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Pandemic Provides Challenges and Opportunities for Estate Planning

As a result of the severe constraints on business operations of all types and the precipitous decline in the value of financial assets, there are unique opportunities at this time to make various types of intergenerational transfers on a tax-favored basis.

By **Thomas E. Jones and Jasmin Severino Hernandez** | May 14, 2020



Tom Jones (left) and Jasmin Severino Hernandez, Chamberlain Hrdlicka. (Courtesy photos)

In this time of COVID-19 contagion, as in other times of crisis, challenges as well as opportunities abound. During these recent weeks, we, as estate planning lawyers, have been pursuing such questions as: How do you validly execute wills and other estate planning documents when “social distancing” is required? What types of estate planning options are best suited to these unique times, characterized by falling assets values and declining interest rates? What tax and other financial benefits has Congress provided to help our business and estate planning clients weather the storm of the pandemic?

Challenges and Solutions

Under Georgia law, wills and other estate planning documents must be executed with certain formalities in order to be valid. The most stringent and inflexible of these requirements apply to wills, where at least two witnesses must be physically present to observe the testator's signature. Additionally, for a will to be "self-proved" and thus to obviate the need for the witnesses to appear in court at the time of probate, the document must also be "notarized" in a prescribed format. An in-person gathering of the lawyer, witnesses, notary public and testator, all passing papers from hand to hand while trying to maintain a 6-foot separation can be a real challenge in this context.

Fortunately, we now have a useful alternative to the traditional in-person document execution session. Thanks in large part to the efforts of the Fiduciary Law Section of the State Bar of Georgia, Executive Order #04.09.20.01 was issued by Gov. Brian Kemp on April 9. It permits remote execution and attestation of wills and other critical estate planning documents. The approved procedures require the use of technology such as a "Zoom" audio/video session whereby the witnesses and notary can hear and observe the testator and each other during the document execution process. The executive order applies not only to wills and codicils but also to the execution of other common estate planning documents such as trusts, financial powers of attorney and advance directives for health care. The suggested protocols governing remote executions are available at <https://gov.georgia.gov/document/2020-executive-order/04092001/download> (<https://gov.georgia.gov/document/2020-executive-order/04092001/download>).

Particularly in these times, when death seems a persistently lurking presence, it is critical to have in place a legally valid estate plan. These useful protocols permit estate planning documents to be lawfully executed, notwithstanding the physical limitations imposed by medical imperatives and governmental restrictions. Once some degree of normalcy returns, all estate planning documents executed under these special procedures should, if possible, be re-executed with the traditional statutory formalities.

Opportunities

As a result of the severe constraints on business operations of all types and the precipitous decline in the value of financial assets, there are unique opportunities at this time to make various types of intergenerational transfers on a tax-favored basis.

Many businesses have (hopefully temporarily) declined significantly in value due to governmental lockdowns and limitations at all levels—federal, state and local. The financial markets have been highly volatile, with daily declines and bounce backs of historic proportions. Additionally, prevailing interest rates are at all-time lows. In this environment, it is possible to transfer assets from parents to children or grandchildren, either directly or in trust, using valuations and interest rate assumptions that minimize the estate and gift tax costs of such transfers. Since the amount of the transfer tax bite is based on a percentage of the current value of the subject asset, transfers made during this time of depressed values can be made at a much lower tax cost than likely will be the case after the economy recovers.

There are a variety of available structures for such inter-generational transfers. One popular approach involves a grantor retained annuity trust, or GRAT, in which an individual contributes assets to a trust while retaining the right to receive annual fixed payments for a term of years. Typically, the gift establishing the GRAT is made by a parent wishing to benefit his or her children. In a "zeroed-out" GRAT, the parent retains the right to receive back 100% of the initial value of the assets over the trust's life in annual fixed payments, plus a rate of return based on an IRS-prescribed interest rate. That rate is 0.80% for May 2020. No gift is deemed made when the trust is created because the parent's retained interest represents all of the trust's initial value. However, any "excess return" above the applicable interest rate, including capital appreciation, passes to the beneficiaries, typically the grantor's children, free of gift tax as well as free of estate tax in the parent's estate at his or her death. Most investment commentators say it is hard to imagine that typical financial portfolios won't beat that IRS rate over the next several years, given the current depressed state of business and investment assets. The GRAT is only one of many planning techniques that have particular

appeal in the midst of the pandemic. Other popular planning options include low-interest intrafamily loans and sales to so-called defective grantor trusts. Defective grantor trusts are especially effective from an estate and gift tax standpoint when the client desires to include grandchildren and more remote descendants as beneficiaries of the trust.

Legislative Relief for Small Business and Estate Planning Clients

Perhaps never in history has Congress enacted so many economic relief measures with such mind-boggling price tags in so short a time. Many of these programs have become well known and broadly utilized, such as the Paycheck Protection Program, providing forgivable loans to eligible businesses with under 500 employees. The PPP forgivable loan program was recently infused with an additional \$320 billion of funding.

Besides the PPP program, which will benefit many of our estate planning clients who operate small businesses, Congress has enacted a number of significant tax relief measures applicable in the estate planning arena:

- The charitable contribution cap for individuals who itemize deductions has been temporarily raised to 100% of adjusted gross income.
- Individuals can withdraw up to \$100,000 from their eligible retirement plans when impacted by COVID-19-related circumstances without penalties. The income tax on such distributions is payable over three years.
- The mandate that participants or owners of certain retirement accounts must take “required minimum distributions” does not apply for calendar year 2020.

The April 15, 2020, deadline for income and transfer tax return filings and payments is automatically postponed until July 15, 2020, and interest and penalties will not apply. Additional information on these and other COVID-19-related tax and financial relief measures may be found on our website at www.chamberlainlaw.com (<http://www.chamberlainlaw.com>).

In the midst of the COVID-19 pandemic, clients can still establish or revise their estate plans to implement their intentions and desires, can take advantage of unique opportunities for planning due to lower valuations and interest rates, and can significantly benefit from the major financial and tax relief measures enacted by Congress in response to the crisis. Challenges and opportunities do indeed abound.

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