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Estate Planning

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29 Est. Plan. 299◆ [Return to ESTPLN TOC](#)**LENGTH:** 4878 words**SUBJECT:** REVIEWING WILLS AND TRUSTS**TITLE:** **Reviewing Wills** and Trusts: What **Planners Should Look** for**AUTHOR:** ROBERT H. FELDMAN, ATTORNEY

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HIGHLIGHT:

Clients should be encouraged to consult regularly with their advisors to ensure that their estate plans reflect changes in the law and in their personal situation. This article discusses issues that advisors should consider when reviewing clients' plans.

CORE TERMS: beneficiary, estate plan, planners, estate planning, marital deduction, fiduciary, probate, designation, decedent, spouse, Tax Act, trust agreement, living trust, real estate, funding, divorce, estate tax, powers of attorney, surviving spouse, prior marriage, no-contest, seminars, retirement, qualifying, surviving, survivor, deceased, contest, bypass, gift

TEXT:

Result After Exercise of Dad's Power of Appointment

Reviewing Wills and Trusts: What Planners Should Look for

Estate plans exist in a state of flux. Plans are affected by changes in clients' personal and economic situations, desires, tax laws, and other laws. With the far-reaching changes in transfer taxes enacted by the 2001 Tax Act, * <1> it is especially important now to review and update existing plans.

----- FOOTNOTE: -----

* <1> Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16 (6/7/01). See Eisen, "Estate Planning Under 2001 Tax Act Presents New Challenges," 28 ETPL 515 (Nov. 2001); Sawyers and Whitlock, "Post-EGTRRA Analysis and Planning," 32 Tax Adviser 822 (Dec. 2001); Blattmachr and Detzel, "Estate Planning Changes in the 2001 Tax Act--More Than You Can Count," [95 J. Tax'n 74 \(Aug. 2001\)](#); Kirkpatrick and Martin, "Its Death Has Been Greatly Exaggerated!: Highlights of the Estate Tax Changes Made by

EGTRRA," 141 Tr. & Est. 43 (Jan. 2002).

----- END FOOTNOTE:-----

Estate planners often are contacted by newcomers to the state who ask what changes are appropriate, or by clients whose documents have been prepared by other planners. We also need to take the lead in reviewing plans prepared for our clients by ourselves, to see what revisions are necessary. This article examines factors to address in any of these scenarios.

Planner's own documents

Changes. Clients experience changes in family circumstances, financial status, business relationships, health conditions, and desires that may affect their current documents. Changes in tax law or other laws may have a bearing on these documents or may offer new opportunities.

Letter to clients. Just as some clients are hesitant to initiate estate planning, many are reluctant to initiate a review of their plans. It is helpful--every few years or upon significant changes in the law--to send a letter to clients for whom estate planning has been done, suggesting a review. A meeting could be scheduled--perhaps without charge--to review changes in the client's circumstances and the law, and to see whether documents should be revised or further steps taken. A friendly letter can prompt clients to useful action, and it shows the planner's continuing interest in serving the client. Feedback may disclose whether the client has moved, has had changes in circumstances, or needs services in other areas of the planner's practice.

Seminars. Estate planners can conduct seminars to explain important changes in the law, and invite appropriate clients.

Funding

Not completed. If a living trust has been established, the client may have volunteered to transfer property titles to it, as appropriate. A review should be done to determine whether this process has been completed properly. It is a good idea to send the client a letter a few months after the trust agreement is signed, checking the status of the funding process and offering to assist.

Newly-acquired assets. The titles of assets acquired after the trust was funded also should be reviewed, to see if the appropriate titles have been placed in the name of the trust.

Inappropriate provisions

Who prepared the documents? To some extent, the suitability of existing documents may depend on the preparer. The documents may not have been well prepared, due to a lack of understanding of the law or a lack of personal attention to the client's needs and objectives. The documents may omit desirable provisions or fail to name alternative beneficiaries or fiduciaries. The person or firm who drafted the documents may have been well-qualified, but the documents may contain provisions that are now inappropriate, due to changes. Documents prepared by the best planners may be too complicated for the client to fully understand, and they should be reviewed to see if the client's desires are met.

Mass-produced documents. Some firms promote trusts through seminars or advertising, and they prepare them in large volume. Such trusts often are included in notebooks with blank forms for funding. The firm may not follow through unless specifically requested by the client to do so. Clients frequently put the documents in a vault or on the shelf, thinking that the

plan is complete, or they procrastinate or become confused about funding.

Mistaken belief. Clients sometimes do not understand their documents. For example, one married couple thought they had an "A-B" (bypass) trust because the attorney had mentioned that concept. All they actually had were testamentary trusts for minor children.

Unnecessary probate. A funded living trust will avoid probate only as to assets that are placed in the trust. If the person making the transfers leaves out even one asset, such as a large savings account, and if it does not pass by joint ownership or beneficiary designation, a substantial fee may be incurred for probating that asset.

Impersonal. A package estate plan, based on forms, can be too impersonal. For example, one attorney wrote a cover letter, explaining that she had reviewed the living trust prepared by an affiliated estate planning firm. The letter explained, in a general way, that if real estate was not provided for, it was because none had been disclosed to her. The client lived in an apartment, had no real estate, and would have said so if asked. How a person leaves his estate is an important and personal matter, and a client deserves more personal attention than a form letter covering a boilerplate document.

Erroneous provisions. A client's current documents may be generally good but contain an erroneous provision, due to a mistake or lack of understanding. * <2> Examples include the following:

- A client used a form from the Internet that contained a 5% or \$ 50,000 clause for withdrawals from the decedent's trust. When asked why \$ 50,000, he explained that he had changed the amount because he didn't think the standard \$ 5,000 was enough. The larger amount would have caused unintentional inclusion in the taxable estate of the power holder. * <3>

- The client or preparer may not have understood the need for specific qualifying language for withdrawals of principal from the decedent's trust, or that imposing conditions on a transfer to the surviving spouse's trust may disqualify the marital deduction. * <4>

- A trust agreement was signed and submitted to a bank, copied verbatim from a form book. It still contained all the optional paragraphs, without any selection having been made. When the trust officer called the attorney, the attorney did not understand the need to make choices among the options. He then said, "He is my buddy; we do each other's work for free, and this is all he deserves." The bank had to decline to serve as trustee.

- A marital deduction formula clause for a deceased client did not make sense to the attorney preparing the estate tax return. When the drafting attorney was asked to explain, he discovered that he had inadvertently omitted the word "not," and he provided a letter to that effect.

- In another situation involving a decedent, a copy of the trust showed the survivor's trust and decedent's trust to be revocable until the second death. This subjected both trusts to estate tax on the second death. * <5> Fortunately, the drafter found that this error had been corrected before the clients signed, so that the trust instrument stated that the decedent's trust became irrevocable upon the first death.

----- FOOTNOTE: -----

* <2> Feldman, "Misconceptions About Estate Planning," [36 Ariz. Atty. 30](#) (Aug./Sept. 1999). * <3> Section 2041. * <4> Pennell, 843 T.M. (BNA), *Estate Tax Marital Deduction*, p. A-31 (1996). * <5> Turner, *Revocable Trusts*, App. 50-16 (4th ed., 2001); Westfall and Mair, *Estate Planning Law and Taxation* Para.16.02 [1] (3d ed., Warren, Gorham & Lamont, 1994).

----- END FOOTNOTE:-----

Old maximum marital deduction. An old will or trust may refer to the "maximum marital deduction." For documents prepared before 9/12/81, this generally would be interpreted to mean \$ 250,000, under pre-1982 law, rather than an unlimited amount. However, the result may depend on subtleties in the language of the clause. * <6>

----- FOOTNOTE:-----

* <6> Economic Recovery Tax Act of 1981 (ERTA), section 403(e)(3); see Pennell, *supra* note 4, at A-3.

----- END FOOTNOTE:-----

Flower bonds. Older trusts tend to include a provision for payment by "flower bonds," issued by the government. These are rarely available anymore. * <7>

----- FOOTNOTE:-----

* <7> Turner, *supra* note 5, at Sec.22.7.

----- END FOOTNOTE:-----

Strange situations

The author has experienced many strange situations, on the part of clients, including the following:

- The clients signed a draft of a trust agreement, the day before they went on vacation. It contained several handwritten instructions made at the time of signing. The intent was to finish the document and re-sign it at a later date, but years have passed and the clients cannot be persuaded to sign the finished documents.
- A lady signed her will but declined to sign the accompanying trust, saying that she wanted to think about it some more. She died soon afterward, so the will left the property to a trust that did not exist. Fortunately, the will indicated the general plan of distribution, but the administration was more complicated than it would have been with the trust.
- An engaged couple had a trust agreement prepared, stating that it would take effect upon their marriage. The wedding was called off.
- A single man preferred to have a trust for a married couple, leaving a blank for the name of his wife. When asked when the wedding would occur, he explained that none was scheduled, and he did not even have a girlfriend, but he thought that he'd get married someday, and a joint trust was more economical.
- In a second marriage, the husband had children from his prior marriage, whom the wife did not like. The couple insisted on leaving their respective estates to each other, but not in trust. This left to chance who would be the survivor, and whether the survivor would leave the entire estate to his or her own family.
- I asked new clients why they had initialed their old wills only on even-numbered pages. They explained that their former lawyer had instructed them to sign where indicated and "initial every other page."
- A wealthy man wrote his own will, replete with ambiguities. For example, bequests were left "to my son John, his beautiful wife and wonderful children." Of course, by the time the testator died, John had a different beautiful wife and additional wonderful children. Much litigation ensued in the family, to resolve various ambiguities.

Issues to discuss with clients

Family matters should be discussed personally with the client, to see how the estate plan may be affected.

Changes in family. The client's family may have changed through birth, death, marriage, divorce, children becoming independent, or family members having special needs. These factors may influence the client's wishes and call for appropriate changes in the documents. Changes in addresses should be noted in the file, if not in the documents.

Children of prior marriage. In a second marriage situation, the client's main concern may be the welfare of the surviving spouse. Nevertheless, it may be desirable to leave some assets to the children of the prior marriage, on the first spouse's death, so that the children are not forced to wait until the stepparent dies before they receive anything. Life insurance could be used for this purpose, if the estate is otherwise insufficient.

Marital deduction. The benefits of the marital deduction should be explained to married clients. If a client insists on leaving a large portion of his estate to his children, rather than his wife, or if he imposes conditions upon leaving assets to his wife, he should understand that an estate tax may result that could have been avoided by qualifying for the marital deduction. * <8>

----- FOOTNOTE: -----
 * <8> Pennell, *supra* note 4, at A-31.
 ----- END FOOTNOTE:-----

QTIP. By using a QTIP trust, the client can provide benefits primarily for the surviving spouse, while controlling how the remainder passes upon the surviving spouse's death. * <9>

----- FOOTNOTE: -----
 * <9> Pennell, *supra* note 4, at A-50.
 ----- END FOOTNOTE:-----

No-contest clauses. Some planners routinely include a clause that provides for forfeiture by any individual who contests the will or trust. That may be useful if a contest is realistically expected. It also can discourage legitimate questions by heirs. A no-contest clause can be made less onerous, such as by excluding certain contestants or by providing that anyone who challenges the documents unsuccessfully will bear the legal costs of the estate, as well as his own costs. The recent trend is that courts will enforce a no-contest clause unless there is probable cause for the contest. * <10>

----- FOOTNOTE: -----
 * <10> Marty-Nelson and Gilmore, 824 T.M. (BNA), *Testamentary Capacity and Validity of Wills*, p. A-57 (2000).
 ----- END FOOTNOTE:-----

Outright vs. deferred payments. The client should consider whether or not distributions should be made outright. This may be inadvisable if the recipient is young, irresponsible, or subject to debts. Payments can be deferred for a period of time, or made discretionary on the part of a trustee.

Fiduciaries. Duties differ as to a personal representative, trustee, or guardian. In many situations, different individuals should be named to these positions. The personal representative should be someone close to the individual, on a personal basis. The trustee should be stable and financially responsible. The guardians should be the persons best suited

to raise the children. The order of succession of the fiduciaries should be set forth in the documents.

The client should understand the pros and cons of naming individuals vs. financial institutions. * <11> Generally, individuals offer lower costs and familiarity with the family, while institutions offer expertise and permanency. The subject of compensation should be addressed for individuals.

----- FOOTNOTE: -----
 * <11> Turner, *supra* note 5, Chs. 15 and 16.
 ----- END FOOTNOTE: -----

Joint ownership vs. a trust. Many clients like the convenience of joint ownership, with right of survivorship. This has disadvantages, including the lack of predictability as to the order of deaths, not qualifying for a fully stepped-up basis, and subjecting the owner's property to the joint owner's debts. * <12> If the objective is to avoid probate, a living trust may be a better alternative.

----- FOOTNOTE: -----
 * <12> Weinstock, *Planning an Estate* Sec.7.3 (4th ed., 1995).
 ----- END FOOTNOTE: -----

Fractional share. Individuals may be left fractional shares of an estate or certain assets. The will or trust should explain whether amounts to be received by each individual are to be offset by advancements, receipt of nonprobate assets, or loans made to them. * <13>

----- FOOTNOTE: -----
 * <13> Uniform Probate Code (UPC) Secs.2-109 (advancements) and 2-609 (gifts); 8 U.L.A. 88, 178 (1998).
 ----- END FOOTNOTE: -----

Statutory law

Changes in tax law, or other areas of law, may have an impact on an estate plan. * <14>

----- FOOTNOTE: -----
 * <14> Shearer, "Guidelines for Reviewing and Revising an Estate Plan," 27 ETPL 164 (May 2000), discusses personal and economic changes that may affect an estate plan. Mabley, "How and When to Conduct a Review of a Client's Existing Estate Plan," 16 ETPL 162 (May/June 1989), explains how changes in the law and other factors may affect a plan.
 ----- END FOOTNOTE: -----

Estate tax reduction and possible repeal. In view of the sweeping changes made by the 2001 Tax Act to estate, gift, and generation-skipping transfer (GST) taxes, advisors must be prepared for three scenarios: (1) increased estate and GST tax exemptions, with lower tax rates; (2) repeal of estate and GST taxes; or (3) a reversion to the system as it existed before the 2001 Tax Act. Because of the phase-out of the state death tax credit and the possible eventual treatment of state death taxes as a deduction, we also must be prepared for increases in tax by some states. * <15> Matters such as the following should be considered:

- Phase-in features of the 2001 Tax Act that will have continuing effects on a client's plan.
- Elimination of mandatory bypass trusts for estates under the exemption amount.
- Capping the bypass trust, to allow a greater share to the surviving spouse; or, conversely,

leaving less to the spouse for the marital deduction and more to the children.

- Increasing life insurance to pay for capital gains tax on assets that do not receive a stepped-up basis.
- Keeping detailed records to establish the basis of assets.
- Deciding whether to make gifts to reduce tax, versus the opportunity for a step-up in basis under new Section 1022. * <16>

----- FOOTNOTE: -----

* <15> See Blattmachr and Detzel, *supra* note 1, at 74, 76. * <16> See Eisen, *supra* note 1; Berall, Harrison, Blattmachr, and Detzel, "Planning for Carryover Basis That Can Be/ Should Be/ Must Be Done Now," 29 ETPL 99 (Mar. 2002).

----- END FOOTNOTE: -----

Pay-on-death (POD) provision. Recent changes have expanded the ability to designate death beneficiaries for certain assets, including securities and real estate, avoiding probate of these assets. * <17> The client should be made aware of these opportunities.

----- FOOTNOTE: -----

* <17> Nonprobate transfers may be made under provisions such as the Uniform Multiple-Person Accounts Act, Uniform Nonprobate Transfers on Death Act, or the Uniform TOD Security Registration Act; 8B U.L.A. 3, 45, 385 (2001).

----- END FOOTNOTE: -----

Powers of attorney. Durable powers of attorney may be relied upon by clients, but they have shortcomings. They do not survive the principal's death, and there are unresolved questions regarding the permissible scope of authority and the principles of administration and fiduciary liability that apply. * <18> States differ in their requirements for powers of attorney. * <19> For example, in Arizona, laws have been tightened to prevent the misuse of powers of attorney, and it is now required that the principal specifically designate the powers conferred and initial each one. * <20>

----- FOOTNOTE: -----

* <18> Casner and Pennell, *Estate Planning*, Sec.3.10.4.1 (6th ed., 1995). * <19> Hook, 859 T.M. (BNA), *Durable Powers of Attorney*, p. A-11 (2000). * <20> Ariz. Rev. Stat. Sec.14-5506; Murphy, "Drafting Powers of Attorney to Comply with the New Legislative Changes," [35 Ariz. Atty. 22 \(Dec. 1998\)](#). In Arizona, failure to comply can result in criminal and civil penalties.

----- END FOOTNOTE: -----

Investments. The Uniform Prudent Investor Act affects investments by trustees by using total return investing as a standard. The Uniform Revised Principal and Income Act provides trustees with flexibility to make adjustments between income and principal. * <21>

----- FOOTNOTE: -----

* <21> Cline, "The Uniform Prudent Investor Act: Trust Drafting and Administration," 26 ETPL 451 (Dec. 1999); Keister and McCarthy, Jr., "1997 Principal and Income Act Reflects Modern Trust Investing," 26 ETPL 99 (Mar./Apr. 1999).

----- END FOOTNOTE: -----

Case law

Significant court decisions may prompt rethinking of aspects of an estate plan, as the following examples illustrate:

Beneficiary designation. A state's revocation-on-divorce statute is pre-empted to the extent the statute applies to retirement plans governed by ERISA. In *Egelhoff v. Egelhoff*, * <22> a deceased husband's retirement plan was awarded to his former wife. He had failed to change the beneficiary designation after he divorced, and the state revocation-on-divorce statute was pre-empted. Beneficiary designations are useful for avoiding probate, but they need to be reviewed for changes in the client's desires and changes in the law.

----- FOOTNOTE: -----

* <22> [121 S. Ct. 1322](#) (S. Ct., 2001). See Gary, "State Statute Does Not Revoke Beneficiary Designation After Divorce," 28 ETPL 376 (Aug. 2001).

----- END FOOTNOTE: -----

Disclaimer by beneficiary with tax lien. Where assets have been left to a beneficiary with tax problems, *Drye, Jr.* * <23> held that a tax lien could not be avoided by the beneficiary's disclaimer. In such a situation, a spendthrift trust may be in order.

----- FOOTNOTE: -----

* <23> [528 U.S. 49, 84 AFTR2d 99-7160](#) (S. Ct., 1999) . See Madden and Hayes, "Current Tax Developments: Uncle Sam No Longer Struck Blind by Heir's Disclaimer to Defeat Tax Liens," 27 ETPL 168 (May 2000); Kessel and Klammer, "Supreme Court Finds Disclaimer Ineffective to Avoid Federal Tax Lien," [93 J. Tax'n 118 \(Feb. 2000\)](#).

----- END FOOTNOTE: -----

Other provisions

State laws. When clients have changed their state of residence, the applicable laws of the new domicile may affect their estate plan. Community property laws may come into play. One spouse's rights to the property of the other spouse may differ greatly from one state to another in the event of death or divorce. * <24>

----- FOOTNOTE: -----

* <24> Campfield and Berall, 803 T.M. (BNA), *The Migrant Client: Tax, Community Property, and Other Considerations*, pp. A-8 (intestacy statutes), A-48 (divorce) (1994).

----- END FOOTNOTE: -----

Tax apportionment. Wills often specify that death taxes will be paid from the residue of the estate. A large portion of the estate may pass outside probate, yet be included in the gross estate for estate tax purposes; as a result, there may be scant or insufficient assets in the probate estate to pay the taxes. If this is called to the client's attention, he may prefer that the taxes be apportioned among the recipients of the taxable assets. * <25>

----- FOOTNOTE: -----

* <25> Magowan, 804 T.M. (BNA), *Probate and Administration of Decedents' Estates*, p. A-75 (2000); Zaritsky, "Estate Tax Payment Provisions in Multiple Documents--Part 3," 26 ETPL 240 (June 1999).

----- END FOOTNOTE: -----

Percentages of estate. If percentages of an estate are left to charities or other beneficiaries, the documents should indicate whether the estate is measured before or after deduction for liabilities, administration expenses, and taxes.

Environmental. The liability of a fiduciary for costs of cleaning up hazardous waste has been narrowed from the original strict liability. In most cases, the fiduciary's liability is limited to the assets in a trust or estate, although the liability can be personal if the fiduciary is negligent. A trust agreement should provide for the trustee to address hazardous substance

conditions. * <26>

----- FOOTNOTE: -----

* <26> Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Sec.107(n)(1); 42 U.S.C. Sec.9601 *et seq.*; Fox and Zabel, "Environmental Fiduciary Liability: The Mist Clears," 136 Tr. & Est. 30 (Jan. 1997); see Mallor *et al.*, *Business Law and the Regulatory Environment--Concepts and Cases*, p. 1145 (10th ed., 1998).

----- END FOOTNOTE: -----

Survivorship. Survivorship clauses can prevent leaving an estate to a person who dies a short time after the decedent, perhaps from a common accident. * <27>

----- FOOTNOTE: -----

* <27> Streng, 800 T.M. (BNA), *Estate Planning*, p. A-22 (2001).

----- END FOOTNOTE: -----

Death beneficiary clauses. The will and trust should be consistent with death beneficiaries named in other documents, such as life insurance policies, retirement plans, or POD transfers of securities or real estate. At least, the effect of such designations should be considered in deciding how to distribute the balance of the estate, which passes by will or trust.

Surviving issue. There are differences in leaving property to surviving issue, by right of representation or per stirpes. * <28> Under the Uniform Probate Code, per stirpes results in grandchildren dividing the share of their parent, while right of representation would cause all grandchildren with deceased parents to take equally. The difference should be explained to the client.

----- FOOTNOTE: -----

* <28> UPC Sec.2-106; 8 U.L.A. 85 (1998).

----- END FOOTNOTE: -----

Rule against perpetuities. The rule has been made less onerous in some jurisdictions. * <29> However, if it is violated because the vesting of an interest is made too remote, the rule can cause a bequest to be invalid.

----- FOOTNOTE: -----

* <29> Uniform Statutory Rule Against Perpetuities, 8B U.L.A. 223 (2001).

----- END FOOTNOTE: -----

Shipping costs. The client may have a preference as to whether the estate should pay the costs of shipping furniture or other large objects to an heir in a distant location.


Prenuptial agreements. There may be contracts that affect the will or trust. For example, the will or trust may be subject to the conditions of a prenuptial agreement or shareholders' agreement. These agreements should be taken into account.

Other documents. Many other documents, legal arrangements, and financial matters may have an impact on an estate plan. These may involve such matters as corporations, family limited partnerships, shareholders' agreements, retirement plans, beneficiary designations, living wills, or health care powers of attorney. These matters should be reviewed with the client.

Conclusion

Clients should be encouraged to consult regularly and carefully with regard to the various factors and decisions that affect their estate plans. These may include the above items and

other questions that the clients have. Thorough, periodic reviews are necessary to assure that the client's plans are suitable and up-to-date.

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