Addressing and Understanding Client Goals, Motivations, and Concerns to Create Successful, Individualized Trust and Estate Plans

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Introduction

When friends and family members, as well as my colleagues who practice in other areas of the law, ask me why I like being a trusts and estates attorney, I explain that I love the fact that I am part physiologist, part counselor, and part problem solver to my clients. The fact that my clients confide in me some of their most personal information, ranging from the benign to the scandalous, from the heartwarming to the tragic, not only creates a level of trust between the client and me, but also gives me the depth of information necessary to create an appropriate and practical estate plan for them. The importance of listening to the clients, understanding their goals and objectives, and then translating that into an effective legal document is both challenging and rewarding.

Clients Are Motivated by Changes in Law

Recent Developments in Trusts and Estates Law

The biggest development in trusts and estates law over the past two years has been the emphasis on gifting. This is directly related to the change in the law that occurred at the end of 2010, which increased the current gift tax exemption from $1 million in 2010 to $5.12 million in 2012. This exemption is scheduled under current law to revert to $1 million on January 1, 2013, although there is always the possibility of legislative action to increase the exemption amount. The uncertainty of what will happen to that exemption has motivated estate planners to make clients aware of the importance of taking advantage of what could possibly be a one-time large gifting exemption. In New York and New Jersey, where I am licensed, the exemption is of even greater significance, because both states levy their own estate taxes but do not levy gift taxes. While clients around the country are currently making larger gifts now using the federal gift tax exemption, taking advantage of those gifts to reduce their estates for federal tax purposes, residents of New York and New Jersey can also reduce their estates for state estate tax purposes given the two states' lack of gifting limits. We have found that some clients are currently motivated to gift more aggressively, either due to the state tax or because they have larger estates they want to ensure are locked into the increased exemption. While the biggest news in trusts and estates law has certainly been the rush to gift, we actually believe many people

have not yet pulled the trigger on making these gifts, and we anticipate that more people will make large gifts toward the end of 2012.

In conjunction with the increased exemption, the values of assets, particularly real estate, have steadily decreased and remained low for a number of years. For gifting purposes, it is ideal to gift these types of assets, as the hope is that the value will grow in future years. By gifting them now at lower values, clients are using less of their exemption than they would if they gifted them in the future, when the values could be higher. Also driving the idea that now is the best time to gift is the discussion over the past few years regarding whether Congress might limit the size of discounts that are available in valuing certain non-voting and limited partnership interests that are gifted. The discounts currently available permit clients to leverage their gifts. These are popular gifting tools, and simply knowing that they are on the congressional radar might push people to use those techniques before they disappear. Trust and estate structures have a direct correlation not only to what the law is, but also to what we believe the law may soon be. Much of the legislation Congress has enacted in recent years has attempted to reduce or eliminate discounts and extend grantor-retained annuity trust (GRAT) terms to ten years. These are the types of issues that certainly evoke an immediate reaction in trusts and estates lawyers everywhere.

It is possible that budget shortfalls and the weakened economy are driving changes in the laws and rules that affect trust and estate planning. New York and New Jersey are likely to retain their estate taxes simply because they need that money in the states' treasuries. Although it is difficult to predict what will happen on the federal level, the talk of abolishing the estate tax seems to have died down somewhat, and we do not anticipate that Congress will eliminate it entirely. Even considering that fact, with the current exemption now exceeding $5 million, it may be difficult for Congress to convince enough of its members to substantially reduce that amount.

TRA 2010's Impact on Estate Planning

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (TRA 2010)[1] has impacted different US jurisdictions in varying

[1] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296.

ways. Because New Jersey and New York have a state estate tax and a state exemption of only $675,000 and $1 million respectively, many of our residents are subject to some form of estate tax when they die. Even those whose assets total less than $5.12 million are interested in gifting—primarily to reduce the amount of New Jersey or New York state estate tax their estates are required to pay at the time of death. This has led to a wide range of people taking advantage of the increased gift tax exemption. People with estates of $20 million and more are not even questioning the timing, of course; for them, gifting now is a certainty. Most of these clients have already used their $1 million exemption and are now taking advantage of the additional $4.12 million exemption available to them. Couples with assets valued at around $10 million may be less comfortable giving away everything they have, and we see fewer people at that financial level who want to take full advantage of the exemption. At the same time, many of these clients recognize that their estates may be subject to estate tax in the future, and, if only to reduce state estate taxes, they are interested in making some sort of a gift.

This conflict between wanting to take advantage of the exemption while not entirely parting with assets has led more clients to transfer assets not directly to their children or even to a trust for the benefit of their children, but instead to trusts that include the spouse as a beneficiary (sometimes referred to as spousal lifetime access trusts (SLAT)). These trusts are, in reality, concurrent gifting trusts where the husband creates a trust for the benefit of his wife and children and the wife creates a trust for the benefit of her husband and children with different terms to avoid the reciprocal trust doctrine.[2] The couple then uses those trusts as the vehicles to make the lifetime gifts using the increased gift tax exemption. Clients are more comfortable gifting to SLATs than to trusts solely for the benefit of the children because the spouses can gain access to their money if they need it, as beneficiaries of the other's SLAT. As previously mentioned, this is more of a concern for people with assets of $10 million to $20 million, since maximizing the exemption takes up a large percentage of their estate;

[2] *U.S. v. Grace Est.*, 395 U.S. 316 (1969). Under the "reciprocal trust" doctrine, if trusts created by a husband and a wife are deemed to be too similar and leave each spouse in essentially the same economic position as if the trusts had never been created, the Internal Revenue Service could deem each spouse to be the grantor of the trust for his or her own benefit and thus include the assets in each spouse's estate under Sections 2036 and 2038 of the Internal Revenue Code.

however, even clients with far more accumulated wealth are concerned with maintaining access to their assets. These concerns are likely the result of the weakened economy leading to a decrease in our clients' net worth.

TRA 2010 and the increased tax exemption have also had a great impact on the techniques trusts and estates attorneys traditionally used when there was only a $1 million exemption.[3] For example, we previously prepared zeroed-out GRATs for many of our clients who had already used their $1 million exemption. Now that most of our clients are taking advantage of an additional $8.24 million (for married couples) of exemption, we have not been using the traditional GRAT technique as often. One reason is because direct gifts to SLATs or other trusts remove assets from the client's estate right away as opposed to the GRAT that requires that the client survive the length of the term. Clients are also interested in taking advantage of the increased exemption in 2012, in case the exemption is lower for future years. Depending on what happens to the gift tax exemption in the coming years, we anticipate that some of our wealthier clients will return to the more traditional techniques, assuming that those techniques are still viable at that point (especially given Congress's interest in possibly cutting back on the allowance of GRATs).

Factors Affecting the Estate Planning Process

Age

A client's age has a great impact on the estate planning strategy. For example, our clients in their twenties and thirties are less concerned about taking advantage of the gift tax exemption than older clients are, because they know they are likely to live another fifty years and the idea of giving away a large amount of money now does not appeal to them. Generally, they are concerned about naming guardians for minor children and creating a basic plan. Our younger clients are also less interested in continuously revising their estate planning documents; they generally want to simply put a plan in place that seems adequate for the conceivable future.

Older clients may be more concerned with what will happen to their assets at death simply because they are closer to dying than younger clients. Older

[3] *Id.*

clients may also be interested in elder care or Medicaid planning in order to preserve some or all of their remaining assets. We also consider the mental capacity of our older clients. When they were younger, a couple may have felt comfortable leaving assets to each other outright, but if a client shows some decline in mental capacity, we recommend putting the assets in a trust and naming the children or some other third party as trustee. When people age, their estate plans become more "real" to them, and that can be extremely difficult for many clients to cope with. Most understand how important it is to provide structure to those plans, though, and can take solace in seeing how their plans will be carried out when they pass away.

Size of the Estate

The size of a client's estate has an impact on the type and amount of planning a client is interested in undertaking. Clients with larger estates are as focused as all other clients on making sure their assets pass in their prescribed manner, but wealthy clients are also very focused on tax savings. As mentioned above, due to the New Jersey and New York estate taxes, many of our clients, including those who would not describe themselves as remotely wealthy, find themselves in a potential estate tax situation and are interested in reducing the size of their estates with the goal of reducing the overall tax.

Outline of the Estate Planning Process

Prior to our first meeting with a client, we send out a data sheet intended to gather personal information and a net worth statement. We ask clients to return…