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Tidying Up Your Estate Plan (So Your Loved Ones Won't Have To)

Chances are that your clients are among the millions now questioning whether each and every personal possession meets the "sparks joy" test in their lives. But chances are equally good that they haven't spent any time at all considering what will happen to their prized possessions if something happens to them.

By **Stephenie Yeh and Janis Cowhey** | September 06, 2019 at 02:10 PM

Have your clients been "Tidying Up with Marie Kondo" on Netflix? Have Kondo's books ("The Life-Changing Magic of Tidying Up" and "Spark Joy") inspired them to declutter?

Chances are that your clients are among the millions now questioning whether each and every personal possession meets the "sparks joy" test in their lives. But chances are equally good that they haven't spent any time at all considering what will happen to their prized possessions if something happens to *them*.

When your clients pass away, will their loved ones know how to distribute the masterpiece hanging in the living room or their one-of-a-kind vintage watch? Who will be accountable to make sure your clients' wishes are followed?

Beyond consideration of tangible assets, who will care for your clients' loved ones when they are unable to? Your clients may be responsible for pets, raising a young child or someone with disabilities, or caring for an elderly or ill parent or grandparent.

A recent survey found that only 43% of Americans have an estate plan. The majority of those surveyed who had an estate plan were 65 years or older. Younger Americans generally did not have an estate plan, although many agreed that having a will is important.

Trusts and estates attorneys are well aware of the importance of establishing an estate plan and keeping it current. But for those who do not specialize in this vital area of law, here are three reasons to raise the issue with your clients.

Ancient Documents and Life Changes

Not only is it important to have estate planning documents in place, but it is also important to periodically revisit the documents and beneficiary designations. If these were completed back when a Bush was still President (which makes your documents more than 11 years old), an update may be in order.

For example, you may have clients who were denied the use of a Power of Attorney executed more than five years ago, or in a jurisdiction where the principal no longer resides. Although the Power of Attorney may have been validly executed at the time and should be accepted, to the frustration of trusts and estates practitioners and their clients, they may still face resistance and ultimately rejection of their document. If your clients are in a situation in which they need their agent to act quickly and efficiently, their financial institution's red tape may be an impediment.

Consider what life changes your clients or their loved ones have experienced in recent years: marriage or divorce, birth or adoption of children or pets, relocation to another state or country, illness or death. Have they recently purchased a new residence or started a business? Have the designated beneficiaries or agents died or has their relationship with them changed?

Ensuring your clients' estate plans are "tidied up" gives them the satisfaction that their loved ones or their favorite charitable organization will be provided for in the way they intend. It also reduces the likelihood that family members will face a complicated, messy guardianship or estate proceeding.

Current Estate and Gift Tax Regulations

Recent changes in estate and gift tax regulations may also demand another look at your clients' estate plans. Under the Tax Cuts and Jobs Act of 2017, the current federal estate and gift tax exemption amount is temporarily expanded to $11.4 million, increasing annually for inflation. Married couples who have not made any prior taxable gifts may currently gift more than $22 million without paying gift taxes. Clients who are moderately wealthy should consider gifting now since the exemption sunsets after 2025 and will revert back to 2017 limits, adjusted for inflation.

What happens when clients have taken advantage of the increased exclusion amount by making significant gifts and later pass away when the exclusion amount is lowered? The IRS issued regulations which confirm that gifts made utilizing the enhanced gift tax exemption will not be clawed back when the exemption is reduced. Prop. Reg. §20.2010-1(c) and Reg. 106706-18. However, that may change depending on the results of the 2020 presidential election.

The Democratic presidential candidates have proposed significant changes in gift and estate taxes, including one proposal by Sen. Bernie Sanders to reduce the gift tax exemption to $1 million and the estate tax exemption to $3.5 million. Future administrations may push for a reduced exemption amount with a retroactive effective date (which would not be the first time). Therefore, it is imperative to gift as soon as possible. 2025 is not the only deadline in consideration; the results of the 2020 presidential election could dramatically change the landscape of estate and tax planning.

With the increased federal gift and estate tax exclusions, many planners have shifted their focus to the estate and gift tax exclusion thresholds of their clients' resident states. This continues to be an important issue for many individuals and married couples. In New York, for example, there is no gift tax. The estate tax exclusion amount is currently $5.74 million, but New York still has a system referred to as the "cliff tax." (Current exclusion amount for decedents whose deaths falls on or after Jan. 1, 2019 and before Jan. 1, 2020.) Any taxable estate that exceeds the basic exclusion amount by 5% or more (which in 2019 equates to an estate valued of $6,027,000 or more) falls off the "cliff." This means the entire taxable estate will be subject to New York estate taxes, essentially losing your exemption. Further, New York does not have portability for married couples, so the surviving spouse is unable to use the deceased spouse's unused exemption, and it can therefore be wasted in the absence of proper planning. Estate planning techniques such as disclaimer and credit shelter trusts may be used to address this issue for married couples.

Specific gifting strategies, including gifts of low basis assets, should also be revisited. This is especially true if your clients' taxable estates will likely fall lower than the federal and state exemption threshold. Instead of focusing on estate taxes, their concern may need to shift to income taxes and capital gains tax. When a low basis asset is gifted, and the recipient later sells that asset, he or she will pay a steep capital gains tax on the increase in value between the original cost basis and the sale price. Therefore, an analysis should be made as to whether the asset should be placed back into their estates, where it will receive a step-up in basis upon their death.

Future Developments in Trusts and Estates

Other potential changes underway may greatly impact trusts and estates for all Americans. One such adjustment is to the rules for withdrawals from qualified retirement accounts, if the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 (the Act or SECURE Act) is enacted. The SECURE Act limits life expectancy payouts for inherited retirement plans. Currently, beneficiaries of inherited retirement plans may enjoy a longer period of tax-free growth by stretching the distributions over their life expectancies. With the passage of the Act, beneficiaries will be forced to receive payouts within a 10-year period. Supporters of the SECURE Act claim the Act protects workers and makes it easier for businesses to offer retirement plans for their employees. The Act repeals the maximum age for individuals to contribute to a retirement plan and increases the age for required distribution from 70½ to 72 years old.

Regardless of the outcome of the upcoming presidential election, it is extremely likely that the SECURE Act will be signed into law. The Act has broad support from both Democrats and Republicans. It recently passed the House of Representatives in May 2019 and is expected to pass the Senate. The Act also has the support of the President.

If the potential changes to retirement accounts concern your clients, there is a method which allows beneficiaries to bypass the required 10-year payout period. By naming a standby Charitable Remainder Unitrust (CRUT) as the beneficiary of their retirement plan, owners of these plans may provide for their beneficiaries while protecting the retirement asset for them. Beneficiaries are able to enjoy an extended payout period over their lifetimes. Additionally, the owners will not have the burden of additional tax filings during their lifetime since the CRUT is not formed until it is funded by the retirement account after their death.

These changes in trusts and estates, together with the likelihood that your clients' circumstances have changed significantly over the past several years, are all motivations for your clients to reconsider their estate plans. It may be a conversation regarding your clients' wishes, or whether the changes in estate and gift taxes impact their estates. All of these are reasons why "tidying up" should not only be reserved for their closets, but should also extend to estate planning.

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