

DECISIONS, DECISIONS, DECISIONS

We make decisions throughout our lives, perhaps none more critical than those involving end-of-life planning, especially in the area of health care. Most people avoid the issue, believing that they will be expected to choose how they wish to die. As estate planning and elder law attorneys, we tend to focus on how clients choose to live. Your personal choice may be guided by religious or philosophical beliefs, by personal experiences, even by the media. Hopefully it will also be guided by conversations with your treating physicians. Ultimately the choice is yours; the decision is personal.

The same standard applies to your loved ones. Although you can reasonably expect to be a caregiver to a parent, a spouse, or a significant other, you should try to prevent a situation in which you are also the decision maker. Start early, when your loved one has the capacity to understand and the judgment to choose. Initiat-

ing the discussion by revealing your own plans is an excellent way to begin. Researching the family medical history and discussing your own options with a health care provider is always helpful.

It is never too early to begin making health care decisions. Remember the cases of Kathleen Quinlan, Nancy Cruzan, and Terry Schiavo, all three women were under the age of thirty-five when they were fatally injured in vehicular accidents, rendering them unable to make or communicate their personal choices. None of them had written documents expressing their wishes. The fact that their stories attracted media attention does not make them unique. The fact that they—like millions of others—failed to anticipate a health crisis at some time in their lives is the real lesson to be learned.

Too many people postpone end-of-life health planning until a crisis occurs. But crisis planning is costly and complicated and frequently fails to achieve the desired result. Start planning for yourself today and open a dialogue with your loved one as well. Our Elder Services Group can assist in weighing your choices and in preparing the documents that will stand as your directions, even if you become incapacitated and unable to communicate your decisions.

IT IS NEVER TOO SOON TO START, AND IT IS NEVER TOO LATE TO TRY. CALL US AND SCHEDULE AN APPOINTMENT. OUR EXPERIENCED ATTORNEYS WILL EMPLOY THEIR KNOWLEDGE AND SKILL TO REDUCE THE ANXIETY, AVOID FAMILY CONFLICTS, AND PROVIDE PEACE OF MIND TO YOU AND YOUR LOVED ONE AT A CRITICAL TIME IN YOUR LIVES.

561-226-4272

TAKE ADVANTAGE OF FLPs AND GRATs NOW

A recent article in *The Wall Street Journal* discusses proposed legislation currently in Congress that if enacted would curtail or eliminate the use of Family Limited Partnerships (FLPs) and Grantor Retained Annuity Trusts (GRATs). FLPs and GRATs are popular and effective estate planning strategies used to significantly reduce federal estate tax. The proposed legislation would eliminate valuation discounts for FLPs hold-

ing nonbusiness assets and eliminate so called “zeroed-out” GRATs which allow the creation of a GRAT without the payment of gift tax.

Although we cannot be certain when or if such legislation will be enacted, it seems likely that such changes may be incorporated as part of the broader estate tax reform. Combined with what are generally depressed asset values and the historically low IRS

interest rates applicable to these strategies, this an ideal time for FLP and GRAT planning.

CLIENTS WHO WISH TO TAKE ADVANTAGE OF FLPs OR GRATs BEFORE THE END OF THE YEAR SHOULD CONTACT US IMMEDIATELY TO DETERMINE WHETHER SUCH STRATEGIES ARE APPROPRIATE.

561-362-9821

IS YOUR BUSINESS PREPARED FOR SUCCESSION?

The *second* most important business succession concept that both business owners and their advisors should understand is that at some point every business owner must leave his or her business, whether that be by a sale to an outside third party, a transfer to family or company insiders, a forced liquidation, or the owner's disability or death. Of course, this should not be news to any owner or advisor.

Typically, owners are so consumed with "working in the business" by building sales, controlling costs, marketing products or services, and handling employee issues, that owners spend little or no time "working on the business." By "working on the business" we mean doing the planning necessary to protect and position the business (usually the owner's largest and most significant investment) for sale so that the owner achieves his or her exit objectives at the highest value possible.

The *most* important concept both business owners and their advisors should understand is that *current planning is required* for a successfully structured exit that will maximize the amount received upon the owner's exit.

Often when the topic of exit planning arises both owners and their advisors respond by indicating whether a buy-sell agreement is in place or needs to be updated. While a buy-sell agreement is crucial to a well-designed exit plan, it is only one aspect of such a plan, and certainly is not, by itself, a complete plan. In fact, a buy-sell agreement may best be described as a component of an exit plan designed to take effect should an owner be forced to leave the business, perhaps due to death or disability, before his or her exit plan is fully implemented. The buy-sell agreement many times serves as more of a contingency plan than an exit plan.

However, before a particular planning idea is explored, it may be useful to think for a moment about why owners should plan at all, or what is the value of planning? Generally, owners who work with their internal and out-

side advisors to develop a comprehensive and written exit plan (including a checklist to monitor implementation of the plan) have at least three advantages over those owners who put off planning or do not plan at all. Owners, who plan, can expect to receive more money for their business, have less risk in a sale to outsiders or transition to insiders, and have more control over the exit process. The good news is that exit planning generally does not interfere with daily business operations and many times is not particularly complicated. The bad news is that delaying all planning until the time an owner wishes to exit his or her business will in many cases significantly increase, and perhaps even double, the income and estate taxes to be paid, thereby reducing the amount received by the owner.

Let's consider the owner of a C Corporation who is considering a sale to a third party in the next several years. An effective planning strategy may be to consider making an election to be taxed as an S Corporation, if all owners are eligible S Corporation shareholders and other circumstances permit. Many sales to third parties are structured as asset sales since buyers rarely want to purchase stock saddled with potential corporate liabilities. Such an asset sale from a C Corporation will result in two taxes; the first as the corporation pays tax on the sale of the corporate assets (at corporate tax rates) and second when the net sales proceeds are distributed to the owner (most likely as capital gain). If the same sale takes place in an S Corporation there would only be one tax since the S Corporation does not pay tax but instead passes its taxable gain through to the shareholder who pays the tax.

Of course, Congress long ago got wise to the strategy of converting a C Corporation to an S Corporation prior to a sale for purposes of avoiding the double tax. To close this loophole Congress enacted the Built-In-Gains Tax which requires an S Corporation which has previously converted from a C Corporation to pay a corporate level

tax of 35% on asset sales occurring ten years after the conversion. Due to recent legislation, the look-back period is seven years for sales occurring in 2009 and 2010.

However, consider the owner of a C Corporation presently valued at \$7 million due primarily to appreciated real property which is a significant corporate asset. Assume the owner requires \$10 million to successfully exit his business and retire. As an aside, part of a proper exit plan would be to measure how much the owner will need, and can realistically expect to receive, from the business to retire, and then to implement strategies to protect and build business value so the owner can successfully exit at the required amount. Since the Built-In-Gains Tax only applies to pre-conversion gains, a conversion of our hypothetical C Corporation to an S Corporation today could avoid a double income tax on the \$3 million of post-conversion gain, which could amount to \$1 million of income tax savings. Such a tax savings, of course, goes right in the owner's pocket. This additional \$1 million is the result of making a simple S Corporation election at the right time as part of the owner's exit plan.

The strategy above is only one of many available to business owners and their advisors. It is described here to make a few basic points. First, an exit plan is more than merely having a buy-sell agreement in place. Second, implementation of an exit planning strategy may not be particularly complicated; however, timing can mean everything. Third, a comprehensive and written plan is essential to discovering and then implementing strategies, such as the strategy described above, which are designed to protect and increase business value and yield the maximum amount to a departing owner. Finally, exit planning must be done now so there is sufficient time to develop and implement a plan before the owner's departure from the business.

LAURA S. ROTSTEIN



The firm is pleased to announce the arrival of Board Certified Elder Law attorney, **Laura S. Rotstein**. With more than 20 years of legal experience, Ms. Rotstein devotes her practice to serving the needs of the elderly population. For nearly a decade, Ms. Rotstein has been certified in elder law by the State of Florida. She concentrates her practice in guardianships, long term care, advance directives, Medicaid and nursing home planning, disability and incapacity planning, special needs trusts, elder law litigation, and nursing home residents' rights litigation.

Throughout her career, Ms. Rotstein has counseled hundreds of clients with the intricacies of elder matters, including reviewing nursing home contracts, coordinating care management assistance, planning for potential mental and disability incapacity issues, addressing complicated marital concerns and handling probate and guardianship matters before the court. She approaches each client with great sensitivity and compassion.

Ms. Rotstein is a frequent lecturer on caregivers' issues, end-of-life planning, guardianship and veterans' affairs issues before local charitable and health service organizations including the Parkinson's Support Group at Nova Southeastern Health Services, University Hospital Medical Center, and the Horizon Group at the Mae Volen Senior Center.

Ms. Rotstein is very active in the Elder Law Section of The Florida Bar, including serving as a member of its Certification Exam Committee. She is also currently a member of the Elder Law Affairs Committee of the Palm Beach County Bar Association; the National Academy of Elder Law Attorneys (NAELA); and the Academy of Florida Elder Law Attorneys (AFELA). In addition, Ms. Rotstein is a board member of the Florida State Guardianship Association and a former board member of the De Hoernle Alzheimer's Pavilion.

Ms. Rotstein earned her J.D. from Nova Southeastern University Law Center. She received a M.A. from Columbia University Teachers' College and her B.A. from Barnard College.

SUPER LAWYER 2009



The firm is pleased to announce that for the third consecutive year, **Arthur R. Redgrave** has been named by *Florida Super Lawyers* magazine as one of the top attorneys in Florida for 2009. Only five percent of the lawyers in the state are named by *Super Lawyers*. Each year, publisher Law & Politics undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by an attorney-led research staff, a peer review of candidates by practice area, and a good standing and disciplinary check.

CERTIFIED EXIT PLANNER



The firm congratulates **Ryland F. Mahathey** who is one of the first in the country to attain the designation of Certified Exit Planner (CEXP). Through the demanding certification program, Mr. Mahathey demonstrated his expertise in providing comprehensive, professionally executed exit planning services to the business owning community. As an attorney, Certified Public Accountant, and Certified Exit Planner, Ryland offers a unique perspective to business owners on a wide array of issues ranging from building value within the business to identifying exit objectives, addressing key employee incentive planning and retention issues, incorporating business continuity planning and establishing wealth preservation, business succession planning, asset protection, and sophisticated estate planning to clients. In addition, Mr. Mahathey was invited to speak on asset protection strategies at the Business Enterprise Institute's Annual Convention on Exit Planning held in Denver.

ESTATE TAX UPDATE

With the estate tax set to temporarily expire in 2010, there has been much uncertainty regarding its future. According to the current schedule, the estate tax will return in 2011 with a reduced exemption amount (\$1 million per person) and at a higher rate of taxation (55%). Initially it was expected that Congress would address this issue this year with the goal of finding a long-term answer to the estate tax question.

However, reports from Congressional insiders and observers are beginning to suggest that any significant changes to the estate tax will likely be delayed until 2010. A recent article on TheHill.com (a nonpartisan publication for and about Congress) indicates that since Congress has been so busy with healthcare reform, the debate over the future of the estate tax has been shelved for the time being. *The Wall Street Journal* echoes these sentiments and expects a

temporary extension of the current 2009 estate tax system (an exemption of \$3.5 million per person and a tax rate of 45%).

Admittedly, with the end of the year rapidly approaching, there is the potential for a sudden and unexpected result. In fact, Senate Finance Chairman Max Baucus has introduced a more comprehensive proposal that would simplify the estate tax system altogether. However, the most likely scenario remains a temporary extension of the current system for at least one more year. This postponement would leave the issue of estate tax reform to be decided in what is expected to be a quite different tax climate in 2010.

Regardless of the outcome, Redgrave & Rosenthal LLP will keep its clients informed of any changes in the estate tax to ensure that once the matter is finally resolved clients' plans may be adjusted accordingly.

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