



Zealous Representation Through Various Trusts

By Stephen Mayfield

I recently had a heated conversation with a financial planner who said to me, "I wish you attorneys would stop always recommending a living trust when a will is all the client needs. It seems to me you are just trying to make money." Without waiving attorney-client privilege regarding our mutual client, I assured my friend that the trust I recommended for the client was, in my estimation, absolutely necessary for the client to accomplish her intended result. I also explained how, on several occasions, I had not recommended a living trust where a simple amendment to an existing trust, or a will would suffice. He did not seem impressed.

The fact remains that some people have a negative impression of estate planning attorneys because of their misconception that we are glorified salespeople, as opposed to qualified legal counselors who advocate important legal strategies. The qualified estate planning attorney has the ethical obligation to "zealously represent" his or her client, just as much as a civil litigator or criminal defense attorney does. The difference is we are advocating for the client so that they or their estate will incur fewer legal costs down the road, to assist them in maximizing the available estate tax exemptions, and to ensure that their estate will be administered and distributed just as they want.

The seasoned estate planner is well versed in the reasons why estate planning is so important and what exactly his or her responsibility as an advocate entails. Unfortunately, there are many "professionals" out there who either misunderstand the estate planning purposes and process, or they offer counsel and services which is likely an unauthorized practice of law violation, either of which results in the client receiving incorrect advice. You may have even fallen prey yourself to a well meaning, but ill-informed financial planner, accountant, or investment broker and received misinformation. After all, if you practice full time in an area of law that does not directly relate to estate planning, you are likely too busy to delve deeply into the world of estate planning, and probably do not fancy the rigors of tax law, which, let's face it, can be overwhelming and can dramatically affect how an estate plan should be written.

As a practicing estate planning attorney, I hope to give the non-estate planning counselor an idea of some

common issues and concerns to be aware of so you can "zealously represent" your client's interests in the event the conversation turns toward wills, trusts, probate and estate taxes.

Probate avoidance

One of the most common reasons for seeking a living trust is to help an estate avoid probate. My financial planner friend could not fathom why attorneys always seem to preach against the evils of probate as the first reason for a living trust. Granted, if a person's estate is composed of joint tenancy property, accounts that have designated beneficiaries or pay on death accounts, then probate avoidance may not be a major concern. However, one thing people usually forget about joint tenancy property is that despite the benefit of avoiding probate on the death of the first to die, the death of the survivor does not enjoy that same result. Ultimately, the property will go through probate if it meets the statutory value.

That being said, what is the big deal about probate? Why indeed is it such a burden that estate planning attorneys everywhere decry it as though probate exposure will leave a client deaf, dumb and blind? Well, certainly it is no big deal to those who practice in probate. After all, we are lawyers and as such, we generally enjoy attending hearings, preparing court documents, and crossing swords with opposing attorneys. However, the typical estate beneficiary does not want to go court, and they certainly do not want to wait six to twelve months, or perhaps more, to finally receive their share of the estate.

For me, one of the biggest benefits to avoiding probate, is the avoidance of stress that the family has to endure in the administration of the estate. Typically, people will need to grieve for a time, and then they will be eager to move on with their lives. Unfortunately, for many people, even in the best circumstances, where there is little or no conflict or litigation involving the estate, probate administration can be frustrating. The passing of a loved one, especially a beloved spouse or child, is often devastating. For those who have never gone through such a loss, it is often difficult to understand the emotional roller coaster that it is. Now add

to that the burden of fulfilling personal representative duties and sometimes clients will break down under the weight of the constant reminder of their loss.

Personal representatives have to deal with their own emotions as well as the mundane realities of probate administration such as verifying petitions, organizing, inventorying and holding assets until distribution is permitted by the court, obtaining appraisals, establishing bank accounts, paying bills and of course the always pleasant duty of preparing tax returns. Then after all of that fun, they get to write out a substantial check to the attorney who made all that madness possible. I believe that a simple cost/benefit analysis of the expense of a living trust versus the monetary expense and emotional trauma of probate will always weigh in favor of the living trust.

Estate tax flux

With the impending *sunset* of the Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA) scheduled to occur on January 1, 2011, I often hear questions from clients about whether they will still need a complex trust if the estate tax applicable exclusion remains larger than \$2,000,000 (the amount for 2008). The answer is, it really depends. If the applicable exclusion is finally set at \$3,000,000, which inci-

dentally is the figure many commentators have suggested is likely, a simple trust may suffice. The real problem is that even if Congress finally comes to an agreement, there is no guarantee that any decision made in the next year or so will remain static. If history has shown us anything, it is that Congress rarely if ever will "leave well enough alone."

Interestingly the recent word from Washington is that the Senate passed a bill, which if passed by the House, will set the estate tax applicable exclusion at \$3,000,000 with the Generation Skipping Transfer Tax (the "GST Tax") at only \$2,000,000. An in depth discussion of the GST Tax is beyond the scope of this article, but suffice it to say that if that is the ultimate decision, then it will give planners several unique challenges. Generally, when the value of an estate is expected to exceed the estate tax applicable exclusion, the estate planning attorney will recommend an AB or ABC trust for married couples so as to isolate the benefit of each individual spouse's exclusion. If done correctly, this strategy will allow the trustors' designated beneficiaries to enjoy the benefits of both trustors' applicable exclusion, rather than just one.

If the trustors subsequently want the principal of their estate to pass to grandchildren or people of the same generation as their grandchildren (a "Skip Person" for GST Tax

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purposes), and if the \$3,000,000 applicable exclusion with a \$2,000,000 GST exemption becomes law, then deciding how to fund the credit shelter trust (the trust generally equal to the applicable exclusion available for the estate of the first spouse to die) will be more difficult. During the EGTRRA years, deciding how to fund the credit shelter trust has been comparably an easy decision because the GST exemption has been equal to the applicable exclusion. With an unequal value between the applicable exclusion and the GST exemption, the goals of the client will need to be clearly defined and discussed. For example, if the main beneficiaries are the trustors' children rather than grandchildren, then the common marital pecuniary or reverse marital pecuniary funding provisions will likely meet the client's needs. Alternatively, if the clients are more inclined to leave the bulk of their estate to a Skip Person then more care will be needed.

One possible way to avoid any GST Tax and yet fully fund the credit shelter trust is to add a general power of appointment for the benefit of the trustors' children. This can have the desired effect of passing the estate indirectly to the Skip Person and simultaneously result in the estate not being subject to the GST Tax. Unfortunately this is not a panacea because in order for this plan to work, the trustors will need to communicate clearly with their children how they should exercise that general power of appointment in order for the plan to work in favor of the Skip Person. If the children have a different agenda than the trustors, well I think you can see that the Skip Person may be left out in the cold.

Another alternative would be to fund the credit shelter trust with just the GST exemption of \$2,000,000 and rely on the marital exemption to avoid any estate tax at the death of the first to die. This may have the result of greater estate tax at the death of the second spouse to die, but it also may open the door to segue into introducing the client to the estate tax benefits of creating an additional trust such as a Grantor Retained Annuity Trust or an Irrevocable Life Insurance Trust.

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For the experienced estate planning attorney, the various possibilities are intriguing and intellectually stimulating. However, in keeping with the theme of the attorney's duty to "zealously represent" the client's interests, the simplest answer may actually be the best. Because of all of the current uncertainty as to the estate tax, a simple Disclaimer Trust may give the client just enough flexibility to isolate that portion of the estate of the first spouse to die to ensure that the beneficiaries get the benefit of both trustors' applicable exclusion. Unfortunately this strategy is not without pitfalls as well. A Disclaimer Trust requires the surviving spouse to formally disclaim a portion of the decedent spouse's estate. The formalities are not arduous but they must be strictly met, otherwise the benefit will be lost. Be aware that if a Disclaimer Trust is chosen, it may be incumbent upon the drafting attorney to check up on the client from time to time to ascertain whether the client needs additional assistance. Remember that in estate planning, when an attorney is sued for malpractice it is more likely that the plaintiff will be the trust beneficiary than the trustor.

FDIC

In the wake of the economic downturn and the general concern over the stability of the banking system, I have recently heard questions about whether bank assets held in trust will be sufficiently protected through FDIC. Fortunately, the good news is that assets held in trust potentially have greater FDIC protection than held outright and free of trust.

Funds held in deposit with a bank that is FDIC insured are insured not just to the value of the amount held in the account, but to the interest beneficially held by each beneficiary. For example, an account with a value of \$1,000,000 that is owned outright is only insured up to \$100,000. That is obviously not the most attractive scenario. For the risk-averse investor it is downright scary. Conversely, if that same account is held by a trust with ten beneficiaries, each beneficiary's separate interest share worth \$100,000 is insurable up to the total insurable amount.

Of course there are limitations and this explanation is an oversimplification, but for the client who is already inclined to put substantial holdings aside for children or grandchildren, the trust option may offer more flexibility and perhaps more importantly, greater peace of mind. **G**

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