INSIDE THE MINDS

Strategies for Trusts and Estates in New York

Leading Lawyers on Analyzing Recent Developments and Navigating the Estate Planning Process in New York

2013 EDITION

ASPATORE

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

Counseling-Based Estate Planning: A Modern Approach

Richard J. Shapiro

Partner

Blustein Shapiro Rich & Barone LLP

ASPATORE

Introduction

Modern estate planning requires that practitioners dedicate a significant portion of their practice to that area of law. We are long past the days when an attorney can "dabble" in different practice areas and remain a competent practitioner in every one of them. Estate planning, which I define to include the closely related fields of elder law, business planning, and special needs planning, involves an increasingly tangled web of legislative and statutory enactments on both the federal and state level, as well as sometimes conflicting federal and state case law. Attorneys must remain constantly vigilant about the shifting legal landscape, and be prepared to act quickly to take advantage of new opportunities presented by changes in the law, or to take appropriate defensive action on behalf of their clients when a new case renders existing planning less effective.

The ever-shifting legal landscape also highlights the importance of offering clients a formal estate planning maintenance plan, which includes asset funding as part of the planning. A client's estate plan is less likely to "succeed"—that is, to meet their actual objectives—if the planning is seen as a one-time transaction rather than a lifelong process. Attorneys who include in-house funding services and a formal maintenance program as part of their practices are better positioned to ensure that their clients' estate plans will remain both fully funded and updated to reflect changes in the law throughout the clients' lifetimes.

Variations in New York's Trusts and Estates Law

New York's trusts and estates law is not especially dissimilar from the laws in most jurisdictions, with a few noteworthy exceptions. First, there is no indication that New York plans to adopt the Uniform Trust Code, which twenty-three other states have previously adopted, nor has New York adopted the Uniform Probate Code, which eighteen other states have adopted (at least in part). In addition, New York retains a traditional rule against perpetuities statute and has resisted attempts to abolish the rule as a number of other states have done where perpetual "dynasty trusts" are now permitted. Another significant distinction is that New York has never adopted "domestic self-settled trust" legislation, which thirteen other states have now adopted. While these laws have some variations, they are generally designed to allow a person to create and fund an irrevocable trust under which the grantor may remain a discretionary beneficiary, while the trust assets remain shielded from the reach of the grantor's future creditors.

Unlike the majority of states where the use of revocable living trusts is prevalent, many—if not most—New York practitioners continue to use the last will and testament as the foundational estate planning document. Many "traditionalists" claim that New York probate is simple, and that except in certain circumstances, such as when the client owns real estate in other states, or when there are unknown or missing beneficiaries, a revocable trust is not necessary. A growing number of practitioners in New York, however, use revocable trusts as a foundational planning tool in the majority of their estate plans. This shift is a reflection of the reality that revocable trusts offer a significant advantage over wills in planning for incapacity. Wills, of course, are only effective upon death, so attorneys often use durable powers of attorney as companion documents for incapacity planning. Among other deficiencies, powers of attorney provide no instructions to the agent as to the principal's intent, are often rejected by banks or other financial institutions (frequently because they are "too old"), and do not remove the principal's authority to act on his or her own behalf—even when obviously incapacitated—necessitating a costly guardianship proceeding to terminate the principal's authority to handle the finances. In contrast, a well-drafted revocable trust provides for a seamless transfer of authority from an incapacitated grantor to hand-picked successor trustees. The trust can also provide a customized process for determining incapacity through the creation of a "disability panel," which typically includes family members, along with the grantor's personal physician. Finally, a trust not only includes a lengthy list of trustee powers, but usually also incorporates explicit and detailed instructions to the disability trustee regarding the use and disposition of trust assets not only for the grantor's benefit, but also for the benefit of other people (such as a spouse, children, or other dependents) who are beneficiaries of the trust assets during the grantor's incapacity. Unlike the problems encountered with the acceptance of a power of attorney, my firm has never had a bank or financial institution reject the authority of a disability trustee named under a revocable trust.

Current Trends and Concerns Regarding Asset Protection and Tax Reduction

Clients today are putting greater focus on asset protection for themselves and their beneficiaries. While they are still concerned about minimizing taxes, perhaps more importantly, they expect to maintain control of their assets and personal affairs while protecting those assets from potential creditors and exposure to long-term care costs. Many clients are increasingly concerned about exposure to litigation, and express worry over the current state of the economy and long-term economic trends. Clients are also increasingly concerned with protecting their children's inheritances from forfeiture due to a child's divorce or exposure due to financial setbacks that the child may face during his or her lifetime. While I have always had a significant bias toward including asset protection concepts in all of my planning, clients today are even more receptive to discussing asset protection planning than they were in the past.

Since 1999, when I began practicing primarily in the areas of estate planning and elder law, my client demographic has become more affluent. A decade ago, my estate planning clients' net worth was between $1 million and $1.5 million. Today, their average net worth is between $2 million and $4 million. While we continue to emphasize the importance of planning to satisfy personal planning objectives such as creditor protection and divorce protection, we remain vigilant in planning for estate tax minimization as well. As New York retains its $1 million state estate tax exemption, we strive to ensure that for married couples with assets exceeding $1 million, each spouse retains ownership (either in the spouse's name or in a trust) of a sufficient amount of assets to maximize that exemption.

The interplay between the federal estate tax exemption and New York's $1 million exemption is an issue of special concern to trusts and estates practitioners. With the recent enactment of the Taxpayer Relief Act that makes permanent the $5 million federal estate and gift tax exemption enacted in 2010 (the amount is pegged to increase with inflation, so the 2013 federal exemption is $5,250,00), federal estate and gift taxes will be of concern only to a handful of our clients in any given year. Most estate tax planning for a typical client now will be focused on minimizing the impact of New York's much lower estate tax threshold. It is imperative that a married couple's estate plan be designed to ensure that each spouse's estate is able to fully utilize the $1 million New York estate tax exemption by incorporating a credit shelter trust for up to $1 million upon the death of the first spouse. Too many times we see a married couple with approximately $2 million of assets have an estate plan that leaves everything outright to the surviving spouse. While there is no longer any risk of federal estate taxes in such cases, this manner of planning will likely result in a New York estate tax of approximately $100,000 – a tax that could be completely avoided through straightforward, but well-considered, estate planning. .

The over decade-long uncertainty regarding the future of the federal gift and estate tax shows the importance of creating flexible estate tax planning clauses in wills and trusts that can provide the desired result regardless of changes in the tax laws. The ever-shifting federal estate tax exemption that we experienced from 2001 through 2013 also prompted my firm to emphasize the value of participating in our client maintenance program. The clients who participate in our *Legacy Assurance Program*™ receive annual education regarding the changes in the laws, as well as our own practice strategies, and updates to their estate planning documents to incorporate both client-directed changes and changes in the law and our own practice. A small but ever-growing number of attorneys have implemented client maintenance programs to ensure that clients meet regularly with their estate planning attorneys to receive updated documents and planning advice.

Case Law Addressing Privity, Attorneys' Fees, and an Attorney-in-Fact's Authority to Amend an Irrevocable Trust

The most significant case in recent years affecting New York estate planning attorneys is *Estate of Schneider v. Finman.*[1] *Schneider* involved a claim that the attorney failed to properly counsel the decedent about the appropriate ownership of a life insurance policy, which, it was alleged, increased the estate tax liability for the estate.[2] The Court of Appeals held that sufficient privity exists between the personal representative of an estate and the will-drafting attorney, such that the personal representative can

[1] *Estate of Schneider v. Finman,* 15 N.Y.3d 306 (2010).
[2] *Id.*

maintain an action for malpractice against the attorney if the personal representative believes that the attorney's alleged malpractice has caused harm to the estate and its beneficiaries.

The *Schneider* decision overturned centuries-old common law that held that only the client for whom the attorney created the estate plan could maintain an action for malpractice, and is important on many levels.[3] Under prior law, attorneys drafting wills and other estate planning documents were largely insulated from malpractice actions, since the only person who could legally bring an action—the client for whom the documents were prepared—was dead by the time the malpractice was both discovered *and* alleged harm had occurred. With the breakdown of the privity "wall," attorneys who typically only dabble in estate planning are exposed to far greater liability than they were prior to *Schneider*.[4] Post-*Schneider*, attorneys must take a more proactive approach in obtaining information from clients at the outset of an engagement.[5] It is critical for the attorney to use an intake form that puts the onus on the client to identify each asset the client owns. The engagement agreement should specify that it is the client's responsibility to provide the attorney with all requested asset information, and to notify the attorney if the client's assets change substantially. The attorney must also ask for copies of wills, trusts, and other estate planning documents the client previously executed, as well as formation and operational documents for closely held corporations and limited liability companies. During planning consultations, the attorney must take meticulous notes regarding the attorney's planning recommendations, as well as the client's planning preferences.

During the drafting process, it is helpful to use a checklist or planning template to help reduce oversights or errors. After drafting the documents, our practice is for the drafting attorney and another estate planning attorney to review the documents to ensure they have been completed in accordance with the plan design. After completing the plan design, the attorney should memorialize the planning recommendations and provide a copy to the client. Among other points, the information

[3] *Id.*
[4] *Id.*
[5] *See id.*

should detail the tax ramifications of the various planning techniques the recommendations will implement.

Cases Pertaining to Attorneys' Fees

There have been a few key recent cases pertaining to the attorneys' fees in estate administration matters. In *Matter of Talbot*,[6] an attorney agreed to take on a contested estate proceeding on a contingent fee basis. The case was settled in approximately four weeks, netting the attorney a fee of $585,000. The client—who evidently reconsidered the contingent fee arrangement after the settlement—brought a proceeding to fix the attorneys' fee under the New York Surrogate's Court Procedure Act (SCPA) section 2110.[7] After the Surrogate's Court granted the attorney's motion for summary judgment, the Appellate Division for the Second Department reversed, holding that the Surrogate Court must ascertain not only whether the retainer agreement was properly entered into, but also whether the fee was itself reasonable under New York law.

In a Third Department case, *Matter of Benware*,[8] the attorney and client signed a retainer agreement that set the attorney's fee at 5 percent of the value of the taxable estate, with additional fees for "extenuating circumstances" billable at $250 per hour. During the course of the estate administration, one of the co-executors filed a petition seeking an accounting and a determination under SCPA § 2110 to fix the attorney's fee.[9] Ultimately, the Appellate Division for the Third Department held that although the Surrogate's Court is not bound by a retainer in setting a fee, the Surrogate Court is *not* authorized to award a fee in *excess* of the fee specified in the retainer agreement.

Matter of Talbot and *Matter of Benware* highlight the fact that attorneys can never take for granted that the courts will approve a retainer agreement setting forth the purported fee for an estate proceeding.[10] If the court views the agreement as unfair, or even unconscionable, the attorney can

[6] *Matter of Talbot,* 84 A.D.3d 967 (2d Dept 2011).
[7] N.Y. SURR. CT. PROC. ACT. LAW § 2110 (McKinney 2012).
[8] *Matter of Benware,* 86 A.D.3d 687,(3d Dept 2011).
[9] N.Y. SURR. CT. PROC. ACT. LAW § 2110 (McKinney 2012).
[10] *Id.; Matter of Talbot,* 84 A.D.3d 967.

expect the court to set a significantly lower fee award than that specified in the retainer agreement.

All three of these cases most significantly affect the area of practice administration. It is critical that an attorney maintain proper documentation about not only the nature and time the attorney spends on a case, but also the advice the attorney provides to the client. *Schneider v. Finman* highlights how critical it is for attorneys to provide advice to clients in writing, not only to reinforce oral advice provided during a client counseling meeting, but also to provide subsequent irrefutable proof as to the nature and timing of the advice in case a client or beneficiary later denies that such advice was ever provided.[11]

Attorney-in-Fact's Authority to Amend an Irrevocable Trust

In 2012, the Appellate Division for the Second Department held, in *Matter of Perosi v. LiGreci*[12], that a grantor of a trust may authorize an attorney-in-fact designated under the grantor's power of attorney to amend or the grantor's irrevocable trust under EPTL §7-1.9, so long as the power of attorney grants the attorney-in-fact the power broad general authority to act.

In *Matter of Perosi,* the principal, as grantor, executed an irrevocable trust in 1991. In April 2010, the principal executed a durable power of attorney, which among other powers authorized the agent to handle "estate transactions" as well as "all other matters." The Major Gifts Rider authorized the agent to establish and fund revocable or irrevocable trusts, but apparently did not include an explicit power to amend trusts executed by the principal.

A month after execution of the power of attorney, the attorney-in-fact and all three trust beneficiaries executed an amendment to the 1991 irrevocable trust pursuant to EPTL §7-1.9. Pursuant to the amendment, the existing trustee was removed and replaced with a new trustee.

The grantor died fifteen days after the trust amendment was executed. When the attorney-in-fact and new trustee appointed pursuant to the amendment

---

[11] *Estate of Schneider,* 15 N.Y.3d 306.
[12] *In re Perosi v. LiGreci,* 98 A.D.3d 230 (2d Dept 2012).

sought a trust accounting from the original trustee, the original trustee moved to have the trust amendment invalidated. Among other arguments, the original trustee contended that both the trust itself did permit the trust to be amended by the attorney-in-fact, and that the neither the power of attorney nor the General Obligations Law authorized the attorney-in-fact to exercise such authority on behalf of the grantor of the trust.

In rejecting the original trustee's arguments, the court held that under EPTL §7-1.9, a trust grantor and the beneficiaries have the authority to amend or revoke an irrevocable trust. The court further read the powers enumerated in the statutory power of attorney to permit an attorney-in-fact to exercise broad authority to act as the principal's alter ego in an array of matters, including the authority to amend or revoke an irrevocable trust. The court held that while there might be "sound policy considerations" to prohibit an agent to exercise such broad authority on the principal's behalf, "if there is to be a presumption that a creator cannot act through his or her agent in amending or revoking a trust, such a policy is for the legislature to enact, not the courts."[13]

The ruling in *Matter of Perosi* confirmed my belief that an agent granted broad authority under a power of attorney does have the power to amend or revoke a power of attorney in compliance with EPTL §7-1.9. As an additional precaution, I have long included an additional power in the Statutory Gifts Rider that explicitly authorizes the agent to amend or revoke revocable and irrevocable trusts that have been executed by the principal.

This case also points out the importance of explaining to clients that they must be certain they are designating an agent under the power of attorney to act in their best interests. In my view, it is important that the power of attorney be drafted as expansively as possible to ensure that the agent can act under any number of circumstances. If a client is hesitant about authorizing an agent to have certain powers, I counsel them that rather than limit the powers, they might instead find another agent who they would trust to exercise broad powers.

---

[13] *In re Perosi*, 98 A.D.3d at 238.

Attorneys' Responses to the Changes in Trusts and Estates Law

In the fall of 2011, my firm shifted its professional practice affiliation to *WealthCounsel.*[14] Joining *WealthCounsel* has enhanced our ability to service our clients by improving our document creation software, and by enhancing our professional education opportunities. Additionally, we have made a concerted effort to keep current our estate planning client database, and especially to maintain and update client e-mail addresses. This effort has allowed us to improve contact with our clients in the form of e-mail blasts and newsletters. Finally, we have contracted with a marketing firm to improve our firm's branding and overall marketing strategies. Working with the marketing firm has helped us unify our marketing message, has enhanced our ability to tout the achievements of our attorneys in the form of press releases, and has sharpened the look and content of our law firm newsletters.

Using Appropriate Resources to Effectively Create Trusts and Estate Plans

There is no substitute for maintaining knowledge and skills through various forms of continuing education, including in-person courses, webinars, professional reading, and participation in practice e-mail list servers (commonly referred to as "listservs"). Membership in the New York State Bar Association's trusts and estates section is essential for New York practitioners, while membership in the elder law section is advised. It is also critical to research the various document creation systems available to trusts and estates practitioners. A few of the most prominent include *WealthDocx*, *Planning Pro, Lawgic*, *InterActive Legal Suite*, and *Medicaid Practice Systems*. With today's technology, there is no need for an attorney to use "cut-and-paste" methods to create forms, which is time-consuming and more likely to result in errors and omissions. Using a practice-specific document creation platform allows attorneys to leverage the collective knowledge of other experienced practitioners, as these programs typically include "help" screens that include explanatory information along with statutory and case law references. Of course, document creation software cannot be a substitute

[14] WEALTHCOUNSEL, http://www.wealthcounsel.com/.

for the attorney's own knowledge and judgment, but properly using these systems can enhance any trusts and estates practice.

Helping New Clients Navigate the Trusts and Estates Planning Process

The critical elements of a successful estate plan include (i) having a detailed counseling conversation with the client concerning the client's goals and fears, as well as teaching the client about the many planning options available to achieve those goals; (ii) ensuring that the estate plan is properly funded; and (iii) incorporating a maintenance program to ensure the client's plan stays current through each phase of the client's life. While my practice has always employed these concepts, an increasing number of attorneys are also including in-house funding and at least some form of a formal estate planning maintenance program as part of their practice.

The counseling phase of the estate plan ensures that the attorney can incorporate all of the client's goals into an appropriately designed estate plan that includes all of the documents necessary to meet the particular objectives. Even a perfectly designed estate plan, however, will fail if the client's assets are not retitled during the funding phase to ensure that the assets are owned by the appropriate trust or other entity, and that individual retirement accounts (IRAs) and other retirement accounts have the appropriate primary and contingent beneficiaries to meet the planning objectives. Finally, the maintenance program ensures that the client's estate plan remains current with changes in the client's personal and financial picture, changes in the law, and enhancements in the attorney's knowledge and experience.

The General Process

I use the same planning process for each client. I use the initial design meeting to learn about the family dynamics and relationships, as well as the client's specific objectives and concerns. I then use a Panaboard—an electronic, four-paneled whiteboard with printing capability—to create design templates that apply the legal tools to the family story and the client's goals and objectives. The design meeting—which, depending on the complexity of the client's family and financial situation can consist of a single three-hour meeting, or last for multiple sessions—gleans the critical client-specific family information that forms the foundation for the estate plan. For example, I learn about difficult or problematic children and their spouses; children, grandchildren, or other beneficiaries with special needs, as well as financial issues and concerns, including the existence of real property owned in other states that may require the involvement of outside counsel to appropriately retitle ownership of the property in the client's trust.

After adequately discussing each part of the estate plan and using the design template as the blueprint, I draft the trust and ancillary documents using the *WealthDocx* document creation software that is included as part of our WealthCounsel membership, and which the firm has customized for our purposes. The drafting process, of course, is intended to prepare the legal documents necessary to accomplish the client's estate planning goals.

After completing the documents, I conduct a "delivery meeting" at which I (or another attorney) thoroughly review the documents with the client to ensure that they meet client expectations. If all is in order, the client signs each of the planning documents as the law requires for each particular document—either in the presence of a notary public, or witnesses, or both. The delivery meeting ensures that the client has a fundamental understanding of the nature and effect of each of the estate planning documents, and that all names and addresses are listed correctly.

The next step is to schedule a funding meeting at which the client and I review and confirm the nature and value of the client's assets, and I recommend how to fund the various assets. The general goal for a typical married couple is to fund roughly equal amounts of assets into each spouse's trust. Once the client and I have made the funding decisions, my firm's funding coordinator works with me, the client, and the client's financial advisor to ensure that the funding is appropriately completed. The funding process ensures that the client's assets are owned by the appropriate trust or other vehicle, and that beneficiary designations for retirement accounts, annuities, and life insurance policies match the estate plan design. This step is critical in the creation of an estate plan that will work exactly as designed.

Gathering the Appropriate Information at the Initial Meeting

I undertake every new case with a "bottoms-up" approach, recognizing the importance of understanding the client's total picture—both on a personal and financial level—before looking at possible planning strategies. Before an initial appointment with a new client, we provide the client with an estate planning intake worksheet to complete that includes family information (the names and dates of birth of children, the names of the children's spouses, the names and ages of grandchildren, the names of any dependents, and the names and contact information of the client's other professional advisors), a listing of the client's primary planning concerns, and a breakdown of all financial assets (including cash accounts, investment accounts, retirement accounts, life insurance, annuities, personal property, real estate, projected inheritances, and money owed to clients) and liabilities (mortgages, liens, and other financial obligations). On the form, we also ask the client to check-off various planning goals and objectives.

At the initial meeting, I hope to establish an immediate rapport with the client to help put the client at ease and allow him or her to speak freely during the counseling sessions. Assuming the client has provided me with the necessary financial information on the estate planning worksheet, I can quickly determine whether tax-planning strategies are likely to be an integral part of the estate planning, or if long-term care asset protection is likely to be a primary goal. What I *cannot* readily determine from the intake form is what makes the client's particular family unique, and what type of planning challenges the family structure and relationships will create. Only as a result of thorough and probing questions can an attorney learn the "hot button" issues particular to an individual or couple. My objective is to get to know as much as possible about the client and the unique aspects of the client's situation, and I ask a number of questions about the client's personal and family background to glean as much relevant information as possible. While the client has the right to assume that I am the "expert" in estate planning, the client is the expert about the client's family; only after I have learned about the client and the client's family can I recommend the appropriate planning tools to match that client's needs and circumstances.

During the initial sessions, I also incorporate the use of a Panaboard to provide diagrams of different planning options, which the client can then take home for review. Research has shown that most people learn best with visual aids, and using the diagrams helps the client truly visualize how an estate plan will fit the needs of both the client and the family.

Addressing Client Misconceptions During the Planning Process

Unfortunately, clients often believe that their individual situations are simple, and require only a simple solution, typically in the form of an "I love you" will. A principal aspect of my counseling process is to demonstrate to the client that the goals and objectives that truly matter when properly presented can be adequately addressed only by engaging in an in-depth counseling process that leads to the creation of a customized estate plan designed to address that client's exact and unique planning goals. Typically, these goals include ensuring personally selected agents and disability trustees will manage the client's financial and personal affairs during incapacity; ensuring that if the spouse survives the client that a potential remarriage will not put the client's children's inheritances at risk; protecting loved ones' inheritance from diminution due to divorce, creditor exposure, or catastrophic health events; and minimizing taxes and expenses.

Clients also generally are uninformed regarding the importance of funding assets to appropriately match estate plan design; neither have they previously been exposed to the concept of estate planning maintenance. At our initial meeting (which may be in the form of an individual client meeting or at a client orientation workshop), we explain each step of our process, and how each of these steps is essential to the long-term success of each client's estate plan.

Creating a Customized Estate Plan

The content of any particular trust is driven by the client's goals and objectives, and the answers the client provides during the design meeting. For example, I am an advocate of creating lifetime protective trusts for the client's children and other heirs. This type of trust can provide the beneficiary with virtually unfettered access to the trust's assets, while protecting those assets from the reach of the beneficiary's creditors, including a spouse in the event of a divorce. During the counseling process, I discuss with the client the various options for each beneficiary's trust share, including the type of access each beneficiary will have to trust income and principal, as well as the pros and cons of having a beneficiary serve as a trustee of his or her own trust share. The client's informed decision after this in-depth counseling discussion determines the provisions I include in the trust.

The choice for any particular type of trust—as well as all the particular documents to include as part of any estate plan—is determined by the client's personal and financial information, including the family dynamics; their financial holdings; the client's health; and of course their goals and objectives. All of that information is gathered during the course of the design meeting(s). The laws currently in effect also drive the types of trusts I use in any particular case. A revocable trust is an integral part of a majority of estate plans for clients who want to provide detailed instructions for the care of themselves and their loved ones in the event of incapacity, strive to reduce estate taxes, and hope to minimize probate. For clients who own or plan to purchase large life insurance policies, an irrevocable life insurance trust is a likely recommendation. Clients who want to protect assets in case long-term care eventually becomes necessary may benefit from funding certain assets into a form of irrevocable trust commonly referred to as a "Medicaid Asset Protection Trust." Finally, I often advise clients with large IRAs or other retirement plans to designate a stand-alone retirement trust as a beneficiary of the retirement plan.

Complicated Estates: Closely Held Businesses, Blended Families, and High Estate Values

The most "complicated" estate plans typically involve clients who own closely held business interests with various forms of ownership (such as partnerships with multiple partners, corporations, and limited liability companies), married couples with children from prior marriages or relationships (blended families), or clients with estate values in excess of the existing federal estate tax exemption.

Clients who have a large percentage of their wealth tied up in closely held businesses present a number of challenges. First, they often own different businesses with various business associates, and the logistics of coordinating planning among a number of people with busy schedules can be daunting. The other primary challenge with this type of client is that closely held businesses have no readily ascertainable fair market value, thereby making it necessary to hire a qualified business appraiser to determine the value of the assets for estate planning purposes. Not only is the process time-consuming, but also many clients balk at the additional expense required for the appraisals. Without the appraisals, however, the estate planning attorney cannot adequately design an estate plan that will minimize the potential impact of estate taxes on that client's estate.

Planning for blended families is a challenge in that the couple typically wants to ensure not only that the surviving spouse or partner is adequately provided for after the death of the first spouse or partner, but also that each of their respective children receives the "appropriate" inheritance. This can be especially tricky when one spouse or partner brings substantially more assets into the relationship than the other.

The challenge in planning for clients with larger estates is to thoroughly explore and evaluate each of the appropriate advanced estate planning tools for estate tax reduction. Given the myriad of available planning tools, it is rare that any single solution is the only appropriate option.

We handle these issues by following a consistent process. In every case, we first obtain all of the client's personal and financial data at, or prior to, the initial meeting so that we can evaluate the potential issues and begin formulating possible solutions. We then engage in a lengthy and comprehensive design process during which we explain all relevant options to the client. Especially in larger estates, the client's other professional advisors, such as the financial advisor, certified public accountant (CPA), and life insurance specialist participate in some or all of the design sessions. In larger estates, we also often work with outside firms to create "design books" that use detailed graphs, charts, and explanatory text to demonstrate to the client how an estate plan that includes numerous integrated planning vehicles will meet the tax and non-tax planning objectives.

For blended families, we explore such options as lifetime or testamentary qualified terminable interest property (QTIP) trusts to ensure not only that the "poorer" spouse is adequately provided for, but also that the "wealthier" spouse's children can ultimately benefit from the assets. Couples in second or subsequent marriages are often good candidates for life insurance that provides an immediate inheritance for the deceased spouse's children upon their parent's death. This is often appealing in cases where there is a great age disparity between the spouses, and the children of the older spouse might otherwise be forced to wait many years to receive their inheritance if the estate plan provides that the estate assets pass to the children only upon the death of both spouses. If life insurance is an appropriate option, it is almost always best for the client to own it in a life insurance trust, which ensures the insurance proceeds are not included in the insured's taxable estate.

Complications Particular to New York

Estate plans for New Yorkers with estates between $2 million and $10.5 million have become more complicated since 2011 given the greater discrepancy between the $1 million per person ($2 million per married couple) New York State estate tax exemption, and the $5.25 million per person ($10.5 million per married couple) federal estate tax exemption. Most estate plans for married couples with a moderate or high net worth incorporate credit shelter trusts for the surviving spouse and descendants of the first spouse to die. In cases where the client fully funds the credit shelter trust to take advantage of the federal estate tax exemption, then to the extent the federal exemption exceeds the New York State tax exemption, the surviving spouse owes New York estate tax on such "excess" amount upon the death of the first spouse.

Alternately, if the amount funded into the credit shelter trust is capped at an amount that does not exceed the existing New York State estate tax exemption, then no New York estate tax is owed upon the first spouse's death. Upon the second spouse's death, however, the amount of that spouse's assets, including all assets received by that spouse upon the first spouse's death *excluding* the assets funded into the credit shelter trust, are subject to both federal and New York State estate taxes.

A popular technique for addressing the disparity between the state and federal estate tax exemptions is to incorporate disclaimer options into the estate plan. Many practitioners design estate plans that provide a surviving spouse with the option to disclaim assets that otherwise would pass directly to that spouse, with the disclaimed assets then being directed—under the terms of the will or living trust, as the case may be—into either a credit shelter trust, a marital trust, or some combination of the two. Disclaimer planning provides the greatest flexibility for dealing with estate tax issues during this period of great uncertainty.

The Consequences of Inadequate or Careless Estate Planning

In my experience, the most frequent error both attorneys and clients make in connection with estate planning is failing to spend sufficient time during the design process to explore the client's options for leaving an inheritance for children in the form of a protected trust. Too often, the estate planning conversation turns on whether the client's estate is taxable, and what types of tax planning provisions the attorney should include in the will or trust, without putting enough emphasis on the appropriate way to distribute a child's inheritance. When attorneys properly counsel their clients that they can leave assets in a trust for their children that can protect those assets from a child's divorce or the reach of the child's creditors, but at the same time enable the child to serve as the trustee and be afforded significant access to the trust assets, clients choose that option almost every time.

The other fundamental error is the failure to adequately retitle the client's assets to effectively "match" the client's estate plan. For example, if each spouse establishes a credit shelter trust in his or her respective will or living trust for the benefit of the other spouse, it is important for the couple to change ownership of their jointly titled assets into the name of each spouse (or the living trust). This severance of jointly held property ensures that upon the first spouse's death, the deceased spouse owns sufficient assets to fund the credit shelter trust. If the assets are not funded and remain owned as joint tenants with rights of survivorship, then the surviving spouse automatically owns all those assets upon the first spouse's death, and the deceased spouse's credit shelter trust is left unfunded. While the surviving spouse may be able to disclaim some of these inherited assets into the credit shelter trust, relying on the surviving spouse to timely effectuate a disclaimer can prove a risky strategy.

These common estate planning errors result in the client receiving far less benefit from the planning than what is readily available. These subpar plans result in poor outcomes, including the imposition of excessive estate tax liability, and, in certain cases, the diminution of inheritances as the result of a beneficiary's divorce or creditor claims. Certainly a plan is not a success if a significant portion of the client's assets go toward paying estate taxes, when sound planning can minimize or even prevent such taxes. Likewise, no client purposely creates a plan where a significant portion of a child's inheritance ends up in the hand of an ex-spouse, yet far too often, these exact results occur.

Estate planning errors also affect the lawyer in a number of ways. Inadequate planning can lead to a damaged reputation for an attorney among the public and the legal community. More seriously, ineffective legal work opens the door to potential claims of malpractice, as evidenced in the *Schneider* case when the Court of Appeals allowed a malpractice action to proceed against an attorney who, the personal representative claimed, failed to provide competent advice to help minimize estate taxes.[15]

Somewhat perversely, poor legal work during the estate planning design process can have an unintended benefit for the attorney. Inadequate counseling or poor drafting can lead to the creation of confusing or vague wills and trusts, which might ultimately lead to protracted trust and estate administration proceedings. The result of this mess is that the attorney handling the administration may pocket larger fees, especially if billing hourly rates for the work. Of course, the risk exists that the Surrogate Court might reduce the fees, especially if the court determines that the attorney is largely responsible for the unnecessarily convoluted or involved administration proceedings.

[15] *Estate of Schneider,* 15 N.Y.3d 306.

Conclusion

I believe trusts and estates law will remain a robust practice area. Demographically, the client base is aging, and the demand for competent estate planning attorneys will surely increase. Budgetary constraints for state and federal governments will almost certainly lead to a need for increased tax revenue, even if government spending is reined in, so it seems unlikely that we will see a complete repeal of the estate and gift tax any time in the foreseeable future. Estate and gift tax planning, then, will remain an integral part of the trusts and estates practice for years to come. The demand for asset protection planning in particular is also likely to increase. Not only are clients increasingly concerned about protecting their assets from the reach of creditors, but attorneys also are discussing this issue with greater frequency on listservs and at continuing education programs. Armed with this knowledge, attorneys looking to provide additional value to their clients are in turn educating clients about this important planning opportunity.

Another area of growth will be in the area of business "exit" planning. Many founders of successful small businesses are from the baby boomer generation and are now well into their fifties and sixties. Without competent planning, the likelihood that such businesses will survive the founder's departure from the business (whether because of death or otherwise) is slim. Finally, all trusts and estates attorneys are well advised to become familiar with "elder law" topics including Medicaid, Department of Veterans' Affairs (VA) pensions, and special needs planning. Even if a trusts and estates practitioner opts not to practice in those areas, it is imperative that the attorney have at least a working knowledge so that he or she can spot the key issues and refer the client to a colleague who specializes in working with those issues.

Using the Advice of Experienced Practitioners and Marketing Experts to Enter the Field

For lawyers new to the trusts and estates practice, affiliating with an experienced practitioner is a great help. This practice area can be well suited for attorneys looking to transition from other practice areas, or even new attorneys fresh out of law school. For such attorneys, it is likewise essential to affiliate with a practice support organization, such as *WealthCounsel*[16] or the *National Network of Estate Planning Attorneys*.[17] These types of organizations offer not only robust document creation software, but also continuing education and practice support in the form of in-person training, webinars, and listservs.

No matter how knowledgeable or skilled, however, a trusts and estates attorney needs clients. Although attorneys often believe that "marketing" is a dirty word, all attorneys engage in marketing in some form. "Traditional" marketing such as advertisements in print, television, or radio is not always necessary; rather, effective marketing can be in the form of participating in bar associations, multi-specialty organizations such as a local estate planning council, or even networking with a CPA, financial advisor, or attorney who is in a different practice area. Finally, writing articles for a local newspaper or a specialty paper catering to seniors, or even creating a blog can help establish the attorney's credibility as an "expert" in the field.

Key Takeaways

- Recognize the increasing value of offering a client maintenance program that ensures clients meet regularly with you to receive updated documents and planning advice.
- Employ the critical elements of a successful estate plan, including detailed counseling conversations concerning the client's goals and fears; ensure that the estate plan is properly funded; and incorporate a maintenance program to ensure the client's plan stays current through each phase of the client's life.
- Engage in an in-depth counseling process to create a plan that addresses how the client's financial and personal affairs will be managed during incapacity, and ensures that if the spouse survives the client, a potential remarriage will not put the client's children's inheritances at risk; protects loved ones' inheritance from diminution due to divorce, creditor exposure, or catastrophic health events; and minimizes taxes and expenses.
- Properly counsel your clients that they can leave assets in a trust that protects those assets from a child's divorce or the reach of the child's

[16] WEALTHCOUNSEL, http://www.wealthcounsel.com/.
[17] NAT'L NETWORK OF ESTATE PLANNING ATTORNEYS, http://www.nnepa.com/public/.

creditors, but at the same time enables the child to serve as the trustee and be afforded significant access to the trust assets. When presented with that option, clients choose it almost every time.

- Consider affiliating with a practice support organization that provides document creation software, continuing education programs and listservs that help you manage your practice more efficiently and productively.
- Market your practice in various ways, which may include media advertising; networking events; one-on-one meetings with financial professionals and CPAs; writing articles for general and specialty circulation newspapers and periodicals; and creating a blog.

Richard J. Shapiro is a partner with Blustein Shapiro Rich & Barone LLP, a law firm based in Goshen, New York. Mr. Shapiro concentrates his practice in the areas of estate planning, elder law, special needs planning, asset protection, and business planning. He received his bachelor's degree from Cornell University, and is a graduate of the University of Pennsylvania Law School. He is "AV" rated by Martindale-Hubbell, and has a 10.0 rating at AVVO.com.

Mr. Shapiro is admitted to the bars of New York and Pennsylvania, and he is presently maintaining an inactive membership with the District of Columbia Bar. He is a member of the trusts and estates and elder law sections of the New York State Bar Association, as well as the Hudson Valley Estate Planning Council, where he is presently serving as a director. Mr. Shapiro belongs to the Orange County Bar Association and City of Middletown Bar Association.

ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.

ASPATORE