Louisiana Estate Planning: Some Information You Should Know

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A. OVERVIEW:

The need for "estate planning" is often dismissed by individuals as being a luxury which can only be utilized by the wealthy. However, anyone who owns any property has need for at least some knowledge of estate planning in order to determine who will receive his or her property at the time of death. The term "estate planning" is not restricted to planning or drafting of wills for individuals who will have a federal estate tax consequence at death. "Estate planning", when used in its broadest sense, is necessary for the husband and wife who want to leave as much as they can to their surviving spouse for that surviving spouse's economic well-being and protection. It is also necessary for the young husband and wife who have several children, a house with a large mortgage, a small savings, and life insurance. Estate planning is also necessary for the single individual with no children who desires to distribute his or her property in a manner different from the statutory course. Do not let the term "estate planning" fool you. It applies to each of us in some form or fashion.

The purpose of this summary is to provide you with some information and education with respect to estate planning in Louisiana. This summary is not all encompassing but is intended to give you the basics with regard to Louisiana law and certain aspects of federal law as those laws affect estate planning. You should, of course, consult your legal advisor with respect to any specific legal question.

There are two fundamental objectives which can lead to successful estate planning. The individual interested in estate planning should provide his or her advisor with all pertinent family, business, and financial information so that the advisor can grasp an accurate picture of the circumstances relating to the individual. Second, the individual should generally understand the nature of the estate plan and how it will work. If these two objectives can be accomplished, then a workable estate plan can result.

In examining this summary, you will encounter many new terms. Every effort will be made to define those terms throughout.

B. PROBATE VS. NON-PROBATE ASSETS:

One of the key elements in gathering information by the advisor is to classify the property of the client as either probate or non-probate assets. Non-probate assets are generally those assets which pass pursuant to the terms of a contract or an appropriately executed beneficiary designation form. The best way to define non-probate assets is to list specific examples. Life insurance policies, tax deferred annuities, individual retirement accounts, profit sharing plans, defined benefit plans, thrift plans, ESOP plans, governmental retirement plans, and U.S. Treasury obligations payable on death to another individual are specific examples of non-probate assets. Non-probate assets can also be

defined as assets which "do not pass" under the terms of a will or under the laws of intestacy. Probate assets are defined as assets which can pass under the terms of a will or which pass by the laws of intestacy. Probate assets will generally include real estate, bank accounts, certificates of deposit, stocks, bonds, mutual funds, cars, personal property, and generally any other property which an individual has under his control but which are not payable to a beneficiary pursuant to an agreement or a contract.

It is important to make the distinction between probate and non-probate assets because the client should know how those assets would be disposed of at the time of death and the rules governing the disposition of those assets. In the course of this summary, reference will be made to probate and non-probate property.

C. COMMUNITY PROPERTY VS. SEPARATE PROPERTY:

A classification of property which should be made early on is the distinction between separate property and community property. Louisiana law imposes the "legal regime of the community of acquets and gains," in the absence of an agreement or contract to the contrary between a husband and wife. Each spouse owns an undivided one-half (1/2) interest in the community property. The term "community property" includes property acquired during the existence of the marriage through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community property; and all other property not classified by law as separate property. There is a presumption in the law that property in the possession of a spouse during the existence of a marriage is presumed to be community, but either spouse may prove that this property is separate.

The separate property of a spouse is exclusive. Separate property includes property acquired by a spouse prior to the establishment of a community property regime (i.e., prior to marriage); property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritance or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the spouse; damages or other indemnity awarded to a spouse in connection with the management of separate property; and things acquired by a spouse as a result of voluntary partition of the community during the existence of a community property regime. Also, damages due to personal injuries sustained during the existence of the community by a spouse are separate property. Nevertheless, the portion of the damages attributable to expenses incurred by the

community as a result of the injury, or in compensation of the loss of community earnings, is community property.

The following might be helpful. Let us assume that both spouses are employed, and each brings home a paycheck. Both paychecks are deemed to be community property. Let us assume that the parents of one of the spouses makes a donation of $10,000.00 each year solely to that spouse. The $10,000.00 is the separate property of that spouse who received it. However, the earnings on this gift are community property.

D. MATRIMONIAL AGREEMENTS AND DECLARATIONS OF FRUITS OF SEPARATE PROPERTY:

Prior to entering into marriage or within one year of moving to Louisiana from another state, the husband and wife may execute what is known as a matrimonial agreement or prenuptial agreement to avoid the application of Louisiana's community property laws. Even after marriage or after the one year period above, the husband and wife can seek to enter into a matrimonial agreement with court approval.

If either spouse has separate property, the fruits and revenues from that separate property are community property. A spouse having separate property may execute what is known as a Declaration of Reservation of Separate Fruits and record this declaration in the conveyance records of the parish of domicile and in the parish where any immovable property is located in order to maintain the fruits and revenues from the separate property as separate property also. Notice must be given to the other spouse.

E. LAWS OF INTESTACY – LOUISIANA:

The laws of the State of Louisiana provide for the distribution of the property of an individual if he or she dies without a will. Let us assume that there is a husband and wife and that they have three children. Let us further assume that the husband dies owning both community property and separate property. If the husband dies intestate (without a will), then the separate property of the husband is inherited entirely by the three children in full and complete ownership. The husband's one-half (1/2) of the community property is also inherited by the three children subject to the right of usufruct in favor of the surviving wife for her lifetime or until remarriage. The surviving wife, of course, already owns an undivided one-half (1/2) interest in the community property. The right of usufruct means that the surviving spouse has the right to the fruits and revenues and the use of the property subject to the usufruct. The right of usufruct over real estate entitles the surviving spouse (usufructuary) to the right to live on the property or to rent the property and collect rents. The usufruct over stocks and bonds entitles the usufructuary to the dividends and interest therefrom, but would not entitle the usufructuary to sell the property subject to the usufruct. The right of usufruct over cash entitles the usufructuary

to spend the cash. In this context, the term "cash" includes such items as savings accounts, checking accounts, certificates of deposit, or money market funds.

Let us assume that there is a husband and wife and no children. Let us assume that the husband dies intestate and owns both community and separate property. In this instance, the community property of the deceased husband is inherited by the surviving spouse. The separate property of the deceased husband is inherited by the brothers and sisters of the deceased husband subject to the usufruct of the deceased husband's parents, if living. If any of the deceased husband's brothers or sisters are deceased, then the nieces and nephews take a share by way of representation. If the deceased husband has neither descendants, nor parents, nor brothers, sisters, or descendants from them, then his spouse, not judicially separated, takes his separate property.

Finally, if we assume an unmarried individual who has never had any children, all of his property will be separate property (because he is not married) and will pass to his brothers and sisters subject to his parents' usufruct in the same manner as the separate property of the husband in the above example. If the unmarried individual does not have brothers, sisters, descendants of brothers or sisters, or parents, then his property would pass to other ascendants (i.e. grandparents) or, if none, to his other collateral heirs nearest in degree.

The Louisiana Civil Code provides for how a person's property is distributed under other circumstances when the deceased dies without a will. Keep in mind that dying intestate, or without a will, is not the same as forced heirship.

F. FORCED HEIRSHIP:

The State of Louisiana is the only state in the United States which has the concept of forced heirship. Under the concept of forced heirship, if an individual makes a will and fails to leave his forced heirs a certain portion of his property, then those forced heirs can claim a portion of the deceased parent's property. The current law provides that the class of forced heirs is limited to children who are twenty-three years of age or younger at the time of the decedent's death or descendants of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of death of the decedent. Under this law, if a deceased parent has one forced heir, the forced heir can claim one-fourth (1/4) of the parent's property. If the deceased parent has two or more forced heirs, then those forced heirs are entitled to claim one-half (1/2) of the parent's property. Keep in mind that even though the forced heirs have the right to claim a portion of the deceased parent's property, the deceased parent can still provide a usufruct for life and beyond remarriage in favor of the deceased's surviving spouse.

It is not necessarily just children who are forced heirs. For example, if a child predeceases his father but leaves his own children, i.e., grandchildren, then those grandchildren are forced heirs to their grandfather's estate provided that the grandfather's child would have been twenty-three years of age or younger at the time of the grandfather's death. In other words, the grandchildren are entitled to step into the shoes of their deceased parent to inherit whatever he would have been entitled to but no more than that. If the deceased parent would not have been a forced heir if he had been alive, then the grandchildren will not be forced heirs. However, a grandchild who is permanently incapable of taking care of his person or administering his estate at the time of the grandfather's death may "represent" his predeceased parent regardless of what that parent's age would have been. Also, children who are adopted have the same rights as forced heirs and intestate heirs.

The forced heirship law not only applies to property which the deceased owns at the time of his death, but also applies to previous donations made within three years of death. At the time of the deceased's death, an aggregate is formed of all the property belonging to the deceased at the time of his death, plus there is fictitiously added to this amount the property disposed of by donation inter vivos made within three years of death, according to its value at the time of the donation. From this amount is deducted the debts of the estate. The percentages to which the forced heirs are entitled are then applied to this aggregate mass of property. If the amount of property that is actually in the estate is less than the proportion to which the descendants are entitled, then those prior donations by the deceased can be reduced.

Certain property is not subject to the claims of forced heirs. This property includes amounts in individual retirement accounts, profit sharing plans, thrift plans, governmental retirement plans, and other such accounts; insurance proceeds payable on the deceased's life and premiums paid by the deceased for such policy; U.S. Savings Bonds and other U.S. Treasury obligations payable to a beneficiary; presumably out of state real estate; donations made to a spouse of a prior marriage and donations made to certain charitable organizations more than three years prior to the deceased's death. Ordinarily, individuals think of tax deferred annuities in the same light as insurance proceeds. However, Louisiana jurisprudence has determined that tax deferred annuities, even though payable to a specified beneficiary, are subject to the claims of forced heirs.

Descendants can be disinherited for certain causes that are defined in the Louisiana Civil Code. The most recent cause added to the Louisiana Civil Code for disinheritance is the situation in which a child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after the child has attained the age of majority, except when the child is on active duty in any of the military forces of the United States.

G. COLLATION:

We have discussed the concept of forced heirship and the fact that donations made during a person's lifetime are subject to reduction at death if a forced heir's forced heirship portion is not satisfied. Parallel to this rule runs the rule of collation. The right to demand collation is confined to descendants of the first degree who qualify as forced heirs and only applies with respect to gifts made within three years of death, valued as of the date of the gift. Collation concerns donations made during the lifetime by a parent to a child or children. Louisiana law presumes that parents desire to treat their children equally. If a parent has, for example, four children and donates to one of those children $10,000.00 but does not donate a similar amount to the other three, then upon the death of the parent, then if the other three children are forced heirs, they can request collation in order to equalize the distributions to all children. Collation provides an equalizing effect. The parent can waive collation by including appropriate language in the act of donation or in an appropriate will.

H. WILLS AND TESTAMENTS:

Louisiana currently has two different types of wills: the notarial will and the olographic will. The primary type of will which is used in Louisiana is known as the notarial will. This will is normally type-written and must be executed in the presence of a notary and two witnesses after the testator has declared to the notary and witnesses that he or she has read the will and that the will is the last will and testament of the testator. The testament must be dated and all parties must sign in the presence of each other. This is a self-proving will. The second type of will which is regularly used in Louisiana is the hand-written or olographic will. The only requirements for this will to be valid is that it be entirely written, dated, and signed in the hand of the testator. The term "testator" is used for a male who executes a will. The term "testatrix" is used for a female who executes a will. A codicil to a will is basically an amendment or a supplement to a will which has been previously executed.

Out of state wills can be probated in Louisiana. However, it is suggested that if you previously executed a will in another state and you move to Louisiana, that you execute another will because of Louisiana's unusual laws with respect to community property and forced heirship.

I. CONDITIONAL BEQUESTS AND COMMON DEATHS:

Louisiana law does allow for conditional bequests if a legatee named in a will does not survive the testator for at least six (6) months. If the legatee does not survive the testator for at least six (6) months the testator can provide in the testament that the legacy will lapse. Similarly, if the testator and a legatee die in a common disaster, such as

an airplane crash, Louisiana law provides that the testator can provide in his will that the testator survived the legatee. Of course, this is merely a fiction in the law but it is permitted.

J. TRUSTS:

Louisiana has recognized the use of trusts for a number of years. However, Louisiana law with respect to trusts is not as flexible and as encompassing as provided under the laws of other states. Basically, an individual will use a trust when he or she wants a third party to manage property either for themselves or for another party. Pursuant to the terms of the trust, the settlor (creator) or testator directs how the property will be managed, the terms of distribution, and the period for which the trust will stay in existence. The trustee must look to the terms of the trust instrument, whether it be an inter vivos trust (created during lifetime) or a testamentary trust (created under a will), for purposes of administering the property subject to the trust.

There are many uses for trusts in estate planning. Several examples may be helpful. Let us assume that grandparents desire as part of their estate plan to transfer property to grandchildren by way of annual gifts of $14,000.00 per year. Let us assume that the grandparents want the donations to be managed and held for the grandchildren at least through age 25. In this case, the grandparents may have a desire that the monies be utilized for the college education of the grandchildren. The grandparents in this case may want to set up an inter vivos trust wherein the grandchildren are named as the income and principal beneficiaries with instructions to the independent third party as trustee to manage and distribute the income and principal for the grandchildren's college education. This is somewhat oversimplified but is a normal scenario. A "Section 529 Plan" should also be considered in this scenario because it may have advantages over a trust.

A second scenario could be the use of a "testamentary trust" under the terms of a will. In this situation, the parent as testator could establish a trust in the will to become effective in the event of the parent's death. No assets flow to the trust until the death of the parent. In the will, the parent would direct the property to pass to the trust, would designate the appointment of a trustee and the terms of management and distribution of the trust property for a specified period during the lifetime of the children. Assuming for the moment that there is no surviving spouse, the parent might provide that the trustee distribute all trust income to the children during the term of the trust and that one-half (1/2) of the trust principal be distributed when a child reaches age 30 and the balance when the child reaches age 40. The purpose for staggering the distribution of the trust principal is to not put all of the property into the hands of the child at one time but to allow for the child to have utilization of some of the property at specified ages.

A third use of a trust could be the utilization of what is known as a life insurance trust. Let us assume that husband and wife have a very substantial estate and desire that insurance be utilized as part of the estate plan. In such a circumstance, a life insurance trust could be established with donations being made to the trust for the benefit of the children who are the income and principal beneficiaries of the trust. The money donated to the trust could then be utilized by the children to purchase a life insurance policy on either spouse or a second to die policy on both spouses. In such circumstance, neither of the spouses would be the owners of the insurance, and the proceeds could be utilized to help pay for the estate taxes that would ultimately become due.

Much has been made recently about the use of revocable living trusts as an estate planning tool. In certain instances, a revocable living trust can provide a great deal of benefit for management purposes for those parties who cannot manage their affairs. However, the revocable living trust is not necessarily a vehicle which is going to avoid the work involved in probate and avoid the concomitant succession expenses. The use of the revocable living trust does not obviate the necessity to obtain valuations with respect to all properties in the trust for federal and state death tax purposes. The acquisition of the valuations of the properties is probably the most time consuming aspect of an estate. Many people are under the assumption that the use of a revocable living trust will avoid forced heirship. This is simply not true. Many have been led to believe that you have to use a revocable living trust in order to obtain the benefits of the federal estate tax marital deduction or the federal estate tax unified credit. This is simply not true. Most people who execute revocable living trusts also execute what is known as a “pour over will” in order to put assets into the trust that otherwise might not have been placed in the trust. The execution of the will itself will require that the will be submitted to probate and that all the other succession functions be carried out. Some who tout the living trust argue that wills are always contested. This is simply not true. Many living trusts are sold by individuals selling annuities and other products. Those these trusts are often poorly drafted and cause more problems than they were intended to solve.

K. PROBATE:

The word “probate” is generally used to refer to the process of filing a deceased individual’s will, if any, paying any final expenses and delivering the deceased’s property to his heirs or legatees. This is also referred to as a “succession” in Louisiana. There are two ways to handle a succession in Louisiana.

First, the deceased’s heirs or legatees can accept the succession without an administration. An administration of a succession involves the appointment of someone to gather the deceased’s assets, sell any assets necessary to pay debts and taxes or divide the property, and then deliver the property to the heirs or legatees upon the conclusion of

the administration. If the deceased did not owe significant debts and the property can be divided easily, many successions are handled without a formal administration. Such a succession will involve gathering the information for the deceased's assets and debts, paying any taxes due and filing the necessary pleadings with the proper court to place the heirs or legatees into possession of their shares of the deceased's property.

A variation of the succession without an administration is the "small succession" also referred to as a "succession by affidavit". If the deceased was a Louisiana resident and died without a will and with all property having a value of $125,000.00 or less, then the succession can normally be completed by affidavit. There is a similar rule for non-residents which may be used if they died with a will also. No formal court filing is needed for the small succession. The affidavit can then be used to transfer titles to vehicles as well as bank accounts, stocks, bonds, and personal assets.

If a formal administration is needed, then an administrator (if the deceased died without a will) or an executor (if the deceased named one in a will) can be appointed by the proper court to administer the succession of the deceased. The administration can be as simple or as complicated as needed depending upon the work needed to wind up the deceased's affairs and distributed the property to his heirs or legatees. The administrator will sell any assets to be sold, pay any debts or taxes and then file pleadings with the court to distribute the remaining property to the deceased's heirs or legatees to conclude the administration. The enactment of the "Independent Administration" discussed below has improved the process of administering successions in Louisiana by giving administrators greater powers to act without court supervision which reduces costs significantly.

L. EXECUTORS, TRUSTEES, AND TUTORS:

When an individual dies with or without a will it may be necessary for an individual or an entity to take over the affairs of the decedent and wind up those affairs through the succession. If an individual does not have a will and a succession representative is appointed, that person is named the "administrator" of the succession. If an individual has a will and has named a person to handle the succession affairs, that person is termed the "executor". Under Louisiana law the succession representative is entitled to a fee of 2-1/2% of the <u>gross probate estate</u>. The succession representative does not have to take the fee if he or she declines to take the same. The fee is subject to federal income tax. The succession representative, whether it be the administrator or executor, is charged with managing the property included in the estate, paying the debts and expenses of the deceased person, filing all appropriate income tax returns and filing the federal estate tax return. The succession representative is charged with distributing the estate as provided under the laws of intestacy or pursuant to the terms of the will. Louisiana has adopted the concept of "Independent Administration". Under the statutory provisions, if provided by

will or if agreed to by the heirs and legatees, the Executor or Administrator does not have to seek court approval to dispose of assets or carry out succession functions.

If a trust is established under the will, then once the succession is closed the trustee designated in the testament will take over the management of the succession property from the executor. The trustee will be in for a longer period of management than the executor.

If there are minor children of the deceased and there is no surviving spouse, then the deceased may want to name a tutor for the minor child or children. The term “tutor” is synonymous with the term “guardian.” The tutor will actually take physical custody and control of the minor child or children until the child or children reach age 18. The tutor can utilize distributions from the trust for the benefit of the minor child or children or can utilize the assets of the succession to which the children are entitled for their support, health, and education.

M. FEDERAL GIFT TAX:

The Internal Revenue Code allows an individual to make annual gifts which are excluded from the federal gift tax when the value of the property given does not exceed $15,000.00 (up from $14,000.00 prior to 2018). For instance, a husband and wife having three children could donate federal gift tax free, up to $90,000.00 per year. This arises because both parents can donate $15,000.00 per year which amounts to $30,000.00 per child. By simply making annual gifts utilizing the $15,000.00 exclusion, a substantial reduction can be made in an individual’s estate.

Also, if one of the parents has separate property and that property is donated, the $15,000.00 exclusion can still be utilized by the spouse who does not have an interest in that separate property. An election can be made on the gift tax return to “split” the gift.

The lifetime federal gift tax exemption is approximately $11,200,000.00 per person for 2018. This exemption is in addition to the $15,000.00 annual gift tax exclusion discussed above. The $15,000.00 annual exclusion is subject to increase for inflation. If a donor exceeds the annual exclusion in any year, then he will use a portion of his $11,200,000.00 gift tax exemption before owing any gift tax. The federal gift tax exemption is subject to increase each year for inflation but will sunset after December 31, 2025 unless Congress acts to maintain it. The State of Louisiana no longer has a gift tax.

N. LOUISIANA INHERITANCE TAX:

The State of Louisiana has eliminated its inheritance tax for deaths after July 1, 2004.

O. FEDERAL ESTATE TAX:

The Internal Revenue Code provides for a federal estate tax and a federal gift tax. The federal estate and gift tax laws run in tandem. During an individual's lifetime, in addition to the $15,000.00 per year annual exclusion for gifts, an individual can donate up to approximately $11,200,000.00 of property in value without liability for federal gift tax in 2018. If the donations exceed the gift tax exemption in value then a federal gift tax is imposed at a 40% tax rate. Any gift tax exemption used during life will, in effect, reduce the amount of estate tax exemption available at death. If no gift tax exemption is utilized, then the estate tax exemption will be approximately $11,200,000.00 for 2018 but will sunset after December 31, 2025 unless Congress acts to maintain it.

Keep in mind that in Louisiana, a community property state, that each spouse can utilize his or her exemption equivalent with respect to his or her half of the community property. Accordingly, if husband and wife own $22,400,000.00 in community property, each spouse's interest therein is $11,200,000.00. Because each has an estate tax exemption of approximately $11,200,000.00, there would not be any federal estate tax consequence in the event of the death of the first spouse.

The federal estate tax law allows for a concept known as "portability" which means if one spouse dies but does not have a taxable estate at least equal to the estate tax exemption, then the surviving spouse can tack on the unused exemption to his exemption at his later death (subject to an election and special rules.)

One important objective in federal estate tax planning is making maximum use of the deceased's applicable exclusion amount (exemption equivalent or unified credit). This is particularly applicable when the probate assets are low in relation to non-probate assets such as 401(k) accounts or IRA accounts. Special "renunciation" or "disclaimer" language should be included in beneficiary designations to accomplish this result.

Since 1982, the Internal Revenue Code has provided rules for the "deferral" of the federal estate tax in the circumstance of married persons. This deferral is termed the "federal estate tax marital deduction". The federal estate tax marital deduction can come into play in several ways:

(1) Outright bequest to a surviving spouse or receipt of assets by way of beneficiary designation form;

(2) Confirmation of a lifetime usufruct under Louisiana law;

(3) Designating the spouse to receive annually all of the income of property held in trust.

In the first circumstance of property passing outright to the surviving spouse, the marital deduction is automatic. In the second two circumstances of the confirmed lifetime usufruct or the qualifying income interest, the federal estate tax marital deduction must be elected on the federal estate tax return. The second two situations involving the marital deduction elections are sometimes referred to as the QTIP elections. Again, the purpose of the marital deduction is to defer the federal estate taxes until the death of the surviving spouse. The marital deduction can be a useful tool at the first death. A surviving spouse can take advantage of the portability election mentioned above.

Deductions are allowed under both the federal gift and estate tax rules for charitable gifts. This includes both outright gifts as well as transfers to charitable remainder trusts.

Under a charitable remainder trust, the donor transfers property, in trust, reserving an income interest to himself or others with the property to ultimately pass to a charity as the principal beneficiary.

Under a charitable lead trust, the charity receives the income from the property transferred in trust for a specified time, with the property passing at the end of that term to a principal beneficiary designated by the donor.

Bequests or donations to grandchildren and others may be subject to additional tax unless they fall under the generation skipping-transfer tax (GST) exemption.

P. INCOME TAX ISSUES RELATED TO ESTATE PLANNING:

Generally, most property received by inheritance will not be subject to income tax by the recipient. For example, if a person leaves $10,000.00 cash to a child, that child does not include the $10,000.00 in income for income tax purposes. However, some assets have accrued income built in to them which will be subject to tax in the hands of the deceased's successors in the same manner as they would have been taxed to the deceased. A common example of this is a 401(k) or other qualified retirement plan. When a participant in a 401(k) plan receives distributions upon retirement, the amounts distributed are taxable to the participant for income tax purposes. The same result occurs for the participant's beneficiary if the participant dies before receiving all of the funds from the plan. Other types of assets which have the same built-in income tax are IRA's

(other than Roth IRA’s), commercial tax-deferred annuities and some United States Savings Bonds.

Upon the death of a participant or IRA owner, beneficiaries will often have an option to receive the funds in a lump sum or in several distributions over some number of years (often the beneficiary’s life expectancy). If the amount is significant, it is often better from an income tax standpoint to take the distributions out over time to continue benefitting from the tax-deferred growth in the account and to spread out the income tax over time to take advantage of the marginal income tax rates. A lump sum distribution would trigger the tax on all of the funds which could be at the maximum income tax rate (unless the beneficiary is the deceased’s spouse who can roll the distribution over into his own IRA).

Federal income tax law provides that in the event of death, the deceased's property receives a new income tax basis equal to the value of the property at the date of death. Let's say that an individual purchases a tract of land for $50,000.00. The purchase price would be his income tax basis so that if he sells the property for $80,000.00 he will have a taxable gain of $30,000.00 ($80,000.00 – $50,000.00). If the individual dies owning this same property, with a fair market value of $80,000.00 as of the date of death, then the new income tax basis is "stepped up" to $80,000.00. In this case, if the heirs or legatees of the property sell it for $80,000.00, they have no taxable gain. If husband and wife have community property, and one dies, then the whole community property (the deceased spouse's half and the surviving spouse's half) can receive a "stepped up" income tax basis. New IRC §6035 requires reporting the fair market value of the deceased's property to both the heirs and legatees receiving the property and to the IRS.

Q. BURIAL INSTRUCTIONS AND ORGAN DONATION:

If you are concerned about burial, cremation or other internment of your remains and want to make certain of the disposition, you must execute a “written and notarized declaration”. Otherwise there is an ordering of the persons who can make the decision. In general that order is (1) surviving spouse; (2) a majority of the adult surviving children; (3) surviving parents; (4) majority of adult siblings; (5) a majority of the adult persons standing in the next degrees of kindred as provided in the laws of intestate inheritance. You should certainly have a declaration in place if you wish to be cremated. The provision for donation of organs should be made through the Louisiana Department of Public Safety through your driver’s license application.

R. INSTANT REPLAY – IT’S NOT JUST FOR FOOTBALL

Louisiana Code of Civil Procedure Article 2904 allows for the admissibility of videotape evidence of the execution of a testament. The videotape evidence may be

entered in a contradictory trial to probate a testament or in an action to annul a probated testament. For the videotape evidence to be admissible, the testator must be sworn by a person authorized to take oaths and the oath must be recorded on the videotape. The videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following:

1. The proper execution of the testament.
2. The intentions of the testator.
3. The mental state or capacity of the testator.
4. The authenticity of the testament.
5. Matters that are determined by a court to be relevant to the probate of the testament.

Videotape is defined broadly under the new provision.

This opens a whole new Pandora's box to the world of will executions. Here are a few thoughts. Wills are normally not "read" at the time of execution unless the testator is sight impaired. Is there a new requirement that wills be read when videotaping is used? Will there be some inference drawn in a will contest if the videoing is not done? Could heirs make claims against the attorney preparing the will if videotaping would have proved proper execution of the testament? What will the cost of videotaping be? In order to determine the intentions of the testator, or the mental state or capacity of the testator, does the attorney have to ask questions of the testator and what questions are sufficient? Will the attorney have to have a script to make certain all issues are covered during the videotaping? How many copies of the videotape do you need? Clearly the videotape can be used to annul a testament so in effect it can be used against the testator who has requested the taping. Do attorneys have to offer videotaping to their clients or is it just a tool of the trade for the attorney if he feels there will be an attack on the testament. This list is not exhaustive but shows just some of the issues that may be raised.

S. MISCELLANEOUS ITEMS:

1. If you own stock in an S corporation you should let your legal advisor know prior to the drafting of the will. The legal advisor should provide special drafting language if a trust is to be utilized for holding the S corporation stock. Otherwise, the S corporation election could be lost.

2. If you own real estate outside of the State of Louisiana you should tell your legal advisor. You may want to make special disposition of this property under the terms

of the will. Some states allow for real property to pass subject to a survivorship provisions included in the deed.

3. You should review your will every three to five years because of changes in circumstances, changes in the law, changes in assets, and changes in family relationships.

4. An appropriate estate plan would also consider use of a general durable power of attorney and discussion regarding the use of a living will. A general durable power of attorney can be utilized by an individual who wants to make sure that his agent will handle his affairs if he becomes incapacitated. A living will is a declaration indicating that the declarant does not desire to have artificial life sustaining procedures taken if the declarant is certified by two physicians as having a terminal and irreversible illness.

5. The biggest part of your estate may be your IRA rollover account or your retirement plan account. While these are non-probate assets, special planning is in order to consider estate tax issues, as well as income tax issues. Consider including renunciation or disclaimer language in a beneficiary designation form to allow for optimum use of the exemption or applicable exclusion amount for federal estate tax purposes.

6. Discuss with your legal advisor the cost for the estate planning services during the initial meeting. No question is ever insignificant. Remember that understanding your estate plan is a substantial part of the process. Ask questions if you do not understand or if something is not clear.

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