

ESTATE PLANNING in uncertain times

BY Katie Perleberg

What business owners and professionals need to know to keep hard-earned assets safe when they are gone

There have been recent tax law changes. The political climate is uncertain. People are living longer, and the incidence of dementia is on the rise. This article addresses topics that business

professionals and owners should consider while doing their 2018 estate planning. This column addresses general estate planning topics and is not meant as actual legal advice.



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I understand the estate tax law has changed? What do I need to know about that, so I can minimize estate taxes?

The federal estate tax law changed as of January 1, 2018. The new law doubled the estate tax exemption from \$5.49 million to \$11.18 million. This means that if a person dies in 2018 with a total estate of less than \$11.18 million—which consists of assets owned at the time of death plus the value of certain lifetime gifts—there is no federal estate tax owed. If the total estate of a deceased person is more than the exemption, then a 40 percent estate tax is due on the value of the assets that exceed the exemption amount.

Additionally, another estate tax law called portability allows married couples to share their exemptions, effectively sheltering up to \$22.36 million from estate tax. The exemption will increase slightly with inflation each year until Jan. 1, 2026, at which time it is scheduled to revert back to 2017 levels—\$5.49 million, plus inflation adjustments.

The doubling of the exemption means that very few people will be subject to federal estate tax. But given the temporary nature of the exemption increase and the uncertainty surrounding what Congress will do with tax laws in the future, business professionals and owners should regularly review their estate plan.

An estate plan usually consists of a power of attorney, health care

directive, will and possibly one or more trusts. If you have a large estate exceeding \$5 million, there are some techniques to reduce the value of your estate before the exemption reverts back to original levels, such as transferring life insurance policies to irrevocable trusts or making properly structured gifts to children, trusts or charities. If federal estate tax is not a concern at this time, there are a lot of other good reasons to have an up-to-date estate plan, such as asset protection, income tax considerations or fiduciary nominations.

North Dakota does not have its own state estate tax. But Minnesota does, and it operates differently than the federal estate tax. The exemption is a lot lower (\$2.4 million in 2018) and there is no portability between spouses. Minnesota residents, and even North Dakota residents who own Minnesota real estate, should visit with their attorney or tax advisor about Minnesota estate tax planning.

How can I divide my estate fairly and address each child's different role related to the business?

This is a common concern of small business owners and other business professionals because families are complicated, and children have varying needs, interests and capabilities. One child might be involved in the family business. One might be interested

4 MILLION COMPANIES

According to U.S. Census Bureau data, about two-thirds of businesses are owned by baby boomers in the U.S., or about four million companies.

in the business, but it may be too soon to tell if there is a future in it. One might struggle with managing money. While you want to account for these differences, you still want to treat each child fairly.

It is very common for people to divide their estate equally among all the children, but to structure their respective inheritances to account for their specific situations. The child that is working in the family business might inherit part or all of the business using a combination of several business succession techniques. The other children could still inherit an equal share, but their inheritances might consist of other assets, such as life insurance proceeds, investments or non-voting (i.e. financial only) interests in the business. The spendthrift might receive his or her share in a trust that has certain restrictions on how the funds can be accessed. Trusts are a great vehicle for structuring estate planning, and there are a lot of ways that trusts can be customized for different and changing circumstances.

What's the difference between "revocable" and "irrevocable" and how would that apply to my situation?

The terms "revocable" and "irrevocable" usually refer to different types of trusts. Revocable trusts are often used as substitutes for wills. Like the term denotes, a revocable trust can be revoked at any time the creator of the trust (the "trustor") is alive and competent. It can also be modified and amended. It allows the trustor to retain total control over the assets until the trustor's death, at which time the assets will pass to the beneficiaries in the manner set forth in the trust document. At the trustor's death, the trust becomes irrevocable and cannot be changed anymore.

Revocable trusts are also used regularly for probate avoidance. If assets pass through a person's will, a court has to approve the will and appoint the personal representative. Because it is a

court process, it is a public record and may cause delays in the administration of a person's estate. Therefore, you may want to avoid that process and maintain more privacy by having your estate pass to your heirs through a revocable trust instead of a will.

Irrevocable trusts, on the other hand, likely cannot be changed or revoked. They are often used by trustors to hold gifts for beneficiaries. Instead of giving money or assets directly to the beneficiary, the trustor gives them to the trust for the benefit of the beneficiary. There are many reasons a person might do this—estate tax minimization, asset protection or business succession, to name a few.

Why is it a good idea to name multiple fiduciaries?

Anybody who has acted as power of attorney or health care agent for

another person or has been named in a will as personal representative (otherwise known as executor), guardian for minor children, or trustee of a trust, knows that it can be a daunting task. All those roles are collectively called "fiduciaries." One way to alleviate this concern is to name multiple fiduciaries. In your power of attorney, for example, you could name two separate individuals as your attorney-in-fact, each of whom would be authorized to act individually and without the consent of the other. That way both people will have the power to act on your behalf if you become ill or incapacitated or simply need some help. They can share responsibilities and split up the work. This arrangement works very well when the fiduciaries know each other and get along well, so you should make your fiduciary selection carefully.

What can I do if one of my fiduciaries is disabled or gets dementia?

It is always a good idea to talk to the people you name as fiduciaries to make sure they are willing to serve. Even if the fiduciaries say they would be willing to serve, it is impossible to know whether that will still be the case when the time comes. The person could be deceased, suffering from dementia or otherwise unavailable.

If your fiduciary gets dementia, he or she may not know that their ability to handle your affairs is compromised and that it is time to step down. Therefore, it is best to name successor fiduciaries in the documents. If your primary choice is unable or unwilling to serve, the document will automatically allow for the successor fiduciary to step in. The documents should contain mechanisms for removal and replacement of fiduciaries and clear criteria for determining when a person is considered disabled or incapacitated.

The "multiple fiduciary" arrangement explained in the last question works very well in this situation. A common arrangement for married couples with adult children is for a person to name his or her spouse along with one of the children on the power of attorney, each of whom can act individually and without the consent of the other. The couple will be able to act for each other as long as they are able, but as couples age and dementia becomes a concern, the named child has authority to act. This avoids the need for a formal resignation from the spouse or a determination of incapacity. The child can simply step in and help as needed.

Most business professionals should review their estate plans with their attorney every five to 10 years, depending on how much has changed in their lives. Changes in the organization of someone's business, marriage or family, or moving to another home can be relevant to your estate plan. And changes to the tax laws are another reason to review your plan. ■

46.8 MILLION

According to Alzheimer's Disease International, there were an estimated 46.8 million people worldwide living with dementia in 2015 and the estimated economic impact worldwide was \$818 billion.