

PUBLICATION

Estate Planning - Reasons for Review

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Important Non-Tax Reasons for Updating Your Estate Plan

Many people believe that estate planning is only relevant to help them avoid estate and inheritance taxes; however, there are a myriad of other reasons for estate planning. If any of the following have occurred, you should consider modifications to your estate plan:

- Marriage (with or without a prenuptial agreement). This may require the inclusion of particular testamentary provisions for a new spouse. In some states, marriage invalidates a former will.
- The marriage, divorce or death of a child (or the former spouse of a child), particularly where such a person is named as an executor, personal representative, trustee, guardian, conservator, attorney-in-fact, health care proxy, or other type of fiduciary.
- Birth of a child or a grandchild. Consider specific bequests, § 529 college savings plans or establishing a trust.
- Divorce. Be certain beneficiary designations are modified so that assets do not pass to an unintended beneficiary, such as an ex-spouse.
- A divorce, relocation or other change of circumstances of persons named as guardians for minors or as executors or trustees. Some states require that an executor be a resident of the state where probate will take place.
- Change in family circumstances. Certain events may warrant switching from outright disposition to disposition in trust. Factors indicating the need for a trust may include addiction, a lack of maturity or financial management skills, marital instability, concerns due to aging and potential senility, special needs and the preservation of government benefits or creditor concerns. These same considerations might call into question the appointment of an executor, trustee, guardian or other fiduciary.
- Retirement or change in job that causes a change in employment benefits.
- Acquisition of new insurance, to assure that ownership and beneficiary designations coordinate with effective estate planning (i.e., consider whether the insurance should be acquired by a trust).
- Receipt or expected receipt of an inheritance. Consider the possibility of using disclaimers in order to minimize the impact of inheritance on your own estate.
- Acquisition of a major asset such as a new home (i.e., consider how title should be held).
- Acquisition of a business interest and the implementation of buy-sell agreements.
- Sale or disposition of an asset that was specifically bequeathed in your Will. This may skew the apportionment among beneficiaries with unintended consequences.
- Creditor issues that may impact planning.
- Forced heirship rules.

Proper estate planning should also include efforts to avoid conservatorship or interdiction and related problems in the event of incapacity . . . not just planning for what happens at death. The public drama surrounding end-of-life decisions in the Terri Schiavo case in 2005 highlights the importance of executing durable powers of attorney, powers of attorney for health care, living wills and advance care directives. It is important that our loved ones know our wishes in the event of our incapacity.

Federal Estate Tax Repeal?

You probably have heard of proposals to either eliminate the federal estate tax or raise the federal estate tax exemption so that few of us would need to worry about the nearly 47% estate tax now imposed on estates over the current exemption amount. The efforts for a permanent cut to the estate tax have stalled in Congress. Weeks of discussion between the House Ways and Means Committee and Senate Republicans about how to refurbish the proposals on the estate tax to attract the support needed for repeal or revision have failed to produce any viable legislation.

Thus, we will have to live with the present contorted scheme of rising exemptions for at least the near future. The federal exemption is currently at \$2 million, will increase to \$3.5 million in 2009, will be unlimited with no federal estate tax in 2010, and then reverts back to \$1 million in 2111. In light of the uncertainty and Congress' inability so far to produce legislation, we do not advise that clients put off estate planning in order to "see what happens."

The Gap Problem

Another reason to focus on estate planning is the so-called "gap" problem that exists in Tennessee and some other states. This gap problem does not apply to residents of Alabama, Georgia, Louisiana and Mississippi but could apply in any other state that has a separate inheritance or estate tax. The current federal tax estate tax exemption is \$2 million. There is currently a gap between the federal estate tax exemption and the exemption available in states such as Tennessee (whose exemption is currently \$1 million). Formulas in estate planning instruments often need to be modified to avoid either paying state inheritance tax on this gap amount and/or to avoid wasting the amount of the federal exemption over the state exemption. If your estate documents have not been reviewed in light of this potential "gap" trap, we suggest that you ask your lawyer to review your estate planning instruments particularly for this problem.

Gifts to Individuals and to Charities

Currently, annual exclusion gifts that are exempt from federal gift tax are \$12,000 per donee. Congress recently enacted the Pension Protection Act of 2006 (the Act), and President Bush signed it into law on August 17, 2006. The Act is a massive tax bill that covers a multitude of issues, many of which, in keeping with the popular name of the Act, relate to the overhaul of pensions (or defined benefit plans). In addition, however, the Act includes a number of significant charitable giving incentives, as well as reforms aimed at certain types of exempt organizations and charitable giving practices.

Conclusion

Again, we suggest that you give your family one of the most important gifts that you can: a well-planned estate.