MOSES & SINGER LLP

Wealth Advisory

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In This Issue

In the Spotlight:

Gideon Rothschild and Daniel S. Rubin have been selected for inclusion in the 2018 Best Lawyers in America for their outstanding contributions in the areas of Trusts & Estates and Trusts & Estates Litigation.

Carole M. Bass, **Arlene G. Dubin**, **Rebecca A. Provder, Gideon Rothschild, Daniel S. Rubin and Irving Sitnick** were named 2017 New York Metro Super Lawyers.

Kerrie C. Horrocks and Laura V. Levy were named 2017 New York Metro Rising Stars.

Gideon Rothschild has been selected as **New York City's Lawyer of the Year** for his work in Trusts & Estates.

Upcoming Events:

Gideon Rothschild and Daniel S. Rubin will be presenting "Creditor Protection Without An APT" during ACTEC's 2017 Fall Meeting on October 19, 2017 at Omni Nashville in TN.

Rebecca Provder will be presenting at "The Lawyer's and Psychologist's Perspective on Family Law and Family Dynamics: All About Prenups" on October 26, 2017 at Moses & Singer LLP.

Carole M. Bass will be presenting on Family Dynamics and Estate Planning at the Estate Planning Council of New York City on November 28th.

Daniel S. Rubin will be presenting at the Fifth Annual Great Lakes Asset Protection Institute on December 4, 2017 at the Ohio State Bar Association in OH.

The Surrogate's Court Corner

By: Carole M. Bass

These days, much of our lives are lived online in a virtual world. It is how we communicate with others, conduct our banking and business and do our shopping. What happens to all of this online information when we die?

Last year, New York enacted Article 13-A of the Estates, Powers and Trusts Law ("EPTL"), modeled after the Revised Uniform Fiduciary Access to Digital Assets Act, attempting to provide a decedent's personal representative with access to certain electronic communications after death while balancing the personal representative's need for information with the decedent's right to privacy in his electronic communications.

In Matter of Serrano, 2017-174 NYLJ 1202790870327 (Surr. Ct. NY County, June 14, 2017), the New York County Surrogate's Court considered the application of EPTL Article 13-A in a case involving a request by a decedent's spouse to access the decedent's Google email, contacts and calendar information.

Under EPTL Article 13-A the custodian of electronic records (in this case, Google) is required to disclose to the personal representative of the decedent's estate "a catalogue of electronic communications sent or received by the deceased user" – not the content of the communications, but the time, date and email address of the other party to the communication, including the decedent's contact list, unless (i) the decedent prohibited such disclosure using an online tool or in his will, trust or other record, or (ii) the court directs otherwise. The court in *Serrano* found that the decedent's calendar was not a "communication" protected by the statute and, thus, must be disclosed to the personal representative.

The content of the decedent's email communications may be disclosed if the decedent consented to such disclosure using an online tool or in a will, trust or other record or if a court finds that disclosure is reasonably necessary for the administration of the estate and disclosure would not violate the federal Electronic Communications Privacy Act or other applicable law.

To ensure that your wishes are carried out with respect to your electronic communications, it is important to include directions in your will or revocable trust as well as in your power of attorney. Documents that have not been recently updated may lack provisions regarding electronic communications.

Putting the Grantor Trust "Swap Power" to Use

By: Edward Becker

A grantor trust is a type of trust under which the tax law considers the trust assets as still owned by the transferor for income tax purposes. As such, (i) all of the income and deductions are taxed to the transferor on the transferor's income tax return and (ii) transactions between the transferor and the trust are disregarded for income tax purposes and therefore does not cause recognition of any income or capital gains taxation. Grantor trusts play a key role in estate planning as they can be structured to exclude their assets from the transferor's taxable estate, even though the transferor is still considered the owner for income tax purposes; as such, the trust grows "tax-free" outside of the transferor's estate because the transferor can cover the income tax out of his or her other assets. The effect is to reduce the transferor's estate while growing the trust.

It is worth noting, however, that if the trust is structured as a grantor trust and the tax burden on the transferor becomes too great grantor trust status could be "toggled off" by removing the powers that caused it to be a grantor trust. Conversely, it is often possible to restructure existing non-grantor trusts and cause them to be treated as grantor trusts on a going forward basis.

Grantor trust status can be achieved by including certain provisions in the trust instrument that the tax law provides will cause the trust to be taxed as a "grantor trust". One of the more popular triggering provisions is a power in the transferor; a so-called "swap power".

Due to a rise in income tax rates and an increasing estate tax exemption, income tax considerations are becoming more of a focal point in the design and implementation of an estate plan. As a result, the actual exercise of the swap power is becoming more prevalent. Assets owned by the transferor at death obtain a step-up in basis to the assets' fair market value, thus reducing any capital gains tax, while assets gifted to a grantor trust retain the transferor's basis. The swap power thus enables the transferor to substitute, prior to death, the transferor's own high-basis assets for low-basis assets held by the grantor trust. After the swap, the low-basis assets will be owned by the transferor and will be stepped-up upon the transferor's death.

Importantly, the assets that are exchanged via the swap power must be of equivalent value as of the date of substitution. If the value of the reacquired property turns out to be less than the value of the assets transferred to the trust, the transferor will have made a gift to the trust of the difference in value.

The characterization of trusts for income tax purposes has always been an important consideration in creating a trust, and various powers have been utilized when grantor trust status has been desired. These provisions have not, however, always been incorporated in a thoughtful manner and with an expectation that they might actually someday be used to obtain a future tax advantage. Under the current federal tax landscape the utilization of some of these powers, like the swap power, may provide a meaningful benefit. If a trust does not currently contain such powers consider decanting or modifying the trust to provide such flexibility.

What is Legacy Planning?

By: Roy Kozupsky

I often get asked by clients some form of the following two questions:

"Why is it that many families fulfill the proverb of shirtsleeves to shirtsleeves by descending into intra-family conflict or plundering the wealth bestowed on the family by an earlier generation?"

And, "Why is it that some second and third generations of other families are able to perpetuate their core values staying united by the fabric of their family's shared values and whose next generations are flourishing into thought leaders in their businesses and philanthropic endeavors?" These multi-generational families are called Legacy Families, and they have a few characteristics that clients and their advisors need to be mindful of.

My answer to the first question is this: Some research suggests a deep failure of family communications, but quite frankly, I really don't know. The reasons are complex and different for all families – greed, consumptive behavior, a lack of shared values to sustain some type of union. Take your pick.

My non-scientific answer to the second question about why some families flourish into Legacy Families is simple – because they want to become one and they work hard at being one. The commitment to begin such a long term family journey or to preserve being a Legacy Family allows all advisors to peek through the family's front window and to get a glimpse of their behavioral thinking surrounding subtle family issues, their values concerning wealth and money and the advisory services they value.

Luckily there is a growing body of research for family advisors working in this area to get a better understanding of the common characteristics of Legacy Families. Understanding their characteristics has important value to families that are beginning this journey and to a wide audience of family advisors who seek to help families navigate this terrain.

So, what are the common threads of these Legacy Families?

First, Legacy Families understand that the true wealth and health of a family is not measured by the size of its balance sheet. The real assets of a family are its highly cherished individual members. Collectively they are the petrol in the tank propelling the commitment, innovation and growth for their collective enterprises.

Next, Legacy Families have taken the time to collaboratively think through their family's mission. These families understand that they must form a social compact reflecting their shared values and visions. Different generations will have behavioral traits and different visons making this process of listening to different voices critical. Click here for a visual tour of the different generations within Families. Mission is not defined in the traditional estate planning sense of how little is paid in estate taxes. Death and estate transfer taxes are indeed important to understand and plan for. Rather, Legacy planning asks a broader set of questions that these families want to explore related to the best practices, including governance strategies, family organization and goals to sustain its members, its businesses and its philanthropic enterprises over many generations.

"*These generative families have discovered that having family wealth is only the beginning. The question to be answered by each successive generation is, 'What do we want to do with the Family Wealth?' Each generation develops a shared purpose that motivates family members to become more than passive, disinterested consumers of the family wealth".*[1] *Watch the video on Understanding the value of purpose and mission in legacy planning*.

Many have observed that Legacy Families work very hard at thinking through these family issues: they understand that their chances of succeeding are directly proportional to the level of planning and execution. They hire the right attorneys and other advisors skilled and schooled in this area of family advisory work.

Another important element needs to be addressed in legacy planning – it is called "pruning". Not every family member may want to be part of this journey. Not every family member wants to share their assets – especially illiquid (non-voting) assets like family business interests whose value, if one is not working in the business, may be hard to quantify. This author's belief is that a family member's ability to monetize illiquid interests at a fair value is critical not only to the overall health of the entire family but also to reducing the likelihood of long term conflict. Too much time is spent by professionals in a one directional linear manner of planning – that of how to get something off your balance sheet to reduce taxes. But attention also needs to be paid to how a beneficiary (or trustee) can monetize the illiquid or business interests if they choose not to be part of the family's enterprise.

Finally, studies have also revealed a unique common thread to most Legacy Families: the critical importance of their philanthropic contributions and missions, not only to their communities but also to their heirs. Giving back is an important element to sustain a Legacy Family. They are deeply and collectively compassionate. Philanthropic planning provides a unique gateway to bringing a family collectively together.

It might seem counterintuitive that a decision to give away hard earned family capital actually helps keep a family together, but my mentors point out an astute and subtle point:

"When a wealth creator makes the decision to allocate a portion of the accumulated wealth to philanthropy in general and a family foundation in particular, an underlying message to the family is that beneficiaries will only be receiving a limited portion of the family wealth. It changes the expectation that all the wealth created in one generation will automatically pass to the next. It reinforces the expectation that each generation be responsible for its own lifestyle and economic success. By managing the expectations of the next generation, parents will have done more to liberate them than to restrain them and will have done more to encourage self-sufficiency and counter overindulgence."[2]

The interest among social scientists, philosophers and now the community of family business advisors, about why some families implode and others flourish, is not a new inquiry. Italian philosopher, Giambattista Vico (1668-1744), astutely noted:

"*People first sense what is necessary, then consider what is useful, next attend to comfort, later delight in pleasures, soon grow dissolute in luxury, and finally go mad squandering their estate."*

So here is my expanded answer to the first question noted above. A family's fabric is as strong as its collective belief in the well-being and flourishing of its members. If these ingredients are absent, the fabric will begin to fray.

Footnotes:

1. Good Fortune: Building a Hundred Year Family Enterprise, by Dennis T. Jaffe, PH.D. August 2013.
2. The Legacy Family, Lee Hausner and Douglas K. Freeman, 2009.

Silent Trusts: One of Delaware's Best Kept Secrets

By: Kara Rademacher

Delaware has long been a preferred trust jurisdiction because of its allowance of directed and perpetual trusts, its asset protection laws, and its favorable tax treatment of trust income. In recent years "silent trusts" have also become a very attractive feature of Delaware law and recent modifications to the law have clarified how these trusts are to operate.

Under the Delaware Trust Act of 2015, a silent trust is one in which beneficiaries need not be informed of the existence of the trust by the trustee for a period of time that can be tied to the beneficiary's age, the lifetime of the grantor or the grantor's spouse, a term of years, a specific date or a specific event that is certain to occur. The Act specifies that any time a governing instrument restricts or eliminates the right of a beneficiary to be informed of his or her interest in a trust, a "designated representative" (who may be appointed by the grantor) may represent the beneficiary for purposes of any judicial proceeding or non-judicial matter. Significantly, non-judicial matters include granting a consent, release or ratification, or receiving a report for purposes of measuring the statute of limitations period. Thus, a designated representative is explicitly authorized to sign consent, release and indemnification agreements that are binding on the represented beneficiaries and to receive account statements on behalf of such beneficiaries. A designated representative may also initiate a proceeding in court on behalf of the represented beneficiaries – without the beneficiaries ever being informed of the existence of the trust.

The ability to establish a silent trust may be appealing to grantors who, for various reasons, do not yet want the beneficiaries to be informed of the existence of a trust for their benefit. Examples of reasons why a grantor may not want beneficiaries to be aware of a trust are:

- To promote fiscal and social responsibility among the beneficiaries, which may be negatively affected if a beneficiary has knowledge of a large trust;
- If the trust is funded with family business interests, to conceal the direction or operation of the business, particularly from younger beneficiaries or beneficiaries who are not involved in the business; and
- To keep information about the trust and trust assets from the beneficiaries' creditors, including ex-spouses.

Taken in combination with other provisions of Delaware trust law, grantors can now preserve privacy, in addition to their other estate planning and asset protection goals.

View our newly released "What you need to know about Trusts and Estates" video series on our YouTube channel, which include such topics as:

- What is a Will Contest?
- Blended Family Estate Planning
- Planning for Foreign Persons Purchasing/Owning US Real Property
- What is Asset Protection Planning?
- Reasons To Avoid Probate
- Charitable Giving
- Probate and Administration
- Family Offices and Family Business

MOSES & SINGER LLP

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Since 1919, **Moses & Singer** has provided legal services to diverse types of businesses and high-net-worth individuals. Among the firm's broad array of U.S. and international clients are leaders in banking and finance, entertainment, media, real estate, healthcare, advertising, and the hotel and hospitality industries.

In a world of giant, multi-office law businesses assembled by mergers, built on associate leverage and driven by billable hour quotas, the needs of clients can get lost. Moses & Singer offers a difference. That difference is the attention of leading practitioners-partners in the firm-with the experience and knowledge to provide our clients creative, cost effective, result-oriented representation. The direct involvement of our partners means aggressive, focused problem solving. The firm's attorneys concentrate their practices in the following areas:

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