Stoel Rives LLP

Estate Planning – Oregon

INTRODUCTION

Estate planning is a process through which a person plans how to transfer property to others during lifetime or at death. In addition to planning for the transfer of property, estate planning addresses the management, conservation, and enhancement of a person's assets. Estate planning may also involve minimizing or avoiding income, gift, and estate taxes. This paper discusses some of the basic components of estate planning.

WILLS

A will is a legal document by which a person, called a *testator*, directs how his or her property will be distributed at death. Oregon law requires that a will be signed in the presence of two witnesses, who must sign the will in the presence of the testator and in the presence of each other. The witnesses must understand that a will is being signed, but they do not need to know its contents.

The most important part of a will is naming the beneficiaries who will receive property at death. Alternative beneficiaries should be named to receive the property if the primary beneficiary dies before the testator. A will designates a person or institution, called a *personal representative* (also known as executor), to administer the property during probate of the will. A parent with minor children may name a person to have custody of the children, called a *guardian*, and to manage the minors' property, called a *conservator*.

Funeral and burial instructions usually are not included in a will. A will often is not consulted until after these arrangements have been completed. Therefore, it is better to communicate funeral and burial preferences to family members; we can prepare a separate document for this purpose if you wish. The same is true with respect to donating parts of one's body. (These wishes may be indicated on a driver's license or an organ donor card.) Finally, wishes concerning the continuation of life support and other medical decisions must be expressed in a separate document, called an advance directive.

Probate is a court proceeding to prove the validity of the will, to establish the legal rights of the beneficiaries to receive property owned by a decedent and to provide a method for paying claims of creditors. A will does not avoid probate. If property is owned in a decedent's sole name, the will must usually be probated to distribute the property as provided in the will.

Wills should be reviewed periodically, particularly if there is a change in a person's personal or financial situation. A marriage may revoke an existing will entirely. If a marriage is dissolved after a will is executed, the will is interpreted as if the former spouse died before the testator. The birth of a child or death of a beneficiary after a will is signed may result in automatic, and perhaps unintended, changes in the will.

A will does not become effective until death. It may be changed or revoked at any time so long as the testator is legally competent. A will can be changed by a separate document, called a codicil, which is an amendment to a will, or by a new will. An original will should

be kept in a safe, fireproof place. A person should not attempt to change a will by writing on the original will, as the writing may have the effect of revoking the will.

INTESTACY

If a person does not make a will, Oregon law will provide for the disposition of property at death. This is called intestacy. Under the intestacy laws of Oregon, property passes as follows:

1. If the decedent is survived by a spouse and children, the estate passes to the spouse if the children are also children of the spouse; otherwise, one-half passes to the spouse and one half passes equally to the children (or children of any child who has died). If there is a spouse but no children or grandchildren, the estate passes to the spouse.
2. If there are surviving children but no spouse, the estate passes equally to the children (or the children of any child who has died).
3. If there is no surviving spouse, children, or grandchildren, then the estate passes to the parents or, if none, to siblings or their children. If there are no parents, no siblings, no nieces and no nephews, the estate passes to the grandparents or, if the grandparents are deceased, to their descendants (including aunts, uncles, and cousins). If a person is not survived by any of these family members, the property will be transferred to the state of Oregon.

JOINT PROPERTY

Many people plan for the disposition of property at death by owning their property jointly with a right of survivorship. Bank accounts and securities frequently are owned in this manner. Also, a husband and wife may purchase a residence or vacation property in both names. Unless they specify otherwise, such property is owned as tenants by the entirety. In either form of ownership, the property will automatically pass to the surviving joint tenant or the surviving spouse. A will or the laws of intestacy have no effect on how jointly owned property will be distributed at death.

Joint ownership of property is an easy way to plan for the disposition of property at death. The survivor automatically owns the property when the other party dies. A death certificate may be the only document needed to establish the survivor's right to the property. However, joint ownership should not be used unless a person intends for the survivor to own the property at death.

Joint ownership may result in unanticipated income, gift, and estate tax problems. A transfer of property to joint ownership may shift part of the income to the other owner, and creditors of the other owner may be able to attach the property. If there have been unequal contributions to the purchase of the joint property, there may be a taxable gift. When either joint owner dies, the joint property is reportable for estate tax purposes. Finally, joint ownership may result in overfunding the estate of the surviving spouse. (See discussion below on "Tax Planning.")

BENEFICIARY DESIGNATIONS, LIFE INSURANCE AND RETIREMENT BENEFITS

Many clients use beneficiary designations to plan for the disposition of assets after death. Life insurance and benefits payable under a retirement, pension or profit-sharing plan or IRA account generally pass directly by beneficiary designation to a designated beneficiary outside of the will or trust. Insurance policies and retirement accounts frequently have default provisions that apply if no beneficiary is designated. In that event, a spouse, a child, or the estate may be entitled to the proceeds. Other assets may pass by beneficiary designation as well. Account owners may name one or more pay-on-death (POD) beneficiaries for bank accounts or transfer-on-death (TOD) beneficiaries for stock accounts. As with joint ownership described above, tax and other issues should be considered when naming a POD or TOD beneficiary; it also is important to remember the beneficiary designation itself is not changed by updates to your will or trust.

Good estate planning includes careful consideration of beneficiary designations and default provisions. Beneficiary designations should be reviewed frequently and updated as personal situations change.

TRUSTS

A *trust* is an arrangement by which a person or institution, called a trustee, holds title, and manages property for the benefit of others. The person who creates the trust is a settlor. It may be helpful to think of a trust as a contract between the settlor and the trustee for the benefit of named beneficiaries.

A person may establish a trust during his or her lifetime. Such a trust is an inter vivos or living trust. The trust may be *revocable*, which means the settlor may change or terminate it, or the trust may be irrevocable, which means the settlor gives up the right to change or terminate the trust. A trust also may be established in a will. This type of trust is called a testamentary trust. Because a *testamentary* trust does not come into existence until the person who made the will dies, it can be modified or revoked by changing or revoking the will at any time before death.

A trust can serve a variety of purposes. The most common types of testamentary trusts are a marital trust established for the benefit of a surviving spouse and a trust established under a parent's will for the benefit of his or her children. The will states how the property held in the trust will be managed for the spouse and children, when distributions will be made and when the trust will terminate. A type of inter vivos trust that is often established as a convenient method of making annual gifts to minor children is called a minor's trust.

Revocable living trusts are trusts established to provide for management of property by a trustee during the settlor's lifetime and to avoid probate of the trust property at the time of the settlor's death. The settlor will continue to report all income and deductions from the trust property on his or her personal income tax return. As with a will, trust property is subject to estate tax upon the death of the settlor.

TRANSFER TAXES

ESTATE TAX

When a person dies, both Oregon and federal law may impose taxes on the property that the person owns. Property that a person owns at the time of death, as well as property that the person had a certain interest in during lifetime, is included in the person's estate for estate tax purposes. Jointly owned property, life insurance and death benefits payable under retirement plans are also subject to estate tax.

Estate tax is paid from the decedent's property. A marital deduction and charitable deduction are available for qualifying transfers to a U.S. citizen spouse or to charity. The current federal estate tax rate is 40 percent on property in excess of the applicable exclusion amount (see below), but rates are subject to change and have ranged in recent years from a marginal rate of 41 percent to 55 percent.

Under federal tax law, each person has an "applicable exclusion amount," which is the amount that can be given free of estate tax during lifetime or at death. To the extent not used for gifts made during a person's lifetime, the applicable exclusion amount is available to reduce the estate tax at death. In 2024, the federal exclusion amount is $13.61 million.

The Oregon estate tax is calculated on the value of the estate in excess of $1 million. The tax rate is graduated, beginning at 10 percent, and increasing to 16 percent on amounts in excess of $9.5 million. The federal estate tax return must be filed within nine months after the date of death and the Oregon estate tax return must be filed within a year. If the value of the decedent's gross estate is less than the Oregon exemption, neither return is required.

GIFT TAX

All gifts are potentially subject to federal gift tax. (Oregon does not tax or track lifetime gifts.) The person who makes a gift, called a donor, is liable for any gift tax that may be due. Most gifts are minimal and below the value that must be reported. Under federal law, a donor may give an amount less than or equal to the annual exclusion ($17,000 in 2023, indexed for inflation) to any number of other persons each year without incurring any adverse gift tax consequences. (There is an exception for gifts of future interests, which includes most gifts to trusts. Those must be carefully structured to qualify.) By making separate gifts or filing gift tax returns, both spouses can use their annual exclusions. Thus a married couple can give double the annual exclusion amount each year to any number of other persons, and none of those gifts will be taxable.

To determine when the annual exclusion limit is reached, a donor must include all gifts made to an individual during the year. This includes birthday, holiday, and other gifts. So long as the total gifts to each individual do not exceed the annual exclusion amount during the year, no federal gift tax return is required.

There is also an exclusion (in addition to the annual exclusion) for gifts made directly to health care providers and educational institutions. These so-called "Ed-Med" gifts are

excluded no matter the amount so long as the check is written directly to the provider of services and not to family members.

The taxable part of a gift for federal gift tax purposes is the amount in excess of the sum of (1) the annual exclusion, (2) the marital deduction for transfers to a citizen spouse and (3) the charitable deduction for transfers to charity. The gift tax is then reduced by the donor's applicable exclusion amount. To the extent the applicable exclusion amount is used to reduce the tax on lifetime transfers, it is not available to offset the tax on future gifts or on transfers at death.

Gift tax returns are due, and any gift tax owing is payable, on April 15 of the year following the year in which the gift was made.

GENERATION-SKIPPING TRANSFER TAX

There also is a federal tax on certain generation-skipping transfers. This tax applies to generation-skipping transfers made either during a transferor's lifetime or upon death. A generation-skipping transfer occurs when property is transferred to persons in a generation two or more below the generation of the transferor. Thus a direct transfer from a grandparent to a grandchild is a generation-skipping transfer. Also, a transfer to a trust that benefits a child during the child's lifetime and eventually passes to a grandchild is a generation-skipping transfer. Such a transfer will be subject to tax unless the trust property is subject to estate tax when it passes to the grandchild.

Transfers that qualify for the annual gift tax exclusion generally are not subject to the tax. Also, there is an exemption from the generation-skipping tax ($12.92 million in 2023). This exemption allows each person to make the above total amount of generation-skipping transfers during his or her lifetime or at death without paying the tax. The generation-skipping transfer tax is very complex. The application of this tax should be carefully reviewed before making any transfer to a generation at least two generations below the generation of the transferor.

TAX PLANNING

An important objective of estate tax planning is to reduce transfer taxes. One way to reduce transfer taxes is to make maximum use of the annual exclusion from gift taxes. When gifts with a value less than the annual exclusion amount are made, no gift tax is paid, the person's taxable estate is reduced and the full amount of the unified credit is still available to reduce estate taxes. Gifts of certain assets may be better than others. For example, there may be a disadvantage in making lifetime gifts of appreciated property because, unlike transfers at death, the donee does not get a new basis in the property for income tax purposes.

Effective use of the federal estate tax marital deduction and the applicable exclusion amount is also important in estate planning. If the first spouse to die gives all of his or her property to a surviving U.S. citizen spouse, there is no federal estate tax due because of the availability of the unlimited marital deduction. However, the applicable exclusion amount available to the first spouse to die will not be used. (The unused exclusion amount may be transferrable to the surviving spouse under some circumstances under current law.) As a result, when the surviving spouse dies, the entire combined estate may

be subject to estate tax. This overfunding of the surviving spouse's estate may result in a substantial increase in transfer taxes. A preferred estate plan uses the applicable exclusion amount available to the first spouse to die by providing for a gift of an amount equal to the applicable exclusion amount to a credit shelter trust. Upon the death of the surviving spouse, the amount in the credit shelter trust will not be taxable in his or her estate.

Another useful estate planning device is a disclaimer. A disclaimer is a refusal to accept property. If timely and properly executed, a disclaimer will be treated for tax purposes as if the person disclaiming died before the transferor and never received the property. A disclaimer may be used to avoid overfunding the estate of a surviving spouse or another beneficiary. It may be used when tax planning was not done before death. By planning for a disclaimer, a beneficiary can decide at the time of death whether he or she needs or wants to receive the property.

Gift, estate, and generation-skipping transfer taxes also may be reduced or eliminated by transfers to charity. Charitable transfers may be outright or in trust and may be of partial or entire interests in property.

For single persons, whose estates exceed the applicable exclusion amount and for married couples whose estates total more than their applicable exclusion amounts combined, other estate planning techniques are available to decrease federal estate taxes. These include methods of making gifts that will reduce the taxable value of both the gift and the portion of the property not given, such as family limited partnerships, limited liability companies, personal residence trusts, grantor-retained annuity trusts and charitable remainder trusts.

CONCLUSION

This is a brief overview of some of the laws that apply to the estate planning process. For some, a simple will, the laws of intestacy, joint ownership of property and the designation of proper beneficiaries may be all that are necessary for an appropriate estate plan. Others may need more elaborate estate planning to minimize transfer taxes and to create trusts for the management of assets for a surviving spouse and for children.