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PRACTICES

Trusts & Estates

Trusts & Estates Alert: COVID-19 and Your Estate: Planning Considerations During These Difficult Times

By Bill Friedler on July 2, 2020



We find ourselves in an unwanted new world, some say a “new normal”.

As the pandemic continues, here are some things to consider as part of your estate planning matters.

It is particularly important to evaluate the choices of fiduciaries that you have named/nominated or will name in the following estate planning designations:

- Your durable powers of attorney
- Your health care proxy and the terms of your living will
- The Personal Representative/Executors of your Estate
- The individuals/entities you have nominated to serve as trustees of your respective revocable and, if applicable, irrevocable trusts

Special attention should be paid to your choices of those who you have or will name to be the holder of your Durable Power of Attorney. The holder of your Durable Power of Attorney, also known as your “Attorney-In-Fact”, will generally have the power and ability to manage your financial affairs and to pay your bills, even if you are disabled. This person should be good with handling money, be responsible, and should have good attention to detail. This is typically your spouse followed by another family or group of family members as successor holder(s). A trusted friend can also be the holder of your Durable Power of Attorney. The power exists while you are alive, even if you are disabled.

Who you nominate as the holder of your health care proxy and the successor holders, is very important. Your health care proxy will be the person empowered to make your medical decisions, including those involving extraordinary medical care, in the event that you are not able to communicate those medical instructions to your healthcare provider. If you can communicate your medical decision, even by the nodding of your head or other physical movements, your wishes will control. But if you are unable to communicate those medical decisions, for whatever reason, the health care proxy’s decision-making authority will be activated, and your doctors will be entitled to rely upon those decisions. The terms of your living will should specify how you feel about extraordinary medical care, including life support matters. Generally, the health care proxy will follow your wishes set forth in your living will. But your living will is not legally binding upon the proxy or anyone else under MA law. But the provisions of your living will are the best evidence of your intent and how you feel about extraordinary medical care and life support, when there is no reasonable chance of your recovery. In some sense then, your living will is morally binding and should accurately reflect your wishes.

If you have already signed a health care proxy that you are pleased with as part of your estate plan, it is important that if you enter a hospital, you do not sign the standard health care proxy form provided by

the hospital. This is because the new health care proxy form you sign at the hospital may inadvertently revoke the health care proxy that you already signed.

Accordingly, you may wish to keep a copy of your health care proxy handy, in the event that you need to be hospitalized on short notice. Hospitals will normally accept a copy of your health care proxy/living will. Also, it is generally a good idea to print out a copy of a list of your current prescriptions.

People often have had documents prepared many years ago when their children were young and were not capable because their young age, to serve in any of these fiduciary roles. Now that the children are older and young adults, it may be time for them to be designated as the holder of your durable power of attorney and/or your health care proxy, after your spouse.

Other choices of fiduciaries in your estate planning documents are important to re-evaluate as well. The Executors of your estate, now called “Personal Representatives” in Massachusetts, should be reviewed along with the individuals named as Trustee of your revocable trusts and their successors. Often children, now grown up, can serve as a Co-Executor or Trustee, after or with the surviving spouse, with a professional Personal Representative or professional independent Trustee.

Irrevocable life insurance trusts, if properly structured and administered, still function to exclude the death benefit from larger life insurance policies from both the decedent’s and his/her surviving spouse’s estate for estate tax purposes. This technique can save significant estate taxes, especially for those individuals that reside in Massachusetts. This is because the Massachusetts estate tax exemption amount is limited to one million dollars per person.

Where do you spend the majority of your time? Are you a Massachusetts domiciliary, or are you a domiciliary of a state that does not impose an estate or inheritance tax, such as Florida or New Hampshire? Proper legitimate domicile planning may save you significant MA estate tax dollars if you no longer are domiciled in MA.

For higher net worth individuals and/or married couples, there are a few things to keep in mind for federal estate tax planning purposes.

The federal exemption is now set at \$11,580,000 per person for 2020. This amount is scheduled to increase each year through 2025, indexed each year for inflation. This amount is doubled to \$23,160.00 for married couples for 2020. A surviving spouse, who has not remarried, may use the unused amount of the deceased spouse’s exemption in his/her estate. However, the amount of the federal estate tax exemption is scheduled to be reduced automatically to pre 2018 levels, (generally cut in half for each individual) in 2026.

The COVID-19 pandemic and the various recently enacted stimulus packages enacted by Congress, such as the Payroll Protection Program, Stimulus 1, 2 and 3 and the other federal relief likely to come, make it most likely there is will be a need to raise revenue on the federal level in the not too distant future. Accordingly, we have no idea how long the federal exemptions against the federal estate tax will be kept at these inflated levels. Therefore, many higher net worth individuals are considering taking advantage of the larger gift tax exemptions while they are in effect. There is no guarantee that the exemptions will remain in effect until 2026, especially if there is a change in the presidency and Congress after the election in November of 2020. Congress may act to reduce these exemptions before 2026. The Treasury Department and the IRS has notified taxpayers that an individual will not be penalized or taxed retroactively for gifts made under the shelter of the exemptions at their current levels. The gift(s) will not be “clawed back”. (See IR-2019-189).

Accordingly, some higher net worth individuals are taking advantage of what may perceived as a gifting opportunity by implementing an appropriate gifting strategy. Gifting, however, is a double-edged sword.

This must be done in conjunction with a professional advisor to make sure one is not achieving estate tax benefits at the expense of increased capital gains issues later for the recipients of the gift. Also, long-term care considerations are a factor to consider when making a gift. How a gift is to be received and by who must also be properly designed.

This may be an appropriate time to review your existing estate plan, if you have not done so in many years. If you have no estate plan, this may be a good time to put a plan in place. The [estate planning professionals at RIW](#) stand ready to assist you. We are currently working remotely. We can arrange a conference call with you either by teleconference or remote video conferencing. Documents can be signed remotely through video conferencing during the Governor's emergency order or in person, at remote, pre-arranged "drive-by" locations, with proper protection and safety measures.

With cautious social distancing and other protective measures, we will all get through this pandemic together. Until then, please be safe and well.

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