

Estate Planning Considerations For Professional Athletes: A "Checklist"

by

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Introduction

When Rod Tidwell, the fictitious professional football player in the 1996 movie "Jerry McGuire" demanded that his agent "show [him] the money," his motivations were largely selfish and with little outlook to the future. Similarly, it is not uncommon for various heirs, beneficiaries, friends, or even acquaintances of a professional athlete to ask to be "shown the money" during or after the life of the athlete. To insure that the intentions of the athlete are followed, the estate planner must provide sound advice, adhere to careful drafting, and keep an eye to the future when dealing with a wealthy and famous professional athlete client.

The professional athlete is unique in the estate planning scheme for four primary reasons. First, compensation levels for the athlete's services have increased dramatically in the last 30 years, resulting in a sudden accumulation of wealth. The average salary for professional athletes in the four major team sports (baseball, basketball, football, and hockey) ranged from \$20,000 to \$25,000 in 1967-68. In 1998, the average salaries were \$1,300,000 in baseball, \$2,200,000 in basketball, \$800,000 in football, and \$1,000,000 in hockey.⁽¹⁾ Prize money winnings for athletes in individual winnings with endorsement contacts that range in value from several thousand to a million dollars or more. The second reason why professional athletes are specially situated is that they have a very compressed career, with the vast majority lasting ten years or less, lending itself to a very

short asset accumulation period.⁽²⁾ Third, the multimedia explosion of the last 30 years has projected the professional athlete into a high-profile position in society, commensurate with that of entertainers, politicians and business executives. Fourth, the estate planner must take into consideration the client's relatively young age and the fact that the athlete is likely inexperienced in managing his or her sudden wealth. Together, these factors challenge the estate planner to preserve the athlete's assets for use during life, structure the plan so as to minimize the impact of taxation and future contingencies, and orderly dispose of the clients property after death in a way that remains consistent with the athlete's personal and individual sports (e.g. tennis, golf, auto racing, and track and field) have similarly increased during this time. Further, athletes typically supplement their salaries or prize money and financial goals.

The purpose of this article is to provide a "checklist" for a professional athlete and his or her attorney, agent, or advisor during the formation of an estate plan. The first part treats taxation-a force that drives the structure of every estate plan but is especially influential when dealing with an athlete's substantial estate. The second section focuses on the mediums in which wealth is transferred, with an emphasis on wills and trusts, the most common estate planning tools and the cornerstones of any effective estate plan. Additionally, reference will be made in this section to other alternative mediums such as life insurance, bank arrangements, marital agree-

ments, and intestacy. The third part of this article highlights potential contingencies that can arise after the death of the client. Finally, the fourth section examines professional athletes in special circumstances, and the accompanying estate planning implications. (3)

Estate Planning Considerations

Taxation Concerns

Domicile

For tax purposes, it is important for the athlete to establish a single legal residence. In addition to simplifying tax returns, the state an individual is domiciled in determines the extent to which the state can tax the athlete's income and estate. This is a key consideration because of the wide differences between the states in their income tax rates and the aggressiveness in which they enforce their rules. The nature of professional sports, especially team sports, makes it difficult to establish a long-term permanent residence in a state with favorable tax provisions. Frequently, athletes in team sports will reside in different states depending on the time of year and whether it is the competitive season, off season, or preseason training time. Athletes in individual sports have a significantly easier domicile decision in that they are not bound to a certain team and its geographic location.

Income Tax

Income tax considerations deserve mention in this article because of the substantial impact they have on the ultimate value of the athlete's estate.(4) However, a distinction needs to be made between athletes who are paid by professional teams and those who work as independent contractors in individual sports.(5) The nature in which professional athletes are compensated allows for several tax planning strategies. For professional team sport athletes, Internal Revenue Code ("IRC")§ 61 deems that taxable income include the athlete's base salary and any incentive bonuses that are contingent on the player's performance. For the independent contractor, IRC§ 74(a) requires that prize money and awards be included in calculating the amount

gross income that is subject to tax liability. In both cases, any income from endorsements, appearances, exhibitions, or licensing of the athlete's likeness is also included in the gross income calculation. In addition, any benefits such as hospitality and gifts received in the course of the professional athlete's work must be added to gross income.

However, there are many ways in which a professional athlete may reduce his or her level of gross income that is subject to being taxed. As set forth in IRC§162 (a), deductions may be made for expenses that are incurred in the course of doing business. Specific to professional athletes, these deductions can include competition entry fees, association dues, money paid to attorneys and agents for services rendered in furtherance of the athlete's professional career, and coaching, training, travel, lodging, and moving expenses. Further, it may be beneficial for the athlete to defer a percentage of his or her income to a later year when a lower tax rate can be taken advantage of. Finally, for athletes competing in professional team sports, there is the strategic use of signing bonuses. Although signing bonuses are taxed under IRC § 61 like any other income, they provide the athlete increased flexibility in allocating income for tax planning purposes and give the professional team more maneuverability when working within the constraints of the league's salary cap restrictions.

Estate and Gift tax

The federal estate and gift tax plays a significant role in influencing the structure of a professional athlete's estate plan. This results because the tax is imposed on the fair market value of all property passing from the decedent to his or her beneficiaries, at rates up to 55% for estates worth \$3 million or more. Thus, it is imperative that the estate plan be structured so the amount paid at death in taxes is minimized and the amount available to intended beneficiaries is maximized. This can be accomplished by the estate planner who makes use of the various deductions, exclusions, and credits that are avail-

able under the IRC.

The Tax Reform Act of 1976 unified the federal estate and gift taxes under a single rate schedule and served to make the calculation of the estate tax cumulative in that the value of all taxable gifts made during one's life are taken into consideration. The estate tax is determined by establishing the value of the taxable estate, which is the value of the gross estate less any deductions or credits. The gross estate includes all real and personal property in possession at the time of death, including transfers by will or intestacy and certain lifetime and nonprobate transfers. This amount includes income payable after death of the athlete, such as that coming from a guaranteed contract or income that has been deferred, both common occurrences in professional sports compensation schemes. As previously stated, the rates applicable to the resulting taxable estate are graduated, with a 55% tax rate for estates worth \$3,000,000 or more.

Marital Deduction

The married athlete has the option under IRC§2056 to transfer an unlimited amount of property to his or her spouse tax-free, provided that the marriage is legitimate and the spouse is both living and a U.S. citizen.⁽⁶⁾ The scope of the marital deduction is broad in that it allows property to be transferred by will, contract, or marital trust.⁽⁷⁾ Using the marital deduction is advisable when the athlete has a taxable estate worth more than \$650,000, because it will allow the couple to take advantage of the unified credit amount. Further, in cases involving professional athletes where the estate of one spouse is much larger than the other, using the marital deduction will allow the estates of the husband and wife to be equalized. Equalizing the values of both estates is desirable because of the graduated tax rates in place.

Charitable Deduction

An unlimited deduction for transfers with public, charitable, or religious purposes is allowed under IRC§2055. Because professional

athletes are frequent supporters of charitable organizations, taking advantage of this deduction should be a part of their estate plan. A charitable deduction can be accomplished by giving directly to the charity or by establishing a trust for the benefit of the charity in the form of a split-interest gift. By using a trust, whether in the form of a charitable remainder trust or a charitable lead trust, an estate tax deduction is allowed for the interests left to the charity. In addition to its estate tax benefits, making a charitable gift or creating a charitable trust can serve as an income tax charitable deduction.

Unified Credit

As a way to mitigate the cumulative nature of the transfer tax system, IRC§ 2010 provides for a unified credit of \$211,300, which is equivalent to \$650,000 of taxable transfers. Thus, an athlete may pass up to \$650,000 individually and up to \$1,300,000 if he or she is married. However, it should be noted that the benefit of the unified credit is phased out for transfers at death that exceed \$10,000,000. In addition, a 5% surtax is imposed on the excess of any transfer over this amount. Because of this regulation, it makes sense for the most successful professional athlete with an estate of \$10,000,000 or more to make use of lifetime transfers and deductions so as to avoid the surtax and be able to take advantage of the unified credit.

Annual Gift Exclusion

As provided for in IRC #(b), annual gifts of \$10,000 may be made to any person once each year, so long as the gift be of a present interest. This means that the gift recipient must have the absolute right to use the property, although, in the case of minors, a gift to a custodial account or a trust will suffice to meet the present interest condition. If the gift is \$10,000 or less, it is not taxed and is not calculated as a part of the \$650,000 unified credit. For an athlete looking to provide monetary assistance to family members and friends after signing a large contract or earning a substantial amount in prize money, this is an attractive option. Somewhat related to the annual

gift exclusion is the exemption allowed for educational or medical expenses, which is not limited by a dollar amount but is required to be paid directly to the institution or provider. By using this exclusion, professional athletes can assist family and friends by paying for their tuition or medical care with no adverse transfer tax consequences.

Generation-Skipping Transfer Tax ("GST")

The Tax Reform Act of 1986 implemented the GST to eliminate the "dynastic trust" and its ability to be insulated from estate and gift taxes for several generations. The GST is currently pegged at 55% for transfers made to future generations and is premised on the day that a transfer tax should be paid once a generation. However, there is a \$1,000,000 exemption from the GST, meaning this amount of property can be transferred to one's grandchildren free of tax liability. Despite the fact that professional athletes are relatively young and probably without grandchildren, the use of this exemption allows for the establishment of a trust that provides for their grandchildren long-term and distributes interest to the athlete's children. In addition, because the GST is at such a high rate, the estate tax savings from the use of this exemption are significant.

Choice of Wealth Transmission Medium

Intestacy

Intestacy is frequently described as the "default" estate plan because it is the statutory method of distributing assets in the absence of a will or other recognized estate planning device. Without question, professional athletes should avoid having their property disposed of by state statute because of the unmitigated tax consequences and the likelihood that portions of the estate will pass to intestate heirs that would not otherwise be intended.

Under a typical intestacy statute, the married client would pass one-third or one-half to the surviving spouse with the remainder to his or her direct descendants, although the majority of states permit the surviving spouse to take the entire state if no descendants exist. The portion

of the estate that does not pass to the surviving spouse, or the entire estate if there is no surviving spouse, passes to the decedent's children in one of two ways. First, the state may follow the general rule where distribution is per capita with representation ("modern per stripes"). Here, property is divided into equal shares at the first generational level in which there are living takers. Second, the state may adopt a system where distribution is per capita at each generational level. Under this arrangement, the initial division of shares is made at the first generational level with living takers, but the shares of deceased persons at that level are combined and divided equally among takers at the next generational level. If the decedent is not survived by a spouse of decedents, the estate will pass, in order or priority, to parents, siblings, grandparents, and nearest kin. If no relatives are found, the estate will escheat to the state.

Wills

Despite the growing popularity and use of trusts in estate planning, a will remains extremely useful for a professional athlete. The utility is multi-fold. In general, a will allows the testator to devise real property and bequeath personal property that is individually owned to one or more named beneficiaries. A well-drafted will is especially important in this regard because clear language will reduce the chance of conflict and confusion among family members and close friends regarding the athlete's intentions in disturbing his or her property after death. More specifically, a will allows the athlete to choose a guardian for his or her minor children, name a personal representative or executor to oversee the administration of the estate, direct which assets should be used to pay taxes and claims against the estate, establish a trust for the benefit of children and other family members, and provide for charities.

Because professional athletes are public figures and have significant estates, the importance of an unambiguous will cannot be stressed enough. In addition to the language included in the document, particular attention must be paid to

the formal requisites and execution of the will. As a starting point, the professional athlete, who acts as the testator, must have both testamentary intent and testamentary capacity. Testamentary intent is satisfied upon a showing that the testator desired the particular document referenced in the will execution ceremony to operate as his or her will. Meanwhile, a testator is declared to possess testamentary capacity if he or she is over the age of eighteen and has a minimum level of mental capacity. In addition to these requirements, the majority of states include other formalities as a part of their Statute of Wills. First, the will must be signed by the testator at the end of the document and in the presence of witnesses. Second, at least two witnesses must sign the will in the testator's presence and in the presence of each other. Regarding the witness requirement, it is advisable to select witnesses who are not beneficiaries under the will and to include an attestation clause following the signature line of each witness, thereby reinforcing that the elements of due execution were met.

When the athlete's financial position or asset distribution intentions change, there is frequently a desire to alter or modify the existing will. If the changes do not necessitate drafting a new will, the estate planner should use a codicil and retain the provisions of the original will that are still relevant. However, in the event of a major life change, the previous will may need to be completely revoked. For example, if the athlete subsequently gets married, divorced, or has additional children, the original will may be partially or totally revoked by operation of law. The majority of states follow this approach, rationalizing that the testator would not want the will or a specific will provision to be in effect in light of the changes personal situation. In response to a major life change, the professional athlete would be well served to take a proactive approach and revoke the previous will by a subsequent written instrument. Revoking by written instrument in the form of an updated will or codicil is the best choice here, so long as it is executed with the

same formalities discussed earlier.

Trusts

Trusts come in many forms, and each should be considered as a part of an estate plan for the professional athlete client. Generally defined, a trust is a fiduciary relationship in which a trustee holds legal title to specific property for the benefit of one or more beneficiaries. A trust overseen by a professional trustee can be used by the athlete for long-term property management a necessity in a professional sports career that is highlighted by a small number of income generating years and where the athlete travels frequently, making it difficult to personally oversee the administration of his or her estate. In addition, because property in a trust is not subject to probate (with the exception of a testamentary trust created via a will), the athlete's financial situation and choice of disbursements is not open to public view. Further, the athlete is allowed his or her choice of law by selecting as trustee a person living in another state and mandating that the favorable laws of that state govern the trust. A final advantage is that trusts, when compared to wills, are fairly easy to create and not subject to all of the formalistic requirements. Because of this, it is much more difficult for a dissatisfied family member or friend to attack a trust as being an invalid expression of the grantor's intent.

Revocable Living Trusts

The revocable living trust ("RLT") is so named because it is established while the grantor is alive and serves as a contract between the athlete and trustee in which the trustee is instructed regarding what to do with the property in the trust and the income generated from it. The establishment of a RLT allows the athlete to retain control over the management of the trust during his or her life, a desirable option when the athlete is young and likely to experience significant changes in his or her personal situation and intentions regarding distribution. In fact, if the RLT includes a clause providing for a qualified successor trustee in the event of the grantor's

death, resignation, or incapacity, the athlete can serve as the trustee. However, a careful evaluation of the athlete's responsibility level and asset management acumen should be conducted before endorsing this scenario. While the perceived advantages of RLTs have made them quite popular in recent years, it should be noted that a drafted will can serve exactly the same function in distributing assets upon death. In addition, RLT arrangements, because of their revocable nature, are treated the same as wills for tax purposes, making them fully subject to estate taxes upon the death of the grantor.

Irrevocable Living Trusts

To mitigate the estate tax which is imposed on RLTs, an irrevocable living trust ("ILT") may be set up by the athlete. Under this arrangement, the assets held in trust are not included when calculating the value of the gross estate for federal transfer tax purposes. However, this is offset by the fact that the athlete will retain no control in the property and cannot influence the management of the assets. Because of the likely change in the athlete's family status and state planning objectives, the inflexibility resulting from the establishment of an ILT must be balanced with its tax advantages. However, for the athlete who already has children and desires to provide for them, an ILT with Crummey withdrawal powers is a viable option.⁽⁸⁾ In this way, the athlete can make use of the \$10,000 annual exclusion per donee and in turn remove the appreciation from his or her estate, while still maintaining the present interest requirement of the annual gift exclusion.

Charitable Trusts

The establishment of a charitable trust is the leading option for the athlete who desires to support a legitimate cause as a part of his or her estate plan. In addition to the intrinsic benefit experienced by the charitable donor, a charitable trust is also the most popular medium that can be used to take advantage of the tax-free charitable deduction discussed earlier. Charitable trusts are distinguishable from private trusts in three ways:

1) charitable trusts must have indefinite beneficiaries who are not specifically named, 2) courts will apply the cy pres doctrine and try to match the charitable intent as closely as possible if the designated charity goes out of existence or becomes impracticable, and 3) the charitable trust may last forever because it is not subject to the Rule Against Perpetuities. Because of their social benefit, and as a way to encourage further benevolent giving, charitable trusts are construed liberally by the courts. Nevertheless, the trusts are constrained by the requirement that they be for a charitable purpose that is recognized by the courts, although this requirement is generally met if the court finds the trust has the purpose of benefiting the community in some way.

For the athlete who wants to go on step further and create a charitable foundation in addition to a trust, the formation of a charitable lead trust ("CLT") is the best vehicle. The CLT has become popular in recent years because signing bonuses are now routinely a component of every player's contract and can be used to initially fund the charitable foundation through the CLT. After being created tax-free, the CLT is established for a set period of years during which time a percentage of the trust's income is used to fund the charitable foundation set up by the athlete. At the end of the time period, which should attempt to coincide with the culmination of the athlete's playing career, the trust ends. The result is that the foundation is completely funded from the disbursements made during the life of the trust and the remaining principal will revert back to the athlete or other designee. As an added benefit, the athlete can further his or her philanthropy by continuing to oversee the administration of the foundation while maintaining a degree of visibility in the community.

Additional Trust Options

Three additional trusts deserve mention as possible choices for the professional athlete client. If allowed by the state statute, the athlete may desire to establish a spendthrift trust for the benefit of a particular relative or friend. Under

this arrangement, a valid restraint on alienation is imposed that does not allow the beneficiary to voluntarily transfer his or her interest without the trustee's consent or allow creditors to reach the property for satisfaction of their claims. Another has significant utility for athletes in that they can be obtained at a relatively low cost because of the athlete's good health. Option, the discretionary trust, allows the trustee to decide whether to apply or withhold the payment of income or principal to the named beneficiary. The discretionary trust is a viable option when the beneficiary lacks financial responsibility and the trustee can be relied on to follow the grantor's intentions regarding the disbursement of trust assets. Finally, if the athlete desires to assist a dependent beneficiary, he or she can establish a support trust. In this arrangement, the trustee is required to pay or apply only so much of the income or principal that is determined necessary to support the beneficiary, be it for medical, educational, or daily living expenses.

Other Alternatives

Life Insurance

The possibility of an athlete passing away early on in life necessitates the procurement of life insurance insurance policies. Also, in the event of death, life insurance can provide support for the athlete's family in the form of an outright disbursement or, if the beneficiary is a minor, in a trust. Further, if the personal or financial situation of the athlete changes, he or she can cash the policy in or change the beneficiaries. Finally, because life insurance policies are analyzed under contract law and not the law governing wills, the formalities of execution and revocation are less strict, providing for more flexibility. Depending on the athlete's situation, there are many types of insurance policies to consider, including term, whole life, variable life, universal life, and accidental death.

In addition to a policy, life insurance can take the form of a trust. Although a life insurance trust ("LIT") can be revocable in nature, the establishment of an irrevocable LIT has consid-

erable advantages, especially for professional athlete client. Unlike a revocable LIT, an irrevocable LIT is not subject to income or estate taxes and allows the trust assets to pass without going through the probate process. However, because the irrevocable LIT does not allow the grantor to amend or revoke the trust, the decision regarding beneficiaries must be final. Thus, for an athlete with children, the irrevocable LIT is a sound choice and can even be drafted in such a way that it can provide for support in the event of children in the future, with a spouse or one's parents as secondary beneficiaries if no children are in fact born.

Bank Arrangements

Known popularly as "Totten" trusts, a majority of states allow money to be held in the depositor's own bank account in trust for another person. Acting much like a revocable trust, this arrangement allows the depositor to control withdrawals until death, at which time the beneficiary takes control. At no time before death is legal title or a beneficial interest passed to the intended beneficiary. A professional athlete may set up a "Totten" trust in a situation where it is likely that the intended beneficiary may predecease the athlete, in which case the trust terminated and the funds on deposit do not pass to the estate of the deceased and instead remain with the athlete.

Marital Agreements

Commonly described as "ante-nuptial" or "post-nuptial" depending on their timing, marital agreements have a definite utility in the estate planning scheme, especially for professional athletes. Despite their impersonal nature and the hesitancy often exhibited when first discussed, the compensation paid to athletes and the accompanying value of their estates demands that a marital agreement be considered, particularly in light of the likelihood of divorce and remarriage in our society. Marital agreements are useful for professional athletes and their spouses because they can explicitly list the assets that are individually owned by each spouse and can set forth the rights of each spouse in regard to the other's

property in the event of divorce, which is particularly true if the couple is domiciled in a community property state.(9)

Planning For Contingencies

Inheritance Rights of Others

The inheritance rights of others plays an important role in shaping the professional athlete's estate plan and challenges the estate planner trying to uphold the client's goals regarding the distribution of assets at death, especially when the athlete desires to disinherit an intestate heir. As a part of the estate plan, it is imperative to inquire regarding the athlete's extended family, their past, personal and business relationships, and any outstanding legal or financial obligations.

To protect against disinheritance, nearly all states have enacted elective for the spouse and pretermitted child statutes for children of the deceased. Under an elective share statute, the surviving spouse can choose to take a share of the decedent's estate in lieu of taking under the decedent's will. Pretermitted child statutes, on the other hand, are aimed at protecting children from being accidentally omitted from the will.(10) The statute usually operates when a child is born or adopted after the effective will was executed. If the statute applies, and there is no showing that the omission was intentional or that has otherwise been provided for, the child will take an intestate share of the decedent's estate.

The inheritance rights of adopted and nonmarital children, both common to professional athletes, also deserves mention here. In the case of adopted children, they are treated the same as natural children, with the right to inherit from and through their adopting parents. However, the right to inherit by children born out of wedlock is less certain. Until the 1960's, a nonmarital child was barred from inheriting from either parent. However, a series of landmark Supreme Court decisions supported by new interpretations of the Fourteenth Amendments Equal Protection Clause, changed the law and allowed for inheritance by extramarital children.(11) The

effect of these cases is that all states now permit an extramarital provided that paternity is established. In most states, extramarital children can inherit from the natural father if the father married the mother after the child's birth, a paternity suit determined that the man is the child's father, or, after the man's death, he is proved to be the child's father by clear and convincing evidence.

Will Contests

A professional athlete's will has the potential to be contested during probate because of its high value and visibility. In addition, the will is more likely to be contested if it excludes immediate family members, treats children in an unequal manner, represents a significant change from an earlier disposition, or excessively restricts the use of property. Thus, the estate planner must be attentive to the grounds in which the will contests can be brought and the effective strategies than can be employed to avoid or mitigate their impact.

In general, only interested parties who would have taken by intestate succession or were named as a beneficiary in a previous will have standing to contest a will. A will may be contested on several grounds. First, a will may be found invalid if any of the formal requisites were not followed during the will execution ceremony. Second, although it seems obvious, as athletes turn professional at younger ages, it is important to verify that your client is eighteen years old on the date the will is executed. In addition to the age requirement, a will contest can be premised on the assertion that the testator lacked the mental capacity to make a will. To show sufficient capacity, the testator must be able to understand the nature of the will execution act, the property that is involved, and the effect the disposition will have on his or her family. Third, if it is demonstrated that the will was obtained through undue influence, it will be declared invalid. To establish undue influence, the contestant must show that influence was exerted on the testator and that the influence had the effect of overpowering the

mind and free agency of the testator, with the result that the will would not have been executed otherwise. Undue influence by a beneficiary upon the testator is often presumed by courts when it is shown that a confidential relationship existed between the two parties or if the beneficiary was involved in the drafting or execution of the will. The possibility of undue influence reinforces the need to inquire regarding the beneficiaries that the athlete requests to be named in his or her will given the fact that professional athletes are young, impressionable, and at times surrounded by associates with ulterior motives. Fourth, courts will usually uphold a will contest and allow extrinsic evidence if there is a mistake in the execution of the will or if an ambiguity is present. However, courts will usually disallow a will contest if it alleges a mistake in the inducement of the will or as to the contents of the will.

The strategies that can be used in preventing a contest of a will are just as numerous. Including a no-contest clause, which provides that a beneficiary who contests the will loses all benefits received under it, can have a definite chilling effect on possible will contests. However, if the disposition is trivial in value, the beneficiary has very little to lose by contesting the will, especially if he or she is an intestate heir. Thus, it is a good idea for the professional athlete to make a considerable disposition for every intestate heir and anticipate possible challenges by specifically referencing the party and the accompanying property and outlining the conduct that triggers the no-contest clause. In addition to a non-contest clause, the estate planner for a professional athlete can further insulate otherwise intended property from being contested by carefully and tactfully explaining the reasons the testator made the disposition and referencing the other ways the beneficiary was provided for over and above that in the will. If this is done, it is important to avoid inflammatory language that would have effect of encouraging a dissatisfied heir to contest the will and give rise to a potential libel suit. to reinforce the testator's intent and

capacity, it is also helpful to obtain outside evidence, by affidavit or otherwise, that affirms the athlete's disposition, especially when the disposition is unusual. Further, because challenges can only be made against wills during the probate process, a professional athlete would be well served to diversify his or her estate plan by making use of other estate planning mediums as well.

Special Circumstances

Athletes with Known or Unknown Children Born Out Of Wedlock

Counseling professional athletes who have, or may have fathered children outside of marriage, deserves special attention by the estate planner.⁽¹²⁾ As discussed, nonmarital children have substantial rights when it comes to inheriting from their fathers and would be likely contestants in challenging a will if not otherwise provided for. It can generally be concluded that the majority of professional athletes would want to provide for their children. If the children are known, a variety of estate planning tools can be used. However, there is the possibility that past relationships resulted in a child that is unknown to the athlete. Because of this, the estate planner for an athlete involved in sexual relationships outside, of marriage child to inherit from his or her mother, and the modern trend permits inheritance from the father, would be well served to set up a contingency trust for the benefit of any such children, providing them a percentage of the estate. Under this arrangement, the trust would only take effect if children, unknown at the time of the trust's formation, can prove paternity. In the event of no extramarital children, a secondary beneficiary can be named to receive the estate assets. As an added benefit, the trust would effectively eliminate the possibility of a nonmarital child from claiming a share of the estate under a pretermitted child statute, a scenario which could significantly disrupt the athlete's estate plan.

Estate Planning for Minor Athletes

Athletes are entering the professional ranks at younger ages than ever before. this pres-

ents a difficult situation for the estate planner who must deal not only with the teenage athlete, but with the athlete's parents or guardians, who may have their own intentions that are not always in the best interest of their child athlete.⁽¹³⁾ Further complicating the matter is the fact that the estate planning options available to an underage athlete are limited. In addition to being unable to form a valid will until they turn eighteen, a minor athlete lacks the legal capacity to manage property and may be precluded from executing other mediums of wealth transfer depending on state law. The best of the remaining alternatives is to establish a trust for the minor as provided for in IRC§2503(b). In this basic trust arrangement, assets are held in trust until the minor reaches the age of twenty-one, at which time the trust ends and the donee gains control of the assets. Variations on this basic arrangement that suit the specific situation of the minor athlete can be accomplished by allowing the child to have a Crummey withdrawal powers, increasing or decreasing the age restrictions, or specifically outlining the ways in which trust assets can be used for the child's benefit until a designated age is reached.

Athletes Who Suffer Career-Ending Injuries or Permanent Disabilities

Career-ending injuries and permanent disabilities occur with frequency in every sport, although the most serious and notable are usually reserved for athletes participating in boxing, auto racing, and football. Because of this, the estate planner must recognize the possibility of a career-ending injury or permanent disability and provide for it as a part of a complete estate plan. Several strategies can be employed in the event of such a personal catastrophe. First, relief may be permitted by the worker's compensation plan in place for the particular sport if the injury was accidental and arose during the course of employment. Second, the estate planner should consider the purchasing a disability insurance policy that provides a coverage in the event of a career-ending injury. This option is also avail-

able to the amateur athlete with reasonable professional potential, who can mitigate the impact of injury by purchasing a no-cash-value temporary disability insurance policy. Under this arrangement, the policy is secured by the athlete's forecasted future earnings as a professional. Third, a health care directive or a durable power of attorney for health care should be established in the event of a permanent disability that leaves the athlete physically or mentally incapacitated and unable to make medical decisions on his or her own behalf.

Conclusion

Much like the athletes competing on the playing field or court, the estate planner has to devise a winning strategy when counseling the professional athlete to ensure that the estate plan orderly disposes of property in a way that remains true to

the athlete's intentions. Given the multiple factors that make professional athletes unique in the estate planning scheme, the estate planner must make use of the various options for transmitting and retaining wealth, while at the same time analyzing the tax implications of every decision, anticipating possible contingencies, and catering to the athlete's special circumstances. By doing this, the professional athlete will continue to be part of a successful team long after his or her playing days are over.

Endnotes

1. Paul C. Weiler & Gary R. Roberts, *Sports and the Law: Text, Cases, Problem* §323 (2d ed. 1998).
2. David J. Herzog, *Financial Planning for Professional Athletes*, 19T. Marshall L. Rev. 663 (1994)
3. For a general discussion of this subject matter, see Gerry W. Beyer, teaching Materials on Estate Planning (1995). For specific treatment, see John K. Harris, Jr., *Essentials of Estate Planning for the Professional Athlete*, 11U. Miami Ent. and Sports L. Rev. 159 (1993) and John K. O'Meara, *Estate*

Planning Concerns for the Professional Athlete, 3 Marq. Sports L.J. 85

(1992).

4. For detailed treatment of this subject, see John Salmas, *Professional Athletes Taxed to Death? Even They Can Strike Out!!!*, 4 Sports Law.J. 255 (1977) and Thomas N. Lawson and Bruce M. Stiglitz, *tax Planning for Entertainers, Artists, and Athletes*, C425 ALI-ABA 111 (1989). For an analysis of the tax issues specific to an athlete who competes on an international basis, see Paul Weisman and Ronald Rale, *U.S. Taxation of Athletes in U.S. and Abroad*, 1 J. Int'l Tax'n 218 (1900).
5. An additional distinction needs to be made between professional athletes that are U.S. citizens and those that are non-citizens. While this article pertains to U.S. citizens, it is general rule that nonresident aliens incur U.S. tax liability to the extent they perform in the United States. Following the controlling case of Stemkowski v. Commissioner, 690 F. 2d 40 (2d Cir. 1982), the percentage of the athlete's compensation that is subject to U.S. tax is calculated by dividing the total number of days services were performed in the United States by the total number of days in which compensation was paid .
6. In cases where the athlete's spouse is not a U.S. citizen, a marital deduction can still be achieved through the use of a qualified domestic trust (QDOT). To be recognized as a QDOT, the trust must have at least one U.S. citizen as trustee and the trustee must have the power to withhold the tax from any amount distributed other than trust income.
7. Marital trusts in this context often take the form of a qualified terminable interest property (QTIP) trust. The QTIP trust allows the gift to qualify for the marital deduction but does not give the beneficiary spouse complete control over the ultimate disposition of the trust property. This makes the QTIP trust a desirable alternative for

the young athlete in the event that his or her spouse remarries following divorce.

8. See Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968).
9. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin have community property systems where all earnings and acquisitions from those earnings during marriage are possessed in equal shares. A marital agreement can circumvent the community property system and keep all the assets individually owned between husband and wife.
10. With the exception of Louisiana, all states allow a parent to disinherit his or her children.
11. See Levy v. Louisiana, 391 U.S. 68. (1968); Labine v. Vincent, 401 U.S. 532 (1971); Trimble v. Gordon, 430 U.S. 762 (1977); Lalli v. Lalli, 439 U.S. 259 (1978).
12. For a detailed chronicle of extramarital children and their professional athlete fathers, see Grant Wahl and L. Jon in gymnastics. In November of 1998, at the age of seventeen, Ms. Moceanu sued her parents for the right to be declared a legal adult so she could take control of the multi-million dollar trust set up for her benefit, which she alleged was being depleted by her parents for their own personal use. The parties settled the suit and a Texas court granted Ms. Moceanu control of the trust as a legal adult.

