

Ten (Non-Tax) Reasons Why You Should Have an Estate Plan

By Michael P. Panebianco Vice President and Trust Officer

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A common perception is that the primary purpose of estate planning is to reduce estate taxes. Although the reduction of taxes is certainly a compelling reason to have an estate plan, it is far from being the only reason. In fact, there are many other reasons that are at least equally important and that, arguably, should be considered by everyone.

It is impossible to do little more than summarize these “non-tax” reasons without either (a) writing a book, (b) putting the reader to sleep, or (c) both. An attorney who specializes in estate planning or a trust officer can discuss any or all of these reasons with his or her client to analyze the pros and cons of each and to help the client determine the most appropriate plan for his or her circumstances.

1. Control

If you have an estate plan, it means that you have made arrangements to ensure that your assets are distributed or managed after your death according to your wishes. A person’s ability to dictate how their assets are distributed or used upon their death is virtually unlimited. YOU can control what happens to your assets.

For some people, only a will is necessary. For others, a will and one or more trusts established during lifetime are appropriate. Control and planning may also involve naming other individuals as joint owner(s) with you on various assets, such as real estate and bank accounts, and naming specific people as beneficiaries of life insurance policies, retirement accounts, and other similar assets.

Without an estate plan, your assets will be distributed pursuant to state law in the state where

you were living at the time of your death. For most people, the “state law” option does not accomplish what is wanted or intended. For example, in most states, if you die without an estate plan and have a surviving spouse and children, your spouse and each child will receive a portion of your assets. This “plan” (really, a lack thereof) means that your assets do not automatically get distributed entirely to your spouse, which is a very common objective.

2. Privacy

A common desire is maintaining privacy after death. If a person does not have an estate plan, or only has a will, then that person’s estate will likely “go through probate” upon death. The result is that the probate court in the state he or she was living in at the time of their death will oversee the administration of the estate, and information about the assets, transactions, and names of the beneficiaries will be available to the public.

An estate plan may be drafted so that one beneficiary does not know what any other beneficiary receives. This advantage may be important, for instance, to someone who is, or may be perceived to be, “favoring” one child over another, or who does not want others to know what charities are being supported. For those with these types of concerns, having an estate plan in place is the only way to accomplish the desired privacy.

3. Incapacity

The uninterrupted management of assets in the event of incapacity or disability during life can be accomplished with an estate plan. Establishing a revocable trust and transferring title to various assets to the trust is usually involved. These assets may include cash, stocks and bonds, mutual funds, real

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estate and other investments. A durable power of attorney and advance health care directives, such as a living will and health care power of attorney (or health care proxy), are also important.

With these types of documents in place, the trustee of your trust would manage the assets titled in the name of your trust, the person you name as your agent under your durable power of attorney would manage all other assets, and the person you name as agent in your health care power of attorney would have the authority to make health care decisions on your behalf in the event of incapacity.

There are important advantages to establishing a trust and funding it during your lifetime. Taking these steps can help to ensure that your assets will continue to be managed and used for your benefit in the event of incapacity or disability and greatly reduce, and often eliminate, the need to have a court-appointed guardian in such a situation.

4. Business Succession

For those who own, or have an ownership interest in, a family business or closely-held business, succession planning is important. One or more owners may want their child to “take their place” when they retire or die. Having a will or trust that simply states “I give my ownership interest in the family business to my son” is a recipe for disaster.

The best time to think about business succession planning is at the very beginning, before the business has even started. Even if, like most people, you did not, it is usually possible to accomplish most, if not all, of what you want through an estate plan. Although business succession planning is not commonly thought of as “estate planning,” it is best if the person’s estate planning objectives and overall estate plan be considered at the same time. When all is said and done, the estate plan will most likely need to be revised to take into account the succession plan for a family business.

5. Creditor Protection

When people hear about using trusts to protect assets against creditors, they often think about doing so to protect their own assets against creditors while they

are alive. This type of trust is often called a “self-settled asset protection trust.” Although it is important to know that this type of trust exists, more people will be concerned with protecting the assets they give at death from the creditors or potential creditors of their heirs.

For example, a child may have his or her own business or work in a profession where there is a risk of being personally liable if a mistake is made or an accident occurs. If the child received an inheritance outright, then those inherited assets could be available to pay any creditors the child may have at that time or in the future. However, if the child’s inheritance were to remain in trust for the child, the provisions of the trust can ensure that the assets are never given to any of the child’s creditors, as allowed by applicable state law. For example, New Hampshire trust law allows most such provisions, but makes some exceptions, such as for alimony and child support; other states allow creditors to reach the assets of the trust more easily regardless of the trust terms.

6. Special Needs

Giving assets to someone who is receiving public assistance, such as Medicaid, as a result of age-related health reasons or a disability such as autism or Down Syndrome, may disqualify the person from receiving future public assistance. However, by establishing a certain type of trust known as a “special needs trust” or “supplemental needs trust,” it is possible to have assets used for the benefit of the person receiving public assistance without jeopardizing that person’s public assistance. In order for this estate planning technique to work, it is critically important to adhere to applicable state law concerning trusts, Medicaid, and other Federal or state public assistance the individual is receiving or may receive in the future.

It is common for a relative, friend, or guardian to be the trustee of a special needs trust to have control over distributions from the trust to or for the benefit of the individual receiving public assistance. However, this person is not always the best person to oversee the general administrative aspects of the trust, such as investment management of the assets and preparation and filing of tax returns. Under New

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Hampshire law, an individual or corporate trustee may be appointed the “administrative” trustee. The administrative trustee is essentially charged with handling administrative matters related to the trust, but has no power or authority over discretionary distributions from the trust to, or for the benefit of, the beneficiary.

7. Substance Abuse / Spendthrifts

For obvious reasons, it is usually not a good idea to give an inheritance outright to someone who is, or has a spouse who is, struggling with alcoholism, illegal drugs or a gambling problem, or is otherwise a spendthrift. A properly designed estate plan can achieve the goal of leaving assets for the benefit of someone about whom you have such a concern without the risk of the assets being wasted. Usually, arranging for the assets to remain in trust for the individual is involved.

8. Second Marriage / Children from prior marriage

It is not uncommon to remarry after divorce or the death of a spouse. If there are children from the prior marriage and/or step-children, particular attention is required to ensure that applicable state law does not derail your desired intent for how you want your assets distributed upon your death. For example, most states have laws that prevent someone from disinheriting his or her spouse. Without an adequate estate plan, your second spouse could receive some of your assets upon your death even if your intent was for all of your assets to go to your children.

Another concern that you may have is the trustworthiness of your child’s spouse. It is common to want to ensure that assets stay within the family blood line. A properly designed estate plan can reduce and often eliminate the chance that assets end up going to a child’s spouse if the child ends up getting a divorce, or that the assets will end up going to a child’s spouse’s new spouse after the child’s death, rather than to his or her children.

9. Pets

Many owners of pets do not consider their pets when thinking about their estate plans, not because of lack of care, but because they do not realize that they can do something. Some states allow you to

create a trust to provide for the benefit of one or more animals that are alive during your lifetime. Pet owners may thereby ensure that their pets will be provided for after the owner’s death, rather than having to rely on the generosity of others to do so.

10. Unanticipated Circumstances

Bottom line: no matter how much you plan for various contingencies, it is impossible to plan for every possibility. However, trust laws in some states, such as New Hampshire, allow you to appoint a “trust protector” or “trust advisor” for your trust, in addition to a trustee. A trust protector or trust advisor may be given a wide variety of powers, including the power to increase or decrease any beneficiary’s interest in the trust, remove and appoint a trustee, and change the governing law or principal place of administration of the trust. The utility of having someone named as a trust protector or trust advisor is increased if the trust is designed to benefit more than one generation, is a special needs trust, or is an asset protection trust.

For example, suppose you want to provide for your grandchildren after your death, some of whom may not have been born yet, and one of them is born with a disability. A trust protector or trust advisor can be given the authority to revise the terms of your trust to ensure that the assets in the trust that are to be used for that grandchild do not cause the child to be ineligible for public assistance.

Final Thoughts

When all is said and done, “control” is the main reason to have an estate plan. All other reasons, non-tax and tax alike, are really subcategories of control. One of the first challenges in estate planning is to have a thorough understanding of what you want to do and what you can actually do. Because state law is so important, it may be advantageous to avail yourself of the laws of a different state from where you currently live. This does not mean that you have to move. Rather, it may mean that you should establish a trust in a different state and appoint a trustee that is located in that state.

A knowledgeable estate planning attorney and/or your trust officer can assist you with all of these issues, including whether another state’s

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trust laws would better serve your wishes. In addition, they can assist you in identifying your own specific estate planning needs and issues

not addressed above, such as who should serve as trustee or as your agent under a durable power of attorney or health care power of attorney.

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Contact us

In Massachusetts contact: Erin Cooper, 617-503-5285, erin.cooper@cambridgetrust.com »

Robert MacAllister, 617-441-1599, robert.macallister@cambridgetrust.com »

or William Yates, 617-503-4041, william.yates@cambridgetrust.com »

In New Hampshire contact: Susan Martore-Baker, 603-369-5101, susan.martore-baker@cambridgetrust.com »

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