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TRUST AND ESTATE LAW

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We are pleased to send you this annual summary of the most significant changes to federal and New Hampshire laws that affect estate planning and estate and trust administration. We hope that you find this information helpful.

Turning first to federal law matters, under current law, each person has an exemption from federal gift and estate taxes, which allows you to transfer property to your family without tax. In 2023, the exemption amount is $12,920,000, to be indexed for inflation in future years through 2025, with portability of the unused exemption by a surviving spouse. Under current law, in 2026, the exemption reverts to $5,000,000 as adjusted for inflation for years after 2011.

The annual gift tax exclusion increased to $17,000 this year from $16,000 in 2022. A person may give up to $17,000 to as many individuals as the person wishes, without reducing his or her gift and estate tax exemption.

There is good news related to making a portability election after the due date of an estate tax return. Made permanent in 2013, portability allows spouses to share their estate tax exemptions. Under this law, if a spouse dies without fully utilizing his or her estate tax exemption, an estate tax return may be filed to identify the unused portion of the exemption that can be later used by the surviving spouse. The time for making the election is the due date for filing an estate tax return, nine months after death, with the option of a six-month extension, if requested. Effective July 8, 2022, the updated rules extend the period within which the estate of a decedent may make a portability election to any time before the fifth anniversary of the decedent's date of death. This extended period to file an estate tax return only applies to estates that would not otherwise be required to file based on the value of the gross estate and taxable gifts.

The SECURE 2.0 Act of 2022 was signed by the President on December 29, 2022. The SECURE 2.0 Act builds on the SECURE Act passed in 2019 which introduced broad changes to the law as it relates to participants in retirement accounts. The changes in the law are applicable to defined contribution plans, such as IRAs and Roth IRAs, but not to defined benefit plans, such as pensions. The changes in these laws are extensive, however, we have included some highlights related to individuals and estate planning.

Before 2023, required minimum distributions (RMDs) from an account had to begin when a participant reached the age of 72. The SECURE 2.0 Act increases the age at which participants must start taking RMDs to 73 for individuals who turn 72

after 2022. On January 1, 2033, the age to begin taking RMDs will further increase to 75.

Under the SECURE 2.0 Act, there is an increase in the catch-up contributions which allows plan participants who are age 50 and older to make contributions in excess of the maximum contribution limits. In 2023, the additional catch-up contribution is $7,500 for 401(k) plans. Starting in 2025, the SECURE 2.0 Act authorizes a higher catch-up for participants ages 60 to 63 equal to the greater of $10,000 or 50% more than the basic catch-up amount.

Also, under the SECURE 2.0 Act, starting in 2024, 529 account beneficiaries may roll over up to a lifetime maximum of $35,000 from a 529 account to a Roth IRA.

The original SECURE Act separates beneficiaries of retirement accounts into two categories: Designated Beneficiaries ("DBs") and Eligible Designated Beneficiaries ("EDBs"). For a DB, inherited retirement accounts must be paid out over a 10-year period following the death of the account holder. An EDB may choose a modified payout period and "stretch" payments of an inherited IRA over the life expectancy of the beneficiary.

There are five categories of EDBs under the SECURE Act: (1) surviving spouse; (2) a participant's child who has not reached the age of majority; (3) a disabled individual; (4) a chronically ill individual; and (5) an individual who is not more than 10 years younger than the participant. Determination of whether a beneficiary is eligible or not occurs at the death of the original account holder. A beneficiary falling into one of these categories is eligible to receive distributions from the inherited account over a period defined by their life expectancy. It is important to note that if an EDB inherits a retirement account, chooses to take it over his or her lifetime, and then dies, the next beneficiary must empty the account within 10 years of the death of the first beneficiary, regardless of whether they would have qualified as an EDB. Also, once a child reaches the age of majority, the account must be empty within 10 years.

The Treasury issued a proposed regulation in February of 2022 to further address the required minimum distribution ("RMD") rules under the Secure Act. In part some of these rules rest on if the owner of the retirement account died before or after the owner's required beginning date, which is the date which the participant must commence taking lifetime RMDs from the account.

Generally, beneficiaries who are DBs are subject to the 10-year rule, with no distribution required until the year that contains the 10th anniversary of the participant's death. However, the proposed regulation provided that if the participant dies after the participant's required beginning date, then the beneficiary must take

annual RMDs based on the life expectancy payout method during the years 1 through 9. These rules, however, will apply no earlier than the 2023 distribution year.

Turning next to New Hampshire law developments, there is a fascinating case working its way through the court system. The issue before the New Hampshire Supreme Court in In re the Omega Trust, is whether email communication between the grantor of a trust and his attorney that outlined the particular terms of a proposed amendment was effective to amend the trust. The grantor and his attorney engaged in back and forth email messages with respect to an amendment that the grantor intended to make. The last email messages were from the grantor, in response to his attorney's summary of the changes "very nice job, there are just a few suggested changes noted below" followed by the attorney's response "will prepare the revised documents accordingly." Two days later the grantor died without having been presented with a draft amendment.

The terms of the trust provided that the grantor could amend his trust by filing notice of the change with the trustee. With respect to execution, the trust provided that the trust and any amendments would be effective when executed by the grantor. In its review of the facts, the Supreme Court held that the language of the trust did not prohibit methods of amendment other than those listed in the trust instrument. The Supreme Court looked to the New Hampshire Trust Code which provides that a grantor may amend a trust either by substantial compliance with a method outlined in the trust or by any other method manifesting clear and convincing evidence of the grantor's intent if not specifically prohibited by the terms of the trust.

The Supreme Court sent the case back down to the lower court to determine whether the email messages amounted to a clear and convincing expression of intent to amend the trust. It will be interesting to see how this case unfolds. Regardless of the outcome of this case, we caution clients that any amendment to their trust should be in a signed instrument, preferably prepared with the assistance of counsel.

New Hampshire has a new pretermitted heir statute. A pretermitted child is one who is not mentioned in a will. Prior to the 2023 change in the law, there was a presumption that if a child was not named in a will and specifically excluded, the child was pretermitted and considered to have been inadvertently left out. The child would then be entitled to the same share as the child would receive if there had been no will. Many clients ask about a provision in our pour over wills that reads "I am mindful of my children and their issue, and except as expressly provided in this Will, I intentionally make no provision for the benefit of my children and their issue." This language was required to avoid running afoul of the prior pretermitted heir statute. Effective January 1, 2023, the presumption that a child not named in a will was unintentionally omitted is now generally reversed. The unmentioned child is only considered pretermitted if the child is born after the execution of the will and not specifically excluded. This new statute will apply to the will of anyone dying after

January 1, 2023. Best practice will still be our practice; that is, to specifically name a client's children and if the beneficiary of the will is a trust, to indicate that the client is mindful of the client's children and is intentionally not benefiting the client's children under the client's will.

As always, it is important that your estate pass to your intended beneficiaries, whether by will, trust, beneficiary designation or joint tenancy. We encourage each of you to review your estate plan every year. This should include a review of your current documents, ownership of assets and accounts, and confirmation of beneficiary designations. You should consider whether any changes are needed at this time.

The support of our amazing staff is essential to our success. Throughout each year, we receive positive feedback and warm compliments from so many clients regarding our staff. They each work hard to provide our clients with superior service. We are thankful for the assistance of our paralegals, Jennifer Pierce, Robin Davison and Victoria Farren. We were fortunate to hire Nicole Masson as our receptionist in September. Emily Moser left our reception desk to teach high school biology. We wish Emily the best.

In 2022, Alyssa graduated from the inaugural class of the American College of Trust and Estate Counsel's New England Fellows Institute. She was honored to participate.

Christine was again honored to be counted among the best trust and estate attorneys in New Hampshire and New England. Christine is thankful for all of our clients and peers who have helped her to achieve these distinctions.

We appreciate your loyalty and referrals of other family members and friends for our services. We are humbled by the volume of business that is sent to us. In order to best serve our clients, we are limiting the number of new clients each week so that we can provide excellent service to the clients with pending planning or administration needs. As a result, it may take a new client a bit longer to get onto the calendar.

Best wishes for a healthy and joyful 2023.