Proskauer

Personal Planning Strategies

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Top Ten Estate Planning Recommendations before the End of 2020

If you have not already been inundated with invitations to webinars, articles and newsletters regarding the estate planning you should consider doing before the end of the year, you undoubtedly will receive these over the next few months. The purpose of this newsletter is to provide our top ten thoughts for year-end planning. We are purposefully keeping it short and sweet. If you have any questions or want to discuss further, we are always available and ready to recommend and implement prior to the end of the year. Here they are:

1. **Exemptions may go back down**. The estate and gift, and generation-skipping transfer, tax exemption is $11.58 million per person, and scheduled to increase each year by an inflationary indexed amount through 2025; in 2026, it will revert to $5 million, indexed for inflation from 2011. If former Vice-President Biden wins the presidential election, then it is a foregone conclusion that the exemption will revert to its $5 million amount (indexed), and perhaps even lower. The IRS has already said that if the exemption is used this year, there will be no claw back when the exemption amount is lowered in the future. Thus, it is a "use it or lose it" scenario, and clients should be *using* the exemption prior to the end of the year. Access our 2020 newsletter from earlier this year setting forth these rules in more detail.
2. **Discounts, GRATs, Grantor Trusts, to name a few, may go away**. If former Vice-President Biden wins the Election and the Democrats regain control of the Congress, it is likely that there could be dramatic changes to the commonly used estate planning techniques we have been using to reduce estate tax exposure such as discounting entity interests and fractional interests in real estate, short term GRATs and grantor trusts. Clients should consider taking advantage of the tools we still have in our tool box before it is too late. Access our podcast on GRATs and our detailed article on GRATs.
3. **Married Couples can Have their Cake and Eat it too!** For the married couple who is uncomfortable gifting significant amounts to their descendants (or, better yet, trusts for descendants), each spouse can create and gift the exemption

amount to a trust for the other spouse (commonly referred to as a spousal lifetime access trust, or SLAT) so that access is not lost. It is critical that the trusts are not exactly identical in order to avoid application of the "reciprocal trust" doctrine, but we know enough about the doctrine so it can be easily avoided. Please see our article on SLATS in this newsletter immediately following this article.

4. **A Single Individual can also Have his or her Cake and Eat it too!** For the single individual who is uncomfortable making a large gift and losing access, he or she can create and gift the exemption amount to a trust in a jurisdiction with "domestic asset protection trust" legislation and still be a beneficiary of such a trust.

5. **Interest Rates are at an all-time low.** Some of the techniques we commonly use (i.e., intra family loans, GRATs and CLATs) work best when interest rates are low, and they have never been as low as they are. Access our newsletter setting forth the detailed current rates.

6. **Values of some Asset Classes (i.e., real estate) are Depressed.** The Pandemic has caused many businesses to close or continue to run at a loss; indeed, for those in the commercial real estate business, rents are not being paid and stores are closing. Now is the time to gift such assets, as values are depressed. Access the special report addressing those issues.

7. **Migration to Florida and other low or no Income Tax States.** In the new world of "telecommuting," we have seen an inordinate number of individuals leave New York and California, and move to Florida, Nevada, Texas and other no or low income tax states. It is very easy to take steps to attempt to become a resident of another state; the "former" states do not want to let go, and make it very difficult – great care must be taken in order to properly give up domicile in a high income tax state. We have published a detailed guide to changing domicile which you can access on our Estate Matters hub on our website.

8. **Capital Gains Rates could Double.** We would never "time" the market, and certainly never make an investment recommendation, but VP Biden has proposed to tax capital gains at 39.6% if an individual has income in excess of $1 million. Thus, clients with appreciated investments will need to consider whether it makes sense to sell such assets to lock in the current 20% capital gains rate.

9. **Carefully Consider the Timing of Charitable Gifts.** VP Biden has promised to raise income tax rates to as high as 39.6%; thus, a charitable deduction *may* be more valuable in 2021. However, he has also proposed to cap the tax benefit of itemized deductions to 28% for taxpayers with more than $400,000 of income, in which cases the deduction may be worth more in 2020. Thus, the timing of making charitable deductions is critical.

10. **Be Smart and Sensible.** While we are happy to discuss and implement techniques to reduce tax, never let the "tax tail wag the dog"; in other words, an estate plan should never create stress, even if it can save a significant amount of money for the family. So be smart and sensible in your planning.

Spousal Lifetime Access Trusts – ("SLATS")

One impediment to the implementation of a dynasty trust (a trust for a donor's descendants which can go on for many generations) is the loss of access to the gifted funds. However, for individuals who are married, they may just be able to have their cake and eat it too.

A SLAT is a technique that can be utilized by a married couple who want to fully utilize their enhanced gift tax exemptions ($11.58 million for each spouse in 2020), but also need (or desire) to retain access to the gifted funds. A SLAT is similar to a dynasty trust, except that the individual creating the SLAT also includes his or her spouse as a beneficiary of the trust. In situations where both spouses are seeking to fully utilize their exemptions, each spouse will create a SLAT for the benefit of the other spouse and their children and more remote descendants. Each spouse will then gift to the SLAT that he or she created assets having a value up to his or her remaining exemption amounts. The transfers to the SLATs will be taxable gifts. Each spouse will be required to file a gift tax return to report the gift and to allocate an appropriate amount of GST tax exemption to the transfer. As with the dynasty trust, by allocating GST tax exemption to the full value of the transfers, the assets in the SLATs will pass from generation to generation without the imposition of transfer tax.

By including the spouse as a beneficiary of the SLAT, the beneficiary spouse will have direct access to the SLAT assets (as a beneficiary of the trust) and the donor spouse who made the gift to the trust will retain indirect access to the SLAT assets (as the spouse of a beneficiary). Thus, as long as both spouses are alive and married to each other, the marital unit will have access to all of the assets transferred to both SLATs. However, upon the death of the beneficiary spouse, or upon divorce, access to 50% of the assets will be lost to the donor surviving spouse because his or her descendants will be the only remaining beneficiaries of the SLAT that he or she created.

If a married couple owns assets in excess of two times the exemption amounts, but one spouse does not own in his or her individual name a sufficient amount of assets to fully utilize his or her exemption amounts, assets can be transferred between spouses as necessary to allow for the full utilization of both spouses' exemptions through the creation of two SLATs. This shifting of assets between spouses should not be subject to transfer tax as a result of the unlimited gift tax marital deduction. Although transferring assets between spouses is an effective way to ensure both spouses fully utilize their exemptions, clients may be reluctant to cede any control over the ultimate disposition of their assets by transferring them to a spouse — even if for purposes of implementing a SLAT structure.

SLATs need to be drafted carefully to avoid the so-called "reciprocal trust" doctrine. Under the reciprocal trust doctrine, if the SLATs created by each spouse for the benefit of the other have substantially similar terms, the IRS may argue that the SLATs should be "uncrossed," so that each spouse is deemed to have created a trust for his or her own benefit. If the IRS is successful, the intended planning will be defeated, as each spouse will be treated as having created a self-settled trust, which will be included in their respective estates for estate tax purposes upon death. To help reduce this risk, the SLATs should have — at a minimum — different independent trustees and the dispositive provisions should differ.

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