TAX AND WEALTH ADVISOR ALERT: WHAT PROPERTY IS SUBJECT TO PROBATE?

During the estate planning process, it is important to consider what types of assets make up your estate. Specifically, you should understand the difference between your “probate” and “non-probate” assets. As you might imagine, your probate assets are the ones that must go through probate, a time-consuming and costly process which we previously discussed here.

Contrary to popular belief, a Last Will and Testament will not, on its own, help your estate avoid probate. Whether or not your estate is subject to probate depends on whether your estate consists of probate assets.

Probate assets are those that are owned solely by the decedent, without any beneficiary designations, transfer-on-death designations, payable-on-death designations, or joint ownership with rights of survivorship. Assets titled solely in the name of the decedent must go through probate—a court-supervised process—to be transferred or distributed to your loved ones. The probate process is necessary for these types of assets because only a court can legally transfer title after a person’s death.

Non-probate assets are those with beneficiary designations, transfer-on-death designations, or payable-on-death designations. They also include assets that are titled in the name of a trust or titled as joint tenants with rights of survivorship. Unlike probate assets, non-probate assets will be transferred directly to your beneficiaries upon your death without any court supervision.

Many people seek an estate plan to avoid or minimize the probate process. Probate avoidance strategies can be personalized to your unique circumstances. If you would like more information on estate planning options to avoid probate, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: IRS CLARIFIES STANCE ON DEDUCTIBILITY OF EXPENSES COVERED BY PPP LOANS

Yesterday, the U.S. Treasury Department and Internal Revenue Service released guidance clarifying the tax treatment of expenses funded with forgiven Paycheck Protection Program

loans. This guidance, Revenue Ruling 2020-27 and Revenue Procedure 2020-51, strengthened the Treasury's prior position in Notice 2020-32, as we previously wrote about here, which stated that expenses funded with forgiven PPP loan funds are not deductible.

In Revenue Ruling 2020-27, the IRS answered the question of whether a taxpayer who paid otherwise deductible expenses with PPP funds can deduct those expenses in the taxable year in which the expenses were paid or incurred if, at the end of that taxable year, the taxpayer reasonably expects to receive forgiveness of the PPP loan. The answer according to the IRS is "no," regardless of whether the taxpayer has submitted an application for forgiveness of the loan by the end of that taxable year.

The Treasury provided its rationale for this in a subsequent press release yesterday, stating "[s]ince businesses are not taxed on the proceeds of a forgiven PPP loan, the expenses are not deductible. This results in neither a tax benefit nor tax harm since the taxpayer has not paid anything out of pocket."

Nevertheless, if desired, Congress could override the Treasury's stance by passing a law that explicitly allows the deductions. Additionally, it is possible a taxpayer may decide to challenge this position in court.

However, based upon these current rulings, it is important for all taxpayers that are seeking PPP loan forgiveness to understand whether or not, and when, they can deduct expenses incurred with the loan proceeds and the tax impact that may arise from the lack of deductibility if the loan is forgiven. For questions or further information, please contact attorney Britany E. Morrison.

TAX AND WEALTH ADVISOR ALERT: A BRIEF OVERVIEW OF WISCONSIN'S MARITAL PROPERTY SYSTEM

In general, states are considered either "common law property" or "community property" states. Wisconsin, along with a few other states, is a community property state (community property is referred to as "marital property" in Wisconsin). It is important to understand the difference between these two systems for purposes of wealth management planning, estate planning, and divorce.

Under the common law property system, assets and debts earned or acquired by one spouse during the marriage belong only to that spouse. With this type of system, only assets and

debts that are titled under the name of both spouses are owned by both spouses. Under Wisconsin's marital property system, all assets and debts acquired or earned during a marriage belong to both spouses, regardless of whose name the assets and debts are titled under. It is important to emphasize that this general rule applies only to assets or debts acquired *during* the marriage—assets and debts acquired before the marriage remain the individual property of whichever spouse brought the assets or debts to the marriage. There are, however, some exceptions to this general rule, such as assets acquired as a gift or through inheritance. Also, non-marital property that is comingled with marital property may be unintentionally reclassified as marital property. Income and appreciation incurred on a non-marital asset may also be deemed marital property.

Spouses living in Wisconsin may wish to enter into a marital property agreement to define and clarify ownership of their assets and debts. Because classifying and defining assets and debts may be difficult, as the above-paragraph outlines, some spouses may wish to enter into a marital property agreement "opting into" Wisconsin's marital property system. By doing so, the spouses can be certain that their property will be classified as marital property, which may have certain tax and estate planning advantages. On the other hand, some spouses may want their property to be subject to a common law property system to protect assets for their children from a prior marriage or shield assets in a potential divorce. These spouses should consider entering into an agreement "opting out" of Wisconsin's marital property system.

Overall, understanding the distinction between common law property systems and community property systems is important for wealth management planning, estate planning, and divorce. Whether it makes sense for spouses living in Wisconsin to opt out of or opt into Wisconsin's marital property system depends on a variety of factors that you should discuss with your estate planning attorney.

If you would like to learn more about Wisconsin's marital property laws and how they affect your estate plan, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: THE IMPORTANCE OF A POWER OF ATTORNEY FOR HEALTH CARE

A proper estate plan covers not only what should happen upon your death, but also what should happen if you lose your decision-making skills. While planning for incapacity may be as unpleasant as planning for death, it is an important step in the estate planning process.

Planning for incapacity ensures that someone you specifically choose and trust can act on your behalf while you are unable to do so for yourself. In another article, we discussed the importance of a Durable Financial Power of Attorney. Here, we discuss why a Power of Attorney for Health Care is equally as important.

A Power of Attorney for Health Care is a document that allows you to appoint someone, your "health care agent," to make medical decisions for you in the event you are unable to do so for yourself. This document allows your health care agent to communicate with your health care providers regarding what treatments you do and do not want.

You will still receive medical care if you do not execute a Power of Attorney for Health Care, but you risk not having the right person speak for you on your behalf and not receiving the type of care or treatment you would want. For example, your physician may ask the court to appoint someone to act on your behalf, and your court-appointed agent could subject you to a medical treatment you did not want. Additionally, the appointment process can be expensive, public, and time consuming.

While a Power of Attorney for Health Care is an important part of your estate plan, it applies only to medical decision-making. For this reason, this document is often drafted as part of a larger estate plan.

The attorneys at O'Neil Cannon have experience in drafting various estate plans, both simple and complex, and would be happy to discuss the estate planning process with you. If you are interested in learning more about estate planning, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: NEW STREAMLINED FORGIVENESS FOR PPP LOANS UP TO $50,000

Late last week, the Department of Treasury and Small Business Administration (SBA) jointly released a new loan forgiveness application for Paycheck Protection Program loans of $50,000 or less. This new streamlined application removes calculations required on prior forms and simplifies documentation requirements, relieving both borrowers and lenders of the prior compliance burdens present in the older form.

Pursuant to an interim final rule, the simper one-page application form, SBA Form 3508S, does not require borrowers to reduce their forgiveness amount for any reductions in full-time equivalent (FTE) employees or in salaries or wages. Additionally, the new form does not

require borrowers to show calculations used to determine their loan forgiveness amount. With that said, the SBA could request additional information and documents as part of its loan review process.

While simpler overall, the application still requires the borrower to make certain certifications regarding the accuracy of the information reported. Further, the application requires the borrower to submit documentation supporting the fact that the use of the loan proceeds was for eligible costs. Borrowers who, together with their affiliates (as determined under SBA rules), received loans of $2 million or more are ineligible to use the new streamlined application. For example, if an entity has a loan of $50,000 and its parent corporation has a loan of $1.95 million, the former would not be able to use Form 3508S to apply for loan forgiveness.

Form 3508S and its accompanying instructions are posted on the SBA's website.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the new streamlined application for PPP loans under $50,000, please contact the author of this article, Attorney Britany E. Morrison.

TAX AND WEALTH ADVISOR ALERT: IRS REMINDS SELECT TAXPAYERS OF OCTOBER 15TH TAX FILING DEADLINE

The IRS has reminded taxpayers who filed an extension that the October 15, 2020 due date to file their 2019 tax return is near. Taxpayers should file their tax returns on or before the October 15, 2020 deadline. Moreover, taxpayers with tax due should pay as soon as possible to reduce any penalties and interest. However, certain taxpayers may have more time to file and pay. Taxpayers with more time to file or pay include the following:

- service members and others serving in a combat zone who typically have 180 days after they leave the combat zone to file returns and pay any taxes due; and
- taxpayers in federally declared disaster areas who already had valid extensions.

Further, taxpayers can make their federal tax payments online through various methods such as a bank account withdrawal or via debit card or credit card. Additionally, taxpayers unable to make full payments can meet their tax obligations in monthly installments by applying for a payment plan. Alternatively, taxpayers can find out if they qualify for an offer in compromise—a way to settle tax debt for less than the full amount or even request a

temporary delay on collection until their financial situation improves.

The IRS also reminded those with little or no income who are not required to file a tax return (non-filers) that they could be eligible to receive an Economic Impact Payment.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and will continue to monitor federal and state tax filing deadlines. For questions or further information relating to the upcoming October 15, 2020 deadline, please contact Attorney Britany E. Morrison.

TAX AND WEALTH ADVISOR ALERT: CONSIDERATIONS WHEN APPOINTING A FIDUCIARY

Various estate planning documents require you to appoint someone to act on your behalf. These appointees are your "fiduciaries" and include your personal representative, guardian for minor children, trustee, attorney-in-fact, and health care agent.

Often times, people name certain individuals for these roles without much consideration, or they may consider the wrong criteria. Below is a general description of each fiduciary role and a few suggestions on what to consider when deciding who to appoint to those roles. In general, you should carefully consider the skillset each role requires and whether the person you would like to appoint possesses those skills.

Personal Representative

You name your personal representative in your Last Will and Testament. Your personal representative will be responsible for overseeing the administration of your estate during the probate process. Consider naming someone who lives nearby so they can administer your estate and someone who will have the time to file all the necessary paperwork.

Guardian

You name a guardian for your minor children in your Last Will and Testament as well. This person will be responsible for taking care of your minor children. Consider naming someone who lives close by so your children won't have to move (or move very far), has similar values as you and will raise your children similar to how you would, and will have the energy to raise young children or children who require extra care and attention.

Trustee

You appoint your trustee in your trust agreement. Your trustee will administer the trust agreement pursuant to its terms, manage and invest the trust assets, and make distributions to your beneficiaries (sometimes at their own discretion). Consider naming someone who will be able to understand the document and its terms, has a financial background and can manage your assets effectively, and will not be placed in an uncomfortable situation if they decide to refuse a beneficiary's request for a distribution. If you cannot think of someone with the requisite skillset, or if you have complex assets that will need to be managed, consider naming a professional fiduciary.

Attorney-in-Fact

You name your attorney-in-fact in your Financial Power of Attorney. This person will manage your financial affairs in the event you become incapacitated. Consider naming someone who has a financial background, lives nearby and can easily manage your financial affairs, and who is familiar with your financial affairs. If you cannot think of someone with the requisite skillset or someone you completely trust to have these broad powers, consider naming a professional fiduciary.

Health Care Agent

You name your health care agent in your Power of Attorney for Health Care. This person will make medical decisions for you in the event you become incapacitated. Consider naming someone who has a medical background or who will be capable of understanding your medical situation, will respect your wishes regarding medical treatment, and will be able to carry out your wishes regarding medical treatment even if others disagree.

As you can see, there are several things to consider when selecting a fiduciary. If you would like more information on these fiduciary roles, or if you would like to create or update an estate plan, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: STRIKE WHILE THE GIVING IS GOOD—HISTORICALLY HIGH ESTATE AND GIFT TAX EXEMPTIONS MAY BE REDUCED OR ELIMINATED AS EARLY AS

JANUARY 1, 2021

With the economy still struggling, one bright spot remains for those who are willing to make an investment of time and money in estate planning. The combination of lowered asset values, reduced interest rates, and historically high estate and gift tax exemptions present a unique opportunity to implement estate planning techniques that will yield significant tax savings. But those looking to take advantage of this unique opportunity should act now, because a rebound in asset values and the outcome of the November 2020 election may make this unique opportunity go away.

The Gift, Estate, and GST Tax Exemptions for 2020

The Tax Cuts and Jobs Act of 2017 created a significant opportunity to transfer wealth by effectively doubling the federal estate and gift tax exemption for transfers made after 2017. The current exemption for 2020 allows an individual to transfer up to $11,580,000 (or up to $23,160,000 for a married couple) over the course of his or her lifetime without incurring gift or generation-skipping transfer ("GST") tax. Any unused amount is available to eliminate estate and GST tax upon the individual's death. Moreover, a surviving spouse inherits the unused gift and estate tax exemption (but not the GST tax exemption) of the first spouse to die if an election is made on a timely filed estate tax return for the first spouse's estate.

Any amounts gifted during life or transferred upon death in excess of the federal estate and gift tax exemption (over $11,580,000 for an individual or $23,160,000 for a married couple) are subject to a 40% estate and gift tax rate at death, plus any taxes that may be imposed by the decedent's state of domicile (Wisconsin has neither an estate nor gift tax). In addition to the gift or estate tax, a separate GST tax of 40% is imposed on transfers in excess of the exemption amount that are made to grandchildren or more remote descendants.

The Scheduled Reduction of the Gift, Estate, and GST Tax Exemptions

Currently, the estate and gift tax exemptions are the **highest** they have ever been since the modern estate tax was implemented in 1916 (with the single exception of 2010, when the estate tax was briefly repealed). However, effective January 1, 2026, the exemption will be reduced to $5,000,000 (or effectively $10,000,000 for a married couple), adjusted for inflation back to 2010.

This means that while currently a married couple can transfer over $20,000,000 without estate or gift tax, if exemptions are cut in half as scheduled on January 1, 2026, then the same couple can only transfer approximately $10,000,000 without estate or gift tax. At a 40% tax rate, the couple creates an approximate $4,000,000 in savings by making a transfer today at current exemption levels. That is $4 million going to their beneficiaries rather than

taxes!

And the good news is that gifts made now utilizing 2020's record-high exemptions may not be "clawed back" as provided in regulations published by the IRS, even if exemptions are later reduced on January 1, 2026, or eliminated by Congress sooner as explained below. The importance of these "anti-clawback" regulations is that taxpayers can utilize today's higher exemption amounts without fear of future penalty or "clawback" and should act before the scheduled reduction.

The Presidential Election

While a deadline of December 31, 2025, for the scheduled reduction may seem like plenty of time to take advantage of these high exemptions, the 2020 presidential and congressional elections and the impact of the pandemic may bring about some drastic changes to estate planning as soon as January 1, 2021.

First, there is a real possibility that taxes may be increased to support the massive amounts spent by Congress on COVID-19 relief. The gift, estate, and GST tax rates could be viewed as the easiest taxes to raise because they would impact only the wealthiest of taxpayers, and not those perceived to be struggling the hardest due to the novel pandemic. It is possible for the gift, estate, and GST tax rates to be increased from the current 40% to 55% or even higher.

Second, there is speculation that if the Democratic Party wins the presidency and gains control of Congress following the November 2020 election, the exemption amount might be reduced to an amount as low a $3,500,000 even before the expiration date of January 1, 2026. In fact, such a change could be effective as soon as January 1, 2021, if Congress passes legislation having retroactive effect.

Additionally, while the Democratic Party's presidential nominee, Joe Biden, has not proposed any specific changes to the estate exemption amounts and tax rates, his recently released economic plan calls for the "wealthiest Americans [to] shoulder more of the tax burden," including raising federal estate taxes "back to the historical norm." This seems to indicate that if Biden and the Democratic Party are successful come November, exemptions going forward could be significantly lower than they are under current law, and thus most tax commentators believe that the current exemption amounts are the best we are going to see.

Maximize Higher Gift, Estate, and GST Tax Exemptions Before It is Too Late—Plan Now!

Gifting assets outright or in trust now, while the exemption levels are still at their historic high, allows taxpayers to "lock in" these high exemption amounts without fear of a clawback or an exemption reduction as soon as January 1, 2021. There are several effective estate

planning structures that can be used to take advantage of depreciated asset values, record-low interest rates, and record-high exemption amounts, but waiting for official election results come November 3 will likely make it difficult to implement these structures.

Some of these structures require several months to implement. Other than planning to reduce gift and estate taxes, there are many other considerations for taxpayers when transitioning wealth to their family, e.g., how and when to benefit family members; choosing trustees; choosing the state of trust administration for asset protection and income tax planning objectives; considering multi-generational planning; and charitable giving and identifying which assets to gift. Additionally, since certain assets may require professional valuations, these transactions may require more time to implement, so now is the time to act in order to ensure that the transactions can be completed before year's end.

Conclusion

The current confluence of lowered asset values, reduced interest rates, and historically high estate and gift tax exemptions may make this one of the best times in history to transfer wealth efficiently with minimal estate tax implications, but the time to act is now. Many estate planning techniques take time to implement, so do not wait until November 2020 to consider making changes to your estate plan.

Regardless of which political party stays in power or takes control in November, our team at O'Neil Cannon realizes that there is no one-size-fits-all strategy to address your estate planning goals and objectives. We are prepared and ready to help you build a comprehensive plan tailored to your needs. If you are interested in taking advantage of these unparalleled opportunities for tax savings, please speak to your regular OCHDL contact, or the author of this article, attorney Britany E. Morrison, to discuss how you can strike while the giving is good.

TAX AND WEALTH ADVISOR ALERT: THE IMPORTANCE OF BENEFICIARY DESIGNATIONS

Some of your most significant assets, like your life insurance and retirement accounts, ask you to make beneficiary designations. If you make valid beneficiary designations on these assets, then upon your death they will pass directly to your named beneficiaries without being subject to the probate process. Click here to view our article on probate and why you might want to avoid it.

Many people overlook the importance of beneficiary designations and neglect to name beneficiaries because they think their other estate planning documents will cover those assets. However, beneficiary designations operate independently from other estate planning documents, like a will or trust agreement. Therefore, you should make beneficiary designations because your other estate planning documents will not control how these assets are to be distributed and to whom they should be distributed. If you neglect to name beneficiaries, then these accounts or policies could become part of your estate and be subject to the probate process.

Just as it is important to make beneficiary designations, it is equally as important to review and, if necessary, update those designations. Major life events, changes in circumstances, or even a change of heart can all warrant an update to beneficiary designations. It is good practice to review your estate plan every three to five years, and each time you do so you should be reviewing your beneficiary designations.

Finally, it is important to consider any unintended consequences to naming someone as a beneficiary. For example, if a special needs person receives assets through a beneficiary designation, then he or she may no longer be eligible for government benefits. In these circumstances and in others, you should consult with an estate planning attorney to discuss your options.

Beneficiary designations are an important part of your estate plan and require special attention. If you would like more information on beneficiary designations and estate planning in general, please contact attorney Kelly M. Spott.

TAX AND WEALTH ADVISOR ALERT: WHAT IS PROBATE AND WHY SHOULD I AVOID IT?

Probate is the legal process during which a court oversees the collection and transfer of a person’s assets upon his or her death. In general, the probate process includes filing a will, appointing a personal representative, inventorying the decedent’s assets, paying the decedent’s debts, filing taxes, and distributing the balance of the estate according to the decedent’s will. If the decedent did not leave a will, then the decedent’s property is distributed according to Wisconsin’s intestacy laws.

Many people seek to avoid probate because probate documents are public record, so avoiding probate means maintaining a sense of privacy. Additionally, the probate process can be very time consuming, ranging anywhere from six months to two years, and expensive.

Expenses such as court costs, probate bonds, fees paid to the personal representative, and attorneys' fees can all add up to a significant amount by the end of the probate process. Because the estate generally pays for these costs, the probate process can significantly drain an estate and take away what you left behind for your beneficiaries.

With a good estate plan in place, it is possible for your estate to avoid the probate process, or at least lessen the process's impact on your estate. If you would like more information on estate planning options to avoid probate, please feel free to contact attorney Kelly M. Spott.