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Professors Do Not Provide *Childs* Support

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By Gregg D. Polsky and Brant J. Hellwig

To the Editor:

In "Structuring Legal Fees Without Annuities: Offspring of *Childs*," *Tax Notes*, July 20, 2015, p. 341 , Robert W. Wood argues that *Childs v. Commissioner*, 103 T.C. 634 (1994) , provides tremendous investment flexibility for plaintiffs' lawyers who choose to invest their contingent fees in tax-favored structured attorney fee products. Likewise, Gerald Nowotny has recently noted that the *Childs* case allows those lawyers to invest their contingent fees in private placement variable annuities.[1]

We agree with Wood and Nowotny. In fact, the reasoning of *Childs* would allow any taxpayer in any industry to use similar vehicles to invest items of gross income on a tax-deferred basis using any investment strategy they desire.[2] For that reason, we have dubbed these *Childs*-based structures "super-IRAs."[3] They provide the same tax benefits and investment flexibility as traditional IRAs but without any contribution limits, restrictions on early distributions, or required minimum distributions.

However, as a matter of technical doctrine, *Childs* was wrong when it was decided, and it remains wrong today.[4] The recent articles by Wood and Nowotny show that the unintended loophole created by *Childs*'s error continues to grow, and it is only a matter of time before taxpayers other than trial lawyers drive their own proverbial trucks through it (assuming that they are not already doing so today). Therefore, the IRS should repudiate the *Childs* holding, and Treasury regulations should be amended to clarify that third-party promises constitute property for purposes of section 83.[5] If the IRS and Treasury fail to act, then Congress should enact legislation to close the unintended *Childs* loophole.[6]

Sincerely,

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FOOTNOTES

[1]*See* Gerald R. Nowotny, "Income Tax Deduction and Deferral Strategies for Trial Attorney Contingency Fee Income Part 1," *ABA Section of Taxation Newsquarterly* (Summer 2012). In a related article, Nowotny explains how trial lawyers can double down on the *Childs* loophole using captive insurance companies. *See* Gerald R. Nowotny, "Income Tax Deduction and Deferral Strategies for Trial Attorney Contingency Fee Income Part 2," *ABA Section of Taxation Newsquarterly* (Winter 2013).

[2]*See* Gregg D. Polsky and Brant J. Hellwig, "Taxing Structured Settlements," 51 *Boston College Law Review* 39, 76-77 (2010). In cases where section 409A may apply (generally, in the case of employee compensation), care must be taken to ensure compliance with its requirements.

[3]*See id.* at 39-40.

[4]*See id.* at 68-73.

[5]*See id.* at 73.

[6]*See* Gregg D. Polsky and Brant J. Hellwig, "Close the Yield Exemption Loophole Created by

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END OF FOOTNOTES