

# Estate Planning Checkup

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It was only several years ago that you met with your estate planning attorney and had your wills and other documents prepared or updated. Your estate plan should be all set, right? Not necessarily. As with the other facets of financial planning, estate planning is always a work-in-progress and may be greatly impacted by changes in your family's circumstances, the market, and legislation. The following are some of the most common areas where existing estate plans may deserve a fresh look.

## Where You Live

A change in your permanent residence (your "domicile") can affect how well your documents will work, and may call for different planning to avoid state taxes or minimize probate costs and delay. If you own residences or other real estate in more than one state, your estate may be subject to more than one state's probate procedures and taxes. Since your current estate planning documents were signed...

- Has your permanent residence changed?
- In particular, have you moved from a "community property state" (AZ, CA, ID, LA, NV, NM, TX, WA, and WI) to a "common law state" (all the others), or vice versa?
- Have you acquired (or retained) real estate outside of your domicile state?

## Your Fiduciaries: Executors, Trustees, and Guardians

The wishes you've expressed in your estate plan and the obligations imposed by federal and state laws have to be carried out by the "fiduciaries" whom you've appointed. These include your executors, the trustees of any trusts you may create, and the guardians of your children who are still minors.

- Are you still satisfied with the individuals or institutions you've named to fill these critical roles?
- Have you named appropriate successors if the first individuals or institutions you've named are not able or willing to serve?
- If there are long-term trusts, is there a procedure for replacing trustees with whom the beneficiaries become dissatisfied?

## Taking Advantage of Your Federal Estate Tax Exemptions

Married couples who want to take advantage of the federal estate tax exemption need to be sure their documents and asset titling are up to date. If you and your spouse's combined estates exceed \$3.5 million (the exemption in 2009) ...

- Does your estate plan create a "bypass trust" or "credit shelter trust" when the first of you dies to take advantage of that first spouse's exemption?
- Do you have enough of your assets titled either in your individual names, or as tenants in common, to make sure the exemption won't be wasted regardless of which spouse dies first?

(Note: Assets held as “joint tenants with right of survivorship” generally cannot be used to fund such a bypass trust.)

- Is the plan flexible enough to use some but not all of the first spouse’s exemption in order to avoid generating too much state death tax (e.g., in New Jersey) in case the tax laws change and/or estate values change?
- Do you know who will be the trustee(s) in control of this bypass trust, and what access the surviving spouse will have to the trust’s income and assets?

## Division and Distribution of Your Estate

Families evolve, personal circumstances change, asset values fluctuate, and your relationships, hopes, and concerns reflect a life in motion. It’s a good idea to review regularly how your assets will be divided and on what terms they will be distributed. Given what you know *today* about your children, grandchildren, and any other beneficiaries (including charities) whom you want to share in your estate when you (and your spouse) have died...

- Are you satisfied both with how your assets will be divided among them, and with how their shares will be delivered to them (outright vs. trusts for awhile vs. lifetime trusts)?
- Will your beneficiaries feel they are being treated fairly and appropriately?
- Have you used trusts where appropriate to hold a beneficiary’s share in order to provide appropriate adult supervision, or protection against creditors’ or ex-spouses’ claims?
- Is there anything in your estate plan that might lead a beneficiary to misunderstand your intentions, or might precipitate a serious dispute among your beneficiaries?

## Incapacity Planning

As life expectancies increase, the probability that you will be incapacitated for some period also increases. If and when that happens, would decisions regarding your medical care and your property be made in accordance with your wishes?

## Advance Health Care Directives, Living Wills, and Organ Donation Instructions

- Do you have multiple signed originals of an “advance health care directive” and “living will”?
- Do these documents name the right person to make decisions about your medical care whenever you can’t communicate for yourself? Do they name one or more successors in case the first person named isn’t available?
- Do these documents accurately reflect your views about artificial life support if you’re terminally ill? Have you shared your views with your spouse and adult children?
- Do these documents include appropriate HIPPA provisions to give your representative access to all confidential information?
- Do you carry appropriate instructions if you are willing to donate any of your organs?

- Who knows where to find these documents? Does your primary doctor have a copy?

### General Durable Power of Attorney

- Do you have multiple originals of a “general durable power of attorney” that was signed within the past few years in the state where you now live?
- Are you still comfortable with the person(s) named who could deal with your assets and financial affairs?
- Does the power clearly state that it will remain effective while you’re incompetent?
- Who knows where to find these documents?

## Nonprobate Assets and Beneficiary Designations

Assets such as IRAs, retirement plan accounts, and life insurance or annuity benefits are not controlled by your will and are distributed outside the probate process that handles most other property you own. Such assets will be distributed based upon the last beneficiary designations you filed with the IRA custodian, plan administrator, or insurer, and will disregard any change in circumstances (e.g., divorce).

### IRA and retirement plan accounts

- For each IRA and retirement plan account, do you have a copy of the beneficiary designation that would control how the account balance would be paid out upon your death? Are those designations still consistent with your current situation and your overall estate plan?
- Are your designations set up so that your beneficiaries can stretch out their withdrawals over their life expectancies to maximize the income tax deferral?

### Life Insurance and Annuity Policies

- For each insurance policy on your life, and each annuity contract you own, do you have a copy of the beneficiary designation that would control how the death benefits would be paid out upon your death? Are those designations still consistent with your current situation and your overall estate plan?
- If any life insurance policy is owned by an irrevocable trust to exclude the death benefits from your taxable estates, have you followed the formal procedures explained by your lawyer for handling your gifts to the trust and the trust’s payments of premiums? Have you considered whether the trust’s provisions still reflect your wishes, or whether you might want the insurance policy(ies) moved to a new trust?
- Given the recent increase in the federal estate tax exemption, as well as the effect of financial market turmoil on your overall estate, have you analyzed whether the amount of insurance on your life is now too much, too little, or still just about right?

## Federal and State Death Taxes

As it becomes more likely that the federal estate tax will not be repealed in 2010, and that federal and state governments will be looking for ways to increase taxes on those who are financially successful, planning for death taxes will continue to be a key element in long-term financial planning.

- Do you have a reasonable idea of the approximate amount of federal and state death taxes that will be due within nine months or so following your death(s)?
- Do you know which assets will be used to fund those tax payments?
- Death taxes are in a sense “voluntary”, in that there are many strategies that can be used during your life and upon your death to greatly reduce or entirely eliminate such taxes. Do you know which of these advanced strategies may be appropriate for you?

## Previous Marriages

People whose marriages have ended by reason of death or divorce often have unique estate planning issues that may be overlooked as they deal with more immediate concerns.

- If you are a widow or widower, does your deceased spouse’s estate plan allow you to use powers of distribution, powers of appointment, or other tools to affect how your overall assets will benefit your descendants?
- If a prior marriage ended by divorce, do your estate plan documents, including beneficiary designations for nonprobate assets, correctly reflect any obligations to your former spouse and to the children of that marriage?
- If you have children by more than one spouse, do your documents reflect your current wishes about providing appropriately for all of your children as well as your current spouse?

## Private Business Owners

Privately-owned business entities could be seriously damaged if the proper planning is not done prior to the incapacity or death of an owner. If you are one of several owners of a private business:

- Is there a signed agreement with the other owners that will control how your interest in the company will be handled and/or liquidated upon your incapacity or death?
- Are the mechanics and the valuation procedure under this agreement still appropriate given the current circumstances and the business succession plan?

## Interests Under Old Trusts

If you hold any “power of appointment” under a trust set up by someone else (basically a power to trigger current distributions, or change to whom and on what basis the trust will make future

distributions), have you considered whether and how that power should be exercised?

## Timely Opportunities

Many or most of the issues noted above will be relevant questions to ask oneself from time to time for the rest of one's life. At present, however, there are a few special opportunities arising from the great turmoil in the global economy and financial markets, or from specific legislation. Two come to mind:

- The historically low yields on Treasury bonds means that the IRS is required to apply very low interest rates in valuing certain intra-family asset shifting strategies. These strategies include grantor retained annuity trusts ("GRATs"), loans, and installment sales. At the same time, the market values of securities, real estate, and many other assets are dramatically lower than they used to be. If your estate is large enough to face significant death taxes, and you feel confident, notwithstanding the market meltdown, that you have more assets than you'll need to maintain your lifestyle, this could be the perfect time to put a lid on the future growth in your estate by using one or a combination of these strategies. This question is all the more timely given the Treasury's recent proposals to make some of these strategies less effective in the future.
- For both income and transfer tax reasons, it can make a lot of sense for someone with a large traditional IRA to do a "Roth IRA conversion" for some or all of that IRA balance, which means paying income taxes on the IRA assets now so that all future growth and withdrawals will be income tax free. The obstacle for many people is that you can't do a Roth IRA conversion if your adjusted gross income is over \$100,000. That rule, however, is scheduled to be suspended for the year 2010, so if you have a large traditional IRA you will want to keep tabs on whatever tax bill Congress enacts this year and be ready to analyze and implement your own Roth IRA conversion strategy.

### For additional information, contact:

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