

Report From Counsel

Insights and Developments in the Law

Summer 2015

Death and Taxes: Gifting Money Lowers Taxes but Might Raise Anxieties

By Jason Smolen and Daniel Ruttenberg



Jason Smolen

There's a saying that death is hardest on those left behind. This is especially true if those left behind receive an unexpected and hefty estate tax bill. Estate taxes—or “death taxes,” as they're often called—can be burdensome. Perhaps the most challenging thing about estate taxes is that they're always changing and we generally don't know if we're going to die in a year when estate taxes favor our heirs.

For example when George Steinbrenner died in 2010, there was no estate tax. Mr. Steinbrenner's heirs did not have to pay federal taxes on his \$1.15 billion estate. Needless to say, 2010 was an anomaly—the residual effect of President Bush's phased-out tax cuts. When the estate tax expired at the end of 2009, most people

expected Congress would reinstate it. They didn't. As a result, the heirs of those who died that year did not have to pay any estate taxes.



Daniel Ruttenberg

In the years that immediately followed, there was a lot of uncertainty as individuals and their attorneys waited to see if Congress would act. If Congress chose not to act, the estate tax law would have reverted to what it was in 2001 and any estate valued at more than \$1 million would have been taxed at a rate of 55 percent. Note that the valuation of a \$1 million estate includes real estate, and many homes in high-dollar real estate markets can easily be valued at more than \$1 million. This leaves heirs with little after the sale of the house.

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SmolenPlevy in the Media

When estate planning, consider whether taxes will turn an inheritance into a burden for your beneficiaries. On MainStreet.com, Co-founding Principal Jason Smolen discussed various tools used to transfer wealth while limiting the impact of estate taxes.

Typically, one's estate plan would account for his or her property and finances. What about online property such as email accounts and social media profiles? On WNEW Radio, Mr. Smolen explained why taking “digital assets” into consideration when planning an estate is important.

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Accolades for SmolenPlevy



Alan Plevy

Principals Alan Plevy, Daniel Ruttenberg and Kyung (Kathryn) Dickerson have been named 2015 Virginia Super Lawyers by Super Lawyers. Additionally, Associates Gretchyn Meinken and Joshua Isaacs have been recognized as 2015 Virginia Rising Stars.

Ms. Dickerson was also recognized at the George Mason University Alumni Association 2015 Celebration of Distinction in April. The alumni association awarded Ms. Dickerson (JD '99) with the School of Law Distinguished Alumni Award for her professional achievements and service to her alma mater.

Guardianships



A guardian is someone who is either appointed by a court or named in a legal document, such as a will, to make decisions for someone (generally referred to as the “ward”) who cannot make decisions for himself or herself. A guardianship requires that someone act on behalf of and protect the ward while the ward is incapable of making legal decisions for him/herself. A court can appoint a guardian when a potential ward is incapacitated or suffering from a mental or physical disability. When a minor child does not have a parent or someone who has been granted legal custody who can make certain decisions on the minor’s behalf, the court can appoint a guardian to make decisions for the child until the child reaches the age of majority. The court also appoints guardians for people who are incarcerated and who cannot be present in certain civil proceedings. Thus, the role of a guardian varies, depending on the circumstances of the ward.

The types of decisions that a guardian might make include:

- Giving consent to medical care or treatment
- Purchasing or arranging for the purchase of necessities, such as food, clothes, household items, and other personal items
- Arranging for daily care of the ward
- Arranging for education or decisions as to where the ward will attend school

How do you establish guardianship of a child?

A person seeking to be appointed guardian of a child generally must file a petition seeking appointment in the appropriate court. The process as to what steps the court requires before hearing the petition varies by state and by the circumstances which resulted in the need for a guardian. These can include a home visit or inspection, or a criminal background check. If the circumstances include the involvement of a state agency such as Child Protective Services or the Division of Family Services, then the agency itself will have its own procedures regarding the temporary placement of the child and the appointment of a temporary guardian, which could be a foster parent.

Selection of a Guardian

The selection of a guardian is an extremely important task. Depending upon the circumstances that lead to the appointment of a guardian and the age and needs of the ward, certain people may be more appropriate guardians. Some people who may be named as guardian include:

- A person designated by the ward, by legal document or otherwise, to handle his or her affairs, before the period of incapacity occurred
- A spouse
- Parent(s) or another relative

- A state employee or private person familiar with the ward and the incapacity at issue
- An attorney

If a guardian is appointed by the court, then that person must be willing and able to perform the duties at hand, and to represent the best interests of the ward. In selecting the guardian, the court considers a number of different factors, which can include the potential guardian’s familiarity and experience with the circumstances that led to the incapacity.

The guardianship statutes of each state detail the specific duties, responsibilities, and powers of the guardian. Therefore, there generally is not a presumptive guardian, except as specified in the statutes of the state in which the ward is a resident.

Removal of a Guardian

If appointed by the court, a guardian may be removed if a court determines that the ward no longer needs the services of the guardian. Also, a guardian may be removed when he or she has not provided appropriate care for the ward or when it is determined that the guardian committed malfeasance, such as failing to obey court orders. Upon court order, the guardian will be removed and a new guardian (or temporary guardian) will be substituted.



If you or a loved one is involved in a guardianship matter, it is critical to contact an experienced attorney to assist you with the process.

Independent Contractors

It is vital that you understand the distinction between independent contractors and employees, for it affects both workers and employers alike.

As an employer, you may genuinely believe that you have hired people to perform services for you as independent contractors. You may discover that, by law, they are considered employees and that you are liable for unemployment taxes and interest. As an employee, you may believe that you were hired as such and are entitled to those benefits afforded to an employee, yet, under the law, you are considered an independent contractor, or vice versa.

Whether the relationship is one of employer-employee will depend on several factors. These include how much supervision, direction and control you have over the services.

Employer-Employee Relationship and its Factors

The courts have found that no single factor or group of factors conclusively define an employer-employee relationship. Rather, all factors are reviewed to determine the degree of supervision, direction and control exercised over the services. Generally, an employer controls what will be done, i.e. the manner, means and results.

An employer-employee relationship may exist if you:

- Choose when, where and how they perform services
- Provide facilities, equipment, tools and supplies
- Directly supervise the services
- Set the hours of work
- Require exclusive services (an individual cannot work for your competitors while working for you)
- Set the rate of pay
- Require attendance at meetings and/or training sessions

- Ask for oral or written reports
- Reserve the right to review and approve the work product
- Evaluate job performance
- Require prior permission for absences
- Have the right to hire and fire

How an individual is compensated is another indicator of the worker's status. Employees typically are paid a salary, an hourly rate of pay or a draw against future commissions with no requirement for repayment of unearned commissions. Employees may also receive certain fringe benefits, including an allowance or reimbursement for business or travel expenses.

Nature of the services performed is also key to deciding if a worker is an employee or an independent contractor. Unskilled or casual workers are usually employees because their labor is often supervised. However, even professionals such as doctors and lawyers, who have much freedom to perform their duties, may be employees if they are subject to significant control.

Control

The courts have also found that workers may be employees and that an employment relationship may exist if the employer controls important aspects of the services performed, other than results and means. For example, a referral agency usually does not directly supervise the individuals it refers for assignments. It could be their employer, if it controls such important aspects of the services as:

- Client contact
- Billing and collection from clients
- The individual's wages

Independent Contractor Relationship and its Factors

Independent contractors are free from supervision, direction, and/or control

in the performance of their duties. It is understood to mean that they are in business for themselves, offering their services to the general public.

Signs of independent contractor status include a person who:

- Has an established business
- Advertises in electronic and/or print media
- Buys advertising
- Uses business cards, stationery and billheads
- Carries insurance
- Keeps a place of business and invests in facilities, equipment and supplies
- Pays their own expenses
- Assumes risk for profit or loss
- Sets their own schedule
- Sets or negotiates their own pay rate
- Offers services to other businesses (competitive or non-competitive)
- Is free to refuse work offers
- May choose to hire help

Contact an Attorney

The distinctions between employees and independent contractors are vast and extremely complicated. Claims under this area of law require experience and an excellent understanding of the minute details that can make or break a case. For example, an employer-employee relationship may exist, regardless of how the hiring party describes it. If you give a worker a 1099 form rather than a W-2 form, they may still be an employee. Persons who work for you may qualify as employees under the law, even if you have the person sign a statement claiming to be an independent contractor or they waive any rights as an employee.

For reasons such as this, it is imperative to hire a professional in the field by contacting an experienced attorney. Get informed and ensure that your legal rights are protected.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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With this uncertainty, it was hard to plan. The possibility that the law would revert to the \$1 million tax exemption level at the end of every year worried people. So, anticipating the worst, people acted. Starting in 2011, an individual could give away to others up to \$5 million tax free—and many did just that. In an effort to protect their estate from taxation, many people increased their gifts to their loved ones. The idea being that if they died during a year when Congressional inaction resulted in a punitive estate tax, their heirs would have already received some of their legacy tax-free.

Now, four years later, the \$5 million unified estate and gift taxes exemption has held steady. (Because it's indexed for inflation, this year an individual can give away \$5.43 million without it being taxed. Note that there is an unlimited charitable deduction and there is an unlimited marital deduction provided that your spouse is a US citizen.) But some people are beginning to wonder if they gave away too much, too soon.

For example, a number of people started aggressively gifting money when they were still working. Now that they're retiring, they are beginning to wonder if their estate is sufficient to see them through their retirement years. It's a very different feeling to be living on resources instead of earning resources. It's not uncommon to be concerned about spending down principal and outliving it.

When planning your estate, you should give serious consideration to the "what ifs" that loom down the road and structure your estate accordingly. While giving money tax-free to your loved ones is nice, make sure you can take care of yourself. It is important to be prepared. You don't want any surprises when it comes to your finances. Below are things to consider to make sure you keep what you need while still giving away what you want:

1. Be realistic about your expenses.

Most people underestimate what they spend. They focus on the mortgage payment, a car payment, insurance, and the groceries but discount the monies spent on clothes, travel, hobbies and pets, home repairs, and utilities? The truth is, we all spend more money than we think we do. When planning your gifting, look at what your estate's worth and carve out a realistic amount of money for what you'll need to live comfortably and do the things you love over the course of many years. Even if you have long-term care insurance, you may still need to pay for nursing care or help if your health fails – this is something else you should consider. Work with your attorney to project future expenses and plan accordingly.

2. Don't be afraid to reevaluate.

If you're someone who gave away a lot of money in recent years and are now beginning to worry it might have been too much, don't panic. Sit down with your estate attorney and look at how much you gave, how much you have left and how much you need to live on. If you need to scale back for a few years and not gift to others for a while, that's okay. Don't let the fear of possibly punitive estate tax laws dictate your actions to the detriment of your own financial security.

3. Live the plan.

Once you have a plan, live it. It's hard to transition from making your assets grow to living on them. It leads to a lot of second guessing. But chances are, if you created an estate plan with your attorney, you're on the right path. If you have questions or are worried that you need to modify your estate plan, then certainly sit down with him or her again and talk it over.

Again, the trouble with the future is that it's uncertain. We don't know what Congress will do and we don't know when we're going to die. But despite this uncertainty, it is possible to plan so you're able to live the life you want to live.

SmolenPlevy in the Media

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Kyung Dickerson

One does not generally think of divorce as something that can be inexpensive or relatively easy, but Principal Kyung (Kathryn) Dickerson says certain strategies can minimize the conflict created by a divorce. On NewsChannel 8's Let's Talk Live, Ms. Dickerson shared some considerations in minimizing the stress and expense involved in a divorce.

SmolenPlevy in the Community

On behalf of the Junior League of Northern Virginia, Associate Gretchyn Meinken recently coordinated a Bagged Meals for the Homeless event. More than 150 meals were assembled and donated to the Carpenter's Shelter and A-SPAN.

Associate Joshua Isaacs served as the race director for the Fairfax Law Foundation's Heroes v. Villains Run for Justice 5K in April. The race raised over \$25,000 for the foundation to fund pro bono programs and other programs benefiting the community.

With the Northern Virginia Chapter of the Virginia Women Attorneys Association, Ms. Meinken assisted with the Women Giving Back Store in May. The WGB Store provides business attire for women currently in shelters and transitional programs.