

Tales from the Pandemic: Some Estate Planning Challenges and Opportunities Highlighted By This Crazy Year

presented by

Gregory S. Williams
Carruthers & Roth, P.A.
Phone: 336-478-1183
E-mail: gsw@crlaw.com



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- Pandemic Psychology and Estate Planning
- Pandemic Logistics Providing Estate Planning Services
- Dangers of the DIY Will and Related Issues
- Probate Avoidance Requires More than Signing a Trust
- Second Marriage Issues
- “Failure to Launch” Kids and Grandkids

- Fights over “Stuff”
- Difficulties of Sharing Inherited Vacation Property
- Long Term Care Planning
- Beneficiary Designations after the SECURE Act
- Income Tax Basis Planning
- “Use it Or Lose It” Planning In Case Exemptions Drop

Pandemic Psychology and Estate Planning

- Facing mortality and “death anxiety”
- Getting one’s affairs in order
- Urgency/motivation

Practical difficulties

- Zoom calls
- Parking lot will signings
- Senior facility lockdowns
- Emergency legislation authorizing video notarization
- Courthouse shutdowns
- Webex hearings

Dangers of DIY Planning

- Invalid or defective will (in drafting or execution)
- Handwritten wills
- Ambiguities or gaps
- Lost or stolen original will
- Will contests

Celebrity Estate Planning Disasters

- Sony Bono – No will; illegitimate child showed up to claim estate
- Jimi Hendrix – No will; likely wanted his brother to inherit
- Stieg Larsson – No will; likely wanted his girlfriend to inherit
- Flo Jo – Lost will; led to litigation
- Heath Ledger – Failed to update will; accidentally disinherited toddler daughter
- Warren Burger – Wrote his own will; neglected to address taxes

Probate – What is it and why avoid it?

- Probate – proving the validity of a will; typically used to refer to the entire process of estate administration under jurisdiction of the court
- Probate is (or can be):
 - Time consuming or slow
 - Unnecessarily complicated
 - Expensive (probate fees and legal fees)
 - Public

Probate – How Do you Avoid It?

- Joint Tenants with Right of Survivorship (JTWROS) (or tenancy by entirety)
- Payable on Death or Transfer on Death (POD or TOD)
- Beneficiary Designation
- Assets Owned by Revocable Trust

Probate Avoidance – Revocable Trusts

- Established during life (hence “living” or “inter vivos”)
- Contains dispositive provisions typically put in the will
- Invisible for income tax purposes during life
- Remains revocable and amendable during life
- Assets owned by trust at death are not subject to probate
- Efficient strategy to transfer control in the event of incapacity or death

Second Marriage/Blended Family

- Relationships; step-parents and step-children
- Premarital agreements
- Postmarital agreements
- Marital Trusts/QTIPs
- Choice of fiduciaries
- Distribution standards

Second or Subsequent Marriages

- Failure to Remove Prior Spouse from Beneficiary Designations
- Potential Disinheritance of Children from a Prior Marriage

Second or Subsequent Marriages (cont'd)

- Subsequent Spouse's Right to Claim Statutory Share
- Premarital Agreements Ineffective for Medicaid Purposes (and for Doctrine of Medical Necessaries)

“Failure to launch” and Other Issues with Children

- **Leaving Property Outright to Minor Children**
- **Leaving Property Outright to Adult Children**
 - **Lifetime trusts/choice of fiduciary**
 - **Distribution standards (carrots and sticks)**
- **Concerns about Sons and Daughters-in-law**
- **Preserving Assets for Grandchildren**
- **Children With Special Needs**

Fights over “Stuff” (tangible personal property)

- 2 extremes – disinterest to bitter and personal
- Means of addressing in will/trust
 - Specific bequests of major items
 - Attach list as exhibit
 - Separate list or “letter to executor”
- Examples

Inherited Vacation Property

- Difficult for children to share inherited property
- Different than other assets
(memories/nostalgia/relationship involved)
- Consider giving one or more of the children an option to purchase (at FMV, TV or other purchase price)
- Another option is to direct fiduciary to sell on the open market

Long Term Care Planning Importance

- Odds are good that one spouse will need care
- 3 ways to pay for it (insurance, self-funding and Medicaid)
- Many parents of our clients waited too long to get insurance, but could run out of assets if self-fund
- Advance planning v. crisis planning

Retirement Account Beneficiary Designation Planning

- Increasingly large part of estate
- Inadequate attention paid
- Subject to income taxes (except for Roth plans) and potentially estate tax
- Creditor protections
- Tax law and personal changes require periodic review

Retirement Account Planning after the SECURE Act

- “Stretch” IRAs – IRAs naming younger beneficiaries so that accounts could be withdrawn over long life expectancies
- Conduit Trusts – exception to rule that oldest beneficiary of a trust has to be used to measure life expectancy; trust mandates that all amounts withdrawn from IRA must be distributed
- SECURE act – 10 year withdrawal period (with some exceptions)

Basis Planning Issues/Ideas

- From 2019: Step Up To The Plate:
Income Tax Basis Planning on a (relatively) New
Playing Field
- New or existing trusts/estate plans, where the
issue of whether to seek a step up in basis is
present

General Basis Rules

- Acquisition
 - “Cost Basis” (IRC Sec. 1012)

- Lifetime Gift
 - “Carryover Basis” (IRC Sec. 1015)

- Testamentary Transfer
 - “Stepped Up (or Down) Basis” (IRC Sec. 1014)

Historical Approach to Basis in Estate Planning (older estate and income tax laws)

- Estate and Gift tax exemptions
 - From \$600,000 to \$3.5 million (gift tax exemption capped at \$1 million)
- Estate tax rates
 - Up to 55%
- Lower top capital gains tax rate
- Itemized tax deductions more freely available
- No 3.8% Affordable Care act surtax
- State and local income taxes not as much of a focus
- No spousal portability

Changing Approach to Basis in Estate Planning (newer estate and income tax laws)

- Estate and Gift tax exemptions
 - Increased to \$11.58 million
- Estate tax rates
 - Flat 40%
- Higher top capital gains tax rate of 20%
- Itemized tax deductions phased out for higher income taxpayers
- 3.8% Affordable Care act surtax
- State and local income taxes more of a focus
- Spousal portability available

Primary Motivations in Earlier Planning

- Maximize Use of Estate and Gift Tax Exemptions
- Maximize Marital Deduction Planning
- Aggressive Lower Valuations
- Use of Lifetime Planning/Charitable Giving/Second to Die Life Insurance

Changing Motivation in Estate Planning

- Tax Law Changes Change Motivation
 - Estate Taxes Are No Longer Relevant in Decision Making for Most People
 - Income Taxes Can Be Substantially More Costly (particularly for estates and trusts)

Assets/Situations to Consider Basis Planning

- Attractive for Basis Adjustments at Death
 - Highly Appreciating Property
 - Very Low Basis Property
- Less attractive for Basis Adjustments at Death
 - High Basis Property
 - Loss Property
 - Assets not entitled to a basis step-up, like IRA's and qualified plans

Strategies for Obtaining Basis Step Up

- Hold Asset Until Death
- “Re-gifting”
- Argue that IRS Arguments for Inclusion Apply
- Distribute Assets to Beneficiary

Strategies for Obtaining Basis Step Up (cont.)

- Use of General Powers of Appointment
 - Types of Powers of Appointment
 - Original Drafting
 - Revising Old Plans
 - Full GPOA v. Formula GPOA
 - Giving Someone the Power to Grant a GPOA

Strategies for Obtaining Basis Step Up (cont.)

- Irrevocable Trusts
 - Decanting (to include GPOA)
 - Use of Distribution Power in Further Trust (to include GPOA)
 - Use of Distribution Power Outright
- Sale to IDGT
- Swapping Assets with an IDGT for Increased Basis

Reasons to Modify or Decant an Irrevocable Trust

- **Extend the trust term**
- **Converting a support trust into a discretionary trust**
- **Fixing drafting errors or resolving ambiguity**
- **Moving the trust to a state with more favorable laws**

Reasons to Modify or Decant an Irrevocable Trust

- **Adjusting powers of appointment**
- **Changing trustee provisions**
- **Combining or separating trusts**
- **Drafting a special needs trust**
- **Qualifying the trust to hold Sub S
stock**

Article: The Estate Tax Exemption May Go Down Drastically (Either Immediately or in a Few Years) – Should You Take Action Now to Reduce a Potential Estate Tax?

Emphasis on Estate Tax May Return

- Estate tax exemption may go down, whether suddenly with a new administration, or with the “sunset” at the end of 2025
- Getting future appreciation out of an estate would be more important
- “Use it or lose it” opportunity for high net worth individuals to make lifetime use of estate tax exemption

Use It or Lose It Hypothetical

- Couple A has a \$28 million estate; \$11.5 million exemption with a 50% estate tax rate
- Couple A gives away \$23 million, fully using their estate tax exemptions
- Couple A dies when the exemption is \$3.5 million
- \$5 million in their estate resulting in an estate tax of \$2.5 million

Use It or Lose It Hypothetical

- Couple B has a \$28 million estate; \$11.5 million exemption with a 50% estate tax rate
- Couple B takes no action
- Couple B dies when the exemption is \$3.5 million
- \$28 million in their estate resulting in an estate tax (after using their \$7 million exemptions) of \$10.5 million

Papers on www.crlaw.com

- [Estate Planning: Like Fire Insurance, Ensuring the Best in Case of the Worst](#)
- [Celebrity Estate Planning Disasters: Lessons from the Lifestyles of the Rich and Famous](#)
- [Breaking Up Is Hard To Do \(But It Might Be Easier with a Prenup\)](#)
- [The Missing Link: Proper Beneficiary Designation Planning on Retirement Accounts Is An Important and Often Overlooked Part of a Good Estate Plan](#)
- [The SECURE Act Eliminates the Stretch IRA and Fundamentally Changes Inherited Retirement Plan Distribution Rules](#)
- [Step Up To The Plate: Income Tax Basis Planning on a \(Relatively\) New Playing Field](#)
- [Irrevocable Trust Reboot: Bringing A Fresh Script To An Old Show](#)
- [The Estate Tax Exemption May Go Down Drastically \(Either Immediately or in a Few Years\) – Should You Take Action Now to Reduce a Potential Estate Tax?](#)
- [Planning for the Worst and Hoping for the Best: The Use of Asset Protection Strategies in Estate and Business Planning](#)
- [Succession Planning: If You Can't Take It With You, Where Should Your Business Go?](#)

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