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March 2015
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Attorneys

Nicole K. Atkinson
Kenneth S. Beall, Jr.
Debra Boje * † §
Jane W. Brown
Elaine Bucher § ** †
John P. Cole
Linda Conahan
Susan Copeland
Nick Curley
James B. Davis § **
Jamison Evert
Fabienne E. Fahnestock
Daniel J. Glassman *
Grace Gutierrez * §
Daniel A. Hanley §
William T. Hennessey †
Aaron J. Horowitz
Robert F. Jacobowitz
Kevin A. Kane * §
Mary Karr
Thomas M. Karr †
Thomas C. Lee, Jr. **
Laura Leslie-Schuemann ∞
Steven A. Lessne
John C. Moran †
Cristina Papanikos
Martin Press * §
Adi Rappoport * §
Alyse Reiser Comiter * ∞ **
Lindsay P. Sawicki
Mark J. Scheer § ∞
Mitchell D. Schepps * **
Lisa A. Schneider § **
Michael D. Simon †
Ann Burke Spalding
Timothy Nicholas Thomes
Jason P. Van Lenten **
Stephen G. Vogelsang * §
Andrew J. Wieseneck *
Alexandra M. Woodfield **

* *LLM*
** *Multi-State License*
∞ *CPA*
§ *Board Certified*
† *ACTEC Fellow*

Utilizing Trusts in your Estate Plan

According to a recent study trillions of dollars are expected to be transferred from high net worth individuals upon their death to the next generation. Whether you consider yourself a high net worth individual or not, now is a good time to revisit your generational transfer plan, especially with an eye towards utilizing trusts in connection with your transfer plan.

A major concern in transferring your estate from one generation to the next is protecting your children (and grandchildren) after you are gone. There has been an extremely large shift in the last five to ten years in the manner in which parents leave their assets to their children (and grandchildren). Traditionally, parents would provide that children would receive their inheritance outright, or at staggered ages – for example, one-half at age 30 and the balance at age 40. The philosophy being, your children are old enough to manage their affairs and they should be trusted to enjoy their inheritance. Leaving assets outright is extremely simple, and, as a result, many people are tempted to choose simplicity over complexity.

A more common approach in leaving assets for your children and grandchildren is keeping assets in trust for the lifetime of children, grandchildren and so on. There are at least six advantages to leaving assets in trust for your beneficiaries.

First, leaving assets in trust may provide creditor protection benefits. If a beneficiary is sued, assets in the individual name of the child will likely be subject to the claims of creditors; however, if the assets are owned by a trust, it is more difficult for a creditor to reach the assets. This is especially important for beneficiaries who are doctors, lawyers, dentists, real estate developers with personal guaranties, etc. It also protects beneficiaries who may, for example, be involved in an accident where they are sued for a substantial sum of money. Again, the assets in the trust would be difficult for a creditor to reach.

Second, leaving assets in trust may protect the assets from a divorcing spouse. We have all seen one or more studies indicating that approximately one out of every two marriages ends in divorce.

If the inheritance is left outright to the beneficiary, especially if the assets are commingled with marital assets or are used during the marriage for marital expenses and purchases, it is more likely that the assets would become subject to a subsequent divorce settlement. If the assets are held in a trust, they may remain free from any divorce proceeding. Of course,

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What Will President Obama's Proposed Tax Plan Cost You?

President Obama's tax proposals, both new and well-worn, have received a good deal of media coverage of late. This coverage is due, in no small part, to the featured status the proposals received in the President's recent State of the Union address. The President's proposed tax plan contains tax increases for high income individuals and financial firms that, if passed, are estimated to raise $320 billion over the next ten years. This new revenue is intended to offset the cost of providing tax credits to "middle class" families.

Under the proposed plan, the President gives special attention to the capital gains tax. Bequests and gifts of appreciated assets (other than gifts to charity) would be treated as taxable events, resulting in capital gains tax on the amount of any appreciation. Normally 20% (excluding the 3.8% Medicare surtax), the tax on that gain for married couples making over $500,000 per year would be increased by 4.2% under the President's plan. This new plan, if implemented, would also introduce a new consideration when deciding whether to make gifts. The application of a capital gains tax to the gift of assets could easily reduce the overall value of many gifting strategies.

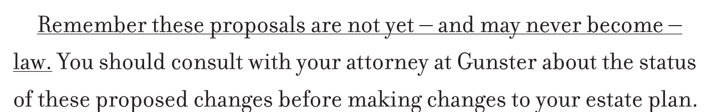
Certain gifts and bequests are treated with deference under the proposed plan. There would still be a version of portability between spouses allowing the capital gains tax to be deferred until the death of the surviving spouse and the proposals also mercifully provide for delayed realization and a 15 year pay-out option for small family-owned businesses. Further, the first $100,000 of capital gains ($200,000 for a married couple) would be exempt at death. Capital gains for a personal residence (up to $250,000 per person or $500,000 for a married couple) and certain tangible personal property would also be exempt.

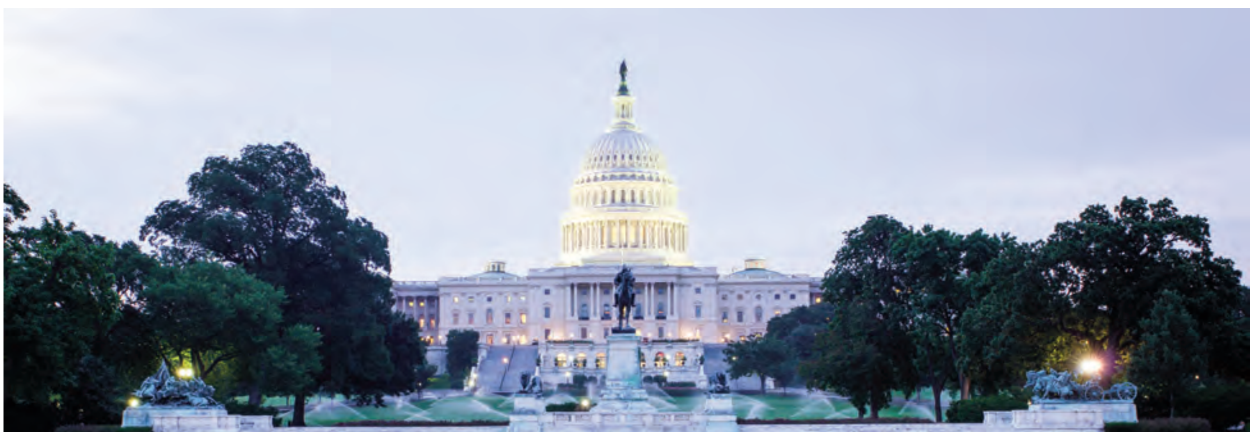
Not only would the President's proposals require sale treatment at death, the exemption from estate tax would be reduced from the current $5,430,000 to $3,500,000 and would only allow a $1,000,000 gift tax exemption. Of course, estate and capital gains taxes are not the only focus of the President's proposals. The proposed plan also considered the impact of IRAs and qualified plans in modern America by requiring business owners with more than 10 employees to automatically enroll workers in an IRA and offering tax credit incentives to employers with up to 100 employees who voluntarily offer retirement plans to employees. Interestingly, the proposed plan would also prohibit contributions and the accrual of benefits to qualified plans and IRAs with balances in excess of about $3.4 million (or the amount necessary to provide the maximum annuity permitted under a defined benefit plan, currently $210,000 annual income in retirement). Of course, these limitations can be avoided by converting to a Roth IRA and paying the tax on the conversion out of other assets.

There are tax breaks to be had under the President's tax plan. The proposed plan introduces a second earner credit of 5% of the first $10,000 of earnings by the lower earning spouse but this credit is phased out for couples earning between $120,000 and $210,000. The proposal also includes an increase in the earned income credit for workers 21 and older without qualifying children and makes permanent earned income credits and child credit benefits that are set to expire in 2017. Further, there is an increase in child and dependent care credits, but these credits would not be available to families with income in excess of $120,000. Child care flexible spending accounts would also be eliminated.

Also of note, the President's proposal increases the American Opportunity Tax Credit and extends it to part-time students, exempts Pell grants from taxation and eliminates the tax on certain student loan debt forgiveness plans. The proposed plan, however, would significantly reduce the value of 529 plans on a going forward basis by eliminating the exclusion from income tax for withdrawals of earnings on new contributions.

Remember these proposals are not yet – and may never become – law. You should consult with your attorney at Gunster about the status of these proposed changes before making changes to your estate plan.





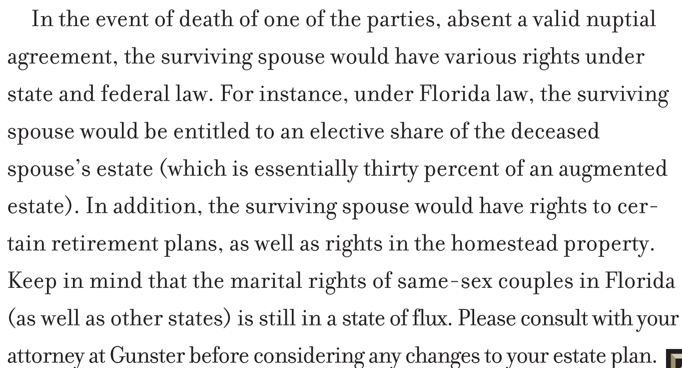
Same-Sex Marriage Comes With Benefits

Same-sex marriage is now legal in a majority of states, including Florida. For federal tax purposes, a same-sex couple is deemed married if the marriage took place in a state that legally recognizes same-sex marriage. The right to marry comes with all the federal tax benefits granted to married couples everywhere, regardless of gender.

Legally married same-sex couples can now file a joint federal income tax return, which is generally preferable if one spouse earns significantly more annual income than the other. Likewise, married same-sex couples can now own their home as "tenants by the entirety", which affords added protection against creditors (except in the case of joint debts). In Florida, they can even apply for a homestead exemption on their primary in-state residence, which grants spousal benefits to a surviving spouse.

Married same-sex couples can also take advantage of certain retirement benefits. For example, a same-sex spouse can rollover a deceased spouse's IRA and avoid immediate payout of IRA funds to beneficiaries. They can also use the estate tax marital deduction to pass assets to a surviving spouse without incurring federal estate taxes. The same is true of any unused estate and/or gift tax exemptions. Gifts between spouses are, of course, also tax exempt.

On the flip side, in the event of divorce, absent a valid nuptial agreement, married same-sex couples would be required to meet all spousal obligations under state law, certain retirement plans, court orders and settlement agreements. Note that alimony payments would be deductible to the payor spouse and taxable to the payee spouse.



In the event of death of one of the parties, absent a valid nuptial agreement, the surviving spouse would have various rights under state and federal law. For instance, under Florida law, the surviving spouse would be entitled to an elective share of the deceased spouse's estate (which is essentially thirty percent of an augmented estate). In addition, the surviving spouse would have rights to certain retirement plans, as well as rights in the homestead property. Keep in mind that the marital rights of same-sex couples in Florida (as well as other states) is still in a state of flux. Please consult with your attorney at Gunster before considering any changes to your estate plan.

In Brenner v. Scott, the United States District Court held Florida's ban on same-sex marriage unconstitutional and issued a preliminary injunction preventing the state from enforcing its ban pending appeal of that case. The preliminary injunction took effect on January 6, 2015. On January 16, 2015, the United States Supreme Court agreed to hear four cases regarding whether same-sex couples nationwide have the freedom to marry. An oral argument on this issue will likely be held in late April 2015.

Utilizing Trusts

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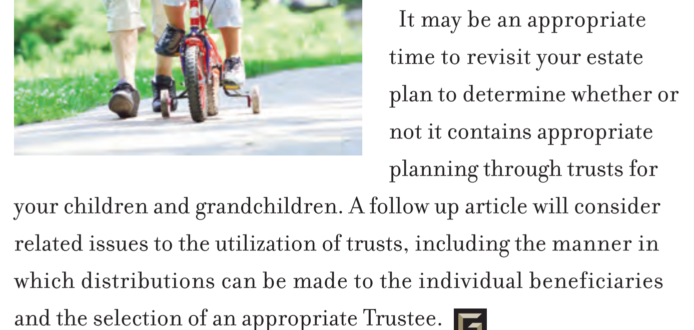
a court may consider the assets in a trust when dividing the assets of the marriage, but, again, the assets in the trust may be protected.

Third, if assets are distributed outright to a child, it is possible that the assets could end up in the hands of your son-in-law or daughter-in-law, a boyfriend or girlfriend, a friend, etc. rather than your grandchildren. However, if the assets are left in a trust, the assets would pass pursuant to the provisions contained in the trust upon the child's death (for example, continue down the bloodline to the grandchildren in further trust).

Fourth, with those families with closely held businesses, instead of leaving the business outright to your children who may disagree about the direction of the business, it may be advisable to leave the business in a trust which contains specific provisions regarding the management and control of the business for future generations.

Fifth, keeping assets in trust allows a portion of your estate to pass from generation to generation without the imposition of any estate taxes. If the assets are distributed outright to a child, upon the child's death the assets would be subject to estate taxes when the child dies, whereas if they are held in trust, the assets would be exempt from tax for successive generations.

Finally, if you were to pass away while your children are minors, and no trusts are created under your estate planning documents for their benefit, the assets for your children would pass to guardianships which are supervised by the court and require court approval for many actions (which can become time-consuming and expensive). If, instead, the assets are in a trust, you can select the appropriate Trustee to manage the minor's assets without court supervision. Also, in a guardianship, the minor child normally receives the assets outright at age 18, which is likely too young an age.



It may be an appropriate time to revisit your estate plan to determine whether or not it contains appropriate planning through trusts for your children and grandchildren. A follow up article will consider related issues to the utilization of trusts, including the manner in which distributions can be made to the individual beneficiaries and the selection of an appropriate Trustee.

Estate Planning 101

Do you have a Will or Revocable Trust? Many people assume that if they do not have substantial wealth, they do not need a Will or a Revocable Trust. If your wishes are completely in line with Florida's intestate provisions you might not need a Will. However, if your wishes differ in any way, large or small (which is almost always the case), a Will or a Revocable Trust is likely the only way to guarantee that your wishes will be fulfilled.

Do you have minor children? If the answer is yes, then you need a Will now! A guardian should be named for your minor children. You do not want a court to choose a guardian for your children if you have and know a viable choice.

Remember, your Will and Revocable Trust do not cover all of your assets. You must name beneficiaries under life insurance policies, retirement plans, IRAs and pension plans. These interests do not pass by Will or Revocable Trust and play an important part in your planning strategy. You may want to consider holding your insurance policies in an irrevocable life insurance trust and not in your own name. Otherwise, the insurance proceeds will first be taxed to your estate, thereby reducing the amount distributed to your beneficiaries.

Also, it may be advisable to take advantage of annual and lifetime gift exclusions (the annual exclusion is $14,000 for 2015 and the lifetime gift exclusion is $5,430,000 for 2015, and both exclusions are annually indexed for inflation). If you can afford to do so, this is an efficient way to reduce your taxable estate. Further, you can make unlimited gifts as direct payments for school tuition and medical expenses. These gifts do not require use of the annual exclusion.

Title your assets properly. You need to title or own your assets in proper form to fund your lifetime estate tax exemption, take advantage of mechanisms like bypass trusts, and avoid assets being subject to the claims of certain creditors. For example, if your bank accounts are held jointly with an adult child (i.e. to allow an adult child to make withdrawals on your behalf), the law will presume that your child owns half the funds in the account and, as a consequence, your child's creditors can attach half of the account.

Be sure to plan for the possibility that you may become incapacitated and unable to make medical or financial decisions for yourself. Again, if you do not execute the proper documents authorizing an agent to make these decisions for you, court intervention will be required to appoint a guardian. Guardianship proceedings in these, or any, circumstances can be both financially and emotionally costly.

Do you own or have an interest in a family business? If yes, you should create a comprehensive business succession plan to document, among other things, the terms of future business ownership, management roles, investment strategies, and exit plans for heirs unwilling or unable to continue the business.

Lastly, make sure to schedule periodic reviews of your estate plan to make adjustments for changes in law, finances, or family structure and the inevitable occurrence of unanticipated events.

The estate planning attorneys at Gunster are here to help you navigate the estate planning process and avoid common estate planning mistakes.

1. All references to available/allowable estate tax exemptions and credits relate only to persons who are U.S. citizens; references to gift tax exemptions/exclusions generally apply to U.S. citizens and U.S. Lawful Permanent Residents (i.e., "green card" holders). While most transfer tax savings techniques discussed can be fine-tuned to benefit non-U.S. citizens, the results will differ and must be addressed on a case-by-case basis.

2. **The 2015 Annual Exclusion** is an aggregate of $14,000 per donee, from each donor; or $28,000 per couple, if a husband and wife file a "split gift" Gift Tax Return on gifts made from either of their assets this year. **Medical/Tuition ["ed/med"] Exclusion Gifts** allow a donor to pay an unlimited amount for anyone's medical or tuition expenses (including health insurance premiums), if paid directly to the service provider, without incurring any gift tax or use of their unified credit; and, if properly structured, ed/med gifts should not reduce the $14,000 amount available to be given to the same person by a donor each year.

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