

Estate Planning Matters

Kramer Radin, LLP
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Gifting Window of Opportunity Closes on December 31, 2012

As stated in our Spring newsletter, the maximum lifetime gift tax applicable exemption amount of \$5.12 million per person (\$10.24 million per married couple) is scheduled to expire December 31, 2012. If nothing is done by Congress before then, effective January 1, 2013, the amount that can be gifted to anyone but a surviving spouse (and not be taxed) will revert to \$1 million. In addition, the maximum marginal tax rate will increase from the current 35% rate to 55%.

Although it is very likely Congress will punt this down the road with a one year extension, financial advisors believe this presents a great window of opportunity for parents and/or grandparents to transfer wealth. It is an opportune time to gift some highly appreciated asset or an asset that will likely grow substantially in the future, such as shares of stock or portions of a piece of real estate, to your children and/or grandchildren.



It is also possible to forgive a loan without it causing tax implications to either to the donor or the donee.

A family with a special-needs child may use this gifting opportunity to set up a special-needs trust for the child that will provide for the child and also protect against losing public assistant benefits for that child.

The lifetime gift tax exemption is in addition to our yearly \$13,000 gift tax exclusion. Even if you have gifted the entire \$5.12 million you can still make annual gifts of \$13,000 to as many people as you choose.

The gift tax rules can be quite complicated. For instance, any gift of real property must be accompanied by an appraisal. That appraisal is then included with the federal gift tax returns, which must be filed the year following the year in which the gift was made.

Our office has assisted many individuals with their annual or life-time gifts. Gifting continues to be an excellent estate planning tool.

Trust Management During Your Lifetime

The trust and accompanying documents we have prepared for you reflect your lifetime management plans and provide for:

- Ongoing management of your assets and liabilities
- Your healthcare decisions
- Disposition of personal property
- Tax strategies
- Charitable and personal gifting

A periodic checkup with our attorneys will ensure that your estate plan reflects your current situation. We recommend scheduling an appointment at least every three years, whenever your situation changes or when (if) Washington, DC makes changes to the tax law.

Meanwhile, it is possible that you no longer feel comfortable or capable of handling your own affairs. That is when the lifetime planning you have done really begins to bear fruit. You have already designated the person or organization you want to act on your behalf. We can help with the transition to that person or organization as well as provide ongoing management advice.

If exploring the possibility of gifting or trust management is of interest to you, please call (650.941.8600 or 408.377.7845) and schedule an appointment with one of our estate planning attorneys.

Same-Sex Couples and Domestic Partner Update

Recently, an Appeals Court scrapped a law that barred same-sex couples from filing joint federal income tax returns even if they were legally married under state law. The Court found unconstitutional a part of the Defense of Marriage Act. And, although the decision will likely be appealed to the Su-

preme Court, a final resolution of the matter will be delayed until at least next year.

A federal district court found unconstitutional a provision in the Defense of Marriage Act barring a married same-sex surviving spouse from claiming the unlimited marital deduction on the decedent spouse's estate tax return. This decision has been appealed and, along with other cases that have found the law to be invalid, will in all likelihood reach the Supreme Court..

In the meantime, married same-sex couples should file protective refund claims with IRS on Form 1040-X if a joint income tax return status would save them tax and protective estate tax claims. The IRS will hold these protective claims in abeyance until there is a final decision in the case.

Also, under a Federal Court ruling, domestic partners and same-sex couples now can enroll in long-term care insurance programs that states offer to their employees.

Community Property

We are often asked about community property issues. In community property states, such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin, married couples own an equal, undivided interest in all property acquired during the course of the marriage. This is true, regardless of which spouse was earning monies during the marriage, or which spouse actually paid for the property.



Spouses residing in community property states may also own property in an individual capacity as separate property.

“Age is an issue of mind over matter.
If you don't mind, it doesn't matter.”

~ Mark Twain

However, income earned on separate property during marriage is typically considered part of the community property. Assets acquired prior to marriage and assets received by gift or inheritance are generally considered separate property. Also, it is possible to transmute separate property to community property and community property to separate property.

When one spouse dies in a community property state, generally the value of all separate property owned by the decedent and the value of one-half of the community property is included in the decedent's estate and is thus part of that individual's taxable estate for estate tax purposes. Even if a community asset passes to a surviving spouse by operation of law, the value of one-half of this asset is still included in the decedent's taxable estate for estate tax purposes.

Why Heirs Fight

When Dad died, his three children were devastated. Losing Mom at a fairly young age, Dad had carried the family along. He had attended the soccer games, the dance recitals, the graduations. He was the disciplinarian as well as the cheerleader. He was there when the first grandchild was born. And suddenly he was gone.

Dad had worked hard and been successful. He was a cautious man and had invested wisely. He was not wealthy but certainly comfortable. He had a trust in which he left his estate in equal shares to his three children. In accordance with his written instructions, the house was sold and the proceeds, along with the stocks and bonds, will be divided equally among the three. His IRA has been rolled over into their individual accounts. Most of the household furnishings were donated to charities.



All went as he had planned except that several months after his death, the children, now in their thirties and forties, are locked in battle over who should receive his tool collection with which he had made their backyard sandbox, jungle gym and picnic table and who should get the side table that was made by their grandfather and was always next to Dad's chair.

The first reasons that come to mind for this battling are greed and selfishness. But these items have more sentimental value than monetary value. Neither greed nor selfishness is the reason for the fight. It is back to that old childhood rivalry. Frequently, things are used to keep score as to who is most favored and, therefore, who wins.

We advocate a family meeting during which you discuss what you would like to happen upon your passing and what each person would like to inherit to remember a particular person or event. For example, the tools are old and dinged up, some of them are rusty but they evoke pleasant memories of playing together in the backyard. The end table always had a book on it. When Dad would sit down in the evening and pick up the book, it brought the feeling of "all's right with the world" at the end of the day.

Discussing these tangible things and intangible memories will not only be a learning experience for the younger members of the family, but also a way of "settling" the estate before there is an estate to settle.

Long story; short lesson. Settle the "who gets what" issue long before it becomes a really big issue that tears the family apart.

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