

Estate Planning Considerations in the Current Environment

March 19, 2020

The coronavirus (COVID-19) is having an enormous impact on all of us globally. We are encouraging clients to review their estate plans (including incapacity documents) and consider whether any changes are needed due to current personal, family or financial developments. The bullets included below highlight estate planning matters that may be particularly relevant in the current environment and worthy of consideration. For those who are in a position to consider transferring current value or future appreciation to benefit their descendants, certain of the strategies described below may be especially advantageous following a significant market decline, when interest rates are low and eventual long-term growth is expected.

Please let us know if you need copies of any of your current estate planning documents, would like our help in reviewing your estate plan or have any questions.

- **Incapacity Documents.** You should review your health care proxies, financial powers of attorney and any related advance health care directives (living wills):
 - Confirm that the named health care agents and attorneys-in-fact continue to be appropriate and that their contact information is current;
 - If you have not done so already, inform the named individuals of their appointments and, at a minimum, the location of the related documentation (you may also wish to share copies, particularly of health care proxies and related advance health care directives, if any);
 - Individuals with advance health care directives should review the treatment instructions to confirm that they accurately reflect their current wishes.
- **Wills and Revocable Trust Agreements.** You should review these documents, including to confirm that the appointments of executors and successor trustees are appropriate and that you continue to understand the dispositive plan, including in light of any tax changes since you last executed your documents.
- **Access to Information.** Make sure the appropriate persons know whom to contact, or where you keep records, so they can obtain information (including computer passwords) to administer your affairs in the event of death or incapacity.
- **Income Tax Deferral.** Individuals, especially those with short-term liquidity concerns, should consult their income tax preparers about the possibility of delaying federal income tax payments normally due on April 15. ¹[While 2019 individual federal income tax returns still need to be filed by April 15 (unless an extension is requested), individuals are permitted, under recently issued guidance from Treasury, to delay until July 15 up to \$1 million of their federal income tax payments normally due on April 15. Married couples filing jointly are also subject to a \$1 million (and not a \$2 million) limitation. The payment relief applicable to individuals also applies to trusts and estates.]

¹ Please note that, after March 19, 2020, Treasury modified and extended its tax deferral guidance. As of March 31, 2020, the deadlines applicable to individual taxpayers for filing annual 2019 federal income and gift (and generation-skipping transfer) tax returns and making the related tax payments normally due April 15th (including first quarter 2020 federal estimated income tax payments) are automatically postponed for three months to July 15, 2020, without the need to file for an extension and without any limitation on the payment amounts that may be deferred. The extension of these tax filing and payment deadlines also applies to trusts and estates, where applicable.

- **Basic Lifetime Gifts.** Individuals who have not yet exhausted their increased gift and generation-skipping transfer (“GST”) tax exemption amounts provided under the Tax Cuts and Jobs Act may be able to leverage their unused exemptions by making lifetime gifts of assets while values are depressed. Lifetime gifts can remove both the value of the gifted property, as well as future appreciation, from the donor’s taxable estate, thus reducing the estate taxes that might otherwise be payable at death. Although these increased exemptions are currently scheduled to sunset in 2025, they are subject to legislative change and clients should consider whether to make use of the current exemptions while still available. Those concerned with their own financial security in the context of additional lifetime giving might consider including a spouse as a beneficiary of a “SLAT” (spousal lifetime access trust) or exploring the creation of a “self-settled asset protection trust” in a jurisdiction, such as Delaware, which permits such a trust.
- **Zeroed-Out GRATs.** A GRAT (grantor retained annuity trust) can be an attractive vehicle for gifting future appreciation on assets with no (or nominal) gift tax. In creating a GRAT, the grantor transfers assets (e.g., publicly traded securities) to a trust and retains the right to receive annuity payments for a specified term of years, after which the remaining trust property passes to the trust’s remainder beneficiaries (typically children or trusts for their benefit). The retained annuity is structured so that its present value using an IRS assumed rate of return (the “7520” rate) is equal to the value of the assets transferred to the trust, thus resulting in no (or nominal) gift tax on the funding of the trust. If the trust is able to outperform the 7520 rate (1.8% for March and dropping to 1.2% for April), the excess appreciation may pass to the trust’s remainder beneficiaries free of gift tax. In addition, annuity payments can be back-loaded to allow additional time for the assets to grow in the GRAT. Although the relevant GRAT rules are not slated to sunset, those rules are always subject to legislative change and clients interested in GRATs should consider whether to make use of those structures while still available.
- **Intra-Family Loans.** An intra-family loan is another technique for transferring future appreciation on assets free of gift or GST tax. Typically, a parent would make a loan to a child or grandchild for a note of a fixed duration. To avoid making a gift, the parent-lender must charge interest at the applicable federal rate (“AFR”) published by the IRS. The relevant AFR for April will range from 0.91 - 1.44% depending on the duration of the loan. If the child-borrower can invest the loan proceeds for a return in excess of the AFR, the excess will effectively be transferred to the child-borrower free of gift tax. Interest on the loan is generally taxable income to the parent-lender. However, if the loan is instead made to a “grantor trust” the parent has created for the child (a trust for which the grantor is subject to tax on the trust’s taxable income, including capital gains) the interest payments should not be taxable to the parent since transactions between the grantor and the grantor trust are generally disregarded for federal income tax purposes. The child or child’s trust would be responsible to repay the note in full, however, even if the invested loan proceeds generated no or negative investment returns.
- **Installment Sales to Grantor Trusts.** Individuals who have previously made gifts to a grantor trust may be able to leverage those gifts by selling assets expected to appreciate significantly to the trust in exchange for a note with fixed principal and interest payments at the AFR. If the growth of the assets sold to the trust exceeds the AFR, the excess return inures to the trust without any gift or GST tax. Additional leverage can be achieved if, for example, the sales price for the transferred assets can be determined using relevant valuation discounts. So long as the sale is structured properly, it should not result in a taxable gain to the grantor or be treated as a taxable gift. The trust would be responsible to repay the note in full, however, even if the asset declines in value.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

Paula A. Ryan	212 450 4611	paula.ryan@davispolk.com
Jeffrey N. Schwartz	212 450 4957	jeffrey.schwartz@davispolk.com
Sarah L. DeBergalis	212 450 4573	sarah.debergalis@davispolk.com
Kelly V. Dunn	212 450 4860	kelly.dunn@davispolk.com
Brian G. Sieben	212 450 4594	brian.sieben@davispolk.com
Lucy M. Taylor	212 450 3112	lucy.taylor@davispolk.com
Rachel Weissmann	212 450 4774	rachel.weissmann@davispolk.com