CHAPTER 1
INTRODUCTION & ETHICAL ISSUES

The purpose of this chapter is to set forth the essential principles of estate planning which enable the attorney to coordinate the various necessary documents — including wills, trust agreements, powers of attorney, life insurance contracts, retirement election benefits, and other ownership documents — with the client's wishes and taking into account the propensity for risk, above all.

I. Objectives of Estate Planning

The goals of estate planning are as varied as the potential clients who address the issue. Ordinarily, clients desire to achieve an orderly plan for the effective accumulation, transfer, growth, and retention of assets and the smooth, efficient transfer to heirs at the appropriate time (e.g., their passing). During his or her lifetime the client must insure he or she retains the required funds necessary to meet lifetime needs, including medical and lifestyle needs, retirement funding, and college tuition. Only if the client is comfortable with the retained resources can the tax-efficient transfer of assets during life be made by gifts. In short, the objective of the estate plan is to pass the client's estate to his/her heirs with the least amount of aggravation, stress, expense, and, sometimes, the least amount of tax. At the client's death the estate is to be passed in accordance with his or her testamentary objectives, which should be the centerpiece of the "plan."

The role of the attorney as estate planner will depend to a great extent upon the professional expertise of the individual attorney and the wishes and objectives of the client. However, for the most part, the attorney should not — and will not be expected to — give specific financial investment advice and should encourage the client to obtain such advice from a financial planner. Often the attorney will work hand in hand with such a planner and, where appropriate, will be the scrivener/advisor to accomplish financial goals identified by the client, the attorney, the accountant, and the financial planner working as a team.

The goals of estate planning are, simply stated, to arrange one's affairs and assets in a manner to protect, to maximize, and to transfer their value. Thus, a variety of legal documents will be prepared for the clients, such as last wills and testaments, powers of attorney, Advance Directives for Health Care, beneficiary designations, and possibly trusts (either revocable or irrevocable). It is essential that the planner not only understand the legal documents but several basic tenants of property law, such as the fact that some assets will pass either by title or by beneficiary designation.

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It is easy to get lost in tax savings issues. For the New Jersey client, there are three taxes to consider: the federal estate tax, the New Jersey estate tax, and the New Jersey inheritance tax. Indeed, saving taxes can and often should be of paramount importance; e.g., with proper planning a married couple with combined assets of $4 million in 2006-2008 can, through a "credit shelter/family trust," leave their beneficiaries their estate free of *federal* estate tax. In New Jersey, additional focus should be directed to the New Jersey estate tax which lowers the exemption threshold from $4 million (twice the $2 million federal exemption amount) in 2006-2008 to $1,350,000 (twice the $675,000 New Jersey exemption amount).

Under both the federal and New Jersey tax planning, the use of trusts is often needed to obtain the tax benefits. These trusts may be set forth in a will or in a separate trust agreement. There are two main tax concepts the attorney needs to be aware of in this so-called "credit shelter/family trust" planning. The first one is the federal unified credit "applicable exclusion amount" ($2 million in 2006), which is scheduled to gradually increase to $3,500,000 by 2009. See Exhibit 1A. The 2001 Tax Act was a major change to the tax aspects of planning an estate. This Act presented President Bush's plan to "repeal" the federal estate tax. The other factor in credit shelter/family trust planning is that, since 1981, there has been an unlimited federal marital deduction which provides that transfers to a spouse will not necessarily be taxed in the estate of the first spouse to die, and allows for a deferral of the federal estate tax until the surviving spouse's death. To fully understand the New Jersey estate tax, a planner must understand the federal system.

As a general rule, a client can leave assets in one of three means and pay no tax. First, there is the "applicable exclusion amount" " as described above, under I.R.C. § 2010 of the Internal Revenue Code of 1986, as amended (hereafter "I.R.C."). Second, a taxpayer can leave assets tax-free under the unlimited marital deduction under I.R.C. § 2056. Third, a taxpayer can leave assets tax free under the unlimited charitable deduction under I.R.C. § 2055. However, the estate planner must first get to know the clients and understand their values and their family obligations and objectives before recommending concepts that are tax-driven.

The objectives of estate planning are:

- ❑ to assist the client in the accumulation and growth of assets to meet lifetime needs;
- ❑ to enable the client to control the distribution of his or her assets, whether during life or at death;

- to minimize potential income, gift, estate, and inheritance taxes and administration expenses, within the framework of the client's objectives;
- to minimize losses, if any, from forced liquidation of property;
- to maximize protection afforded by trusts or other devices for beneficiaries for those whom the client deems to be in need of such protection or professional guidance; and
- to provide protection and flexibility for the client and the client's estate during the client's lifetime, through trusts, powers of attorney, and/or living wills.

II. ETHICAL ISSUES

Estate planning is not ordinarily adversarial. Recall that the ethics rules are established from the primary view of the lawyer acting as advocate, and not as an advisor. However, there are potential problems of an ethical nature which can arise for the lawyer who is acting as an estate planner,[1] especially relating to the representation of multiple clients, such as husbands and wives, parents and children, and fiduciary and beneficiaries.

Many problems can be avoided if there is an agreement (preferably in writing) between the lawyer and the client at the outset of the relationship that outlines the scope of the relationship and the potential problem areas. See Exhibit 1B. In some states, such as New York, the use of engagement letters is ethically mandated. In New Jersey, the use of engagement letters is not legally required (although encouraged and possibly demanded by malpractice carriers) but it is certainly good practice to discuss an engagement with the client and place the agreement in writing. Defining the scope of the engagement aids the clients and lawyer in understanding the nature and obligations of engagement.

A. ETHICAL GUIDELINES

There are only a few published guidelines for the estate planning attorney. Of course, estate attorneys are subject to the New Jersey Rules of Professional Conduct ("NJRPC") that apply in their jurisdiction. The rules are necessarily general and there are few rules that apply specifically to the estate planning context. The NJRPC apply to estate lawyers in general, but there are a few rules in which estate planning issues are raised. For example, NJRPC 1.8(c) provides:

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[1] For an excellent discussion of the ethical issues involved, see J.R. Price, *An Overview of Estate Planning and the Elements of Professional Responsibility*, in PRICE ON CONTEMPORARY ESTATE PLANNING 1 (2nd ed., Panel Publications, 2000).