CHAPTER 1

Estate Planning Objectives

The primary objectives of estate planning are (1) to secure to the property owner (and his or her family members) during his or her lifetime the maximum economic benefits available from the possession and use of his or her property, and (2) to enable that property owner to transfer the property to the surviving members of his or her family (or other desired beneficiaries, including trusts) with minimal shrinkage from applicable death taxes and other property transfer costs. Estate planning is, therefore, concerned primarily with (1) minimizing federal and state income, estate, gift, and inheritance taxes; (2) reducing probate and associated property transfer costs and similar mechanical burdens; and (3) conserving and enhancing the client's net worth both (i) currently for the benefit of the client and his or her family, and (ii) after the client's death, for the eventual beneficiaries of the primary client's property. Obviously, this estate planning must be consistent with the specific objectives of the client for both (1) the lifetime use of the property by the client, and (2) the testamentary disposition by the client of property to his or her surviving beneficiaries.

In developing a proposed arrangement for both the lifetime and the testamentary disposition of the client's property, the "estate planner" often functions as much more than a legal technician. He or she is both (1) a property/tax planning lawyer and (2) a legal counselor. As a property/tax lawyer he or she must be conversant with the state and federal laws regarding the construction of wills and trusts; property ownership (including community and joint property) rules; asset transfer processes (including for future interests); individual and trust income taxation; inter vivos and death time transfer taxes (both federal and state); probate administration; corporate, partnership,

and limited liability company laws and taxation; and rules resolving conflict of laws. As a "counselor," however, he or she must also be skilled in dealing with the human elements of this property/tax planning.[1] He must be able to explain the probate administration processes. Often this must be done on a multigenerational basis where each generation has different perspectives on these questions. Further, he or she must also be able to encourage the client toward appropriate investment strategies for the management and growth of the client's assets during lifetime.

The estate planner must consider the unique objectives of his or her individual clients and attempt to mold a rational wealth accumulation and property transfer plan that is consistent with those clients' specific objectives.[2] In proceeding with this engagement, the attorney/estate planner often will be consulting with the client's other advisors (including, possibly, an accountant, banker, insurance representative, securities broker or investment adviser, and certified financial planner). The estate planner may thereby benefit from a variety of perspectives as to how the estate plan for the individual client may best be formulated and implemented, but the estate planning advisors should be careful to avoid the clients being dominated by one of these other advisors.

Considering these basic objectives of the estate planning process, the function of this book entitled *Estate Planning* is:

- to serve as a fundamental guide for the estate planner to analyze practical and recurring problems confronting clients in the estate planning context (particularly relating to federal tax planning);
- to provide ideas for use in identifying any available options for the resolution of these estate planning issues; and
- to enable the estate planner to formulate specific recommendations and suggestions for implementation by his or her clients.

Increasingly, clients with a reasonable amount of wealth are frustrated by the fluidity of the relevant tax rules in this context, particularly the changes in the estate, gift, and generation-skipping transfer tax rules. This necessitates regular review of the client's estate planning and a continuing response to changing developments. This also suggests structuring substantial flexibility into the client's estate planning documents—about which the client may not be comfortable.

More detailed discussions of many of these matters are included in the various Tax Management portfolios covering estate, gift, and trust income taxation.[3] This book does not deal in depth with such matters as the implementation of (1) a durable power of attorney, (2) anatomical gift documents,[4] (3) a "living will" or "directive to physicians" to evidence an individual's direction to medical caregivers that he or she not be kept alive by life-sustaining procedures in the event of a terminal physical condition,[5] (4) a "durable power of attorney for health care" or a "medical power of attorney,"[6] (5) a declaration of guardianship for oneself,[7] or (6) a burial power of attorney.[8] A "durable power of attorney" is implemented to enable another person to deal with the principal's assets without the requirement of first seeking approval through some type

of incompetency or guardianship proceeding in a local court proceeding.[9] Statutes authorizing living wills or advance directives have also been enacted in various states.[10] These statutes generally specify how living will directives are to be implemented and revoked. The objective of legislation permitting a "durable power of attorney for health care" is to enable a person to delegate one's health care decision-making capacity to another person.[11] This document is often used to counteract perceived deficiencies in the use of a living will, including those situations not contemplated by the client when implementing the living will. Because of the occasional reluctance by physicians to recognize these instruments (whether for professional malpractice concerns or for other reasons), the use of both documents might sometimes be useful. In many jurisdictions the use of both documents is the preferred practice.

These matters involving the client's asset management during incompetency and the making of health care determinations are beyond the scope of this book but are discussed in other Tax Management portfolios. These are important questions, however, which the estate planner should carefully examine with his or her clients under appropriate circumstances. In many instances the several types of powers of attorney should be strongly recommended to the estate planning client. The estate planner should be sufficiently organized so that these documents can be produced electronically with limited effort (and, therefore, on a cost-effective basis for both the estate planner and the client).

Much of the discussion in this book is structured to address the situation of the "traditional family." However, demographic trends in the United States suggest that the traditional family is declining in percentage. Increasingly, the estate planner will need to consider a number of variables: (1) a reduction in the number of children and, therefore, a greater necessity to assure that a support network is available for older clients; (2) more second (third, fourth, etc.) marriages, with mixed families including multiple stepchildren[12]; (3) same-sex marriages, domestic partner relationships, and similar arrangements; (4) older heterosexual couples living together without being married and having children from prior marriages; (5) grandparents as heads of households including their grandchildren without the intermediate generation present; (6) more balanced income sources for both spouses contributing to the support of the household; (7) a desire for long-term protection (from various creditors and divorced spouses) for family assets through the use of trusts that continue for extended periods; and (8) children produced using new biological techniques. All these situations can present factual and psychological "wrinkles" in the estate planning that must be carefully addressed in the individualized situation.

Notes

1. The estate planner may determine that the emotional issues, rather than property planning issues, are paramount in the early stages of the estate planning. These might include: (1) determining who should succeed to the property ownership (particularly as to items of tangible personal property), (2) whether this inheritance will change the future behavior

of the beneficiary, and (3) contemplation by the client of his or her death (final arrangements for disposition of one's physical remains). Certain of these issues may be even more psychologically complicated in situations involving second marriages and children of previous marriages.

2. Because of the commoditization of estate planning, the advisor must be able to demonstrate that he/she brings added value to this endeavor. Otherwise, the client may conclude that his estate planning can more easily (and more cost-effectively) be accomplished by using documents available through less expensive websites. *See* Goffe & Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 Est. Plan. 27 (Apr. 2011).
3. Throughout this book reference is made to Tax Management portfolios, where appropriate. For a listing of the portfolios useful in specific estate planning contexts, *see* (1) the Tax Management Estates, Gifts and Trusts Portfolio Classification Guide; and (2) the online BNATAX Management Library (available from Bloomberg BNA Tax Management, telephone 1-800-372-1033 or its website: www.bnatax.com).
4. All states have enacted some form of the Uniform Anatomical Gift Act. This act exists in several versions, being most recently revised in 2006, revising the 1968 and 1987 versions. The 2006 Act indicates how anatomical gift documents can be made, amended, or revoked by an individual. The Act specifies how such gifts can be made by others such as family members. This gift can be accomplished by a testamentary document. The Uniform Act provides that an anatomical gift by last will takes effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected. Because often a will is not located until after the funeral, many states permit this gift to be evidenced by a separate document designed to be carried by the donor. In some jurisdictions this includes an appropriate designation on a driver's license. This state legislation also often specifies the permissible donees of a person's body or body parts. *See* www.uniformlaws.org for this Act, summaries of this Act, and the status of its adoption in the several states.
5. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990), where the Supreme Court effectively indicated that quite specific instructions must be provided by an individual to authorize the termination of life support systems.
6. For further discussion of durable powers of attorney for health care and/or medical powers of attorney, see 816 T.M., *Planning for Disability* (Bloomberg BNA).
7. Under state law, an individual may have the capacity to designate a guardian for oneself to manage one's physical care and welfare. This would be different than the designation of a representative to manage one's physical and financial assets. Even though other documents, such as a durable power of attorney and a funded revocable living trust, may be adequate for the management of one's assets, this document may be useful to supplement a health care power of attorney. Further, this document might be used to disqualify an individual who might otherwise have a priority under local law to serve as that person's guardian for physical care and welfare purposes.
8. Under state law, authority may be able to be delegated to a specified agent to control the disposition of the client's physical remains. This may be important where (1) the individual does not want the members of his biological family to control burial arrangements, or (2) prepaid funeral arrangements have not been implemented.
9. See the Uniform Durable Power of Attorney Act, included as Article V of the Uniform Probate Code, for an example of legislation intended to facilitate the implementation of a durable power of attorney. An important objective is to assure that the power granted

to the agent to act on behalf of the principal does not terminate as of the time that the principal becomes disabled or mentally incompetent. This matter of validity of this document is dependent upon state law. State laws as enacted may differ, notwithstanding the Uniform Act. Consequently, if the client has property in several jurisdictions, the estate planner should assure that the durable power of attorney will be effective in each of those jurisdictions to enable the attorney-in-fact designated under that power of attorney to conveniently deal with the property located in each of those jurisdictions. For further information on durable powers of attorney, see 859 T.M., *Durable Powers of Attorney* (Bloomberg BNA), and 816 T.M., *Planning for Disability* (Bloomberg BNA).

10. In some jurisdictions this legislation is identified as a "Natural Death Act." This state legislation specifies such matters as the form of the written directive and the required witnesses.
11. In many jurisdictions a form is prescribed by statute for implementing this authorization. Often an agent under a durable power of attorney for health care may exercise this authority only if the principal's attending physician certifies that the principal lacks the capacity to understand and appreciate the nature and consequences of a health care decision.
12. For example, in this situation the estate planner might need to be concerned about any intended (or unintended) disinheritance of a client's natural children for the benefit of the second spouse.