

Creating an Effective Estate Plan in an Uncertain Planning Environment

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Introduction

The following chapter is meant to serve as a guide to the practical concerns that tax attorneys are currently confronting. It is altogether likely, based on the fast-changing circumstances in Washington, D.C. and the negotiations that are going on between Congress and the president, that a number of issues raised in this chapter may already have been resolved by the time this is read. Nevertheless, the issues raised in this chapter are in many ways universal and worth reviewing at the present time.

Recent Laws and Rules Affecting Estate Planning Attorneys and Clients

The Bush tax cuts are set to expire on December 31, 2012, and if Congress does nothing before the end of the year, we will essentially see a sunset of that law—and the law that was in effect in 2001 will go back into effect. Under the current law, husbands and wives are each allowed to give their children \$5.12 million estate and gift tax free, for a total of \$10.24 million. However, unless that changes prior to year end, that gifting amount will drop to \$1 million per spouse as of January 1, 2013.

Consequently, the issue at the forefront of every estate planner's mind at this time is whether our clients should, between now and the end of the year, make gifts in a way that would take advantage of the current higher exemptions. This decision is being analyzed on a case-by-case basis. It is very difficult to give advice that is uniform for every client, simply because everyone has different assets and a feeling as to what may or may not happen under the law. Simply stated, we are working in a very challenging environment at this time, because it is not entirely clear what is going to happen with respect to the estate and gift tax exemptions.

Risks of Over Planning—or Not Planning Enough

It is important to examine every client estate planning case based on its unique fact pattern. It is possible that you may end up doing very significant planning that, because of future changes in the law, may have been unnecessary. For example, you may make asset transfers that result in different types of taxes being paid down the road, such as capital gains taxes on assets that are gifted rather than inherited—and if you had not made those transfers, the capital gains exposure would not have come into effect.

Because you cannot give a black and white answer or guarantee for every client as to what exactly is going to occur, it is your job to educate the client regarding these issues. You need to point out exactly what is going to occur under each option, and then let the client make the decision. I often say to clients, “There is no right or wrong answer—you may guess wrong, or you may make an educated decision based on facts that will change in the future.” Regardless, the client needs to make informed decisions based on what they think is an appropriate course of action for them right now.

Common Client Misconceptions

Perhaps the most common misconception that clients have about the estate planning process is that they believe that to take advantage of some of these gifting strategies they must make gifts outright to their children. Doing so sometimes causes concerns for the client—either because their children are still very young or the parents are wary about giving up control over their assets.

In such situations, the client has to be educated to understand that there are ways that they can make gifts while staying in control of their assets, and in many cases, they can retain a portion of those assets for their own use. In other words, they can allow certain assets to be removed from their estate while still retaining control over those assets. This can be done by placing assets into trusts, family partnerships, or limited liability companies where the parents give underlying equity interests but retain voting control. All too often, however, clients do not understand or fully appreciate some of the estate planning advantages that are available under the law.

Family Business Succession Planning Issues

Family businesses always present a unique set of estate planning concerns because very often the owners/parents have more than one child—and one child is involved with the business while the other child is not. Therefore, the parents who own the business need to address a key question: i.e., whether they want control of the family business to go to the child who is active in the business, or whether they want to split control between their active and inactive children. If the parents ultimately decide that they want their business to go only to the child who is active in the business, they must come to grips with

how they may—for lack of a better term—“equalize” the inheritance for the child who is not getting control of the business. When parents say, “I want to give the business to child A, but I want to make sure that child B is made equal in some way,” it forces them to quantify what their business is actually worth. Consequently, there is a unique set of challenges for estate planning clients and attorneys in this area.

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