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Yearly Letter/Estate Plan Update – December 2023

Dear Clients:

I trust this message finds you and your loved ones safe and well. I am pleased to report the landscape of estate planning has remained relatively steady over the past year, with no significant surprises or notable changes to report. However, it is imperative we address the impending tax law modifications scheduled to take effect on **January 1, 2026**, as they are likely to have substantial impact on certain clients.

Currently, the federal death tax exemption stands at $12,920,000 per person for the year 2023, with an anticipated increase to approximately $13,600,000 for 2024, and there may be a further increase in 2025. It is crucial to note a significant adjustment is on the horizon. Come January 1, 2026, the estate tax exemption is expected to plummet to approximately $6 million per person, potentially presenting a considerable challenge for clients with larger estates.

For most clients with assets below $6 million, this change may not significantly alter your current estate planning strategies. However, for married couples, each spouse will have their own exemption, effectively allowing approximately $12 million to be transferred to your family free from any estate tax liabilities.

Conversely, for those with assets exceeding $6 million per individual, this impending shift carries significant weight, as every dollar surpassing the exemption amount will be subject to a substantial 40% tax rate. Consider this scenario for a single person: ***If the estate tax exemption drops to $6 million per person, and your estate is $7 million in assets, the 40% tax will be levied on the excess $1 million, resulting in $400,000 payable to the IRS as the estate tax.***

To proactively navigate these changes, I recommend considering the strategic implementation of the Spousal Lifetime Access Trust (SLAT) for married couples, or the Intentionally Defective Grantor Trust (IDGT) for single individuals. The SLAT allows married couples to leverage their combined estate tax exemptions, while the IDGT enables individuals to remove assets from their taxable estates, and potentially minimize the impact of the anticipated lower estate tax exemption in 2026.

Suppose a married couple, John and Suzi, collectively own assets valued at $15 million. Given the current estate tax exemption of $12.92 million per person for 2023, they are not subject to estate taxes if they both died today. However, they are concerned about the impending drop in the estate tax exemption to around $6 million in 2026. They decide to take proactive measures to minimize their potential estate tax burden. In this scenario, John and Suzi could establish Spousal Lifetime Access Trusts (SLATs) for each other, effectively utilizing their current combined estate tax exemption of $25.84 million (2 x $12.92 million). By transferring a portion of their assets into each other's SLATs, they can leverage the current higher estate tax exemption, shielding a significant portion of their wealth from potential estate taxes even after the exemption drops in 2026.

For instance, John could create a SLAT for Suzi, transferring $5 million of their assets into the Trust, while Suzi, simultaneously establishes a SLAT for John, with an equal amount. By doing so, they have effectively utilized $10 million of their combined estate tax exemption, leaving them with only $5 million subject to potential estate taxes in 2026, assuming the estate tax exemption drops to $6 million. This strategic use of the SLAT enables John and Suzi to protect a substantial portion of their assets from the impact of the lower estate tax exemption, ensuring their wealth is preserved for the benefit of their family and future generations.

Let's consider the case of an individual, Emily, who owns assets valued at $8 million. As the estate tax exemption is expected to decrease to approximately $6 million in 2026, Emily is concerned about the potential estate tax implications on the excess $2 million. To mitigate the impact of the anticipated decrease in the estate tax exemption, Emily decides to establish an Intentionally Defective Grantor Trust (IDGT). By transferring $3 million of her assets into the IDGT, Emily effectively removes these assets from her taxable estate, thereby reducing the value of her estate for potential estate tax exposure.

Emily structures the IDGT to enable the Trust to grow and accumulate wealth without being subject to income taxes. She also designates beneficiaries, such as her children or other family members, who will ultimately benefit from the Trust's assets and any future appreciation. By implementing the IDGT, Emily can leverage the current higher estate tax exemption and effectively safeguard $3 million of her assets from potential estate taxes, even after the estate tax exemption drops in 2026. This strategic use of the IDGT allows Emily to secure her financial legacy and ensure her wealth is preserved for the benefit of her chosen beneficiaries, all while minimizing potential tax implications.

In an effort to provide a little more clarity, I will sum up the strategies by simply stating - you are moving certain estate assets to an irrevocable, non-changeable Trust. You will be making a gift using the exemption that will be lost starting 2026. The obvious benefit is that all money moved to this irrevocable Trust will pass eventually to your beneficiaries free of the 40% death tax. The downside to this strategy is that you are moving your assets to a non-changeable Trust where your access and control will be limited. One of my favorite clients, I'll call him Bill, was very much against giving up control of assets to save on taxes. Now that he is a little older, and his kids are mature and successful in their own right, I think he would be more amenable to implementing this tax saving strategy.

Starting in January, I, and an additional attorney colleague of mine, will be available to discuss the process of gathering information and diving into the particulars related to setting up these irrevocable Trusts. The meetings are more time-consuming and require gathering additional financial information. You will have all of next year, 2024, and most of the following year, 2025, to implement these Trusts prior to the drop in the estate tax exemption on January 1, 2026.

Do not wait until the last minute; I probably would not be able to implement a plan if you came three or four weeks before the exemption amount drops on January 1, 2026. ***J. MARK FISHER***

Litigation

When a court finds that a Will is the product of undue influence, the court will find the Will is invalid, and the estate may pass as set forth in a prior Will, or, if there is no prior Will, under the laws of intestacy (laws that apply where a person dies without a Will). Many different instruments may be challenged as being the product of undue influence including deeds, Trusts, beneficiary designations for insurance policies or investment accounts, transfer on death designations for bank accounts, and even an inter vivos gift (gifts made during the lifetime of the person giving the gift). Undue influence has been part of Florida law for over 100 years, and early on, courts realized that undue influence is rarely exercised out in the open, and, thus it can be proved with circumstantial evidence.

Eventually, Florida courts created a presumption of undue influence to level the playing field and give parties contesting a Will (or other instrument) a fair chance. When the presumption of undue influence arises, the burden of proof shifts from the party contesting the Will to the party benefiting from the Will. The presumption of undue influence arises where the party contesting the Will proves (1) there was a confidential relationship between the person making the Will and the beneficiary; (2) the beneficiary is a substantial beneficiary of the Will; and (3) the beneficiary actively procured the Will. The first two factors are always present because the beneficiary will always say the reason they deserve the benefit is because of how close they were to the person making the Will, and if the beneficiary was not a substantial beneficiary of the change, there would be no need to challenge it.

Where the rubber meets the road is active procurement. Active procurement is proven by showing that (1) the beneficiary was present at the execution; (2) the beneficiary was present when the person making the Will expressed the intent to do so; (3) recommendation by the beneficiary of an attorney to prepare the Will; (4) the beneficiary having knowledge of the contents of the Will prior to execution; (5) giving of instruction on preparation of the Will by the beneficiary; (6) the beneficiary securing witnesses to the Will; and (7) safekeeping of the Will by the beneficiary after execution. This is a not an exclusive list of factors and not all need to be present; rather, the court looks at the evidence as a whole and makes a determination. Other factors include mental inequality between the person making the Will and the beneficiary, and keeping the change secret from those affected by it. If you think a Will or other instrument excluding you or someone you know from being a beneficiary is the product of undue influence, we may be able to help by challenging the Will or other instrument. ***James R. Green, Jr.***

Nursing Home Medicaid Planning

Nursing Home Medicaid Planning comes down to the numbers. So, let's look at the current relevant numbers, published by the Florida Department of Children and Families at Appendix A-9:

The individual monthly income limit is:	$2,742
The individual asset limit is:	$2,000
The community spouse resource allowance is:	$148,620
The homestead equity limit is:	$688,000

The current average monthly cost of a Nursing Home: $10,809 (Appendix A-35). The planning is also governed by the fact the applicant cannot make a gift or uncompensated transfer within 5 years of applying for these benefits.

This planning can be challenging to navigate, but if properly navigated, can put the whole family at ease. The biggest piece of advice I can give to a family is to have the correct estate planning documents in place. Specifically, a properly worded Power of Attorney will allow for the planning that needs to happen to be able to take place. Having the appropriate documents in place and knowing where to go to find them when/if the time comes, will most likely lead to a successful outcome. In short, proper planning prevents poor performance.

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