THORNY PLANNING ISSUES IN LIGHT OF TAX REFORM

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2017 Tax Reform: Potential Pitfalls

- Existing trusts may no longer accomplish client's goals and may actually be counter to client's goals
- Unless Congress acts, the higher estate and gift tax exclusion levels will sunset at the end of 2025
- Flexibility is key

2017 Tax Reform: Lifetime Planning Opportunities

- Lifetime Planning Opportunities
  - Large gift now
  - Allocate increased GST exemption
  - Fund a dynasty trust
- Clawback Concerns
- Can't afford complete gift now? Create a SLAT

Spousal Lifetime Access Trust (SLAT)

- Settlor creates trust for spouse for life
- Funds the trust to utilize increased basic exclusion amount before basic exclusion amount decreases
- No QTIP election
- Trust assets not includable in estate of either spouse
- Economic benefit for donee spouse

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SLAT: General Concerns

- Risk of divorce
  - Will spouse's interest continue?
    - State statutes and applicable case law
    - Define the term "spouse" – but ethics consideration
  - Trust assets as marital or separate property?
- Risk of spouse's early death - SPOA

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SLAT: Reciprocal Trust Doctrine

- Avoid “Reciprocal Trust Doctrine” if spouses create SLATs for each other
- Estate tax inclusion if Reciprocal Trust Doctrine applies
- SLAT provisions MUST be different

Client Goals and Considerations for Transfers on Death

- New focus on non-tax estate planning goals
- Consider wealth level and age of client
- Review formula bequests
- Consider accelerating gifts and forgiving outstanding family loans
- Special planning needs – Second marriage/ special needs/ asset protection

Client Goals and Considerations for Transfers on Death

- Balance protecting assets, minimizing tax exposure, and allowing clients to access funds
- Emphasize flexibility
  – Include nontaxable powers of appointment
  – Use of Trust Protectors
  – Broad discretionary trusts
  – Simplification

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Flexibility Planning: Low Estate Tax Risk

- If client will never have estate tax risk – outright distribution or gift in trust?
  - Full access versus Controlled use of assets
  - Creditor and predator protection with trust
  - Basis adjustments

Flexibility Planning: Potential Estate Tax Risk

- Uncertainty of estate tax laws – flexibility for use of applicable exclusion and marital deduction
  - Portability planning
  - Disclaimer planning
    - 9 month deadline,
    - inadvertent acceptance of assets
    - refusal to disclaim
  - Prepare for possibility of Marital Deduction

Qualified Terminable Interest Property (QTIP) Trust

- Transfer at death that qualifies for the marital deduction but decedent controls ultimate distribution of assets on spouse’s death
- Election by decedent’s personal representative required – 15 months to make election
- Survivor has reliable stream of income and may (but not required to) have discretionary access to principal during life

QTIP Trust

- Principal assets held in the QTIP Trust are protected from creditors and predators
- Federal estate taxes due only at the survivor’s death
- Step-up in basis at the survivor’s death
- Reverse QTIP election for decedent’s unused GST exemption
- Simplify planning with “single lung” trust

“Clayton” QTIP

- If partial QTIP election – trust assets not subject to QTIP election pass to a discretionary credit shelter trust
  - Appropriate planning with second marriage
  - Unclear whether gift tax issue if spouse is personal representative - use independent personal representative to make election
  - Include guidance regarding settlor intent
  - Consider basis adjustment planning

Estate Tax Planning v. Income Tax Planning – Basis Adjustment at Death

- Assets gifted in life avoid estate tax but take the donor’s basis and thus lose any step-up in basis at death
- Assets in credit shelter trusts receive step-up in basis only on the decedent’s death and not on survivor’s death
- Are there assets that will definitely benefit from a basis adjustment?

Estate Tax Planning v. Income Tax Planning

- Basis step up is less of a concern when beneficiary is in low tax bracket
- Markets do not always go up
- Consider the estate tax rate vs. the capital gains tax rate
  - Never appropriate to incur estate tax at 40% rate
- Will basis step up be a concern after 2025?

General Powers of Appointment (GPOA)

- Build in flexibility with general powers of appointment
- Give an independent party the power to grant or eliminate a general power of appointment
- Could use a formula general power of appointment provision in tax protected trust to include assets in survivor's estate for basis step-up on survivor's death

GPOA Concerns

- Creditors may be able to reach appointable assets even if the power is not exercised
- Assets may be subject to spousal elective share rights
- Estate tax may be triggered using GPOAs if beneficiary is beneficiary of multiple trusts – may cause too many assets to be included in beneficiary's estate

GPOA Drafting: Hardwired in Trust Document

- Hardwiring into the trust document ensures the GPOA's existence, but may not be appropriate in future
  - Uncertain beneficiary behavior
  - Uncertain tax laws
  - Uncertain state laws
  - Retirement Plan issues
- Include provisions giving a non-adverse party the power to amend or eliminate GPOA

GPOA Drafting: Appointed GPOA Powerholder

- Name a Trust Protector to grant and eliminate a GPOA in the future
- Could also authorize Trustee to appoint Trust Protector in future to grant and eliminate GPOA
- Future grant of GPOA permits tailoring to future circumstances - but no guaranty GPOA will ever be granted
- Exculpatory language and triggering events

THANK YOU!