Gadsden Schneider & Woodward LLP

Trusts and Estates Legal Update

Summer 2019

To Our Clients and Friends -

We hope you had an enjoyable summer and are looking forward to fall. In this issue, we will discuss some matters that may affect your estate planning and also share some firm news.

The "New" Normal: Everything is Subject to Change

Once again politicians have cast the future of the estate tax into doubt. As discussed in our prior newsletter, the current high unified gift and estate tax exclusion amount (the "unified exclusion amount") of $11.4 million per person is set to fall back to about half that amount in 2026. Members of Congress from both parties have proposed bills or made policy proposals that include significant changes to the estate tax. While it is unlikely that any significant changes will come before 2021, it is possible changes will be made before the scheduled 2026 "sunset."

Republicans continue to push to repeal the estate tax. The *Death Tax Repeal Bill* co-sponsored by 33 Republican senators would eliminate the estate tax and the generation-skipping transfer ("GST") tax for all decedents dying after enactment (but estate taxes would still be imposed on QTIP trusts included in a surviving spouse's estate established by a decedent who died prior to enactment). The gift tax, with the existing $11.4 million exclusion (with inflation adjustments going forward but without the 2026 sunset), would continue to apply to lifetime gifts, with the rate reduced to 35%. The

bill leaves intact the so-called step-up in basis at death, whereby recipients of property from a decedent's estate take a basis in the property equal to the date of death fair market value, eliminating all built-in gains (or losses).

On the Democratic side, several of the presidential candidates have generally expressed interest in expanding the reach of the estate tax, and several have concrete policy proposals or sponsored bills that would do just that. Each of Elizabeth Warren's *American Housing and Economic Mobility Act of 2018*, Bernie Sanders's *For the 99.8% Act*, and Corey Booker's *American Opportunity Account's Act* would use the estate tax to pay for unrelated programs. All call for the unified exclusion amount to be reduced to $3.5 million, to increase the estate tax rate and to add brackets, with the lowest bracket between 45% and 55% and the highest marginal rate between 65% and 77%, depending on the proposal. All three proposals also include provisions that would eliminate or reduce the efficacy of popular wealth transfer techniques by (i) bringing into a person's estate any income taxes paid on behalf of the person's grantor trusts, thus eliminating the advantage of such payments, which are essentially gift tax-free gifts; (ii) significantly limiting the availability of the annual exclusion from gift tax (currently $15,000 per donor, per donee) for gifts made to trusts with so-called "Crummey" powers (withdrawal rights, triggered by additions to a trust, which allow such additions to qualify for the gift tax annual exclusion); and (iii) setting additional requirements for "grantor retained annuity trusts" or "GRATs," which would make them much less valuable wealth transfer vehicles.

Both Senators Warren and Sanders would also impose the GST tax on all transfers from trusts not required to terminate within 50 years of creation regardless of the application of the grantor's GST exemption, including all existing GST-exempt trusts after a 50-year grace period. This would severely limit the tax benefit of GST-exempt dynasty trusts that under current law can continue to grow free of GST tax (and estate tax) for as long as the trusts exists (indefinitely in many states, including Pennsylvania in the case of post-2006 trusts).

In addition, Senator Sanders would reduce the gift tax lifetime exclusion to $1 million, so that essentially only the first $1 million of a person's $3.5 million unified exclusion amount would be available during life. He also proposes additional reporting requirements regarding the basis of property gifted during life to ensure that the basis of gifted property recipients report when such property is sold is the same as the transferor's basis at the time of the gift. Finally, Senator Sanders would eliminate various valuation discounts that may currently reduce the fair market value for estate and gift tax purposes of non-publicly traded business entities.

Beyond the scope of this summary, but still of interest, Senators Warren and Sanders have each proposed imposing a new annual wealth tax on certain households with wealth greater than $21 million under Sanders's proposal, or $50 million under Warren's. Senator Booker also would alter the income tax law not only to remove the so-called step-up in basis at death, but also to cause realization of all built-in capital gains in property transferred at death or by gift, with only a $100,000 exclusion for gains realized at death.

Implementation of any of these proposals could cause a seismic shift in estate planning, but if the current divided government and the Republicans' and Democrats' opposite goals in this area continue past the 2020 election, it is possible that none will become law. Stay tuned!

Do Young Adults Need An Estate Plan?

The first time many adults even begin thinking about estate planning is when they become new parents or enjoy significant financial success. However, everyone age 18 and over can benefit from having a well-considered estate plan in place, and the advantages can extend to parents and other family members, too. Some of the most notable benefits include the following:

1. Perhaps most vitally, having a health care power of attorney can allow a younger adult to choose who can participate in his or her medical care after age 18. This can range from making doctor's appointments to being automatically designated as the medical decision maker in the event of an accident.

2. For a college-age adult living away from home, creating a durable power of attorney naming his or her parents can allow them to assist with basic financial tasks, such as banking or filing tax returns.

3. For unmarried adults, having a health care power of attorney/living will and durable power of attorney can confer legal rights to a cherished partner, allowing the partner to participate in both medical and financial decisions in the unlikely event incapacity strikes.

4. A will is also important to consider because it allows unmarried adults--particularly those with no children—to choose beneficiaries other than parents (who would inherit all of the adult's assets automatically in the absence of a will). Common choices include siblings, a partner, friends or charity. Having a will can also:

    a. Provide the flexibility to distribute token-value sentimental possessions, honor meaningful relatives or friends, or follow through on the adult's charitable values and giving; and
    b. Prevent the carefully constructed estate plan of the adult's own parents from unraveling. In scenarios where such parents have made deliberate lifetime gifts to their children, the adult children's wills can benefit siblings or nieces and nephews instead of allowing the assets to be added back into the parents' estates.

5. It is critically important for younger adults with minor children of their own to designate a guardian for their children in a will. Furthermore, having trusts in place allows trusted advisors and friends to safeguard and manage assets for minors, avoiding a scenario in which a deceased couple's assets are inherited directly by their children, who can gain unlimited access to the assets too early.

Younger adults can also benefit from the multitude of other general estate planning benefits, including tax reduction, creditor protection for their beneficiaries, increased privacy through revocable trusts, and general peace of mind. We encourage anyone with children age 18 or over for their beneficiaries to discuss these issues together. Like saving for retirement and learning how to balance a checkbook, creating an estate plan is good "life hygiene" for all adults.

Brave New World: Planning With Digital Assets

A generation ago, most people kept their documents in file cabinets, stored their photographs in photo albums, and took their paychecks to the bank to deposit. Today, a growing majority of people use the Internet to communicate, shop, bank and store all kinds of "digital assets," which may include everything from cryptocurrency to airline miles, intellectual property (such as documents, databases, or proprietary software), as well as music collections, online gaming accounts and social media accounts. The average American over age 18 is estimated to have at least 25 online password-locked accounts. Navigating the maze of digital assets that may be left in the wake of a loved one's death has become an increasingly thorny problem.

While one might assume that a fiduciary (an executor, an agent under a power of attorney, a trustee or a guardian) would have automatic access to a decedent's or incapacitated person's digital assets after death or incapacity, this is not necessarily the case. Simply leaving a list of account passwords in a secure location does not do the trick either, due to the intersection of digital asset ownership and the expectation of privacy in online communications under federal statutes such as the Stored Communications Act ("SCA") and the Computer Fraud and Abuses Act ("CFAA"). In addition, a number of states, including Pennsylvania, have statutes restricting access to digital accounts. These laws require online service providers to protect a deceased user's information and risk civil and criminal liability if they do not do so. They also criminalize a common behavior -- the posthumous accessing of a decedent's online accounts to retrieve information, material with sentimental value, photographs, etc. While a fiduciary might succeed in accessing digital accounts, the fiduciary may still risk violating the law if she or he did so without express authorization and through false pretenses (*i.e.*, impersonating the decedent). An even more frequent risk is that the provider will simply close the account if irregularities are detected.

What may a fiduciary legally do to access and preserve a decedent's digital assets? Historically, the answer depended on the Terms of Service Agreement or "TOSA" that a user enters into with a service provider. TOSAs, which are typically complex and rarely read in full by users, vary with regard to the amount of access provided after a user's death or incapacity. For example, Apple account owners may be surprised to learn that each of them entered into a TOSA with Apple that provides the account terminates at death – a deceased account owner's heirs do not automatically inherit the decedent's photographs, music files and the like.

To bring order to this often chaotic landscape, the Uniform Law Commission passed a model statute known as the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"). RUFADAA has already been enacted by more than 40 states, and Pennsylvania is likely to adopt its own version soon. RUFADAA establishes a legal framework for rights to digital assets to be specified in wills, revocable trusts and powers of attorney, and clarifies that a TOSA will control only in the absence of such authorization. RUFADAA also permits the use of "online tools," i.e., account-specific features that allow a user to direct the provider to disclose digital information to a designated recipient, and if accepted, will override everything else.

Without a RUFADAA statute, Pennsylvanians are at the mercy of TOSAs, but may still take appropriate steps such as backing up files, making digital copies, and creating an inventory of digital assets so that a fiduciary's job may be as painless as possible under the circumstances. Further, in anticipation of a RUFADAA statute, now is the time to confirm that your documents incorporate digital asset authorizations. If your estate planning documents do not currently contain any reference to digital assets, we are happy to meet with you to discuss an update.

GSW News

We are delighted to introduce you to two new team members. **Kenneth E. Miller** has joined GSW as an associate attorney. Ken is a recent graduate of the Temple University Beasley School of Law where he received his J.D. with honors. **Leigh Ann Griffith** joined us at the end of 2018 as a certified paralegal. She previously served as a trust administrator at U.S. Trust, Bank of America, Private Wealth Management.

Kim Heyman and **Kate Crary** presented at the **National Business Institute's** *Trusts: The Ultimate Guide* on August 26 and 27. This two-day seminar provided attendees with information on the key structures and uses of today's top trusts, anticipated administration challenges and tax consequences.

Caitlin Akins was recently welcomed to the inaugural Mid-Atlantic Fellows Institute of the American College of Trusts and Estates Counsel (ACTEC). The Institute was created by ACTEC Fellows to develop the profession's future leaders in trust and estate law through a series of in-depth educational presentations led by nationally recognized experts in various estate and trust related subjects from across the U.S. The American College of Trust and Estate Counsel is a national organization of lawyers elected to membership by their peers on the basis of demonstrating the highest level of integrity, commitment to the profession, competence and experience as trust and estate counselors.

Kim Heyman recently became a Fellow of the American Bar Foundation. The Fellows comprise a global honorary society of attorneys, judges, law faculty, and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and to the welfare of their communities. Membership in the Fellows is limited to one percent of lawyers licensed to practice in each jurisdiction. Fellows are recommended by their peers and elected by the Board of the American Bar Foundation.

Congratulations to **Tim Miles** and his wife Rebecca Rivard on the May 4th birth of their son Augustus Rivard Miles. Augustus has already made several trips to the office where we line up for the chance to hold him for a few minutes.

Augustus Rivard Miles

Please refer to our website www.gsw-llp.com for information about the firm and our attorneys, directions to the office, and copies of this and prior years' newsletters.

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