

I N S I D E   T H E   M I N D S

# Estate Planning Client Strategies

*Leading Lawyers on Understanding the Client's  
Goals, Using Trusts Effectively, and Planning in a  
Changing Economic Climate*



ASPATORE

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# Client Strategies and Recent Trends in Estate Planning

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## **Developing a Client Strategy**

### *Communicating Benefits to Prospective Clients*

Typically, I offer a no-obligation initial consultation to give prospective clients an opportunity to get to know me, as well as provide me an opportunity to learn more about their position and needs. I also offer an online questionnaire that can be completed and submitted with a free initial analysis and comments for consideration. There is a great deal of information on our Web site. Some of the issues discussed include the probate process, transfer tax issues when relevant, the planning required for long-term care needs, and the issues of family dynamics that arise after a death.

Almost every client can benefit from early estate planning, from young parents with young children who may need a guardian or trustee if something should happen to both parents, to the wealthiest of families who need complicated and sophisticated transfer tax planning and advice regarding the legacy they intend to leave.

Some new clients may be new to the notion of estate planning, and may not know what questions to ask. Here are sample questions the attorney can use to encourage discussion:

- What is involved with estate planning, and how does the process work?
- Based on my situation, which options are available?
- Which options are more appropriate?
- What information do I need to provide?
- What do I need to do to complete the process?
- What steps are required after the documents are completed?
- How much will the process cost?
- What steps are taken to plan for disability?
- How will you implement my goals and aspirations for my own legacy?
- How do you incorporate the special requirements of family members?

This is not an exhaustive list, but if the attorney guides the client through a thorough examination of some of the factors he or she needs to consider,

there is a higher likelihood that the client will successfully complete the estate planning process.

### *First Client Meeting*

Traditionally, the first meeting is at the convenience of the client for an in-person contact, either at my office, or their office, home, or other convenient location such as a quiet restaurant or coffee shop. Today, it is more frequent for the initial “meeting” to take place by telephone or e-mail if it is the preference of the client. Although most, if not all, initial information can be obtained during the first meeting, it is helpful if the client can provide background information regarding the family, including a list of descendants, the relationship, their ages and contact information, and the client’s own personal data including contact information, employers, social security numbers, birth dates, and states in which they have previously lived. Further, they can describe their circumstances and concerns, as well as preparing an overview of their net worth and types of assets, liabilities, and income. The client should gather—either prior to the initial meeting or immediately following—all of the appropriate documentation (e.g. previous estate planning documents, legal descriptions for real estate, documentation for closely held business interests, beneficiary designations for specific assets, etc.), so that the attorney can verify their financial and legal position, and determine what actions will be necessary to properly execute any proposed estate plan.

It helps to identify all issues that should be considered as part of the process, and assists the clients in identifying issues that may need further discussion. It helps the client when they are not initially aware of which questions to ask.

### *Employing Checklists to Avoid Error*

Accuracy in estate law is especially important, because errors can cause significant problems—sometimes many years later. For example, an error in drafting a provision in a will or trust can result in costly and lengthy litigation among beneficiaries. Lack of thoroughness may cause problems that the plan was intended to avoid, such as having to file a probate for one asset that may have been overlooked in the titling process after the

documents were completed. A checklist can be a valuable tool for new attorneys because it ensures that all of the important requirements have been met. Experienced attorneys find it a useful tool as well; constant changes in estate and tax laws make the process complex even for seasoned professionals. Appendix K includes a sample checklist.

### *Managing Client Expectations*

Typically, the first meeting helps to frame expectations and helps to establish a timeline. Through fact-finding, which may include an estate planning questionnaire completed by the client (Appendix J), the attorney can identify and interpret issues at the initial meeting, with further development as the client provides relevant information (such as documentation that may not have been available at the first meeting). If it is clear after the initial meeting what needs to be done, then documentation can be provided within hours or days depending on the situation. An issue that an estate planning attorney always needs to be prepared to handle is the terminally ill client with only hours or days to plan. In addition, there may be restrictions on planning for long-term care or for saving transfer taxes if the planning is not done far enough in advance, or the options may be restricted because of the limited time available to complete the steps necessary to implement a particular plan. In some cases, the client may be unable to spend the time and energy to facilitate the completion of the plan. This is almost always a challenge for busy clients who have daily tasks and issues that require attention and take priority over the perceived lower time sensitivity of estate planning.

### *Avoiding Common Misconceptions*

Many people believe that drafting a will or trust avoids the necessity of probate upon death. They do not realize that the issue of probate is driven by how the assets are titled, and the probate process is intended to manage any assets that are owned solely by the deceased, with no joint owners or beneficiary designations. They also may believe that a will or the establishment of ownership or beneficiary designations to avoid probate will avoid transfer tax issues. Others believe that a simple will is all that is needed to accomplish their estate planning objectives. For example, they may wish to provide special distributions to specific individuals or

organizations, or they may have beneficiaries with special needs that require a trust arrangement for the inheritance. Simple wills are also normally inappropriate for estate tax minimization, since an estate plan for a large estate normally includes division of the assets into separate shares to take advantage of the tax laws available at the time of the decedent's death. Clients at times do not understand why it is important for estate planning professionals to know their financial matters, explore personal and confidential issues regarding family members, or discuss philosophies regarding the handling of wealth or handling of family matters. It is helpful for the practitioner to discuss the steps required to avoid probate or minimize taxes, so that they can understand your need to compile the confidential information about their situation. As with any attorney-client relationship, it is also important for the client to understand that we need complete information and full disclosure in order to properly represent them and consider all of the appropriate options that may be available.

Clients may also come to the table with an idea of the time and complexity of estate planning. The actual time, complexity, and expense are usually greater than the client expects. The attorney can minimize the level of surprise by walking the client through the basics of structuring estate plans: the structure of an estate plan is typically driven by the size of the estate or the goals of the client. Complexity of the family dynamics, such as children with special needs or a desire by the parents to provide restrictions and directions in the documents, can also affect the structure of an estate plan and the time it takes to prepare it.

Some clients will initiate an idea for structuring their estate planning. This is both positive and negative. The client's engagement is positive, because it indicates that they are interested in the process and thinking actively about their planning. On the other hand, the idea that they bring to the table may be ill-conceived, or an idea that was suggested to them by an outside party. My first response is to identify and discuss the advantages of the structure they have suggested. I then suggest other options that accomplish their goals in a different or more efficient manner. Comparing the advantages and disadvantages of each approach helps the client to understand the differences and make an informed decision. My goal is to encourage the client to look at options that may be easier or less costly to implement, because there is usually more than one option available for any particular

goal. If they learn of the better, less-costly options after the engagement, they may be disappointed.

### *Role of Family Members*

Family members can be very valuable to elderly clients by helping them to identify needs and understand options. This is particularly true in planning that involves complicated rules such as Medicaid eligibility for long-term care costs and its options, or complex and technical options to reduce exposure to transfer tax liability.

Typically, the family members should participate in a family meeting where all interested members are invited to give their input. With current technology, this may take the form of a conference call by telephone or an exchange of shared e-mails. The attorney needs to be careful to make clear that he or she is representing the client, and any information obtained from other family members is typically not confidential with respect to the client. The family members may be more conversant or understanding of the options available and the implications of each. As potential beneficiaries of the estate, they also may have different expectations that should be discussed with the client and considered as part of the estate plans.

## **Estate Planning Strategies**

There are recurring issues that can be problematic if they do not receive consideration and planning: disability, titling of assets, and planning for distribution to intended beneficiaries. The most costly estate/trust administrations arise because of disputes among beneficiaries regarding the design or implementation of the plan. Tax issues can be a significant cost to the estate/trust if not properly designed, as well as increased cost of administration for issues that need to be handled after death (and could have been resolved with early planning).

### *Disability*

An individual is many times more likely to be disabled at any given time from an accident or illness than they are to die. Therefore, the potential costs of disability should be of primary importance to estate planning

clients. The costs can be significant, particularly if there is a lengthy disability causing loss of income and/or catastrophic medical or long-term care expenses. For the legal practitioner, the primary tools for planning for disability are the health care power of attorney and financial power of attorney. The practitioner should also make sure that the client receives appropriate advice regarding insurance coverage and other programs that may be available to cover the costs that occur upon disability.

The health care power of attorney has undergone a great deal of change and development over the past twenty years, as the states have adopted forms that respond to the changing health care environment. The first statutes involved the development of “living wills,” which were documents that enable a client to express their health care wishes if they were terminally ill. The earliest forms typically involved a question and answer format, requiring the client to answer the questions in narrative form and using their own language. The forms have been modified to allow the appointment of an agent to handle the health care matters on behalf of the client (principal), and make sure that health care professionals will honor any directions in the living will portion of the document. In many states, you can indicate whether the client wishes to be considered for organ donation if appropriate, and direct whether the agent will have authority to make decisions regarding disposition of the remains. If a health care directive is completed, it is helpful for the client to have a copy on file with their primary care clinic or physician for easy and quick reference in case of emergency.

Financial powers of attorney are also governed by the statutes of the state where the individual resides. For clients who may live in different states during the year, you may consider having them prepare powers of attorney for each state, and have those available for any emergencies that may occur in the local jurisdiction. Most states have a “statutory” financial power of attorney, which is modeled in the statute and must be identical or substantially identical to the statute in order to receive the benefits and protections provided by the statute. The statutory form also has the advantage of being recognizable by most financial institutions where you may need to access the assets of the principal. Because of the restrictions in the statutory form, however, many practitioners will also have the clients execute a general power of attorney that covers issues such as making large gifts of the principal’s assets for estate planning purposes, transferring assets to

revocable trusts during lifetime, or performing other estate planning modifications while the principal is incapacitated.

### *Titling of Assets*

Titling of assets is important because it drives the distribution of the assets, an issue that can be independent of the estate plan that is structured in written documents. For example, if the client owns assets jointly, when the client dies the assets will automatically—in most cases—become the 100 percent-owned property of the surviving joint owner. As part of any estate planning engagement, the attorney should counsel the clients on the appropriate titling of their assets to make sure that the titling is consistent with the plan that is established in the documents. You will need to ask the client who will be the owners of the asset during lifetime, and how the ownership should be handled upon disability or death. You also should determine any issues that may apply to other owners or beneficiaries, such as disability or special needs, creditor problems, tax issues or irresponsibility in managing assets.

### *Designation of Beneficiaries*

A disconnection with the estate planning documents can also occur with beneficiary designations that have been established for specific assets. The most common intention of the estate planning client is to structure the distribution of the estate to their beneficiaries; this in fact is a primary goal in all estate planning documents. As much as possible it is helpful for the attorney to confirm the actual ownership and beneficiary designations that have been established by the client, and then provide advice on changes that are recommended in order to assist the client in establishing the plan. In some cases, the client may be willing to retain counsel to assist with these steps. In most cases, the distributions to beneficiaries will be discussed as part of the estate plan and incorporated into the documents. The attorney is charged with the task of making sure that the documents are consistent with the client's wishes. The attorney should counsel the client on how to title the assets, and who the beneficiaries should be, in order to match the titling with the distribution plan built into the documents. If the client does not retain you to handle this task, then you may wish to give the client directions that can be part of the file and available for future reference as additional assets are acquired.

### *Systematic Review*

In general, an estate plan should be reviewed every one to five years, and more often if there are significant changes in circumstances, such as marriage, divorce, birth or death of a child or other family member, changes in the parties who are involved in the estate plan (fiduciaries such as personal representatives, trustees, or guardians), and significant changes in net worth or tax laws. For example, if the estate plan includes retirement accounts, there are frequent changes in how distributions are made upon the owner's death. Another example might be planning that was based on the current estate tax exemption of \$3.5 million at the federal level (and possibly a different exemption at the state level), and then the exemption amounts change. The original plan may not flow as intended if based on a formula tied to the estate tax exemption.

### *Avoiding Probate Delays*

The most frequently cited drawbacks to probate include the cost, lengthy process, and exposure to public scrutiny. However, the adoption of the Uniform Probate Code by most states has helped probate become a more efficient and less costly process for undisputed estate administration. Under the Uniform Probate Code, an estate can be completely administered and the probate closed within four months after the personal representative is appointed. In most cases, any delay beyond that is caused by litigation, creditor issues, open tax issues, or difficulties in transferring the assets. Most states have statutory provisions that enable an estate to avoid probate through appropriate titling or beneficiary designations on assets. As examples, there are “payable on death” designations for bank accounts, “transfer on death” designations for securities, investments and brokerage accounts, transfer on death or quit claim deeds for real estate, assignments for personal property or closely held business interests, and beneficiary designations for life insurance, annuities and retirement accounts.

### *Ethical Issues*

Estate planning, by its nature, can be wrought with ethical issues. A well-prepared attorney can resolve most of those issues with careful planning and maintaining a focus on the needs of the client. The most common

ethical issue that arises is conflict of interest, which emerges when an attorney is representing multiple clients (husband and wife, parent and child, siblings, etc.). Other dilemmas are the appointment of an attorney as a fiduciary, or the attorney negotiating and closing a transaction with the estate, such as a personal purchase of an asset held by the estate.

When an ethical issue arises, the attorney should discuss the conflict with the clients and make sure that they understand the implications. In some cases, a waiver can be signed by the clients in order to proceed with the representation. Another option is to represent one party, and advise the others to retain their own independent counsel. Without the waiver, the clients need to be aware that the attorney may need to withdraw from representing both parties if there is a subsequent dispute.

An attorney always has the duty to represent the best interest of the client, and to advise them of any conflicts that may require a withdrawal or a change of representation. When dealing with estate administration, the majority of states still recognize the principle that the attorney represents the fiduciary (personal representative or executor) as a representative of the estate, and not the estate itself. In all jurisdictions, the practitioner needs to be aware of the duties to the beneficiaries. Although there continues to be a difference between the duties to the client and the duties to the beneficiaries, there is increasing recognition by the courts of particular limited duties to third parties and beneficiaries. At a minimum, the attorney should find ways to keep beneficiaries informed of the progress of the case.

It is not uncommon for clients to make unreasonable or unethical requests, or present case strategy ideas that are inappropriate. The best way to respond is to discuss the request with the client; ensure that they understand your perception that a particular request might be unreasonable or unethical. Once you reach an understanding with the client, discussion of the options for resolving the difference can follow. Some examples of resolution include withdrawal of counsel, changing the request to something that is reasonable and ethical and, in appropriate cases, continuing to represent the client in other matters or issues while refusing to comply with the unreasonable or unethical request.

*Client Relocation and Estate Planning*

The main issue for clients when relocating is the differences among state laws regarding the legal impact of documents executed in another state. Clients should seek counsel from a local attorney after relocation so that existing documents can be reviewed and analyzed under the laws of the new state of residence. Most, if not all states, have a “full faith and credit clause,” which means that in most cases a state court will recognize a document prepared in another state if the document was properly executed and valid at the time it was signed in the other state. For example, Uniform Probate Code (which can be found at [www.nccusl.org](http://www.nccusl.org)) § 2-506, Choice of Law as to Execution, states that “a written will is valid if executed in compliance with § 2-502 or 2-503 or if the execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.” Article IV, Section 1 of the Constitution of the United States of America states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial proceedings of every other State...”

Although an estate will typically follow the residence of an individual, the jurisdiction of a trust can be more complicated. If certain activities continue to take place in the original state, for example management and investment decisions, it is possible that the trust may continue to be subject to the laws of the original state, and not the state of the beneficiary’s or trustee’s new residence. It is possible with a trust to have the interpretation continue to be governed by the original state statutes, while the investment and management activity becomes subject to the laws of the new state of residence. For example, the Uniform Trust Code, which can be found at [www.nccusl.org](http://www.nccusl.org) provides in Section 107 that “the meaning and effect of the terms of a trust are determined by (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction’s law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue, or (2) in the absence of a controlling designation and the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue. If the trust did not otherwise provide the governing law, the jurisdiction will be considered by factors such as the place of the trusts creation, the location of the trust

property, and the domicile of the settlor, the trustee, and the beneficiaries. Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. The laws of the state where the trust was initially created should be researched for the state's rules governing situs and jurisdiction.

Another significant issue is the difference in property law among the states. There are a few states that have “community” or “marital” property laws which protect the rights of a surviving spouse regardless of how the assets are titled, while most states have a “common law” system which is more driven by the titling of the assets, for example, if the assets are owned by the spouse jointly or by one individual. In general, the courts have determined that property continues to maintain its property law status under the laws of the state when it was acquired, unless the parties take proactive steps to subject the property to the laws of the new jurisdiction. Some states have also enacted statutes that provide further guidance regarding these issues. As an example, there is a uniform act, that can be accessed at [www.nccusl.org](http://www.nccusl.org), titled the “Uniform Disposition of Community Property Rights at Death Act,” which resembles the common law in most states governing the characterization of property as either community property, quasi-community property or common law property based on the state law applicable when the property was acquired.

### *Provisions for the Care of Minors*

The primary challenge when creating provisions for the care of minors is an understanding of the client's philosophy and desire related to the legacy they wish to leave the beneficiary, and ensuring that their wishes are reflected in the documents. There also is the challenge of predicting what provisions may work best for a particular child. Many times the client is not able to adequately express their philosophy about money or their goals for the legacy, and at other times the practitioner may not be careful in listening to what the client is communicating. There also is the challenge of drafting for some unpredictable future event, and not knowing the situation for the client or the beneficiaries, for example, a minor child, at that particular time. A wide variety of options are available, and in many cases the challenge is to

know which will work best in a particular situation. As a simple example, a parent needs to determine at what age a minor child will eventually have access to an inheritance. If the parent believes the child will be completely responsible, they may be willing to release the inheritance, without having to receive permission from the trustee, at an earlier age (e.g. 18 or 21). On the other hand, if the child is not responsible, or it is unpredictable how the child will handle the inheritance, the parent may prefer to schedule the inheritance to be distributed over a period of time (e.g. at ages twenty-one, twenty-five, and thirty), giving the child an opportunity to learn from mistakes made with earlier distributions prior to receiving the later ones.

The challenge is addressed by first understanding the client's needs and desires, and then getting as much information as reasonable as to the expectations about how the plan will affect the beneficiaries at that future time. There is usually a great deal of flexibility in the drafting, so that changes can be made when a specific circumstance demands a change. Because it is also sometimes difficult for the client to think several years in advance, we frequently counsel them to consider how they would like the plan handled within the next five years, and then invite them to revisit the plan on occasion so they can accommodate any changes in circumstances or desired outcomes.

## **Trends in Estate Planning**

The most important factor is to discern what constitutes an important trend. Some of this can be gleaned from the practitioner's knowledge; or professional and life experiences. Interpretation can also frequently be assisted through the commentary of other practitioners who may be more focused on a particular issue and have more experience in that particular area. Tax law is always changing, so it is helpful to keep informed of the changes as they occur. The practitioner may also participate in listservs or study groups within which other practitioners will discuss common challenges or issues faced in the estate planning area. The practitioner should also stay informed through skimming of periodicals and other sources where articles related to estate planning may appear.

Attending continuing education sponsored by local and state bar associations, as well as other professional groups, will help an attorney stay

informed about developments in the field. There also are several organizations, such as community foundations, which provide weekly updates regarding developments in their area that overlap with the general estate planning practice. As an example, the organizations will send out alerts and newsletters describing portions of new legislation or judicial decisions that affect charities or their donors, and in many cases will provide analysis of specific challenges that an attorney may face while representing a client. For practitioners who deal with tax issues, it is important to have access to a tax research service. Most will provide daily or weekly updates via e-mail or newsletter regarding developments in the tax area. Many national organizations have informative Web sites that cover numerous estate planning topics, and when dealing with specific situations a search of the web may lead the practitioner to specific Web sites sponsored by attorneys or organizations that have articles or information regarding those issues. The attorney may also consider joining study groups or local professional associations focused on estate planning.

### *Living Wills*

There are three trends shaping the preparation of living wills (the portion of a health care directive where you describe your wishes). One is that it is more common for healthcare directives to be included in a standard estate plan. A second development is that patients who are entering a health care institution—whether a hospital, nursing home, or other long-term care facility—are being asked for a health care directive. If one is not available, the patient is given a form to complete that establishes the directive. Another important trend is clients filing a copy of their directive with their primary care clinics or physicians and, if they have frequent encounters with emergency medical technicians, also providing a copy to the first responders with whom they deal.

Although a living will is typically identified as a document for the elderly, it actually is important for any individual of majority age. The circumstances arise at any age due to accident or illness. The living will governs health care decision-making if they are unable to communicate their own medical care wishes. We can never predict in advance when this will occur, and once it does happen, it is often too late to prepare the document. The only option if no directive is prepared in advance, in almost all jurisdictions, is to have a

concerned individual petition the local court (in most cases the probate court division) to be appointed guardian to handle the individual's health care matters and personal care issues, and/or custodian to handle their financial affairs. Many significant court cases, including the Schiavo case in Florida and the Quinlan case more than twenty-five years ago, involved young patients who were unable to communicate their wishes. A common misperception that counsel must correct early in the process is that the parents or a domestic partner are automatically recognized under state law as able to make health care decisions regarding their child or partner. In the absence of a directive, those individuals are sometimes not granted authority for health care decisions.

The best way to ensure that the client's wishes regarding healthcare are honored is to ensure that the desired agent has been appointed to handle the healthcare decision making with the health care team, and that all health care-related requests have been expressed in advance. The process of completing the document, typically a health care power of attorney governed by the statutes of the state where the principal is resident, can also lead to communication between the principal and the agent regarding the desired health care at a time when he or she can be more thoughtful and logical about his or her intentions. Once an emergency arises and decisions need to be made with urgency, it can be difficult for family members or close friends to make critical life changing decisions for a loved one. The forms in many states can also provide directions regarding organ donation and disposition of the remains.

### *Selecting an Attorney-in-fact*

A person who is given the authority to handle financial matters on behalf of the individual named in an estate planning document is known as the attorney-in-fact. This individual's power and responsibilities are defined by the power of attorney document. The individual selected is acting as an "agent" for the principal, and has a duty to act in the best interest of the principal.

The attorney's role in the selection of an attorney-in-fact is to counsel the client on duties and responsibilities, and assist the client in identifying the characteristics important for the position. This can help to identify

individuals or professional fiduciaries that may be most appropriate for a particular circumstance. The attorney can then counsel the client on the advantages and disadvantages of having co-agents, and also how to determine the order of succession if desired by the client.

In some cases, the client, particularly one who has outlived many of his or her family, may not have individuals who are readily identified as potential attorneys-in-fact. There also can be conflicts among family members who may be of equal relation to the principal and feel equally entitled to act as attorney-in-fact. Also, the principal may have some conflicting feelings about who would be the more appropriate designee for the position. When counsel encounters these types of conflicts, the first need is to try to learn more about the conflicts and attempt to understand the designees. Based on the duties and responsibilities, and your experience in dealing with these issues, counsel can assist the client with making the most appropriate decision regarding the position. Ultimately, it is the client's choice, and if counsel disagrees, it is good practice to make a note to the file to explain the concerns.

### *Estate Planning Mediation*

Estate planning mediation is becoming more common, but its growth is either restrained or encouraged by state law recognition. Many states, for example, continue to follow the historical model of not providing a mediation alternative in probate situations. In the absence of a statute requiring the process, parties can voluntarily agree to submit the dispute to mediation. They may be somewhat discouraged from doing so if it increases the cost of estate administration without providing a binding result. In most cases, however, the increased cost involved with litigation drives more clients to more cost-efficient resolution of disputes.

Another factor driving mediation is the longer period required to navigate the judicial process. Alternative dispute resolution (ADR), which can include mediation or arbitration, is becoming an increasingly common method for resolving disputes and avoiding the uncertainty of the judicial process. Arbitration involves a process in which the parties present their case (in a manner similar to a trial but with less formality) and the arbitrator makes a decision that can be binding or non-binding on both parties.

Mediation is a process during which a mediator negotiates with both sides and attempts to achieve a voluntary compromise between the parties. For estates that adopt binding mediation or arbitration, the estate planning process should become more efficient and less costly to the beneficiaries. This also adds another option to the beneficiaries for resolving their disputes and ultimately lessens the burden on the court system.

### *Impact of Tax Reform on Estate Planning*

Tax reform has a direct impact on estate planning; not just at the federal level, but the manner in which federal and state tax policy interact. For example, the federal estate tax exemption is a maximum of \$3.5 million, while states that are battling fiscal challenges have not increased their exemptions. While tax reform has eliminated estate tax issues for 90 percent or more of estates, it has increased complexity for decedents who are resident in a state with a separate transfer tax system. In many cases, they need to file a state return when no federal return is required. For the fortunate few who have estates under both the federal and state thresholds, it has brought greater simplicity to the planning process.

For estates larger than the state tax exemption, it has increased the complexity and the risk that residents may not plan for the state consequences when there are no federal consequences. Because estates and trusts also may have income tax issues, the continuous changes in the income tax law have provided more complexity to the fiduciary income tax rules. Attorneys need to be especially wary of making sure their plans are appropriate for the tax laws of the state in which their client is a resident, and being fully versed in state and federal law. There also can be fairly specific elections and options available for pre- and post-mortem planning that the practitioner needs to consider. If they are not an expert in this area, they should consider bringing in co-counsel to assist in potentially taxable situations. As a simple example, there is an election that allows a surviving beneficiary to file a “disclaimer” within nine months after the decedent’s date of death for tax planning purposes. This is a strict timeline with strict compliance, however, which cannot be extended or mitigated by the tax authorities. The attorney needs to be aware of this in counseling beneficiaries of an estate after the decedent’s death.

## *Changing Role of Trusts in Estate Planning*

Trusts have become a more prominent piece of estate planning. Although trusts are commonly used by wealthy clients, it has become a more prevalent tool for many families. The most common form is the revocable living trust, with many other trust structures that are designed specifically for tax or special needs purposes.

Much of the change has been driven by federal and state tax laws and regulations, as well as statutory changes that allowed the use of trusts for clients with special needs. In addition, there has been much publicity about the use of trusts in order to avoid the probate process, although the process is no longer as onerous as it once was. The Uniform Probate Code, which has been adopted in most states, provides very efficient means for handling a probate, but there continues to be a great deal of marketing targeted at avoiding the process. For the practitioner, the Uniform Probate Code has provided a number of additional options that need to be considered when counseling the probate client. This adds more flexibility, but also more complexity. The use of trusts has made trust administration more familiar and comfortable to clients, and has provided a greater body of law to rely upon for trust administration issues that may arise.

### **Final Thoughts: Advice for New Practitioners**

When you graduate from law school, you have learned a great deal of technical skills and substantive law dealing with estate planning. However, I believe the biggest challenge that is not part of the formal education process is the handling of the clients in person (the attorney's "bedside manner"). I have learned that the best skill at the outset is the ability to listen and focus to the client's desires, goals, and emotions relative to their estate plan and legacy. Once we truly know their feelings and perspective, we can then lead them to the appropriate solutions.

You want to make sure that the work product will meet the client's current and future needs and expectations, and will hold up to any challenges by a family member or other professional. There is almost always more than one alternative to a particular situation, and it is important to know the client's intentions before choosing one or another solution. The goal is to avoid

any family disputes or disagreements, and hopefully express the client's desires and goals through the documentation that is prepared. Clear communication can also prepare the client and the business for future succession issues, or at least provide flexibility when the time comes to choose from different options, rather than being involuntarily forced to choose one alternative (which in many cases is the more expensive alternative).

Common errors made by new practitioners include assuming that a standard form will work for all clients, failure to recognize the transfer and income tax issues involved with the client's planning, and not recognizing and understanding the state-specific statutes governing the estate planning process. Fortunately, these errors are relatively easy to overcome. Learning the substantive law and attending continuing education on specific issues are both necessary to maintain an appropriate balance of knowledge in the estate planning area. State and local bar associations publish many helpful guides and materials, including forms with commentary, to assist a new practitioner with navigating the options that are available to a client. New attorneys are also well-advised to seek senior partners or colleagues who are willing to serve as mentors. Access to proven experience is invaluable when starting out. Study groups, professional organizations, and co-counsel can assist with specific information.

New practitioners often develop an estate planning questionnaire, which is provided to the client. The questionnaire presents questions that allow the practitioner to identify issues that require attention. See Appendix J for an example of a questionnaire.

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