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Volatile economy holds new challenges for estate planning

BY PAUL BRINKMANN

Volatile markets, aging baby boomers and new laws require nimble strategies from attorneys who plan or advise trust and estate clients.

Avoiding future litigation for estates is inherently a matter of planning and foresight – and that can be difficult in changing economic times like 2008.

Local attorneys say they anticipate a number of new dynamics for trust administration and estate planning, based on the economy and other factors. These include:

- A greater need for trustees to shift investments in response to an evolving market picture.
- Continued growth in the number of wealthy baby boomers planning their final will.
- More requests from beneficiaries for disclosure of assets and investment strategies. Florida's new trust code in 2007 required such disclosures be prompt and comprehensive.



Donohue

Anticipating these dynamics will help prevent litigation, said Mary Sue Donohue, a partner at Buckingham, Doolittle & Burroughs in Boca Raton.

One thing that hasn't changed is the traditional advice for making a will as litigation-proof as possible: Start early and update often.

"One of my biggest pieces of advice is to make decisions when you're sharp, and know you're sharp," Donohue said. "You also want to avoid making wholesale change late in life."

A frequent challenge to wills is a claim that the deceased was under duress, inprop-

erly influenced or not of sound mind when the will was written. Sweeping changes at the last minute can make that claim harder to defend against.

REINVESTMENT STRATEGY

One of the pitfalls facing trust administrators is a tendency to stick with the same investments the deceased used. That can be harmful in today's markets, but the goal of the trust is usually more long term than any current market cycle.

For example, Donohue said a longtime client named her as co-trustee for his estate. The other co-trustee – a friend of the deceased – wanted to keep the same investment strategy, but Donohue counseled against that tactic.

Eventually, the co-trustee relented, and assets were sold and diversified.

"We did sell most things. The broker said our account has gone up this year by 1 percent, which is pretty good for this period," Donohue said.



Cohn

Alan Cohn, an attorney at Greenspoon Marder, said another area of trouble is flat numbers for disbursement amounts. If a grantor leaves \$1 million to each family member, and the value of the assets take a dive, someone could get cut out of the will completely.

"Whenever possible, I suggest percentages," Cohn said. "Leaving flat dollar amounts could engender litigation, against the estate or the trust, or a malpractice suit against the grantor's advising attorney."

FEELING THE HEAT

Chris Gagic, a solo practitioner in Boca Raton, said trust planning isn't changing in response to the current market, but trust administration is.

"Trustees are really feeling the heat. It seems like all the models have gone out the window," he said. "People are calling and saying things like, 'We lost 35 percent of our value.'"

Gagic said trustees he advises are calling, along with beneficiaries, regarding their concerns about asset allocations. The best defense against possible litigation by beneficiaries over drops in trust value is simply to ensure diversification of assets.

If a grantor has restricted the investments of a trust, Gagic said waivers are usually required for the trust administrators and the beneficiaries.

"There's a big sign-off, a waiver of some type, if a grantor is forbidding the trustees from selling off a certain stock," he said.

Gagic said baby boomers' huge numbers, relative wealth and exposure to litigation should prompt a new interest in trust law.

One of the biggest changes because of the new Florida Trust Code is that trustees are now required to make sure beneficiaries know they are entitled to an accounting of the entire trust.

In the past, Gagic said the beneficiaries of

a trust often did not realize they could demand a copy of the trust and an accounting of the entire trust's holdings, so they were often in the dark about the total assets. Now, the trustees must inform the beneficiaries about their rights.

PLANNING OPPORTUNITIES

The down economy is not all gloom for estate planning, though.



Carlos Batlle, attorney with Squires, Sanders & Dempsey in Miami, said his practice group is trying to focus on the upside of the down economy – transferring assets when their valuation is low.

Batlle
"In a low-valuation environment, if you're going to gift that asset to the next generation, you want to do it today, for gift and estate tax benefits," Batlle said.

He said litigation on behalf of trust beneficiaries regarding drops in value is a possibility. Small trusts that slip under the \$50,000 level can be collapsed, as provided by state law.

But, the advice for avoiding litigation against a will or estate in the future is still the same, Batlle said, adding: "Make sure you dot all the I's and cross the T's."