A Present (Prescient) Look at the Future of Everyday Estate Planning

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This crystal-ball-gazing session is informed by three distinct subjects. The first is the current and continuing uncertainty in the law that affects estate planning today. Will Congress act before January 1, 2013 to prevent the scheduled reversion of the law to its status in 2001? Might we expect some last minute (or later than last minute but retroactive) change that makes permanent any part of the current provisions — especially including those that were adopted as part of the 2010 compromise tax agreement? Having been totally surprised by the Obama administration's compromise in the December 2010 legislation, predictions seem pretty foolhardy at this time, so on this prognostication you're pretty much on your own. At a minimum, it seems unlikely that the Obama administration will be willing or able to put its thumb on the scale during a lame duck session following the 2012 presidential election.

For what little it is worth, surveys of estate planners show that most believe that the status quo — a 35% flat rate, a $5 million exclusion amount that applies for gift and estate tax purposes, and portability — all will remain in the law. That prevailing wisdom may reflect a lack of imagination or historical memory. It may reveal a lack of cynicism about the legislative process. Or it may predict a lack of political ambition on the part of Congress. If I had to bet I would put even odds on Congress doing nothing before January 1, 2013, with the law reverting to the $1 million level and a 55% rate, followed by Congress acting sometime in 2014 to retroactively make permanent the two things that it did in December of 2010 that I anticipate are toothpaste that is out of the tube and cannot be reversed, being the $5 million exclusion and portability.

These issues about uncertainty are illustrated for purposes of this discussion by a set of materials that are reproduced in the Appendix. These are representative because they deal with marital deduction planning in the current uncertain environment. That subject may be the most immediately common example of everyday estate planning that is made uncertain by the current state of the law, given questions about the permanency of both the $5 million exclusion amount and portability of a deceased spouse's unused exclusion amount. How should a married couple plan in anticipation of the law that may apply when either spouse dies? As the appended material reveals, the most important element in planning today in this climate of uncertainty is to provide flexibility to best adapt to the law as it exists when the first spouse dies. For marital planning purposes, that flexibility best consists of relying on partial QTIP elections to engineer the amount of marital deduction sought, and using nongeneral powers of appointment (or a trust protector or other third party power to amend the terms of a trust), to make other more global changes that may become necessary over a two-life plan, such as that for a married couple.

Other less common techniques that similarly are awaiting action by Congress on legislative proposals include GST exempt dynasty trusts — will they be made taxable after a certain period of time if another taxpayer's exemption is not allocated to them anew — and GRAT planning — will the law require a minimum term and a taxable gift of some amount? In regard to proposals such as these, the effective dates of various legislative changes that are under consideration are the most critical element. Some (like changes proposed under §2704 that would affect discount entity creation) would be retrospective (in that case to 1990), others (like the proposed §2702 changes to the GRAT rules) are prospective only.

There is no indication (yet) about what might happen to the portability of a 2011 or 2012 decedent's unused exclusion amount, which may make it doubly difficult to decide in such an estate whether to elect portability or rely on other postmortem planning techniques (such as disclaimer) to attempt to shelter an unused exclusion amount. A "best guess" is that the surviving spouse of a 2011 or 2012 decedent whose estate elects DSUEA portability will not lose the benefit of that election even if the law reverts in 2013 to its pre-enactment status. Moving forward, however, regardless of your personal expectations about the permanency of portability, client planning probably requires more proactive methods of dealing with this uncertainty — in the marital arena that might require encouraging clients to engage in inter vivos transfers, joint settlor trusts, or similar techniques (discussed in the Appendix material) designed to soak up and shelter the unused exclusion amount of the first spouse to die.

The second distinct subject that swirls in the background of this topic was the focus of the 2010 session at this Institute on the changing demographics of estate planning clients. That session looked at traditional planning that has not yet evolved to reflect the transition from planning for the G.I. generation to planning for the Silent or the Baby Boomer generations. The 2010 materials for that program are available to registrants on the 2011 flash drive that contains materials from prior Institute years.

The ongoing importance of that subject is the current need to rethink outdated planning approaches that have been a staple of estate planning for many years. Such as to refine our thinking about the role and function of women in the enjoyment and administration of client wealth, to reflect modern realities about the education and experience of women today, as compared to their mothers' generation of women. Or the difference in the abilities and ambition of beneficiaries in different younger generations. Two divergent examples being adult children who have failed to launch, and those who did but whose trajectory has been flattened by the economic meltdown. Think about the one child who is living on the couch in your client's basement, versus the other who graduated from professional school just when hiring went into the deep freeze. Planning responses for each of these un(der)employed beneficiaries of a client's estate might be very different, both from traditional planning for descendants and from planning for either child's particular ambition and situation.

Following the 2009 ACTEC Trachtman lecture on the changing demographic of the client base, ACTEC appointed a task force on Estate Planning in the 21st Century, which studied various factors that will inform change in the estate planning practice. That Task Force conducted a survey in advance of the ACTEC 2011 Annual Meeting, at which it presented a symposium on the subject of change in estate planning. Among the issues that the Task Force considered were:

- Client demographic changes (including marriage later in life, single parenting, increased mobility, and living longer, with related health care and aging issues and longer retirement income needs).

- Demographic changes in the estate planning profession, including hiring, training, and succession issues for an estate planning practice.
- Fiduciary administration and wealth management issues.
- The provision of ancillary services by estate planners.
- State law changes, dealing with questions of status, the new biology, and new or revised Uniform laws that have "nationalized" the practice.
- Litigation trends.
- Ethnic diversification and cultural or religious differences that affect estate planning.
- Changes in the delivery of traditional client services, including on-line document preparation and computer-assisted do-it-yourself tax compliance.
- Incursions into the estate planning field by nontraditional advisors.
- Changes in asset allocation, such as a perceived reduction in the use of life insurance.
- Post-recession stratification of wealth.

The Task Force also studied published IRS "statistics of income" data (drawn from estate tax returns), including:

- The return filing change in the past decade for estates under $5 million, which have gone from 65% of all returns filed in 2001, to 35% in 2008, to zero today.
- Closely held business stock went from 4.5% of estate value in 2001 to 7.0% in 2009 and from 1.8% of estates exceeding $20 million to 6% in 2008 (the last year for which that breakdown currently is available).
- In the same time publicly traded stock went from 30% to 25% of estate value, but the 2008 meltdown had virtually no effect on the value of publicly held stock in taxable estates (a decline of just 1% from 2007 to 2008 and only 0.4% from 2007 to 2009).
- In the same period, retirement asset values went from 8.5% to 4.8% of estate value in all estates, dropping from 6.9% in 2007 to 4.8% in 2009 alone.
- Life insurance (face value) was only 1.2% of all estates in 2009 (compared to 4.8% in retirement assets). Among estates based on size, the vast majority of the insurance reported was in estates smaller than $5 million, which probably reflects that larger estates make extensive use of ILITs (meaning that the proceeds do not appear on the insured's estate tax return).

In a 2011 survey of South Carolina estate planners over one-third of the respondents had been in the estates practice for over 24 years. (For ACTEC members the average was over 34 years.) Notable about the South Carolina survey was a dearth of practitioners with between 15 and 24 years in the practice. Which suggests an opportunity for younger planners (in that survey, practitioners under age 45). It also may mean that succession from older planners to seasoned juniors is likely to suffer. A second interesting "gap" that appears in both the ACTEC and the South Carolina survey results is size of the firms in which estate planners practice. With nearly equal representation in solo, small, and mega firm practice settings, the dip is in mid-size firms, which tends to confirm a stratification of the practice.

By observation there are fewer large or mid-sized firms with an estate planning practice, but those large firms that remain have gotten larger and have assumed a national presence. Given the economics of their practice, they tend to represent only high and ultra-high net worth clients. Boutique firms also ply that carriage trade, but practitioners in smaller firm settings are trending toward representing the "middle rich" client population — those who have enough wealth to need effective planning but who are not taxable under the current tax regime and whose needs do not include tax-driven planning schemes.

The chasm that is developing between the high/ultra-high net worth clients and their advisors and everyone else is becoming wider and deeper. It seems likely that a stratification of wealth and wealth advisors will continue and that there will be little cross-over between the two. If that prediction is correct, then practitioners today may need to decide which side to pursue, because issues such as keeping current may differ as planning needs and responses to changes in the law continue to stratify as well. Continuing education itself may change, as programs that all planners at one time found valuable also stratify to appeal to and satisfy the needs of just one group or the other.

This need to focus on one side or the other may not occur in a dramatic a manner, but in planning for their futures, practitioners may need to consider what their client base will look like, and about the economics of serving that clientele, how to staff up to perform the types of work that those clients will need, and what the competition will entail.

For example, if the $5 million exclusion amount (indexed for inflation) is made permanent, and 99.86% of the decedent population therefore continues to be nontaxable, then for most planners' clients the estate planning process will not be driven by the desire to minimize wealth transfer taxes. Instead, those clients may need income tax planning, business succession planning, and help resolving family related controversies, for which the ability to charge fees that seem reasonable in comparison to taxes saved will decline. In addition, many clients' desire for "just a simple estate plan" (a basic will and durable powers, for example) may be satisfied (at least in the client's mind) by products that are available to do-it-yourself users of on-line software. With a younger, more computer savvy clientele and ubiquitous access to the internet, an estate planner's competition may be the computer, rather than other practitioners. Which may force a change in how documents are produced, so as to drive the price down to competitive levels.

Having viewed some of these on-line products, the likely result will be a shift toward more work reforming or construing botched planning (as opposed to getting things right at the planning phase). For a variety of reasons there is, and will continue to be, an increase in estate and trust related controversy work. There also will be more estates that pass through probate (because a self-help decedent failed to effectively transfer assets into a probate avoidance trust, or did no planning to minimize probate).

In addition, if clients with smaller estates are less inclined to engage a professional estate planner prior to death, there will be more need for postmortem "scramble" planning to address opportunities or deficiencies — such as failure to shelter a deceased spouse's unified credit. This will lead to postmortem disclaimers or portability elections if the surviving spouse's estate is likely to exceed $5 million at the second death. There will be a cottage industry preparing

Form 706 estate tax returns to elect portability in nontaxable estates, and the estate planning profession will undertake more postmortem planning that in the past.

How likely are these predictions? In the 2011 ACTEC survey 60% of the respondents reported that over half of their current practice is for clients with less than $5 million. In the South Carolina survey fewer than 25% of the respondents reported that even 25% of their revenue came from serving clients with more than $5 million. Sometime around the end of 2012 or early 2013 the future of the exclusion amount may be resolved, and the future for estate planners may become more clear. Or Congress might continue to torture everyone by kicking tax reform down the road, with further short-term extensions and compromise legislation. Estate planning will look very different if the exclusion amount drops back to $1 million. But what about a $3.5 million exclusion — which the Obama administration already has announced is its compromise target — or repeal, which some Republicans advocate?

In response to all of these developments there will be an increase in revenue earned from "ancillary" services — which may range from serving as fiduciary (or advisor to a fiduciary) in estate or trust administration, to providing investment advice, tax compliance services, elder law planning (and litigation to redress the increasingly common forms of financial abuse of the elderly by their own families), bill paying and other faux-fiduciary services for an increasingly large population of elderly clients, asset protection planning, and perhaps even the sale of products such as life insurance or financial investments. There will be changes in marketing (inevitable in any event, given the influence of computers and the internet in our lives), and in billing practices.

None of this will occur overnight. Many older estate planners can anticipate a span during which they will remain busy revising existing plans, collapsing unneeded structures created under prior law, and helping clients position themselves on one side or the other of the wealth chasm. For many older planners the critical issue will be who will take over their practice when they retire. A large number of estate planners are baby boomers who will cut back, retire, or die in the next decade or two. For them, a challenging issue today is the training of their successors.

The generation of estate planners behind the baby boomers is a small cohort, too modest to shoulder the representation of the huge number of baby boomer clients who will have needs, theirs being the largest generation in history, and who will live longer than any prior generation. Meanwhile, rookie estate planners who historically learned our trade in the mega firms and then transitioned into smaller boutique practices will not have the option of being trained in that environment. This next generation of estate planners already is facing the changed economics in big firms and the reality that those traditional training houses may not continue to provide estate planning at all, or they will not represent "small" estates on which young practitioners can cut their teeth.

For example, in the legal arena, far fewer jobs exist in the traditional big firms, which have changed their hiring practices in the wake of the economic downturn. More law school graduates are being hired as contract lawyers, not partner-track attorneys, their training is minimal, and their involvement in all phases of client representation is slight. Some work that traditionally was performed by younger planners is being outsourced, the internet and easy communication and document transfer making it economical to bypass traditional costs and be more profitable at more competitive prices. If that trend continues, young estate planners will need a different opportunity to acquire the training that will position them to assume client representation when their predecessors leave the practice. And the current generation of estate planners may find it difficult to hire individuals with the experience to take over a practice.

A supremely respected commentator on all of this observes that estate planners are really in the wealth management business, and that our specialty is advising clients on the preservation of wealth. Estate planners who are trusted advisors provide guidance and a variety of needed services regarding the management, preservation, and distribution of client wealth. These are things that are not effectively outsourced or obtained via the internet. Owners of wealth always will need advice, whether it is about wealth transfer taxation, personal income tax, business succession planning, and the transition of wealth to their beneficiaries.

The challenge facing estate planners is to find ways to satisfy those needs. Included in that search to remain relevant as a trusted advisor will be every estate planner's need to:

- Analyze which side of the wealth planning chasm you will occupy.
- Consider the training that you personally need to be competitive in that environment.
- Analyze your staffing needs, in that environment.
- Consider the education that your staff needs, and how they will obtain it.
- Think about whether and how you will prepare a successor to assume your practice.
- All with clear vision of the services that you will offer, at an attractive price to clients.