

Corporate Insights: Estate Planning/Trust/Probate

With an aging population, changes in estate tax law and the economic recession, there has been growing interest in the field of law that governs the management of personal affairs and the disposition of property in the event of incapacity or death. *The Daily Transcript* asked several local attorneys specializing in estate planning, trust and probate law to weigh in on current issues.

There has been a significant increase in the use of revocable living trusts over the last few years. Why are these so popular and what are the ramifications of their increasing popularity?

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The popularity of living trusts grew with the unpopularity of probate. People envisioned probate as expensive and time consuming. Some thought "probate" meant the state was going to get everything, either by way of taxes or by escheat, or that the attorneys would get everything. Trusts have been touted as a means to avoid probate, avoid taxes and a host of other bad consequences. Creation of a trust is seen as evidence that the trustor really cared for his or her family and looked out for their best interests. Trusts also provide more flexibility than is sometimes possible in probate.

As their popularity grew and attorneys started advertising and promoting trusts, either based on price or convenience, the quality declined. Clients frequently received no guidance or instruction on creative ways to meet distribution goals and on how to fund their trusts. People would price shop without any regard to the quality of the product. Then, the non-lawyers started getting into the act, offering a trust as an entrée to sell an annuity. The clients of these salespeople



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The repeal of the estate tax has created a situation that no one ever really contemplated happening. The prevailing wisdom since 2002 was that Congress would change the estate tax law prior to 2010 and the estate tax would remain at a "reasonable" level.

Since 2002, the estate tax exemption has been increasing. Every two years or so it would continue to increase, in 2009 the exemption was \$3.5 million dollars.

The estate tax is always an individual exemption. Thus, for married couples, with proper planning, the exemption could be doubled. For example, if a couple had \$6 million, you would create an "AB Trust." Upon the first spouse's death, half of the property would be placed in trust "A" and the other half would be placed in trust "B." In this way, \$3 million would be in "A" and \$3 million in "B" and no estate tax would be owed. The thought was that we wouldn't know the value of the estate upon the death of a spouse in the future and we also wouldn't know what the estate tax exemption would be at the time. This necessitated creating trusts that were flexible and looked at what the estate tax provisions were at the time of the first death.

The other change that occurred with the estate tax repeal is that there is a limit



matters we established LLCs and at the point we felt values had reached bottom, we gifted interests in the LLCs — or the assets themselves — to family members and to trusts for family members. That gifting continues today. Depending on a family's overall net worth, some of these gifts are made by baby boomers, and some of these gifts are made to baby boomers, and to the children and grandchildren of baby boomers (or to trusts for their benefit).

As people live longer, I have more conversations with clients about the ability to make annual exclusion gifts to an ever-expanding family over a longer number of years. Additionally, as the generation Tom Brokaw described as "the greatest generation" has continued to live long lives, the use of grantor retained annuity trusts has been a particularly favored vehicle to transfer wealth to younger generations in a family (although that vehicle may no longer be as valuable for some families under provisions of the Obama budget proposal).

Clients continue to revise their basic estate planning documents, even in the strange estate tax world in which we live at the present time. And of course, sadly, clients continue to die and the preparation of estate tax returns required to be filed as a result of death continues.

I do not know where we shall be next year or even later this year, from a gift, estate and generation-skipping tax perspective. I do believe the huge flow of work will continue — older generations will wish to transfer assets during their lifetimes to younger generations whom they love, people of all ages will continue to prepare and revise their estate planning documents to benefit those they love, petitions are occasionally needed to clarify or modify the terms of documents, and alas, estate tax returns of some sort will con-

tinue to be filed. I am grateful for such a wealth of work.

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How have laws changed regarding probate, and why it is important to avoid probate? Has the current economy impacted the probate process?

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The probate process was established by the government to ensure that property is distributed to the proper person or persons. Like other sectors of our lives and government, the court system has been greatly affected by the economic climate, making probate, an already difficult process, even more challenging. While the legislative intent is well intentioned, the actual process of probating someone's estate has become very arduous.

In fact, the probate process in California has never been a simple affair, requiring long, drawn-out proceedings and high costs.

While probate is merely the process of taking assets out of a person's name at their death, many people do not understand what probate is, which contributes to lack of planning for probate and the inability to navigate through a probate unassisted by an attorney.

Since the downturn in the economy, filing fees have continuously been raised. Filing a petition for probate alone currently costs \$355. Another new imposition is that each petition requiring a hearing filed after the initial petition is also a \$355 filing fee. Previously, it was \$40.

Once a petition is filed, obtaining a hearing date, amid the furloughs mandated for government employees, has



also become a challenge. Typically, a petition for probate filed now won't be set for hearing for at least a month. Should there be even a minor problem with the petition, a continuance likely will have to be sought, and continued hearing dates often are six to eight weeks out. In addition, once a personal representative of the estate is appointed, obtaining a certified Letters and Order from the court can take longer than a month. This poses a problem because these documents are necessary for the personal representative to have any authority to administer the estate. San Diego courts have recently implemented a trial process that allows you to submit the Letters and Order to the clerk to be issued the day of your hearing.

If you own property in your name, it will be probated, regardless of who has a lien on it. Even if the decedent's heirs plan on "giving" the property back to the bank, someone must be authorized to do so, which would necessitate probate proceedings.

It is a time-consuming and expensive process. With proper planning, probate can — and should — be completely avoided.

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How has the dismal economic climate impacted the estate planning business? What are the benefits of estate planning in a down economy, and what does this mean for estate planning attorneys?

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How many times have you heard, "The economy is cyclical; it will bounce back in time"? I have heard it more times than I can count —



both by those who were so conservative that they lost very little, as well as by those who lost it all. Given the economic downturn, now, more than ever, people believe it is more important to focus on saving money for immediate needs like paying bills and buying groceries, rather than to spend money on estate planning, something many consider a discretionary and long-term expense. There is a disconnect between the public's perception of the cost and complexity of creating estate planning documents and the reality that a large number of affordable estate planning attorneys are available to consumers from all economic backgrounds. As a result, many estate planning attorneys — like their clients — are feeling the effect of the down economy.

While the downturn in the economy may make many feel like this is an inappropriate time to focus on what you will give and to whom, right now is the very best time to get it done. For example, income tax can be avoided on the appreciation in value that occurred while the clients owned the property. Another benefit is that asset values and interest rates are at all-time lows, so individuals and businesses can transfer much more wealth to future generations than they would otherwise be able to in a good economy.

Estate planning attorneys whose business is down are either seeking new marketing avenues to show the public the advantages they can provide them in a down economy, or looking to other practice areas to pick up the slack. However, those attorneys who have a balanced and cost effective legal practice are seeing more opportunities than ever before.

— Compiled by
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