

Estate Planning In The Age Of Coronavirus

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A figure who has commented several times in these pages is Charles Lowenhaupt, chairman and partner at Lowenhaupt & Chasoff. He writes here, along with Carolyn Ohlsen, managing partner, about the sensitive estate planning matters that are particularly acute at this time of the coronavirus pandemic.

Lowenhaupt & Chasoff, LLC is a law firm founded in 1908 that develops wealth strategies and provides counseling to individuals and families of significant wealth. The editors are pleased to share these views; the usual editorial disclaimers apply to views from outside contributors. Email tom.burroughes@wealthbriefing.com and jackie.bennion@clearviewpublishing.com

Nothing is more certain than death and taxes. In this time of coronavirus, maybe taxes are not so inevitable or so immediate. Yet, death and mortality are never far from the minds of many of us. And for those who think about family and wealth, the anxiety about one's own death is heightened by the prospect of this new, hidden disease. Before the illness even hits, it separates family members sheltering in place and further isolates patients.

All of this leaves many contemplating their estate plans, which bring together death, family, legacy and taxes, as well as a whole host of emotions and considerations. Among those are fear of isolation, fear of illness, fear of death, and concern for legacy.

What is strangely different about this crisis is that in our firm's more than 100-year history of helping wealth holders plan their estates, we have never found ourselves constrained to telephone conversations for all client interaction. Social distancing and sheltering in place make estate planning more difficult than ever. How does one sensitively deal with the emotions and fears that come with talking about death if one is separated by the phone or Internet? What kind of reassurance and comfort can one achieve virtually? How are documents to be completed and executed? Where are the two witnesses and the notary needed to finalize the documents?

Freedom from wealth

Sheltering in place is also an extraordinary restriction on a wealth holder's freedom. Two months ago, people who could drop in on Paris for a weekend or go to Hong Kong to look at an investment cannot now go out to dinner at a neighborhood restaurant. Now the question is: "Where shall I have my dinner tonight? My kitchen or my bedroom?" Isolation makes us value freedom of movement more than ever.

Right now, a wealth holder needs to recognize that their sense of imprisonment is fundamental. What wealth is for is freedom. How can your estate plan ensure as much freedom for your children and grandchildren as possible? This is what we call Freedom from Wealth or the ability of an individual to be all he or she can be. As we endure this current misery, we can focus on what we want for future generations, even if we cannot have it now for ourselves. Thus, now is the time to review your wills and trusts. Timing is important.

The new urgency of estate planning

The silver lining in this crisis is the productive estate planning discussions we're having with clients about their intentions for their children and grandchildren.

Even in the best of times, developing or updating an estate plan is a complex undertaking. That's the experience one of our clients and his family encountered. The client could not make up his mind whether to establish a fairly complicated, but innovative and tax-advantaged trust for his children and grandchildren. He knew that it would save lots in estate taxes, so we prepared the documents and then went to the IRS in Washington, DC, to get an advance ruling. It turned out that the strategy was fine with the IRS and would meet his needs for tax purposes.

By chance, the written reply from the IRS approving the transaction got lost in the mail room. The agent in charge was

exasperated by the incompetence of the mail room. While waiting for the ruling, the client was diagnosed with a terminal illness. When the ruling finally came back, the client had decided tentatively not to proceed with the trust.

He and his children continued to discuss it as he got sicker and sicker. One day, two of his children walked into the office holding the "signed trust." As they came in, their mother called to say the client had died. "He signed it just in time," said one of the children. "Boy were we lucky," said the other. As attorneys, we had to know the details because the tax requirement was that he sign the trust himself. Then we learned he had been in a coma when the family signed the trust for him. They said they decided he would have wanted that, even though he was not conscious.

The bank that was to be co-trustee had to be informed, and when they were told, they said they could not accept the trust because the client had not "signed" it. The family was upset and wanted that "fixed." We asked the bank whether they would accept the trust if the IRS approved it. The bank said it would accept the co-trustee assignment if the IRS approved, but they and their attorneys knew that could not happen. We were determined to try our best to make it happen and so we called the IRS agent who had been so frustrated by the delay. He asked us to write a proposed ruling with some legal justification. We did that overnight and received a favorable reply the next day. That was surely last-minute estate planning, and it worked in this instance!

Lessons learned

In the current environment, flexibility and creativity are critical for both the person considering his or her estate and the consulting attorney. All conversations with attorneys and other advisors must now be done entirely by phone or video. However, writing a will and trust is a business activity like many others, and communication can be done effectively using both modes of communication. Document signing may be somewhat more complicated. Some jurisdictions are changing the rules for notaries and others may change them for witnesses. There may be other options, but again, creativity and flexibility are key.

Fortunately, that was the approach taken by two of our clients, a married couple. They had completed all their estate planning, and we had completed all documents. After careful discussion, the anxious couple were willing to come to our offices to finish their plans – the signing with witnesses and a notary. However, the night before their appointment, the government closed all businesses and required people to shelter in place.

Despite that, we were able to move forward. One of our attorneys emailed the documents to our clients. Thinking ahead, our attorney also brought home her notary stamp from the office. And, she realized she could use her two adult children who occasionally did work for our law firm to serve as witnesses. That made it easy to do a "drive-by signing," as she called it.

The clients printed out and signed the documents on their patio table, in full view of a car full of their witnesses, lawyer and notary. They used a cell phone to memorialize the attestation. The documents were slipped through the car window and signed by the witnesses and notary - all the while they were in the presence of each other and the clients. By the end of the day, the clients, their advisors and loved ones had all received scanned PDFs of the new documents as appropriate. That drive-by document signing worked and will work again.

Just as death and taxes are certain, so is another saying worth remembering during this period of uncertainty: This too shall pass. In the meantime, now is an opportune moment to review and update estate plans and to consider what you now know that can inform it.