

Estate and Financial Planning News You Can Use

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PROPOSED CHANGES TO FEDERAL ESTATE TAX LAWS: AFFECT ON VALUATION OF CLOSELY HELD BUSINESS INTERESTS

– Brian K. Janowsky, Esq. and Elizabeth L. Perry, Esq.

On January 1, 2009, the federal estate tax exemption rose from \$2,000,000 to \$3,500,000, at a tax rate of 45%. Currently, the federal gift tax exemption remains at \$1,000,000, also at a tax rate of 45%. Under the current law, the estate tax is set for repeal on January 1, 2010, meaning that the estate of an individual who dies in 2010 will not be subject to a federal estate tax of any kind. The estate tax is set to return in 2011, but at an exemption level of only \$1,000,000 and a maximum tax rate of 55%.

It seems clear that Congress is working to avoid the estate tax repeal slated for 2010. To that end, legislation titled “Certain Estate Tax Relief Act of 2009” has been introduced to address this issue. This legislation would effectively freeze the estate tax exemption level at \$3,500,000 at a maximum tax rate of 45%. While the higher estate tax exemption level proposed by this legislation is good news for most people, the legislation also contains some less-publicized provisions that may affect the estate plan of closely held business owners.

Notably, the proposed legislation may affect the way that people transfer closely held business interests to the next generation.

For example, over the past several decades, a common estate planning strategy has included the use of a Family Limited Partnership or “FLP.” The FLP would typically pool family assets under one cohesive management structure, and allow interests in the FLP to be gifted, over time, to the next generation.

Presently, there are various discounts which may apply to reduce the fair market value of gifted interests. For example, because a closely held business is an interest in a business which is not publicly traded, valuation experts often apply a “lack of marketability” discount due to the inability to sell the interest on the open market. In addition, unless an individual is transferring more than a 50% interest in a closely held business, there may be a “minority interest” discount applied to the value because the interest is a non-controlling interest. This discount is partly based on the presumption that a willing buyer would not pay full value for an interest which would not provide the buyer with any control over the closely run business. These discounts, when provided by a professional business appraiser, can provide significant transfer tax savings when valuing the transferred interests.

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PAYABLE ON DEATH ACCOUNTS: DO THEY AVOID PROBATE AND TESTAMENTARY INTENT?

– Brian K. Janowsky, Esq. and Elizabeth L. Perry, Esq.

In many banks and financial institutions, much is made of avoiding probate (i.e., the process by which a Will is proven in Court to be valid). Avoiding probate will allow an individual's assets to pass to his or her intended beneficiaries without Court involvement.

In order to facilitate the passing of property outside probate, many states recognize what are known as "Testamentary Substitutes." In New York, these testamentary substitutes are codified under the Estates Powers and Trust Law. "Payable on Death" and "Transfer on Death" accounts are a common form of testamentary substitute. While the use of these types of accounts may be beneficial in certain circumstances, these accounts can also have devastating consequences with respect to an individual's overall estate plan. For this reason, payable on death accounts must be coordinated with an individual's Will and estate planning goals.

What is a Payable/Transfer on Death Account?

A Payable on Death (POD) account (also known as a "Totten Trust") is simply a standard bank account where specific person(s) are designated as beneficiary of all funds once the account holder dies. Similarly, a Transfer on Death (TOD) account is generally used to allow a holder of a security (stock or bond) or brokerage account to transfer ownership of the account or security to a named beneficiary upon the owner's death. The terms POD and TOD are often used interchangeably.

POD accounts can be used for many different types of accounts, including bank savings and checking accounts, savings and loan accounts, credit union accounts, certificates of deposit, Treasury securities and savings bonds. There is no need for a formal trust agreement or trustee.

The beneficiary named by the account holder has no right to the funds until the account owner dies. The account holder retains full control over the funds during his or her lifetime, and is able to withdraw some or all of the funds and make changes to the named beneficiary, without restriction.

Beneficiaries: Who gets what?

In order for a beneficiary to be eligible to receive POD funds, he or she must survive the account holder. If the only named beneficiary predeceases the account holder, the deceased beneficiary (and her estate) loses all rights in the account, and the proceeds will be distributed through the account holder's estate. Therefore, if the beneficiary of the account predeceases the account holder, the account holder's goal of avoiding probate will not have been achieved.

A common complication has arisen where two or more beneficiaries are named on the same account. Up until 1998, courts held that if one beneficiary had predeceased the account holder, the remaining beneficiary only received, upon the holder's death, the portion of the funds she would have received had the other beneficiary survived the account holder. As a result, the portion of the funds allocated to the predeceased beneficiary were distributed through the estate of the account holder.

A change in the law was made in 1998 to resolve this issue. Under the current law, if one beneficiary predeceases the account holder, the entire account passes upon the holder's death to the surviving beneficiary (in absence of contrary instructions from the account holder).

Individuals are advised to have their estate planning attorney assist in the decision of when and how to use POD accounts. Attorney assistance is also advisable when an individual is completing a beneficiary designation form to ensure that appropriate language is used and the proceeds of the account pass in accordance with the individual's overall estate plan.

Will vs. POD account

Generally, a testamentary substitute, such as a POD account, controls the transfer of the account proceeds. The asset passes outside the purview of the probate process, and, therefore, the Will of the account holder has no control over its disposition.

Take, for example, the case of an individual who set up a bank account and decided to make her sister the POD beneficiary. The individual and her sister agreed that they would change the beneficiary on the account "later." However, this change was never made. If the individual's Will attempts to distribute "all money in any banking institution to my children," but the individual's only account was payable on death to her sister, the POD designation would control the distribution and the individual's children would not receive any funds from the account.

New York law does allow, in certain circumstances, a Will to overrule or revoke a POD designation. However, the language under the Will must be very specific, and must generally specify the banking institution where the account is held as well as an account number. Further, it is not enough to provide under a Will that a testator wishes to revoke all trust accounts held in any bank in trust for any and all named beneficiaries, and courts have held this type of language too vague to revoke a POD designation.

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GIFTING OPPORTUNITIES IN A BEAR MARKET

– Brian K. Janowsky, Esq. and Elizabeth L. Perry, Esq.

Looking for an upside to the recent down-turn in the economy? Depressed values have made 2009 an ideal time to make gifts.

Under the present law, each individual has an annual \$13,000 gift tax exclusion. This means that an individual (the “donor”) can make \$13,000 gifts to an unlimited number of people (who need not be related to the donor) in each year without having to file a gift tax return. A married individual may consent to split gifts with his or her spouse, allowing a single spouse to make \$26,000 annual exclusion gifts under this rule.

In addition, each individual has a \$1 million lifetime gift tax exemption. This lifetime exemption amount is reduced when an individual makes a gift in excess of his or her annual exclusion amount.

Based on current values, a parent could gift a \$10 share of stock that may have been worth \$20 at this time last year. Using this example, the parent will be able to transfer twice the number of shares to the child as part of the parent’s 2009 annual exclusion gift as he could have in the prior year. Ideally, this gifted stock will then recover its value in the hands of the gift recipient (and outside of the donor’s estate).

The decline in real estate values has also created a tremendous gifting opportunity. Individuals may consider an outright transfer of real estate, or the use of a trust, such as a Qualified Personal Residence Trust (QPRT), to transfer title to real estate to the next generation. Even though a low interest rate environment may not be ideal for a QPRT, because the gift is made when real estate values are low, the donor will use a minimal amount of his or her lifetime gift tax exemption. The future appreciation on the real estate will pass to the gift recipient on a tax-free basis.

For individuals who are charitably inclined, the combination of a low interest rate environment and diminished market values creates an opportunity to achieve charitable goals and pass wealth to the next

generation. One example of such a plan is called a Charitable Lead Annuity Trust (CLAT). Under this trust arrangement, a charity receives a set annuity amount for a term of years based on the value of the assets transferred to the trust and the applicable interest rate at the time the trust was created. If “zeroed out”, the transaction will avoid gift taxes. At the end of the term, any growth of the assets which exceeds the applicable interest rate at the time the trust was created passes to the trust beneficiaries on a tax-free basis.

The Grantor Retained Annuity Trust (GRAT) is another vehicle suited for the depressed market. A GRAT works similarly to a CLAT, except the creator of the trust, or “grantor”, receives the annual annuity for a fixed term, not a charity. When designed properly, a GRAT can be “zeroed out” much like a CLAT, to avoid gift tax on creation of the trust. Any growth that exceeds the applicable interest rate at the time the GRAT terminates will pass to the trust beneficiaries on a tax-free basis. Simply put, a GRAT can put the trust beneficiaries in a position to fully benefit from the eventual up-swing in market performance, freezing the value of the assets transferred into the GRAT and pushing the appreciation outside of the donor’s estate to his or her chosen beneficiaries.

There are many commentators who believe that the federal government will make dramatic changes to the federal gift tax law, some of which may take effect in the very near future. For the time being, the current gift tax laws and the bear market present an opportunity to maximize gifts and to transfer wealth to the next generation.

There are many rules pertaining to the federal gift tax and the federal estate tax which exceed the scope of this article. Individuals are encouraged to speak with an attorney or tax professional before undertaking a gifting program. ■■

USE OF ESTATE-FREEZE STRATEGIES TO PROFIT FROM SLOW ECONOMY

The National Bureau of Economic Research (NBER) defines a recession as a “significant decline in economic activity spread across the economy, lasting more than a few months, normally visible in real GDP, real income, employment, industrial production, and wholesale-retail sales.” The most common indicator of a recession is a decline in real GDP over two consecutive quarters. Recessions are usually short, lasting between six and eighteen months, and they have been rare in recent memory. The last recession began in March 2001, but wasn’t officially recognized by NBER until November 2001, the some month the recession ended.

One common occurrence during a recession is a reduction in interest rates by the Federal Reserve, which results in a decline in income from short-term investments. But those low interest rates, combined with the general market slump, create a nice opportunity to employ estate-freeze strategies.

Estate-freeze strategies essentially fix (or “freeze”) the value of an asset for purposes of gift or estate taxes so that any future appreciation of the asset passes to the recipient without tax consequences. An outright gift of an asset would accomplish the same tax result -- any appreciation would not be realized by the giver because the asset would belong to the recipient. But estate-freeze strategies allow an owner to retain some use and control over an asset while giving away the future increase in value and at the same time avoiding taxes on that increase.

For estate-freeze strategies to be effective, the asset in question must appreciate at a rate faster than the federal interest rates for loans or trusts. The May 2008 Applicable Federal Rate (AFR) for loans -- that is, the rate of interest the IRS assumes a loan will earn -- is 1.64% for short-term loans, 2.74% for mid-term loans, and 4.21% for long-term loans. For trusts, the rate is referred to as the 7520 rate, and it represents the rate of return the IRS projects onto trust assets. For May 2008, the 7520 rate is 3.2%.

All of these rates are at historic lows, making now an excellent time to consider estate-freeze strategies because the assets will likely outperform the rate the government projects and thus increase in value outside of the tax system. Although there are many types of estate-freeze strategies, common ones include installment sales, intra-family loans, and grantor-retained annuity trusts (GRATs).

A simple way to freeze an asset’s value is to sell it at its current market price and to arrange for the buyer to

make installment payments. This structure allows the seller to receive annuity payments over the life of the sales contract, and any appreciation of the asset will be realized by the buyer and not the seller. The seller may be responsible for capital gains tax, however, and the seller must also be confident that the buyer, who may be a friend or family member, can continue the installment payments over time.

An intra-family loan avoids the capital gains tax but still freezes the value of an asset in much the same way as an installment sale, provided that the borrower invests the loan proceeds at a rate greater than the applicable AFR. Assume, for example, a parent loans \$1 million to a child for a term of ten years. The IRS will impute the long-term AFR of 4.21% on that loan. If the child invests the \$1 million, the child keeps any return greater than the 4.21% AFR. The parent receives the \$1 million back, in addition to the 4.21% interest, and has effectuated a gift but avoided both gift taxes and estate taxes.

A GRAT is a trust set up by a property owner who retains the right to annuity payments based on the initial value of the property. At the end of the trust period, what is left in the trust, including any appreciation in the property, passes to its beneficiaries and again triggers no gift or estate taxes. Grandparents, for example, could put \$500,000 worth of stock in a GRAT for a period of ten years, reserve annuity payments for themselves, and leave the remainder of the trust assets to grandchildren. Annuity payments would be structured so that their present value using the current 7520 rate of 3.2% equals the original \$500,000 investment. In this hypothetical, the annuity payments to the grandparents would be about \$60,000 per year. If the GRAT stocks grow at a rate faster than the 7520 rate, then the grandchildren, as trust beneficiaries, would receive the balance of the assets.

A similar trust could be set up with annuity payments made to a specified charity instead of to the grantor of the trust. These trusts, called charitable lead annuity trusts (CLATs), otherwise operate just like GRATs, allowing any increase in trust assets above the 7520 rate to pass to the trust beneficiaries without any gift or estate tax.

Estate-freeze strategies can shield wealth and allow gifts to family members without gift or estate tax consequences. The current confluence of market conditions, with AFR and 7520 interest rates at all-time lows, makes this a good time to consider some of these strategies as part of your estate and financial plan. ■■

TEACHING FINANCIAL RESPONSIBILITY TO FUTURE GENERATIONS

American students graduate from high school with a dismal understanding of personal finance. They are also able to easily obtain credit cards. And they have not been alive when ATMs weren't on every other street corner as an endless supply of cash. This generation is ill-equipped to successfully navigate the financial challenges of savings accounts, utility bills and car insurance.

Each year, \$50 million is spent trying to teach school children about money. But, CNN reports, that expenditure has not been completely effective. High school seniors, including those who have taken various types of financial literacy classes, continue to fail a 30-question exam about basic financial facts.

Financial education should start much earlier than high school and it must be accompanied by experiential learning. Children need to observe their parents and grandparents making fiscally responsible decisions, they need to be taught sound financial rules, and they need to practice dealing with money.

From an early age, children can benefit from instruction and role modeling of basic financial concepts. As early as three or four years of age, children can practice saving coins they find or receive as gifts. They may not entirely understand the nuances of a piggy bank, but they can start the habit of putting money in one and watching their collection grow over time.

A child who receives an allowance from parents or grandparents should be asked to earn it by doing specified chores for the family. Enforce the saving habit by having children divide allowance money into several different piggy banks – one for saving, one for spending, one for donating. Encourage kids to keep records of their money by creating a ledger for their piggy banks. When it's time to have children open a savings account, choose one that provides an official

passbook so they can continue the account-keeping practice. A savings account is also an excellent tool for teaching them about compound interest.

Talk to your young family members about other families who cannot afford things like toys or maybe even clothes and food. As a family, choose a charity to donate money, toys and time.

As appropriate, involve children in family discussions about money, including budgeting or balancing a checkbook. Explain the fundamentals and importance of insurance policies for health care and home or vehicle protection. Teach children and grandchildren to maximize value on the things they buy by comparison shopping or researching price and quality with the help of Consumer Reports.

Perhaps more important than lecturing about savings accounts and budgeting, use everyday opportunities to “walk the walk” of financial responsibility. At the ATM, explain that the money will come from your checking account and show kids the entry in your checkbook register. When using a credit card, discuss the required payment to the credit card company and the consequences of failing to make it. Point out benefits you receive from the taxes you pay – road improvement projects, garbage collectors, new school buildings. As with many other things in life, actions can speak louder than words. ■■

Additional resources you may find helpful:

- www.learntosave.com
- [Silver Spoon Kids: How Successful Parents Raise Responsible Children](#) by Eileen Gallo, Jon J. Gallo, and Kevin J. Gallo
- [Capitate Your Kids](#) by Dr. John E. Whitcomb

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BLESSED WITH A LONG LIFE... AND THE RESOURCES TO ENJOY IT

Many people dream of spending their retirement years traveling or spoiling grandchildren or perfecting hobbies. Unfortunately, some people lack sufficient retirement resources to continue those activities, opting instead for a part-time job or delayed retirement. And even if people have substantial retirement resources when they initially leave the work force, the possibility of outliving those resources is a legitimate cause for concern.

Retirement isn't cheap. Continued inflation squeezes retirement dollars, particularly given that inflation rates are higher for the elderly than for any other segment of the population -- now up to 15% more!

Much of this difference can be attributed to rising health care costs, particularly since the elderly spend twice as much of their income on medical expenses than do working people. Additionally, about 40% of retirees will also need to factor in costly long-term care, either in or out of the home.

And while people are spending more money on health care, they are seeing the benefits in terms

**life expectancy has
increased by 30 years**

of longer, healthier lives, which means more years to support themselves after retirement. According to the National Center for Health Statistics, average life expectancy has increased by 30 years over the last century. The concern is even greater for women, who by the time they reach 65 years of age, still need to be planning for an average of 20 more years!

To ensure sufficient long-lasting income, retirees might consider limiting withdrawals to no more than 4% of their portfolio value, particularly in the early retirement years. A balanced portfolio of stocks and bonds can provide financial security even in adverse market conditions, although investors should consider being aggressive with a portion of retirement assets right up to, and perhaps even into retirement to increase a sustained portfolio base. Purposeful structuring and careful monitoring of investment portfolios can guard against outliving retirement resources. ■■

PAYABLE ON DEATH ACCOUNTS

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Providing an attorney with the proper account information can help ensure that POD designations are consistent with an individual's estate plan and that there will be no unintended "surprises" down the road.

Additionally, if an individual's Will was drafted outside of New York, it is wise to have a New York attorney review the document to ensure it complies with the New York laws for revoking and modifying POD accounts.

Unintended Tax Consequences

As explained above, assets passing by POD designation are not subject to, or included in, the probate of a Will. However, it is important to remember that any asset, including a POD designated account, owned at death is included in the taxable estate for federal and state estate tax purposes.

Frequently, a Will instructs the executor to pay estate taxes from the testator's residuary (probate) estate. Although a POD account is includible in the owner's estate for estate tax purposes, if the owner's Will directs all estate taxes to be paid from his or her probate estate, the beneficiaries of the POD account would receive their inheritance estate tax free (at the expense of the Will beneficiaries, who would be responsible for the payment of estate taxes relating to the POD account and all other taxable assets from their share of the probate estate). This result may be unintended and inequitable for the beneficiaries of the testator's Will, and underscores the importance of coordinating POD designations with the provisions of the Will and other estate planning documents.

Divorce and POD

Similar to the adverse effects explained above, POD accounts often become problematic after the divorce of an account holder. Generally, in New York, a divorce automatically revokes the rights of the former spouse under a testator's Will. Unfortunately, divorce may not have any effect on a testamentary substitute such as a POD account. Unless a separation agreement specifically addresses the accounts designated as POD, the assets in the accounts will not pass according to the account holder's testamentary wishes, but rather the POD designation.

An individual who has been through a divorce should investigate any POD accounts designated in favor of a former spouse, and take the necessary steps to make the appropriate changes.

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PAYABLE ON DEATH ACCOUNTS

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Lack of Contingency Planning

Because no individual can predict the future, an effective estate plan should address a variety of possible future scenarios, however unlikely they may appear to be at the time the estate plan is crafted. The use of Wills and Trusts is essential in this regard, while a POD beneficiary designation offers very little in the way of contingency planning.

For example, let's assume that D designates Spouse as primary beneficiary and Son as secondary beneficiary on all of D's POD bank accounts. These assets account for 90% of D's estate. D dies without a Will and is predeceased by Spouse and Son, but is survived by Son's eight-year-old child.

Because Spouse and Son have predeceased D, the beneficiary designations fail, and the bank accounts will become part of D's estate to be distributed in accordance with New York statutory law. By virtue of New York's intestacy statute, the bank account assets will pass outright to D's minor grandchild. D's grandchild may now have full access to the funds at a younger age than D otherwise would have intended, rendering them available to future creditor claims or irresponsible spending habits.

Had D created an effective estate plan which accounted for the death of Spouse and Son, he could have specified, for example, that funds set aside for a minor beneficiary were to be held in trust for his/her education, support and maintenance.

Conclusion

In many circumstances, the use of a POD account can be an easy and inexpensive way to ensure a particular asset is transferred quickly to its intended beneficiary. However, over time, an individual's testamentary intent may change significantly due to death, divorce and/or changes in family circumstances. The POD designation may also be out of sync with the individual's Will and overall estate plan leading to unforeseen and inequitable results for the individual's intended beneficiaries. Not only is it advisable for an individual to update his or her estate planning documents to keep pace with changing circumstances, it is also advisable to update POD designations.

Individuals are advised to inform their attorney of whether POD designations are in place on any accounts. These issues should be dealt with during lifetime to ensure that an individual's testamentary wishes are fulfilled. ■■

FEDERAL ESTATE TAX LAWS

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In recent years, the Internal Revenue Service has consistently challenged valuation discounts related to intra-family transfers of closely held business interests. The proposed legislation would take this scrutiny a step further by eliminating the minority discount, in part, from a determination of the value of a transferred interest. The disallowance of this discount would apply to any non-business/passive asset, or assets not used in the act of conducting a trade or business, such as cash, stock, bonds, annuities or any equity interest in an entity. Additionally, the legislation provides that, in the context of intra-family transfers, there will be no discount for the transfer of a minority interest, other than an interest that is actively traded, where the recipient of the interest does not have control of the entity but the members of the family retain control. The result is that any non-business asset passing to the recipient of the interest will be considered a direct gift of that non-business asset, and will be ignored when determining the fair market value of the interest being transferred.

While the proposed legislation does not specifically address the lack of marketability discount, some valuation experts have concerns about this discount's future viability. This is because the lack of marketability discount relies, in part, on analyzing minority interests in the business. By eliminating the minority interest discount, there may be little basis for establishing meaningful discounts for lack of marketability.

In addition to the proposed legislation discussed above, a competing bill addressing the estate tax has also been introduced under HR 2023, titled "Sensible Estate Tax Act of 2009". This proposed legislation would provide for the estate tax exemption to be rolled back to \$2 million. However, this \$2 million exemption amount would be indexed for inflation. HR 2023 would provide a progressive estate tax rate starting at 45% and maxing out at 55% for estates exceeding \$10 million. HR 2023 would also allow for "portability" of the estate tax exemption, effectively allowing a surviving spouse to use any exemption not utilized at the first spouse's death without the need for marital and credit shelter trust planning.

Both pieces of proposed legislation are still pending and are not in final form. Nevertheless, if you are considering transferring closely held business interests, this is an appropriate time to reassess your plans and consider your options in light of the almost certain changes to the federal estate tax law. In addition, if the portability provisions discussed above are enacted, it is advisable to consult with your estate planning attorney and tax professional in order to review the impact of the new law on your current estate plan and documents. ■■



Estate and Financial Planning Department

Since its founding in 1897, BS&K has been committed to helping clients transfer their assets to their families and other beneficiaries in a prudent manner with minimal tax costs. We have met this commitment by offering our clients comprehensive estate planning and administration services which reflect our expertise, experience, and sensitivity to the difficult challenges estate planning and administration present to families. Our clients range from individuals of modest wealth to those of significant wealth, from younger clients building a career to older clients who have already amassed their wealth, from clients who are professionals or employees of larger entities to those involved in family businesses. In addition, we represent universities and other charitable and tax-exempt organizations assisting them in the challenges of raising and administering tax deductible charitable gifts.

Times have changed over our Firm's existence - taxes have become a more pervasive force; wealth has grown among a broader spectrum of clients; forms of wealth such as retirement benefits and life insurance have taken on new significance; and the use of trusts for broad or specific purposes, often related to taxes, has expanded. However, what has not changed is our commitment to treat each estate plan or administration uniquely according to our client's needs, and to provide our attention and skills to ensure optimal results and client satisfaction. We consider our role to be more one of counselors than of technicians. While we provide our clients with our experience, skills, and technical knowledge to ensure successful results, we do not lose sight of our responsibility to counsel clients with respect to the comprehensive best interests of the clients and their families. We strive for an ongoing relationship with our clients knowing that family needs change and estate plans evolve. ■■

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