; small leather goods, namely, leather picture frames, leather key fobs, and leather key holders; plastic flags; vinyl banners, baby bouncers, baby changing mats, baby changing tables, high chairs for babies, playpens for babies



- “Linsanity”

- Trademark disputes between Jeremy Lin and those seeking to exploit his name (including his former coach!)

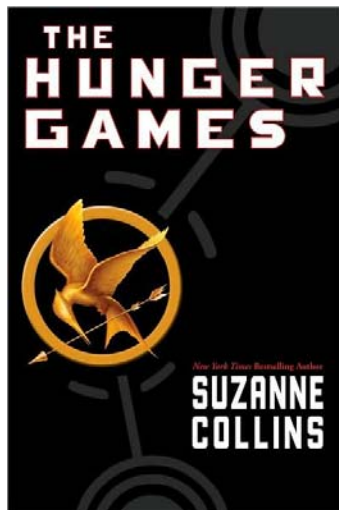
# Copyright

- Protects the expression of ideas
- Literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works
- Rights: to reproduce; to prepare derivative works; to distribute; to perform publicly, to display publicly; to perform by digital transmission
- Duration: Complex, but basically
  - Individual author - life of author plus 70 years
  - Joint authors - life of last surviving author plus 70 years
  - Work made for hire - first of 95 years from publication or 120 years from creation
- Work made for hire
  - Employee vs Independent Contractor

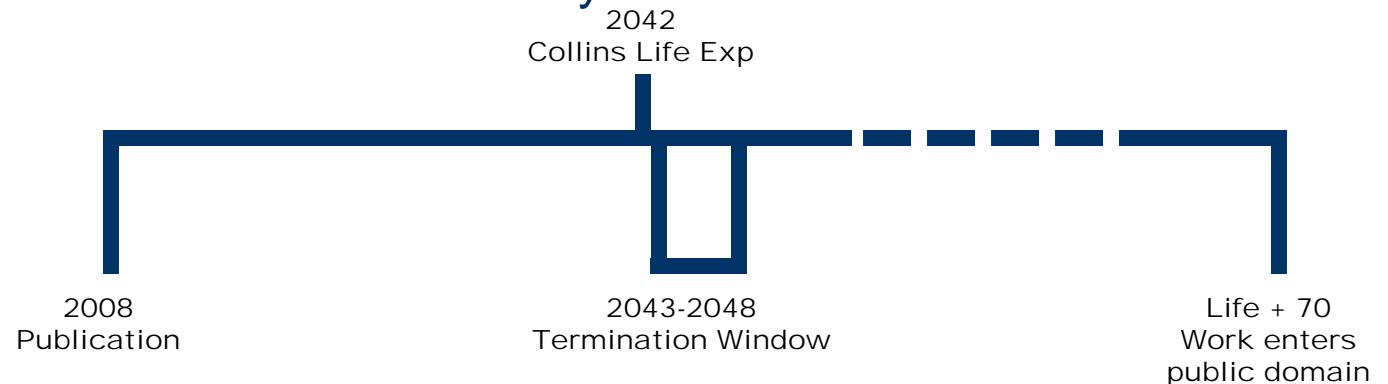
# Copyright Transfers And Termination

- Transfer or License the “bundle of rights”
  - Any or all rights
  - Fixed term or perpetuity
  - Any or all media
  - Geographic restrictions
  - Use restrictions
- Termination Right
  - Gives author ability to terminate any grant of copyright 35 years after original transfer, regardless of contract, etc.
  - Statutory – cannot be eliminated by contract
  - Exercised within 5 year window with proper notice
  - Upon termination, copyright reverts to author with ability to further exploit
  - Termination rights pass to heirs by statute and CANNOT be altered by testamentary instrument. Heirs can further exploit the copyright.

# Copyright Transfers And Termination Example



- Published in 2008 by Scholastic



- Film released by Lion's Gate in 2012
  - Termination rights allows terminator to prevent studio from making derivative works (i.e. sequels) but cannot prevent studio from showing existing movie.

# Copyright Transfers And Termination Continued

- Forced heirship issue
  - May want to equalize
- Does not apply to works-made-for-hire
- Loan-Out Corporations
  - Widely used for liability and tax purposes
  - May accidentally eliminate termination rights
  - May purposely want to eliminate
- Gift/Estate Tax Problems
  - No marital deduction for lifetime gifts
  - Valuation and liquidity

# Privacy Structures And Safeguards

- Privacy
  - Revocable Trust
    - Naming
    - Properly funded to avoid probate
  - Title holding/Nominee Trusts
    - For initial purchase
    - Double nominee for existing properties
    - Watch for acceleration issues
  - LLCs
    - Proposition 13 issues
  - Domestic Employee Agreements
    - Confidentiality and Remedies
- Other Safeguards
  - Marital Agreements/Cohabitation Agreements
    - Support Obligations
    - Maintenance and defining character of assets, both existing and future.
  - Disability Planning - Trustee succession, powers of attorney
  - Advance Health Care Directives and HIPAA concerns



# Non-Marital Relationships

- Many traditional planning opportunities are not available
  - No marital deduction
    - Does cohabitation constitute a gift
  - No spousal roll-over for retirement assets
  - No community property to shift wealth
  - No spousal exclusion from reassessment



# Non-Marital Relationships

- Planning Opportunities Available
  - GRITs: There is no need to comply with Chapter 14
  - Cross ownership of life-insurance
- Unexpected Risks
  - If age difference is more than 37.5 years, transfers are subject to GSTT as well as gift or estate tax

# Cross Border Issues

- US Tax Residency for Non-Citizens
- US Residents/Domiciliaries are taxed on their worldwide income for income tax purposes and their worldwide assets for estate tax purposes



## Income Tax Test ( § 7701(b) or 183 Day Test)

- You are a US Income Tax Resident if:
  - You are present in the US 31 Days during the current tax year AND
  - The sum of
    - the days present in the current tax year
    - 1/3 of the days present in the preceding tax year AND
    - 1/6 of the days present in the second preceding tax year
  - Equals 183

# Income Tax Test - Continued



- The Bad News: Artist And Athlete Treaty Provisions

Most income tax treaties contain provisions permitting taxation of income earned by non-resident artists and athletes in the country in which it is earned. Therefore, even if you are very careful in the number of days your client is physically present in the US, your client's income from actor/athlete services actually performed in the US may still be subject to US income tax.

- The Good News: Royalty Income and Pension Income

Even if your client's income from the Kings or MGM Universal is subject to income tax in the US, generally royalty income and pension income will not be subject to US income tax provided that your client remains a non-US resident for income tax purposes.



# Estate Tax Domicile Test

- US Estate Tax Resident if “domiciled” in the US at time of death.
- Supreme Court and the IRS suggest that you cannot be a US Resident for estate tax purposes if you are in the United States on a visa that limits the duration of your US stay.
- In determining intent for domicile, consider:
  - Location of domicile in prior years
  - Jurisdiction for voting registration
  - Location of employment
  - Location of newly acquired living quarters
  - Present status of previous living quarters (i.e. sold, rented out, maintained vacant for future use etc.)

# Non-Citizen Spouses

- Limited Gift Tax Marital Deduction
  - \$136,000 per year
  - Transmutation not available
  - Confirming that earnings are community property may mitigate
- Estate Tax Marital Deduction only if Qualified Domestic Trust
  - Distributions of principal subject to estate tax
  - Must have US Trustee
  - If value exceeds \$2 Million, must have US institutional trustee, bond or letter of credit



# Offshore Assets



# UBS



# Offshore Assets: Reporting Obligations

Governments are catching up on the fact that here is now a global economy and are requiring increasing reporting to ensure that they collect “their fair share” of tax on your assets and income

# Offshore Assets: US Reporting Obligations

## Report of Foreign Bank and Financial Accounts (FBAR/TD F 90-22.1)

- \$10,000 aggregate account filing threshold
- **June 30 filing deadline (no extensions)**
- Penalties for failure to file **assessed each year**
  - Reasonable cause and balance reported (penalty waived)
  - No willfulness (as much as \$10,000 per violation)
  - Willfulness
    - Civil penalties of **GREATER** of \$100,000 or 50% of account balance **PER VIOLATION**
    - Statute of limitations for assessing penalties not tolled or extended



# Offshore Assets: US Reporting Obligations Continued

## Statement of Specified Foreign Financial Assets (IRS Form 8938)

- Applies to interests in foreign real property held through an entity or foreign trust (i.e. enveloped UK residence, Mexican residence held through fideicomiso)
- Filing Threshold:
  - Single/US Present:  
\$50,000 last tax day/\$75,000 highest value aggregate value
  - Single/Not US Present:  
\$200,000/\$300,000
- Filed with income tax return



# Offshore Assets: US Reporting Obligations Continued

Penalties for failure to file IRS Form 8938 assessed each year

- \$10,000 failure to file penalty each year (plus additional up to \$50,000)
- Penalty waived for reasonable cause
- 40% accuracy-related underpayment penalty
- 75% underpayment penalty for fraud
- Criminal penalties possible
- Statute of limitations on income tax return tolled for 3 years after 8938 filed

# Reporting Transactions With Foreign Trusts And Foreign Gifts

- Annual Return to Report Transactions (IRS Form 3520)
- Required in any year in which:
  - Foreign trust created or funded by US person
  - After March 18, 2010, FMV of use of trust property is a deemed distribution under IRC § 643(i) and is disclosed on Part III, Line 25
  - US Person received a loan of cash or securities from or guaranteed by foreign trust with a US grantor
- Filed with income tax return



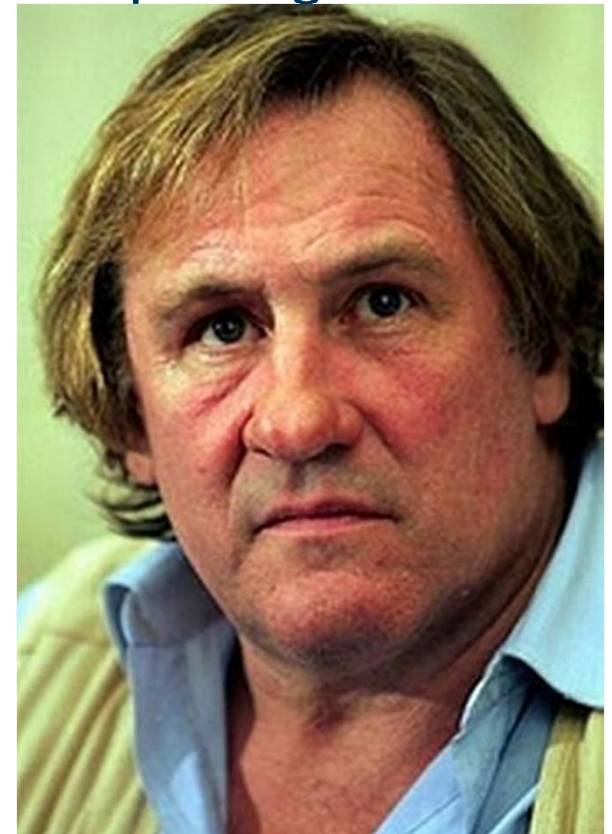
# Foreign Trusts And Foreign Gifts: Reporting Penalties

Penalties for failure to file Form 3520 assessed each year

- Penalties equal to GREATER of:
  - \$10,000 or
  - 35% gross value of property transferred to or received from trust
  - 5% of gross value of assets of foreign trust deemed owned by US Person
- Penalty waived for reasonable cause. Reasonable cause does not include:
  - Fact that foreign country would impose penalties for disclosure
  - Provisions in foreign trust that prevent disclosure
  - Reluctance of foreign fiduciary
- Criminal penalties may apply

# France

- September 15, 2012 Regulations on Reporting Obligations of Foreign Trusts
- Reporting required if:
  - Settlor is French resident
  - 1+ beneficiary is French resident OR
  - 1+ asset held by trust is French asset
- Additional Requirements
  - Reporting required within **one month** of formation/amendment/termination of reportable trust
  - Annual reporting due **September 30**

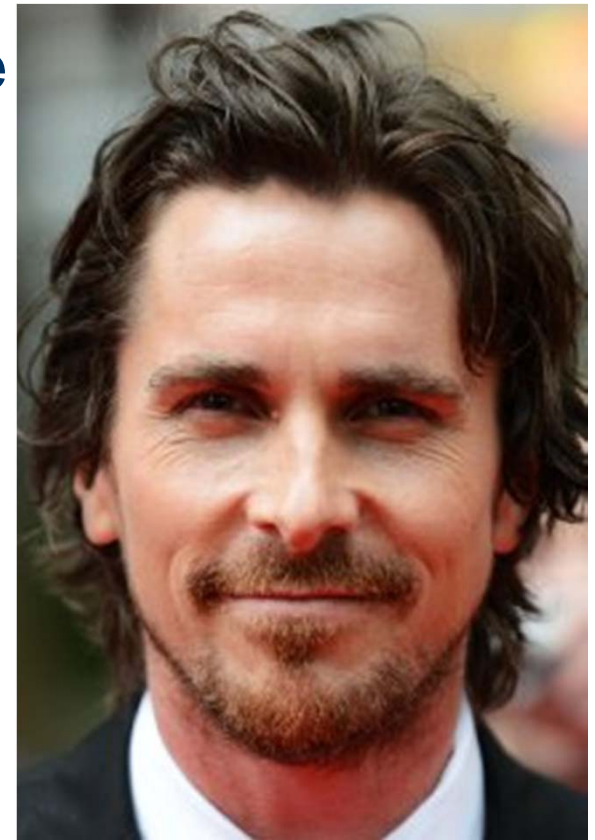




## UK

### September 14, 2012 Bilateral Agreement to Improve Tax Compliance

Developed in conjunction with France, Germany, Italy and Spain, as well as UK, so we anticipate similar Agreements with those governments in near future





# Foreign Reporting Obligations

- Italy: Reporting of Foreign Investments On Form RW
  - Applies to Italian residents
  - €10,000 threshold for reporting
  - Foreign Investments Reported Include
    - Foreign financial accounts
    - Loans, notes derivatives with foreign counterpart
    - Foreign real estate
    - Yachts, jewelry, paintings, gold
  - Penalties from 5% to 25% of amount that should have been reported



# Offshore Residential Property

- New Rules for High Value UK Residential Property
  - Effective date March 2013
  - Applies to
    - UK situs residential real property
    - With a value in excess of £2 Million
    - Held through a non-resident company or trust
  - Increases stamp duty land tax from 7% to 14%
  - Subjects sales to capital gains tax
  - Imposes annual charge (£15,000 to £140,000)



# Offshore Residential Property

- Fideicomiso For Mexican Coastal Property

- Treated as foreign trust by IRS
- Triggers reporting on Form 8938, 3520 and 3520-A
- Use of property by US beneficiary or family member will be a deemed distribution with a value equal to fair rental value for period of use



# Offshore Assets: Forced Heirship

- Assets situated in civil law country (France, Italy, Germany, Japan) may be subject to forced heirship rules even if owner is US citizen
- A share may be reserved for children, even if there is a surviving spouse, raising US estate tax issues



# Planning Issues For Migrant Clients

- UK IHT Issues Raised For UK Nationals
  - UK IHT imposed on worldwide assets of UK domiciliaries and UK situs assets of non-domiciliaries
  - Funding of revocable trust or title holding trust triggers IHT
    - 20% of net asset value on funding
    - 6% of net asset value every 10 years **AND**
    - 40% on death if settlor retains beneficial interest
  - Domicile of birth difficult to lose
  - Planning for UK nationals should utilize LLCs for privacy and unfunded revocable trusts



# Planning Issues For Migrant Clients

- UK IHT Issues Raised for US Citizens
  - Mismatch of UK IHT and US Gift and Estate Tax
  - Transfer of UK assets to non-domiciliary spouse not exempt and no QDT option
  - Pre-immigration planning for non-UK situs assets using trusts



# Planning Issues For Migrant Clients

- Canadian Capital Gains Tax Issues
  - Funding of revocable trust triggers Canadian capital gains tax
- Most civil law countries do not recognize trusts
  - France, Italy, the Netherlands, Switzerland and China have signed the Hague convention on recognition of trust
  - Even in countries recognizing trusts, the results of holding property through a US revocable trust may be unexpected