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FLYING WITH AN OLD DRIVER'S LICENSE? DON'T MISS YOUR FLIGHT!

Beginning on October 1, 2020, boarding a flight in the United States will require a REAL ID-compliant driver's license, a state-issued "enhanced" driver's license or another acceptable form of identification (i.e., a passport). Many Americans currently do not have a REAL ID-compliant driver's license or an enhanced driver's license and the Department of Homeland Security is anticipating that many people will not have the requisite driver's license by October 1, 2020.

REAL ID-compliant cards are marked with a star at the top of the card. State-issued "enhanced" driver's licenses are generally marked with a flag (the new Florida "enhanced" driver's license has the Florida state seal and a large orange "FL" over a stark white base and a star at the top of the card). *The Florida Department of Highway Safety and Motor Vehicles has recently been issuing the new compliant driver's licenses so you should make sure that your current Florida's driver's license complies with the Department of Homeland Security requirements and has the star in the top right hand corner*. If not, you should have a secondary form of identification or make an appointment with your local Florida Department of Motor Vehicle to obtain your new up to date driver's license.

IRS FINAL REGULATIONS CONFIRM NO CLAWBACK OF TAXABLE GIFTS

In 2017, the gift tax and estate tax exemptions were doubled to $10 million per person, with inflationary adjustments ($11.4 million in 2019 with these inflationary adjustments and scheduled to increase to $11.58 million in 2020). Under the 2017 law, on January 1, 2026 the gift tax and estate tax exemptions are scheduled to revert to $5 million per person (with inflationary adjustments).

The Internal Revenue Service had previously issued Proposed Regulations to protect taxpayers who may make substantial gifts between 2018 and 2025 but then die when the estate tax exemption might be lower than when the gift was made (the so-called "clawback"). Theoretically, this clawback could result in additional estate taxes due at the time of the taxpayer's death. On November 22, 2019, the Internal Revenue Service issued Final Regulations confirming that no additional estate taxes would be due in this situation and that the higher gift tax exemption at the time of the gift would be respected.

LOW INTEREST RATES PROVIDE ESTATE PLANNING OPPORTUNITIES

A low interest rate environment is generally conducive to many estate planning techniques. The Internal Revenue Service (the "IRS") promulgates on a monthly basis the minimum interest rate that must be used for various estate planning techniques. Currently, these interest rates are near the lowest they have been in years. Generally speaking, so long as the assets selected for a particular estate planning technique appreciate at a faster rate than the minimum prescribed IRS interest rate, the estate planning technique should be successful. Furthermore, if the assets are of a nature where a minority interest and lack of marketability discount can be applied (i.e., a limited partnership interest in a family limited partnership), further benefits can be obtained. In this current low interest rate environment, it may be time to consider some of the estate planning techniques discussed in this article.

Some of the more common estate planning techniques that partially rely on low interest rates include (a) the creation of a grantor retained annuity trust ("GRAT"), (b) a sale to an intentionally defective grantor trust ("IDGT"), and (c) the creation of a charitable lead annuity trust ("CLAT").

GRATs - The GRAT is a wealth transfer technique whereby a grantor makes a gift of assets to an irrevocable trust for certain named beneficiaries and retains the right to certain payments for a specified number of years chosen by the grantor (the "Retention Term"). Statistically speaking, the shorter the Retention Term of the GRAT, the more likely the GRAT will be successful. The minimum Retention Term must be two years. The grantor typically receives the same payment from the GRAT on an annual basis. At the end of the Retention Term, the property in the GRAT passes to the trust beneficiaries.

If the grantor survives the Retention Term, any appreciation on the GRAT assets after the date the GRAT is funded will pass to the grantor's remainder beneficiaries free of gift or estate tax. If the grantor does not survive the Retention Term, then part or all (depending upon the terms of the GRAT) of the value of the assets as of the grantor's date of death will be included in the grantor's taxable estate (which is the same position the Grantor would have been in if the GRAT was not created). Many GRATs are structured as "zeroed out" GRATs such that the gift tax consequences upon creation are nominal. Also, GRATs can be particularly beneficial if funded with a rapidly appreciating asset that has a significant income stream.

For illustration purposes, if a two year GRAT is funded with $10 million in December, 2019 (when the IRS prescribed interest rate is 2.0%) and the assets appreciate at 7% per year, the results of the GRAT are as follows:

Year	Beginning Amount	Growth	Annuity Payment	Balance
1	$10,000,000	$700,000	$5,150,391	$5,549,609
2	$5,549,609	$388,473	$5,150,391	$787,691

Upon creation of the GRAT, the amount of the gift is approximately $1, which must be reported on a gift tax return. As a result, under this scenario, $787,691 of assets can be transferred to your intended beneficiaries at a gift tax cost of approximately $1.

Sale to an IDGT – In a sale to an IDGT, the grantor sells assets to an IDGT in exchange for a balloon promissory note bearing interest at the minimum prescribed interest rate. The value of the assets sold are "frozen" in value at the time of the sale such that all appreciation subsequent to the sale would pass to the trust beneficiaries free from any transfer taxes. For transactions occurring in December, 2019, and assuming a promissory note with a maturity of three to nine years, the minimum prescribed IRS interest rate would be 1.69%, compounded annually. Because the IDGT is a grantor trust for income tax purposes, the sale is ignored for income tax purposes and there is no gain or loss to report on the sale. Furthermore, when the IDGT pays interest to the grantor pursuant to the terms of the promissory note, the grantor does not have to recognize any interest income because the IDGT is a grantor trust for income tax purposes. To maximize the benefits of a sale to an IDGT, it may be advisable to sell assets that can be discounted for valuation purposes (i.e., an interest in a family limited partnership can be sold to an IDGT).

In addition, the IDGT should be "seeded" with sufficient assets to justify the issuance of the promissory note in connection with the purchase of the assets. Although there is no standard amount with which the IDGT should be funded, as a guideline, approximately 10% of the purchase price should be sufficient. Unless you already have an IDGT with sufficient assets to enter into the transaction, you would need to create a new IDGT and make a taxable gift to the IDGT to properly seed the IDGT. Your available gift tax exemption could be used to shield any such gift from the imposition of gift taxes.

Although the GRAT is a simpler technique than a sale to an IDGT, one major advantage of a sale to an IDGT is that oftentimes the assets sold to the IDGT would be exempt from transfer taxes from generation to generation because your generation-skipping transfer tax exemption would be allocated to the assets initially transferred to the IDGT (i.e., the "seed" money). With a GRAT you cannot allocate your generation-skipping transfer tax exemption to the assets transferred to the GRAT, but you can make a late allocation upon the termination of the GRAT.

CLAT – A CLAT is a "split interest" trust with both non-charitable and charitable beneficiaries. The CLAT's charitable beneficiaries are entitled to begin receiving distributions upon the creation (and funding) of the trust. The charities will continue to receive payments from the trust for a term of years or during the life or lives of one or more individuals who are living when the trust is created. Upon the termination of the charitable interest in the CLAT, the remaining assets are distributed to the donor's non-charitable beneficiaries.

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ANNUAL NOTICE LETTERS ARE A *CRUMMEY* (BUT NECESSARY) REQUIREMENT

Under current tax law, a donor may annually gift up to $15,000 to any donee without being subject to any gift tax (so called "annual exclusion" gifts). So long as the gift does not exceed $15,000, the donor does not have to allocate any portion of his or her lifetime gift tax exemption (currently $11,400,000) to the gift. The annual amount a donor is allowed to gift is indexed for inflation to the nearest one thousand dollars so, historically speaking, the annual amount increases by one thousand dollars every few years. For purposes of this article, the annual amount is assumed to be $15,000.

Gifts to individuals qualify for the annual exclusion because the donee has the present right to enjoy the gift. Gifts to an irrevocable trust, however, are not eligible for the annual exclusion unless the trust specifically grants the beneficiary the right to withdraw a portion of the amount gifted to the trust (normally the amount withdrawable will be the lesser of the amount of the gift and $15,000). These withdrawal rights are considered the equivalent of receiving the gift outright and are intended to qualify for the annual exclusion.

Normally, the beneficiary of the trust has a certain amount of time to exercise his or her right to withdraw the amount gifted and if the time period expires without exercising the right, the right to withdraw lapses. Most of the time, the beneficiary does not exercise his or her right to withdraw the amount gifted to the trust. These withdrawal rights are commonly referred to as "Crummey" withdrawal rights and are based on the Internal Revenue Service court case, *Crummey v. Commissioner.*

Many insurance trusts are drafted with these withdrawal provisions. Oftentimes, a trust that owns an insurance policy may not have sufficient liquid assets to pay the annual premiums on the insurance policy. As a result, the insured, who is typically the person who created the insurance trust, will gift sufficient amounts to the insurance trust to allow the insurance trust to pay the insurance premium. If the insurance trust has multiple beneficiaries, each beneficiary could be considered a donee for purposes of the annual exclusion gift determination. The intent is for the gift to the trust to qualify for the annual $15,000 exclusion on a per donee basis. However, in order to qualify for the annual exclusion, the Trustee of the trust must notify the beneficiary (or beneficiaries) of the contribution to the trust, the right to withdraw a portion of the contribution, and the lapsing of the withdrawal right if it is not exercised within a certain time frame.

To ensure that the gift to the trust will qualify for the annual exclusion, the Trustee of the irrevocable trust should make sure that the beneficiary is actually aware that the right to withdraw exists by providing the beneficiary with written notice of the right (although verbal notice may be acceptable in certain situations) and that the beneficiary has sufficient time to exercise the right to withdraw prior to its lapse. The specific procedure is normally set forth in the trust instrument and the Trustee should follow any such procedure. If the beneficiary is a minor, the notice would normally be sent to the guardian of the minor.

Following these annual notice requirements can be cumbersome and time consuming for a Trustee. However, to permit the donor to treat gifts to an irrevocable trust as annual exclusion gifts, the Trustee should follow the applicable procedures to ensure that the beneficiaries are deemed to have withdrawal rights over any such gifts. If you have created any irrevocable trusts and have made gifts to such trusts that are intended to qualify for the annual exclusion, you should analyze whether or not the proper notice has been provided to the beneficiaries, and, on a going forward basis, all requisite notice procedures should be followed.

If you have any questions or require assistance regarding notice procedures, we are available to help.

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Because the non-charitable beneficiaries must wait to receive assets from the CLAT, the value of the gift to them is discounted (i.e., it is reduced) for estate and gift tax purposes. Depending on how the CLAT is structured, the benefits of a CLAT may include a current income tax deduction on its creation and a reduction in your estate and gift taxes. As with GRATs, the CLAT can be a "zeroed out" CLAT such that the gift upon creation is nominal.

For illustration purposes, if a ten year "zeroed out" CLAT is funded with $1 million in December, 2019 (although the December, 2019 IRS prescribed interest rate is 2.0%, the IRS allows you to use the lowest rate for the current month and the prior two months, which would be the October, 2019 rate of 1.8%) and the assets appreciate at 7% per year, the charities would receive $110,170 per year for ten years, and upon the expiration of the CLAT, approximately $444,993 can be transferred to your beneficiaries free of gift tax. In addition, you would receive a $1 million income tax deduction upon the creation of the CLAT.

Conclusion – In this low interest rate environment, you may want to consider the creation of a GRAT, a sale to an IDGT or the creation of a CLAT. Please keep in mind that prescribed IRS interest rates change each month so the examples set forth in this article would change depending on the month the estate planning technique is adopted.

CHARITABLE GIFTS FROM INDIVIDUAL RETIREMENT ACCOUNTS

Since 2006, some taxpayers have been able to use the funds in their Individual Retirement Accounts ("IRAs") to satisfy charitable gifts. The provision had been renewed a few times over the years and, in 2015, the provision was made permanent.

Each year, an individual may direct up to $100,000 to be distributed directly from an IRA to charity. The amount distributed to charity counts towards the individual's required minimum distribution from the IRA for that year. For tax reporting purposes, the individual does not report the amount distributed to the charity as income (distributions from an IRA to an individual are normally considered taxable income to the individual) and the individual does not report a charitable deduction on his or her income tax return as an itemized deduction. The ability to make the distribution directly from the IRA (rather than reporting the distribution as taxable income) normally results in income tax savings to the individual.

In order to take advantage of this provision, there are a number of requirements that must be satisfied:

1. The taxpayer must have attained age 70 1/2 at the time the distribution from the IRA to the charity is made.

2. The distribution must be made from a traditional IRA, inherited IRA or a Roth IRA (although using a Roth IRA for such distributions would normally not be recommended from a tax planning standpoint). Distributions from 401(k), 403(b) or profit-sharing plans would not qualify. Also, generally speaking, distributions from an SEP-IRA or SIMPLE IRA would not qualify if the individual made any contributions to such accounts during the year in which the charitable gift is desired to be made.

3. The maximum annual amount that an individual can direct to charity is $100,000 per year. Each spouse may direct $100,000, but each spouse must use his or her own IRA (i.e., one spouse cannot direct $200,000 to be distributed from his or her IRA to a charity and have the other spouse be deemed to have contributed $100,000).

4. The charitable gift must be made to a public charity. The charitable gift may not be made to donor advised funds, certain types of private foundations and charitable trusts. The $100,000 does not have to be made to only one charity – it can be split among various charities.

5. The charitable gift should be made directly from the IRA to the charity by issuing a check payable to the charity. If the IRA issues a check payable to the taxpayer and the taxpayer then writes a check to the charity for the same amount, the payment would not qualify.

6. If the taxpayer has already satisfied his or her required minimum distribution for the year, the taxpayer cannot avail himself or herself of the gifting provision. For example, if the taxpayer has already taken out his or her minimum required distribution from the IRA during a particular year and, later in the year, directs $100,000 to be distributed directly from his or her IRA to a charity, the $100,000 distribution would have to be included as taxable income (but the taxpayer may be able to obtain a charitable deduction for a portion of the charitable gift).

7. As with other charitable gifts, the taxpayer should obtain documentation from the charity acknowledging the amount of the contribution and that the taxpayer did not receive any financial benefit in consideration of the gift.

For the charitably inclined taxpayer, the ability to make charitable gifts from his or her IRA is an extremely useful tax planning tool. If you would like more information on this provision, please contact one of our Private Wealth Services attorneys.

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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 2019 Annual Exclusion** is an aggregate of $15,000 per donee, from each donor; or $30,000 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 $15,000 amount available to be given to the same person by a donor each year.

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