Pasternak & Fidis Reporter

FALL 2020

**ESTATE PLANNING AND ADMINISTRATION**

Roxy Araghi
Anne W. Coventry
Oren Goldberg
Stephanie Perry
Christina K. Scopin
Micah G. Snitzer
Adam P. Swaim

**DIVORCE AND FAMILY LAW**

Linda J. Ravdin
Vicki Viramontes-LaFree
Anne (Jan) White

**Linda J. Ravdin, Editor**

**PASTERNAK & FIDIS, P.C.**
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland 20814
T 301.656.8850
F 301.656.3053
www.pasternakfidis.com

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# Maintaining the Effectiveness of Your Estate Plan: Is Your Plan Up to Date?

**BY ADAM P. SWAIM**

One question that clients frequently ask is "How often should we review our estate planning?" Although a comprehensive estate plan should not require frequent, extensive review, we recommend regular, periodic reviews of your core estate planning documents (will, revocable trust, financial power of attorney, advance health care directive) to ensure the documents accomplish your current objectives, especially if your circumstances or wishes have changed.

You should also consider the potential impact of changes in tax laws on your estate plan. Under a 2017 law, the federal estate, gift and generation-skipping transfer (GST) tax exemption amounts were *temporarily* doubled (*see* "Tax Cuts and Jobs Act: Impact on Estate and Gift Planning," Pasternak & Fidis Reporter (Spring 2018)). For 2020, the exemption amount is $11.58 million and is adjusted for inflation. In 2026, the exemption amount is scheduled to decrease by half unless Congress acts between now and then. The tax rate on estates, gifts, and GST transfers above the exemption amount is 40%. There could be significant revisions to the federal transfer tax laws even before 2026. In any event, there is no assurance that the increased exemption will be made permanent. In light of the current law, in certain situations it may be beneficial to modify existing estate plans or to make lifetime gifts to new or existing trusts for the benefit of children, grandchildren, or other beneficiaries to take advantage of the historically high exemption amount.

Here is a checklist to help you review the state of your planning.

1. **Will.** Have the circumstances of your beneficiaries or your wishes for the distribution of your assets changed? Are the people you have designated under your will in a fiduciary capacity (personal representative, trustee, guardian for minor children) still the individuals you wish to serve in that capacity? Since you signed your will do you have assets of greater or lesser value which, along with changes in the federal transfer tax laws, might suggest a change in tax planning is warranted?

2. **Financial Power of Attorney.** Have you changed your mind about the appropriate person to manage your financial and property affairs in the event of your incapacity? Is your power of attorney more than five

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# Raising the Bar for Diversity, Equity, and Inclusion

**BY ANNE W. COVENTRY**

Having served for 10 years on the Council for the Estate and Trust Law Section of the Maryland State Bar Association, I became Chair at the end of June. It is both an honor and a privilege to serve, and it is not lost on me that my term takes place during a worldwide health crisis that has disrupted how we work, and at a time of public and private reckoning with what a history of unjust choices has wrought in our communities.

As to the latter, my goal is to focus this year on concerted efforts to improve diversity, equity, and inclusion in the Section and on the Council. Our first step, unanimously adopted at our June meeting, was to expand by 10 the number of seats on the Council over the next four years. This step, coupled with the continued expansion of the Council's committee structure to bring broader participation in its work, will help to change the culture of permanent tenure that has created a barrier to inclusion. Further expansion of our committee structure will provide both an on-ramp to Council, in which members may experience committee work *before* joining the Council, and an off-ramp for long-term Council members to continue providing service and institutional memory to the Section while stepping aside to make room for new voices.

Having a diverse Section Council will help to combat racial disparity in the Section and in our profession. An open letter, published in *Medium* on June 19 (https://medium.com/@aasu/a-letter-to-corporate-leaders-bd931d5326ab), from the African American Student Union at Harvard Business School to the nation's corporate leaders, pointed out that "Black professionals hold just 3.2 percent of all executive or senior leadership roles, less than 1 percent of all Fortune 500 CEO positions, and receive 1 percent of all venture capital investment." (citing https://www.talentinnovation.org/__private/assets/BeingBlack__PressRelease.pdf) The leadership ranks in the estates and trusts Bar bear these same indicia of a long history of systemic inequality. Through the efforts of leadership, the Section Council can work to repair these wrongs.

Recognizing that we have to acknowledge race and the role systemic racism has played in each of our histories in order to change the future, made me reflect on some of my own personal history:

> I claim Chicago as my hometown, but actually I grew up within the four whitewashed walls of every John Hughes movie—in a northwest suburb of Chicago—one whose particular claims to fame include the Arlington Racetrack and a 1977 Supreme Court case (*Village of Arlington Heights vs. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)) that upheld racist zoning rules. A deliberate outcome of those racist zoning rules and redlining was that my elementary and middle schools were almost entirely white, and my high school of 1,600 had only one Black student. It was not until law school, in Virginia, that I ever had a Black teacher. Chicago continues to be one of the most segregated metropolitan areas of this country, and although I grew up there and think of it as "home," the only times I was further south than Soldier Field were to visit the Museum of Science and Industry. We grew up internalizing messages that the rest of the city was out of bounds, and we did not question it.
>
> My father was a career public defender in Cook County, handling death penalty cases. He was on the news a lot when I was young, because he accused the Chicago police of torturing a confession out of one of his clients. I was young, but I remember answering the phone when Dad's client called our house to speak to him. He spoke kindly to me, told me to stay in school, and said that his daughter and I should get together and be friends, because we were the same age. At just 10 or 11 years old, my first thought in response was, "but that can't happen; she lives on the South side." I'm told she became a lawyer, too, but I've never spoken to her.

I look back now at far too many missed opportunities to effect change in the spaces in which I held any influence. Looking forward to this year as Chair of the Section Council, I am optimistic that we can effect meaningful change in our own sphere of influence, including:

- Prioritizing the efforts of the Section's Diversity & Inclusion Committee, inviting and welcoming its input into what more the Council or the Section can do (*e.g.*, reviewing our bylaws through a diversity & inclusion lens, and suggesting revisions to them), and supporting and carrying out its recommendations.

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# Premarital Agreements and the Gray Divorce

**BY LINDA J. RAVDIN**

With boomers living longer and marrying multiple times, the argument for premarital agreements for these couples is compelling. A premarital agreement defines the property rights of the parties when the marriage ends at death or divorce. Not all marriages between mature people will last until death.

**Property Rights at Dissolution.** A premarital agreement will typically provide for each party to retain exclusive rights to existing assets and assets acquired during the marriage by gift or inheritance. Parties must decide whether they want a title-controls type of agreement, so that each retains exclusive rights to *all* property he or she owns, or whether they want to share the fruits of their labor. When both parties have substantial assets and both are still working, with the ability to continue to build their nest eggs, a title-controls type of agreement is often appealing. A title-controls agreement can allow for a clean break with a minimum of legal fees.

When there is a substantial asset disparity, and the stronger party is employed, a property-sharing type of agreement may suit parties better, as it would allow a weaker party to benefit from the accumulation of assets resulting from the high-earner's work. Nevertheless, there are pitfalls. For example, a spouse nearing retirement age who can afford to retire may do so, cutting off the accumulation of shared assets. A third option, when there is a big wealth disparity, is for the wealthier party to agree to make property transfers from his or her separate property in the event of divorce to provide for the other spouse's financial security.

**Terms for Payment of Living Expenses During Marriage.** Many couples prefer to deal with payment of living expenses informally during the marriage as they would if they had no agreement. When parties want to address living expenses in the agreement, they will need to agree on the allocation of responsibility for their common expenses and whether a stronger party will pay some or all of the personal living expenses of the other spouse.

When one party will be solely or primarily responsible, the agreement should give him or her some discretion about the level of expenditure he or she must fund. It should acknowledge that changes in circumstances, such as a payor's retirement, will permit a reduction in the level of expenditure. The agreement should address responsibility for extraordinary healthcare expenses, such as nursing home care. For some situations it may be appropriate to require that a party spend down his or her own assets for nursing home expenses before the other spouse is required to contribute.

The current health crisis points up the need to ensure that both parties have adequate health insurance; parties will need to decide whether the agreement should mandate it. When there is a significant wealth disparity, the wealthy party may agree to pay the premiums for the other spouse. In some jurisdictions a spouse may be obligated by law to pay for necessaries, such as healthcare, which can include nursing home care, for a spouse who is unable to pay his or her own. Long-term care insurance can mitigate the risk for both parties. Therefore, parties should consider whether to mandate such coverage and who should pay for it.

**Provisions Regarding Spousal Support after Divorce.** Parties entering into a late-life marriage with a premarital agreement have several options regarding spousal support:

- A blanket waiver of all post-divorce support;
- A reservation of support so that one party, or either, can seek an award;
- A provision for a predetermined amount and duration of support;
- A predetermined amount of support payable indefinitely;
- A lump sum in lieu of periodic payments.

Spousal support can be appropriate where there is a significant wealth disparity, an economically weaker spouse will be moving from another geographic area or giving up his or her employment, or where he or she will lose spousal support from a prior spouse as a result of remarriage. If the provisions for property will provide adequate financial security for a weaker party, he or she may be able to forego spousal support. A wealthy party may consider a predetermined amount and duration of support acceptable because it provides certainty without the necessity for litigation and affords

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# STAFF SPOTLIGHT: Sharon Coop

Clients who have worked with Senior Probate Paralegal Sharon Coop know that she is thorough and can explain the most esoteric concepts in an understandable way. But when Sharon started at the Firm almost 19 years ago, her paralegal experience was limited to tax assessments; she didn't know anything about probate. She learned everything about estate and trust administration, including preparing complex estate tax returns, from partners Marcia Fidis, Al Pasternak, and Nancy Fax. She translates that knowledge to bereaved clients with empathy and respect. Now, as the department's most senior paralegal, she helps train and mentor other staffers and enjoys working to streamline the Firm's processes. Perhaps that's due to one of her first jobs: working on an assembly line at an Estée Lauder factory (complete with hairnets and notes passed on the conveyor belt!), where process was everything. Sharon, her engineer husband, teenage daughter, and two black labs like to visit their remote cabin in West Virginia on weekends. Sharon's passion for rescuing black labs started after she inherited two siblings from an estate that she handled—the widow could not keep the dogs after her husband died, and she was so grateful that Sharon took them in. Her family enjoys hiking, kayaking, and fixing up the cabin to make it a cozy escape from their DC life. We are thrilled to have Sharon on our team. ■

## Premarital Agreements and the Gray Divorce

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a weaker party a period of support during transition. A reservation of support is rarely appealing to a stronger party as it means the potential for an open-ended obligation and potentially high litigation costs. As appealing as a reservation may be to a weaker party, the benefits may be illusory. Alimony typically terminates on the payor's death. Moreover, it is generally modifiable upon a change of circumstances; a payee could face another round of expensive litigation when the payor retires.

**Provisions for the Marital Home.** In drafting provisions relating to a shared residence, there are several issues to consider:

- Will the agreement apply only to an existing residence, or also to a later-acquired residence?
- Will special provisions for a residence apply only to the principal residence or to additional homes that the parties may use together?
- Will one spouse be able to evict the other spouse from a solely owned home in the event of separation? What provisions should the agreement make to protect the interests of the non-owner spouse? What if the non-owner spouse is elderly and moving would threaten his or her health or would otherwise be very burdensome?
- Will the sole owner be able to sell the home over the objections of the other spouse?

Options for treatment of ownership of a primary home include:

- One spouse retains sole title and sole interest in an existing home and the other party never acquires any rights to the property (unless the owner elects to transfer title).
- One spouse retains sole title to an existing home, but the other spouse acquires an equitable interest that could be based on monetary contributions or the passage of time.
- A spouse who owns a home agrees to transfer title into a survivorship form after the marriage. The agreement could provide that the original owner is entitled to a transfer back upon dissolution but would enable the survivor to retain the home if the marriage ended at death.
- The parties agree to purchase a home together, and to titling the property in a survivorship form, and on the allocation of their interest in the equity in the event of dissolution, which could be based on each party's monetary contributions.

The agreement should include provisions for a buyout

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## Maintaining the Effectiveness of Your Estate Plan: Is Your Plan Up to Date?

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years old? Does your existing power of attorney specifically authorize your agent to access and manage your online accounts?

**3. Advance Health Care Directive.** Have you changed your mind about the person who should make your health care decisions in the event you cannot? Have your wishes for your health care changed, including your views about artificial life support (*e.g.*, CPR and breathing machines) in light of the COVID-19 pandemic?

**4. Revocable Trust.** If a revocable trust is a part of your estate plan, is it properly funded to maximize its usefulness for probate avoidance? Given your age or health, do you need to consider incorporating a revocable trust in your estate plan as a financial management tool in the event of your incapacity?

**5. Asset Protection.** Are you concerned about protecting an inheritance you leave to your children from divorce, creditors or dissipation from lack of proper management? Do you wish to protect assets you leave a spouse against the claims of a subsequent spouse so that the assets eventually pass to your children or other beneficiaries of your choice?

**6. Trusts for Children.** Are your children older, wiser, more stable than when you first established a trust for them under your will so that they should be involved in managing their own assets? Or does a child have problems with finances, creditors, or a spouse that you had not contemplated when your estate plan was established? Do you think that another person might be a better choice to serve as trustee of a trust for a child under your estate plan? Given your current assets and the current federal transfer tax laws, should you consider making lifetime gifts to a new or existing trust for the benefit of children (and grandchildren) to optimize the use of your available gift and GST exemption amounts?

**7. Life Insurance.** Do you need to review the beneficiaries on your life insurance policies to be certain they are consistent with your estate plan? Do you need to review your life insurance policies to see that they are performing as anticipated when you purchased them, or to see if there are better more cost-effective products on the market? Do you need a life insurance trust to protect proceeds from estate taxes or to hold policies that are needed to pay estate taxes that may be due on your death?

**8. Retirement Assets.** Have you recently changed jobs or retired and rolled over your retirement plan? Are your beneficiary designations for all retirement accounts up to date, in accordance with your current wishes and properly coordinated with your overall estate plan?

**9. Charitable Beneficiaries.** Do you have charitable beneficiaries that you want to benefit that are not mentioned in your will? If you have charitable beneficiaries, do you want to consider whether to maximize income tax savings by making donations to them out of retirement assets rather than under your will, given the value of your assets and the current estate tax laws?

**10. Disability Planning.** Is physical or mental disability for you or a family member now a greater concern to you than when your planning was completed? Do you need to review any provisions for a beneficiary with a disability to be sure that assets you leave them are protected so as not to disqualify the disabled beneficiary from receiving governmental benefits? ■

***If you answered "yes" to any of these questions, then it may be time for a review of your estate plans.***

## Raising the Bar for Diversity, Equity, and Inclusion

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- Recruiting diverse authors to write articles for the Section newsletter, not only about estates and trusts topics, but also specifically about diversity and inclusion and elimination of bias in the legal profession, in the estates and trusts practice area, and in the Section.
- Devoting the kick-off program of the Section's Study Group this October to a diversity-focused program.
- Recruiting diverse presenters for Section continuing education programs, and featuring elimination of bias as a program topic, particularly programs that can reach a broad audience.
- Including more expansive topics for Section-sponsored articles and programs, beyond the traditional focus on issues affecting the 1%, to address estates and trusts topics affecting underserved communities.

The Study Group, under the leadership of P&F associate Micah Snitzer, is already going beyond just the fall kick-off program; this year's agenda includes additional programs on anti-racist topics, such as ways in which the tax laws perpetuate racial inequality.

Through these efforts, the Section will gain a vibrant energy from new ideas and perspectives, a Council in a position to respond better to the changing needs of its members, and a Section that expands its membership rather than watches members slip away.

Pasternak & Fidis has long valued our diversity as one of our strengths. We are committed to inclusivity and equality—Managing Partner Stephanie Perry and I both serve on the Diversity, Equity & Inclusivity Committee of ACTEC (the American College of Trust and Estate Counsel)—and we know we have room for improvement, too. We expect it to take hard work, be uncomfortable, and invite missteps along the way, and we commit to holding space for one another, engaging in difficult conversations, and encouraging each other to learn and grow and become more socially conscious. We are proud of the work we are doing to effect meaningful change in the spaces we are in. ■

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if both parties will have a monetary interest. When one party will own sole title, the agreement should provide for an orderly transition if the marriage fails, giving the other spouse adequate notice to move out and, in some cases, money for moving expenses. When the spouse who must move is to receive a cash property settlement, some thought should be given to the timing of payments in relation to when that person must move.

**Privacy Concerns.** A premarital agreement can include a confidentiality clause prohibiting dissemination of information about the other party's financial affairs, or it could be broader and include information of a personal nature. A confidentiality clause should permit a party to disclose confidential information to his or her attorney, financial advisor, and possibly a mental health professional. The confidentiality clause can include a provision that, in the event of a divorce filing, the parties will consent to entry of a protective order that prohibits them from disseminating protected information to the press or third parties. Whether or not a court will enter a protective order depends on the law and rules of that jurisdiction.

**Dispute Resolution.** Parties to a premarital agreement may wish to provide for binding arbitration in the event of a dispute about interpretation of the agreement, about the protocols for implementation of the terms, or about a claim of breach. Binding arbitration can have benefits for both parties. Parties may be able to get a quicker resolution. Arbitration proceedings are generally not open to the public; thus, parties may be able to better preserve their privacy. The parties' lawyers can hand-pick their arbitrator and can therefore choose an experienced domestic relations lawyer to resolve the dispute. It will generally not be in the best interest of the proponent of the agreement to agree in advance to binding arbitration of a dispute about validity; as arbitration decisions are generally not appealable, he or she should retain the right to require a court trial on such a claim along with the right to appeal an adverse ruling.

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# P&F NEWS

**In October, a group of attorneys and staff braved chilly drizzle to volunteer at Red Wiggler Community Farm. While maintaining proper social distance, they were able to harvest over 50 pounds of kale and over 60 pounds of eggplant that ultimately went to the farm's neighbors in need. Red Wiggler, located in upper Montgomery County, is a farm where people with and without developmental disabilities come together to work, learn, and grow healthy food. We look forward to supporting Red Wiggler's mission again in the future.**

## D.C.'s Estate Tax Exemption Reduced

**BY MICAH G. SNITZER**

In response to budgetary pressures, D.C. Mayor Muriel Bowser signed the "Estate Tax Adjustment Amendment Act of 2020." The Act reduces the estate tax exemption from $5.76 million in 2020 to $4 million for decedents dying on or after January 1, 2021. The exemption amount will be adjusted for inflation starting in 2022 and will continue to be non-portable between spouses. The Act became law on November 2, 2020, 60 days from the date it was submitted to Congress for passive review. The change to the D.C. estate tax exemption amount is a reminder of the importance of crafting an estate plan with sufficient flexibility to accommodate unanticipated changes to the estate tax laws. D.C. residents whose estates exceed the $4.0 million estate tax exemption amount may wish to review their estate plans to consider whether any adjustments are necessary considering the decreased estate tax exemption. ■

## Premarital Agreements and the Gray Divorce

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**Contract for Implementation.** The premarital agreement should acknowledge that the parties will need to enter into a marital settlement agreement in the event of separation or divorce to state the specific terms for dividing any marital property, for the sale or spousal buyout of real estate, for allocation of tangible personal property, to confirm or determine spousal support, and other necessary terms. Depending upon the terms of the agreement, the parties may need a marital settlement agreement to avoid gift tax consequences for transfers that will be made after a divorce. In those cases, the premarital agreement can condition payments to be made after divorce on the parties signing a settlement agreement. ■

**PASTERNAK & FIDIS, P.C.**
7735 Old Georgetown Road
Suite 1100
Bethesda, Maryland 20814

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