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SUMMER 2017
ESTATE PLANNING UPDATES

We always remind our clients not to forget about their estate planning documents once they have been signed. It is far too easy to take those newly signed documents, put them in a safe place, and forget about them. While establishing an estate plan is an important first step, it is equally important to revisit your plan to be sure that it still reflects your wishes, taking into consideration legal, tax, and family changes that happen from time to time.

We recommend reviewing your estate plan if (i) you have not reviewed your plan within the past 3 years; (ii) your circumstances or your beneficiaries' circumstances (i.e. health, wealth, family) have changed; (iii) you no longer wish for the person or entity named as your trustee/executor/agent to act on your behalf; or (iv) you have concerns about asset protection.

Here are a few new developments for 2017 to consider when updating an existing estate plan or contemplating a new one:

TAX REFORM

As we discussed in our November 2016 newsletter, the election of Donald Trump as the 45th President of the United States, coupled with Republican control over both the House and Senate, suggests that we will see some major changes to the tax law in the near future. On April 26, 2017, the White House announced the broad strokes of President Trump's tax proposal, which included repeal of the federal estate tax (but not the federal gift tax).

Since Trump's election, there has been much talk about potential repeal of the federal estate tax and some people have decided to postpone further estate planning, hoping that the repeal will occur. After much reflection, we believe this is a bad idea for the following reasons:

- On February 21, 2017, California State Senator Scott Weiner announced a ballot measure, Senate Bill 726, that would create a California estate tax if the federal estate tax is repealed, equal to the federal estate tax that would have been paid by a California resident.

- Wealth transfer generally works best the longer the time period between transfers and death, and in low interest rate environments. We are currently in a low interest rate environment, but that could change.

- The tax law currently permits discounting certain wealth transfers, and such discounting may not be available in the future if the regulations proposed by the IRS last year become final.

- Even if estate tax repeal passes, unless 60 Senators support the bill (which seems unlikely), the bill will sunset 10 years from its enactment and the estate tax will be reinstated.

- Congress could reinstate the estate tax in the future.

- Tax planning is only one aspect of estate planning and postponing an estate plan may very well hinder one's non-tax estate planning goals.

Importantly, the federal estate tax affects very few families and individuals. In 2017, the exemption amount is $5,490,000 per person, with the option of "portability" for married couples (i.e., a law that allows the surviving spouse to use the remaining estate tax exemption of the deceased spouse and pass both exemption amounts [totaling $10,980,000 in 2017] to beneficiaries free of estate tax). With exemptions this high, the estate tax has already effectively been repealed for about 99.5% of Americans. No matter what tax reform occurs, the core benefits of a comprehensive estate plan (including avoidance of probate, orderly distribution of assets at death, protection during incapacity, and asset protection, among others) still remain.

<u>THE REVISED FIDUCIARY ACCESS TO DIGITAL ASSETS ACT</u>

Digital Assets continue to be an important consideration in estate planning. "Digital Assets" broadly refers to such online assets as e-mail accounts, digital files, social networking accounts, online media and cloud accounts, and so forth. We strongly recommend keeping a secure list of your user names and passwords, as well as an inventory of your digital assets, so that your trustee or executor can readily access and manage your accounts after your death. A useful tool is "LastPass," or a service that manages all of your passwords for you, and allows you to share those passwords if needed. All you have to remember is your master password.

Until recently, there has not been an established approach for dealing with Digital Assets after an individual's death. Each separate website or company had its own terms of service that dictated that company's policy on post-death access. While we have been including digital asset provisions in our estate plans since 2014 to assist with management of these assets, recent California legislation has provided more guidelines for administration of a deceased person's digital assets.

Effective January 1, 2017, California has adopted the "Revised Fiduciary Access to Digital Assets Act." Instead of relying solely on each site's terms of service, the new California act provides mechanisms for management of a decedent's account. It is important to note that the company is not required to disclose a password; thus, keeping a list of passwords, or using a service such as LastPass, remains critical. However, so long as you have that information for the decedent, there are now standard policies in place to assist with the management of these assets. If an individual has not used a site's own protocol for managing that asset post-death (for example, Facebook allows users to designate a "Legacy Contact," or someone who can manage your account after you pass away), the terms of an individual's trust or will dictate to what extent a fiduciary has access to an account. The site's own terms of service only govern if an individual has not provided their own preferences for management of digital assets. **Please contact us if you wish to add Digital Asset provisions to your own estate planning documents, or if you'd like more information on this subject.**

LONG-TERM CARE PLANNING

A concern of many individuals is planning for their long-term care. Some professionals believe that about 70% of individuals over the age of 65 will require at least some type of long-term care service during their lifetime. Long-term care insurance and/or planning to pay for this type of care with personal funds are options that many individuals have.

However, some clients choose to plan in advance for Medi-Cal (California's version of Medicaid) eligibility. To be eligible for Medi-Cal, there are income and resource limits for eligibility (with assets such as a personal residence, IRAs, automobiles, and other items excluded from this calculation). To qualify, individuals can proactively spend down some assets and/or choose to gift assets, depending on personal circumstances. After death, California will then place a claim on the estate of an individual to recover the Medi-Cal benefits received during life.

Effective January 1, 2017, California implemented SBB 833, which changes some of the recovery provisions post-death. Generally speaking, the types of Medi-Cal services during life subject to recovery was narrowed, and more favorable provisions were enacted impacting the state's recovery rights over property received by a surviving spouse after an individual's death. Formerly, there was no recovery until the surviving spouse died, at which time the state would recover from the surviving spouse's estate. After January 1, 2017, if the Medi-Cal recipient is survived by a spouse, a claim is prohibited and forever barred. If, however, the surviving spouse also receives Medi-Cal services subject to recovery, his/her estate can be subject to a post-death estate claim. But under the new law, recovery is limited to those assets that are subject to probate. For example, assets held in a living trust will no longer be subject to recovery (a will, however, depending on the value of the estate, is usually subject to probate in California).

For individuals without the means to pay for long-term care privately or for individuals without adequate long-term care insurance, planning for Medi-Cal eligibility can protect you and your family from the high costs associated with such long-term care. Additionally, strategies can be used to protect assets from the Department of Health Care Services' asset recovery program. **Please contact us to discuss whether Medi-Cal planning may be a feasible option for your or your family members' individual circumstances.**

FIXING AN IRREVOCABLE TRUST THAT IS BROKEN

Our philosophy in estate planning is to provide comprehensive documents that cover as many realistic scenarios as possible. This includes drafting documents that accomplish the intent of our clients while simultaneously allowing for future flexibility as family circumstances, tax laws, and wealth changes.

What can one do when an irrevocable trust document that, at its creation, was necessary or desirable but, as times have changed, has become outdated or inefficient? If a trust document is irrevocable (either because it was irrevocable from its creation, or has become irrevocable due to the death of an individual), it is still possible to modify, alter, or terminate the document. In most cases, the California probate court will allow for modification or termination of the trust when circumstances since the trust's creation have changed such that it is beneficial to the beneficiaries to modify or terminate the trust. This can done by court petition. In nuclear families, we have used this procedure in several cases to terminate "bypass trusts" that were no longer needed for tax purposes (and in fact could cause an increase in income taxes) or desired by the surviving spouse and children. In other cases, an irrevocable trust can be kept in place, but modified to be made more income tax efficient.

If you have questions about this newsletter or wish to review your estate plan, please call our office at (818) 338-3252
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