

Best Estate Planning Ideas for 2016 and beyond...

Birmingham Estate Planning Council

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PREPARED BY

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Agenda: The Seven Best Ideas

- I. Buyer's Remorse: A Second Look At Completed Significant Gifts And How To Undo Them
- II. Completed Significant Gifts: The Importance Of Leverage
- III. Gifting In 2016 and beyond: Going Forward With The Permanent Laws
- IV. New Twists on Philanthropic Planning

Agenda: The Seven Best Ideas

- V. Congruent Planning: Align Entities For Income, Gift, Estate Tax Planning and Family Values
- VI. Portability Planning Opportunities and Pitfalls Under ATRA
- VII. Inter-Generational Planning: Planning is a Systems Approach- Focus On The Next Generation and the prior one.

I. Buyer's Remorse

- The Risks of Funded Dynasty Trusts
 - Now that the law is permanent, “I did not mean to give that much away.”
 - My son just filed for divorce.
 - I want the income.
 - I did not want to give up the stepped up income tax basis.
 - I was in a rush and did not think through all my choices.

Buyer's Remorse

- Can I pull the trust back into my taxable estate and obtain stepped up income tax basis?
 - If trust is a grantor trust, one strategy would be to switch assets and sell high basis assets for low basis assets in trust. Swap or sale is ignored for income tax purposes and does not incur capital gains tax if trust is grantor trust.
 - Donee receives higher basis in assets.

Buyer's Remorse

- Risks of pulling trust assets back into the estate
 - Interplay with state estate taxes if trust is a grantor trust
 - Risk that assets will appreciate in the future
 - Risk that exemption will decrease

Buyer's Remorse

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Buyer's Remorse - Decanting

- Decanting may be an option.
- Assets are “decanted” from distributing trust to a receiving trust.
- A decanting power is a power of appointment that is granted to or held by a trustee who can exercise the power in favor of one or more beneficiaries of an existing trust. The new trust has more favorable provisions than the old one.

Buyer's Remorse - Decanting

- Reasons to decant include protecting tax treatment of trust, granting beneficiary power of appointment, reducing administrative costs, extending trust termination date, changing trust's governing law, converting from grantor to nongrantor trust (and vice versa), creating separate trusts, reducing personal liability of trustee, converting trust to supplemental needs trust for governmental assistance purposes, modifying administrative powers, creating dynasty trust and correcting drafting errors.

Buyer's Remorse – Authority to Decant

- Ability to decant depends upon law of jurisdiction, statutory powers, common law powers or power in document to decant or make such a distribution.
- Decanting options in Alabama: See Uniform Trust Code Provisions Ala. Code Section 19-3B-411 to 416

Buyer's Remorse – Authority to Decant

- Some states have statutes allowing decanting.
- In other states, may be permissible under common law or by terms of trust.
- Typically, neither accountings, nor court approval are required.
- Typically, beneficiary consent is not required (although notice to beneficiaries is typically required).

Buyer's Remorse – Decanting and Operation

- Consider how trust will be operated; estate planning has two components- organizational and operational.
- Life is a movie, not a snapshot; operation is as important as document itself.
- Choice of fiduciary, trust protector, removal and appointment provisions are key.

Buyer's Remorse – Decanting Pitfalls

- Be aware of income, gift, estate and GST consequences, including whether decanting causes trust to become grantor trust.
- There may be recognition of gain to trust or beneficiary of receiving trust.
- Determine if grantor of distributing trust is also grantor of receiving trust.
- Analyze if decanting to new trust jeopardizes Subchapter “S” status.

Buyer's Remorse – Modifying an Irrevocable Trust in Alabama

- Ala. Code Section 19-3B-411 Modification or termination of noncharitable irrevocable trust by consent.
- Ala. Code Section 19-3B-412 Modification or termination because of unanticipated circumstances or inability to administer trust efficiently.
- Ala. Code Section 19-3B-415 Reformation to correct mistakes.
- Ala. Code Section 19-3B-416 Modification to achieve settlor's objectives

Buyer's Remorse – Specific Alabama UTC Provision

- Alabama version of UTC (Ala. Section 19-3B-304(b)) provides that “presumptive remainder beneficiaries” may represent and bind contingent remainder beneficiaries to the extent there is no conflict, but does not require that the interests of the presumptive and contingent remainders be identical.

Buyer's Remorse – Wild Card Thoughts

- Repurchase of assets gifted into the trust. Should donor purchase the gifted assets by cash, promissory note or combination?
- Achieves stepped up basis.
- Only works if the trust is a grantor trust and therefore non event for income tax purposes; if not grantor trust then taxable sale.

Buyer's Remorse – Wild Card Thoughts

- If the trust a SLAT (Spousal Limited Access Trust) under which spouse is beneficiary, can spouse request distribution of assets from the disinterested trustee?

II. Completed Taxable Gifts – Now What?

- Power of leverage
- How should the assets be invested?
- Life insurance as a leveraged investment
- What about the vacation home?
- The power of asset swaps

III. Future Gifts – 2016 and beyond

- Permanent income, estate, gift and GST rates
 - Income tax
 - 39.6% highest marginal rate
 - 20% maximum rate for LTCG and qualified dividends
 - 3.8% surtax on net investment income of high income taxpayers

Future Gifts – 2016 and beyond

- Permanent income, estate, gift and GST rates
 - Estate and Gift Tax
 - \$5,450,000 estate, gift and GST exemption adjusted for inflation
 - 40% gift, estate, and GST tax rates
 - Unified estate and gift tax
 - Portability for estate and gift, not GST

Future Gifts – 2016 and beyond

- To Gift, Not to Gift, How to Gift?
 - Lifestyle needs
 - Outright or in trust
 - Selecting assets to gift
 - Leverage
 - Gifting should only be the starting point; leverage is critical
 - Alabama - no estate tax or inheritance tax

Future Gifts – 2016 and beyond

- Advantages of Gifting
 - Removal of post gift appreciation from estate
 - Grantor trust- payment of income taxes
 - Gift tax is tax exclusive vs. estate tax which is tax inclusive
 - Possible to shift income to lower generations or lower earners
 - State estate tax is reduced or avoided (Only CT has gift taxes)

IV. New Twists on Philanthropic Planning

- The power of the “double inheritor”
- Don’t forget the art collector.
- Look at that second home.
- Guaranteed income for the aging population works with gift annuities.

V. Congruent Entity Planning Is Key

- What are family values, outright? In trust? Dynasty?
- Fair vs. Equal
- Fiduciary Duty vs. Businessman's Risk
- Aligning business assets with businessman's risk
- Aligning fiduciary assets with fiduciary duties
- Coordinating and integration of assets and entities

V. Congruent Entity Planning Is Key

- Don't forget about interplay between income and estate tax.
- Stepped up income tax basis.
- Look at lifetime vs death time impact of inherited or stepped up basis in installment sales transactions.

VI. Portability Planning After ATRA

- Portability is a game changing concept.
- Planning will become segmented: Clients below the exemption and clients above the exemption

Portability Planning After ATRA

- Portability applies to gift and estate taxes, not to GST.
- Must file estate tax return to be entitled to portability.
 - Simplified estate tax return for non-taxable estates electing portability
 - Filing deadline

Portability Planning After ATRA

Portability vs. Credit Shelter Trust

- Benefits of Portability
 - Simple
 - Re-titling of assets is not necessary
 - Step up in basis at death of first spouse and on entire amount at death of surviving spouse
 - With credit shelter trusts basis of assets at first death stepped up once
 - Works well with assets such as retirement planning assets

Portability Planning After ATRA

Portability vs. Credit Shelter Trust

- Downsides
 - Not available for GST
 - DSUAEA not indexed for inflation
 - Future changes to estate taxes

Portability Planning After ATRA

Portability vs. Credit Shelter Trust

- Benefits of credit shelter trusts
 - Removes appreciation from surviving spouse's estate
 - Asset protection
 - Control over disposition and distribution of assets
 - Able to use GST exemption at death of first spouse.
 - State tax exemption amount can be sheltered because there is no portability at the state level

Portability Planning After ATRA

Portability vs. Credit Shelter Trust

- Benefits of credit shelter trusts
 - Avoids probate
 - Asset protection, including assets of first passing spouse cannot be reached by survivor's new spouse
 - Distribution protection in blended families
 - Distribution protection for minor children, beneficiaries with special needs and beneficiaries with substance abuse issues
 - Law may change eliminating portability

Portability Planning After ATRA

- If you are utilizing credit shelter trusts, not just portability –
 - Give increased thought as to what assets should be titled/positioned to fund the trust, and why.

VII. Inter-Gen Planning

- Opportunities of working across generations
- With increased exemptions and increased gifting for wealthy families, more wealth is generationally entwined.
- Focusing on the family across generations is congruent, leads to sustainable integrated planning.
- Decisions made from the inter-generational point of view can lead to cascading exemptions and significant overall family wealth.
- Inter-generational leverage is key.

Inter-Gen Planning

- For the ultra high net worth family, as gift exemptions are used and dynasty trusts are established, the wealth will be co-owned and intertwined.
- View planning for the family system as important as planning for individual family members

Questions & Answers

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