TAX ADVANTAGES OF SPORTS FRANCHISES: PART II - ESTATE PLANNING

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I. INTRODUCTION

This article is a companion piece to another[1] which began as a treatment of the tax advantages of owning a franchised sports team, whether in a major league or a lesser league. As explained in the prior article[2], this piece was originally envisioned to deal with issues such as amortizing players' contracts, potential appreciation of the owned team, and possible capital gains treatment, each of which, it was hoped, would be helpful to owners of such assets (and owners of other highly appreciated, illiquid assets).

As these two articles were developed, it became apparent that two of the current major issues and advantages of owning sports franchises are (1) obtaining a publicly financed sports facility[3] and (2) avoiding the estate tax on the death of the owner of the sports team. This article deals with the problems and advantages in estate planning for the wealthy owners of sports franchises (and how others might learn from some of these problems and advantages).

Although the topic of estate planning for sports team owners is an important and topical subject, not much professional commentary seems to have appeared.[4] This article will examine the problems which highly appreciated sports teams present for estate planning. Part II reviews specific failures and some successes in estate planning. Part III examines two particular successes in depth: (1) Ewing Kauffman and the Kansas City Royals, and (2) Paul Brown and the Cincinnati Bengals. Part IV discusses ways that other owners can build on those successes. Finally, Part V outlines the Economic Growth and Tax Relief Reconciliation Act of 2001 and its impact on estate planning.

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1. John R. Dorocak, *Tax Advantages of Sports Franchises: Part I - The Stadium*, 3 L. REV. M.S.U.-D.C.L. 579 (1999) (hereinafter Dorocak, *Tax Advantages-I*).

2. *Id.* at 580.

3. *Id.* at 580-81.

4. A Lexis Nexis search of 'estate planning' and 'sports' (October 18, 2002) in Law Reviews and Tax (various publications) revealed only four articles that appear to deal with estate planning in sports specifically. David S. Gasperow, Note, *Are Estate Planning Taxes Sounding the Death Knell for High-Value Family-Owned Businesses? An Examination of the Jack Kent Cooke Estate and the Forced Sale of the Washington Redskins Football Franchise*, 2000 COLUM.. BUS. L. REV. 303; John K. O'Meara, *Estate Planning Concerns for the Professional Athlete*, 3 MARQ. SPORTS L.J. 85 (1992); John K. Harris, *Practioner's Notes: Essentials of Estate Planning for the Professional Athlete*, 11 U. MIAMI ENT. & SPORTS L.REV. 159 (1993); Joseph D. Wright, *Skyrocketing Dollars and the Tax Reform Act of 1997: Estate Planning for the Professional Athlete in a New Millennium*, 6 SPORTS LAW J. 27 (1999).

II. ESTATE PLANNING AND SPORTS TEAM OWNERS

Estate planning for sports team owners has often, it seems, been a failure or non-existent. First, three apparent failures in planning will be examined (the estates of Joe Robbie, Jack Kent Cooke, and Leon Hess). Secondly, two situations, where owners apparently fearing estate-planning consequences took the drastic actions of either selling or moving the team (Peter O'Malley and Art Modell), will be examined. Finally, two successful examples of estate planning by sports team owners will be scrutinized (Ewing Kauffman and Paul Brown).

A. Joe Robbie and the Miami Dolphins

The estate planning failure of Joe Robbie, late owner of Miami Dolphins football team, seems a typical story of high estate taxes and family strife, the latter aggravated by the particular plan utilized.[5] Joe Robbie died January 7, 1990.[6] His wife Elizabeth died November 5, 1991.[7] At his death, besides his wife, Joe Robbie was survived by nine of his eleven children.[8] Robbie's will created a trust, which owned 87.5% of the Dolphins. But Joe left only three of the children in charge of the trust.[9] One Miami area attorney commented, "If there ever was an estate plan crafted to fail, it was this one. Especially in a family of contentious as this one."[10]

In addition to the family strife which Joe Robbie's plan either created or exacerbated, the death of his wife left a huge state estate tax bill. His estate consisted of $73 million plus his Dolphins interest valued at about $68 million.[11] Robbie avoided paying estate taxes at his death by leaving property to his wife in QTIP (Qualified Terminable Interest Property) Trust.[12] Wife Elizabeth's death forced all the estate taxes to be paid at roughly 55%[13]

5. For tales of the Robbie family woes, *see* David Satterfield, *Bitter fight over Robbie estate may mean new Dolphin owners*, HOUSTON CHRON., Sept. 22, 1991, at 7; Dan Bickley, *As the Robbies turn, Miami's family feud*; CHICAGO SUN-TIMES, Nov. 24, 1991, at 16; Eric Conrad, *Robbie Siblings Get Millions, But Rift 'Has Destroyed Family'*, SUN-SENTINEL (FORT LAUDERDALE), July 9, 1994, at 1A; Craig Barnes, *Robbie Finds Life After Game - Dolphins Owner Still Remains a Fan*, SUN-SENTINEL (FORT LAUDERDALE), Aug. 27, 1994 at IC; and Gerry Fraley, *Split heirs, Joe Robbie's family had disintegrated since his death*, DALLAS MORNING NEWS, Jan. 24, 1995, at 16B.

6. Satterfield, *supra* note 5.

7. Bickley, *supra* note 5.

8. *Id.*

9. *Id.*

10. Bickley, *supra* note 5.

11. *Id.*

12. Satterfield, *supra* note 5.

13. *Id.*

Despite the family's discord it appears that a lack of funds plus a highly valued illiquid asset resulting in large estate taxes forced the sale of the Miami Dolphins football team. Tim Robbie, one of the three children trustees of the trust owning the football team, described the situation as follows: "The biggest thing people have said to me since the sale is 'it's too bad you had to sell the club. It's not right that our laws require an estate tax of 55 percent that forces someone to sell the family business.' Selling wasn't by choice. It was by necessity."[14]

In order to pay the estate taxes, the Robbie family ended up selling the Dolphins and Joe's privately built Joe Robbie Stadium to Blockbuster and trash hauling tycoon, H. Wayne Huizenga.[15] Joe Robbie himself had previously refused to sell Huizenga even half the stadium.[16]

The Robbie family ended up with about $109 million from Huizenga and had to pay estate taxes estimated at around $43 or $47 million. It was estimated also that each of the surviving children of Joe Robbie would eventually receive $5 to $6 million each.[17]

B. *Jack Kent Cooke and the Washington Redskins*

The estate of Jack Kent Cooke seems to be another example of failed estate planning by a sports team owner. Cooke died of a heart attack at age eighty-four on April 6, 1997.[18] After a series of cash bequests, Cooke's will left the majority of his estate, with a valuation between $800 million and $1.2 billion, to a charitable foundation, the Jack Kent Cooke Foundation, to provide athletic scholarships for under-privileged youths.[19] The charitable bequest to the foundation sheltered much of Cooke's estate from estate taxes because of the charitable deduction.[20] Cooke's will instructed his executors to sell the football team "to my son . . . to the extent they deem reasonable."[21] However, the charitable foundation set up by the will was under a fiduciary obligation to sell the team at the highest price.[22]

John Kent Cooke, Jack's son, wanted to purchase the team from the

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14. Barnes, *supra* note 5.

15. Conrad, *supra* note 5.

16. Bickley, *supra* note 5, and Satterfield, *supra* note 6.

17. Conrad, *supra* note 5, and Fraley, *supra* note 6.

18. David S. Gasperow, Note, *Are Estate Taxes Sounding the Death-Knell for High-Value Family-Owned Business? An Examination of the Jack Kent Cooke Estate and the Forced Sale of the Washington Redskins Football Franchise*, 2000 COLUM. BUS. L. REV. 303 (2000).

19. *Id.* at nn. 29-32 and accompanying text.

20. *Id.* at 33 and I.R.C. § 2055.

21. Albert D. Crenshaw, *Experts: Cooke Was Left in Taxing Situation by Father*, WASHINGTON POST, Dec. 19, 1998 at F06.

22. Gasperow, *supra* note 18, at n.37 and accompanying text.

Foundation, but simply could not raise the capital. If the team had been left to him outright, he would likely have had similar difficulty raising the capital to pay the estate taxes.[23] The team was eventually sold to a group of investors led by Daniel Snyder for $800 million.[24] John Kent Cooke issued a statement at the time of the agreement for the sale saying in part, "[T]he result of this decision is the loss of the family business and a personal tragedy to me."[25] The sale to Snyder likely frustrated the decedent's intent. Three years prior to his death, Jack Kent Cooke had stated, "I'm taking every possible step to ensure the Redskins and stadium will remain in the Cooke family. There is such a loyalty in the family toward the Redskins, I can't imagine anything but the Cookes' family ownership for the foreseeable future."[26]

Others have been inspired to take action regarding estate planning or sales of their professional sports teams based on owners' failures in planning, particularly Jack Kent Cooke's.[27] Others in sports and a variety of businesses often fail to plan ahead for the business transition and estate taxes.[28] Abe Pollin decided to sell interest in the Washington Capital's National Hockey League team, and the Washington Wizards National Basketball Association franchise after Cooke's problems.[29]

C. Leon Hess and the New York Jets

Leon Hess, owner of the New York Jets football team at the time of his death on May 7, 1999, was perhaps most affected by Jack Kent Cooke's estate planning problems.[30] Six weeks before he died, Hess altered his will,[31] apparently reacting to Cooke's estate problems.[32] In his revised will, Hess explicitly directed that the Jets be sold upon his death and expressly

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23. *Id.* at n.38 and accompanying text.

24. Paul Woody, *Snyder Reaches Deal to Buy Skins; NFL's Teams Likely to Approve $800 Million Sale of Team to Communications Executive*, RICHMOND TIMES DISPATCH, Apr. 27, 1999, at E-1.

25. *Id.*

26. Gasperow, *supra* note 18, at n.38 and, accompanying text, *citing* Thomas Heath, *Death, Taxes Are Certain to Shape Arena Plans,* WASHINGTON POST, July 19, 1994, at D1.

27. Eric Fisher, *Cooke's lasting legacy; Tumultuous Redskins sale makes owners plan ahead,* WASHINGTON TIMES, June 29, 1999 at B1; Gasperow, *supra* note 18.

28. *See* Julie Pitta, *"It's not my favorite topic." (Inheritance and Succession Planning by the rich) (personal affairs),* FORBES, Oct. 19, 1992 at 276. This article was written before Cooke's demise and some individuals altered their planning subsequently.

29. Fisher, *supra* note 27, and Gasperow, *supra* note 18, at nn.57-58 and accompanying text.

30. Fisher, *supra* note 27, and Gasperow, *supra* note 18, at nn. 57-58 and accompanying text.

31. Dareh Gegorin, *Jets Owner's Will Sacks Kin Who Try to Block Sale*, N.Y. POST, May 29, 1999, at 5, *cited by* Gasperow, *supra* note 18, at nn. 443-47 and accompanying text.

32. Fisher, *supra* note 28.

forbade the Hess family from bidding for the team.[33]

D. Art Modell

Then there is the plight of Art Modell who once declared, "The pride and presence of a professional football team is far more important than 30 libraries"[34]. Although Modell blamed his move from Cleveland to Baltimore on the football team losing money ("The Browns have been losing money for several years" said spokesman David Hopcraft) and an old stadium ("[The facility] Modell now calls 'that old barn'"),[35] his move may have been driven by a lack of estate planning.[36]

Modell apparently told other National Football League owners that his move to Baltimore was at least partly to help the family pay estate taxes upon his death.[37] Because of a history of health problems including his heart, Modell could not avail himself of life insurance to pay the estate taxes.[38]

The real blame, of course, is on Modell himself for failing to provide for his family needs and those of the city that was his adopted home for over thirty years. "Terry Fergus, a partner in the Cleveland office of KPMG Peat Marwick, a national accounting firm ... said an accountant friend who once worked on Modell's finances proposed a plan in 1978 that would have frozen the value of his estate at $30 million but Modell declined to do it."[39] "Art's world has greatly changed, and now somebody's dangling a lot of money and saying, 'Here's a way to solve your problems,' said William Karnatz, an estate planning lawyer..."[40] Subsequent to his move to Baltimore, Modell himself had said, "My estate planning includes a reduction of corporate debt and making sure my family can stay in business for a long time or as long as they see fit."[41] Nonetheless, Modell will likely sell the team.[42]

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33. Fisher, *supra* note 28, and Gasperow, *supra* note 18.

34. *See e.g.*, Dorocak, Tax Advantages - I, *supra* note 1, at n.79, *citing* Mark F. Berstein, *Sports Stadium Boondoggle*, 132 PUB. INT. 45, 46 (1998).

35. Diane Solov and Ted Wendling, *Brown's Woes Run Deep: Modell's Spending, Debt Shows Stadium not the Only Issue*, CLEVELAND PLAIN DEALER, Jan. 7, 1996 at 1A.

36. *Id. See also*, Miriam Hill, *Estate Planning as Motivation? Decision to Move Team May be Driven by Modell's Age: 70*, CLEVELAND PLAIN DEALER, Nov. 7, 1995 at 7A; PR NEWSWIRE (Florida) *Did Art Modell's Estate Planning Cost Cleveland the Browns?* Nov. 28, 1995.

37. PR NEWSWIRE, *supra* note 36.

38. *Id.* Solov and Wendling, *supra* note 35.

39. Solov and Wendling, *supra* note 35.

40. Hill, *supra* note 36.

41. Fisher, *supra* note 27.

E. Peter O'Malley and the L.A. Dodgers

"Even Peter O'Malley's decision to sell the Los Angeles Dodgers two years ago, after his family owned the team for nearly a half-century, was directly driven by a desire to liquidate his holdings while still alive."[43]

III. SUCCESSFUL ESTATE PLANNING BY SPORTS TEAM OWNERS

Not all sports team owners' estate planning is a litany of failures. There are some standard planning techniques which can minimize taxes, including: transferring partial interests over time to the next generation to minimize gift and estate taxes; purchasing life insurance, often in an irrevocable trust, for payment of estate taxes; spreading the payment of estate taxes under I.R.C. § 6166 over fifteen years (with the first five years interest only); and freezing the value of an estate from further appreciation by an intervivos transfer to a partnership or trust, similar to a corporate recapitalization.[44] Various techniques will be discussed further in Part ?? of this article. Rankin Smith, owner of the Atlanta Falcons football team, used some of these basic techniques quite successfully.

Rankin Smith combined life insurance and a transfer of partial interests to his children to lessen the burden of estate tax after his death.[45] "Insurance policies will provide much of the relief, [Taylor] Smith said, noting his father's expertise in that field. It helps that the Smith's five children retain more than 50 percent of the class A stock in the franchise."[46]

Smith was able to achieve such financial planning success even though his team was not a success on the field or at the box office because of foresight.[47] National Football League Commissioner Paul Tagliabue has placed estate planning on the agenda of NFL owners' meetings to encourage such foresight.[48]

The following examples of successful estate planning by sports team owners are a bit more complicated. The planning involved the separate es-

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42. Jamison Henslet, *Bisciotti Plans to Buy Out Modell*, BALTIMORE SUN, Mar. 21, 2003.
43. *Id.*
44. Crenshaw, *supra* note 21, and Solov and Wendling, *supra* note 35.
45. Len Pasquarelli, *Rankin Smith, 1924-1997; Future of the Franchise; Smith prepared for family to retain ownership*, ATLANTA JOURNAL & CONSTITUTION, Oct. 27, 1997, at 05B. *See also* Len Pasquarelli, *Smith family to keep Falcons*, ATLANTA JOURNAL & CONSTITUTION, Nov. 1, 1997 at 01E.
46. Pasquarelli, *Smith family to keep Falcons*, *supra* note 45.
47. *Id.*
48. Pasquarelli, *Rankin Smith, 1924-1997; Future of the Franchise*, *supra* note 45.

tates of Ewing Kauffman, owner of the Kansas City Royals baseball team, and Paul Brown, legendary football coach and owner of the Cincinnati Bengals football team.

A. Ewing Kauffman and the Kansas City Royals

Ewing Kauffman devised a rather complicated plan to ensure that the Kansas City Royals baseball team, which he owned, would remain in Kansas City, although not within family ownership.[49] A graphical depiction of this plan is provided in the Appendix to this article. Kauffman's plan worked; the IRS approved it.[50] However, it garnered some criticism, particularly regarding whether the donation of a baseball team to a charity could serve a charitable purpose.[51] Kauffman decided not to bequeath the team to his heirs in order to avoid burdening his estate with a fifty-five percent of estate tax on an asset worth probably over $100 million and to avoid burdening his heirs with a baseball team operating at annual losses in the millions.[52] He also decided not to leave the team to the city of Kansas City because of a prohibition on doing so by Major League Baseball.[53] Finally, Kauffman did not leave his team to his own private foundation because it would have had to sell the team and not necessarily to a Kansas City buyer.[54]

Instead, Kauffman transferred all his S corp stock in the baseball club to a revocable trust that became irrevocable upon his death in August 1993.[55] On approval by the IRS, a new distribution took place. Three classes of stock (A, B, and C) were established with class A stock having a sole right to vote and receive dividends and classes B and C stock having no rights to vote or receive dividends but retaining the right to share appreciation.[56] The trust then exchanged its old stock for 10,000 shares of the Class A stock (100%) and 75,000 shares of Class B stock (75%). The

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49. *See, e.g.*, Stephanie Newkirk, *Comments: Foundation's Ownership of Professional Baseball Team is Fair Play Under I.R.C. Section 501(c)(3)*, 65 U.M.K.C. L. REV. 263, 268-71 at nn. 39-65 (1996). *See also*, Burgess J. W. Raby and William L. Raby, *Achieving Donor Desires and Keeping Tax Exemption*, 17 EXEMPT ORG. TAX REV. 269 (1997); Lee A. Sheppard, *News Analysis: Your Bread, Kansas City's Circus*, 67 Tax Notes 881 (May 15, 1995).

50. *Investment in Kansas City Royals Baseball is Charitable Purpose*, 68 TAX NOTES 692 (Aug. 7, 1995).

51. Paul Streckfus, *Rulings in Search of a Rationale*, 68 TAX NOTES 891(Aug. 14, 1995).

52. Newkirk, *supra* note 49, at nn.26-28.

53. *Id.* and Dorocak, *Tax Advantages - I, supra* note 1, at nn.182-185.

54. Newkirk, *supra* note 49, at nn.31-33, and Lee A. Sheppard, *News Analysis - Exempt Organizations: The Kansas City Royals' Curve Ball*, 60 TAX NOTES 431 (July 26, 1993).

55. Newkirk, *supra* note 49, at n.39.

56. *Id.* at nn.40-44 and Sheppard, *supra* note 54.

Class A stock was sold to a partnership to run the team for $450,000 with the proceeds donated to the Kauffman Foundation, the Class B stock was donated to the Kansas City Community Foundation. The remaining 25,000 shares of B stock and 100,000 shares (100%) of Class C stock were not immediately issued.[57] The trust contributed $50 million to the Community Foundation to purchase 25,000 shares of Class B stock and 20,000 shares of Class C stock, while the Hall Family Foundation and various organizations in the Kansas City area organizations contributed funds to purchase the remaining Class C shares.[58]

The partnership agreed not to sell its Class A stock to other than a local Kansas City buyer until after a six-year period.[59] The Community Foundation had to sell the Class B and C stock when the Class A stock was sold.[60] Proceeds of these sales of the stock were to be distributed (1) to pay all liabilities, (2) to repay the partnership its initial purchase price, (3) to pay 5% of the remainder to the Community Foundation as Class C shareholder, (4) to pay the lesser of 5% or a fifth of the remaining proceeds or 15% of the initial price for the Class A stock to the partnership, with those proceeds then to be contributed to any exempt organization within thirty days, and (5) with the remainder of any proceeds to be paid to the Community Foundation as Class B shareholder.

In a series of three private letter rulings, the IRS approved Kauffman's plan. In the first ruling, the Service concluded that the Community Foundation by holding the Class B and Class C stock would further its exempt purpose by "lessening the burdens of government."[61] The IRS also ruled that there was no inurement or other direct private benefit to the Class A shareholders because the Community Foundation would receive any profits realized on sale of the club.[62] In a second ruling, the Service decided that the Hall family's contribution to the Community Foundation did not result in self-dealing and also furthered the exempt purpose of the Foundation.[63]

Finally, in a third ruling the Service determined that Class A, B, and C shares of common did not constitute more than one class of stock so as to

57. Newkirk, *supra* note 49 at nn.45-49.

58. *Id.* at n.52-54.

59. *Id.* at nn.55-58.

60. Newkirk, *supra* note 49.

61. Priv. Ltr. Rul. 9530024 at 40 (May 1, 1995). *See also Investment in Kansas City Royals Baseball is Charitable Purpose*, *supra* note 50

62. Priv. Ltr. Rul. 9530024 at 56 (May 1, 1995).

63. Priv. Ltr. Rul. 9530025 at 62 (May 1, 1995). *See also Investment in Kansas City Royals Baseball is Charitable Purpose*, *supra* note 50.

ruin the baseball club's S Corporation status.[64] The Service also decided that the estate tax deduction for the transfers to the Community Foundation was the fair market value of the Class B shares since the Class A shares were sold to a for-profit partnership.[65]

The IRS rulings in favor of Kauffman's planning were subject to strong criticism.[66] One commentator suggested, "Obviously, every other major league team can become a charity..."[67] The same commentator explained,

> I'm sure the governor of Maryland, if faced with the prospect of losing either the steel mill or the auto assembly plant, will gladly sign an affidavit that any charity owning either or both will be relieving a burden of the governor of Maryland. Believe it or not, the Royals rulings actually addresses this point, although the possibility that the rulings drafter is being sardonic has not escaped my attention... 'While one might argue that the same could be said of any large business enterprise, the governmental units here have shown an intense and unique interest in professional sports franchises.'[68]

That commentator also found a "fiction of a donor-advised fund in the Kauffman plan" since the funds within the Community Foundation had to be used to purchase stock in the baseball team.[69] Finally, the commentator found private benefits "to private parties involved in the team's operation, such as players, other operating personnel, and other persons benefiting from that operation."[70]

While some may think the private letter rulings in favor of Ewing Kauffman's plan were wrong, they may constitute an IRS approved blueprint for team owners willing to give up family ownership but seeking a large charitable contribution deduction and some civic involvement in maintaining a sports franchise in a particular city. In fact, Kauffman's plan did result in the team being sold to local ownership. A group headed by David Glass, who had been involved in Royals' management previously, successfully bid for the team in April 2000.[71] Kauffman may have achieved even more than a charitable contribution deduction and maintained ownership within Kansas City. Apparently, he was able to transfer

64. Priv. Ltr. Rul. 9530026 (May 1, 1995); *See also Investment in Kansas City Royals Baseball is Charitable Purpose*, *supra* note 50.

65. Priv. Ltr. Rul. 9530024 at 83 (May 1, 1995).

66. Streckfus, *supra* note 51 and Sheppard, *supra* note 49.

67. Streckfus, *supra* note 51.

68. *Id.*

69. *Id.*

70. *Id.*

71. Steve Rock, *Royals' ownership history*, KAN. CITY STAR, April 18, 2000 at C4.

to the subsequent owner he always intended and avoid taxes on a gain.[72]

The next rather involved estate plan allowed the family to retain a sports team and avoid estate tax: the plan of Paul Brown, owner of the Cincinnati Bengals football team. Thus, Paul Brown was able to achieve a success in his planning tantamount to his numerous successes in football[73] (in contrast to his notorious nemesis, Art Modell).[74]

B. Paul Brown and the Cincinnati Bengals

What seems to have upset the IRS about Paul Brown's estate planning is that it worked. Paul Brown died on August 5, 1991, a fact that was front-page news around the United States.[75] From 1967 to 1991, Paul Brown was the Chief Operating Officer of the Cincinnati Bengals football team. As shown graphically in the Appendix, in 1983, he sold all but one of his 118 shares of stock to John Sawyer. In return, Sawyer gave Brown a $3.5 million note and an option to Brown's sons to buy 329 shares of the stock (212 of Sawyer's 213 shares and the 117 shares which Paul Brown had sold to Sawyer). The option, which Sawyer granted, could be exercised between 1993 and 1996; the sons purchased the 329 shares in 1993. Paul Brown's federal estate tax return reported only one share of Bengals stock owned by Brown.[76]

In *Estate of Brown v. Commissioner*,[77] the IRS argued that the 1983 transaction between Paul Brown and John Sawyer was, in substance, a sale of stock from Sawyer to Brown.[78] The Service recharacterized the sale of the 117 shares to Sawyer as a transfer of dividends on those 117 shares to Sawyer for ten years in exchange for a remainder interest (the option) in Sawyer's 212 shares of stock so that all 329 shares passed from Brown's estate to his children.[79] The Service based its recharacterization on the fact

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72. Steve Rock, *Kauffman wish fulfilled; Daughter of late owner says he wanted Glass to take over*, KAN. CITY STAR, April 18, 2000, at C4.

73. In addition to his numerous football accomplishments there is a story told by noted Los Angeles sports columnist, Jim Murray, about an appearance before the media by Paul Brown at a Superbowl. At the appearance, the media stood up and applauded. Murray heard two young media representatives say, "Who is this guy anyhow?" Referring to the Cleveland Browns football team, Murray replied, "He was so good they named the team after him." Jim Murray, *This Coach was in a Class by Himself*, The Los Angeles Times, p.1 (Jan. 29, 1989).

74. *See* Solov and Wending, *supra* note 35 and accompanying text. Art Modell fired Paul Brown as the coach of the Cleveland Browns and moved the Browns from Cleveland to Baltimore.

75. *See, e.g.*, Bob Oates, *Paul Brown, Innovator for NFL, Dies at 82*, LOS ANGELES TIMES, Aug.6, 1991 at C1.

76. Estate of Brown v. Comm'r, T.C.M. 1997-195, at n.1 and accompanying text.

77. *Id.*

78. *Id.* at 51.

79. *Id.*

that the option gave the Brown children the right to buy the stock at a price ($25,000 per share) less than the price in 1983 ($30,000 per share).[80]

The court concluded "because Sawyer granted the option to Brown's son in an arm's-length agreement between Paul Brown and Sawyer, we do not disregard the option."[81] The court also noted that the IRS did not raise the question of whether Paul Brown had made a constructive gift to his sons in 1983 when he bargained to have Sawyer grant the sons the option.[82]

One commentator severely criticized the court's reasoning in the *Estate of Brown*.[83] The essence of this commentator's analysis is that the court should have relied on cases involving options, particularly a case such as *Estate of Slutsky*.[84] The commentator argued that the IRS's view of substance-over-form should prevail since the option had little substance because it was certain to be exercised: "Given the economics of the option pricing, it is hard to believe that Sawyer gave any weight to the theoretical possibility that the children would not exercise the option in 1993."[85] However, another well-respected estate tax commentator reasoned that it was difficult for substance to prevail over form in estate and gift tax cases.[86] This commentator apparently found "full and adequate consideration" paid by Brown sufficient for the Tax Court to reject the IRS argument of substance-over-form.

The IRS argued in part that Paul Brown had a retained interest under I.R.C. section 2036 when he sold his 117 shares of stock to Sawyer since Brown still had the voting rights on that stock.[87] Section 2036 states specifically that "the retention of the right to vote (directly or indirectly) of shares of stock from a controlled corporation shall be considered to be a retention . . . ."[88] However § 2036 states that the section applies "except in

80. *Estate of Brown*, at 52.

81. *Id.* at 55.

82. *Id.* at n.9 and accompanying text.

83. Paul L. Caron, *Tax Court Fumbles Substance-Over-Form Ball in Estate of Brown*, 75 Tax Notes 1240 (June 12, 1997).

84. *Id. citing Estate of Slutsky v. Commr*, T.C.M. 1983-578.

85. *Id.*

86. Jerry A. Kasner, *IRS Argues Substance Over Form in Gift and Estate Tax Cases*, 76 Tax Notes 247 (July 14, 1997).

87. *Est. of Brown v. Commr*, T.C.M. 1997-195 at 40.

88. I.R.C. § 2036(b).

2036(b)(1) IN GENERAL . . For purposes of subsection (a)(1), the retention of the right to vote (directly or indirectly) shares of stock of a controlled corporation shall be considered to be a retention of the enjoyment of transferred property.

2036(b)(2) CONTROLLED CORPORATION . . For purposes of paragraph (1), a corporation shall be treated as a controlled corporation if, at any time after the transfer of the property and during the 3-year period ending on the date of the decedent's death, the decedent owned (with case of a bonafide sale for an adequate and full consideration."[89] The court held that Paul Brown did receive adequate and full consideration for his 117 shares sold to Sawyer.[90] The court also noted that Paul Brown did not receive the voting rights in Sawyer's 212 shares and a remainder interest in those shares since Brown already had the right to vote the shares because of a long-existing voting trust and the Brown family paid over $1.5 million cash (in addition to returning Sawyer's $3.5 million note) for Sawyer's shares in 1993.[91]

The voting trust had existed since the inception of the Bengals because of a National Football League (NFL) policy that each team should be controlled by one person.[92] The business purpose for arms-length nature of the 1983 agreement between Brown and Sawyer was supported in part by Sawyer's need for cash which would come from dividends on the stock.[93] Although one of the commentators previously cited,[94] seems to cast doubt on the need for a business purpose to justify estate planning other than mere minimization of estate taxes, the business setting and financial needs surrounding the 1983 negotiated agreement at least help explain and justify its arms-length nature. Shortly after the 1983 agreement, Paul Brown organized a family limited partnership and it was through that partnership that the children bought the Sawyer stock under the option (which had been transferred to the family limited partnership). The Brown children used Sawyer's own promissory note for 3.5 million to Paul Brown 9for the

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the application of section 318), or had the right (either alone or in conjunction with any person) to vote stock possessing at least 20 percent of the total combined voting power of all classes of stock.

2036(b)(3) COORDINATION WITH SECTION 2035. . For purposes of applying section 2035 with respect to paragraph (1), the relinquishment or cessation of voting rights shall be treated as a transfer of property made by the decedent.

89. I.R.C. § 2036(a).

General Rule

The value of the gross estate shall include the value of all property to the extent of any interest therein which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death . . .

2036(a)(1) the possession or enjoyment of, or the right to the income from, the property, or

2036(a)(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

90. *Est. of Brown v. Commr*, T.C.M. 1997-195 at 42.

91. *Id.* at n.7 and accompanying text.

92. *Est. of Brown v. Commr*, 1997-195, at 6, 8-9.

93. *Est. of Brown v. Commr*, 1997-195 at 21-22. *See also*, Bill Sloat and Keith C. Epstein, *IRS Examines Paul Brown's Transfer of Bengals to Sons*, CLEVELAND PLAIN DEALER, June 8, 1995, at 1A.

94. Kasner, supra note 86.

1983 purchase) in turn to purchase Sawyer's stock and added another 1.556 million.[95]

IV. SUGGESTIONS FOR ESTATE PLANNING FOR OWNERS OF HIGHLY APPRECIATED ILLIQUID ASSETS

What are other sports team owners and owners of other highly appreciated illiquid assets to learn from the successes and failures detailed above in this article? What unique estate planning techniques (e.g., those of Paul Brown and Ewing Kauffman) and more commonly used techniques would be most adaptable to their situations? The following section discusses various special estate planning approaches that could be utilized.

A. Irrevocable Life Insurance Trusts

Most of the above-detailed failures in estate planning by owners of sports teams likely could have been avoided by planning ahead using irrevocable life insurance trusts.[96] Rankin Smith, owner of the Atlanta Falcons football team, was apparently successful in his planning by utilizing insurance (in addition lifetime gift-giving of partial interests discussed next).[97]

One commentator has called an irrevocable life insurance trust "one of the main building blocks of an estate plan."[98] Life insurance can provide a ready source of cash to pay estate taxes, particularly if it is purchased sufficiently in advance so that premiums are affordable. I.R.C. § 2042 provides that the insurance proceeds will not be included in the decedent's estate if the insurance is not payable to the estate, if the insurance is not payable for the benefit of the estate (e.g., to pay taxes), and if the insured retains no incidents of ownership.[99] Treasury Regulation § 20.2042-1(c)

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95. *Est. of Brown v. Commr*, T.C.M. 1997-195, at 31, 36-37.

96. *See supra* notes 6-44 and accompanying text.

97. *See supra* notes 45-48 and accompanying text.

98. Evelyn M. Capassakis, *Top 10 Estate Planning Strategies, (Part I)*, (hereinafter Capassakis, Part I), THE TAX ADVISER 26 (Jan. 2001). *See also* Evelyn M. Capassakis, *Top 10 Estate Planning Strategies, (Part II)*, THE TAX ADVISER 100 (Feb. 2001) (hereinafter Capassakis, Part II).

99. I.R.C. § 2042. Proceeds of Life Insurance. The value of the gross estate shall include the value of all property.

> 2042(1) RECEIVABLE BY THE EXECUTOR - - To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.
>
> 2042(2) RECEIVABLE BY OTHER BENEFICIARIES. . To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding

defines "incidents of ownership" to include such things as the right to designate beneficiaries, the power to cancel or surrender the policy, the power to borrow against the policy.[100] When an irrevocable trust owns the policy the insured/decedent can arrange to retain no "incidents of ownership" and the proceeds are paid to the trust rather than to the estate or for the benefit of the estate. Under I.R.C. § 2035, if the insured has relinquished any rights or transferred the policies into the trust more than three years before date of death, the proceeds of the policies will not be added back to the estate at date of death value (the full amount of the insurance proceeds) under the latest incarnation of the gifts in contemplation of death rule.[101]

The irrevocable trust often is structured to purchase a high-value illiquid asset from the estate of the decedent thus providing cash to the decedent's estate to pay estate taxes and allowing the family to continue owning the assets in the trust of which the family members are beneficiaries. The estate will likely have no gain on the sale since basis will be stepped up to fair-market value at date of death for an appreciating asset per I.R.C. § 1014[102] at least until 2010 when the estate tax is repealed and the stepped-up basis rule is repealed with only relatively minor step-ups allowed.[103]

Even the annual gifts of cash into the trust to pay life insurance premiums could avoid gift tax if the amounts are under the annual exclusion amount (historically $10,000 for some time, but now subject to inflation adjustment and at $11,000 for 2002). The beneficiaries of the trust are treated as receiving present-interest gifts if they are given and even limited in time right to withdraw those annual gifts of cash from the trust under the *Crummey* case and its progeny.[104] Gift splitting, of course, would al-

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sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

100. Treas. Reg. § 20.2042-1 (c) (2002).

101. I.R.C. § 2035(a) (2002).

102. I.R.C. § 1014 (2002).

103. *See* section V. infra.

104. *Crummey v. Commr*, 397 F.2d 82 (9th Cir. 1968). *See also Est. of Cristofani*, 97 T.C. 74 (1991); *acq*. 1992-1 C.B. 1; *acq*. 1996-2 C.B. 1.

low a husband and wife to double the amount of the transfer into the trust equal to the annual exclusion and still have made no taxable gift.[105]

This relatively straightforward and quite effective tool often is unavailable because of cost considerations if the life insurance is not purchased when the decedent/owner of the asset is younger. The estate of Joe Robbie, former owner of the Miami Dolphins football team, clearly had to sell the sports team asset in order to pay estate taxes.[106] Similarly, although Jack Kent Cooke was able to avoid estate tax by leaving the valuable Washington Redskins football team to a private charitable foundation, his son did not have the benefit of proceeds from life insurance to help raise the capital necessary to purchase the team.[107] Carpetbagger Art Modell, who moved an NFL football team from Cleveland to Baltimore for money, likely did so because of his failure to do estate planning in advance, which would have included life insurance to provide cash.[108]

B. *Lifetime Gift-Giving and Family Limited Partnerships*

Lifetime gift-giving, another simple technique, can have significant estate planning impact. This technique can be combined with others such as the family limited partnership (FLP). Besides life insurance, Atlanta Falcons owner Rankin Smith transferred partial interests as gifts to his children during his life to reduce estate taxes.[109] Cincinnati Bengals owner Paul Brown created a family limited partnership and then both gifted and sold interests in that partnership to his children and their children.[110]

Lifetime gift-giving can have three objectives (1) use of the annual exclusion (increased to $11,000 per donee per year for 2002)[111] (2) use of the effective exemption amount ($1 million of a taxable estate exempted in 2002), and (3) payment of tax on lifetime taxable gifts above the effective exemption.

Under IRC § 2503(b)[112] every taxpayer has a gift tax exclusion in 2002 of $11,000 per donee per year. Gifts up to that amount per donee are not taxable gifts. Hence there is no gift at date of gift value to add back to the estate and all appreciation is not included in the estate. Husband and wife

105. I.R.C. § 2513 (2002).
106. *See supra* notes 6-18 and accompanying text.
107. *See supra* notes 19-30 and accompanying text.
108. *See supra* notes 35-44 and accompanying text.
109. *See supra* notes 45-49 and accompanying text.
110. *Est. of Brown v. Commr*, T.C.M. 1997-195 at 3.
111. I.R.C. § 2503(b) (2002).
112. *Id.*

may elect to split gifts under I.R.C. § 2513[113] so that each may make a gift of up to $11,000 per donee in 2002 and exclude the gift from the gift tax return. Fractional interests in a closely held business or units in an FLP may be used in a lifetime gift-giving program. With such interests lacking marketability and consisting of minority interests, the discount for gift tax valuation could be as much as 40%.[114] If fractional interests are gifted over time, annual revaluations will be necessary. Gifts — other than gifts with a retained interest under I.R.C. § 2036, a reversionary interest under 2037, or with a revocable interest under 2038, or of an insurance policy under 2042 — will not be added back at date of death value, even if within three years of death.[115] Even gifts under 2036, 2037, 2038, and 2042 are not added back at date of death value if made longer than three years ago. Taxes on all gifts made within three years of death are added back to the estate (the gross up).

For an excellent example of lifetime giving involving family limited partnership interests, see the opinion in the case of the estate of Paul Brown.[116] There in detail are set forth numerically Paul Brown's establishment of the FLP and the transfers to his children and grandchildren of partnership interests by gift or sale, together with gifts of debt forgiveness and capital gains on such forgiveness of debt used by the children to purchase partnership interests. In establishing the family limited partnership, Paul Brown had transferred to it a $3.5 million promissory note from his fellow stockholder Sawyer who had purchased Brown's stock. Brown's sons Mike and Peter assigned their stock option to purchase shares back from Sawyer. Paul Brown also capitalized the partnership with over $2.3 million. Over the period from 1983 (the formation of the FLP) until 1991 (the year of Paul Brown's death) Brown made transfers of FLP interests by gift or sale and forgave debt where family members had used debt to purchase interests. In fact, the partnership was liquidated late in 1990 after Paul Brown had withdrawn as general partner, in advance of his death in August 1991. For a capital gains tax of $500,000, Paul Brown was able to secure the transfer of the team to his sons who exercised their option and purchased Sawyer's controlling interest using about $1.5 million in cash and Sawyer's own $3.5 million promissory note.[117]

113. I.R.C. § 2513 (2002).

114. Capassakis Part I, *supra* note 98 at n.3 and accompanying text (*citing Estate of Furman*, T.C.M. 1998-157. *See also* Capassakis Part II, *supra* note 98 at nn.40-41 (*citing Moore v. Commr*, T.C.M. 1991-546, *Harwood v. Commr*, 82 T.C. 239 (1984), *Est. of Weinberg v. Commr*, TCM 2000-51, and *Est. of Simplot*, 112 T.C. 130 (1999).

115. I.R.C. § 2035 (2002).

116. *Est. of Brown v. Commr*, T.C.M. 1997-195 at 31-35.

117. *See supra* notes 75-76 and 95 and accompanying text.

As discussed below, Brown's situation may have had unique facts and therefore poses risks for others attempting to utilize his strategy. However, sports team owners and other owners of highly appreciated illiquid family assets can utilize the lifetime gift-giving used by Paul Brown and Rankin Smith with sufficient planning.

A word of caution: family limited partnerships have come under repeated attack by the IRS, although with only limited success.[118]

C. *Other Techniques and Loss of Control of Assets*

There are other techniques that can reduce estate taxes, but most involve a loss of control of the assets during the decedent's lifetime. Many dominant owners of family businesses such as highly appreciated sports franchises do not want to part with control during their lifetimes. Therefore, techniques such as sales to intentionally defective irrevocable trusts, sales to the next generation paid for by a private annuity or a self-cancelling installment note (SCIN), or contributions to a charitable lead trust are generally not useful techniques because of loss of control.[119]

Therefore the situations of owners of illiquid highly appreciated assets, such as owners of professional sports teams, and the desires of such owners to maintain control of those assets during their lifetimes may leave few planning options. The two relatively straightforward techniques discussed above, irrevocable life insurance trusts and lifetime gift-giving (possibly combined with a family limited partnership), will apparently work often. Of course, any purchase of life insurance, as discussed above, normally requires sufficient advanced planning for the purchase of such insurance when the owner is younger and in good health and therefore at lower premiums.

Other techniques involving certain code provisions provide only limited relief. The marital deduction for property passing to the surviving spouse, I.R.C. § 2056, could be used to reduce or eliminate the estate tax on the death of the first spouse. However, the deduction only postpones the problem of estate tax until the death of the second spouse. Section 2057, allowing a deduction for family-owned business interests, is limited in amount and does not apply to estates of decedents dying after December 31, 2003 per § 2057(j). If applicable, I.R.C. § 6166, allowing the execution for closely held businesses to defer making estate tax payments for

118. Capassakis Part II, *supra* note 98 at nn. 42-54 and accompanying text.

119. Capassakis Part II, *supra* note 98, at nn. 20-39 and accompanying text. *See also* John R. Dorocak, *Potential Penalties and Ethical Problems of a Filing Position: Not Reporting Gain on the Expiration of a SCIN After Frane (as an Example)*, 23 DAYTON L. REV. 217 (Winter, 1998).

five years, and then to pay the taxes in ten installments, merely postpones the payments, with interest.

It may be worthwhile to review the planning of Ewing Kauffman and Paul Brown with an eye towards extracting generalized approaches that may serve other sports team owners (or others) and thus be a true tax advantage to such ownership. Kauffman's planning involved at least some ostensible charitable purpose and a possible transfer outside the family whereas Brown's planning was similar to the lifetime gift-giving/family limited partnership technique with the added twist of a sale to an outside third party used to immediately freeze the value of the entire asset replacement in Brown's estate. The next two sections of this article will review these two plans to see if indeed they may prove useful to other sports team owners and owners of other highly appreciated illiquid assets.

D. Is Ewing Kauffman's Planning for Others?

The Kauffman plan, although giving up family ownership of the Kansas City Royals baseball team, secured a large charitable contribution deduction for the Kauffman estate and some civic pride in maintaining the sports team in Kansas City.[120] Kauffman was in fact able to transfer the team to the individual he apparently always intended.[121] Query whether Jack Kent Cooke would have been able to provide his son with sufficient funding by using an approach similar to Kauffman's. With such planning, saving the capital gains on the sale by the former owner and securing that owner a large estate tax charitable deduction, might provide the necessary additional source of funds through inheritance for someone like Cooke's son, John Kent Cooke. Although a Kauffman-type plan might seem more problematic when the subsequent buyer is a family member, nothing in the IRS' Kauffman ruling seems to prevent such and the Kauffman estate itself sold to a close business associate of Kauffman's.[122] In fact, both one of the commentators critical of the Kauffman plan and also the IRS itself had suggested that any "large business enterprise" might be able to implement such a plan with a transfer to a charity and a subsequent sale by the charity when the local government units "have shown an intense and unique interest" in the particular family business.[123]

In fact, Joe Robbie may have been able to use similar Kauffman-type planning to assure funds to his children to buy the Miami Dolphins foot-

120. *See supra* note 72 and accompanying text.

121. *See supra* notes 72-73 and accompanying text.

122. *See supra* notes 62-66 and 72-73 and accompanying text.

123. *See supra* notes 67-69 and accompanying text.

ball team, as well as Leon Hess with his New York Jets football team.[124] In all these instances, presumably a gift to a charity would generate a large estate tax deduction and the subsequent sale by the charity (possibly to a family member) would be free of capital gains tax. Although this all seems too easy as some of the critics have pointed out, the IRS did not seem to restrict the approach to Ewing Kauffman only. One wonders whether Art Modell would have been able to use a similar approach to keep his football team within the family rather than moving the team and whether Peter O'Malley could have at least secured a buyer in the Los Angeles area, like Kauffman did, and secure the tax deduction and avoid the capital gains tax.[125]

E. Is Paul Brown's Planning for Others?

Paul Brown's estate planning could be recharacterized as a twist on a family limited partnership where the older generation owner transfers the family business into the partnership and then over time gifts fractional partnership interests and/or sells them to the younger generation.[126] A family limited partnership is often used to freeze the value of the owner's assets at the time of the transfer to the FLP, although subsequent valuations will be needed if gifts of partial interests are subsequently made.[127]

There were several significant unique twists to Paul Brown's estate planning which made it easier for the judge to uphold it in the face of an IRS challenge. First, Brown contributed a note for $3.5 million he received for the sale of 117 of his 118 shares to a fellow shareholder.[128] In addition, Brown already had the voting rights on those shares as well as others through a voting trust encouraged by the sports franchise's league of teams and therefore did not need to retain control.[129] Finally, Brown's sale of the shares, with an option to his sons to purchase the sold shares and the shares of the buying shareholders, was an arms-length transaction as found by the Tax Court. Particularly in light of the fact that the other shareholder, John Sawyer, explained and later testified that he needed the cash which would be forthcoming from the dividends over the period from the sale to the possible exercise of the option.[130]

What the facts of the Brown situation permitted was for the value of

124. *See supra* notes 6-18 and 31-34 and accompanying text.
125. *See supra* notes 36-44 and accompanying text.
126. Capassakis Part II *supra* note 98 at nn. 40-54 and accompanying text.
127. *Id.*
128. *See supra* notes 116-117 and accompanying text.
129. *See supra* notes 91-92 and accompanying text.
130. *See supra* note 93 and accompanying text.

the ownership interest to be frozen at one point in time by replacing it with a promissory note. Thus, Brown potentially avoided (1) the need for subsequent valuations (unless it could be argued that the option contributed by the sons to the partnership increased in value) and (2) increasing capital gains on sales of partnership interests. The same note that Paul Brown had received from John Sawyer and contributed to the partnership was subsequently used to purchase the previously sold and Sawyer's own shares.

Although the Brown situation may even seem more unique than Kauffman's and may be more susceptible to an IRS challenge (since the IRS approved Kauffman in advance but challenged Brown after the bet), it would seem the most unique factor would be the National Football League's encouragement of one-person control. In fact, that policy may not be that unique.[131] Other factors in the Brown situation may not indeed be that unique, even the arms-length bargaining would not necessarily require the other party's need for cash since the Court's holding was based on the arms-length negotiation.[132]

F. Observations

Based on the above discussion, it seems clear that planning similar to Ewing Kauffman's and Paul Brown's could work for other taxpayers in the right situations, particularly sports team owners, thus providing a true tax advantage. Furthermore, the relatively straight forward and often used techniques of an irrevocable life insurance trust and lifetime gift-giving, often coupled with a family limited partnership, could prove useful to sports team owners. Finally, other owners of highly appreciated illiquid assets, particularly in family businesses, could utilize all of these techniques.

V. IMPACT OF THE ECONOMOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001.

A. EGTRRA and Estates and Gifts Generally

Although the Economic Growth and Tax Relief Reconciliation Act of 2001 makes major changes in the tax law, including taxation of estates and

131. Sports team league rules often seem to encourage one-person control and dominant personality, wealthy owners often wield single-handed control (e.g., Jerry Jones of the Dallas Cowboys, George Steinbrenner of the New York Yankees, Daniel Snyder of the Washington Redskins, and Mark Cuban of the Dallas Mavericks).

132. *Est. of Brown v. Commr*, T.C.M. 1997-195 at 42, 53. *See also*, Kasner *supra* note 85.

gifts, for the period 2001 through 2009, the act may make little impact on estate planning techniques, at least until the approach of 2010 and the repeal of the estate tax.[133] EGTRRA does eliminate the estate tax in 2010 and on its way there increases the estate tax effective exemption from tax first to a $1 million in 2002 and then eventually to $3.5 million in 2009. At the same time, EGTRRA decreases the estate tax rate first to 50% in 2002 and then to 45% in 2009 prior to repeal.

The gift tax effective exemption increases to $1 million and remains there even after 2003 when the estate tax effective exemption increases further. The gift tax is reduced along with the estate tax to 45% by 2009 and then 35% in 2010. As the law was first written, all of the changes are repealed in 2011 and the 2001 law with a 675,000 exemption for both estate and gift tax and a 55% rate for both estate and gift tax returns.[134]

In 2010, those who inherit property will do so at a basis equal to the lesser of the adjusted basis of the property to the decedent or its fair market value on date of death rather than the current fair market value date-of-death, which often results in a step-up in basis. There will be a limited step-up. The executor or administrator can step-up the basis in assets $1.3 million with an additional $3 million step-up in the basis of assets inherited by the surviving spouse.[135]

B. EGTRRA and Estate and Gift Planning

As EGTRRA phases in, the planning techniques discussed above such as irrevocable life insurance trusts and lifetime gift-giving with or without a family limited partnership should still prove effective. The planning technique of Paul Brown's estate should also continue to be effective since it is used in conjunction with the family limited partnership. The Kauffman estate technique also will continue to be effective to create an estate tax charitable deduction and avoid capital gains. When the estate tax is repealed in 2010, the need for these techniques will, of course, diminish. Since the estate tax will be gone in 2010, there will not need to be planning to pay or avoid the estate tax. Some commentators are already suggesting that no taxable gifts be made pending the repeal of the estate tax in 2010, but only gifts below the annual exclusion.[136] 2010 may be a single year opportunity, unless Congress further amends the tax law.

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133. Roby B. Sawyers and Brant T. Whitlock, *Estates, Trusts & Gifts: Post-EGTRRA Analysis and Planning*, 32 THE TAX ADVISER 822 (December 2001).

134. *Id.*

135. *Id.*

136. *Id.*

With the new carry-over basis and limited step-ups of $1.3 million and $3 million, it would be difficult for the subsequent generation to sell an appreciating asset without paying substantial capital gains tax. Some of the techniques could be adapted to the new tax law regime. For example, the Kauffman technique could possibly be used to create a charitable contribution deduction and then a subsequent sale from the charity, possibly even to family members, without capital gains tax. The Brown technique could still be used to limit the capital gain by negotiating a sale well in advance of transfer to the subsequent generation. Lifetime gift-giving, as suggested, probably should stay below the annual exclusion rather than eating up the 1 million gift tax exemption. An irrevocable life insurance trust might still prove handy to purchase the assets from the older generation's estate even though capital gain would be involved, with the subsequent generation then holding the asset through the trust with now an increased basis.

VI. CONCLUSION

Sports team owners have had notable failures in their estate planning.[137] Some owners, however have had considerable success in planning, even unique types of planning, particularly Ewing Kauffman and Paul Brown.[138] Some common and relatively simple estate planning techniques can assist sports team owners and other owners of highly appreciated illiquid assets avoid or minimize estate tax; namely, irrevocable life insurance trusts, and lifetime gift-giving (which can be used in conjunction with family limited partnerships).[139] In fact Kauffman's and Brown's rather unique approaches may work for others where there is a desire to donate to a charity and then sell (Kauffman) or to sell stock and later purchase it back (Brown).[140] The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) will likely have little effect on estate planning short term prior to 2010 when the estate tax is scheduled to be repealed and such planning techniques will not then be needed as much.[141]

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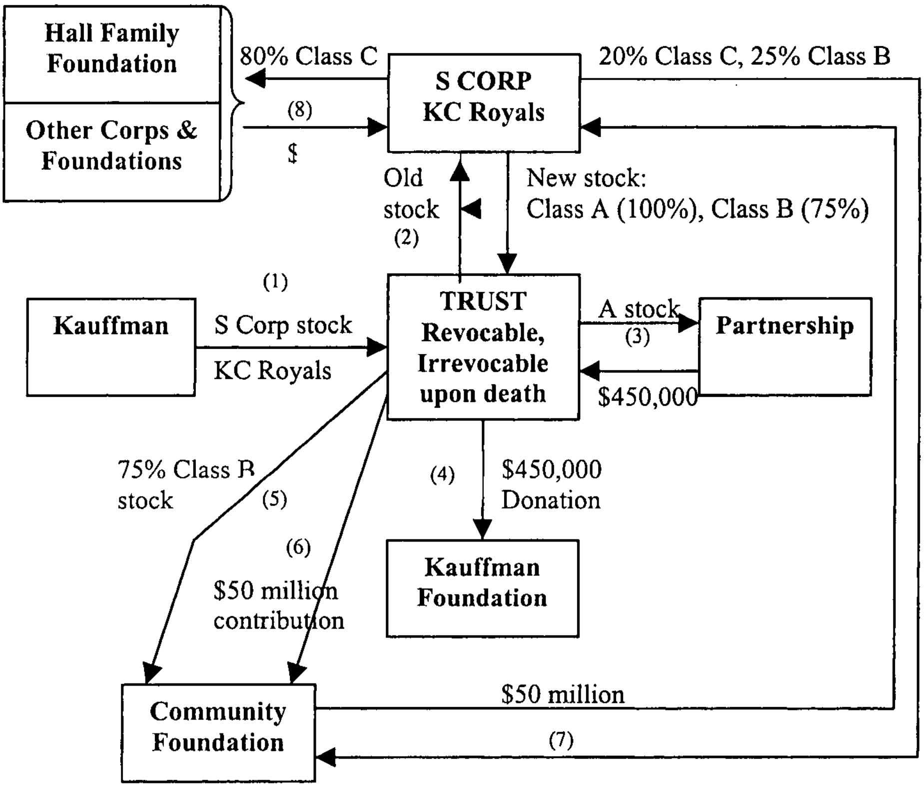
137. *See supra* notes 6-42 and accompanying text.
138. *See supra* notes 44-95 and accompanying text.
139. *See supra* notes 96-133 and accompanying text.
140. *See supra* notes 120-133 and accompanying text.
141. *See* supra notes 133-136 and accompanying text.

APPENDIX :

EWING KAUFFMAN'S ESTATE PLANNING STOCK IN KANSAS CITY ROYALS' BASEBALL TEAM



PAUL BROWN'S ESTATE PLANNING STOCK IN CINCINNATI BENGALS FOOTBALL TEAM