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Trust & Estates Update - April 17, 2020

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We hope all of you are safe and healthy during this very trying time. Last week, our Trust & Estates Team at Chamberlain Hrdlicka sent a general alert addressing some of the challenges and opportunities that exist for our clients' estate and tax planning as a result of the COVID-19 crisis.

This week we want to focus on a helpful new development regarding the formalities applicable to the execution of Wills and other estate planning documents during this time of "social distancing." We also wish to highlight several estate planning techniques that have special attraction during this time of depressed values and historically low interest rates.

Remote Notarization and Attestation of Estate Planning Documents

Estate planning documents, and especially Wills, must be signed with certain formalities to be legally valid. For example, in the case of a Will, Georgia law and the laws of most states, provide that the testator must sign the Will in the physical presence of at least two witnesses who must themselves sign the Will document. Additionally, it is helpful if a Notary Public attests to the fact that these formalities were followed by executing and sealing an acknowledgment document attached to the Will.

Obviously, with the social distancing rules we all are attempting to observe as a result of voluntary guidelines as well as mandatory governmental orders, make it extremely difficult to observe these required legal formalities. In response to these realities, on April 9, 2020, Governor Brian Kemp signed Executive Order 04.09.20.01, which temporarily allows the use of remote notarization and attestation to meet the Georgia requirement that a document "be signed, subscribed, executed, witnessed, attested, acknowledged, or affirmed in the physical presence of another individual or other individuals." The Order allows this requirement to be met if the necessary parties to the transaction use any real-time means of electronic conferencing technology to communicate with one another through both sound and sight. Under these temporary rules, we can assist our clients in executing various documents, such as:

- Powers of Attorney
- Petitions to be filed in the Probate Court
- Advanced Directives for Health Care
- Trusts
- Wills and Codicils

Through the use of audio-video communication technology, these and other legal documents can be validly executed by the client, the witnesses, and the Notary, while

Trust & Estates Update - April 17, 2020, *Continued*

each of them is physically separated and observing applicable social distancing guidelines and requirements. The Executive Order contains additional detailed requirements that must be followed for the document to be validly executed under the temporary rules. As a cautionary step, all documents signed according to these temporary procedures should be executed again utilizing routine procedures at a later time when the current crisis has abated.

Timely Estate Planning Techniques

Due to the recent rapid changes in market and business conditions resulting from the COVID 19 pandemic, asset valuations are significantly depressed and interest rates have dropped precipitously. Because estate and gift taxes are based on the value of assets being transferred either during life or at death, these lowered values and interest rates provide an opportunity to make asset transfers to spouses, children and other family members on very favorable terms from a tax standpoint. Two specific techniques stand out as attractive planning options in this environment.

• **Outright Gifts to Grantor Retained Annuity Trusts ("GRATs")**

- A GRAT is simply a form of trust that serves as recipient of a particular type of gift. Generally, the client would make a gift to the GRAT of assets such as marketable securities expected to increase in value while retaining a right to receive a fixed annuity over a period of a few years. To the extent that there are assets left in the GRAT at the end of the term of years and after the client has received all required annuity payments, such "excess" assets pass to children or other family members free of any current gift tax or estate tax at the time of the client's death. Because the value of a gift to the GRAT is "net" of the annuity retained by the grantor, a GRAT can be structured to effectuate significant wealth transfer with minimal (or zero) gift tax consequence.
- This transaction is especially attractive in a time of low interest rates because those low rates permit the annuity payment to the client to be correspondingly low, thus potentially passing more "excess value" to the family members free of gift and estate tax in the client's estate.
- The tax rules governing GRATs are complex but, with careful planning, excellent results are possible.

• **Installment Sales to "Grantor" Trusts to "freeze" the Grantor's Estate**

- Another technique for clients to consider at this time is an installment sale to a "grantor" trust. Here, the client transfers assets to a so-called "grantor trust" in exchange for a promissory note equal to the value of those assets. The note is subject to the minimum interest rate as set by the IRS, and the appreciation of the assets occurs outside of the 'Grantor's estate. Currently, the IRS minimum interest rates on promissory notes are the lowest they have been in years (see Intra-Family Loans discussion below).
- The concept is similar to a gift to a GRAT, but there are certain advantages to the installment sale technique that may make it more attractive than the GRAT transaction in a number of circumstances. For example, due to certain technical rules applicable to GRATs, installment sales to grantor trusts can be used more effectively to benefit grandchildren or more remote descendants.

• **Intra-Family Loans**

- Intra-family loans (loans between family members or trusts for family members) remain a relatively simple technique to transfer wealth to the next generation. To utilize this technique, a senior generation family member loans money to a junior generation family member in exchange for an interest-bearing promissory note. This technique successfully transfers wealth when the junior generation family member's return on investment of the loan proceeds exceeds the interest rate payable to the senior generation. Accordingly, intra-family loans are increasingly attractive as a wealth transfer technique as interest rates decrease.

Trust & Estates Update - April 17, 2020, *Continued*

- The minimum interest rates applicable to intra-family loans are issued by the IRS on a monthly basis. For May 2020, the mid-term rate (applicable to 9-year term loans) is 0.58% and the short-term rate (applicable to 3-year term loans) is 0.25%. This historically low interest rate environment provides a unique opportunity to take advantage of this straightforward and simple technique for transferring wealth.

Additionally, any existing intra-family loans (resulting from sales to grantor trusts or otherwise) should be reviewed to determine whether refinancing the loans at the historically low interest rates is advisable.

We hope this information is of interest and use to you as you consider whether to implement basic or more sophisticated estate planning during this challenging time. We would be pleased to discuss the temporary rules for execution of estate planning documents as well as these attractive planning techniques at your convenience. In the meantime, please stay safe and know that we are here to assist.

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