RESOLUTIONS FOR YOUR ESTATE

Whittier Trust

2021 New Year's Resolutions for Your Estate Plan

FEBRUARY 2021

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With the start of a new year, many participate in the practice of setting intentions or resolutions for the coming year. While you may be considering what you'd like to accomplish for 2021, now is also a good time to get your estate planning house in order.

Review Your Current Estate Plan

How old is your plan? If it has been years (or decades) since you executed your Will or Trust, now is a good time to revisit your documents. Have circumstances with your family changed? Was your trust drafted when your children were minors and they are now in their thirties? There may be a reason to revisit provisions now that children have matured, grandchildren born, etc.

Your documents may also have been drafted back when the estate tax exemption amount was smaller, which may have a bearing on formula clauses related to funding subtrusts at the death of the first spouse. With the Federal estate and gift tax exemption amount at $11,700,000 per person, as of January, 2021, it's a good idea to review these provisions with your advisors, as they may now need to be modified or removed completely to avoid funding a subtrust that may no longer provide the intended estate tax savings.

You may also need to revise your revocable trust to consider state estate tax issues. If you have changed residency, or your current state has modified its state estate tax, you may need to ensure that your trust accounts for potential state estate tax.

Revise Outdated Powers of Attorney and Health Care Directives

How current are your ancillary documents (powers of attorney, health care directives)? Older powers of attorney are unlikely to have provisions related to digital assets, as well as other clauses addressing an array of modern issues. Are your named agents still appropriate? In addition, now is a good time to review when your power of attorney is effective. Some powers are structured as "springing"-this means that until you are incapacitated, and a medical professional attests to your incapacitation, your agent cannot act. This type of power is contrasted with one often referred to as a "durable" power of attorney, which lets your agent act as soon as you sign the document. You may feel a springing power inhibits

your agent from controlling your assets unless you are incapacitated, but you should also consider that hurdle could make it difficult, time consuming, and costly to implement the power when it's really needed. The delays related to having a physician confirm incapacity, and other criteria that your document may require, can be problematic. This is not to say that a springing power is wrong (in the states the permit it) but you should revisit this with your legal counsel to discuss whether a durable or springing power of attorney is right for you.

When it comes to older health care directives and powers of attorney, you also run the risk that the medical or financial institution may question the validity of the documents. The American Bar Association Commission on Law and Aging suggests that you re-examine your health care wishes whenever any of the following "five d's" occurs:

- Decade: When you start each new decade of your life.
- Death: When you experience the death of a loved one.
- Divorce: When you experience a divorce or other major family change. (In many states, a divorce automatically revokes the authority of a spouse who had been named as agent.)
- Diagnosis: When you are diagnosed with a serious medical problem.
- Decline: When you experience a significant decline or deterioration from an existing health condition, especially when it diminishes your ability to live independently.

If you have children of college-age who are 18 or older it's also a good idea to make sure they have powers of attorney and health care directives with HIPAA authorizations in place. If your child is away at school and becomes involved in an accident or has an illness, a valid advance health care directive will allow the agent to obtain important information about the child's condition and treatment, as well as make important decisions about care, if necessary.

Lastly, make sure your agents have a copy of your current power of attorney and health care directive. It is also suggested that you provide your health care directive to your primary care physician and any specialists. Some hospitals can even keep a copy of your health care directive on file.

Look to Implement New Estate Planning Strategies

If you have a larger estate, consider implementing new estate planning strategies as part of your overall estate plan. As mentioned above, the Federal estate and gift tax exemption is $11,700,000 per person for 2021. While we cannot predict whether there will be any change to the gift and estate tax laws in 2021, now may be a good time to consult with your attorney to look into taking advantage of the high exemption amounts while we have them. Using flexible strategies, such as Spousal Lifetime Access Trusts (SLATs), irrevocable trusts with discretionary provisions, or intentionally defective grantors trusts (IDGTs), to name just a few, may be beneficial for you and your family.

Your estate planning strategy should be customized based upon your particular assets, lifestyle needs, and goals. One type of estate planning vehicle may be best for one family, but not another. When considering planning, it also important to work with your attorney, tax advisors, and wealth management team to model out and review scenarios, considering how the proposed strategy may impact your future cash needs. Now is the time to consider what your goals are related to legacy, family, and philanthropy and make sure your estate plan successfully accomplishes your intent.

Review Assets in Existing (Grantor) Trusts

For those who have already done advanced estate planning, now is also a good time to revisit executed trusts, particularly if you have a grantor trust as part

of your plan. A grantor trust is a trust in which the individual (grantor) who creates the trust is the owner of the assets and property for income tax purposes. The grantor, therefore, is responsible for paying the income tax on the income earned by the assets held by the trust.

Many grantor trusts have an express provision permitting the grantor to "swap" or substitute assets of equal value for trust assets. The grantor may also sell an asset or buy an asset from the trust with no income tax consequence.

Given the gains we have seen in the stock market over the past decade, now may be an opportune time to talk with your estate planning attorney about whether you should swap those assets out for cash or other high-basis assets so that should you die, your estate would obtain a step-up in the income tax basis of those assets.

Review your Retirement Assets and Talk with Advisors About the SECURE Act

Signed in late 2019, the SECURE Act made various changes to retirement benefits, 529 plans, and the "Kiddie Tax".

Most importantly for estate planning, the SECURE Act substantially limits "stretch" planning for distributions from IRAs following the death of the owner of the IRA. Under prior law, following the death of the IRA owner, IRA benefits could be paid over the life expectancy of a "designated beneficiary," to stretch the receipt (and, therefore, the income taxation) of retirement benefits. However, the SECURE Act requires that distributions to a designated beneficiary be made within 10 years following the death of the participant, with exceptions for five categories of "eligible designated beneficiaries." Distributions from the IRA are typically taxed as ordinary income, so the ability to stretch the receipt of those benefits as long as possible defers the time that the income tax must be paid.

For those that have significant IRAs and retirement assets, now is a good time to review the beneficiary designations to evaluate the impact of the SECURE Act on those designations. If you have or are considering naming a revocable or irrevocable trust as the beneficiary of an IRA, it is important to discuss the trust with your estate planning attorney to ensure that the trust contains certain provisions to accomplish your goals in a tax-efficient manner.

Make Sure Your Trusts are Funded

Did you buy a new home or a new life insurance policy in 2020? Many individuals succeed in creating a trust, only to fail to properly "fund" the trust. Funding a trust is the process of transferring your ownership of the assets to your trust. Once ownership is transferred, the trustee will have control of these assets. If you have a revocable trust with the intent to have it facilitate planning during your later years, and avoid probate, not transferring assets to that trust may derail those wishes.

As you purchase new assets, such as real estate, or open up a new financial account, proper attention to titling is critical. In addition, there has been a flurry of refinancing activity in the past year, thanks in part to historically-low interest rates. For those who hold title to real estate in a trust, it's a good idea to ensure that once your refinance is completed, the property is correctly titled in the name of the trust.

Make it a point in 2021 to talk to your planning team and get appropriate assets properly transferred to your trust(s).

Resolve to Administer Your Estate Properly

Most individuals think that once they've signed their estate planning documents they are done and can go home and forget about their planning. They may stick their documents in a desk drawer in their home office and hope to never think about it for years, if not decades to come. However, you should think of your estate planning documents, as "living documents" that should be revisited often. You likely review your investment portfolio and its performance at least annually and the same should be done with your estate plan.

Resolve to dust off your plan and review the administration each year with your advisors. The best plans are of little use if not administered properly. If you have irrevocable trusts it's important that formalities such as filing of tax returns, making distributions in accordance with trust terms, and having appropriate parties give authorization are respected. The same should be done with entities that may be part of your estate plan, which may require corporate filings, state payments, formalities such as minutes, etc.

Review all Fiduciary and Non-Fiduciary Positions Contained in Your Documents

Lastly, now is a good time to consider the individuals and institutions you may have in place as part of your estate plan. You may have various individuals or institutions serving as trustee, executor, trust protector, investment advisor, or in other roles. You may have also named a variety of successors to hold these positions should the need arise.

Are those that you have named still suitable? Do they have the business acumen or financial acumen to address the complexities that may be involved in fulfilling their role? Many of these positions require tax, investment, accounting, and legal expertise and the responsibilities may be great. In addition, the size of your estate may have grown considerably and your affairs increasingly complex since the time you named those to serve as part of your estate plan and it may be best to consider a corporate trustee. A corporate trustee can bring experience, objectivity, and professional resources to help ensure that the trust is administered efficiently and according to the terms of the trust.

A corporate trustee can also promote family harmony. As an unbiased, objective third party, a corporate trustee can ensure your intent is carried out, without putting your family members in difficult or uncomfortable situations. In addition, having an institution, as opposed to an individual ensures continuity of stewardship. The life of a typical trust can be decades, or even centuries, in the case of trusts created in favorable jurisdictions such as Nevada. Only a corporate trustee has the potential ability to manage the duties required to oversee the trust—from recordkeeping to asset management—over great periods of time.

There's no time like the present to comprehensively review your estate planning matters with your attorney and advisors and set yourself up for the new year ahead.

As a general rule, you want to stay out of your former state more than 183 days in each calendar year. Although you don't have to be in your new state for more than 183 days, your former state will look at how many days you spent in your new state as one factor in determining whether you have in fact established residency in the new state. The closer you are to the 183-day threshold, the more likely your former state will initiate a "residency audit," requiring you to prove that you were not in your former state for more than 183 days.

Increasingly, states are challenging former residents who attempt to change their domicile to another state. Residency audits are on the rise, particularly in states where larger numbers of residents are more likely to spend winters elsewhere. Some states are so aggressive in their pursuit of those relinquishing residency that they will conduct a residency audit after the first year an individual claims non-residency, regardless of how close the individual is to the 183-day threshold. In a residency audit, an auditor will focus on a number of factors, including where you spend your time (days in your former state, days in your new state, and elsewhere), the number of residences you own and their respective values, where you claim a homestead exemption for property tax purposes, and other factors.

Just about everything in your personal life can be

relevant in determining the true location of your tax home, and taxing authorities will focus on where you spent your money and your time. Auditors will review credit card statements to determine where charges were incurred, and can also look into cell phone records and application data that tracks your time in different jurisdictions. They will examine freeway fast-lane pass charges and records of airline frequent-flyer miles. Given the pervasiveness and personal nature of the evidence needed, it follows that a residency audit can be much more intrusive than a traditional income
tax audit.

Changing your residence can be complex, so we recommend that as part of your planning process, you consult with your Whittier Trust team, as well as your legal and tax advisors before undertaking any action.

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