Chapter 16

The Big Picture

As a way of wrapping up our study it may be helpful to stand back and look at the big picture regarding estate planning. There are truths and some truisms, maxims and objectives that may come to you only after years of experience, but some may resonate with you now that you've had a chance to gaze at this endeavor.

Most of what we've focused upon in this book is the techniques of estate planning, but not entirely. And in the final analysis the art of estate planning is more significant to clients than the science of it. Many professionals are competent to cobble together the documents of transfer and to select from among various tools available in the estate planning arsenal. Ultimately what will distinguish you from someone who just peddles paper and procedures is the ability to see what your clients want, determine what they and their beneficiaries need, and then exercise good judgment in marrying those wants and needs in a palatable and effective manner. After all, most beneficiaries would prefer to just receive the wealth outright (thank you very much!), and their benefactors would like to avoid all taxes or other interference with or constraints on their desire to preserve the wealth and govern how it will be enjoyed (the golden rule of wealth: those who have the gold get to make the rules). We know that often those are not consistent nor even viable goals or approaches, which makes all this such a challenge.

Objectives

Through the dual prisms of conflict avoidance and goal achievement, we can see at least half a dozen negatives that good estate planning seeks to avoid, and as many affirmative planning goals that it seeks to accomplish. In addition, for the small slice of the population subject to the wealth transfer tax, there may be another half dozen tax related notions to keep in mind. Consider:

Negatives to Avoid

Probably first on any person's list of things they would abhor is the loss of personal freedom that attends incapacity. Clients with wealth worry about their own inability to attend to their affairs, and they worry also about the possibility that their beneficiaries will be unable to manage wealth or to care for themselves. The typical answer to these fears is to create a plan today in contemplation of incapacity, providing a safety net in case the need arises.

Often for a client with real wealth this means creation of a self-trusteed declaration of trust or, for those with more modest means, execution of a durable power of attorney for property management. All clients also likely will favor execution of a durable power of attorney for health care. A living will also is useful and, due to widespread publicity and misuse of terminology, clients often believe that this is the document they want or need, and you'll certainly provide it as well.

Related to incapacity is improvidence, imprudence, or just plain inexperience, usually of beneficiaries in the management of wealth. Just as clients want to protect against their own inability to deal with their estate as they age, they want to provide management and protection until their beneficiaries have reached a maturity and level of experience, and sometimes for their entire lives.

A second concept that dovetails into the first is that hardly anyone wants their affairs to be subject to court supervision. If a personal representative (guardian, conservator, or other fiduciary) is needed, the loss of autonomy implicit in their obligation to the court that appoints them usually is regarded with disfavor. But not always: on occasion the factions vying for control of a situation inform the use of a disinterested intermediary who has the full support and authority of the judicial system. But ordinarily that oversight causes delay and second guessing that does not benefit the family, it entails a public scrutiny that is difficult to restrain, and it may follow an embarrassment (in the public forum) of establishing to the court that someone is unable to manage for themselves. As little as most folks care to know about another family's troubles, those who are in the middle of such a situation routinely feel the glare of public illumination and seek to avoid any semblance of the publicity that can be generated by a court supervised administration.

That said, it may be necessary to engage the services of special advisors who can assist with investments, management, and determinations of appropriate invasion or distributions. This need not involve a court appointed representative or fiduciary, but a third objective is to avoid the disadvantages that may flow from an unsatisfied need for outside assistance.

Fourth, as appropriate as may be some supervision or assistance, hardly anyone wants (or even needs) overlapping fiduciaries. For example, there typically is no need for a trust settlor to have both a trustee and a guardian, or for an estate to undergo ancillary administration (a second probate, such as would be required in a state in which vacation or investment realty is located). So avoiding the inconvenience, the disruption, and the added cost of overlapping fiduciary administration typically is desirable.

Fifth (and without a doubt first on the list of many clients) is avoiding taxes to the fullest extent possible. Let's remember that tax minimization is not an ultimate good that can be attained without cost: the client's entire estate could be left to a qualified charity and all taxes could be avoided. So the trick here is to minimize taxes with an acceptable level of cost. While we're at it, let's also be sure to consider minimization of both federal *and* state transfer taxes. The latter often get overlooked, notwithstanding that frequently they are the easiest to address. And they are becoming more prevalent.

Finally, those clients with a family business seek to avoid interruption or ultimate failure of the enterprise on account of death. Succession planning is a critical element of any successful plan for the business owner.

Affirmatives

The former are things to avoid. They're not nearly as fun or gratifying as the positives that clients seek. On the affirmative side of the ledger are another series of goals that frequently apply.

For example, it is easy to predict that many clients want a more intuitive or sensitive disposition of their estate than intestacy. Selecting among natural objects, engineering an age for distribution or incentives for good behavior, all are easy to appreciate.

And so is preservation of wealth for natural objects of the client's bounty, several generations removed, without dissipation by predators (such as creditors, tax collectors, plaintiffs in tort cases, or new spouses who may be feared sometimes as the "gold digger" or "gigolo" in terms of how the client feels about the next spouse of their surviving spouse (or even of their children)).

Third is supporting dependents, whether they be a spouse, children, or aging dependent parents. Clients don't want to think of their loved ones engaged in spend down planning to qualify for meager public benefits if they have enough wealth and it can be settled in a manner to protect those who they are supporting during life.

At the same time, many clients want to target disposition of certain assets to or away from certain beneficiaries. Wanting equality of entitlement is not the same as wanting every beneficiary to have an equal share of every asset. Most folks know which property they want to go to which beneficiary, particularly if one or more is instrumental in the operation or preservation of certain particularly favored assets (such as the family business, or realty).

A fifth objective is to provide flexibility, to plan affirmatively for changes in needs and concerns. We know the technique of choice is the second look opportunity provided by well drafted powers to appoint. This too is easy and very desirable planning.

And finally (but potentially viewed as a negative to avoid rather than a positive to accomplish) is the desire to provide spendthrift protection and defer possession of inherited wealth until a beneficiary is situated for outright enjoyment. For example, can any sensible professional (such as you) who stares at the risk of malpractice liability dislike the opportunity for their inheritance to be placed in the gilded cage of a spendthrift trust, where it may be enjoyed and kept free of claims? It may not always be the right choice for the law to favor inherited wealth over the claims of meritorious litigants, but to parties involved in estate planning this is one of the most desirable aspects of common law trusts. If you personally receive an inheritance in trust, you likely will thank the thoughtful planner who insured it against your professional foibles, because we're all going to make mistakes and many of us are going to be sued for them.

Taxes

And then there is the other certainty in life! We haven't figured out how to avoid death, but good estate planning for the sliver of the population subject to taxation is literally worth its weight in the gold that is preserved. There is nothing wrong or distasteful about making certain that clients pay no more than their fair share, as defined by law. And sizeable opportunities are afforded without going out on the limb of aggressive planning or questionable techniques.

In this regard it is wise to remember in the current environment that both state and foreign death taxes should be considered, along with the more ubiquitous federal wealth transfer tax. Shifting appreciation with estate freezing techniques is essentially a thing of the past, but closely related planning remains viable, such as paying tax with frozen value assets or accelerating the payment of tax to benefit from reduced effective rates. Certainly the shelter of both spouses' unified credits or generation-skipping transfer exemptions, and taking maximum advantage of the annual exclusion, all make sense in any situation in which taxes otherwise might be a burden. Don't forget income tax savings, and most important: always keep an eye on liquidity needs, either by engineering deferral (such as with the marital deduction or §6166 installment payment) or by striving to convert illiquid investments over time to make it possible to pay tax with the least disruption or financial strain.

Maxims

Over the years four fundamental notions often impress themselves on experienced estate planners. They are of such global significance that they might rightly be regarded as guiding principles or maxims of estate planning.

One is a reality that you already have witnessed in your lives, probably in a college classmate or perhaps even in law school, to say nothing of reading the papers or watching the news. Witness highly paid stars of sports, entertainment, or industry who have been injured by success. "Nothing destroys like too much money." It may be the scourge of thwarted ambition, the destructive nature of the habits of excess, or the lure of money that invites the attention of predators. You need only document the countless disasters that have visited winners of the lottery to see that, particularly in one not well prepared for its demands, the sudden acquisition of wealth can be an especially destructive force. It can be moderated, and beneficiaries can be "groomed" for the demands that it can create, but without proper planning and consideration of its negatives wealth is one of the worst things that can happen to a person. Good estate planners understand both the very positive things and the very bad consequences that attend to wealth, and try to foster the former while minimizing the latter.

A second notion is that a good plan provides maximum flexibility. It should be an extension of the donor's pocketbook, in the sense that the wealth will be used in the same well reasoned ways that the client would personally employ if still alive. If circumstances change and needs must be met, the good plan should provide the means to satisfy those desirable goals in as close to the same manner as if the wealth owner still was alive and able to act.

Third is that tax planning should never overshadow the appropriate plan. "The tax tail should not wag the family planning dog" by causing undesirable dispositions or discouraging results that the client otherwise would want. A good question to always ask early in an estate planning engagement is what the client would want done with the wealth if there were no outside influences like taxes or other restrictions. Then see how close to that desired plan the situation can be brought with a minimum of dissipation (through unnecessary taxes or other "costs"). Jumping through hoops with devices that no one would select were it not for the desire to minimize taxes often proves to be a fool's errand.

Finally, something that a newly minted estate planner can hardly apply but that experience will teach you is critically important: the traditional KISS principle ("keep it simple, stupid"). Or, to put it more mildly, it seldom is desirable to employ fancy techniques and use all the sophisticated gimmicks at your disposal if a more straightforward or simple technique will do just as well. As you acquire the skills of the best of the trade you will itch to use them, but frequently the situation just does not call for the heavy artillery that you have acquired. Try always to employ the least invasive techniques and literally to put yourself in the place of the client, who typically is not as enamored of your skills and toys as you are. It is tough, to have acquired a wonderful tool that will accomplish so much, and not to break it out and use it at every possible opportunity. But that literally is what prudence often recommends: be careful about what you use, and when, so as not to overwhelm the client or the situation.

Estate Planning Top Ten List

A number of years ago a newspaper reporter asked what the average "client on the street" ought to consider doing (or not doing) in terms of preparing an estate plan. In no particular order this is the "top ten" list that resulted. Read it as if you were the potential estate planning client, and consider how it coincides with your own notions of what an estate planning advisor should recommend that a client consider.

First, *determine what you own.* It sounds silly, but do it like Santa: make a list, check it twice. Be sure to include assets that you don't currently enjoy but that will benefit your survivors (e.g., life insurance and retirement benefit death payments), and nonprobate assets like jointly held property or property transferred into a revocable inter vivos trust. Remember that most people are worth more dead than alive; don't *just* consider your walk around wealth.

Next, *verify title*. Don't take anyone's word for it. Instead, actually ascertain who owns what. Be sure the title is accurate and in the name you thought. You'd be surprised how many people think they alone own property and find that it is held in joint tenancy with someone else (like a spouse - or ex-spouse! - or parent). Or folks who created an inter vivos trust for probate avoidance purposes, only to discover that they never transferred any assets to the trust.

Also *ascertain beneficiary designations*. Again, don't assume you know who has been designated as beneficiary of your insurance, retirement benefits, or other nonprobate assets. Is there a trust in place and was it properly designated as the beneficiary? What does your current will provide? Don't guess! Get out the documents and read them. Don't be surprised if the plan makes no sense to you anymore, or if it is outdated, in terms of your current situation and desires.

Now *ascertain values*. Many people underestimate the value of their net worth because they low-ball the value of assets. Sometimes they don't know the value at death (for example, many life insurance policies will pay double or even triple indemnity for an accidental death; if you are young and don't expect to die, you might want to assume that the accidental death payout will be the one your beneficiary is likely to receive). Be conservative by considering what the government would say is the value (e.g., for a closely held business, don't take the maximum valuation discount you hope your estate might be able to justify). Plan for your worst case, not the most favorable.

Consider the dispositive plan you would want if there were no taxes to avoid or minimize. There is no sense letting the tax tail wag your estate planning dog if the result you get really isn't what you want. Approach your planning with the notion that you want to come as close as possible to the disposition you have in mind, with as few modifications as necessary to accomplish the tax objectives that are in the realm of reason in terms of the changes they impose on your desires.

Evaluate liquidity. If your estate were to mature tomorrow, how would your personal representative pay the taxes owed? Would it require a sale of assets you favor or want to preserve for a particular beneficiary? If so, consider whether you want to acquire more liquidity through the purchase of life insurance or by making some portion of your wealth more liquid.

Decide whether you want to (and when) begin to *maximize your wealth*. Not through employment or investment decisions (you probably do that every day) but through such things as exercising options to purchase stock or more life insurance without proof of insurability, or putting more money in tax deferred vehicles like an IRA. But before you opt for more tax deferral techniques, also run the numbers on what the taxes will be when that money ultimately is received, by you or your beneficiaries.

If you are married, *consider when you* and your spouse would *prefer to pay any tax* that will be due on your aggregate wealth. In this regard, don't assume that deferral of the tax is best. A common "time-value-of-money" justification for deferral is exactly wrong for wealth transfer tax purposes (although you get to use Uncle's money during the surviving spouse's overlife, you will not earn back enough to offset the difference in tax generated by the delay). You might decide to defer payment for lots of good reasons (e.g., because the survivor of you is concerned that there won't be enough wealth to live on, you think maybe Congress will repeal the tax before the survivor dies, or because the survivor will make gifts during his or her overlife, which is the cheapest way to move wealth for transfer tax purposes). But don't be suckered into using the marital deduction to defer tax on the theory that you'll come out ahead. In most cases you will not, unless it just happens that the marital plan works an equalization of the wealth you own so that both of your tax benefits (like exemptions or credits) are fully used.

Think about *fiduciaries*. Often the most difficult choice in the estate planning process is who should be guardian of your minor children, who is capable of being your personal representative, is anyone trustworthy to be the holder of a durable power of attorney for property transfers, and (if a trust is involved) who would be the right long-term selection for the role of trustee. You might decide not to use a trust because you can't identify anyone better than your beneficiaries to manage the property (or you may decide to name the beneficiaries as trustees — that's okay, although it requires careful drafting to accomplish the trust purposes).

Finally, consider with your estate planner the package of *documents* that you want drafted to accomplish your desires. Do you want or need a trust? You will need a will in all events, and perhaps an irrevocable life insurance trust would be appropriate. At the same time be sure to request a durable power of attorney for health care and perhaps another for property transfers. Would you like organ donor cards, a living will, or perhaps prepaid funeral arrangements?

Take note that almost everything you read about in the papers involving estate or trust litigation is a function of planning or devices that made no sense to someone. Don't chase after (or be badgered into) techniques that gratify the planner more than you or your beneficiaries, and remember that most things that seem too good to be true usually are. Unless you want to benefit your attorney or tax advisor with fees paid now (and again later when the controversy arises), think hard about whether to be a bit more conservative. And where family controversy is involved, keep in mind that greed brings out the worst in people, and inequality makes beneficiaries crazy. If you plan to play favorites, consider leaving a note that explains why you thought it was appropriate, and be sensitive to the feelings of your survivors.

There is plenty of prejudice and personal opinion in that list, some of which you may embrace and other things about which you may disagree. Here at the end of our study is a good time to confront your particular quirks and feelings about the recommendations we all make, especially to consider whether they flavor your vision of the undertaking and the advice you would give. Because, after all is said and done, what you are dispensing is guidance and advice, not just (and hopefully not primarily) documents and gimmicks. In that regard, the talent that separates routine advisors from those that clients clamor to engage is the judgment and wisdom they bring to the table. For most of us that is an acquired commodity, often taking a lifetime to accumulate. The following collection is intended to give you a head start.

Estate Planning "Judgment"

The collection below is not the sort of thing that a pinheaded academic sitting in the ivory tower could offer without the substantial assistance of seasoned and savvy practitioners. And so it is that this list has been expropriated without shame from wise advisors who have been willing to share. Not any of us could hope to accumulate this much knowledge in a lifetime of practice, but we all can benefit from the collective wisdom. Use it well and prosper in your practice.

- Saving taxes isn't that important in the overall scheme of things. It becomes even less important the closer your client gets to death.
  - Your clients are not going to pay the *estate* tax. Their beneficiaries will.
  - Married couples don't need an estate planner's help. Most estate planning is for the benefit of the second generation (not the client *or* the client's spouse).
- Assume that your client won't return for a new will/trust (or even for a check up) for a decade. But draft as if they will die tomorrow.
- Assume that your client won't read anything you send for review. Some will, many will not, and most of those who do will not read carefully.
- Don't take your client's word (or that of other advisors) for anything that you can verify with little investment in time or other costs.

- There is pain for everyone in practice economics. Balance cost against competence and adjust your bill (if necessary) rather than cut corners.
- Know how much complexity the client can tolerate.
    - One of the hardest things any estate planner must learn is: don't use the $10 plan when a $2 approach will work.
    - Write documents with simple terms, titles that make them easy to understand, flow charts that illustrate concepts, client memos in plain English. Make it easy for clients who don't read documents to appreciate what they are doing.
    - Learn to explain complex issues in a simple and concise manner. It isn't easy!
    - Don't push your client into a plan that requires more record keeping or administration than the client wants (or is able) to handle.
    - Many individuals will fail to keep fiduciary or partnership accounts properly and probably will commingle assets or otherwise defeat the plan. So, create a letter explaining what the client needs to do, use a tickler system, and perform due diligence follow ups.
    - An estate plan that doesn't work is worse than no estate plan at all.
- It is okay to be creative, but don't be the first kid on your block to try any new gimmick. Be willing to get out front if you're satisfied that a strategy works, but remember: "The second mouse gets the cheese."
- Care as much that other respected professionals respect your work as you do about what your clients think of it.
- Don't create an estate plan that doesn't make sense, even if that is what the client wants.
- Walk away from trouble, including any client who is not honest or open.
- Don't sell snake oil:
    - Don't sell product if it means you cannot maintain your independent judgment. After all, the only thing you really have for sale is your credibility and integrity.
    - Think hard about the advisors, marketers, and clients you align yourself with. You *are* known by the company you keep.
    - Don't "sell" anything (including services) if all you're doing is "churning." (An exception is doing needed documents early, even if you must redo them later when all elements of the total plan have congealed.)
- A good question to ask yourself about the planning you propose (or that the client requested) is whether it is something you would recommend to your own family.
    - Be realistic about what you're creating.
    - Be realistic about what your clients *say* they want.
    - Remember that clients can tolerate disappointment, but not surprises.

- Keep your eye on the ball: don't overlook the primary objectives of any engagement.
- Remember the easy stuff! It is so easy to overlook basic, safe planning like annual exclusion gifts, the ed/med exclusion, tax exclusive gifting, lifetime equalization, early and complete use of both unified credits, fractional interest discounts, etc.
- Pay attention to demographics:
  - The average American will have more spouses than children.
  - Half of all marriages will end before death.
  - Over one-third of all births in America are nonmarital.
  - A growing percentage of children will die *before* being orphaned.
  - Think about the time of greatest need for wealth: children at 30 with a young family and a new career are far more in need than those who become orphans at age 60 or 70 when their surviving parent dies.
- Pay attention to trends in the law, and in life:
  - The new biology and adoption: children on demand, at any age, to anyone. Consider their impact on the plan you draft.
  - Modern portfolio investing: there is a changing paradigm in the tension between income and remainder beneficiaries.
- Establish rapport with your clients and "get to know them" in terms of such things as how their family works, where the torpedoes are buried, what issues are divisive.
  - Don't put bickering children "in the same rowboat" and expect them to reach any destination by working in concert.
  - Visit a client's business. You will enhance your relationship and credibility, and learn more about subtle issues than you can ever learn sitting in your own office.
- Look for the discomfort and pay attention to the subtle clues. Practice with your senses: by *ear* and *sight* and sense of "*smell*." Trust your instincts and intuition.
- Run the numbers, but don't be driven by them.
  - Know ballpark figures. The client may need estimates to make informed decisions. But remember that the numbers usually are no better than just a guess.
  - Always determine how the client will pay the tax. Think liquidity first *and* last.
  - Beware of planning that works only in a rising market.
- It may work to adopt tactics/tricks developed by others, but it never works to mimic someone else's style. Do your own thing.
- Mistakes cannot be avoided by a "never apologize and never explain" approach.

- The better course is to be forthright in virtually everything. Be truthful when the mistake is obvious. How you handle the mistake will say the most about you.
- Nobody likes someone who is hiding something. And clients have less trouble suing advisors they don't like.
- "When you're already in a hole, stop digging!"

- Don't make your client's problem *your* problem. Be sure that you are not an advocate whose proposals carry a representation that will take you down with the client's ship.
- Malpractice and bad ethics go hand in hand, and usually neither is about knowledge or brainpower. Instead, good judgment (good business practices and a sensitivity to the situation) will protect you from both.