ESTATE PLANNING
THE RISE OF TRUSTS
WARS

Martin S. Finn, JD, LL.M., CPA/PFS, Accredited Estate Planner® (Distinguished) Nominee
Lavelle & Finn, LLP

Federal Estate Tax

- Estate tax exemption of $11.58 million in 2020 ($23.16 million for married couples)
  - ➢ Increased from $11.4 million ($22.8 million for married couples) in 2019
- Portability
  - ➢ The executor of a deceased spouse can elect to transfer the deceased spouse's unused exclusion amount to the surviving spouse
  - ➢ This is NOT automatic
    - ✓ The executor of the deceased spouse MUST make a portability election on a timely filed estate tax return (IRS Form 706) for the deceased spouse
    - ✓ IRS Form 706 is due within 9 months after the date of the decedent's death
  - ➢ If portability is not elected, the unused exclusion amount of the first spouse to die will be lost

New York State Estate Tax

- Basic exclusion amount for 2020 is $5,850,000 ($5,740,000 in 2019)
- Estate tax rates range from 3.06% (first $500,000) to top rate of 16%
    - Top rate applies when the New York taxable estate is over $10,100,000
- The "Cliff"
    - If your taxable estate is more than 5% over the exclusion amount, your estate is subject to New York estate tax in its entirety
- New York State does not allow portability
- Three (3) year gift tax rule
    - Any gifts of property made in New York three years prior to a decedent's death are added back into their gross estate
    - Rule was set to expire on January 1, 2019 but has now been reinstated by the budget bill signed by Governor Andrew Cuomo on April 12, 2019
- Changing your domicile

Income Tax

- Federal ordinary income tax rates range from 10% to a top tax rate of 37%
- Capital gain/Qualified dividend tax rates range from 0% → 23.8%
- New York State income tax rates range from 4% to 8.82%

The Secure Act

- Stretch IRAs dead – for most beneficiaries
- 10 year rule applies now
  - ➢ Account must be emptied by end of the 10th year following the year of death
- Exceptions to 10 year rule – "eligible designated beneficiaries" ("EDBs"):
  - ➢ Surviving spouse
  - ➢ Chronically ill beneficiary (IRC Section 7702B(c)(2))
  - ➢ Disabled beneficiary (IRC Section 72(m)(7))
  - ➢ Individuals not more than 10 yrs. younger than decedent
  - ➢ Minor beneficiary (only until they reach age of majority)

Lifetime Trusts for Non-Tax Planning

- Avoiding probate
  - ➢ TOD/POD/ITF/JTWROS
  - ➢ Revocable trust
- Asset protection
  - ➢ Irrevocable trust
  - ➢ Domestic Asset Protection Trust (DAPT)

Avoiding Probate – Account Designations

- Transfer on Death Accounts (TOD); Payable on Death Accounts (POD); and In Trust For Accounts (ITF) allow for owners of accounts, i.e., bank accounts and investment accounts, to transfer the assets held in those accounts to a named beneficiary upon the death of the account owner
- Joint tenants with right of survivorship
  - ➢ At the death of the first joint tenant, the property will pass automatically to the surviving tenant

Avoiding Probate – Revocable Trust

- Lifetime revocable trust – created and funded during the grantor's lifetime
- Grantor is appointed as trustee and may benefit from the trust during life
- Grantor retains the power to amend or revoke the trust pursuant to the trust agreement
- Generally no tax benefit resulting from formation of a revocable trust
- Revocable trust will bypass potentially lengthy/costly probate process
  - ➢ Bill of sale and pour over will as part of estate plan
- Revocable trust plan is often used where an individual has real property in multiple states in order to avoid ancillary probate in non-domiciliary states
- Revocable trust will state how assets owned by the trust are distributed at death
  - ➢ Outright or in trust for the beneficiaries

Revocable Trust vs. TOD/POD/ITF/JTWROS

- A revocable trust entails a comprehensive agreement that allows the grantor to not only benefit from the trust assets during life but to decide on the distribution of the assets owned by the trust at the grantor's death
- The trust may include planning for minor children, beneficiaries with disabilities or the potential that a beneficiary becomes disabled, and protecting the inheritances of your children/beneficiaries by distributing assets to them in trust
- The above listed designations may provide for a simple way of transferring assets to specific beneficiaries while still avoiding probate but ultimately will not provide for necessary and comprehensive planning

Asset Protection

- Trusts protect against:
  - ➢ Inability
  - ➢ Disability
  - ➢ Creditors
  - ➢ Predators
- Testamentary v. Lifetime irrevocable trusts
  - ➢ When do you want the assets to transfer?
- Domestic Asset Protection Trust (DAPT)
  - ➢ These trusts cannot be created in every state
    - ✓ Seventeen states allow for DAPTs
      - o Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming

Tax Planning Trusts

- Testamentary
  - Credit shelter trust
  - Qualified Terminable Interest Property Trust (QTIP)
  - Disclaimer planning
- Lifetime
  - Life insurance trust
  - Spousal Lifetime Access Trust (SLAT)

Testamentary Tax Planning Trusts

- Credit shelter trust
  - Irrevocable trust created upon a married individual's death and funded with that individual's estate for the benefit of the surviving spouse
  - Used to maximize the benefits of both the federal and New York State exemption amounts
- Qualified Terminable Interest Property Trust (QTIP)
  - Transfer of assets to a trust for the benefit of the surviving spouse and will qualify for the marital deduction
  - Spouse has an income interest in the trust during life but does not have a power of appointment over the principal
  - Value of the trust property is includible in the gross estate of the surviving spouse for estate tax purposes

Testamentary Tax Planning Trusts *(CONT.)*

- Disclaimer planning
  - ➢ Surviving spouse disclaims a portion or all of the estate.
  - ➢ A qualified disclaimer results in the property being treated as if it had never transferred to the disclaimant and therefore, disregarded for estate and gift tax purposes.
  - ➢ Requirements for qualified disclaimer:
    - ✓ Must be irrevocable, in writing and delivered to the transferor of the interest
    - ✓ Within 9 months after the later of (1) the date on which the transfer creating the interest in the disclaimant is made or (2) the day on which the claimant attains the age of 21;
    - ✓ Disclaimant must not have accepted the interest disclaimed or any of its benefits; and
    - ✓ Interest must pass to either the spouse of the decedent or to a person other than the disclaimant without any direction on the part of the person making the disclaimer.
  - ➢ Disclaim to a trust for the benefit of the spouse and/or children

Lifetime Tax Planning Trusts: Life Insurance Trusts

- The irrevocable life insurance trust owns your life insurance policies
  - ➢ Removes face value of insurance policies from the insured's estate
  - ➢ Minimal lifestyle impact when changing ownership of a life insurance policy to a trust
- Estate tax reduction technique for individuals and couple with taxable estates
- Crummey powers: A limited right of a trust beneficiary to withdraw the amount transferred to the trust on his or her behalf
  - ➢ This right to withdraw allows gifts to be one of a "present interest" capable of being excluded under the annual gift tax exclusion
  - ➢ Many Crummey powers are limited to the 5 or 5 limitation (greater of $5,000 or 5% of the trust corpus)
- Transfers within three years of death

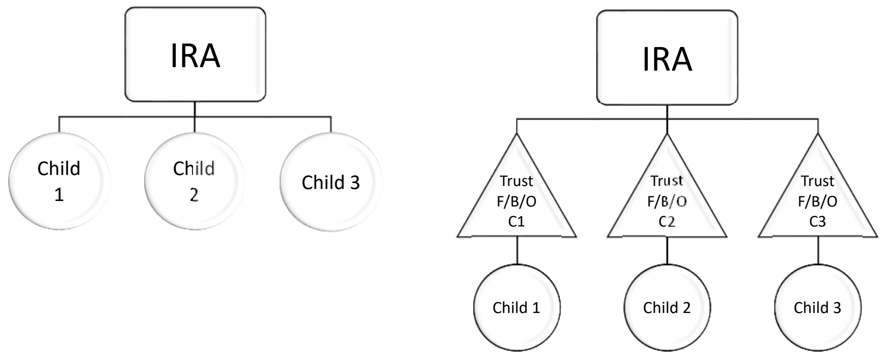
Lifetime Tax Planning Trusts: Spousal Lifetime Access Trust (SLAT)

- SLAT is intended to use the lifetime estate/gift exemption – before it goes away!
  - 2026? 2021?
  - IRS finalized anti-clawback regulations
- One spouse creates an irrevocable trust for the benefit of the other spouse to utilize the exemption, allows the spouse to continue to benefit from the gifted property, and removes the property from both spouse's estates
  - SLAT should be funded with the donor spouse's assets and not jointly owned assets
- Grantor spouse will have ability to access assets through distributions to the other spouse

Lifetime Tax Planning Trusts: Spousal Lifetime Access Trust (SLAT) *(CONT.)*

- May consider having each spouse fund a SLAT for the other
- However, be careful of the "reciprocal trust" doctrine!
  - Invoked when two people create trusts for the benefit of each other that have identical terms and leave each donor in no different financial position than before trusts were created
  - Trusts would then be "uncrossed" as if the donor created a trust for his/her own benefit
- Suggested methods to avoid the Reciprocal Trust Doctrine:
  - Create the trusts at different times, draft trusts pursuant to different plans, use different distribution standards or use different trustees.
  - Don't put husband and wife in the same economic position following establishment of trusts.
  - Include a marital deduction savings clause in one trust.

IRA BENEFICIARY PLANNING



IRA BENEFICIARY PLANNING *(CONT.)*

- Planning Options under the SECURE Act
  - ➢ Most client plans may still “work” – but not as expected
  - ➢ Review and revise beneficiary designation forms
    - ✓ Outright v. Trust Beneficiary
    - ✓ Charity
  - ➢ Review and revise current wills/trusts
    - ✓ “Conduit” v. “Accumulation” Trusts
    - ✓ Non-judicial and judicial revision of trust provisions
  - ➢ Charitable Remainder Trust (“CRT”) as beneficiary
    - ✓ Couple with Wealth Replacement Trust with life insurance
  - ➢ Consider life insurance to finance tax cost
  - ➢ ROTH IRA Conversion

Questions?

Martin S. Finn, JD, LL.M., CPA/PFS,
Accredited Estate Planner® (Distinguished) Nominee

Marty@lavelleandfinn.com
(518) 869-6227

Lavelle & Finn
LIMITED LIABILITY PARTNERSHIP
Attorneys At Law

188 Church Street
Saratoga Springs, NY 12866

29 British American Boulevard
Latham, NY 12110

4966 State Highway 23
Oneonta, NY 13820-4506