Modern Estate Planning Requires a Broader View

Going Beyond Death and Taxes

By Brian T. Bradley

Bulletin File Photo

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Death and taxes are inevitable, the saying goes. But should they be your primary concern when you draft an estate plan for your clients?

The reality is that what we call "traditional estate planning" — that is, drafting traditional revocable living trusts to avoid death taxes and probate — no longer meets modern clients' needs. Today, it has been replaced by advanced estate planning known as Asset Protection.

Why? Because death and taxes are no longer the two biggest wealth destroyers. They have been replaced by the Big Four: predatory lawsuits; devastating health care costs; the death and remarriage of the first surviving spouse; and the death or divorce of your clients' own children before their spouse.

Instead of focusing on death and taxes, therefore, estate planners should be protecting all of their clients from the financial effects of living longer — and doing preventative lawsuit planning and risk management for those who are investors, business owners or high-net-worth families. (For a great in-depth read on this topic, see the book *"Estate Planning Is Dead! Asset Protection Planning is Alive and Well"* by fellow attorney Reed K. Scott.)

By changing their focus, they can better serve their clients' needs by identifying the assets that are at risk, why they are at risk, what the clients' risk level is and what to do to protect those assets from modern destruction. The unspoken truth: An expensive revocable living trust is worthless if the client has no assets to pass down.

Most clients want to protect the assets they have built against a legal system that provides little predictability and protection for them. More and more predatory lawsuits are being filed against those who have high-risk professions, or those who have started to invest in cash-flowing investment properties. It's a simple concept: The more your clients have, the more visible they are — and the higher the odds of being sued.

If a client chooses to invest in real estate, for example, it must be explained to them that real estate law is the most heavily litigated area of law. It's likely not a matter of *if* they are going to be sued, but *when*. Will they be in a position to defend themselves and force a favorable settlement? It's very good to have insurance, of course, but that can create a false sense of security and should not solely be relied on to cover a claim for damages.

That's why having an Asset Protection system in place is vital.

Providing Peace of Mind

Asset Protection is not about helping clients commit fraud or scam the system, or about tax avoidance. It's an advanced form of estate planning and wealth transfer. In simpler terms, it's a way to serve clients who are really asking for "lifestyle preservation" and "peace of mind." This can be accomplished by proactive planning, and by building multiple legal barriers around the client's vulnerable and exposed assets.

No silver bullet exists, of course, and each client's case and needs will vary. The first step is determining the client's level of risk and areas of vulnerability. This is done with a simple risk profile evaluation. From there, an asset diagnostic must be conducted to evaluate the client's total estate and net worth. This would include their profession, annual salary, current investments and assets, businesses and investment strategy.

Next, Asset Protection involves looking to maximize a client's federal and state exemptions. This is important because exemptions are legal rights. Think of Florida homestead rights or federal exemptions for 401(k). Once you know what assets can be characterized as exempt, then you will know what remaining exposed assets are still at risk and need additional advanced planning.

At this stage, you would also want to collaborate with an experienced CPA or financial advisor to go over your client's prior three years of tax returns. This will yield documented evidence to support any funding needs in the event that trust funding is challenged.

With all of that information in hand, the final step is setting up a trust. The type of trust you use will vary, depending on the client's facts and needs, but in most general cases I use an Asset Protection Trust. The client's asset and risk evaluation will help determine the

best jurisdiction, and whether it should be purely foreign, domestic or a hybrid called a "Bridge Trust."

Picking a Jurisdiction

Picking a jurisdiction for the trust is a very big issue. The laws and rules that govern both people and trusts are different from one state to another and one country to another. I prefer the power of going offshore, or at least having the option of going offshore in the event the client needs it. This is simply because a Foreign Cook Island Trust provides the best home-court advantage — statutorily, the Cook Islands do not recognize any other jurisdiction's court orders.

A U.S. judgment, for example, is worthless in the Cook Islands. A plaintiff would have to start their case from scratch, facing the highest legal standard in the world: "beyond a reasonable doubt." The plaintiff would have to front court costs and pay to fly in a judge from New Zealand. The claim would not be amendable, meaning that once the complaint is filed, it cannot be changed or amended after the discovery process ends.

Most importantly, the statute of limitations in the Cook Islands is only one year, making it difficult for most plaintiffs to even take their chances with a lawsuit.

On the other hand, purely domestic Asset Protection trusts fail both on effectiveness and control because of the hallmark of asset protection. According to Article 4, Section 1 of the U.S. Constitution, every state must grant "full faith and credit" to the judicial proceedings of every other state. Your clients simply cannot run from judgments in the U.S.

But courts in the U.S. do not have the power to tell an offshore Cook Island trustee what to do or to give transferred assets back. The Cook Islands statutorily do not recognize any U.S. court order or judgment.

Not all clients will need a foreign jurisdiction, of course. Domestic trusts do offer certain benefits, including reasonable cost, less IRS reporting disclosures and anonymity. But clients can combine the flexibility of domestic trusts with the strength of a trust set up in the Cook Islands by "bridging" the two countries together.

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Pictured: Standing (L to R) Trisha Thompson, Dayna Underhill, Peter Jarvis, Allison Martin Rhodes
Seated (L to R) David Elkanich, Calon Russell, Nellie Barnard

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Crossing the Bridge

With a "Bridge Trust" — a term coined by my affiliate, Doug Lodmell — clients can "cross the bridge" to the sanctuary or safety of the Cook Islands if their assets are under attack, using automatic triggers drafted into the trust. When the attack is over, the assets then move back to the U.S.

The Bridge Trust is a grantor trust, whether domestic or foreign; the person who created it keeps some of the powers over income or assets. And like all Asset Protection trusts, it is a self-settle spendthrift trust. What this means is that grantors can "self-settle" the trusts as their own beneficiary.

(Some accountants and attorneys are unfamiliar with trusts that combine irrevocability with grantor status. A grantor trust can also be irrevocable; it simply has to be drafted to meet the grantor trust rules contained in IRC sections 671, 673, 674, 675, 676 or 677. For tax purposes, an irrevocable trust can be treated as a simple, complex or grantor trust, depending on the powers listed in the trust instrument.)

The Bridge Trust is a foreign offshore Asset Protection Trust registered in a jurisdiction like the Cook Islands. However, for the purposes of the IRS reporting and disclosure code, the Bridge Trust is considered domestic, not foreign. This is because it is specifically drafted to meet the two-part test of USC section 7701, which refers to the "court" test and "control" test. The client serves as the initial trustee, passing the control test, and the trust designates a U.S. jurisdiction as having primary supervision over the administration of the trust, meeting the court test.

For tax purposes then, Bridge Trust clients don't have to deal with foreign IRS filings of any kind unless the trust is threatened and they "cross the bridge" to the Cook Islands. At that point, they would have to make all of the foreign IRS tax filings, such as 3520 and 3520A. Annual maintenance fees would also increase while their assets are held offshore.

Asking for Help

Asset Protection, exemption planning and the importance of jurisdiction aren't usually taught in law school, and they're

not tested subjects on any state bar exam. This is a very specialized area of law. So my recommendation would be to join a large network of Asset Protection professionals via affiliations and of-counsel relationships. This would allow you to share in the work, build your working knowledge and provide the necessary protection for your clients through your law firm the right way.

One affiliation I highly recommend is the Asset Protection Council (*assetprotectioncouncil.com*), a nationwide network of attorneys, CPAs and financial advisors who can provide expertise, coaching and, yes, a wealth of asset-protection tools. ■

Brian T. Bradley is an Asset Protection and Advanced Strategic Estate Planning attorney. He is also in-house counsel to TRUST-CFO and has been selected to the Super Lawyers Rising Start List, Lawyers of Distinction List and Top 100 High Stake Litigators List. Reach him at brian@btblegal.com.

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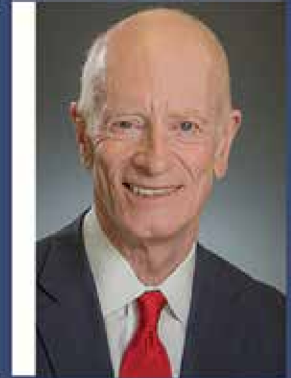

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