DrummondWoodsum 2019
Estate Planning Year in Review

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"It is impossible that the whistle-blower is a hero and I'm not . . . These morons – when this is over, I will be the hero."

- President Trump's personal lawyer, Rudy Giuliani, in an interview with a reporter for *The Atlantic* while discussing the Ukraine scandal whistle-blower complaint (September 26, 2019)

In all our years of writing the annual *Estate Planning Year in Review*, this is the first time we've given opening credit to the same person twice. Faithful readers of the *Estate Planning Year in Review* will recall that last year we gave top spot to Rudy Giuliani's declaration, "Truth isn't truth."

For years we made a conscious decision to steer clear of politics in this, our annual estate planning missive. Those days are gone. It would seem disingenuous to ignore the events that dominated our domestic news during the latter months of 2019 and that are destined to capture our attention through much of 2020. Like it or not, politics often play a notable role in shaping the advice we give our clients in designing effective estate planning, particularly when considering tax efficient options for transferring assets during life or upon death - - considerations that are prominent in this edition of our *Estate Planning Year in Review.*

Elections Have Consequences

It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so.

- Attribution uncertain. Perhaps Mark Twain or Will Rogers.

Rudy Giuliani would do well to heed the above aphorism. His assuredness that history will prove him to be a hero doesn't make it so. As of year-end 2019, his pronouncement isn't looking terribly propitious.

When clients come to us for an initial meeting to discuss their estate planning and we ask how we may be of help, it's not unusual to hear them say, "We don't want to pay any estate taxes." We take that as a given. A federal Court of Appeals decision, well-known among tax lawyers, acknowledges a person's right to avoid paying tax: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury." This calls to mind the old tax joke, "What's the difference between 'avoid' and 'evade?' About 20 years."

How can a person be expected to efficiently plan to minimize their estate tax burden when our elected representatives seem so intent on constantly changing the rules of the game? Fortunately, annual estate planning reviews and revisions aren't typically required solely for tax planning. In most cases, we're able to design the tax planning components of an estate plan with enough flexibility to have the plan work efficiently despite frequent changes in estate tax laws. But that isn't always the case. Sometimes, the estate tax laws can change dramatically enough that what was a tax efficient design at the time it was created is no longer optimal.

For example, 2018 brought us the Tax Cuts and Jobs Act that more than doubled the then federal gift and estate tax exemption from $5,490,000 to $11,180,000. The substantial increase in the estate tax exemption led many people to conclude that estate tax planning was no longer needed. In many cases, that was true. But the doubling of the federal exemption is temporary. The new gift and estate tax exemption "sunsets" on January 1, 2026 and reverts to what it was before the Tax Act was passed. If the sunset takes place, the exemption as of January 1, 2026 will be based on the 2017 exemption of $5,490,000, adjusted for inflation from 2018 to 2026 . . . and will likely fall somewhere close to $6.5 million. A federal estate tax exemption of $6+ million will safely protect most estates from tax. But . . . this is one of the many ways in which elections have consequences. The federal estate tax has always been as much philosophical as fiscal, as much about social engineering as generating revenue, and the debates taking place in the run-up to the 2020 elections have proven the estate tax to be as politicized as ever. During 2019, various federal legislative efforts were made to either make the estate tax increases of the Tax Cuts and Jobs Act permanent, or to repeal the federal estate tax altogether. Those legislative efforts were spearheaded by Republicans and none were successful in a Democratic controlled House of Representatives. In contrast, during 2019, Senator Bernie Sanders introduced legislation to reduce the federal estate tax exemption amount to the 2009 level of $3.5 million. That legislation was also unsuccessful. Other Democratic presidential candidates have also advocated a return to a federal estate tax exemption amount of $3.5 million.

For our Maine resident clients, politics were front and center during 2019 in efforts to change the Maine estate tax exemption amount. Under our previous Republican Governor Paul LePage and Republican controlled Maine Senate, the Maine estate tax exemption increased from $1 million in 2011 to $5.7 million in 2018. In January 2019, Democratic Governor Janet Mills took office, and Democrats took control of both chambers of the Maine Legislature. During the 2019 legislative session, two bills were introduced to reduce the Maine estate tax exemption. One bill proposed a reduction to $1 million and the other to $2 million. Both failed to pass, but the bill to reduce the Maine estate tax exemption to $2 million survived until the final week of the legislative session and was just narrowly defeated. Because of the strong Democratic support that the bill received, many people expect that the bill could re-surface in 2020 or in a subsequent legislative session. Sara Gideon, the 2019 Maine Speaker of the House, and a contender to be the Democratic nominee to oppose Senator Susan Collins in the 2020 election for the United States Senate, supported the bill to reduce Maine's estate tax exemption to $2 million. Only Massachusetts, New Jersey, and Oregon impose a state estate tax at a lower threshold than $2 million.

Democracy is two wolves and a sheep voting on what to have for dinner.

- Attribution uncertain

As if the vicissitudes in estate tax laws generated by our elected representatives don't make it hard enough for us to do effective long-term tax planning, voter-initiated referenda in Maine add to the challenge. Maine residents will remember "Question 2" that appeared on the ballot in November 2016 as a means of funding the cost of public schools. Question 2 proposed adding a 3% income tax surcharge on household annual income over $200,000, effectively raising the top marginal income tax rate in Maine to 10.15%, the third highest in the country, surpassed only by Hawaii and California. Maine voters narrowly approved Question 2 by a vote of 50.4% to 49.6%. However, the Maine Legislature, with encouragement from then Governor Paul LePage, repealed the voter approved tax increase.

More recently, on the November 2018 ballot, Maine voters were presented with Question 1, which proposed a 3.8% income tax surcharge on adjusted gross income above $128,400 to fund home-based assistance to senior citizens and people with disabilities, regardless of income. Question 1 was soundly defeated by a vote of 37.14% to 62.86%, but only after an expensive "Stop the Scam" public relations advertising campaign funded by broad business interests.

Somewhat akin to the two Maine citizen referenda are the proposals by Senators Elizabeth Warren and Bernie Sanders to impose an annual wealth tax. As Senator Warren has explained, her tax would be "only 2 cents" on every dollar of wealth over $50 million up to $1 billion, and "only 6 cents" on every dollar of wealth over $1 billion.

Creating tax policy by voter referendum, or as some would say, by 30-second sound bite commercials, as opposed to by educated debate by elected representatives, is not the optimal way to create tax policy. Although a wealth tax would be created by our elected representatives, citizen tax referendums and the wealth tax both bring to mind two wolves and a sheep voting on what to have for dinner.

Retirement Account Planning

There really are two lives we live. The first life and then the second life when we realize we only have one life.

- Attribution uncertain

For many people, the majority of their net worth is comprised of two assets - - the equity in their personal residence and their retirement accounts. Many people have multiple retirement accounts, an assortment of one or more of a 401(k), 403(b), 457, traditional IRA, roll-over IRA, and Roth IRA.

As we've explained in previous issues of the *Estate Planning Year in Review*, estate planning can be somewhat akin to a jigsaw puzzle, requiring the coordination of different pieces to avoid an inconsistent and unintended result in the overall disposition and distribution of assets to heirs. Although people often tend to think of their will as the cornerstone of their estate planning, the will frequently controls very little, if any, of a person's assets at death. The will only controls the disposition of assets that are not controlled by some other means, most commonly joint ownership, beneficiary designations, and ownership in a revocable trust. Retirement accounts all have beneficiary designations that control the disposition of the account balances at the death of the account owner.

In the final days of 2019, Congress passed, and the President signed into law, the SECURE Act - Setting Every Community Up for Retirement Enhancement. A few provisions of the SECURE Act are worthy of note from our estate planning perspective. Of interest are the provisions of the Act that permit a person to continue to contribute to a traditional IRA beyond the former limiting age of 70½, and that permit a person who hasn't yet reached age 70½ by the end of 2019 to delay taking required minimum distributions until age 72. But, the most significant provisions of the Act, from an estate planning perspective, are the provisions that affect inherited retirement accounts.

Until the SECURE Act took effect, a non-spouse beneficiary who inherited a retirement account had the ability to "stretch" withdrawals from the account over the inheritor's life expectancy. For example, a 40-year old inheriting a retirement account had the option of taking required minimum distributions incrementally over the inheritor's 43 year life expectancy. The inheritor always had the option of withdrawing funds from the inherited retirement account on a faster schedule, including taking an immediate lump sum withdrawal of the entire account. But stretching the retirement account withdrawals over as many years as possible by taking only the required minimum distributions enabled the inheritor to defer payment of income tax on the account and take advantage of years of continued tax deferred growth in the account. A surviving spouse who inherited a retirement account had an even better stretch and deferral option. A surviving spouse has always had the ability to treat the inherited retirement account as his or her own, delay taking any required distributions until reaching age 70½, and then take even smaller required minimum distributions based on a more advantageous IRS life expectancy table.

The SECURE Act has eliminated a non-spouse inheritor's ability to "stretch" the IRA withdrawals over the inheritor's lifetime. With a few exceptions, any person, other than a spouse, who inherits a retirement account after 2019, will be required to withdraw the entire account within ten years after the death of the account owner. By accelerating the rate that beneficiaries are required to withdraw funds from their inherited retirement accounts, Congress is forcing accelerated payment of the income tax on the accounts. A surviving spouse who is named as beneficiary of a retirement account will have the same attractive options as always - - to treat the inherited retirement account as his or her own, delay taking any required distributions until reaching age 72, and then take required minimum distributions based on an advantageous IRS life expectancy table.

The new law has a significant effect on retirement accounts payable to trusts. The use of trusts as beneficiaries of retirement accounts has always been an attractive planning option. Trusts can, among other things, provide creditor and divorce protection for a beneficiary, restrict a beneficiary's access to trust assets until designated ages, provide effective lifetime asset management, and ensure that assets are used to provide lifetime support for one beneficiary and then be distributed to or used for the benefit of other named beneficiaries.

Beginning with deaths occurring in 2020, those advantageous uses of trusts as the beneficiary of retirement accounts will be substantially limited. We will still be able to name a trust as the beneficiary of a retirement account, but the assets of the retirement account will need to be withdrawn within ten years rather than over a period based on the trust beneficiary's life expectancy. In most cases the trustee will need to immediately distribute the withdrawn retirement account benefits directly to the trust beneficiary. If the assets withdrawn from the retirement account are not immediately distributed from the trust to the trust beneficiary, the amount withdrawn from the retirement account will be subject to income tax at unfavorable trust tax rates, which reach the top tax bracket of 37% at income of just $12,950 in 2020. With the changes made by the SECURE Act, it is important that everyone who has named a trust as the beneficiary of a retirement account revisit their estate plan and make changes where appropriate.

Under the SECURE Act, there is no requirement that the inheritor of a retirement account withdraw the assets of the account in ten equal installments. Rather, it appears that a beneficiary will have the option of taking no withdrawals until the tenth year, at which time all assets will need to be withdrawn from the inherited account. But, withdrawing all assets in a single year is likely to push the beneficiary into a higher income tax bracket, resulting in the payment of more income tax than would have been paid if the assets of the account had been withdrawn incrementally over a ten year period. Each beneficiary will need to weigh the potential trade-off of ten years of additional tax deferral against the likelihood of a higher tax rate on the assets if withdrawn in a single distribution.

If a retirement account owner doesn't mind 10% of the value of the retirement account going to charity, an attractive planning option, which will closely mimic a life expectancy stretch, is a charitable remainder trust. A charitable remainder trust will permit payments to the trust beneficiary either for the beneficiary's life or for a period of not more than 20 years, with the balance, but not less than 10% of the initial value of the trust, distributed to charity. The charitable remainder trust will permit continued tax deferred growth of the retirement account assets, with income tax paid only as the trust makes annual distributions to the trust beneficiary. The larger the retirement account, the greater the potential benefit of incorporating a charitable remainder trust into the estate plan.

Roth IRAs will also have to be distributed within ten years of the death of the original account owner, but without income tax due on the distributions.

People who inherited retirement accounts as a result of a death before 2020 will be unaffected by the SECURE Act and will be able to continue taking required minimum distributions based on their life expectancy.

Although we, as estate planners, have always taken great care to structure our clients' estate plans to ensure that retirement account beneficiaries have the option to take maximum advantage of income tax deferral opportunities, what we often hear from beneficiaries, during the administration of a deceased client's estate is, "How soon can I get the money?" Oh, well. For those beneficiaries who were never interested in taking advantage of the tax deferral of a stretch IRA, the changes made by the SECURE Act won't be considered a detriment.

The Gift & Estate Tax Exemption

Last night I watched the news from Washington, the capitol
The Russians escaped while we weren't watching them, like Russians will
Now we've got all this room, we've even got the moon
And I hear the U.S.S.R. will be open soon
As vacation land for lawyers in love

- Lawyers in Love (1983) Jackson Browne

As of January 1, 2020, the federal gift and estate tax exemptions are unified at $11.58 million – an inflationary increase from the 2019 exemption of $11.4 million. The tax rate on transferred assets over $11.58 million is a flat 40%. A person may use his or her $11.58 million exemption during lifetime or on death to transfer assets without payment of gift or estate tax. The exemptions are not cumulative – whatever you use of your gift tax exemption during your lifetime reduces dollar-for-dollar the estate tax exemption available at your death. The gift and estate tax exemptions will continue to increase with annual inflationary adjustments. But, as noted above, the current law, which went into effect in 2018, is scheduled to expire on January 1, 2026.

Will Congress let the current gift and estate tax law, with the increasing exemptions, expire in 2026? The answer brings us back to the segment above under the heading *Elections Have Consequences*. The answer will depend on which political party controls Congress and the White House between now and 2026.

If Congress doesn't act before January 2026 to extend the current enhanced and increasing gift and estate tax exemptions, we can expect people who can afford to do so to make lifetime gifts rather than risk losing the opportunity to transfer substantial wealth to their heirs free of gift and estate tax. If a large lifetime gift now is exempt from gift tax because of the enhanced exemption amount, and the donor dies after the exemption amount has been reduced, will the gift be taxed anyway ("clawed back") in the calculation of estate tax? In November 2019, the United States Treasury and IRS issued regulations that give us the answer. If someone makes $9 million of lifetime gifts today, while the exemption amount is $11.58 million, and at the time of the person's death, the exemption amount is $6 million, the person will not be penalized for having used $9 million of exemption, but the person will have no exemption remaining to use at death. If a person makes $2 million of lifetime gifts today, while the exemption amount is $11.58 million, and at the time of the person's death the exemption amount is $6 million, the person will have $4 million of exemption remaining to use at death. In short, the new rule governing the potential future reduction of the gift and estate tax exemption amounts is "use it or lose it."

The generation-skipping transfer tax exemption is tied to the gift and estate tax exemptions, and also increased to $11.58 million on January 1, 2020.

The annual federal gift tax exclusion amount increased from $14,000 to $15,000 on January 1, 2018 and remains unchanged for 2020. The annual gift tax exclusion permits a person to give $15,000 per year to as many recipients as desired, without eroding the $11.58 million federal gift and estate tax exemption. Payment of tuition and certain medical expenses are not subject to gift tax and may be made in addition to the $15,000 annual gift tax exclusion.

The annual gift tax exclusion for gifts to non-U.S. citizen spouses increased to $157,000 (from $155,000 in 2019) on January 1, 2020.

Neither Maine nor New Hampshire has a separate gift tax, but gifts made within one year of death are included in the calculation of Maine estate tax.

The Maine Estate Tax

You don't need a weatherman
To know which way the wind blows

- Bob Dylan, Subterranean Homesick Blues (1965)

The Maine estate tax exemption in 2019 was $5.7 million. As of January 1, 2020, the Maine estate tax exemption amount increased to $5.8 million based on an inflationary adjustment. With Maine's estate tax exemption no longer tied to the federal exemption, people with estates valued at more than the Maine exemption will need to be sure that their estate planning documents are designed with the flexibility to account for the difference in the Maine and federal exemptions.

The Maine estate tax has three rates ranging from 8% to 12% that apply in $3 million increments. The 2020 brackets are:

- Up to $5.8 million: no tax
- Greater than $5.8 million and no more than $8.8 million: 8% of the excess over $5.8 million
- Greater than $8.8 million and no more than $11.8 million: 10% of the excess over $8.8 million
- Above $11.8 million: 12% of the excess over $11.8 million

Maine remains in the minority of states that impose an estate tax, with 36 states having no estate tax. In contrast, not only is Maine one of just 14 states with an estate tax, as discussed above under the heading *Elections Have Consequences*, in the 2019 legislative session, the Maine House of Representatives narrowly defeated a bill to lower the Maine estate tax exemption amount to $2 million. Maine therefore remains on the list of states you don't want to be caught dead in if you have assets valued in excess of the Maine estate tax exemption amount (or in excess of two times the Maine estate tax exemption amount if you and your spouse or partner have done proper Maine estate tax planning to ensure that both persons' exemptions are fully utilized). For our clients who already spend the winter months in Florida or one of the other warm weather states that have no estate tax, it's not a difficult decision for them to begin spending at least 183 days a year in the warm weather state to change their state of domicile. If you are considering changing your legal domicile to escape the Maine estate tax, while retaining a home in Maine, be sure to consult us about the planned transition so we can properly advise you about severing your tax ties to Maine.

Each state that has eliminated its estate tax, and each state that is considering eliminating its estate tax to remain "competitive" in attracting affluent retirees, recognizes that it faces an inherent tax trade-off. A state's decision to retain the estate tax is a gambit to capture a one-time tax when a resident of wealth dies. On the other hand, retaining the state estate tax creates a risk of lost income tax revenue from each resident who leaves the state to escape the state's estate tax. The obvious risk for Maine, which already has many of its wealthy residents spending a few months or more each year at a second home in a warmer climate, is that the wealthy resident will choose to make its second home its primary residence, and make its Maine residence the second home.

The Maine estate tax exemption is not portable as it is under federal estate tax law. Portability allows a surviving spouse to elect to use the deceased spouse's unused gift and estate tax exemption amount. Because Maine has not adopted portability, effective Maine estate tax planning requires that Maine couples – both married and unmarried – who have combined assets valued at more than the Maine estate tax exemption amount ($5.8 million for 2020), include tax savings provisions in the estate planning documents of the first of them to die.

New Hampshire Has No Estate Tax

New Hampshire is one of the 36 enlightened states that do not impose an estate tax.

Political Disclaimer

What my political views or my constitutional views are just doesn't matter.

- United States Supreme Court Justice Elena Kagan

Lest any reader view this edition of the *Estate Planning Year in Review* as a political advocacy piece, this is our official disclaimer of any such notion. Lawyers at Drummond Woodsum span the political spectrum, as do our clients. The estate tax is only one of many issues that will inform and influence a voter's propensity for casting a ballot and we respect all political leanings on this and other issues. *The Estate Planning Year in Review* is, above all, intended to be informative, and hopefully entertaining.

State of The Estate Review

Be not afraid of growing slowly; be afraid only of standing still.

- Chinese Proverb

As professionals, we're committed to continuing our growth as trust and estate planning lawyers. Standing still is not an option. Those who aren't on a constant quest to expand their professional knowledge and skills are destined to fail in their ability to be competent advisors to their clients at each generational level. We pride ourselves in the fact that estate planning documents we prepare today are different in many respects, some obvious, some subtle, from documents prepared just a few years ago. The differences are primarily due to two factors - - changes in the law and changes in creative approaches to accomplishing planning goals. We learn new approaches with professional experience and continuing legal education.

Just as we grow in our professional abilities, our clients' planning goals evolve and grow as well. Just as it is impossible to wade into the same river twice, none of us is the same person today as we were yesterday. As a result, it's not uncommon for us, when reviewing our client's estate planning documents with them, to hear them say, "I know that made sense to me at the time I did it just three years ago, but that isn't the way I would do it today."

The client meeting that we call the *State of the Estate Review* is an acknowledgement that estate planning is a process, not an event.

The frequency with which you update your estate plan is left to your discretion. However, if it has been more than a few years since you updated your plan, we encourage you to call to schedule a *State of the Estate Review* of your existing estate planning documents and discuss updates that may be appropriate for both tax and non-tax reasons. If you have named a trust as the beneficiary of a retirement account, scheduling a *State of the Estate Review* during 2020 should be one of your New Year's resolutions.

Absent your request to schedule a *State of the Estate Review*, we will not review or update your estate plan to reflect changes in the law or for other purposes.

The Best of The Best

Mamas, don't let your babies grow up to be cowboys
Don't let 'em pick guitars and drive them old trucks
Make 'em be doctors and lawyers and such

-Ed and Patsy Bruce (1975), recorded in 1978 by Waylon Jennings and Willie Nelson

For the third year in a row, Drummond Woodsum has been recognized as one of the Best Places to Work in Maine. For those of use who are fortunate enough to work here, that comes as no surprise. Fifteen years ago, Drummond Woodsum was a law firm of 32 lawyers with a single office on Commercial Street in Portland. Today, Drummond Woodsum has 94 lawyers, with 71 in our Portland office, and 23 spread across three offices in Portsmouth, Manchester, and Lebanon, New Hampshire. The impressive growth of the firm is a reflection of the strength of our client relationships, the breadth of our practice areas, and the talent of our lawyers.

Fifty two lawyers at Drummond Woodsum were recognized by Super Lawyers and/or Best Lawyers in America in 2019 for their work in a broad array of legal practice areas. Working in the midst of such an impressive group of professionals raises the bar for all of us and it's an honor to have them all as professional colleagues.

David Backer and John Kaminski were each recognized by Super Lawyers and/or Best Lawyers for their work in trust and estate planning and probate, and John was also recognized for his skill in tax law. In addition, John was selected by Best Lawyers as the Portland, Maine Lawyer of the Year in tax law for 2020. Both David and John are elected Fellows of the American College of Trust and Estate Counsel. A lawyer cannot apply for membership in the College. Fellows of the College are selected on the basis of professional reputation and ability in the fields of trusts and estates. David was one of only six lawyers in Maine recognized by the 2019 Chambers High Net Worth Guide as a "Band 1" lawyer - the highest distinction awarded by Chambers - in the realm of private wealth law. Per Chambers' review of David: "Backer is a 'top-tier,' 'outstanding attorney,' sources say. . . . A local lawyer says Backer is 'very thoughtful and highly skilled in terms of his drafting, his analysis, his understanding of complex tax and estate planning concepts and techniques. I think he can be distinguished from other attorneys by his ability to venture into the policy/analytical realm in thinking about the law.'" The High Net Worth Guide covers the private wealth market in key jurisdictions around the world and is designed to be an all-encompassing resource for high net worth individuals and their advisors.

David is currently in his eleventh year as a member of Maine's Probate and Trust Law Advisory Commission created by the Maine Legislature in 2009, and has served as Chair of the Commission since its creation. The Commission, made up of lawyers and judges, is charged with conducting a continuing study of the probate and trust laws in Maine and making recommendations to the Legislature for how those laws may be improved.

Jessica Scherb was named a Rising Star in estate planning and probate, as well as mergers and acquisitions, by Super Lawyers. Rising Stars are selected by our peers as the best attorneys no more than 40 years old, or who have been practicing for 10 years or less. Jessica is licensed to practice in both Maine and New Hampshire, where she provides estate planning and trust and estate administration services, as well as a broad range of business services, for her clients.

When disputes arise in estate and trust administration, we regularly turn to Dave Sherman, who chairs our Trial Services Group. Dave has broad experience in resolving estate and trust disputes in the Maine courts, and is recognized as a New England Super Lawyer in estate and trust litigation, general litigation, and business litigation. He was also recognized as the 2018 Litigation Real Estate Lawyer of the Year for Portland, Maine by Best Lawyers.

Chris Stevenson is a lawyer and certified public accountant. We turn to Chris for input on the many tax issues inherent in trust and estate planning and administration. Chris is recognized as a Rising Star in tax law by Super Lawyers.

Parke Burmeister was selected by Super Lawyers as a Rising Star for the third year in a row for his work in estate planning and probate. Parke provides estate planning, probate, and trust administration services to clients at each life stage, and is admitted to practice in both Maine and Massachusetts.

Thank You for Your Trust

We take seriously the trust you place in us and will continue to do everything possible to continue to earn your trust.

DrummondWoodsum
ATTORNEYS AT LAW

For a full list of attorneys, office locations, and the latest Drummond Woodsum news, please visit us online at **www.dwmlaw.com**.