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Estate Planning Series

IS IT TIME TO REVIEW YOUR ESTATE PLAN?

An estate plan should be reviewed every two to three years to ensure that it: (i) meets your current family objectives, (ii) conforms to ever-changing federal and state estate and inheritance tax rules, and (iii) is being properly implemented. Set forth below are 10 questions to help determine if your current plan needs to be reviewed. We would be happy to either review your current Will and estate planning documents or establish a new estate plan to assure your objectives are achieved in the most tax efficient manner.

1. Has your estate plan been reviewed within the last two to three years?

An estate plan should be reviewed every two to three years to ensure that it still accomplishes your wishes and any tax objectives originally incorporated into the plan. Such a review has become especially important now. Currently, the Federal estate tax laws are in a state of flux since the $3.5 million exemption that existed in 2009 expired on December 31, 2009. Therefore, technically there is no estate tax exemption in 2010 and the exemption will be reinstated to $1 million in 2011. It is, however, believed, although not certain, that in 2010 Congress will reinstate the $3.5 million exemption or some higher exemption amount. There is also uncertainty over whether the current "step-up" basis rules (which gave a "fresh start" fair market basis for most assets upon death) will be replaced with the less favorable adjusted carryover basis rules, which could have a dramatic effect on beneficiaries.

If an estate plan was prepared before 2001, it may be in particular need of review. If it was prepared after 2001, it may still be a good idea to review that plan to determine whether any changes are needed in light of the increasing exemption or for non-tax reasons.

2. Are changes to your estate plan required as a result of the decoupling of New Jersey's and New York's estate tax from the federal estate tax?

New Jersey and New York now base their own estate tax on the federal regime that was in place in 2001, when the federal estate tax exemption was $675,000. As a consequence, unlike the result in years prior to 2001, a plan that makes full use of the federal estate tax exemption at the death of the first spouse will result in increased New Jersey and New York estate tax. Married couples with larger estates will still likely pay less combined federal and state estate taxes by making full use of the federal exemption. For estates under $3.5 million, however, it might make sense to add a disclaimer provision to the wills to give the fiduciary flexibility to make post-death adjustments that can minimize the overall state and federal estate tax consequences. If your estate plan was prepared more than two years ago, it may make sense to have it reviewed to ensure it addresses this issue.

3. Has your family or financial circumstances changed significantly since you last reviewed your plan?

If your family or financial circumstances have changed significantly (e.g., divorce, death of spouse, death or incapacity of designated fiduciary, agent or sole beneficiary, birth of a child or grandchild, a substantial increase or decrease in wealth due to inheritance or other means, etc.), then it may be time to review your estate plan. Some of those changes can affect not only wills, but also powers of attorney, living wills, trust agreements, insurance coverage, etc.

4. Have you taken care of your favorite charities in your estate plan?

If you are charitably inclined, you may wish to consider the best way to achieve your charitable objectives. A number of vehicles are available to accomplish charitable planning to gain income tax and estate tax advantages, if desired, and existing charitable plans could benefit from a review in light of possible rule changes over time.

5. Do you have an irrevocable life insurance trust or are you properly administering your irrevocable life insurance trust?

If you have life insurance, which is held in your individual name and not an irrevocable life insurance trust, you may want to consider establishing an irrevocable life insurance trust to hold the life insurance policies to save on estate taxes.

If you have established an irrevocable life insurance trust to remove insurance proceeds from your estate for estate tax purposes, then the trust must actually own your life insurance and be named the policy beneficiary. Failure to complete and file the appropriate policy assignment and change of beneficiary forms with the insurance company will result in failure of the tax goals of that trust and inclusion of the proceeds in your estate. In addition, it is important to ensure that: (i) "Crummy" withdraw notices are being sent to the beneficiaries each year that a transfer is made to the trust (this is necessary to obtain the benefit of the gift tax annual exclusion for the transfers made to the trust to pay the premiums); (ii) premiums are being paid by the trustee through a checking account opened in the name of the trust; and (iii) in the case of insurance trusts intended to be exempt from generation-skipping transfer tax, GST exemption has been allocated to the trust on a timely-filed gift tax return.

6. Have you recently reviewed the beneficiary designations of your benefit plans?

It is important to remember that IRA's, 401(k) plans, life insurance and other arrangements that employ beneficiary designations do not pass according to the provisions of your Will, but rather pass by those express beneficiary designations. Therefore, it is important that beneficiary designations be reviewed and updated along with your will and other estate planning instruments, to ensure that the funds from these arrangements will be disposed of in a manner consistent with your overall tax and non-tax estate planning objectives.

7. Have you reviewed the title to your assets to make sure that the title is consistent with the plan in your will?

It is important to remember that property owned with another person as joint tenants with right of survivorship or, for married couples, as tenants by the entirety, does not pass according to the will of the first co-owner to die, but rather automatically passes to the surviving joint owner. Therefore, re-titling of joint assets may be necessary if you intend a particular asset to pass through your will, which is often essential for the success of the tax planning provisions incorporated in wills. For example, married couples whose wills contemplate the use of a "bypass" or "credit shelter" trust on the death of the first spouse should ensure that each spouse has title to sufficient assets to fund the bypass trust under his or her will in the event that the spouse is the first to die. Additionally, a client who intends to have his or her estate pass primarily into a marital trust (commonly referred to as a QTIP Trust) may not accomplish his or her intended results if most assets are jointly titled with, or pass by beneficiary designation outright to, the surviving spouse.

8. Are you taking advantage of the low interest rate environment in your gift plan?

Many lifetime wealth transfer techniques that leverage the $1 million gift tax exemption can still be attractive. These include gifts to a grantor retained annuity trust, sales to intentionally defective grantor trusts, gifts of interests in family limited partnerships and limited liability companies at discounted values, and other techniques. You may wish to consider reviewing your plan to determine whether any of these techniques would make sense for you in today's low interest rate environment when values of property are also low.

9. Have you revisited your annual gift plan since the introduction of Section 529 College Savings Plans?

Section 529 College Savings Plans are state-sponsored savings plans designed to help families save for future college costs. Distributions from a Section 529 Plan are not subject to income tax so long as the distributions are used for qualified higher education expenses. An individual can give five years' worth of gift tax annual exclusion gifts to a section 529 Plan in a single year. A married couple can therefore fund a single plan with $130,000 free of gift, estate and GST tax in a single year. Given the benefits of Section 529 Plans, you might want to review your annual gifting program to determine whether a Section 529 Plan is right for you.

10. Are you complying with the formalities of your family limited partnerships?

For plans that include family limited partnerships or limited liability companies, it is important that proper books and records be kept for these entities, and the formalities of the agreements be complied with.

The best way to address these questions and revisit or establish your estate plan is to have your professional advisors work as a team in order to devise a strategy and plan which best satisfies your needs.

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