RECENT CHANGES TO ESTATE PLANNING LAWS AND CASES THAT COULD AFFECT YOUR ESTATE PLAN

So, it's been quite a while since we sent out new estate planning information and it's been an exciting couple of years. We've prepared a brief summary of new laws effective from 2021 to 2023 we think you'll find interesting or helpful. If you have questions about these (we've been brief and haven't explained all the nuances) and how they affect your estate plan. Remember, these summaries are not legal advice, so don't rely on them without your lawyer be your side.

I. Remote Witnesses and Notaries

During the COVID Public Health Emergency, just about everything went online and could be handled remotely by video. This includes the law permitting notaries and witnesses to do their thing based on a live video of someone signing a document. During the Pandemic, the Governor signed various executive orders permitting the remoteness we had to become used to.

In mid-2021, Illinois enacted new laws codifying portions of the executive orders related to witnessing documents remotely and notarizing documents effective as of January 1, 2022. Some of the detailed laws on remote notarization will not take effect until the Illinois Secretary of State creates additional rules. Those are still in process.

Some highlights:

- There is a difference between a remote notarization (needs a wet signature) and an electronic notarization (completely electronic – rules are still incomplete)
- An increase in the fees a notary can charge (from $1 to $5 for non-electronic and a new fee maximum of $25 for electronic. Fee schedules are different for Immigration forms).
- The person signing must be in Illinois when signing (and say so on the recorded video)
- The person signing must send paperwork to the notary and witnessed within 24 hours (there is an outside 30 day rule on this, but we are waiting for the Secretary of State's rules on how to implement).
- You can find The Illinois Electronic Wills and Remote Witnesses Act here: https://www.ilga.gov/legislation/publicacts/102/PDF/102-0160.pdf

How does this change affect your estate plan? If you have changes to your documents, you may be able sign them remotely.

II. Extended Portability Election Relief

Portability is a federal estate tax planning tool that allows the unused amount of a deceased spouse's amount allowed at death that is not subject to the estate tax ("estate tax exemption") to be transferred to the surviving spouse. In 2023, this applies to any estate worth more than $12.92 million. This portability only works for Federal Law and not for Illinois. Illinois imposes an estate tax on estates worth more than $4 million. However, to use Federal portability, the surviving spouse must file an estate tax return within a certain time period. Previous rules required the surviving spouse to file the estate tax return within three years (If there is an estate tax due, the surviving spouse must file and pay estate taxes within 9 months of death). The IRS recently changed its regulations to give surviving spouses an additional two years to file the return requiring a filing within five years of death. Sometimes, it's hard to die with more than $12.92 million . . .

How does this change affect your estate plan? If your spouse dies, leaves you a lot of money, and you didn't file estate tax forms yet, you now have more time to file those forms.

III. Transfer on Death Instruments ("TODIs")

TODIs are instruments that (when properly executed and recorded) essentially allow landowners to name beneficiaries to their land ("real property"). While Illinois has allowed TODIs on residential real property since 2012, changes to the Illinois Real Property Transfer on Death Act now allow TODIs to apply to commercial real property as well.

How does this change affect your estate plan? It is now easier to put beneficiaries on all real estate that you own in Illinois without needing a trust. (However, please read our caution below.)

We advise you to be careful when you simply put beneficiaries on all of your assets, rather than using a trust or the probate process to transfer assets to your loved ones. When you place a beneficiary on your real estate using a TODI, the title passes automatically to that beneficiary. This also applies to bank accounts, securities accounts, retirement accounts, annuities and life insurance and other assets. While this is great because you don't have to pay a lawyer to administer the estate afterwards, what do you do if there are selling expenses for the house? What do you do if your beneficiaries must pay an accountant or a lawyer to help with taxes and estate administration? Pay for your funeral? The beneficiary designation assets will not help with those. The person administering the estate must beg for funds from the other beneficiaries. Frequently, the beneficiaries don't want to share or help.

That has caused big problems with many of our clients. So, if your beneficiaries are not the best of friends, use them with caution (or plan correctly by identifying a pool of asset that can pay for estate administration expenses and use an appropriate legal instrument to provide for that).

The last part of beneficiary designations that is really annoying (but not with the new TODI rules) is that after someone dies, you can't get information on who is a beneficiary on an account unless you guess right and submit a claim or open a probate estate to obtain the legal authority to ask.

IV. Changes to IRS Letter Rulings

Taxpayers can apply to the IRS for a Letter Ruling or a Decision Letter to get the government's opinion how the tax law applies to the taxpayer's written representation of facts. Of course, the government does not want to opine on every application, so the IRS created an "exempt" list of certain areas of law in which it will not issue rulings or letters. After issuing Revenue Rev. Proc. 2022-3, the IRS expanded the list to include not telling you anything more about its interpretation of various matters that intersect with trusts and estates law, such as certain inquiries regarding charitable remainder trusts and gift tax marital deductions.

How does this change affect your estate plan? It doesn't unless you are engaging in very complex and expensive tax planning that this firm does not do.

V. Minor Changes to the Healthcare Power of Attorney Law

Effective, January 1, 2023, a health care agent can present an electronic device displaying an electronic copy of a healthcare power of attorney as proof of a valid POA.

How does this change affect your estate plan? You can store a PDF of your health care POA on your phone. If you don't have an electronic copy of this, contact us and we will look to see if we have an electronic copy we can e-mail you (we store images of 99% of the documents our clients have signed).

VI. Residential Real Estate Disclosures

Under Illinois law, sellers of residential real estate must disclose defects in that real estate that are known to them. Changes to the Illinois Residential Real Property Disclosure Act now clarify that beneficiaries of land trusts, wills, intestate succession (i.e., heirs who would inherit real estate from those who died without wills), and TODIs are also considered sellers of real estate, even if the real estate is technically titled to another entity.

For example, if Jane Doe's will leaves her estate to her husband, John Doe, and instructs the executor of the will to sell the home and give him the proceeds, John Doe is a seller after Jane Doe's death, even if the house is still technically owned by Jane's probate estate and administered by her executor.

How does this change affect your estate plan? It doesn't, but provides some clarity on real estate forms if you are selling a property of a loved one who has died.

VII. New Federal Estate Tax Exemption for 2023

As mentioned above, the "estate tax exemption" is the amount allowed at one's death that is not subject to the estate tax. For 2022, in addition to the Illinois state estate tax (which applies to estates with a value of $4 million or more), the federal estate tax applied to estates with a value over the 2022 federal estate tax exemption of $12.06 million. Because this amount is currently indexed for inflation through 2025, the 2023 federal estate tax exemption has been increased to $12.92 million. However, this amount is scheduled to be reduced by 50% in 2026 and could be reduced earlier by Congress.

How does this change affect your estate plan? You can die and give even more money to your family without estate taxes than you could last year.

VIII. New Gift Tax Exclusion for 2023

In theory, if one makes a total amount of gifts (i.e., transfers without receiving anything in return) that is greater than the federal estate tax exemption throughout his or her life, then he or she will be subject to the federal gift tax. Given that the federal estate tax exemption for 2023 is $12.92 million *and* one can give an unlimited amount to his or her spouse while both spouses are alive, the chance of incurring gift tax liability is highly unlikely.

Further decreasing the odds of gift tax liability is the fact that each taxpayer may gift up to an "annual gift tax exclusion" each year without those gifts counting towards the lifetime gift tax exemption described above. The annual gift tax exclusion applies to each gift recipient. To illustrate, if Shemp has three best friends (Larry, Moe, and Curly) he may give gifts up to the annual gift tax exclusion to *each* of Larry, Moe, and Curly without any of those gifts counting against his lifetime gift tax exemption.

The annual gift tax exclusion is adjusted annually for inflation, and will be increased to $17,000 per recipient. While the federal estate tax exemption (and therefore the lifetime gift tax exemption) is scheduled to be reduced by 50% in 2026, the annual gift tax exclusion is not. This means that we can expect the annual gift tax exclusion to continue to increase in coming years.

How does this change affect your estate plan? If you have a taxable estate, you can now give away more money in 2023 than you could in 2022 to people you like without having the gifts affect your estate taxes.

IX. SECURE Act 2.0

On January 1, 2020, the Setting Every Community Up for Retirement Act (the "SECURE Act") took effect. The SECURE Act brought many legal changes. For the trust and estates field, the most notable change was to the tax treatment of retirement interests held in trust and otherwise. After that law passed, if you are not a spouse, minor child, or disabled, you need to take out (and pay taxes on) all the retirement monies you inherit within 10 years of death. Previously, you could elect to receive the money over your actuarial life expectancy. If you have not updated your estate plan since 2020, we encourage you to contact us to see if any changes are desirable.

As a further development, one of the last acts of a slightly functional Congress occurred on December 29, 2022 with the "SECURE Act 2.0." The SECURE Act 2.0 expands on some changes of the original SECURE Act. These include (but are not limited to) the following:

i. **Increase in age for beginning required minimum distributions ("RMDs")**. Beginning on January 1, 2023, participants in employer-sponsored qualified retirement plans, IRAs, or individual retirement annuities do not have to take money out of those retirement interests until they reach age 73. This gives eligible people an extra year of tax benefits. The age for RMDs further increases to 75, beginning January 1, 2033.

ii. **Decreased penalty for failing to take RMDs**. Before the SECURE Act 2.0, failing to take a timely RMD resulted in a penalty as a 50% excise tax. Beginning in tax year 2023, this penalty is reduced to 25%, and can further be reduced to 10% if the situation is remedied in a timely manner.

iii. **More "catch-up" 401(k) contributions allowed for those aged 60–63**. Currently, those aged 50 and older can contribute an additional $7,500 per year to their 401(k) plans (a "catch-up"). Beginning January 1, 2025, the SECURE ACT 2.0 will increase the catch-up amount for those aged 60–63 to the greater of 1) $10,000 or 2) 150% of the catch-up amount otherwise allowed for those aged 60–63. After tax year 2025, this amount will be indexed for inflation.

iv. **Indexed IRA catch-up limits**. In addition to the increased catch-up for those between 60 and 63, the catch-up limit for all eligible will be indexed for inflation beginning in tax year 2024.

v. **Increased age limit for ABLE Programs**. ABLE Programs are established by states to offer tax-advantaged accounts to those with disabilities. Currently, one can be the beneficiary of an ABLE account only if the individual becomes blind or disabled before age 26. Beginning tax year 2026, the SECURE Act 2.0 will increase this age limit to age 46.

vi. **Automatic enrollment in retirement plans**. Beginning in plan years after December 31, 2024, 401(k) and 403(b) plans will be required to automatically enroll employees when they become eligible. However, the SECURE Act 2.0 will permit employees to opt out of such plans.

vii. **Tax-free rollovers from 529 accounts to Roth IRAs**. 529 Accounts are state-sponsored investment plans that trustees can use to pay for a beneficiary's education. Subject to several rules, the SECURE Act 2.0 will permit trustees of 529 Accounts to make penalty-free transfers to Roth IRA accounts in their names. This change will affect rollovers made on or after January 1, 2024.

viii. **Penalty-free IRA emergency withdrawals**. Under current law, withdrawal from retirement accounts (e.g., IRAs, 401(k)s, etc.) are subject to a 10% penalty if made before the holder reaches age 59 ½. However, a number of exceptions apply to the penalty rule. Beginning January 1, 2024, the SECURE Act 2.0 will add another exception for "emergency expenses," which include unforeseen or immediate financial need stemming from personal or family emergencies. Only one distribution of up to $1,000 will be permitted per year.

ix. **Penalty-free early distributions for those with terminal illnesses**. The SECURE Act 2.0 provides another exception to the 10% early distribution penalty if the distribution is made to someone with a terminal illness. This change is effective as of December 30, 2022.

x. **Lost and found for retirement plans**. To address the problem of "lost" retirement benefits caused by company name changes and mergers, the SECURE Act 2.0 instructs the Department of Labor to create a database to search for the contact information of their pension or 401(k) plans. Under the SECURE Act 2.0, this database should be operational by December 29, 2024.

The Senate Finance Committee has a brief 19 page summary here:
https://www.finance.senate.gov/imo/media/doc/Secure%202.0_Section%20by%20Section%20Summary%2012-19-22%20FINAL.pdf

How does this change affect your estate plan? The changes are self-explanatory and mostly address retirement planning.