Estate Planning Insights

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IS IT TIME TO REVIEW YOUR ESTATE PLAN?

The Relevant Numbers for 2009. The federal estate tax exemption amount has reached its highest level ever: $3,500,000. At the time of writing this newsletter, a bill is pending in Congress to make that amount the "permanent" exemption from the federal estate tax. The estate tax rate is (still) 45%. Thus, a person who dies in 2009, without having made any *taxable gifts* during life, can leave a total estate worth $3,500,000 to anyone and no U.S. estate taxes will be payable.

Fortunately, Texas no longer imposes an inheritance tax on the estates of persons who die domiciled in Texas or on non-residents who die owning Texas real property or minerals. When discussing death taxes, however, it is important to remember that many states impose their own estate or inheritance tax on both residents (as to all of their assets) and non-residents (as to their interest in real estate or minerals located in that state). Some of our clients own real estate or minerals in other states and, while we can assist clients in creating an estate plan designed to make the transition of out of state property and minerals easier on death, most of the simpler methods for accomplishing this do not result in avoiding death taxes in those other states. Thus, when a person dies owning real estate or minerals in a state outside Texas, the Executor must ascertain whether that particular state imposes some type of death tax and, if so, file any required state death tax return and pay that state any death taxes due.

The annual federal gift tax exclusion amount is now $13,000. Thus, in 2009, a donor (maker of a gift) can give cash or other assets having a total value not exceeding $13,000 (for the year) to each individual she wishes without making a taxable gift (assuming the gift is an outright gift or otherwise qualifies as a "present interest" gift). Our last newsletter focused on the making of gifts during life, so we will not discuss that issue again in this newsletter.

The annual exclusion amount for making tax-free gifts to *a spouse who is not a U.S. citizen* is now $133,000. When your spouse *is* a U.S. citizen, you can make gifts of unlimited amounts to him/her, either during life or at death, without incurring a transfer tax due to the unlimited marital deduction. The marital deduction is limited, however, for gifts to a spouse who is not a U.S. citizen. Each year the exclusion amount for making tax-free gifts to a non-citizen spouse is adjusted for inflation. For annual gifts to a non-citizen spouse above the exclusion amount and gifts made at death, you need to create a Qualified Domestic Trust (or "QDOT") to defer transfer taxes via the marital deduction.

The Generation-Skipping Transfer Tax Exemption amount is also now $3,500,000. The Generation-Skipping Transfer ("GST") Tax is a federal excise tax that is separate from the estate and gift tax. The GST tax is imposed on "generation-skipping transfers". There are basically three types of generation-skipping transfers:

1. A gift from a grandparent to a grandchild, great-grandchild or more remote descendant (these beneficiaries are referred to as "skip persons" and this type of generation-skipping transfer is called a "direct skip").

2. A gift to a trust that allows the Trustee to make distributions to grandchildren, great-grandchildren or more remote descendants (i.e., to skip persons). When distributions are made from the trust to skip persons, the Trustee is making a "taxable distribution".

3. A gift to a trust for a child that lasts until the child's death, at which time the trust terminates and the remaining trust assets pass to the child's children. When the assets in the child's trust are distributed to the child's children, it's a "taxable termination" for GST tax purposes.

Many of our clients create "lifetime, protective trusts" for their children to protect inherited assets from the claims of creditors, including a spouse in a divorce, and to avoid future estate taxes. The assets in these trusts pass to the child's children (i.e., to the grandchildren) on the child's death. This would be an example of no. 3 above. Further, the Bypass Trust most clients use allows the Trustee to make distributions from the trust to grandchildren, as well as to the surviving spouse and children. This would be an example of no. 2 above. Some clients create trusts solely for the benefit of their grandchildren. This would be an example of no. 1 above. Whenever clients make generation-skipping transfers, we have to deal with the GST tax, as well as the estate and gift tax. Thus, GST tax planning adds a layer of complication to the estate plan.

Time To Review Your Estate Plan. While it's too early to know if the $3,500,000 estate tax exemption amount will be permanent, that amount does apply to the estates of persons who die this year. Many clients created their estate plan before 2004, when the exemption amount was $1,000,000 or less. Thus, most of our married clients with "older" estate plans have "formula Bypass Trust Wills". If you have a Bypass Trust in your Will (or revocable trust) and your combined estate is less than $3,500,000 (or even $7,000,000 if "portability" between

spouses becomes law), you should consider whether you still need or want a Bypass Trust. Once a person dies, it is quite difficult to "get rid of" a Bypass Trust created in his/her Will. If you no longer want the Bypass Trust, change your Wills *now*!

MRDs Suspended for 2009. Because of the economy, Congress recently enacted legislation that suspends minimum required distributions ("MRDs") from qualified retirement plans and IRAs for calendar year 2009 for both participants and beneficiaries. Please consult further with your CPA, however, if you are a participant who turned (or will turn) age 70-½ in 2008 or 2009.

IRA Distributions to Charity Still Available. Also note that Congress has extended the law so that, in 2009, IRA owners (but not qualified plan participants) who are over age 70-½ may still make qualified charitable distributions (direct transfers to charity) from an IRA not exceeding $100,000 in the aggregate. These distributions do not qualify for the income tax charitable deduction, however.

Appraisal District Title Changes. We have recently learned that the appraisal districts no longer automatically pick up changes in title to real property resulting from probating a decedent's Will. Technically, probating the decedent's Will effectuates a legal change in title (the Will is treated as a Deed). In some cases, however, the actual beneficiary of the real property is not clear from the terms of the Will and we will then prepare and file an Executor's Distribution Deed to make the change in title more prominent in the particular county's official public records. However, the appraisal districts no longer review probate and deed records for purposes of changing title in *their* records. Instead, the Executor (or new beneficiary) needs to complete and submit the appraisal district's own change of title forms to change title with the appraisal district.

Contact Us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below.

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