

I N S I D E   T H E   M I N D S

# Strategies for Trusts and Estates in New York

*Leading Lawyers on Protecting Clients' Assets,  
Determining the Best Estate Planning Strategy, and  
Adapting to New Laws and Trends*



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First Printing, 2010

10 9 8 7 6 5 4 3 2 1

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Guiding Trusts and Estates  
Clients through the Forest of  
Legal and Societal Changes

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ASPATORE

The practice of trusts and estates, or as it is currently being referred to as “private client,” has morphed from being primarily a tax-based estate planning practice to also include planning for different generational situations, changing legal relationships, and migratory clients, as well as advocating on behalf of clients in surrogate’s court. As our society becomes more complex, so too does the practice of the trusts and estates attorney who is regularly asked for advice on legal issues as diverse as his or her clientele. This chapter will survey some of the more interesting developments in the New York trusts and estates practice, as well as how to help individual clients with their legal concerns.

### **Important Trust and Estate Topics Heard by New York Courts**

Recently, New York courts have heard some significant cases in the areas of same-sex marriage equality and financial elder abuse. The results of these cases have implications for trusts and estates practitioners. Historically estate planning documents have focused on traditional marriages, primarily because of the opportunities to save estate tax with trusts for surviving spouses. Although the states are slowly changing the rules, until same-sex marriages are more commonplace, estate planners will be asked to counsel and plan for clients in non-traditional relationships. Estate planners have also focused on drafting documents that anticipate potential loss of capacity or health. With society living longer, there is more potential that unscrupulous people may take advantage of our elderly clients. Every estate planning attorney at some point will be asked to help prevent or stop situations of elder abuse.

#### *Same-Sex Marriage Equality*

Two recent New York cases have been decided regarding same-sex marriages. In 2006, the New York Court of Appeals in *Hernandez v. Rolles*, 855 N.E.2d 1 (N.Y. 2006), held that the New York State Constitution did not compel recognition of same-sex marriages, determining that the issue is a question to be addressed by the legislature. At stake are over 1,000 incidents in New York laws that are dependent on marriage. Some of the most commonly referred-to examples for trusts and estates attorneys are (i) rights of a surviving spouse under the Estates Powers and Trusts Laws, (ii)

child custody rules under the Domestic Relations Law, (iii) priority in the right to deal with the estate of a partner who dies without a will, and (iv) tax-free inheritances.

As a matter of comity, New York will recognize same-sex marriages if valid in the place where they were entered. See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008). The New York Assembly passed a bill (No. A077320) on May 12, 2009, to allow same-sex marriage. There seems to be political support for the bill, since Governor Paterson and Mayor Bloomberg both support it, but the New York Senate must also pass the bill before it can become law. Voters in California rejected a similar provision last year. Until this kind of legislation is passed, same-sex couples will continue to deal with the uncertainties of cohabitation contracts (contracts expressing the parties' property ownership and support intentions, similar to ante-nuptial or post-nuptial agreements) and other legal instruments such as health care proxies, living trusts, powers of attorney, and funeral directives. These documents will help the parties have more certainty as to their property rights and their ability to make health care and financial decisions for each other if necessary. In addition, the parties should be counseled on the legal consequences of how they title ownership of their property and the beneficiary forms for life insurance and pension plans. Of course, the trust and estate attorney must carefully comply with the ethical rules before representing two parties with potentially conflicting interests.

### *Financial Elder Abuse*

Every trust and estate attorney can recall cases in which heirs complained that someone was unexpectedly able to enrich themselves by gifts manipulated from the decedent during the decedent's lifetime, or cases where the person has been named as a joint owner on the decedent's accounts. In some celebrity cases similar to the recent Brooke Astor trial, the district attorney may even bring criminal charges against the person allegedly committing the abuse. We are often reminded that we are in the midst of the largest intergenerational transfer of wealth in history as the "Greatest Generation" transfers their lifetime savings to their children. However, because that generation is living longer, the additional years of

life increase an elderly person's vulnerability to abuse. As a result, we can expect financial elder abuse cases to multiply in the coming years.

Lifetime gifts in New York made by an agent with a power of attorney must be in the "best interest of the principal." See *In re Estate of Ferrara*, 852 N.E.2d 138 (N.Y. 2006). If the gift is made to the sole heir or for some reason is made within the context of the principal's gifting history, it is usually a smooth process. However, if the gifts alter the principal's estate plan, there will be cause for dispute. As will be mentioned below, attorneys should be aware of the new requirements for gifts made by an attorney-in-fact pursuant to a power of attorney dated September 1, 2009, or thereafter.

If the principal is alive but not able to resist someone taking their property, the attorney may bring a guardianship proceeding with a temporary restraining order. Under the Mental Hygiene Law, the court may, either prior to or simultaneous with the appointment of a guardian, issue a temporary restraining order freezing bank accounts or otherwise preventing the transfer of assets of the alleged incapacitated person. This will occur only in cases where the court feels that the temporary restraining order is necessary to protect the alleged incapacitated person's welfare. If someone is helping themselves to the alleged incapacitated person's bank account or attempting to put their name on a deed to the home, the restraining order will be necessary. Another useful tool in this situation is the inclusion within the temporary restraining order of a subpoena power for the alleged incapacitated person's attorney. The attorney can then discover information about the alleged incapacitated person's missing assets. If the court determines that a person is incapacitated and appoints a guardian, the court has very broad powers to revoke powers of attorney and reverse any transactions or schemes that resulted in exploitation or abuse of the alleged incapacitated person. Interestingly enough, this power of the court has even been used to annul a marriage.

## **The Counseling Process**

### *Key Concerns for Surviving Family Members*

The primary concern for a surviving spouse is control over their property and maintaining their feeling of independence. While spouses often

rationally understand the logic of trusts or other components of an estate plan designed to maximize inheritances for children, they are often emotionally unwilling to surrender control over their finances. Upon finding themselves alone and bereaved, they are often fearful of what they perceive as a loss of control. Trusts must be designed to address this concern, even though this concern may not be expressed or anticipated by the clients during the planning stage when both spouses are alive.

Several years after the first spouse dies, attorneys often hear the surviving spouse express a concern that parallels one of the major concerns of the children. After any tax plan has been implemented, the next concern for many families is whether anything should or can be done to qualify for governmental assistance if there is the potential that extended nursing home costs may diminish or delete the estate. In cases where the home is a large part of the estate, parents often want the peace of mind of knowing that, even if all else fails, they will be able to preserve the family home for the children.

Other than how much the surviving spouse receives, the primary concern of children, usually the ultimate beneficiaries of the estate plan, is that they are all treated equally regardless of their personal financial success. Often one child may have received more financial support than the others have during the parents' lifetimes. In addition, certain children are many times put in the role of caregiver for elderly parents, and they feel they should be compensated. When both parents are gone, children want to know how much of the estate all their siblings are receiving.

Sibling rivalry is one thing, but in the case where the deceased parent left a second spouse, the children of the first marriage are always interested in making sure their inheritances are secure. All too often, children view their parents' lifetime accumulations as theirs, so unless they receive what they perceive as their correct share, the estate administration can be contentious.

Occasionally there are surviving spouses who have not been included in an estate plan. The usual situation is a second marriage when the deceased spouse procrastinated in getting their will signed. The survivor is then faced with claiming what is referred to in New York as the "right of election" under the N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (2006). This

gives the spouse the right to take one-third of the estate, and the election must be made within six months of the executor or administrator being appointed but no later than two years from the date of death. When a right of election is filed, it is typical that contentious issues about the estate valuation will surface. The children are often possessive of their parents' estate and will argue for low values to minimize what the spouse will receive.

The children may also raise, as a defense to the spouse's right of election, that the spouse has "abandoned" the deceased spouse. If this legitimately is the case, the surviving spouse will not inherit. Abandonment is a difficult defense to prove. It requires a "hardening of resolve" never to return to the marriage on the part of the survivor. The person asserting abandonment has the burden of proof and must show that the abandonment was (i) unjustified, (ii) without the spouse's consent, and (iii) without intent to return. *In re Price's Estate*, 36 A.D.2d 946, 321 N.Y.S.2d 798 (N.Y. App. Div. 1971).

### *Initial Steps with New Clients*

Clients generally fall into the following categories:

1. Estate and trust planning (no prior planning done)
2. Estate and trust planning (prior plan in place)
3. Tax planning or tax controversies
4. Estate or trust administration
5. Charitable organization formation or operation issues

My preferred procedure in taking on a new planning case is to have clients complete an estate planning questionnaire listing their estate assets prior to the meeting. The estate planning process is 80 percent about organization. To accomplish certain goals, the client's assets often need to be reorganized, whether changing the ownership of specific assets between spouses or to trusts, determining whether the assets will pass to the heirs through probate or a trust, or aligning beneficiary designation forms for "contract assets" (IRAs, pension plans, life insurance, etc.). If the attorney reviews the client's list of assets prior to the initial meeting, the time with the clients can be more efficient and productive. I generally have the assets

converted to an Excel spreadsheet so I can refer to a convenient one-page list showing assets, ownership, and approximate value.

If the client already has a plan in place, it is important not only to have a current list of the estate assets, but also to obtain copies of the signed documents and review them for any special provisions that may have been important to the client when the prior plan was established. In cases where the client needs help with a tax controversy, all the previous Internal Revenue Service correspondence must be reviewed. In estate or trust administration cases, the first documents to review should be the death certificate, asset account statements, bills and debts, the will, any trusts in existence, and especially any documents related to closely held businesses. Much litigation can be avoided if any deadlines or other issues related to the decedent's business interests are identified immediately following the death.

### *The Initial Client Meeting*

All initial client interviews have a similar theme. Clients have come in for advice and guidance, but sometimes they are overwhelmed by the process or they simply are unsure what they need. The attorney's role is to find out which concerns were important enough to bring the clients into the office. To advise them properly, I need to know about their personal and financial situation. The personal matters relate to marital status, children, grandchildren, parents, and any other significant people in their lives. It is necessary to learn some basic details about these individuals, and I will ask questions relating to whether they are working, their education, their marital status and the health of their marriages, any physical or emotional disabilities, and the quality of the relationship my client has with them. I will also ask if they are receiving or if they expect to receive any governmental assistance, and if they have any business or creditor problems. The best way to elicit this information is to lead the client with questions and let them open up to you. Eventually you will understand what is most important to them.

As far as the financial situation is concerned, if the client has sent me information beforehand, I review my asset list with them to determine if it is accurate. If I have not received any financial information beforehand, I ask questions to determine in a broad manner the nature and extent of the

client's assets. I ask for copies of any prenuptial agreements and long-term care insurance contracts. I will ask questions about their citizenship, and if they are not U.S. citizens, I determine their visa status. Other questions include whether they have ever lived in a community property jurisdiction and if they have or expect to have creditors. If they own a business, I ask about the partners and whether there are any agreements between the partners or restrictions on transfer of shares of the business. I will also explore how the client thinks the business will be valued in case of death and whether the family expects to sell the business to the surviving partners.

The purpose of these questions is to uncover the emotional issues the clients want me to address in their estate plan. If I ask the client why they have come to see me, they generally give me an academic or highly logical reason such as “to avoid probate” or “to save taxes.” That is never the sole reason. The real reasons are more complicated. More and more frequently, clients are keenly interested in preserving their estate for their children in the event that the children divorce. Clients almost feel embarrassed admitting this concern and are relieved to find out this is the norm rather than the exception. If one of their children has a disability, they are often looking for a plan better than just leaving everything to someone else in the hopes that the other person will care for the disabled child. It might be that there is a concern that the surviving spouse will get remarried or be taken advantage of at an elderly age, thereby jeopardizing the children's inheritance. Bringing these kinds of issues up for discussion will give the client peace of mind that their estate plan is thorough and competently prepared.

Certain types of clients are also interested in asset protection strategies. Doctors especially are concerned about all the lawsuits they are constantly hearing about. The same applies to entrepreneurs.

In all cases, we discuss the legal fees and potential disbursements at the first meeting. Not only is it good practice to have the client understand the billing process up front, but in New York attorneys are required to have clients sign a written retainer agreement if the amount involved is anticipated to be \$3,000 or more. In our office, we find that clients overwhelmingly prefer flat fee agreements. There is too much anxiety

involved for individuals when they think of an expensive attorney charging for every tenth of an hour. In most planning situations, we can estimate the time it will take to complete a project so that a flat fee can be used. If there is a situation where outside factors keep us from controlling the time, it is usually impractical to do anything other than charge by the hour. An example of such a case would be a contentious estate administration where several parties may have separate attorneys. In non-contentious estate or trust administration cases, we can usually offer the client a choice of a flat fee or payment based on the hours spent.

## **Estate Plan Reviews**

A good rule of thumb is to review an estate plan every five to seven years. It is always surprising how quickly time passes. Regardless of the calendar, the estate plan should be reviewed whenever something significant happens in the client's life. Significant events include a fortunate increase in wealth, marriages, births, divorces, or deaths. The plan should certainly be updated when an heir in the estate plan or a nominated fiduciary is no longer in the picture. These people are also usually the people named in the ancillary documents, which would then also need replacement.

## **Common Recent Issues**

### *Asset Protection*

The most common themes these days regarding clients' concerns are protecting the children's inheritances from divorces while giving the children control over their inheritance and protecting the surviving spouse from incurring impoverishing nursing home expenses. These concerns will affect how the trusts are drafted, including the selection of the trustees, the ability to remove and replace the trustees, and the standard, if any, for principal distributions to or for the beneficiary.

### *Advancements*

Recently we are seeing more lifetime gifts to certain children with the condition that the parents want the gifts treated as an advance inheritance so that all the children are treated equally. This should be communicated at

the time of the gift so that it is not a surprise to the child, who later will receive what he or she may perceive as less of an inheritance. Communication to the child that the lifetime gift is an advancement, or communication to the other heirs that the client understands there may be unequal treatment, helps avoid strained relations among the surviving heirs.

### *Guardians*

Choice of guardian for minor children has always been a primary motivation for planning, but in today's mobile world, we find that the person of choice is often a person outside the United States. It is important to understand that the New York Surrogate Court will not appoint a non-resident alien. Parents have to be aware of this rule, and alternate planning must be considered. We encourage clients in this situation to keep current what we call a "travel letter." If the relative who would otherwise be named as the guardian is allowed to travel with the children, the hope is that in an emergency that relative would bring the children to the home jurisdiction where a proper legal guardianship proceeding can be commenced.

### *Expats*

Because my practice deals with so many international clients, a recent technical issue has become significant in the planning process. It is often necessary to determine whether the client who is not a U.S. citizen has had a permanent resident green card for eight years or more. New rules have been enacted penalizing U.S. people who inherit from a person who surrendered U.S. citizenship or long-term U.S. residency.

More and more clients own property outside the country. This makes the planning more complicated, because it involves local counsel and it usually involves different rules regarding inheritances. In some countries, you are not free to leave your property to whomever you wish.

### *Trust Fees*

Because of the recent poor performance of the stock market, it is important for clients to be advised of the annual expenses of maintaining a trust. If the trust is invested in a typical balanced portfolio of, for example, 60

percent equities and 40 percent bonds, the income return may be 3 percent or less. If the trustee is charging approximately 1 percent commission and if there is also a fee for management of the account, the question may be raised about who the real beneficiary of the trust is: the beneficiaries or the managers? In the past, banks were perceived to be expensive fiduciaries, but if having a bank as fiduciary eliminates the additional expense of managing the portfolio, the bank fees seem more reasonable.

### **Motivations and Timeline to Complete the Plan**

The emotional issues mentioned above are what motivate clients to complete their planning. Unquestionably, the most important part of the estate planning process is the client interview and identifying the significant emotional issues driving the client to get this important task done. Depending on the issues and how much time or how many meetings it takes for the client to express their concerns fully and understand the proposed solution, this part of the estate planning usually takes the most time for the experienced attorney. Once the issues and solutions are identified, the attorney can then outline the plan and the drafting and document preparation can be completed by less experienced professionals. In the more complicated plans, it is often necessary to create spreadsheets for the client so they can see a projection of how much their heirs will receive depending on which of the estate planning options are implemented. This part of the planning usually takes between two and ten hours, and is 70 percent of the attorney time spent overall.

Setting a timeline is important, since estate planning involves a great deal of procrastination. Most clients like the system of establishing a schedule, such as: (i) clients return any missing financial information within two weeks, (ii) drafts are produced in week three, (iii) the estate plan is discussed again either by phone or personal meeting in week four, and (iv) the documents are signed later in week four or five. Making a schedule like this ensures that the clients and the attorney will stay focused and the plan will be implemented on a timely basis. Clients appreciate this efficiency.

Sometimes the clients are extremely motivated and have even done their own research. This makes the job easier and the timeline shorter. Estate planning is about organization of both the client's distribution ideas and

their finances. The more motivated the client is, the more organized their information will be and the easier it will be to assemble all the relevant documents.

## **Is There One Most Effective Type of Trust?**

With certain variations within the broader categories of revocable versus irrevocable trusts, the choice between those broad categories is often the first decision to make. Clients are often interested in a trust that will transfer their assets to their heirs when they die. If they do not want to relinquish control over their property during their lifetimes, the choice is relatively limited: they need a revocable living trust. Alternatively, we can put in place a last will and testament that creates the trusts when the client passes away. This choice is usually based on whether the client can supply the necessary details regarding their assets, whether any of the assets such as cooperative apartments may present problems if the title needs to be changed to a trust, or whether the client is willing to make the effort to create and fund the trust or just leave it to their executor to implement.

In some cases, such as when the client wishes to make a charitable gift that will take effect after their lifetime (or someone else's lifetime), the choice of trust is dictated by the Internal Revenue Code. There are strict rules on the types of charitable trusts and the wording required in a charitable trust to qualify for the charitable tax deductions.

If the client wishes to benefit an heir who has special needs and who is receiving or may receive governmental assistance, the choice is also narrowed to something called a supplemental needs trust. New York has statutory language as to what will qualify as a supplemental needs trust. That language is not exclusive, but it is useful. If the client's intent is clear, perhaps by referencing the *Escher* case (one of the earliest supplemental needs trust cases: *Estate of Escher*, 407 N.Y.S.2d 106 (Sur. Ct. 1978), *aff'd*, 75 A.D. 2d 531 (N.Y. App. Div. 1980), *aff'd*, *Matter of Gross*, 52 N.Y.2d 1006 (N.Y. 1981)), the trust should qualify as a supplemental needs trust. Using the statutory language has the advantage of certainty. When a supplemental needs trust is established, it is irrevocable.

If life insurance is part of the client's estate plan, it is often advantageous to have the insurance owned by a trust. Life insurance trusts are always irrevocable. In the advanced planning stages—in appropriate situations—more sophisticated devices such as grantor-retained income trusts and sales to intentionally defective grantor trusts are used. Grantor-retained income trusts are a product of the Internal Revenue Code, and thus those trusts must contain certain language to qualify. Similarly, the use of an intentionally defective grantor trust is a tax-driven strategy in which the Internal Revenue Service rules and regulations dictate much of the language in the trust.

The decision as to which trust may be most beneficial to meet the client's goals is usually a natural result of the client interview. As the client's needs and goals are more accurately identified, the experienced estate planning attorney who understands the tools at their disposal can gauge the client's tolerance for the effort and expense to implement the strategy. Depending on the trust or the strategy to be implemented, it may be that different levels of expertise are required. For example, a supplemental needs trust will require knowledge of the New York Estates, Powers, and Trust Law. Trusts meant for asset protection purposes for the heirs will involve an understanding of the debtor creditor rules. In the more complicated situations where tax planning is the objective, the Internal Revenue Code and regulations, as well as other current authorities, will come into the planning process. In such a case, the estate planning attorney should have an understanding of not only the estate and gift tax rules, but also an understanding of the income tax rules and of cash flows from businesses.

### **Developing the Plan: The Process and Parties Involved**

Clients are often referred by financial advisers, insurance salespersons, and accountants. Each of those professionals will often think of themselves as the “quarterback” in the estate planning process, responsible for bringing together all the components to meet the client's needs. As it develops, the estate plan will usually involve a varied set of rules, ranging from the tax code, to trust law and debtor creditor laws, to Medicaid qualification rules and probate. The trust and estate attorney familiar with all these disciplines is usually relied on to guide the team through the process. If an insurance trust is necessary, the insurance salesperson will coordinate all the

documentation needed from the insurance company. The accountants will usually handle any tax reporting that is required, such as gift tax returns and income tax returns or cash flow projections from closely held companies. The financial adviser is necessary to advise the client whether they can afford any of the plans that may involve irrevocable gifting strategies. Any of these professionals may also have valuable insight into the family dynamics, and may have the credibility with the clients to assure them that the suggested plans are advisable.

## **New Estate and Trust Laws**

The recent increase in the federal estate tax exemption to \$3.5 million from \$2 million, which can shelter a \$7 million estate for a married couple, has had the most impact on estate planning strategies. The routine bypass trust that was required in most estate plans for the past twenty years is often now unnecessary. Since the estate tax exemptions are a moveable target under current law, flexible estate plans are now routinely drafted allowing the surviving spouse to decide whether to inherit the entire marital estate or to put some or all of the estate into a “bypass trust” that will bypass estate tax when the survivor dies.

Discounts in value for estate and gift taxation can usually be taken for transfers of minority interests in family businesses. The proposal to limit further the use of valuation discounts in estate planning has motivated many planners and clients to implement plans now before the law becomes more restrictive.

The Internal Revenue Service’s victories in family limited partnership cases that had the purpose of obtaining minority discounts have also significantly changed the landscape as to when family limited partnerships are suggested or used. For a time, planners were considering family limited partnerships as a form of planning with little downside, and as a result many practitioners produced cookie-cutter plans using family limited partnerships. Of course, the Internal Revenue Service went on the offensive and now family limited partnerships are used much more judiciously when the business purpose for the partnership can be clearly documented.

With the shrinking of the federal estate tax, base clients are focusing on the much less expensive but still significant state estate tax costs. In addition, the issues of nursing home costs and Medicaid qualification have increased in significance on the list of client concerns.

One of the routine practices in completing a client's estate plan is to prepare the ancillary documents, such as the health care advance directives and the financial power of attorney. On September 1, 2009, New York law required a new form for valid powers of attorney. The major changes are (i) that the person who is given the power of attorney (known as the agent) must now sign the document and (ii) in order for the agent to have the authority to make gifts for the principal, a separate "major gifts rider" must be signed.

### **The Outcomes Clients Are Seeking**

Clients retaining a trust and estate attorney in New York are usually seeking the peace of mind referred to above that comes from knowing that their estate plan has finally and competently been put in place. As the relationship develops, the trust and estate attorney becomes a family adviser. The attorney-client relationship is based on trust and confidence. Often the estate planning attorney is the first person called when life's personal problems are encountered, whether such a problem comes in the form of tax issues and controversies, prenuptial agreements, real estate closing advice, advice and referrals for personal injury or divorce attorneys, certified public accountants, or contract disputes. As an example, just this week, I had a client ask for advice on a dispute with a catering hall when his daughter's wedding had to be canceled. Often the estate planning attorney will have the breadth of knowledge and client understanding to give the necessary advice. In many cases, however, additional expertise is required, whether it be litigation, contracts, employment law, or something else, and if the estate planning attorney is in a full-service firm such as ours, the client's needs can be served within the firm.

### **Monitoring Systems and Required Filings**

The most frequent type of trust requiring monitoring is an irrevocable insurance trust. Each year, something called a "Crummey notice" must be

mailed to the trust beneficiaries. Crummey notices are a gift tax technique ensuring that the premium payments will be tax-free gifts. The notices are mailed to the trust beneficiaries. Attorneys drafting insurance trusts must make it clear to the client and the trustee when and how often the Crummey notice should be mailed, as well as how to document that the annual notices were in fact mailed. If the client wishes, the attorney will maintain a docketing system to keep track of when the notice is due.

In addition, the health and age of named trustees can be monitored at least as often as the suggested review of the estate plan. Trustees that move away or are no longer appropriate may be asked to resign, after which the trust procedures for naming successors can be implemented. In charitable trusts, the annual payment to the beneficiaries must be dutifully computed and documented in order to comply with the Internal Revenue Code rules for charitable trusts, and for the eventual accounting to the New York attorney general when the trust is terminated.

More sophisticated plans involving grantor-retained annuity trusts and intentionally defective grantor trusts will also have to be monitored to ensure that payments are being made in a timely manner. If the cash flows are insufficient, the cash payment shortfall is addressed.

With all irrevocable trusts, an annual income tax return must be filed. This usually falls within the responsibility of the certified public accountant. The estate planning attorney will have to make the initial contact and make sure the certified public accountant is aware of the trust's existence and the need for the annual income tax return. The income of a revocable trust is reported on the grantor's personal income tax return. With some revocable trusts, such as when the grantor is not the trustee, an annual information return is required to be filed with the Internal Revenue Service. When advanced estate plans are implemented and irrevocable gifts are made, the gifts must be reported on the federal gift tax return. Some charitable trusts are treated as private foundations, so there will be additional Internal Revenue Service compliance issues and annual New York attorney general reports.

## **Pitfalls and Common Mistakes**

### *Drafting Errors*

Poorly drafted trusts can have unintended consequences affecting the beneficiaries. As an example, our firm just handled a situation where a document drafted by another firm many years ago created trusts for three branches of the family. The trusts were somewhat complicated, and the termination provisions were unclear. The trust language was similar to “when the beneficiary of Trust A dies, the trust will terminate and the proceeds will be added to Trust B if that trust is still in existence; otherwise, they will be added to Trust C.” The dispute arose because the beneficiary of Trust B died one year before the beneficiary of Trust A, but as of the death of the Trust A beneficiary the trustee still had not fully distributed Trust B. Consequently, Trust B was technically still “in existence,” although it should have terminated with the death of the beneficiary of Trust B. The court eventually found that the words “still in existence” were not trust terms of art, and that therefore Trust B should be treated as terminated and not in existence. The result was correct, but it took time and attorney litigation fees to sustain.

Another current case in my office is one in which parents wanted to give their caretaker daughter a life interest in their house and give her the option of selling the house at some point in the future and splitting the proceeds with her brothers. The brothers are arguing that the trust is not clear and the house should be sold and the proceeds divided equally now that both parents have died. It will take more time and perhaps some negotiation before the daughter satisfies her brothers and keeps her relationship with them. If that trust plan had been clear and communicated to the children while the parents were still living, the family relations would not have had to suffer.

### *Estate Tax Payments*

In many cases, the issue of who pays the estate tax can completely alter an estate plan. I have had cases where the spreadsheets used during the drafting process showing the client the net each beneficiary would receive were the important documents that prevented any further litigation.

## **Precautions to Avoid Pitfalls**

The two most useful precautions to avoid unintended consequences and costly litigation are to make projections of the distribution of the client's estate and to have another experienced practitioner read the document. Often in complicated documents where there are many contingencies, holes in the distribution plan can exist if the tedious process of tracking how the funds will flow, should the contingencies arise, is not meticulously followed. After spending the time drafting the documents, having a fresh pair of eyes read the document and follow the distribution plan can uncover unintended results. The drafting attorney should not presume he or she cannot overlook a contingency.

Checklists are invaluable. Issues like qualification of trusts for the marital deduction are not difficult, but if inexperienced attorneys draft documents they may change certain provisions, such as principal invasion paragraphs in favor of children that should not be changed unless the consequence is understood. Another example is giving the surviving spouse the power to appoint a trust that he or she created with a disclaimer. This may sound like a control the spouse would like to have, but the cost associated with including this provision is that the trust will be taxed when the surviving spouse dies.

When junior attorneys prepare documents, I ask them to explain why each provision is included in a particular trust. It will become evident very quickly whether the meaning and consequences of the trust provisions are understood or whether the attorney is just cutting and pasting what sounds right to them. The latter is a very dangerous practice.

Information monitoring is also essential in avoiding potential pitfalls. The expansion of the Internet has made it far easier to stay current. Attorneys no longer have to rely only on monthly periodicals and annual seminars to keep current. The New York Bar Association has listservs for both the trusts and estates and the elder law sections. Practitioners are online every day asking questions and monitoring other issues that are being raised by attorneys with similar client problems. In addition, there are Internet services such as Leimberg Information Services, which offer several

listservs and electronic newsletters that will broadcast any important developments or analysis of new cases or statutes.

## **The Most Challenging Elements of New York Estate Planning**

### *Efficiencies*

One of the most challenging aspects of practicing trust and estate law in New York is to maintain the practice within a traditional New York general practice firm. The billing rates charged to corporate clients generally drive the firm's expectations. The trust and estate attorney who is billing individuals will have to streamline the practice and have efficiencies in order to keep the billings for individuals within a range the client considers reasonable. Skilled paralegals are critical, as is technology. Attorneys need to be skilled at projecting the consequences of the various estate planning options, and they need document drafting software that can produce consistent and accurate documents.

### *Marketing*

Many informed clients ask for trusts that avoid the probate process (i.e., living trusts, which require more paralegal time to implement trust funding). Providing this service is labor-intensive, so it is difficult to do without the help of experienced paralegals. Therefore, the practice must have a certain volume to keep the paralegals busy. Efficiencies can be achieved in this area if there are enough cases to keep specialized paralegals busy and relieve the attorney of these tasks. To cultivate this business, marketing skills are a must. Attorneys should not only be participating in bar association activities to network with others in the practice, but they should develop skills of public speaking and writing in order to meet potential new clients or client referral sources.

### *Varied Expertise*

Another challenge is being able to handle certain cases that may involve learning new skills. An example is that there has historically been a divide between the traditional trust and estate practice, which was tax-centered, and an elder law practice that is Medicaid-centered. Now with nursing

home costs and Medicaid issues becoming so common, the trust and estate attorney must also be competent in areas that were once thought of as a subspecialty of elder law.

In addition, in many cases when the attorney is involved in the administration of estates, the attorney must be familiar with the peculiar litigation rules of the surrogate's court in case there are disputes among the beneficiaries. Trust and estate attorneys must be able to prepare motion papers, participate in settlement conferences, be prepared to set discovery schedules, depose witnesses, and conduct kinship hearings. They must also be able to assist trial attorneys if matters cannot be settled. Although maintaining competence in the breadth of these areas presents a challenge for the trust and estate attorney, it is also what makes the practice one of the most interesting.

## **Conclusions and Predictions**

As long as there is a surrogate's court in New York, there will be attorneys practicing trust and estate law. Certain practices will maintain the traditional tax-based practices, but most will have a much broader practice. In my office, young attorneys are learning litigation skills taking depositions and representing clients at hearings. Will contests are few and far between, as well as very difficult to win, but at some point the trust and estate attorney will need to defend a challenge that in itself is a valuable learning experience. Understanding how a will contest proceeds will also solidify how an attorney drafts and executes wills and trusts. I have had several threatened challenges evaporate when the opposing attorney met for a conference and was briefed on the procedures used to make sure the particular will or trust would withstand a challenge. Although will contests are rare, there does not seem to be any shortage of contested accountings or spousal rights of election.

In addition to litigation skills, the lines between traditional estate and trust practices and elder law have become extremely blurred. Attorneys must be part of the daily conversations with fellow practitioners, whether at bar association meetings and conferences or on the Internet listservs in order to network and stay current on the issues.

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