AN INTRODUCTION TO ESTATE PLANNING: WHAT YOU SHOULD ASK BEFORE YOU ACT

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1. Where are you presently domiciled and, if you are married, have you been domiciled anywhere else during the period of your marriage?

    - What is meant by domicile?

    - How one's domicile affects support obligations and the legal interests of spouses and prospective heirs in personal and real property.

2. What do you (think you) own?

    - Does your spouse have an existing or potential interest in what you own (separate property, quasi-community property and community property)?

    - Do you hold any life income interests in property gifted by parents or remoter ancestors and, if so, are they coupled with a power of appointment?

    - Have you entered into any contractual obligations with a present or former spouse or a charity which might constrain your testamentary powers?

3. If you could act without giving any account to tax considerations, what would you consider your ideal estate plan?

    - Who might (reasonably) expect that you would provide in your will or under the terms of a trust agreement for his or her continuing support and maintenance or for his or her (further) education, and (within the constraints of your means) what amounts do you consider reasonable set-asides for the continuing support or education of those dependent upon you?

- To the extent that your assets exceed your perceived continuing obligations (whether or not imposed by law) in respect of support and education, who should participate in such “excess”, in what form, subject to what conditions and when?

  - The cliché about giving to children “enough to do anything but not enough to do nothing” may be a worthy goal, but in reality it only begs the question how to accomplish this?

  - Should gifts to surviving spouse, issue and others take the form of outright bequests, should they be formulary (in the nature, of an allowance) or should they be incentive based or some combination of these options?

  - At what age “financial maturity”, and what are the pros and cons of taking into account perceived differences in the talents of prospective heirs?

  - Can you effectively control the access of in-laws and third-party creditors to family funds?

  - Do you have complex assets and, if so, do you want them kept intact and in the family (the management skills of your prospective heirs permitting)?

  - What role charities or charitable purposes?

  - Does your spouse agree; what are the implications if a surviving spouse does not agree or what if he or she appears during your lifetime to agree but changes his or her mind after your decease?

  - Do you or your spouse or both of you have children by prior marriages and, if so, what implications for your plan?

4. How might tax considerations cause you to divert from your ideal plan?

   - The transfer tax (gift, estate and generation skipping transfer) – an excise tax which is “donor focused” in the United States.

     - Gratuitous transfers made outside of the shelters conferred by exemptions or credits are potentially very expensive and are likely to remain so in respect of “living gifts” even if federal estate tax is repealed.

- ♦ Is it a gift or does it discharge a “support obligation”?

- ♦ The “valuation game”.

- ♦ Imputation rules (interest-free loans of money don’t work, but what about low interest loans or the free use of other species of property)?

- ♦ Life insurance: A valuable tool but it has limitations.

- The income tax: “earner focused”.

  - ♦ The “rate game”: The competing and conflicting considerations of the compression of income tax rates for trusts, the “kiddie tax” and the potential inability of young adults to handle income distributions motivated by their low rate brackets.

- The multi-generational or “dynasty” trust:

  - ♦ Rule by the “dead hand” or a necessary vehicle for insuring wealth preservation during periods of generational transition and for mitigating the potential for devastating value depletion by reason of excise taxes.

  - ♦ The compelling rationale for not tying trust termination to the measuring formula of an antiquated rule against perpetuities.

5. “Asset protection”

   - Differentiating between “spendthrift” provisions designed to protect heirs from their own profligacy and “self-settled trusts” designed to thwart the access of future creditors of the settlor.

   - Domestic asset protection versus offshore asset protection.

6. Foreign entanglements

   - How the absence of a marital deduction for living gifts to a non-citizen donee spouse may complicate property arrangements between living spouses.

   - Are you the recipient of “foreign gifts”: the reporting requirements and the potential consequences of ignoring same.

   - The tax and reporting consequences of the receipt of distributions from a foreign trust funded by a non-U.S. family member.

- Creation and funding of a foreign trust by a U.S. person – it's not unlawful but the costs likely outweigh the benefits.

7. Choosing a trustee

   - The five alternatives: the grantor (or settlor) himself or herself, the grantor's spouse or other family member, a trusted friend or colleague, an individual professional (such as an attorney or accountant), or a corporate fiduciary.

   - Competence, commitment, continuity, conflicts and costs – the circumstances in which the corporate fiduciary is not only the right choice but arguably the only choice.

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