legally speaking

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WILLS, TRUSTS & ESTATES: PLAIN AND SIMPLE

ESTATE PLANNING AFTER DEATH: 20/20 HINDSIGHT

Yes, sometimes your estate plan can be changed AFTER you die to alter bequests made in Wills and Revocable Trusts. (For ease, "will" is used throughout this article.) This is done to change ownership of assets and/or to obtain the best tax results possible. These changes are made by your Executor, who makes certain tax elections, and by your beneficiaries, who decide whether or not they want some or all of the bequests you made to them. Your Executor also chooses the estate assets with which to fund various trusts. Post mortem planning provides the opportunity for 20/20 hindsight, as these decisions are made in light of the circumstances existing at your death (ex., tax rates, exemption amounts, surviving beneficiaries).

A "disclaimer" (called a "renunciation" under New York law) is when a beneficiary wants the bequest made to him/her under your Will to go to the person who would have received the bequest if that beneficiary had died before you. For example, your Will bequeaths $250,000 to your daughter, or if she doesn't survive you, to her children. Daughter has an estate of $25 million and does not want the $250,000 becoming subject to estate tax in her estate. Daughter signs disclaimer documents (which are filed with the court), and the $250,000 passes to daughter's children. There are state and federal tax laws and time limitations with which to comply for a disclaimer to be valid.

Elections made by your Executor on your estate tax return can have significant tax consequences. While the estate tax is usually applied to the value of assets at your death, your Executor can make an election to use the "alternate valuation date", which is generally six months after your death. For instance, you die with a stock portfolio of $7 million, which declines in value to $5 million six months after your death. If your Executor elects to use the alternate valuation date, the estate tax will be levied on $5 million, rather than on $7 million. If alternate valuation is elected, however, the lower value becomes the income tax basis for your beneficiaries, which may result in larger capital gains taxes when the securities are sold. The income tax and estate tax costs and benefits must be carefully considered when your Executor is contemplating this election. In addition to the alternate value election, there are numerous elections for your Executor to consider.

For trusts created under your Will, your Executor chooses the assets that go from your estate into the respective trusts. This choice can result in significant tax benefits. For example, your Executor may put assets that are expected to appreciate quickly (ex. a closely held business) into the credit shelter trust (that will not be included in your surviving spouse's estate at his or her death) and put assets with little expectation of appreciation (ex. bonds) into the marital trust (which will be included in your spouse's estate). By thoughtfully choosing the assets to fund the trusts, the tax burden on your spouse's estate can be significantly reduced. Again, income tax consequences must also be considered.

Some estate plans are intentionally structured to give your beneficiaries and your Executor the ability to make educated decisions about post mortem planning after your death. In any case, it is important for your Executor (and your lawyer and accountant) to consider the post mortem alternatives that may be available to benefit your family.

Patricia C. Marcin is a partner at the law firm of Farrell Fritz, P.C. concentrating in trusts, estates and tax law. Patricia has lived in Lloyd Harbor since 2005 with her husband John. They have two sons, Sam and Matt. Their faithful dog, Blizzard, still lives at home.