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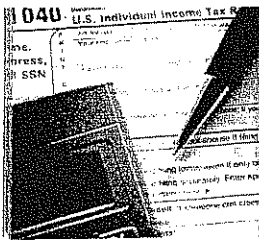
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A New Paradigm: Truly Multigenerational Planning
Help families achieve a diversity of shared goals

By Mark R. Gerson Gilfix & Michael Gilfix



FEATURE: ESTATE PLANNING & TAXATION

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A New Paradigm: Truly Multigenerational Planning

Help families achieve a diversity of shared goals

To many attorneys, the term “multigenerational planning” brings to mind family business, dynasty trust, generation-skipping transfers (GSTs) and a host of tax planning opportunities. These opportunities are inherently “top down,” in the sense that the older generation—the parents—do the planning for the benefit of following generations.

Attorneys pay far less attention to the type of multigenerational planning that’s required when concerns about the cost of long-term care (LTC) and related issues arise. On a more plebeian level, it’s rarely considered and pursued when dealing with a more or less straightforward estate plan for a typical client.

These latter examples suggest a different paradigm—an approach in which multiple generations actively participate in and coordinate planning. It’s an approach that causes cautious traditionalists to wince.

A traditional, one-client-per-lawyer perspective pays homage to selected rules of practice. It warns of violated confidences and the possibility of abuse by younger or manipulative family members. We get that. Indeed, we’re alert to signs of elder financial abuse.¹ We’re also careful and selective about when this approach may be successful.

Regardless of wealth, most members of our client communities will benefit from multigenerational perspectives and planning. Indeed, we believe that carefully considered and crafted multigenerational estate planning is the paradigm to be pursued.

The goals and, arguably, the tensions are clear. The senior generations—parents and grandparents—want to be sure that they’ll have sufficient resources, both public and private, for adequate health, housing and other age-related services as they get older. Secondarily, they want to preserve assets for the next generation.

What of the goals and objectives of younger generations? The overwhelming majority agrees that the well-being, quality of care and abundance of LTC opportunities for the older generation are paramount. For understandable reasons, asset protection for their parents is an important concern. The younger generations are concerned about and want to preserve their inheritances, without compromising the elder’s quality of life.

As members of two generations (father and son), the Boomer and Millennial, we’ll focus on the art and science of planning for these concerns. Our experience as a multigenerational team of estate planners strongly reinforces the benefits of this approach. While not appropriate for every client and every family, this new paradigm facilitates discussion among family members; enhances a family’s ability to deal with crises; and often achieves a diversity of shared goals.

Grasp the Demographics

We’ll focus on planning for two and perhaps three generations. Given the enormity of the Boomer generation (that is, those born between 1946 and 1964), this perspective is particularly compelling. The Boomer generation numbers over 76 million.² Indeed, by 2030, nearly one in five Americans will be over age 65.³ Never before has such a tsunami-like “age wave” existed. It will challenge our social service structure, our elder care systems capacity and the economics of aging. While it’s a generation that’s done well economically, only 40 percent are confident that they’ll have enough money for retirement.⁴ Objectively, an even higher

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percentage should be worried.

At the same time and like no generation before, Boomers plan on remaining vital, active, employed and in their own homes. The aging-in-place movement is at the core of Boomer philosophy. Boomers have parents; Boomers have children. No other group is a more likely focus of multigenerational planning.

There are, therefore, complicated, multi-faceted objectives and countless constraints. One constraint, discussed below, is the cost of care and how to address it. Unless a comprehensive LTC insurance policy is in place, precious few older Americans have sufficient resources to pay the ongoing, relentless cost of LTC without eroding their life savings. It's particularly challenging for the mass of elders who are "house rich" and seem to have large estates, but are in fact "cash poor."

Compellingly, studies show that three in four Americans are worried about the Social Security system and its ability to provide support in the future.⁵ Polls also show that over 68 percent of Americans are concerned about the cost of LTC.⁶ To address these very real fears, the legal community must respond with accurate and effective advice. Strategies that are most successful typically and necessarily involve at least two generations.

Also consider the "supply side." There's already a dramatic shortage of competent caregivers. Noting that most caregivers are family members, it's of great concern that millions of older Americans have no children. Indeed, birth rates have been declining for many years.⁷ Many have children, but often none who will care for them in any meaningful way.

Anecdotal evidence strongly suggests to us that devoted family caregivers are often daughters-in-law. They're an increasingly absent segment of the population among Gen X or Millennial generations that are experiencing a dramatically reduced number of marriages.

On the other side of the equation, the children of Boomers (often termed "Millennials") face their own fears and financial issues. In many parts of the country, they can't afford to live near their parents, as housing costs for Millennials have far outstripped salaries.⁸

They, too, worry about the cost of LTC. Polls show that 71 percent of Americans in their 30s share this concern.⁹ We view this as a positive, if somewhat surprising, result. Awareness of problems, like the cost of LTC, enhances a sense of empathy. We're optimistic that it will

translate to more supportive involvement on the part of second and third generations.

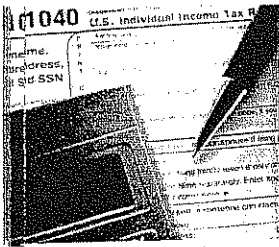
Perceptions and Concerns

What goals and concerns of the older generation might interfere with multigenerational planning? Here are rather typical comments we've heard from elders.

- "I shouldn't tell my kids about how much money I have. It's none of their business!"
- "It's not good for them to know. They must make their own way, stand on their own two feet."
- "If they know about what they might inherit, they

Instead of focusing on fears, privacy issues and negativity, change the discussion to focus on shared goals, hopes and dreams.

- won't work and they won't fund their own IRA. I become their IRA!"
- "I want to keep control. I don't want them to interfere with my decisions. I'll continue to make my own decisions regarding my healthcare, my money, how I invest it and where I live."
- [If there's a family business] "I want to keep control as long as possible. I also want to control what happens after I die."
- "If I tell my kids too much, it will create conflict, rather than eliminate conflict."
- "If they see my estate plan, they'll know which of them I chose to be my successor trustee, who'll be in charge. This, too, will create resentment and make things more difficult for me."
- "I simply believe in privacy."
- "It's my money. I can spend it in any way I like."
- "We're close to our two kids, and we both want and need them to live nearby."
- "I want my kids to live nearby, but I really want my grandkids to be nearby."
- "I don't want to be a burden to my kids as I grow old.



There's no reason to worry them about my care. It will work itself out."

Now, let's consider the perceptions, goals and concerns of the next generation as they think about their parents. They likely struggle with conflicting feelings. They want the best possible care for their parents, but also want or need to know if their parents will become a financial burden or if they can expect any kind of inheritance or financial assistance. These questions are increasingly important for children living in areas with high housing costs.

Some of their concerns:

- "My parents worked their entire lives to build up their estate, but will it be enough to cover the costs of long-

In fostering communication between the generations, you may be the attorney for both generations.

- term care? Will I have to step in and help?"
- "What type of planning have they done? I'll be far better prepared if I know what they have and how they structured their plan."
- "I feel a responsibility for my parents. I want them to get the best possible care."
- "I'm worried that they're making risky investments and/or that a financial advisor is taking advantage of them."
- "I worry that someday they'll make unsafe, inappropriate decisions about where to live and put themselves at risk. Will they be able to safely stay at home as long as they want?"
- "They tell me they want me to help, but they don't give me the information that lets me do so."
- "They're not getting reliable information about taxes, estate planning and asset protection if they need long-term care."
- "I've heard some horror stories. If they don't take the right steps, we're going to lose the family home."
- "They want me and my family to live nearby, but they

know we can't afford it. And, we haven't really talked about how they might help us do this."

- "I want to discuss these matters with my parents, but I don't want to appear greedy or disrespectful."
- "I admit it: An inheritance will be extremely important for me and my family."

Communication and Cooperation

There are ways to bridge the gap between generations and to change the tone of the conversation. Instead of focusing on fears, privacy issues and negativity, change the discussion to focus on shared goals, hopes and dreams.

Here are examples of how to frame conversations. You can pose these questions to both generations.¹⁰

- What do you envision for your lives as you get older? How do you hope to live?
- What are your goals and passions for your "Golden Years?"
- What are your biggest worries? What stresses you out the most about your health? Your finances? Your care?
- Where do you want to live as you grow older? Do you want to stay at home as long as possible? Are you near the rest of your family?
- What do you want for your children? Your grandchildren? What type of legacy do you want to leave?
- Do you want to provide a financial safety net to your children and their families?
- Is it important to you that your children/grandchildren live near you? Do you want to provide help to encourage this?

These types of questions can identify shared hopes and dreams. They can generate fruitful discussion about legal tools and planning steps that can achieve a family's goals. The challenge is to acknowledge all of these motivations, yet harmonize them.

To this end, we host family meetings. We've hosted up to four generations in the same room. Our approach is arguably akin to family offices that serve the very wealthy. Our clients are very real, middle and upper middle class. They have hopes, fears and a variety of needs. Other family members and family resources can address these needs when their plan is properly structured.

Joint Representation

What happens if you're the attorney for both

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generations? (See "Clients Seeking Joint Representation," this page, for more information on handling this issue.)

Note that we make no effort to discuss the intricacies of the Model Rules. Suffice it to say that Rules 1.4, 1.6, 1.7 and 2.1 substantially address the issue of multigenerational representation. As one commentator noted when considering these issues in the context of the Model Rules, "When joint representation is sought, the lawyer must reasonably believe that any potentially conflicting individual desires are subordinate to the clients' desires to achieve a common goal."¹¹

Needless to say, we proceed multigenerationally and with joint representation only in those matters in which there's open and complete communication. We only proceed when there are commonly identified goals. Let's consider and examine issues and factual circumstances when multigenerational, coordinated planning is optimal.

Medicaid Planning

The cost of LTC, and the cost of skilled nursing care in particular, financially exhausts many older Americans. Many look to the federal Medicaid program, which can pay all or most of the cost of skilled nursing care. They may take planning steps, in compliance with Medicaid law, to protect family assets while achieving eligibility. Such planning simultaneously requires careful and sophisticated attention to the most fundamental requirement, which is quality care for the individuals who may need varying levels of LTC.

Legislation and regulations pertaining to Medicaid and asset preservation planning are complicated and state specific. Yet, core aspects of Medicaid legislation are a function of federal law and apply in every state.

For example, there's currently a 60-month lookback period when an individual applies for Medicaid in a skilled nursing care setting. Rules are complicated, and we make no effort to discuss them—and planning options—in this article. Many attorneys advise elders to make gifts to members of the next generation in contemplation of Medicaid eligibility. There may be an early diagnosis of Alzheimer's, Parkinson's or other diseases or disabilities. There's typically a very strong desire to protect the family residence, at minimum.

Transferring most assets out of one's name because there may be a need for skilled nursing care could be viewed as a radical act. Countless issues are raised, but let's consider steps that might be taken in a positive mul-

Clients Seeking Joint Representation

Can the same estate-planning team work for multiple generations?

Recently, a couple who came to our office had heard us speaking together at a popular senior center. They came to us after first consulting with another, very well liked local estate-planning attorney.

In the meeting they had with her, the attorney told them that their sons would have to get their own, separate attorneys because she's representing the parents. She told them that this is how it's done.

In the seminar we presented, we suggested precisely the opposite: that families are well-advised (when there aren't troubling issues) to have the same estate-planning team working for multiple generations.

They were struck by these comments because they were starkly different. To quote these clients, who retained us: "We love your approach. This resonates with us. The advice from the other attorney made us uncomfortable."

—Mark Gerson Gilfix & Michael Gilfix

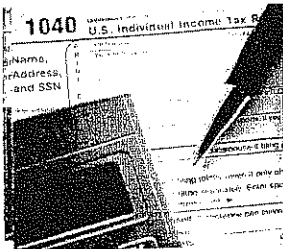
tigenerational context.

First, acknowledge that "a gift is a gift." Transferring significant assets is only advisable when a perfectly competent elder is aware of the risks and benefits. There are and can be no strings attached. Your client needs to complete and file a federal Gift Tax Return (Form 709) with the Internal Revenue Service. Quite simply, the assets then belong to the children, the next generation.

Special Needs Trust

What might the children as gift recipients do? They could set the gift aside in a separate account and do their best to keep it sacrosanct, perhaps available for the benefit of their parents, if needed. They must acknowledge, however, that such steps bring risks and challenges. A child may face a divorce, bankruptcy or litigation. A child may even become disabled or predecease his parents.

For this reason, the gift recipients may independently decide to create a special needs trust (SNT) for the



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benefit of their parents. An SNT can hold any amount of money for the benefit of an individual without disturbing or preventing eligibility for Medicaid. Simply stated, the assets don't count. Yet, the parent, whether or not a Medicaid recipient, is the sole beneficiary of the SNT. Assets in the trust are retained exclusively for the parent's benefit. They're to be used liberally to ensure quality of care for home care and for any level of care that may be optimal. Assets in the trust can be used to pay for companion aides, supplemental health care, transportation to bring grandchildren to visit the beneficiary and for other such purposes.

You, as the attorney, must carefully advise the children about gift, estate and other tax implications of such planning steps. The children must be careful to identify appropriate trustees for the SNT. In addition to transfer-

Many individuals of differing ethnic and cultural backgrounds expect multigenerational planning.

ring assets into an SNT while they're living, the children may also provide for a larger, supplemental distribution to the SNT in their estate plan in the event that they predecease their parents.

This type of coordinated planning must be done with great care, with fully informed clients who are advised about the risks as well as the benefits. When done properly, extraordinary asset protection objectives are achieved while quality of care is secured. Asking the right questions to improve multigenerational communication and cooperation early in the process is absolutely critical.

Use and Risks of Reverse Mortgages

Reverse mortgages allow older homeowners to take advantage of the equity in their homes. They may receive a lump sum distribution or receive monthly payments in the form of increasing loans. The funds are, therefore, available to pay for home repairs and, more important, home care assistance that may be needed if the homeowner is to be able to continue living at home.

Reverse mortgages offer benefits. They come at a significant price, and they present risks that are typically hidden from the homeowner.

If an elderly homeowner needs a higher level of care, such as skilled nursing care, he'll have to leave his home. If the borrower no longer lives in the house, typically meaning that he's out of the house for one year or more, the reverse mortgage becomes due.

Medicaid eligibility. A residence is, presumptively, an exempt resource in the context of Medicaid eligibility to pay the cost of skilled nursing care. If the residence is sold, the exempt resource is replaced with cash. A person otherwise eligible for Medicaid—typically because he has less than \$2,000 in non-exempt assets—suddenly has funds substantially in excess of that amount. Medicaid eligibility is lost. The net cash proceeds are expended at the rate of perhaps \$8,000 or \$10,000 per month. The estate is decimated.

Capital gains tax. Since most Boomers have owned their homes for 20 to 40 years, the capital gains can range from \$200,000 to \$2 million. While the \$250,000 capital gains tax protection is presumably available, it may not be nearly enough. Tax due on sale will be in the tens or hundreds of thousands of dollars. Forced sale, before the owners' death and stepped-up basis, rewards the government and punishes the homeowners' families.

Loss of the family residence. Virtually all older homeowners want to preserve the residence for the next generation. Yet, because of lack of communication, they may use a reverse mortgage and ultimately lose the family home.

What alternatives exist, particularly those flowing from multigenerational planning? Children (potential inheritors), are well advised in such circumstances to pay for home care or to loan their parents money to pay the cost of care, thereby avoiding reverse mortgages. Depending on how the children deliver such support, there can be income tax benefits to the children. They may take a parent as a dependent and establish that payments are needed for health services, thereby making them eligible for health care cost income tax deductions. If payments are characterized and treated as loans, the children are ultimately repaid.

The residence is retained in the parent's estate until his passing. The basis step-up is captured. The property can be retained or sold without capital gains tax exposure.¹² Multigenerational coordination in this situation can pay huge dividends.

Fundamental Estate and Tax Planning

Many clients feel that their financial and estate-planning



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documents are private, not to be shared with anyone. For myriad reasons, they don't want their children and other family members to know about the size of their estate, the nature of their estate and how they plan to distribute their estate. This desire for privacy is understandable, particularly because of the penchant for independence that has been the hallmark of prior generations. But, it can do damage.

Every estate-planning attorney represents clients who keep the next generation in the dark and perhaps even mistrust them for asking questions about finances, LTC plans and financial security. When such attitudes prevail, multigenerational planning may be impossible given the prerequisite of multigenerational coordination and trust.

Every estate-planning attorney has also seen families who openly share information, making the next generation aware of the parents' assets, estate-planning documents, values and fears. With rare exceptions, these estates are better managed, assets are more likely to be preserved and tax exposure is likely to be reduced or eliminated.

The reasons are manifold, perhaps obvious. For example:

- GST tax planning can be aggressively pursued and implemented.
- Family businesses can be preserved.
- Awareness of a family member's financial difficulties allows for protective planning.
- Special or extraordinary needs of a particular family member may be addressed in a coordinated manner that captures tax benefits and perhaps eligibility for government benefits.
- LTC needs can be addressed without destruction of the estate.

Is Multigenerational Planning Naïve?

Good faith, trust, open communication and ethical behavior are typically at the heart of multigenerational planning. Sometimes brazen self-interest—when openly acknowledged, understood and addressed—justifies such planning, as it does among business associates.

An attorney pursuing such planning for multiple generations or multiple members of a particular family¹³ has a special responsibility to ensure open communication that identifies all risks and benefits of planning

options. Advice and representation may focus on a particular asset, such as a family residence. It may more comprehensively focus on preserving a family business for following generations. It may be very limited and therefore very manageable. It may be broad, multifaceted and very difficult to manage.

Cultural and Ethnic Values

Many individuals of differing ethnic and cultural backgrounds expect multigenerational planning. They're affirmatively alienated by an insistence on separate, individual representation for different family members. They may be ill-served by well-meaning attorneys who aren't open to planning approaches that directly involve two or three generations.

Bottom Line

The world and our client communities are changing. They have expectations and needs that aren't readily accommodated by traditional approaches. We must evolve and respond or, in this world of start-ups and disruptors, others will.

Endnotes

1. See Michael Gilfix, "Addressing Financial Elder Abuse," *Trusts & Estates* (September 2014), at p. 34.
2. See Paul Taylor and George Gao, "Generation X: America's neglected 'middle child,'" *Pew Research* (June 5, 2014).
3. Population Reference Bureau, <http://www.prb.org/Publications/Articles/2002/JustHowManyBabyBoomersAreThere.aspx>.
4. Population Reference Bureau, <http://www.prb.org/pdf11/aging-in-america.pdf>.
5. www.gallup.com/poll/1693/social-security.aspx.
6. See Amy Norton "Many Americans Worry About Cost of Long-Term Care: Poll," *HealthDay Reporter*.
7. Victor Luckerson, "More Women Aren't Having Children, Survey Finds," *Time* (April 7, 2015).
8. Victoria Stilwell, Victoria and Wei Lu, "These Are the 13 Cities Where Millennials Can't Afford a Home," *Bloomberg* (June 8, 2015).
9. See *supra* note 6.
10. See Michael Gilfix and Mark Gerson Gilfix, *Facing the Reality of Long-Term Care* (2014).
11. Teresa Stanton Collette, "The Ethics of Intergenerational Representation," *Fordham Law Rev.*, Vol. LXII, No. 5 (March 1994), at p. 1478.
12. If the homeowner receives Medicaid benefits, care must be taken to avoid a Medicaid reimbursement claim on his passing.
13. While much has been written about joint representation for family members, joint representation of committed, yet unmarried or unrelated individuals presents another area of opportunity and challenge.