ESTATE PLANNING – TIME FOR A REVIEW

Copyright 2016. John J. Scroggin All rights reserved.

We are in the midst of some of the most radical changes in estate planning since federal estate taxes were reenacted for the fourth time in 1916. For decades, estate planning has been largely dominated by techniques designed to minimize a confiscatory federal estate tax. However, the permanent transfer tax (i.e., estate, gift and generation skipping taxes) exemption levels enacted by the American Taxpayer Relief Act of 2012 ("ATRA") have permanently reduced the number of US residents who will be subject to a federal transfer tax(less than 0.2% of all estates will be taxable). **Virtually every American citizen and US resident needs to reevaluate their estate planning in light of ATRA's changes.**

ARTA included a number of permanent transfer tax changes, including:

- Estate, gift and generation skipping exemptions of $5,450,000 (in 2016) with an inflation increase in future years,
- Portability of a first to die spouse's estate exemption in which the unused estate exemption of a deceased spouse may be used by the surviving spouse for estate and gift purposes, but not for generation skipping purposes, and
- A flat 40% transfer tax rate above the exemptions.

Planning for your Legacy. In many ways, ATRA has made the estate planning decision process more complex than it was before we had "permanent" reform. But for many clients, it can substantially simplify their planning and how they own their assets. Some of the changing perspectives include:

- The fundamental purpose of estate planning is being reevaluated by many clients and their advisors. The pivotal reality is that estate planning is not fundamentally about taxes – or even about the assets clients intend to pass. It is about how clients deal with their inevitable death and potential incapacity. It is about clients trying to make the right decisions about their own mortality, the consequences of their passing and how to leave a positive **LEGACY** for their heirs. This perspective starts with understanding that estate planning does not start with **THINGS** or the taxes imposed upon them. It starts with **PEOPLE**: Who clients were and are and who their families are and may become. Instead of wrapping the estate plan around the tax issues, clients are increasingly starting with the family issues and then wrapping the tax issues around the family goals and needs.
- For years, married clients were advised to "equalize" their taxable estates so that each spouse's estate exemption was used to eliminate estate taxes. Depending upon the particular facts, this approach may no longer be necessary. Assets can be disproportionately titled or assets may be held in a manner that automatically pass the assets to the surviving spouse, without having to probate the first to die spouse's Will. It is still important to have a Will in this event so that the order of death does not pass all assets solely to the surviving spouse's family under intestacy laws.
- Most married clients who have significant assets have provided for trusts at the first death to minimize estate taxes. By-Pass Exemption Trusts have been used to reduce the taxes on the combined estate. With transfer tax portability, such trusts may no longer be necessary. However, in situations in which a client has been previously married and has children from a prior marriage, By-Pass Exemption Trusts and Marital Trusts may still be advisable.
- The tax planning component of estate planning for most US residents is shifting from a focus on federal transfer tax avoidance to a focus on state and federal income tax avoidance and state death tax minimization in those states which still impose a death tax.
- Asset and divorce protection for heirs is an increasing part of the planning.
- An increased focus on estate planning that is designed to minimize conflicts which so often occur when someone passes away, including:
  - Naming decision makers whose judgment you trust, while providing mechanisms to remove and replace them.
  - Providing Personal Property disposition lists so families are not fighting over who gets the family grandfather clock. See a form for this purpose at *www.scrogginlaw.com.*
  - Passing a family business in a manner that reduces conflicts between those who will run the business and

those who are just "investors."

Failure to Have a Will. It is amazing how many people either do not have a Will or do not know their prior Will was revoked. Failure to have a Will can result in significant problems, including for example:

- In many states, each child and the surviving spouse will inherit an equal percentage (with the surviving spouse inheriting some minimum amount). For example, in Georgia a deceased husband with no Will and two children from a prior marriage may only convey 33.3% of his estate to his surviving wife. Because a trust is not established by a Will, any children may be entitled to receive assets by age 18 - before they may be mature enough to handle the money. Ex-spouses may have control of the inheritance until the children reach age 18.
- If a couple with no children was injured in the same accident and one spouse survived the other by five minutes and then died, that spouse's relatives could inherit all of the couple's joint estate with the other spouse's family receiving no assets.
- The courts will have no insights into your choice of guardian for minor children. In the absence of a declaration from you, the courts will have to make an independent judgment, based upon the family members who request guardianship.
- The courts will have to decide on the person(s) to manage your assets for any minor children. Do you really want that brother-in-law who has been bankrupt twice to manage the funds? If you do not leave a Will making such a designation, he could be given control.
- The failure to have a Will can significantly increase both the income taxes and estate taxes payable by your family.
- In many states, the estate taxes are an expense of the probate estate. However, if assets flow outside the probate estate, the taxes on those assets may still be due from the probate estate - in effect one set of heirs may receive the assets (e.g., beneficiaries of a life insurance policy or retirement plan), while the probate heirs pay their estate taxes. A Will can dictate how taxes are paid.

There are few situations in which a Will (or a "Will substitute" such as a Revocable Living Trust) is unnecessary. Review your existing estate plan at least every 2-3 years. If you do not have a Will, discuss the implications with your accountant or attorney.

Planning for your Incapacity. Every adult (of any age) should have a Medical Directive which authorizes someone to make medical decisions (including withdrawal of life support) if they become incapacitated. A well drafted, comprehensive General Power of Attorney is also advisable for every adult. Under Georgia law, the General Power of Attorney can provide that is only operative upon the signer's incapacity. Make sure your adult children and your parents have Medical Directives and General Powers of Attorney in place.

Providing Basic Information to Your Family. Perhaps the most frustrating and time consuming aspect of dealing with the disability or death of a family member is the lack of necessary information. The author has developed and provides to clients as a part of the estate plan a form (completed by the client) which provides information the family needs if the client become disabled or dies. See *www.familyloveletter.com* for a copy of this “Family Love Letter.”® If you do not use something like a Family Love Letter, then create a notebook containing copies of important insurance, asset, estate and family documents, including the name, address and phone numbers of advisors. Make sure your family knows the pass codes to your computer and other vital information sources.

Beneficiary Designations. To save income taxes and make expected dispositions, it is equally important to make sure you have made proper beneficiary designations for life insurance, IRAs and retirement plans - particularly after a divorce. Many people believe that the beneficiary designation of a former spouse was terminated by the divorce decree. This is normally not the case. A new beneficiary designation is normally needed. How you designate the beneficiaries of your IRAs and retirement accounts can have a tremendous tax impact on your heirs.

Finding an Estate Planning Advisor. How do you locate a competent advisor? Go to www.naepc.org to find a local advisor who specializes in estate planning. Another website, www.martindale.com not only will allow you to locate an attorney, but it also allows you to see how other attorneys rate the attorney for competence and integrity. See also: www.Superlawyers.com and www.AVVO.com.

THIS ARTICLE IS NOT INTENDED TO PROVIDE SPECIFIC LEGAL ADVICE. YOUR PARTICULAR CIRCUMSTANCES OR LOCAL LAW MAY SIGNIFICANTLY CHANGE THE RECOMMENDATIONS. AS WITH ANY PLANNING APPROACHES, YOU WILL WANT TO DISCUSS ANY APPROACHES –WITH COMPETENT COUNSEL BEFORE IMPLEMENTING THE APPROACH.