

# ALERTS

## Estate Planning and the Coronavirus

*MVA COVID-19 Resource Center*  
04.2020

We hope you and your loved ones are all safe and healthy during these trying times. For any of you who have fallen ill, we wish you a speedy and full recovery. In response to the coronavirus pandemic, Moore and Van Allen has created a Covid-19 Resource Center including the latest news, alerts, and insights -- covering multiple practice areas to help you navigate this rapidly evolving situation from a legal and business perspective. MVA lawyers, professionals, and staff are here to support you during this uncertain time and remain committed to your success and well-being. We wanted to share directly with you some updates that might affect you, as well as some thoughts on opportunities this unprecedented situation has presented.

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### Tax Payment Deadline Extension

The Federal government has extended the deadline for the filing of 2019 income tax returns and the payment of the associated income taxes (including first quarter 2020 estimated taxes) to July 15, 2020. No interest or penalties will begin to accrue until July 16<sup>th</sup>. It should be noted that second quarter 2020 estimated taxes are now due by July 15, 2020 (instead of June 15, 2020).

In North Carolina, the tax return filing deadline has also been extended to July 15, 2020 for 2019 tax returns. While the North Carolina Department of Revenue will not assess penalties against filings received by the July 15 deadline, they will still charge interest for taxes owed by April 15, unless the state legislature enacts a new law abating the interest.

In South Carolina, the due date for the filing and payment of taxes was moved to July 15, 2020 for 2019 tax returns. No interest or penalties will be assessed for returns and taxes received by the July 15 deadline.

In New York, the due date for the filing and payment of taxes was moved to July 15, 2020 for 2019 tax returns. New York will not assess interest or penalties if returns and payments are received by that date.

Virginia has waived penalties on taxes due if received by June 1; however, interest will still accrue beginning May 1. The due date for Virginia returns has not been extended, and income tax returns are still due by May 1.

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For any other states, please contact your Moore & Van Allen attorney.

### Provisions of CARES Act Affecting Individuals

While more information on the CARES Act will be available at the MVA Covid-19 Resource Center, we wanted to point out a few key provisions that may affect you individually. First is the waiver of required minimum distributions (“RMDs”) for 2020. For calendar year 2020, RMDs are waived for certain defined contribution plans (i.e., 401(k)s and IRAs), both for those who have already been taking annual RMDs, and for those who would start taking RMDs in 2020 (including those who turned 70 in 2019 but deferred the first RMD to April 2020). For those who have already taken their RMD for 2020, it is now not considered to be an RMD and can be rolled over (put back into the account) within 60 days of the withdrawal. If 60 days from the RMD have already lapsed, we expect that relief could be forthcoming.

Another highlight of the CARES Act is for taxpayers who do not itemize their deductions on their income tax return. Under the CARES Act, even non-itemizing taxpayers can deduct up to \$300 of charitable contributions made in cash in 2020. Not all contributions are eligible, such as contributions to donor advised funds, certain supporting organizations and certain private foundations. For taxpayers who do itemize their deductions, the taxpayer can elect to increase the deduction limitation to 100% of their adjusted gross income (“AGI”) (currently cash contributions are limited to 60% of AGI) in 2020. Again, contributions must be made in cash and cannot be made to donor advised funds, certain supporting organizations or certain private foundations.

### Updating Estate Planning Documents

Now is the time to review your estate planning documents. Unfortunately, the coronavirus has proven it can be devastating for even young and otherwise healthy individuals. You should review your Financial Powers of Attorney, Health Care Powers of Attorney and Living Wills, and HIPAA Authorizations to ensure that the individuals named in those documents are the people you currently wish to act for you in case of a medical disability. Living Wills generally permit you to state your wishes and instructions concerning life-sustaining treatment in the event you are unable to make your own health care decisions. In some states, such as North Carolina, your Living Will may be incorporated into your Health Care Power of Attorney document. Health Care Powers of Attorney permit you to name a health care agent to make medical decisions on your behalf in the event you are unable to do so. Financial Powers of Attorney permit you to name an agent to control your finances if you are unable to do so. Wills and Revocable Trusts provide how and to whom your assets pass at your death. All are important documents, and in light of recent events, they have become all the more important. If you have children or grandchildren over the age of eighteen, they should also execute these documents, since parents can no longer make those decisions for adult children.

### Additional Planning Opportunities

We recognize that for many of our clients, this is a difficult financial period. However, for those clients who have substantial wealth to transfer to assist younger generations, the current economic climate has led to reduced asset values and historically low interest rates, which create an unprecedented opportunity to transfer significant wealth to descendants. Estate planning transactions are most successful when the appreciation of an asset occurs after the transaction, when the asset is outside of the donor's estate for

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estate tax purposes. This can be accomplished by gifting or selling the asset to an irrevocable trust. In gifting transactions, the gift can be made, for example, to a multi-generational trust or to a type of trust known as a Grantor Retained Annuity Trust (a "GRAT"). When selling assets to a trust, the seller often receives a promissory note in exchange for the assets. Additionally, for those clients who are charitably inclined, now is a good time to consider funding a Charitable Lead Trust ("CLT"). All of these techniques benefit from depressed asset values at the time of the transfer. Gifts to GRATs, leveraged sales in exchange for a promissory note and gifts to CLTs are most effective in a low interest rate environment. Given the recent reductions in both asset values and interest rates, now may be an opportune time to consider transferring wealth to your descendants or other beneficiaries.

### Gifts

Under current law, every individual has a lifetime Federal gift and estate tax exemption of \$11,580,000 (\$23,160,000 for a married couple), adjusted for inflation. When you make a gift during your lifetime, you use some of your exemption, reducing what is available during lifetime and at death. For example, if this year you were to gift an asset worth \$1 million to someone other than a spouse, then you would have \$10,580,000 of your exemption remaining. If the asset gifted then doubles in value, the recipient of the gift has an asset worth \$2 million, and you have moved \$1 million of appreciation out of your estate for an estate tax savings of at least \$400,000 (i.e., \$1 million X 40% federal estate tax rate). You can structure the gift so that the gift is to a multi-generational dynasty trust for the benefit of your children and grandchildren (and their descendants). In that case, not only have you moved the appreciation out of your estate, but the entire asset can stay out of your children's, grandchildren's and future descendants' estates - potentially freeing the asset from all future estate and gift tax. The trust can also be structured as a Grantor Trust, which is a type of trust where the Grantor (i.e., the person setting up the trust) is responsible for the income taxes due on the trust income, which allows the assets in the trust to grow income tax-free during the Grantor's lifetime for the benefit of the trust's beneficiaries. Another benefit of a dynasty trust is that the assets held in the trust are protected from a beneficiary's creditors (for example, protection in the event of a beneficiary's divorce or car accident). As noted above, every individual currently has a gift and estate tax exemption of \$11,580,000 (\$23,160,000 for a married couple). However, under current law, the exemption is reduced by approximately half at the end of 2025. Furthermore, it is possible that the exemption could be reduced, perhaps to as low as \$3.5 million per person, with a change in the administration and Congress. Therefore, clients with large estates may want to consider using their current exemptions prior to the end of this year. As noted above, you may want to consider making gifts now while the markets are down, in order to take advantage of depressed portfolio valuations.

### GRATs

If you have used up all of your exemption already or merely wish to transfer appreciation on an asset (versus gifting away the underlying asset itself), a GRAT may be worth considering. With a GRAT, the Grantor transfers assets to a specially designed irrevocable trust. Over the term of the GRAT (usually 2-10 years), the GRAT is required to pay back an annuity to the Grantor, with the remainder of the assets passing to the beneficiaries selected initially by the Grantor. The Grantor is treated as having made a gift to the GRAT, and the Grantor's lifetime exemption is reduced by the amount of the gift. The value of the annuity payments retained by the Grantor is determined based on an IRS specified interest rate (currently 1.2% in April 2020,

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and potentially to drop even further in the next few months). If the assets in the GRAT appreciate at a faster rate than the IRS interest rate, then the value of the assets passing to the GRAT's remainder beneficiaries will be greater than the value of the gift as calculated for gift tax purposes. It is even possible to structure a GRAT so the value of the gift is \$0. As a result, none of the Grantor's exemption amount is utilized for the gift, and even if the GRAT "fails" (i.e., nothing passes to the beneficiaries because the GRAT's assets either decline or do not appreciate in excess of the IRS interest rate), there is no tax cost to the Grantor. In a volatile market like we are in, you can create multiple GRATs funded with different assets. The GRATs funded with appreciating assets will succeed and pass wealth to beneficiaries. Conversely, although the GRATs funded with poorly-performing assets would not accomplish a transfer of wealth to beneficiaries, there would be no tax cost to the Grantor.

### Sales To Irrevocable Trusts

If you have already used your lifetime exemption with previous gifts or wish to transfer appreciation, in addition to a GRAT, you may want to consider selling assets to an irrevocable trust in exchange for a promissory note. The promissory note can be structured at an extremely low interest rate (currently 0.99% for a 9-year note and 1.44% for notes longer than 9 years) that pays interest only on an annual basis, with a balloon payment of the principal at the end of the note's term. Unlike in the case of a GRAT, the prior gift made to the trust is at risk if the asset sold to the trust declines in value, but the interest-only nature of the note (in contrast to GRATs, which must amortize principal) can allow for a substantially greater transfer of wealth over time. Furthermore, the irrevocable trust can be structured as multi-generational unlike the GRAT.

### Charitable Lead Trusts

A CLT makes a series of payments to one or more charities for a defined period of time (the "term" of the CLT). At the end of the term, the remaining trust assets will pass to the remainder non-charitable beneficiaries of the CLT, such as your children, at a gift tax discounted cost. The payments may be structured as an annuity payment (a fixed dollar amount) or as a unitrust payment (a fixed percentage of the fair market value of the trust assets each year). Upon the contribution of assets to the CLT and depending on the type of CLT used, you can receive an income tax charitable deduction equal to the present value of the future payments to the charitable beneficiaries. As a result, a CLT can be a useful technique in a year when you expect to have a large income tax liability. The value of the remainder interest that passes to the remainder non-charitable beneficiaries is the taxable gift portion of the transaction. The value of the remainder interest is calculated at the time of the funding of the CLT, based on the same interest rates used to calculate the value of a GRAT. In a low interest rate environment, the calculated remainder interest will be lower, which makes the CLT an efficient way to transfer wealth to the next generation, because over time assets are likely to appreciate faster than the lower interest rate. You can even designate a family foundation or a donor-advised fund as the recipient of the stream of payments during the charitable lead term. Given the low interest rates we are currently experiencing, a CLT is a good option for those clients who are charitably-inclined.

### Reevaluating Previous Transactions

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It is possible that some estate planning transactions (such as GRATs and leveraged sales) done over the past few years are now under water with the depressed stock market. It may be possible to remediate the transaction and reduce the "failure." For instance, in a leveraged sale to an irrevocable trust, it may be possible to refinance the promissory note and take advantage of the current historically-low interest rates (note that this can also be used to further improve successful transactions). It may also be possible to re-use in new transactions the assets that were transferred in previous failed transactions and capture any future increase in asset prices.

Again, we wish you and your families good health during this difficult time. Please feel free to contact us if you would like to discuss your planning.