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Navigating a Perfect Storm
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Estate and Asset Protection Planning in a Pandemic

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The New Pandemic Paradigm

Anticipate that the following matters, all of which impact estate and asset protection planning, are likely to change:

- Life Expectancy
- Spending and Lifestyle Needs
- Wealth Creation and Depletion
- Residency of Client and Beneficiaries
- State and Federal Income and Transfer Taxation

Basic Estate Planning Considerations

Review Existing Documents for Needed Changes:

- Power of Attorney
- Health Care Proxy/Living Will
- Last Will and Testament
- Revocable Living Trust

Opportunity/Issue of Remote Notarization/Witnessing

Refinance Existing Intra-Family Obligations

Avoiding probate – is there value there?

Situations Where One Might Consider Trying to Avoid Probate…

- Individual is a celebrity
- Individual has one or more "lost heirs"
- Individual has property in multiple jurisdictions
- Individual has his/her domicile in a "bad" state
- Individual is aged or infirm
- Individual's plan is likely to result in a contest
- Individual desires planning flexibility after incapacity
- COVID-19 court closures and resulting issues

Issues in Connection With Trying to Avoid Probate…

- Increased cost of planning?
- Increased complexity and effort by individual

ASSET PROTECTION PLANNING IS THE PROCESS OF IMPLEMENTING ***ADVANCE*** PLANNING TECHNIQUES TO PROTECT AGAINST ***POTENTIAL FUTURE CREDITORS***

Fraudulent Transfer Issues

The law prohibits transfers made with the intent to "...hinder, delay or defraud" creditors.

Differentiate between:

- Present creditors - the transferor has notice of these creditors when making the transfer
- Subsequent creditors - the transferor has actual fraudulent intent against these creditors, even if the actual "claim" arises after the transfer
- Potential future creditors - those nameless, faceless persons of whom no awareness exists when the transfer is made

Anticipate the “Rush To Judgment”

- Remember that legitimate asset protection planning involves the implementation of *advance* techniques to avoid *potential future creditors*

- Consider the following techniques *ahead* of the problem:

    - Exemption Planning
    - Domestic Asset Protection Trust Planning
    - Foreign Asset Protection Trust Planning
    - Transfer Tax Planning

Estate, Gift and GST Taxes for 2020

- Federal exemptions are currently $11.58 Million, but are scheduled to revert to $5 Million after 2025

- State exemptions are often significantly lower
  - New York exemption = $5,850,000 but no gift tax
  - Connecticut gift/estate tax exemption = $5,100,000
  - New Jersey – no gift or estate tax but possible inheritance tax

- Pandemic spending, unprecedented government deficits at every level, and an unpopular federal response to the crisis has increased concern that these exemptions may be cut sooner, and far more deeply, than scheduled

- Action may be required now to benefit from existing law

Benefit of Acting *NOW*

Lifetime Gift to Dynasty Trust

- Gift of $11,580,000
- Earning 5% in 10 years = $18,862,600
- Estate Tax = $0
- Transfer to Beneficiaries = $18,862,600

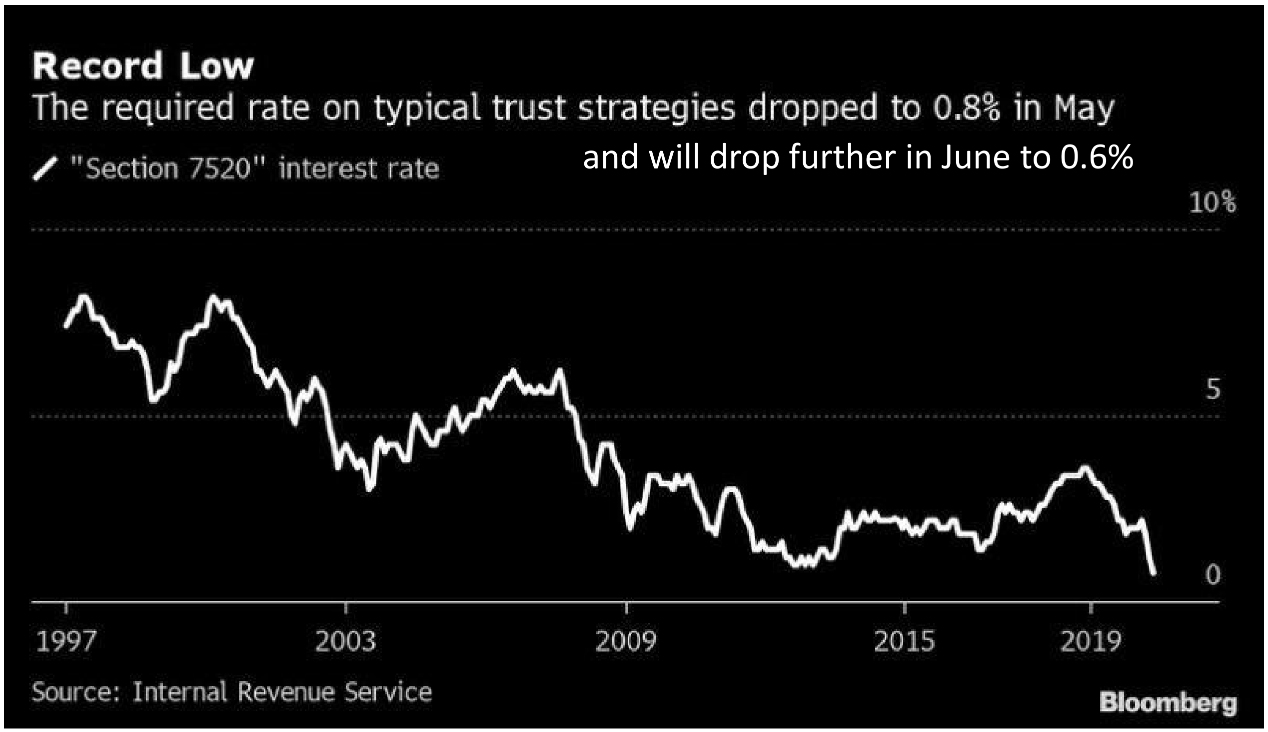
No Gift During Lifetime

- Transfer @ death in 10 years = $18,862,600
- Estate Tax (~50%) = $9,431,300
- Transfer to Children = $9,431,300

Benefit of Acting Now = $9,431,300

Section Sec. 7520 Rate

History of Section 7520 Rate



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Smart Transfer Tax Planning

Make gifts sooner, rather than later

- Takes advantage of existing exemptions while they remain in force
- Utilizes depressed asset values
- Removes the greatest amount of future appreciation from transfer tax system
- Avoids any "deathbed" gift problems
- Protects against potential future creditor problems of the donor

Make gifts in trust, rather than outright

- Future appreciation is outside of the ambit of the transfer tax system.
- Absolute creditor protection for beneficiaries
- Ability for grantor to retain investment control
- Ability to limit beneficiaries' otherwise unbridled access to unearned wealth
- Potential to structure for income tax savings
- Potential for continued access to gifted property

Maximizing the Trust Benefit

- Use a grantor-type trust

  If an existing trust is not a grantor trust, convert the trust to a grantor trust

  - Consider changing the trustee(s) to generate grantor trust status
  - Consider decanting
  - Consider non-judicial settlement agreements

- Use a dynastic trust in a jurisdiction that has repealed the Rule Against Perpetuities

- Ensure grantor retains potential access to the trust – i.e., having your cake and eating it too

- Utilize a “freeze” technique to leverage existing exemption

Having Your Cake, and Eating It Too

- Consider a spousal lifetime access trust ("SLAT")
  - Provide for a "floating" spouse?
  - Utilize a life insurance "side car"
- Consider "Not Quite Reciprocal" Trusts
- Consider a Special Power of Appointment Trust ("SPAT")
- Consider a Self-Settled Spendthrift Trust

Thoughtful Trust Planning

- Power to fire and hire the trustees
- Decanting power included in trust agreement
- “Quiet” or “silent” trust provisions
- Retention of investment control

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Common Valuation Issues

- Entity valuation (and to a lesser extent, real estate valuation) is itself highly subjective – even absent the effect of an unprecedented pandemic

- Plus, minority Interest (or "lack of control") discounts will likely apply

  - Consider recapitalizing the company into voting and non-voting interests for control purposes and to avoid Code Sec. 2036(b)

- Plus, marketability discounts will likely apply

Valuation Problem? Valuation Solutions!

- Use a grantor retained annuity trust ("GRAT")
  - "If the annuity is stated in terms of a fraction or percentage of the initial fair market value of the trust property, the governing instrument must contain provisions...relating to adjustments for any incorrect determination of the fair market value of the property in the trust." Treas. Reg. § 25.2702-3(b)(2)
- Use a "cushioned" gift to account for possibility of value adjustment upon audit
- Make a seed gift of cash or marketable securities and then sell the business interest to avoid gift tax reporting
- Use a formula transfer clause

Planning with Grantor Trusts

Overview of Income Taxation

- Grantor deemed owner of trust income
- Grantor's payment of income tax on trust's income is not a gift – Rev. Rul. 2004-64
- Allows trust to grow income tax free
- Reduces Grantor's taxable estate

Common Techniques

- Grantor Retained Annuity Trust (GRAT)
- Installment Sale to Grantor Trust

GRAT Example

- Father, age 50, creates a two year GRAT with $10 million when the § 7520 rate is 1% retaining a $5,075,110 annual annuity. If the property appreciates at 8% per year the following will take place:

End of Year	Value	Annuity Payment	Balance
1	$10,800,000	$5,075,110	$5,725,880
2	$618,287	$5,075,110	$1,107,760

- Son will benefit from $1,107,760 remaining in trust for his benefit, gift tax free, after two years.
- The value of the gift made by father is $0.13

Contrast - Grantor Trust Sale Technique

Sale to Grantor Trust

Applicable Federal Rates	Applicable Rate	May Rate	June Rate
Loans that Mature 3 years or less	Short-Term	0.25%	0.18%
Loans that Mature 3-9 Years	Mid-Term	0.58%	0.43%
Loans that Mature 9+ Years	Long-Term	1.15%	1.01%
Discount Rate for Annuities, Life Estates and Remainder Interests	§7520 Rate	0.80%	0.60%

- No mortality risk
- Ability to immediately allocate Generation-Skipping Transfer (GST) Tax Exemption

Grantor Trust Comparison

Non-Grantor Trust	**Grantor Trust**
(*Nominal* Return @ 9%)	*Nominal* Return @ 9%
Effective Return @ 5.8%	*Effective* Return @ 9%
• Trust Value in 20 Years = $6,176,512	• Trust Value in 20 Years = $11,208,821
• Trust Value in 30 years = $10,854,255	• Trust Value in 30 years = $26,535,357

Benefit of Grantor Status @ 30 Years = $15,681,102

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Factors in favor of gift giving…

- Democratic proposal, if enacted, will reduce gift exemption to $1 Million and estate exemption to $3.5 Million
- Proposal to return top gift and estate tax rates to 55 percent or more
- Opportunity to protect assets from creditors
- State estate tax with lower exemption
- Low valuations as a result of pandemic

Factors against gift giving…

- Clients risk giving away too much for comfort
- Planning may, in hindsight, turn out to have been unnecessary
- Risk of misjudging value of gifted assets and incurring gift taxes
- Planning costs

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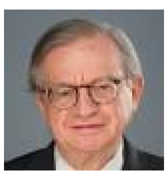

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Thank you for your attention!

Questions?

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