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The Safety GRAT™

***By Robert T. Napier*[1]**

Many clients believe that the greatest enemy to their wealth is the federal estate tax. The reality is that very few estates actually pay a federal estate tax and current estimates are that fewer than 20,000 estates annually *will* actually pay the federal estate tax. Furthermore, it is understood that quality estate planning can materially reduce, if not eliminate, any tax due.

The enemy to a client's wealth is not the estate tax, it is the reluctance in overcoming inertia. It is easy to understand how the current financial environment can make even the most affluent clients feel relatively vulnerable. Furthermore, with the current federal exemption at $3.5 million per taxpayer, husband and wife can shelter $7 million from federal estate tax.

But for families with wealth that is taxable, or might be taxable if assets appreciate in the future, this is an opportune time to plan. Too often there is reluctance to engage in planning. This is true even for simple and appealing estate planning strategies such as grantor retained annuity trusts (GRATs).

GRATs are typically built to benefit a younger generation at the termination of the trust. Clients recognize that the typical Walton GRAT transfers only the appreciation, beyond a hurdle rate, to the next generation. In other words, the client usually retains the assets that were used to fund a successful GRAT, as well as the appreciation up to the hurdle rate. Intuitively, it would seem that clients should be comfortable creating a GRAT to benefit the younger generation. If a client had tens of millions two years ago and now has half that amount, it is understandable that he or she may feel impoverished and less inclined to give up additional assets.[2]

GRATs can help clients take advantage of historically low interest rates, generous valuations and the current financial markets, including GRATS for the benefit of the grantor's spouse. This can be accomplished by having the remainder beneficiary of the GRAT be a trust for the benefit of the grantor's spouse, followed by the next generation. This permits the grantor to retain the principal used to fund the GRAT, plus the appreciation up to the hurdle rate, while the spouse, as primary beneficiary of the remainder trust, enjoys the appreciation of the GRAT assets beyond the hurdle rate. In other words, all of the GRAT assets and their appreciation remain with the older generation. However, the remainder trust is drafted not to be includable in the spouse's estate, nor is it in the includable in the grantor's estate (provided the grantor survives the GRAT term).

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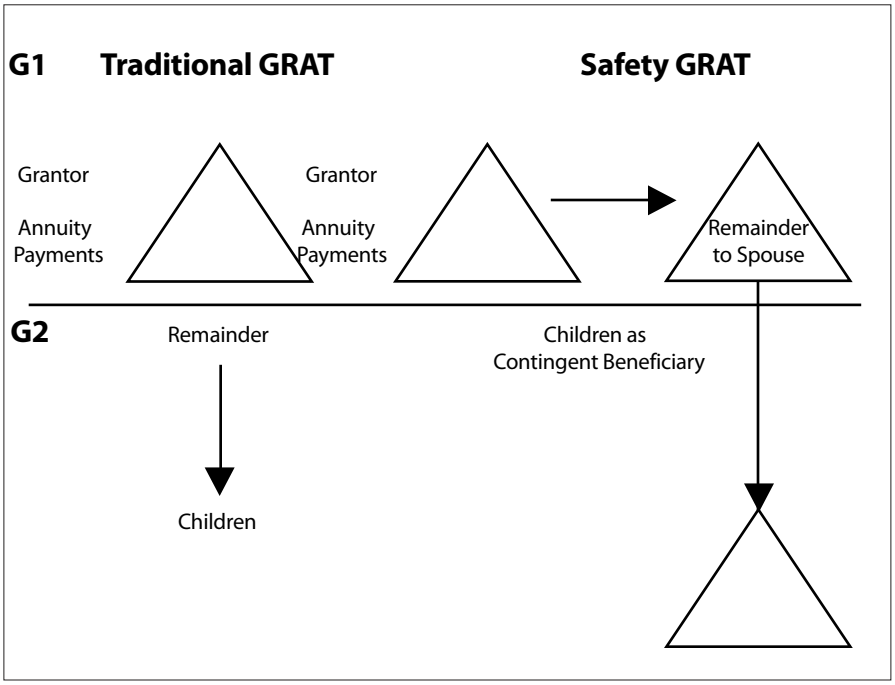

Typically, the remainder trust is crafted as a non-exempt trust for generation-skipping transfer tax purposes.[3]

We have found that married couples are far more interested in this concept than in the traditional GRAT. It affords the grantor and the grantor's spouse the luxury of keeping all their wealth at their generation, thereby preserving their financial safety, while lessening the future burden of the federal estate tax by removing the appreciation in excess of the hurdle rate (and all future growth thereon) from their taxable estates. The Safety GRAT helps clients overcome their reluctance to prepare a tax-efficient estate plan.

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2. A recent Barron's article suggested that clients feel disproportionately poorer when they lose half their wealth, as compared to how they would feel if they increased their wealth by half.

3. It is theoretically possible to build this trust as a GST-Exempt Trust if the grantor is inclined to allocate GST exemption at the expiration of the ETIP. This may be prudent in limited situations.

Probate Act problems in proving up wills

By Lawrence P. Devens[1]

This article examines the problem that arises when a petitioner must rely on a witness attestation clause to admit a will in a "formal proof" hearing under the Probate Act.[2]

755 ILCS 5/6-21 was enacted in 1980 as part of an overhaul of the Probate Act intended to speed up and simplify the admission of wills to probate.[3] This Section specifically excludes witness attestation clauses and witness affidavits in formal proof hearings.[4] The exclusion conflicts with a longstanding body of case law allowing the attestation clause in certain contested admission hearings.[5]

This article will first review the procedure for admitting a will before and after Section 755 ILCS 6-21 was enacted. A look at three cases decided after Section 755 ILCS 6-21 was enacted reveals that the First District appears to sanction the use of the attestation clause at these hearings, despite the exclusion provision.[6] Another case demonstrates that the exclusion provision ultimately has no force beyond requiring a Section 755 ILCS 8-2 will contest to prove the will with the attestation clause.[7] Dicta in two cases suggest that providing voluntary notice of a Section 755 ILCS 6-4 hearing may preempt a Section 755 ILCS 6-21 hearing.[8]

Section 755 ILCS 6-4 of the Probate Act governs the admissibility of a will to probate. Part (a) was not substantially changed by the 1980 revision.[9] This Section enumerates the *prima facie* elements required to prove a will. It provides that each of two (2) witnesses to a will must state that: (1) he or she was present and saw the testator sign the will; (2) he or she signed the will in the presence of the testator; and (3) he or she believed the testator to be of sound mind and disposing memory. In addition, there must be no evidence of fraud, forgery, compulsion or other improper conduct sufficient to invalidate the will. [10]

Section 755 ILCS 6-4(b) was rewritten.[11] The prior version, enacted in 1969, provided that with the written consent of all competent heirs and legatees, the proponent could prove the will with attestation clauses and witness affidavits, "with the same effect as if the witnesses testified in person."[12] Section 755 ILCS 6-4(b) as amended, replaced the admission by consent provision with a provision allowing the petitioner to admit the will with witness testimony, an attestation clause, an affidavit, and "any other evidence competent to establish the will."[13]

Prior notice of the petition to admit is not required under the Act. [14] Instead, the petitioner must provide notice to heirs and legatees within 14 days after the will is admitted along with a notice of their right to formal proof.[15] An heir or legatee may petition to require formal proof within 42 days after the original admitting order.[16] Section 755 ILCS 6-21 allows the same evidence in the formal proof hearing as in the initial Section 755 ILCS 6-4 hearing, with the exception of the attestation clause and affidavit.[17]

A duly executed attestation clause is traditionally admissible in contested cases to establish a *prima facie* case.[18] This *prima facie* case can be rebutted with positive evidence that the will was not validly executed.[19] However, if the rebuttal evidence merely creates doubt as to whether the requirements were met, such as in the case of forgetful, equivocating or recanting witnesses, the presumption arising from the attestation clause will prevail.[20] The role of the attestation clause in these cases cannot be overstated. An axiom in Illinois probate jurisprudence states that, "if the probate of a will was made to depend upon the recollection of subscribing witnesses, very few wills could be upheld."[21] The formal proof exclusion provision conflicts with this established body of precedent. This Section explores how the parties, trial courts, and appellate courts have struggled with that conflict.

Forgetting, Equivocating, and Recanting Witnesses

In *In re Estate of Carroll,*[22] an issue in a formal proof hearing was whether the decedent intended her signature appearing in the opening paragraph to be her authenticating signature. There were two surviving attesting witnesses but neither could remember details of the testator signing the will. The Trial Court, apparently excluding the attestation