THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S
WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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THE YEAR IN REVIEW

ROBINS KAPLAN LLP

REWRITING THE ODDS

WELCOME TO THE SPOTLIGHT

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The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of the Spotlight? Let us know at SPosthumus@RobinsKaplan.com.

– Denise S. Rahne and Steve A. Brand

To learn more about our wealth planning, administration, and disputes attorneys and the services we provide, contact one of our experienced partners:

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INSIDE THIS ISSUE

REVISING YOUR ESTATE PLAN – LEAVE A LEGACY, NOT A BURDEN

BY ANTHONY A. FROIO AND SARAH J. KHOURY

Discussing life after death is not a conversation anyone particularly enjoys. It can be morose to imagine, but the benefits provided outweigh the discomfort it can cause. And further, your loved ones will thank you, even if you do not know it. A number of major life events help shape the need for and scope of an estate plan; however, it is critical that you make regular updates to your plan as your personal situation changes. Discussed below are the especially significant times when you should consider and formalize plan revisions.

CHANGES IN FAMILY DYNAMIC

Marriage, divorce, arrival of children, retirement, and death are all major life events that should drive a review of your estate plan. With the birth of a child comes the time to name the guardian and conservator you want to ensure the child's care in the event of your death. A birth, marriage, or divorce can also necessitate changes in beneficiaries to the provisions of your estate plan. In the case of remarriages, you will also want to consider the complexities of providing for children in blended families to ensure your intentions, both individually and as a couple, are reflected. A beneficiary may also need to be removed due to a death and/or incapacity.

It is also important to confirm that the individuals designated in your estate plan (e.g., executors, trustees, guardians, conservators, attorneys-in-fact, and health-care agents) remain those you wish to serve in the designated capacity and that they are still willing and able to serve.

CHANGES IN RESIDENCE

Estate planning documents drafted and validly executed under one state's laws are typically valid from one jurisdiction to another, but each state has its own statutory requirements. These differences in laws may mean your documents still function in the new state but could have additional hurdles to overcome. The following are some important considerations:

- Whether the new state imposes either an estate or inheritance tax or both.
- For married individuals, determine how your state treats marital property. Documents may need to be updated to properly reflect your wishes.
- Probate, the court-supervised process of distributing a decedent's estate, can also vary by state. You will want to make sure your estate plan effectively follows the probate laws of your new state.
- With purchase of real estate in a new state, you may want to revise your trust to ensure it is funded with all the assets you intend to pass to a beneficiary directly.

CHANGES IN LAW

Periodically check to see whether your state has enacted new laws that impact your estate planning documents. For example, at least 46 states have now enacted laws addressing access to digital assets upon their holder's death. Additionally, in 2017, Congress passed the Tax Cuts and Jobs Act, which nearly doubles the federal estate tax exemption to $11.2 million per individual and increases the annual gift tax exclusion to $15,000 per person per year. This increase greatly reduces the number of individuals subject to the estate tax, but it can also provide unique planning opportunities to those with significant wealth. Many states have estate tax provisions that do not follow the federal estate tax. Accordingly, an individual's federally exempt estate could still carry significant state tax implications. Estate plans drafted prior to the tax law changes should be revisited to review the tax strategies employed when last drafted.

CHANGES IN HEALTH

Significant changes in your health (or that of a named beneficiary, executor, or agent) may require an update to your estate plan. The cost of health care might affect your assets, or you may change your mind about the end-of-life wishes provided in your documents. In the event of disability, specific planning tools can be utilized for the benefit of a disabled individual and/or beneficiary in order to allow for the continuation of qualification for public assistance.

CHANGES IN BUSINESS STRUCTURE

Succession planning, significant investments, and/or the sale of a closely held or family business should also trigger an evaluation of an estate plan for tax and planning purposes. Although such transactions often involve estate planning considerations, they often do not include a review or input from an individual's or family's estate planning counsel, whose input could be critical to the structure of such business matters.

CONCLUSION

Throughout your lifetime, people will change, personal goals will change, and the law will change. Your estate plan should also change to remain current and reflect your desires. And while there are costs associated with revising your estate plan, the larger cost will inevitably come from leaving it neglected. Give yourself and your loved ones the courtesy of a legacy left behind, not the burden and unnecessary stress later.

'TIS THE SEASON TO GIVE (LESS TO THE IRS)

BY STEVEN K. ORLOFF AND TIMOTHY W. BILLION

The IRS taxes gifts from one individual to another in several ways, including the estate tax and the gift tax. Recently, Congress passed and the president signed the Tax Cut and Jobs Act, Pub. L. No. 115-97 (the "TCJA"). Among other provisions, the TCJA contained tax code changes that taxpayers should consider as part of their estate planning.

WHAT ARE THE NEW LIMITS ON TRANSFERS?

Prior to the TCJA, the lifetime gift and estate tax exemption was computed off a base of $5,000,000 per taxpayer, adjusted for inflation. In 2017, the adjusted lifetime exemption was $5,490,000 per taxpayer. The TCJA doubled the lifetime exemption, meaning each individual taxpayer's lifetime transfer tax exemption is computed off a base amount of $10,000,000. On March 2, 2018, the IRS announced that the 2018 exemption amount, adjusted for inflation, is $11,180,000. Because that amount is calculated per taxpayer, a couple can transfer twice the limit—$22,360,000 in 2018—without paying taxes. Transfers above the lifetime gift and estate tax exemption are taxed at a rate of 40 percent.

The lifetime exemption operates in conjunction with an annual gift tax exclusion. The annual exclusion allows taxpayers to make certain gifts up to a specific amount each year without eroding that taxpayer's lifetime exemption amount. If a taxpayer gives more than the annual gift tax exclusion in any given year, that taxpayer begins to eat into his or her lifetime gift and estate tax exemption.

The annual exclusion is subject to inflation adjustments, but only when the cumulative inflation adds up to a $1,000 increase in the exclusion. Between 2013 and 2017, the annual exclusion per person was $14,000. In 2018, the annual exclusion rose to $15,000. [1]

HOW CAN YOU TAKE ADVANTAGE OF THE INCREASED EXEMPTIONS BEFORE THEY EXPIRE?

The majority of Americans will be able to transfer their assets without running up against the limits of the lifetime exemption. If you are one of the fortunate few who may be in a position to give more than the lifetime exemption, you should consider some strategies to maximize your giving and minimize your taxes. [2]

Notably, the TCJA's increased exemption level is only effective through 2025. Unless Congress acts again to raise the exemption level, the exemption will revert to its old formula on January 1, 2026. Thus, if you are considering a major gift, you should also consider whether you should make that gift prior to the expiration of the increased lifetime exemption level.

Many people have concerns about giving away assets early. Of course, before you transfer any asset, you should make sure you leave yourself enough to live on comfortably. In addition, if you are concerned the person receiving the gift may not be ready to handle the responsibility that comes with it, you can consider creating a trust. Trusts allow you to set specific rules on the use of assets and appoint trusted people or professionals to control and manage them. Each state has its own rules governing trusts, so if you are considering creating a trust, you should talk to an experienced estate planning attorney or professional.

Each individual's estate planning situation is unique. However, as you review your estate planning, you should consider whether you want to take advantage of the TCJA's changes to the lifetime exemption and whether other giving options make sense for you.

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[1] Not all gifts count toward this limit. For example, directly paying qualified educational or medical expenses would not count toward the annual limit.

[2] This article focuses only on federal tax implications. Depending on where you live, you may have additional state tax obligations.

A FEW NOTABLE TRUST AND ESTATE CASES FROM 2018

BY DENISE S. RAHNE AND ENA M. KOVACEVIC

Like most years, 2018 certainly produced a number of noteworthy trust- and estates-related cases across the country. Here are a few that caught our attention.

One closely watched case in Minnesota involved the question of whether the domicile of a grantor at the time of a trust's creation provides sufficient basis to tax trust income. The case involved four separate grantor trusts created in Minnesota by a Minnesota domiciled grantor. The trusts were classified as "resident trusts" under Minnesota Statute section 290.01, subdivision 7(b)(a)(2) and subject to taxation in the state. In July of this year, the Minnesota Supreme Court upheld the tax court's ruling that the definition of resident trusts under the statute is an unconstitutional violation of the Due Process Clause of both the Minnesota and U.S. Constitution. The trusts lacked sufficient contacts with Minnesota and received no protections or benefits from the state. *Fielding v. Comm'r of Revenue*, 916 N.W.2d 323 (Minn. 2018).

Around the same time as the *Fielding* decision, the Supreme Court of Idaho issued a decision in *Hodge v. Waggoner*, which evaluated Idaho's slayer statute in the context of jointly held property. Paul Welch and Barbara Chitwood held two bank accounts as joint tenants with right of survivorship. Welch admitted to shooting Chitwood in the back of the head twice with a .22 caliber pistol and then shooting himself in the face in a poorly considered effort to cover his crime. The lower courts applied Idaho's slayer statute and prevented Welch from obtaining the funds from the joint accounts. Welch appealed, arguing in part that the slayer statute could not deprive him of his own, albeit jointly held, property. Noting that Welch could not legally acquire the property under a right of survivorship but for the murder of Chitwood, the Idaho Supreme Court concluded that Welch had no right to the accounts. *Hodge v. Waggoner*, No. 45336, 2018 Ida. LEXIS 135 (Idaho July 27, 2018).

E-STATE OF HOCKEY

The Robins Kaplan Wealth Planning, Administration, and Disputes Group is going to watch the Minnesota Wild play the Chicago Blackhawks in St. Paul on February 2, 2019. We have a limited number of tickets to our suite available for our loyal readers. Call Denise Rahne at 612-349-8433 if you are interested in joining us.

Also this year, the Minnesota Supreme Court sized up treatment of specific or general devisees on the one hand and residuary devisees on the other and found no basis for differential treatment under Minnesota law. In this case, the decedent devised the residue of his estate in equal parts to his three children. Before the probate, one of the children conveyed his interest to a third party. The estate's personal representative issued a quiet-title claim to the property, claiming the devisee did not have interest to convey the property. The issue before the Minnesota Supreme Court involved interpretation of Minn. Stat. § 524.3-101, which states that "[u]pon death, a person's real and personal property devolves to the persons to whom it is devised by last will." Specifically, the Court determined that persons to whom the property devolves includes residuary devisees. Accordingly, the son had an ownership interest in the house when he conveyed title. *Laymon v. Minn. Premier Props., LLC*, 913 N.W.2d 449 (Minn. 2018).

File this one under "say it like you mean it." The matter of *In re Will of E. Warren Bradway* has attracted much attention for its macabre fact pattern, and we at The Spotlight cannot resist including it in our year-end summary. In this case, a New Jersey appellate court affirmed a lower-court decision that a decedent's one-page codicil, handwritten in his own blood, was valid. The case involved handwriting and DNA experts and ultimately hinged on whether the proponent for the codicil could establish, by clear and convincing evidence that the decedent intended to alter his will. While the eccentricity of the writing fluid has captured a lot of attention, what has been somewhat overlooked is the fact that the use of the blood actually substantively impacted the outcome. Specifically, in finding that there was clear and convincing evidence of intent to alter the will, the court in part relied on the fact that the codicil *was prepared using the decedent's own blood. In re Will of E. Warren Bradway*, 2018 N.J. Super. Unpub. LEXIS 1505 (App. Div. June 25, 2018).

For those of us who practice in Minnesota, no 2018 summary would be complete without an update on 2017's *Lund v. Lund*, which addressed the impact of the still relatively new Minnesota Trust Code on attorney fee awards. Previously, under the common law, trustees were entitled to reasonable attorney fees incurred in good-faith defense of the administration of a trust. The court found that Minnesota Statute section 501C.1004 expands the court's discretion to award (or not award) attorney fees from a trust and that the court's emphasis must be on justice and equity. Under the specific facts of the case, the court determined that the parties should each pay their own fees. The case is on appeal and was argued to the Minnesota Court of Appeals in the fall of 2018. Stay tuned. *Lund v. Lund*, File No. 27-CV-14-20058 (Minn. Dist. Ct. 10/18/2017).

THE WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP: "GREED, DECEIT, AND OUTRIGHT VILLAINY: BAD BEHAVIOR IN FAMILY DISPUTES"

Steve Brand (left) and Alan Page (right)

The Wealth Planning, Administration, and Disputes Group was pleased to host the seminar, "Greed, Deceit, and Outright Villainy: Bad Behavior in Family Disputes." Speakers included Marit Peterson, program director of the Minnesota Elder Justice Center, Hon. Alan Page (Ret.), former Minnesota Supreme Court Justice, as well as a panel of legal and financial experts. The firm welcomed nearly 100 guests and the event received wonderful feedback from internal and external participants alike. We look forward to next year's Wealth Disputes CLE.

MEET OUR ISSUE EDITOR:

SARAH J. KHOURY

As an attorney in Robins Kaplan LLP's Wealth Planning, Administration, and Disputes Group, Sarah Khoury represents clients in estate planning, trust and estate administration, trust and estate litigation, and guardianship and conservatorship matters. Sarah works with clients to design and implement comprehensive estate plans reflecting their unique goals and values, both during their lifetime and at death. Sarah can be reached at SKhoury@RobinsKaplan.com.

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