Last Minute Estate Planning

Your spouse is terminally ill, and unfortunately procrastination got the better of you. Now there's no time for orderly, thoughtful estate planning. Or is there . . .?

Clearly the best time for estate planning is when all involved parties can discuss the various options, mull over the possibilities, and craft a plan that makes the most sense for them. But too often estate planning is delayed until illness or incapacity, at which time options become limited. However, while choices may be fewer, there is often still a lot that can be accomplished, provided you know what to do and can act quickly.

One note of caution: acting in haste without sound professional advice can be worse than not acting at all. Because many decisions made shortly before death cannot be undone, and there can be serious unforeseen federal and state tax ramifications, it is best to receive professional advice and not rely on what your neighbor says worked for them.

There are two general approaches and some additional advanced techniques for last minute estate planning. The first approach focuses on getting assets out of your estate to shrink your taxable estate. The second focuses on removing assets likely to grow quickly so that you keep the future growth out of your estate. There exist several advanced techniques, but the situations in which these apply are far more limited, and therefore are not addressed in this article. Except one, focused on avoiding capital gains taxes, that is worthy of mention because it is more likely to be pertinent to readers.

Techniques to make your estate smaller are particularly appropriate where estate tax liability is a possibility. This includes making gifts that will be covered by the annual gift tax exclusion. In 2008, up to $12,000 a year in cash or other assets can be given to as many individuals as the giver would like. Married couples can give up to $24,000 a year to an unlimited number of people. This is not to suggest you give away money to anyone who shows up on your doorstep; rather if the giver was planning on bequeathing certain sums to specific people, consider making those gifts prior to death rather than after. By giving out money before death, those sums are not part of your estate, and where no estate plan exists, these gifts will avoid probate too. In addition, gifts to IRS-listed charities or nonprofit institutions will shrink your estate, but usually these gifts can be made before or after death, with little tax impact, unlike gifts to individuals which can greatly benefit from being made prior to the giver's death.

Next, consider making tuition or medical payments for family members or friends who are important to the giver. An unlimited amount of money can be given tax free provided the money goes directly to the educational or medical institution. This is a great way of quickly getting a lot of money out of an estate that could otherwise be taxed at rates of more than 40 percent. As with most techniques, it is essential to discuss this approach with an attorney or accountant before making the transaction to be sure to organization receiving the money is qualified and that the money will be applied to expenses that fall within this exception. For example, payments for tuition qualify, but payments for room and board, or books, do not.

Next, there are three methods to remove future asset growth from the giver's estate. These assets might include a business interest that is expected to appreciate rapidly in the near future. In this case, the giver can gift the assets before the triggering event that causes the increase in value, even if the value of the gift is more than $12,000 in any single year. Gifts of more than $12,000 to any single individual will require a gift tax return, but everyone can gift up to a total $1 million before triggering a taxable event, provided the estate tax exclusion

amount has not been exhausted. By getting the assets out of the estate before they increase in value, the increase in value is not attributed to the estate, and thus would avoid potential estate tax.

The second approach is to gift assets that will soon increase in value, even if you have to cross the $1 million threshold and pay a tax on the gifts now. This approach is rarely used today, but in the right circumstances can make a big difference. It is important to talk to a CPA or attorney experienced in estate and gift taxation and work through the various computations and scenarios prior to settling on this approach.

There are also various estate freezing techniques where future income and appreciation is shifted out of the estate. This is very similar in concept to making annual gifts, but can involve low-interest loans to family or friends, sale-leasebacks or gift-leasebacks to family or friends, outright sales of property interests, and recapitalizing of ownership interests in a family business to steer future income away from the giver. These approaches would typically require a longer lead time to implement, but are worth addressing with an attorney if the assets in question fit the bill.

There are several other methods, but one that stands out. First, consider making a gift of low basis property *to* the giver, who then will leave the property to a family member upon the giver's death. It works like this: wife is terminally ill, so husband gifts to her low basis real estate that husband owns separately. The wife then directs in her will that the property pass to her and her husband's two sons. Because spouses can pass an unlimited amount of property between them, there is no tax upon the initial transfer from husband to wife. When the wife passes, the real estate receives a step up in cost basis before passing to their sons. Provided inclusion of the property does not cause an estate tax issue for the wife, the sons receive the property with a cost basis equal to the fair market value of the property at the date of the wife's death, and thus face a far smaller capital gains tax exposure if the sons subsequently sell the property.

This and the other situations are fact specific, thus it is advisable to discuss with a CPA or attorney whether the facts are in your favor or not before trying to make a specific technique work for you. Nonetheless, several options exist to plan even when time is short. But because any actions will likely be irreversible when the ill person dies, it is essential to receive professional advice up front. There is no room for error in last-minute planning.

Adam Bartsch, *Last Minute Estate Planning*, The Shelburne News, March 6, 2008.

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Please contact NEET if you have questions or require additional information.

Northeast Estates and Trusts, PLLC
Shelburne Creamery Building, Suite 22-B
5138 Shelburne Road; P.O. Box 928
Shelburne, VT 05482
802-985-8811