Gifting in 2021 is a case of 'Use it or lose it'

By Jessica N. Cory

This article appeared as a Guest Column in The Oklahoman on April 27, 2021.

The federal government currently imposes a 40% tax on most lifetime gifts and transfers at death, with a few exceptions.

For example, taxpayers can make "annual exclusion gifts," or transfers of $15,000 per person per year, to as many people as the transferring taxpayer desires, without incurring any gift tax or even having to file a gift tax return.

Jessica N. Cory

Taxpayers also can make tax-free gratuitous payments for certain educational and medical expenses and can make tax-free (and tax-advantaged) transfers to charitable organizations.

In addition, taxpayers are also permitted to gift up to a set "unified credit amount" free of the gift or estate tax, whether the transfers are made during life or at death.

Under the Tax Cuts and Jobs Act of 2017 (the "TCJA"), the unified credit amount was temporarily doubled, greatly increasing the ability for individuals to engage in strategic planning and reduce their future taxable estates. For example, the unified credit amount is $11.7 million in 2021 (or $23.4

million for a married couple), up from $5.49 million in 2017. However, given the possibility of tax changes in 2021, it may be time to finalize some planning and lock-in at the current unified credit amount.

For many individuals, taking advantage of the current higher unified credit amount involves a tricky balance, navigating between transferring as much wealth as possible out of the individual's taxable estate, while at the same time maintaining sufficient income and financial security.

One solution for this type of situation is a Spousal Lifetime Access Trust (or "SLAT"). With this type of trust, an individual establishes an irrevocable trust for the benefit of his or her spouse, and funds it with a completed gift, removing those assets from the individual's estate and taking advantage of the current $11.7 million unified credit amount. The SLAT can be set up to allow the trustee to make income and principal distributions from the trust to the beneficiary-spouse during the spouse's lifetime, providing the couple with a future income stream even after the gift is complete.

Because a SLAT offers the ability to make a gift now, using up some of the historically high unified credit amount while preserving access to income and principal, it is a valuable estate planning tool, especially in 2021.

However, SLATs are not without some potential pitfalls.

For example, if two spouses each want to set up a SLAT for the other, the trusts must be carefully drafted to avoid something known as the "reciprocal trust doctrine," which the IRS can use to essentially unwind the couple's planning and pull the trust assets back into their estates.

In addition, because a SLAT involves a completed gift to the beneficiary-spouse, the donor-spouse must give up all control over the property placed into trust, including in the event of a subsequent divorce or the death of the beneficiary-spouse. Accordingly, it is important to carefully weigh a number of considerations before funding a SLAT, including other gifting strategies that can effectively leverage the unified credit amount.

Minimizing future estate tax is only one component of a successful estate plan. However, given the current legislative environment, it is a particularly important piece this year.

Under the tax plan that President Biden campaigned on, the unified credit amount would be reduced significantly, potentially back to 2009 levels, or $3 million. Accordingly, it makes sense to use up the unified credit now, before potentially losing it later this year or in 2022.

Jessica N. Cory represents businesses and individuals in a wide range of transactional matters, with an emphasis on tax planning.

***For more information on how the information in this article may impact your business, please call 405.552.2472 or email* Jessica N. Cory.**

Follow our coverage on ***FACEBOOK***