Blended Families, Privacy, Pitfall Avoidance, and Other Reasons Why Estate Planning Lawyers Remain Important

By Jeffrey D. Moss

The recent changes to the estate tax laws contained in the American Taxpayer Relief Act of 2012[1] have shifted the landscape for estate planning. Beginning in 2013, the act kept the applicable credit amount for avoidance of the estate tax at $5 million per person[2] and made permanent the portability election (the transfer of unused death tax credit from one spouse to another).[3] As a result, in 2014 a married couple can easily obtain a gift and estate tax shelter of up to $10,680,000 without any advanced tax planning. Thus, for the vast majority of people, unless transfer taxation reverts back to pre-2001 levels, most estate planning will not be driven by estate tax reduction activities. However, the reasons to engage a lawyer for estate planning, as set forth in this article, apply to many more families regardless of wealth. It is incumbent on these families to exercise their legal rights to plan for the disposition of their assets in an efficient manner, yet many individuals do not adequately seek out qualified advisors.

Pitfalls for do-it-yourselfers

It has become increasingly common for people to purchase software or otherwise attempt estate planning on their own. Alternatively, some individuals attempt to circumvent lawyers by creating joint accounts or adding a child's name to a real estate deed. Frequently, these types of transactions result in unintended negative consequences. For example, under state law or federal tax law, adding a person's name to an account can be deemed a gift, requiring gift tax returns or other reporting to the government. Moreover, adding a joint owner to property can possibly prevent a full step-up in basis upon the death of the decedent; because the joint tenant's portion is not stepped up, income taxes and capital gain taxes can actually increase going forward. Also, it is possible to lose the income tax benefits from the principal residence exemption otherwise available under Internal Revenue

Code §121 resulting from a do-it-yourself transfer. Additionally, in many states, adding a joint owner can be considered a divestment for Medicaid purposes or a transfer that triggers a real estate transfer tax. It may also cause the uncapping of a real estate value that can increase property taxes. Finally, when children or other third parties are added to accounts or deeds for convenience, your property is then subject to the potential claims of creditors of the children or third parties. Of course, there is always a chance your children will claim, after your death, that the parent intended for them to get a larger share, because the parent put their names on joint property.

A person's goals can be accomplished by alternative means. Quite simply, many do-it-yourself options can cause problems and create more expense than hiring a lawyer. The do-it-yourself and online options for estate planning often do not work for those with simple estates, and definitely don't address more sophisticated and complex situations such as those described in this article. Many people refuse to accept that there are no one-size-fits-all options and their personal and financial situations require guidance and discussion to balance conflicting goals and objectives.

Situations requiring attention

Following are some situations that, if applicable, frequently require additional attention from an experienced estate planning attorney.

Blended families

With the nationwide divorce rate for marriages at more than 50 percent and the increased longevity of older Americans, blended families include younger families with children from multiple marriages (as seen in *The Brady Bunch*) and scenarios in which grandparents find new partners or spouses later in life. In these situations, individuals may have different priorities with respect to the disposition of assets, including providing for their spouses, their own children from a former marriage, or children within the blended family. Moreover, even if a blended family desires to treat the children of each spouse equally, the default rules in Michigan do not accomplish equal treatment, and those without a written estate plan can fail to achieve their goals. Thus, a properly completed estate plan will help accomplish the goal of treating the children equally.

When a parent remarries or finds a new partner, he or she may want to make arrangements to permit the surviving spouse to remain in the home for a certain period and also to provide funds for the continued support of the surviving spouse or long-term friend. In many of these situations, friction can arise between the surviving spouse and the children of the deceased. This tension can be minimized or avoided with proper trust planning and communication. An estate planner can create a workable written plan using trusts to minimize the possibility of future friction and ensure the parents' goals are accomplished.

Protection of minor children

When young parents die leaving minor children, in the absence of a trust document, the law presumes that until age 18, the child must have a court-supervised conservator who is subject to annual reporting in probate court.[4] Additionally, the law presumes the child will receive all assets outright when he or she turns 18. Many of us would not permit an 18-year-old to receive a lump sum outright without proper safeguards. A springing trust or standalone benefit trust can be drafted to allow a responsible family member or professional fiduciary to manage assets and make distributions for higher education, home purchase, and other financial undertakings that can be outlined in advance.

In addition, incentive trusts can be used to pass along a client's personal financial values to their children and may contain certain incentives to promote particular career choices or behavior for the children.

Special needs trusts

A special needs trust can be drafted for families with a disabled minor or adult child to help protect assets left to the child without disqualifying him or her from Medicaid or governmental assistance. If a family has a disabled child, one should not rely on the good conscience of another family member to make the appropriate expenditures on the child's behalf. Specific directives should be in writing to ensure that the child receives proper care and that family or governmental resources are not wasted.

FAST FACTS

Engaging in estate planning without using an experienced lawyer can have unintended consequences because the disciplines of property law, taxation, insurance, and ERISA are complicated.

Each situation is unique, as families have different dynamics, assets, goals, and objectives. There is no one-size-fits-all solution.

Cohabitation and same-sex marriages and partnerships

With the recent United States Supreme Court decision in *United States v Windsor*[5] and the increasing number of unmarried couples living together—whether opposite-sex couples or same-sex partners—the complexity of federal and state tax and property laws makes it imperative for individuals in these households to seek competent estate planning assistance. Estate planning attorneys can ensure that property rights, custody rights, beneficiary designations, tax benefits, and healthcare decisions are carried out in the desired manner.

Other benefits to estate planning

Probate avoidance, privacy, and other financial and health powers

Regardless of a person's wealth or status, a desired goal should be to avoid probate court and its processes, fees, and public disclosure. Prospective clients often have the misconception that all they need is a will. This is wrong. In fact, a will is effective only upon an individual's death, and a simple will merely guarantees a trip to probate court. And avoiding probate court means avoiding public disclosure. Given modern advances in medicine, people are living longer, but as they age their mental processes and memories can falter, increasing the need for durable powers of attorney and patient advocates for healthcare. An estate planner can protect privacy and accomplish a client's financial goals through revocable trusts, wills, and durable powers of attorney. Additionally, every person should have a healthcare power of attorney, advance directive, or patient advocate designation that identifies an individual or individuals to act as a successor for healthcare decisions and also documents his or her wishes concerning life-sustaining procedures.[6]

Downstream asset protection

Asset protection can mean different things to different people. Some may think of asset protection in terms of the physician, business owner, or professional athlete concerned about lawsuits and liability who transfers all his or her assets in an effort to be "judgment proof." There are lots of options, guidelines, and nuances to this type of planning—and many debate its effectiveness—including titling of property and transfers to domestic asset protection trusts or offshore protection trusts as balanced against fraudulent conveyance and fraudulent transfer act implications. However, even for those in low-risk professions, protection in the form of downstream asset protection for surviving spouses or children can be achieved to safeguard the transferred assets from escalating medical costs, creditors, or reckless spending. This type of downstream protection is created by the "spendthrift" clause in a revocable trust, which protects the beneficiary after the trust maker's death.[7] Many people would like to transfer assets during their lifetimes or upon death to their children, but may have reservations about a child's spouse or prospective spouse. Attorneys can draft trusts to provide downstream protection for children from creditors and "gold digger" spouses.

New developments

Although estate planning has existed for centuries, the law continues to develop. For example, with the rise of electronic media and storage, many individuals have electronic or digital property and property rights including financial accounts, incentive programs, photographs, music, books, social media persona, and more. Nationwide, states struggle to address these rights with regard to estate planning. It is anticipated that a national Uniform Digital Asset Act proposal will emerge soon. A set of bills was recently introduced in the Michigan House of Representatives to address digital assets.[8]

There is also a trend toward practicing estate and elder law in a holistic manner with a focus on assistance with dignity, including helping with transitions in living arrangements, recognizing shifting mental capacity, finding medical advocates to ensure access to medical care, and assisting with Social Security and veterans' benefits.

Conclusion

As tax and estate planning lawyers, we have many tools at our disposal to help reduce estate taxation for families with high net worth.[9] However, for individuals who do not need these tools, the primary goal should be focusing on the basics of estate planning such as wills, trusts, and financial and healthcare powers. A qualified estate planner can discuss goals and objectives with clients, can explore options, and put a person's affairs in order. A comprehensive and effective estate plan is one of the best gifts someone can give to their loved ones. ■

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ENDNOTES

1. PL 112-240, 126 Stat 2313.
2. See 26 USC 2010(c)(3)(A). This credit amount is subject to cost-of-living adjustments and is $5,340,000 for 2014. The credit is now called the Deceased Spousal Unused Exclusion amount, or DSUE.
3. See 26 USC 2010(c)(4).
4. See MCL 700.5418.
5. *US v Windsor*, 570 US 12; 133 S Ct 2675; 186 L Ed 2d 808 (2013).
6. See MCL 700.5506 *et seq.*
7. See MCLA 700.7502–700.7505 for discussion and statutory exemptions.
8. HB 5366–5370 (2014).
9. For example, the Family Limited Liability Company, the Grantor Retained Annuity Trust, the Irrevocable Life Insurance Trust, and the Qualified Personal Residence Trust.