PRACTICAL PLANNER
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PLANNING POTPOURRI

Estate Identity Theft: Crooks steal live people's identities, why not steal a decedent's identity? The executor would have to fight the theft no different then you would have to address a similar problem. Precautions: Change locks on any empty house or apartment, install an alarm in any now empty home, and cancel all credit cards (not just cut them up).

Powers of Attorney and Chronic Illness: If you have a chronic illness that could result in unexpected short term hospital stays, consider a second power of attorney. This might be appropriate for someone with ulcerative colitis, or multiple sclerosis, which triggers exacerbations. Consider a limited power of attorney, effective immediately, with no springing provision, which permits your agent to act only if you are disabled. This will undermine the agent's ability to act quickly in repeated hospitalizations or attacks. A limited power restricts the agent's rights to those matters that need addressing during a short term hospitalization or exacerbation. No power should be given to make gifts, change beneficiary designations, etc.

Foreign Move: If you permanently move overseas, review any tax treaties between the U.S. and your new home country. Obtain a new will governing property in the foreign country and coordinate your US and foreign wills.

No Fiduciaries: What if you have no one to name? Will - Name a bank or trust company if you don't have individuals you feel comfortable naming or that live local enough to handle matters. Power of attorney - If you really don't have someone that is appropriate, set up a revocable living trust, fund it with all of your assets, and name a bank or trust company as a trustee. Health proxy – if you have no one to name, focus on a comprehensive living will as a statement of your health care wishes. This is problematic in states that don't recognize living wills, but it's a lot better than doing nothing.

529 Plans: Instead of 529 plans, your family might benefit more if, as part of an asset protection and estate plan, you establish trusts for children and grandchildren. Then gift interests in family businesses or investments at a discount and fractionalize ownership of family entities by these gifts. You can only gift cash to 529 plans. You can always pay for tuition in addition to annual gifts to the trusts (currently $12,000/year). PP

Practical legal stuff... in plain English
www.laweasy.com

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PRACTICAL PLANNER

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FAMILY VACATION HOME

Vacation homes are a common family asset, but keeping them in the family for successive generations, while keeping the peace, is not easy. You have to address gift and estate tax issues on making the transfer, funding carrying costs, and family issues (who gets to use the house this Christmas?). There are many ways to structure gifts or bequests of second homes or vacation properties to your heirs. Here's a few:

Revocable Trust – This won't transfer the property, but can avoid probate and assure the desired disposition at a later date. This would prevent an agent under your durable power of attorney from selling the house.

Simple Gifts – If your vacation home is not that valuable, or if you have a large family, you might simply gift the house to your heirs using the annual $12,000 gift tax exclusion. The simplest way to accomplish this is a deed reflecting the ownership percentages after each gift. Example: You own a vacation condo worth $300,000. You have 5 children, each of whom is married. You and your spouse can each gift $12,000 worth of the home to each of 10 heirs, or $240,000 in one year. Revise the deed to reflect (ignoring discounts) each heir owning 8% of the condo. Next year, you and your spouse gift the final interests and a new deed would be prepared reflecting each of the 10 heirs owning $1/10^{th}$ of the condo.

General Partnership (GP) or Limited Liability Company (LLC) - If gifts will be made over a longer duration, which could cause the deeds will become too cumbersome, of if local transfer taxes or fees are costly, or if there are minor children (who may not own real estate directly under state law), you might have a simple GP or LLC own the property, which allows you to divide ownership interests of the entity rather than using a deed each year to accomplish the transfers. These approaches can provide control mechanisms as well. The general partner of the GP or the manager of the LLC can control decision making for the property. Example: You could name your two children as managers so that all decisions rest with them, not their descendants.

Qualified Personal Residence Trust (QPRT) – This is a trust designed to gift your home or second home to children, with significant leverage to the transfer, for gift tax purposes, because the value of the house is reduced by the right you retain to live in it during the term. Example: You gift a $1 million vacation home to your four children using a 15 year QPRT. You're age 65. You have the right to live in the house for the 15 years after which your children will own it. The value of the house is reduced to $260,000 for gift tax purposes. Further, if the house appreciates at 4%/year it will be worth about $1.8 million when the children receive it. Great gift tax leverage. However, unlike the dynasty trust the house will not pass to future generations unless your children decide to do so (e.g., after your QPRT, your children QPRT the house to their children).

Dynasty Trust – You could establish a long term trust (or, if your state permits, a perpetual trust that continues forever) to hold a family vacation home for future heirs, including grandchildren and later generations. The trust documents would include provisions governing use of the house (e.g., no pets, no smok-

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CHECKLIST: EMPLOYEE BUYOUT

Your employer has merged with a firm and has offered you a buy-out. What issues must you as the employee consider? It's not just about the money. It's about all the steps necessary to untangle your relationship. While the details will vary by deal, here are a few points to consider:

√Complete Agreement – Insist on a written settlement agreement addressing all relevant issues, not just a check.

√General Release - If you're an executive level employee, and especially if you were employed by a closely held or family business, request a general release. This is a separate document or provision in the settlement agreement confirming that the employer (and anyone else that might be named, e.g., individual owners) have no claims against you. You want to know that when you leave you're really done. If there is an open issue that the employer might have (e.g., a possible claim against you on one client account you serviced), that one item can be identified and excluded from the general release so that both you and your employer know what is open. There is no point in your negotiating a large dollar settlement to find

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...Family Vacation Home

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ing, strict limitations on sale, rotational systems (which child's family gets the house on which Christmas, etc). Investment provisions would have to be included in the trust document to permit the trustee to have most of the trust wealth comprised of a single asset, not have to diversify, and express permission to hold non-income producing assets. Carefully plan how the trust will meet expenses of the property. The simplest approach is to gift or bequeath sufficient cash to the trust to meet expenses, but this doesn't provide much tax leverage (e.g., no discounts). Even if cash is contributed, should the trustee charge heirs for certain expenses or a usage fee?

In addition to the structure of the gift, there are a host of other issues you must address when transferring a family vacation property to your heirs. The following are a few:

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Agreement – To minimize the likelihood of disagreements, you should have a written agreement addressing as many issues as possible. If you're planning a gift of a vacation home to your heirs, complete the agreement and have it signed as part of the gift process. For example, if you're making simple gifts using a GP or LLC, then the partnership or operating agreement for the entity can include the rules governing the use and operation of the property. If you're gifting the vacation home to a trust for your heirs, the trust document could include operational rules. If your parents have already given the house away to you and your siblings, you should all work together to get an agreement in force before you really need one (then it's too late!). If there is an issue you all cannot agree on, focus on the positive and agree on everything but those thorny issues. At least other problems can be avoided. Often, building consensus on lots of other issues helps resolve the previously irresolvable issues. You and your siblings could form a GP or LLC and create a simple agreement to govern usage, funding costs of repairs, etc.

Agreement Details – What should be addressed in the agreement? While specifics will vary depending on the property, family, use and other factors, consider the following:
o Who can use the vacation home and when? Example: Your daughter and her family can use the home for Christmas in even years. Your son and his family in odd years.
o Allocation of costs. Who pays for what? Example: Each child could contribute a pro-rata share for taxes and interest. Other expenses could be allocated by the number of days each family uses the property.
o Who decides if an improvement should be made? Perhaps the managers or a unanimous vote of all family members of the senior generation (e.g., your children, not grandchildren) can decide.
o Should smoking be prohibited?
o Who chooses decorations and furnishings? Who pays for them?
o Who can make legal decisions (e.g., appeal a property tax assessment)? This could be handled by a person or heir designated by you, or elected by the heirs generally.
o What insurance coverage should be maintained?
o Can an interest be sold? At what price and to whom? Should buy out provisions be included in case certain family members don't get along?
o Are pets allowed?
o Who is allowed to use the home? Step-children? Unmarried partners? Ex-spouses? Friends? Frat brothers?

> *Terms in red defined in the glossary at www.laweasy.com. For e-newsletter sign up at www.laweasy.com.*

Conservation Easements – These can be used to maintain the property as it is and to lessen the value for transfer tax purposes, making the gift of the property to your heirs less costly. You might be able to donate the development rights to a qualified charity, exclusively for conservation purposes, and receive a current income tax deduction. This can be achieved by adding a permanent deed restriction or grant an easement to a qualifying charity. Your income tax deduction is the excess of the value of the property before the easement over the value after.

Family vacation homes can be a wonderful source of enjoyment but careful planning to address a complex array of personal and tax issues is

...Checklist: Employee Buyout

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that you have a claim against you for even more.

√Fairness - Most employer-drafted settlement agreements are totally one sided and have you as employee release the employer without comparable provisions for you. When the tenor of your comments on the agreement your employer gives you are asking for equivalent treatment, there is a fairness to your requests that may help you obtain some concessions even when dealing at a disadvantage relative to the power and financial strength of your employer.

√Covenant not to Compete - If you signed an employment agreement it probably had a covenant not to compete. Unless you're retiring, get a release from that restriction so you can work anywhere. If you have a new job that you don't think violates the covenant, have the employer acknowledge that in writing so that you won't have a problem. Even if the new job is not subject to the restriction, a vindictive employer can intimidate your new employer into not hiring you. In many cases your employer may have specific concerns about an old covenant not addressing issue that are now of a concern. It's often possible to revisit and modify the covenant to accomplish additional goals that everyone wants addressed.

√Reference - Get a letter of reference now so that it cannot be withheld later. The form of letter could be attached as an exhibit to the settlement agreement. That way, when you need a reference you know what you'll be getting.

√COBRA – You can continue health insurance coverage until you get new coverage at your new job. Don't accept a lapse because there then may be issues with a pre-existing condition and getting new coverage. Although COBRA is governed by law, be sure to look into it because you may have special benefits from a plan at your employer, or state law may provide for greater protection. Know your rights and address them.

√Assets - Clarify issues on your use of names, customers, etc. It can be easier to resolve these issues up front than have a fight later. For example, if you have written articles, or have a rolodex of names, can you use them? Who owns what? Clarify it now.

√Tax Status - How are the payments you have or will receive from your employer as part of your termination being characterized? Are they payments for past services? Emotional distress that is causing you to leave? Other items? This can have a huge tax impact. Be certain that your agreement states the amounts you get, what they are for, and what the tax ramifications are.

√Equity - If you owned equity in your employer's business, negotiate a buyout as part of the settlement agreement. Also, if the employer is an LLC or S corporation, confirm what the distributions and tax consequences will be. Most closely held businesses are organized as S corporations or LLCs and income flows through to the owners. You don't want to have income on your personal tax return, without a distribution of cash to pay the tax. PP

Recent Developments

Abusive Tax Shelters – The government has never been fond of abusive tax shelters and to combat them has an array of penalty provisions. In a recent case, *Reiserer v. U.S., 99* AFTR2d 2007-1438 (CA-9, 2007), the court held that the IRS could assess penalties under Code Section 6700 (100% of the gross income from the activity) and Section 6701 against the estate of a deceased promoter of abusive tax shelters involving offshore employee leasing. If the penalties were penal in nature, they would not have survived the promoter's death. Because the court held they were not, the penalties survived, and his estate was liable. The IRS had weighed in against these transactions in Notice 2003-22, 2003-1 CB 851.

Deferred Compensation - Code Section 409A, added by the 2004 Jobs Act, requires that amounts under a nonqualified deferred compensation plan are currently includible in income to the extent that they are not subject to a substantial risk of forfeiture, unless certain requirements are met. If compensation is deferred and the requirements not met, all deferred amounts under the plan must be included in income by the participant, interest is assessed at the underpayment rate plus 1%, and a 20% penalty will be incurred. The IRS issued final regulations addressing nonqualified deferred compensation plan rules T.D. 9321, 04/10/2007. Be sure to amend any plans prior to 12/31/07. PP