

Deathbed Planning - Probate and Tax Planning Checklist

- I. Obtain balance sheet.
 - a. For married client, assets of both spouses are relevant.
 - b. Review assets and ownership on an asset-by-asset basis. For each asset, determine:
 - i. Ownership (individual, joint, trust).
 - ii. Fair market value.
 - iii. Basis.
 - c. Review liabilities.
- II. Confirm beneficiary designation forms reflect client's wishes.
 - a. Retirement plans.
 - b. Life insurance.
 - c. Transfer on death (TOD) accounts.
- III. Review estate plan documents and confirm documents reflect client's wishes.
 - a. Durable Power of Attorney:
 - i. Fiduciaries.
 - ii. Powers.
 1. Gifts.
 2. An agent acting under a durable power of attorney may amend or revoke the principal's revocable trust *if* expressly authorized in both the revocable trust *and* the durable power of attorney. M.G.L. c. 203E § 704(c).
 - b. Health Care Proxy / Living Will:
 - i. Fiduciaries.
 - ii. End-of-life wishes.
 - c. Will:
 - i. Fiduciaries.
 - ii. Exercise of powers of appointment.
 - iii. Dispositions.
 1. Letter of wishes for tangible personal property.

- d. Revocable Trust:
 - i. Fiduciaries.
 - ii. Dispositions.
- IV. Confirm irrevocable trusts reflect client's wishes.
- a. Review assets, distribution and trustee provisions, control.
 - i. Opportunities to "amend" irrevocable trusts: petition court, decant, clarify matters in non-judicial settlement agreement, exercise power of appointment, "swap" assets in grantor trust.
 - 1. If settlor and all beneficiaries agree, may amend or revoke irrevocable trust. M.G.L. c. 203E § 411(a).
 - ii. Caution transfer tax consequences – especially GST-exempt and GST-grandfathered trusts.
 - b. Review assets – value vs. basis.
- V. Probate planning:
- a. Accounts in decedent's name will be "frozen" until personal representative is appointed for estate.
 - i. Fund revocable trust.
 - 1. Avoid ancillary probate for assets in other jurisdictions.
 - 2. Lifetime gifts from trust.
 - ii. Move assets into joint names.
 - b. Designate successor custodian for UTMA, 529 plan account, donor advised fund, etc.
- VI. Estate tax reduction strategies:
- a. Pay tuition and medical expenses – must be paid directly.
 - b. If making lifetime gifts, compare estate tax savings versus income tax consequences.
 - i. Ideally gift high-basis assets and keep low-basis assets in client's name or revocable trust.
 - c. Make annual exclusion gifts – currently \$14,000 per person.
 - d. Utilize lifetime gift tax exemption – currently \$5,450,000 – may reduce Massachusetts estate taxes. (See Exhibit A.)
 - i. Making taxable gifts generally will not be beneficial to reduce federal estate taxes for client with short life expectancy.

1. Gift taxes paid on gifts made within 3 years of death are brought back into taxable estate under § 2035(b).
- e. Additional considerations for married clients:
 - i. Unwell spouse should have at least \$5,450,000 of assets in his/her name to utilize federal exemption. (If not possible, portability may help.)
 - ii. Consider spouse's health and life expectancy.
 - f. A nonresident alien's U.S. situs intangible property may be transferred during life free of gift tax under § 2501(a)(2), but will be subject to estate tax if retained until death.

VII. Income tax reduction strategies:

- a. Appreciated assets owned at death receive "step-up" in basis for income tax under § 1014.
 - i. Exception for items that would have been income in the hands of the decedent – such as retirement assets.
 - ii. Depreciated assets are "stepped down".
 1. Consider selling before death.
 - iii. Immediate benefit for depreciable assets.
 - iv. Consider "swapping" cash for appreciated assets in client's grantor trust if trust contains a power to substitute clause.
- b. Capital loss carryforwards and NOLs are lost if not used before death.
- c. Additional considerations for married clients:
 - i. Consider transferring low basis assets to unwell spouse.
 1. Caution §1014(e) – limits step-up of property acquired by gift passing back to donor within one year of death.
 - ii. Jointly-held assets generally receive one-half step-up.
 - iii. Community property receives full step-up.
 - iv. *Gallenstein* election – pre-1977 spousal joint tenancies may receive full step-up if first-to-die provided all of the consideration for the property.

Appendix A

Estate Tax Calculations Assuming No Gift^{1/}

	\$2 Million Estate	\$5 Million Estate	\$10 Million Estate	\$15 Million Estate
MA Estate Tax	\$99,600	\$391,600	\$1,067,600	\$1,866,800
Federal Estate Tax	\$0	\$0	\$1,392,960	\$3,073,280
Total	\$99,600	\$391,000	\$2,460,560	\$4,940,080

Estate Tax Calculations Assuming \$1,000,000 Gift^{1/}

	\$2 Million Estate	\$5 Million Estate	\$10 Million Estate	\$15 Million Estate
MA Estate Tax	\$33,200	\$280,400	\$916,400	\$1,706,800
Federal Estate Tax	\$0	\$0	\$1,453,440	\$3,137,280
Total	\$33,200	\$280,400	\$2,369,840	\$4,844,080

Estate Tax Calculations Assuming \$5,000,000 Gift^{1/}

	\$5 Million Estate	\$10 Million Estate	\$15 Million Estate
MA Estate Tax	\$0	\$391,600	\$1,067,600
Federal Estate Tax	\$0	\$1,663,360	\$3,392,960
Total	\$0	\$2,054,960	\$4,460,560

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^{1/} Calculations assumed an unmarried decedent, resident of Massachusetts, who died in 2015, with no deductions.

Best Practices Where A Contest Is Likely

- Ensure client has sufficient capacity and that capacity can later be established:
 - Obtain client's consent to speak with any predecessor counsel
 - Obtain client's consent to interview client's physicians
 - Obtain client's consent to access client's medical records
 - Consider seeking client's consent to examination by a psychiatrist or neurologist, and obtain a letter or affidavit from the examining physician
 - Ensure any evaluation of capacity is made using the appropriate standards (e.g., testamentary standard v. contractual standard)
 - Consider videotaping client at the time he or she executes the instruments
- Ensure client is not acting under any undue influence and that lack of undue influence can be established:
 - Meet with the client alone in a confidential and private meeting, without any proposed beneficiary being present, preferably at the attorney's office
 - If the client cannot travel to the attorney's office, the attorney should meet with the client in a room with the door closed
 - Ask the client to explain in his or her own words what it is they want, the changes that are being considered, and why he or she wants to make those changes
 - Consider having this done in presence of witness to will
 - Elicit client's intentions in his or her own words; try to avoid interviewing client with leading questions that will elicit simply a "Yes" or "No" response
 - Any script or written paper should be put away out of sight during the questioning process, particularly if there is any suspicion it was not prepared by the client
- In any case where a contest is likely:
 - If a person will be receiving less than what they may expect, consider including a specific statement regarding lack or size of bequest (e.g., "I intentionally omit...")
 - Consider also specifying a reason why someone may be receiving less, but be careful not to specify a reason that is factually erroneous
 - Consider including an *in terrorem* or forfeiture clause
 - Prepare a contemporaneous memorandum summarizing your interviews with the client and the reasons for his or her changes
 - Solicit narrative about other events in client's life (family, current events, day-to-day activities) and include in memorandum
 - Supervise the execution of the will to ensure it is done properly
 - Consider having witnesses prepare contemporaneous memorandum