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Estate Planning Risk Factors Listing

We have prepared this listing to inform readers of many, but not all, of the potential Risk Factors related to estate and related planning. Many of these risks may have already been communicated to you by your advisers if you are involved in planning. If you pursue planning because of the risks of a change in Washington from the 2020 election, many of the below risks may affect you. Please understand that estate planning is inherently complex, subject to varying interpretations, and the laws change frequently. Periodic review and maintenance of every plan and document by a collaborative team of multidisciplinary advisers is essential. There is no assurance that any particular result will be realized. There are risks and negative consequences to every planning step and technique, some of which have not been enumerated in this listing, and others of which have been indicated in other communications, and some of which might be indicated in future communications from your advisers. If you have questions on how any of the risks listed below apply to you, please contact your advisors to discuss them. In all cases you should only proceed with any planning step if you understand and accept the known risks, and that there are always unidentifiable risks. If your proceed with planning, you will have to accept the risks and uncertainties involved. If you have existing planning and believe you misunderstood a risk involved, contact your planning team.

General Risk Factors.

■Your counsel may not be admitted to practice in each state and local counsel may have to be retained.

■Your advisers are not guarantors of results. All planning undertaken faces an array of tax, legal, and other risks.

■There are assuredly other risks and issues which are not reflected in this partial listing.

■Consider other verbal, email, and written communications your advisers have sent, or may send in the future, during the course of an engagement that identify other risks and considerations.

■In preparing any document your advisers rely on information that is supplied by you. Few, if any, advisers perform due diligence to confirm information provided.

Personal Risk Factors

■Family dynamics are unpredictable in all families and lead to a range of possible risk factors.

■Life expectancy is uncertain and may be relevant to supporting various components of your planning. These might include cash flow and forecasts, the term of GRATs, the term of promissory notes, insurance decisions, etc.

Advisor Risk Factors

■Few estate and related plans can be structured, implemented or maintained without the cooperation of a collaborative team that addresses all relevant disciplines to your plan. It is your responsibility to authorize and demand that all advisers on your team collaborate.

■Consider the indemnifications and disclaimer various advisers place in their engagement letters and other documents and how that may limit your rights.

Financial Risk Factors

■The completion of a judgement and lien search, and a forensic evaluation by an independent specialist, are recommended as part of the due diligence for asset transfers.

■Cash flow projections should be performed to evaluate whether sufficient funds will be available for various required annual payments for certain transactions, and to help support that the transactions are sustainable.

■Fluctuations in interest rates may cause estate planning techniques to have unintended or undesirable results, or even to fail, and may adversely affect cash flow analysis that are relied on to assure adequate resources for living expenses or for a planning transaction to succeed.

■The price of an asset that is critical to a plan may decline in reaction to various events that cannot be controlled.

■Inflation can affect the value of assets or the success of a planning technique. Unanticipated material changes to rate of inflation could adversely affect gift, estate, and retirement planning goals.

■Reinvestment risk can affect various aspects of a plan. There is the risk that future proceeds from investments may have to be reinvested at a potentially lower rate of return.

■Dependence on particular assets, particularly non-diversified assets, can present liquidity risks.

■Loss of access to and use of income from property gifted to an irrevocable trust could create hardships for the transferor.

■Divorce or death of a spouse could reduce or eliminate indirect access to assets in a trust thereby undermining financial security.

■Adverse cash flow pressures resulting from the grantor of a trust having to make payments of income tax on the "phantom" income generated by a grantor trust, may be problematic.

Entity Risks

■If an entity is not operated with due respect and regard to the independence and formalities of an entity separate from its owners, and if commingling of personal and entity assets or attractions is not avoided, the IRS and other potential claimants may be able to disregard the entity and any asset protection the entity may have afforded.

■Governing documents for entities should be updated periodically to reflect changes in the state entity and other laws.

■Inconsistencies in the documentation of entity interests, values or other factors in lender, bank, tax, or governing documents could raise questions as to the validity or integrity of a transaction or the entity itself.

State Tax and Other State Risks

■State courts in any state where you have a home, other assets or interests, may seek to tax you.

■Trusts may be taxed by different states based on different criteria. The law in this area is also evolving and remains uncertain.

■Residency and domicile are different concepts and your obtaining or retaining a residence in a particular state may subject you to income or estate tax in that state.

■If your connections, or the connections of a trust or other entity or activity to a state are sufficient that state may assert jurisdiction over you or that entity, trust or matter. This could result in very different laws applying thereby changing the intended results of a plan or transaction.

■Many trust plans may require a New Jersey Inheritance Tax Return and the possibility of having a "compromise tax."

■New York's estate tax system is decoupled and has a "cliff" which results in the elimination of the estate tax exemption when assets are sufficiently above the state exemption amount. New York also taxes so-called "ING" trusts as grantor trusts. NY may also have a gift tax.

Marital Planning

■If you are married or have a partner, be mindful of the limitations on scope of what your advisers can do to advise either of you.

■There is no certainty to how a court may interpret marital documents or provisions in a trust that address a spouse, e.g. a "floating spouse" clause in a trust.

Medicaid and Special (Supplemental) Needs Planning

■You must retain a specialist in each state where a special needs beneficiary resides and be mindful that laws are state specific and often change.

Irrevocable Trust Risk Factors

General Irrevocable Trust Risk Factors

■Trusts must be operated in accordance with their terms and respected as independent entities. Examples include, but are not limited to filing income tax returns, maintaining separate bank accounts, paying bills from the trust that are trust expenses, filing Form 56 with the IRS, filing gift tax returns, etc. must be addressed.

■Trust law and drafting and planning techniques change frequently.

■Title to assets owned by a trust must assure that title documentation conforms with actual steps taken and is consistent.

■All fiduciary and non-fiduciary positions and powerholder positions should be reviewed with professional advisers and the persons serving in those positions.

■Appreciation on assets transferred to an irrevocable trust will not be stepped-up on death of the transferor.

■While there are mechanisms that might permit modifying an irrevocable trust (e.g. trust protector action, trust decanting, non-judicial modification of the trust), none of these options are assured to be available or tax free.
■Assets transferred to an irrevocable trust may not be available to access, depending on the terms of the trust, state law, and the decisions of the fiduciaries holding distribution powers.

Grantor and Non-Grantor Trusts Generally

■Income on grantor trusts is taxed to the settlor and could create a financial hardship to the settlor.
■Grantor trusts may include a "swap" power, which must be carefully monitored and exercised in conformity with the trust instrument.
■If a trust is intended to be non-grantor, the trust must not include various provisions that can taint the trust status as grantor, and the trust must be operated in a manner consistent with non-grantor status.
■If the status of a grantor trust changes to non-grantor, income tax on negative basis assets could be triggered.
■If real estate interests are transferred to a grantor trust, and which have been or will be fully depreciated and are subject to liabilities, capital accounts may be "negative." The cessation of grantor trust status will trigger taxable gain.

Spousal Lifetime Access Trusts ("SLATs")

■SLATs need to be created, funded and operated differently to avoid the reciprocal trust doctrine. Tax authorities and creditors may "uncross" separate trusts that are too similar thereby undoing intended tax and asset protection benefits.
■Differentiation of SLATs may be achieved by incorporating different rights and benefits in each trust. Each party may not be treated equally under each document, depending on the terms, the beneficiaries of each trust may be treated in different manners economically which could be viewed as unfair or even a hardship on one or more of the beneficiaries.
■If a married couple creates SLATs for each other, the death of one spouse may prevent access of the surviving spouse to one of the trusts.

Insurance Trust Risks

■If you transfer life insurance by gift to a trust, the policy proceeds may be included in your estate if you die within three years of transfer. If you instead sell a policy you might avoid the three year rule.
■Life insurance policies often do not perform as initially projected. You must monitor life insurance annually with an insurance consultant.
■There are inherent tax risks with every life insurance trust and the common use of such trusts belies the risks involved. As but one example, if an insurance trust can use income to pay premiums on insurance on the life of a grantor, some commentators believe that makes the entire trust a grantor trust, but that result is subject to some uncertainty.
■Premium financing adds financial risk to an insurance plan.
■Split-dollar life insurance is subject to risks and there have been recent negative case law developments.

Grantor Retained Annuity Trusts ("GRATs")

■GRATs must be administered precisely in accordance with the regulations, including but not limited to the proper payment of the periodic annuity payment, not making additional gifts to the GRAT, etc.
■GRATs are not GST exempt so that values remaining in GRATs will be taxed in the estates of the beneficiaries of the GRAT.
Self-Settled Domestic Asset Protection Trust ("DAPT") Risks.
■Many commentators view these trusts as inherently risky.
■Some commentators believe that a person resident in a state that does not have legislation permitting DAPTs can not successfully create such a trust, and that if they endeavor to do so it will not be respected. In other words, some commentators believe DAPTs don't work for residents of non-DAPT states.
■The more connections a DAPT has to its host state, the greater the trust assets held within that state are, and the fewer connections to a non-DAPT state, may all enhance the possibility of such planning succeeding, but favorable results are not assured.

Valuation and Transaction Risk Factors

General Transaction Risks

■Valuation discounts may not be respected. Legislative proposals have been made to eliminate discounts. Discounts may reduce basis step up.
■Valuation determinations may be challenged.
■The IRS may apply a step-transaction or sham transaction doctrine to challenge the intended results of each transaction.
■The IRS may argue that the transferor/decedent, in conjunction with others, continues to control assets transferred and thereby argue that none of the purported transfers shift value out of the transferors estate.
■Creditors may attack any transaction as a fraudulent conveyance.
■A trustee in bankruptcy may void a transfer to a self-settled trust or "similar device." It is not clear how broad the latter term may be defined.
■The proper administration, accurate recordkeeping, and respecting formalities of a transaction are essential to the IRS or other potential claimants respecting the transaction.

Defined Value Mechanism Risks

■The "defined value" mechanisms used in transactions to deflect a valuation challenge by the IRS may not be respected.
■The IRS may argue that a "spill-over" of excess value into a GRAT as part of a defined value mechanism is a second and prohibited contribution.
■The IRS may not respect the use of the mechanism selected as the "spill over" for a defined value mechanism such as a GRAT, marital trust, donor advised fund, incomplete gift trust, etc.
■If a defined value mechanism succeeds, it may potentially bring a portion of equity back into the transferor's estate under the Powell case.

Note Risks

■Valuation of promissory notes is subject to different views and risks. The IRS often challenges notes that are discounted in a family context.
■The terms of a promissory note must be adhered to and interest and principal must be paid in accordance with the terms of each promissory note. A default under a note must be enforced.
■Some commentators believe that the deferred gain on a note sale transaction to a grantor trust is triggered on the grantor's death.

General Tax Risks

■Changes in the tax laws may dramatically change the impact and effectiveness of any planning advice offered, it may even make a plan that may have provided tax or other benefits a detriment.
■Federal and state tax laws may be adversely affected by new legislation, new interpretations, new case law, changing IRS or state/local tax authority audit strategies, and other factors.
■There is a wide array of differing views of tax practitioners on the effectiveness of what some view as common tax planning strategies.
■The value of the gross estate may include the value of any property (or interest therein) of certain gifts made within 3 years of decedent's death.

Income Tax Basis Risks

■Assets that are transferred to irrevocable trusts, and held within those trusts on death, may not get an income tax basis adjustment on death.
■Step-up in basis at death may permit additional basis for annual depreciation deductions and may allow a reduced gain on sale.
■If a grantor trust has a swap or substitution power, unless that power is monitored and exercised properly, it will provide no benefit.
■Dividing community property means that if one spouse dies no basis step up on the non-decedent ½ of the community property will occur.
■Community property trusts established in states that permit these techniques are not assured to provide community property treatment for those domiciled in non-community property states.

Gift Tax Risks

■A gift tax return must be filed and adequately disclose all transactions, if the statute of limitations for an audit is to run.
■Gift tax returns should appropriately allocate GST exemption, or if advisable, opt out of automatic GST allocation.
■A gift tax audit could result in incurring gift tax, interest and penalties.

Estate and GST Risks

■An estate tax audit could result in all or a portion of the transferred property being included in the gross estate of the donor/transferor.
■ GST tax may be incurred on a taxable distribution from a trust.

Other and Unidentified Risks

■***There are a myriad of risks associated with every estate, financial, insurance or other planning transaction. No adviser can identify all of them, and most risks cannot be quantified. You must proceed with a plan, or retain an existing plan, based on your decision to accept the risks, both known and unknown, in that transaction or plan.***