A FEW GEMS FROM

THE 2022

ANNUAL ESTATE PLANNING SEMINAR

HELD ON OCTOBER 24-25

SEATTLE, WA

**1. The Forgotten 40 Acres** – A look into the history of slavery, reparations and thoughts for moving forward. Of particular interest for the tax policy folks out there was the proposition of a new IRC §501(c)(40) for Reparations Organizations which would have a specific goal of assisting in compensation of reversing historic anti-Black racism and would allow the private inurement to qualifying individuals. The proposal would create a tax-credit (not a deduction) for donors.

Clearly not as simple as it sounds, but the tax code has been, and will likely continue to be, a viable vehicle to promote political policies. §121 Cap Gain exclusion for home sales, §101, Income exclusion of Life Insurance, §2503(b), annual exclusion and $2503(e) unlimited gifts in context of gifts for education or medical expenses, §32, earned income tax credit, etc.

**2. Life Insurance –Still Relevant (that’s what he said)** – Historically, when the Federal Estate Tax Exemption was certainly less than it is today, for many estate planners and advisors, Life Insurance policies were often sold to cover anticipated estate tax invoices, or to allow an estate to avoid selling off estate assets of high value but low liquidity (real estate, farms, family businesses, etc.). To optimize the planning insurance policies were often set into trusts (Irrevocable Life Insurance Trusts – ILIT). As the Federal Exemption increased, some planners have shifted focus on the benefits of life insurance. This portion of the seminar reminded us that Life Insurance still has its place for certain families in their overall plan. Some continued benefits of life insurance:

A. Provides source of liquidity for beneficiaries who may often also be those responsible for end-of-life expenses of the decedent and for future expenses of the decedent’s household.

B. Generally, life insurance is still received on a tax-free basis. Generally, because there are certain transfer-for-value rules (not discussed here) and of course income generated on the policy is taxed as income as is appropriate.

C. Often times, a viable way for borrowing simply if proper for circumstances.

D. Asset protection is strong in most states – careful who you name beneficiary though – estate should not be named directly.

E. Fund buy-sell agreements between closely owned companies.

F. Adds flexibility in family businesses where it is clear one child (or few than all children) will take over the family business and no need for siblings to be involved.

**3. Washington Probate and Trust Update – Always an interesting update although because of the deadline for submitting materials is in September, and the conference is in October, the review is not the year in whole.**

A. Tax Advisory issued by the WA DOR emphasizes that in order for selling expenses to sell property to be deductible as an estate expense the estate must have a need to sell the property to settle the estate obligations, preserve the estate or transfer remaining property to the beneficiaries. If there is no **“compelling reason”** the deduction will not be allowed.

PRACTICE TIP: If the estate is very liquid, expenses probably not allowed absent other compelling factors. In proper situation, consider putting obligation to sell home in Will – a mandate to sell will likely support the deduction of expenses. Can allow family members to have first rights to purchase.

B. K&W Children’s Trust v. Estate of Fay, 20 Wn. App. 2d 862 (Div. III Feb 8, 2022). K & W married and had two children – later divorced and singed a separation agreement which, included among other things, that the parents would set up a trust naming their minor children as beneficiaries of said trust. The trust was to hold 40 acres owned by K & W. At some point K transferred her interest to W. W then later divided the 40 acres into 4 10 acres parcels (did not transfer them into trust and K did not push the trust issue). **W married K2**. W died (unexpectedly per opinion…..). K attempted to establish trust pursuant to separation agreement and file a TEDRA action against K2 and W’s estate which the court dismissed. Dismissal was found proper and the court pointed out certain claims could have been brought but were (constructive trust (but see In re Estate of Rule, 2022, WL 3152591 (unpublished) explaining constructive trust is not a cause of action but a remedy under other equitable claims), breach of contract under separation agreement). The court specifically held K had no interest in the property once she signed it over. To add insult to injury – K was assessed with estate and K2 legal fees.

**TAKE AWAY: Agreements, even in writing, must be followed up on for proper legal planning.**

**Consider who really is a proper party under RCW 11.96A (anyone interested in the estate probably not as broad as it sounds); don’t be afraid to ask your hired counsel their experience in the area.**

C. In re Estate of Hill, 19 Wn. App. 2d 1043 (Div. III Oct 28, 2021) (unpublished). MUTUAL WILLS

What is a mutual will? Generally, wills made by two or more people that legally binds the survivor to an agreed upon plan; all to surviving spouse then equally between 5 children.

Here M had 3 children when she married S (who had 1 son M) and they had 1 child (B) together. They signed a three-prong CPA and S died first. M transferred property to herself under the CPA and later drafted a new Will leaving M less a small cash bequest noting he had gotten 27 acres previously. M filed a will contest asserting Mutual Wills – court held against M and indicated the wills may have been **RECIPROCAL**  but were not Mutual. No contract could be proven.

D. In re Rule, 2022, WL 3152591 (Div. I, Aug 8, 2022). In this case an Agent under a power of attorney changed an individual’s IRA designation. A, a friend of Rule (right hand woman was the description), was removed as IRA beneficiary. A sued for, among other things, Breach of Fiduciary Duty. Court found RCW 11.48.010 grants exclusive authority in PRl to bring an action against an Agent under a power of attorney on a decedent’s behalf and dismissed her claim for lack of standing. Have to wonder how this works practically when PR and POA Agent are very often the same person.

**4. Federal Tax Update. Always a particular great segment – has been presented by Samuel Donaldson02**

A. 2023 – Annual Exclusion Amount $17,000.00

B. 2023 – Federal Estate Exemption Amount $12,920,000.00

C. 2023 – Federal Standard Deduction for married coupleswil$27,700; one-half for single or married filing separately.

D. 2023 – Income tax brackets have been adjusted to take into account inflation.

E. Rev. Proc. 2022-32 – allows for a filing for portability only, up to the 5th anniversary of the decedent’s death. Practice Tip: If you are filing a Washington Estate Tax Return, it will likely make sense to file your Federal Return then as well, not only for portability but to make elections that could differ for state and federal tax purposes – specifically differing QTIP elections.

F. Proposed Regulations under Secure Act ( the Secure Act was originally, seemingly, presented as a move away from RMDs), will require, in many instances, distribution within 10 years **AND** RMD distributions within that 10 years.

G. Yost v. Carroll, N.D. Illinois, January 20, 2022. Be careful what you sign. Son-in-law who signed promissory notes from father-in-law (over 7M) with his wife. As the couple decided to divorce, FIL decided to sue SIL for payment on promissory notes. SIL argued FIL committed two fraudulent misrepresentations: first that the notes were simply being signed to avoid gift taxes and two that there was never intent for the FIL to collect on the notes. He then said the only reason FIL was collecting was the change in circumstances. The court found this later position in consistent with the position that there was NEVER an intent to collect. SIL also argued the notes should be denied due to illegality (tax evasion). The court ruled not enough evidence was provided to allow the court to make a conclusion. The claims of SIL were dismissed, without prejudice……..stay tuned.

Interesting approach to claim someone did something illegal and that you participated in the illegality but the illegality should only be held against one.

**5. When Estate Planning and Marital Agreements Collide: How to Avoid Unintended Consequences.**

A. In the context of prenuptials, post nuptials and settlement statements, disclosure of ones assets and income is paramount for successful challenges to the same. With that being said, while your attorney has the duty to keep information your provide them confidential, the party (spouse or will be spouse or will be ex-spouse) are not bound by the same rules. As such, prior to any negotiations or disclosure of information you, on behalf of your client should require a confidentiality agreement be signed between the client parties. In such an agreement you will want to :

1. Identify, with as much precision as possible, the information to be protected.

2. Clearly set forth instances where disclosure may be allowed. Ultimately you are seeking inappropriate disclosure. For example, when disclosure may be mandated by the court or by law (one example, RCW Probate duty to appraise and account for decedent’s estate for benefit of certain parties)

3. Clearly set forth the on-going nature of the obligation.

4. Provide for adequate consideration – we are in the world of contracts here.

5. Consider if a non-disparagement clause is appropriate, it’s all fun and games until it’s not.

6. Provide for remedies in the form of injunctions, court order, etc. Disclosure – I have not seen one of these play out so I have no real applicable information to provide.

B. What matters are/may be appropriate to disclose? In addition to what we would all think of as appropriate to disclose, consider the following.

1. Good Faith estimates of assets whose values are not readily available. Be cautious here and consider adding a statement that the parties agree and recognize the estimate is a good faith estimate only.

2. Closely held business, disclosure of financials should be considered, along with buy-sell agreements, restrictions on transfers, business tax returns, P&L Statements, etc.

3. Beneficial rights in trusts created by others for which you may have an absolute vested interest or an expectation. While gifts and inheritances are considered separate property (generally), that property still may be before the court in a divorce.

4. Consider a general disclosure of realistic expectances.

C. Planning for divorcing heirs – what to consider in discussing how your client’s plans may very well become an “in-laws” property and if that is of concern, consider steps to take to address this. Examples we have all likely seen, family farm suddenly not in the family, Lake Cabin sold or heavily encumbered before dropping down to the next generation, close family business without proper documents, have a new (and presumably not welcomed) member.

1. Consider trust planning for future generations.

2. Within trust planning be flexible so that a descendant is not the sole beneficiary of his/her trust.

3. Consider addition additional contingent beneficiaries within a trust to get over to siblings or descendants of divorcing party.

4. Always have a spendthrift clause.

5. Support your descendants in their estate planning (including prenuptials if appropriate). Practitioners just keep in mind who your client is 😉.

6. Drafting Limited Powers of Appointment in favor of descendants of initial grantors only.

7. Include Trust protectors for particular distributions.

8. Consider No-Contest Clauses in the context of what will pass in the courts.

**6. Estate Planning Paralysis: Getting your Clients to Act. I believe the title could read Financial Planning Paralysis, Tax Planning Paralysis, Insurance Planning Paralysis, etc. etc. We’ve all been there. We get a client who wants to put a plan in place but for whatever reason doesn’t move forward.**

A. Reasons Clients don’t Act:

1. Fear – Fear and did I mention Fear. In my field I have heard more than once that someone died without a Will because they just knew if they had one drafted, it’d be the jinx to call on the grim reaper. In other fields there are other types of fears. Some examples I could think of is the client visiting with his CPA who has learned some prior filings to be grossly incorrect (or totally absent) having concerns with taking action will set them up for audit. For the life insurance provider, maybe there is a fear similar to that what I have heard or being concerned about liquidity. For the Financial Advisor maybe the market conditions or living through a depression/recession may prevent their clients from moving forward. Whatever your field, fear is a real factor in paralysis.

2. The business of life and convinced that there will be plenty of time to get things done. Alas, tomorrow is promised to no one.

3. The confusion sometimes crated by professional jargon. QTIP, QPRT, Bypass, Exemption Trust, SLAT, POA, LPOA, GPOA, ROTH, Tax Harvesting, Disregarded entity, etc. etc.

4. The investment in terms of $$$ in planning (but doesn’t it always cost more when there is not a plan?).

B. Overcoming Fear and other Paralysis

1. Get to know your client, not just their financial situation. Intake sheets, initial visits that start off with broad life questions (what’s important to you, why are you here, etc.).

2. Be sure they know you are open for questions and there are no

Dumb questions.

3. Communicate clear expectations and request any special needs from your client. I often tell people that I will send regular e-mails until we get the project done (as my schedule allows) unless they tell me not to do so. I also make it clear though that there are times where they may not hear from me for an extended period and they should feel free to reach out.

4. Humor goes a long ways. Sometimes scary stories do too (as well as statistics).

5. Educate your client on options – no one size fits all right?

6. Consider flowcharts, and other visuals, when appropriate.

7. Keep it as simple as possible for the circumstances of the client’s situation.

**7. On the Road Again: Counseling Clients Cross State Borders - A review of Clients whose worlds cross state lines.**

A. Increase in Client Who Work one Place and Live Another. COVID-19 (and all those that followed 19) certainly had many impacts on our families, our lives and our work. One matter that, for many, became apparent, is that they could live one place and work remotely in another place. With this in mind concepts of Residency and Domicile are more critical and, in the forefront, more than ever before.

B. Domicile Vs. Residence. A person can have many residences but only one domicile. Generally, your domicile is generally the person plans to remain. A true, fixed, permanent home, that when one is absent from, he/she plans to return. Facts and circumstances considered such as where one votes, place listed on driver’s license, address on Federal Tax Return and where one spends the majority of his/her time. Many legal concepts require a review of one’s domiciliary or residency.

C. Community Vs. Separate Property. More movement creates a greater risk of blending concepts of community and separate property. Parties should continually be visiting on expectations and plans for clarifying property status.