Gifts That Keep On Giving

Helpful Tools for Deathbed Estate Planning

by Craig D. Solar, Esq.

Coping with failing health or terminal illness is one of the hardest things anyone ever has to face. Furthermore, when time is limited, you are faced with making immediate end-of-life decisions, including how to best provide for your family's financial future.

Take comfort in knowing that there are "deathbed" strategies that you can implement at the last minute to minimize estate taxes and enhance your ability to satisfy your family's needs after you are gone.

Tax-free giving

Giving gifts may be an effective strategy for deathbed estate planning. Although gifts may be subject to gift tax, there are exclusions that let you make tax-free gifts without using your $5 million lifetime gift tax exemption (which is scheduled to be reduced to $1 million in 2013, unless Congress changes the current law):

Annual exclusion gifts. You can make an unlimited number of $13,000 current interest gifts, such as gifts of cash or property, per recipient each year. Married couples can combine their gift-giving power and give away $26,000 worth of cash or property tax free, per year, per recipient. This will reduce the size of your estate, which in turn will reduce your estate tax bill.

Gifts for medical or educational expenses. You can give away an unlimited amount to pay for a person's medical or educational expenses. You must make these payments directly to the institution (the school or hospital) and not to the beneficiary. When gifting educational expenses, only payments for tuition are covered for the exemption, not books or room and board. Also, medical expenses reimbursed by insurance are not eligible for this exemption.

Gifts in decoupled states. Many states, like New York, do not have a gift tax, even though they have an estate tax. This means that a resident of such a state can achieve tax savings by making gifts because, once made, the gifted property reduces the resident's state estate tax.

SL TRUSTS & ESTATES SOLAR LAW, PLLC

800 Westchester Ave. ◊ Suite N641 ◊ Rye Brook ◊ NY ◊ 10573 ◊ Tel: (914) 269-8783 ◊ Fax: (914) 297-6646 ◊ Craig@SolarLawFirm.com

Deathbed estate planning considerations

When considering deathbed strategies, be aware of the following:

Gifting appreciated assets. A gift of an appreciated asset made immediately before death is worth less to the donee than the same gift would be worth if it were made upon the donor's death. This is because a legatee's cost basis of an inherited asset is the fair market value of the asset on the date of death, whereas a donee's cost basis of a gifted asset usually is the same as the donor's cost basis.

For example, you have 300 shares of XYZ stock that you purchased for $10,000 15 years ago that are now worth $50,000. If you gift the shares to your grandchild, Tim, his cost basis in the stock will be $10,000. If Tim receives the XYZ stock as an inheritance, and it has a value of $50,000 on the date of your death, Tim's cost basis in the stock will be stepped-up to $50,000.

Gifting depreciated assets. If you have a depreciated asset and can use the loss, you should sell the asset so that you can take the loss on your income tax return, and use the cash proceeds for the gift. If you can't use the loss, you can gift the depreciated asset itself. Gifting the depreciated asset will not shift the loss to the donee because the donee's basis in the gifted asset for loss purposes will be its lower fair market value on the date of the gift. However, for gain purposes, the donee can use your higher basis if the donee sells the asset in the future for a value that exceeds your basis. Note, that a transfer of this asset at death would eliminate your higher basis for gain purposes as well as for computing losses.

Borrowing money to make gifts. If you do not have high basis assets or cash to make deathbed gifts, you can use your appreciated assets as collateral for borrowing cash to make the gifts. After death, the basis in the appreciated assets will be "stepped-up." The assets can then be sold with no capital gains taxes, and the cash proceeds can be used to repay the loan.

Establishing a family limited partnership (FLP). An FLP created immediately prior to death may not work because the IRS might determine that the FLP was established to avoid paying taxes, rather than for legitimate business purposes.

Setting up an irrevocable life insurance trust (ILIT). To achieve its intended tax benefits, an existing insurance policy must have been gifted to the ILIT at least three years before the insured's death. If the policy is purchased by the ILIT, however, you could avoid this three-year rule.

It's never too late

Ideally, the best time to plan your estate is when you're in good health and before serious illness strikes. Even so, you can have peace of mind knowing there are some last-minute steps that you can take to ensure the financial welfare of your loved ones tomorrow.

A message to clients and friends:

I hope you found this Article informative and useful. If you would like further information about the topic discussed in this Article, or any other topic involving your estate planning and wealth transfer objectives, please call me and let me know how I can be of assistance.

Craig D. Solar, Esq.
Solar Law, PLLC
800 Westchester Avenue
Suite N-641
Rye Brook, NY 10573
Tel: (914) 269-8783
Fax: (914) 297-6646
Craig@SolarLawFirm.com

Mr. Solar counsels and represents clients in all aspects of estate planning, including planning for wealth transfers, business succession, charitable giving, asset protection and individuals with special needs. He also advises clients regarding estate and trust administration matters.

The goal of the firm is to ensure the most expert representation with regard to our clients' needs and objectives, while remaining involved in the very human side of our clients' legal issues, guiding them through critical decisions and offering counsel and comfort in difficult times.

Prior to founding Solar Law, PLLC, Mr. Solar was a partner in a prominent White Plains law firm and was a senior associate at Weil, Gotshal & Manges LLP, a well known international law firm.

Mr. Solar frequently lectures on subjects relating to tax law and trusts and estates law, including programs sponsored by Pace Law School, the New York State Bar Association, Lorman Education Services, BNY Mellon, and the Rotary Club of White Plains .

"There are two systems of taxation in our country: one for the informed and one for the uninformed." *Honorable Learned Hand, US Appeals Court Justice*

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