

Lifetime Planning on Death's Door

Boston Bar Association

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I. GATHER INFORMATION AND THE "TEAM"

- a. Assets and Liabilities
 - i. Obtain and confirm title of all assets
 - ii. Estimate/determine fair market value and cost basis of all assets
 - iii. Confirm beneficiary designations and TOD designations
 - iv. Assess all outstanding liabilities and responsibility for the same
- b. Estate Plan Documents and Corporate Documents
 - i. Request copies of client's current planning documents
 - ii. Request copies of all corporate documents, LLC agreements, buy sell agreements, etc.
- c. Contact Client's Financial Services Team
 - i. Speak with investment advisors, accountants, and attorneys to get as full of a financial/familial picture as possible

II. CLOSE REVIEW OF EXISTING PLANNING DOCUMENTS

- a. Wills:
 - i. Personal Representatives/Guardians/Conservators
 - ii. Powers of appointment exercised?
 - iii. Tangible personal property memos/instructions?
 - iv. Direction to sell real estate for M-706 deduction?

- v. Residue
 - A. To revocable trust?
 - B. To individuals/charities? – consider creating/funding revocable trust
- vi. Charitable bequests/specific bequests to individuals?
 - A. Consider moving bequests to revocable trust to avoid notice requirements and to keep gifts private
- b. Revocable Trusts:
 - i. Current and successor trusteeship
 - ii. Ensure dispositive provisions are accurate
- c. Irrevocable Trusts Created by Client:
 - i. Confirm existence of crummey withdrawal letters (if applicable)
 - ii. Generally
 - A. Check for “substitution” powers
 - B. Consider drafting precatory instructive memos to trustee
 - C. Current and successor trusteeship
 - D. Review for decanting powers
- d. Irrevocable Trusts of Which Client is a Beneficiary:
 - i. Current and successor trusteeship
 - ii. Check for powers of appointment, including contingent general powers of appointment
 - iii. Confirm generation-skipping transfer tax status of trust
- e. Durable Power of Attorney
 - i. Verify acting attorney(s)-in-fact
 - ii. Check date – replace if outdated (if client has capacity)
 - iii. Confirm DPOA contains power to fund a revocable trust, if desired

- iv. MGL c. 203E §602(e) power to amend or revoke revocable trust
- v. Is DPOA springing or not?
- vi. Gifting Powers
 - A. How broad is the power?
 - B. Are there any descendants with special needs?
 - C. Is the powerholder a potential gift recipient
- f. Health Care Proxy/Living Wills/MOLSTs
 - i. Verify accuracy of acting agents
 - ii. Confirm provisions
 - iii. Consider the use of a MOLST (Massachusetts Medical Orders for Life Sustaining Treatment)
 - iv. Are any funeral or burial instructions provided?
- g. Business/Corporate Documents
 - i. Review transfer of interest/stock provisions
 - ii. Review any call provisions and valuation formulas
 - iii. Confirm current and successor management

III. PROBATE PLANNING

- a. Avoid Probate Process/Asset “Freeze”
 - i. Create trust account and fund revocable trust
 - ii. Create LLCs to hold property
 - iii. Move out-of-state property into trust or joint names to avoid ancillary administration
 - iv. Consider gifting property during lifetime
 - v. Consider joint ownership
- b. Review accounts with named beneficiaries and retirement plans to confirm client’s “estate” is not the named or default primary beneficiary

IV. INCOME TAX PLANNING

- a. §1014 Cost Basis Step-Up Considerations
 - i. Transfers between spouses of low basis assets for step-up at death
 - A. §1014(e) denial of “boomerang” gifts
 - ii. Consider selling depreciated/underwater assets (stepped down)
 - iii. Consider asset swaps in grantor trusts
 - iv. Consider carry-over basis for any gifted assets
- b. Capital Loss Carry-Forwards and NOLs Lapse at Death
- c. Plan for Assets that are Income with Respect to the Decedent
 - i. IRAs and other Retirement Plans
 - ii. Will be subject to both income and estate tax after death
 - iii. Consider charitable rollover of IRD where applicable
- d. Reverse Planning Possibilities
 - i. Consider whether forcing assets into client’s estate for step-up purpose will be tax efficient
 - A. Trusts that will otherwise not be included in client’s taxable estate
 - B. Gifts from spouse or others

V. ESTATE TAX PLANNING

- a. Gifting to Reduce Massachusetts estate tax
 - i. Understand the math
 - ii. Remember tax basis carry-over concerns
 - iii. Low basis asset to sell if any loss carryover
- b. Annual Exclusion Maximization
- c. Maximize Educational/Medical exclusions from gift taxes
- d. Use Charitable Pledges/Gifts or provisions in estate plan to take advantage of charitable deductions

- e. Remember 3-year rule for gift taxes paid
- f. GRATs will likely not be effective in “deathbed” scenarios given minimum terms

VI. RISKS INHERENT IN PLANNING OF THIS NATURE

- a. Second Marriage/Blended Family Situations
 - i. Always keep a focus on allocation of estate taxes – who will pay and when?
- b. Asset-Specific Plans can be Disastrous
- c. Understand the Tax-Math (income vs. estate taxes and the effect of portability)
- d. Be 100% sure of Capacity
 - i. Understand the Standards that Apply
 - ii. Beware of undue influence
 - iii. *Hanna v. Williams, et.al.* (Lawyers Weekly No. 12-181-16)

VII. CASE STUDY

Client is 75 years old and terminally ill. She has done some estate planning over the years, but has the following assets in her name:

- Primary residence in Boston
- Vacation home in Florida
- Brokerage account with diversified portfolio
- IRA

Client’s estate plan provides:

- Small bequests to relatives
- Larger bequests to charities
- An amount equal to her remaining GST exemption to a trust for her grandchildren
- Balance to share trusts for her children

Client has also done estate planning during lifetime:

- Made a \$2 million gift to irrevocable trusts, one for each child, in 2012
- Established an irrevocable non-grantor trust, funded with annual exclusion gifts, to provide for her grandchildren’s education
- Ongoing charitable gifts
- Has \$1 million of her deceased spouse’s unused exemption (DSUE)