

# Estate Planning

## Minimize Tax on Foreign Trusts

Social Security Benefits Strategies

Multigeneration Estate Planning





# Mesh Multigeneration Planning With “New Economy” Ideas

Broaden client services by giving estate planning a multigenerational scope and being alert to “new economy” opportunities.

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**A** multi-generational approach to estate, elder law, and special needs planning represents a “paradigm shift”—i.e., a major change in methods to serve client needs.<sup>1</sup> Consider the indicia of traditional legal representation: duty of loyalty to the individual client, confidentiality, and protection from claims and challenges of and from others. Explicitly or implicitly, they create a presumptive 1:1 relationship. In the world of estate planning, “I am the attorney, and my client is the benefactor in this approach.” It seems obvious.

How does this approach under-serve so many clients? Consider that the traditional approach identifies enemies or oppositional forces:

1. It sees tax as the enemy.
2. It sees diminution of the estate for any reason as the enemy.
3. It sees children as secondary participants, excluded from the planning process.

The approach recommended in this article is very different. It focuses on quality of care, quality of life, and the sharing and diversification of responsibilities among two or perhaps three generations. Indeed, this is why the secondary focus of this article is on the “new economy.” The authors acknowledge, of course, that this approach is not for every family. Sometimes the traditional approach is unavoidable.

A problem in this context, generally speaking, is that the oldest generation is not the most tech savvy, not the most likely to understand new services, even if these services are targeted to them as users. The discussion that follows explores why the next generations

can be a critical component of multigenerational planning.

## Competition

As the economics of the practice of law have changed, estate planning attorneys face increasing competition. An estate tax exemption of \$5.45 million per person has substantially reduced demand for estate planning services. Many attorneys have gone to a “trust mill” model, offering cut-rate services for extremely basic estate planning documents.

Estate planning attorneys also face increasing competition from non-attorneys. These include financial advisors (or advisors to the masses, like Suze Orman) and internet-based providers, including Legalzoom, Rocket Lawyer, and Nolo Press. These companies offer low-cost, basic estate planning services to anyone who completes their online questionnaires.

These companies have staying power. Legalzoom has raised over

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\$65 million in venture capital,<sup>2</sup> and RocketLawyer has raised over \$46 million. Moreover, these companies represent the first wave of technology-enabled competitors. As companies like IBM and Google invest heavily in artificial intelligence (AI), increasingly “intelligent” AI-driven document creation services are no doubt on the horizon. Indeed, a recent poll by the International Legal Technology Association found that North American law firms already see artificial intelligence as a top legal technology trend.<sup>3</sup>

### The new economy

What does this mean for a typical estate planning attorney? Differentiation and the development of deep client relationships are absolutely crucial. Multigenerational planning is a key component. Engaging grandparents, adult children, and even younger children in sophisticated, positive, and proactive ways is an important way to differentiate from “trust mills” or from online services.

Perhaps counter-intuitively, an *awareness* of new technologies and technology-enabled services is another way estate planning attorneys can provide immense value to clients and further differentiate from competition. Rather than fight the development of new technology-enabled services, help clients to join them and use them.

With the rise of development and investment in “new economy” and “on demand” companies—Uber,

Lyft, and Airbnb perhaps the most prominent—opportunities abound to help clients identify and coordinate new services that can assist families across multiple generations. This is especially true in the area of financing and providing long-term care services.<sup>4</sup> A deep understanding of these companies can help families in myriad ways. These can be characterized as “getting help” and “providing help,” as new economy services help elders and their families improve and maintain quality of life.

*Getting help.* Many emerging, venture-backed companies provide services that can help families coordinate home care and selected services. They thereby provide more independence in the long-term care setting to the oldest generation. New services and technologies, for example, provide cost-effective ways to remotely assist and monitor parents’ well-being. Independence can be maximized while safety is ensured. Some companies, like Healthsense ([www.healthsense.com](http://www.healthsense.com)) or Intel-owned CareInnovations ([www.careinnovations.com](http://www.careinnovations.com)) have, for several years, provided remote systems that both monitor and connect seniors at home with physi-

cians, caregivers, and their families. Others are newcomers.

Examples of such startups include Touchstream ([www.touchstreamolutions.com](http://www.touchstreamolutions.com)), and Careangel (<https://careangel.com/>). This space is developing rapidly and must be closely monitored. Yes, advisors must pay attention to their economic viability. New entrants can be acquired. New companies can go out of business.

The world of home care providers is changing as well. Along with nationally established companies like Home Care Assistance ([www.homecareassistance.com](http://www.homecareassistance.com)), venture-backed Honor ([www.joinhonor.com](http://www.joinhonor.com)) and HomeHero ([www.homehero.org](http://www.homehero.org)) provide additional services for families, or older clients themselves, to identify and hire caregivers on a part-time or full-time basis. The future will determine which emerge as the source of highest quality, most dependable services.

In addition to in-home monitoring and caregiving, several “new economy” or “on demand” companies provide services that, while not specifically focused on seniors, can provide great value to elders with limited mobility. In most major markets, groceries can be delivered to the home via Instacart

<sup>1</sup> Gilfix and Gilfix, “A New Paradigm: Truly Multigenerational Planning,” 154 Tr. & Est. 14 (September 2015).

<sup>2</sup> [www.crunchbase.com/organization/legalzoom-com#/entity](http://www.crunchbase.com/organization/legalzoom-com#/entity).

<sup>3</sup> Manglani, “Artificial Intelligence Is a Top Legal Technology Trend in 2015,” [managingpartner.com](http://managingpartner.com), 9/1/2015, available at [managingpartner.com/news/finance/artificial-intelligence-top-legal-technology-trend-2015](http://managingpartner.com/news/finance/artificial-intelligence-top-legal-technology-trend-2015) (last visited 4/29/2016).

<sup>4</sup> Gilfix, Mark, “Technology Innovation and Long Term Care: Report from The Aging 2.0 Expo,” *The Elder Law Report*, April 2016.

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(www.instacart.com). Meals can be delivered via Doordash (www.doordash.com) or Postmates (www.postmates.com), among many others. Seniors at home need not drive; they can get rides on-demand via Uber or Lyft. Uber has started to offer wheelchair-enabled services in some markets. Taskrabbit (www.taskrabbit.com) provides “handyman” and other similar-type services to assist with issues around the home. The sheer amount of these new services can seem overwhelming, indeed.

**Rather than fight the development of new technology-enabled services, help clients to join them and use them.**

It can be difficult to coordinate multiple services to assist with the care of an at-home senior. One venture-backed company, Envoy (www.helloenvoy.com), helps to solve this. Envoy strives to build a one-on-one relationship with families by providing a consistent “concierge.” This “concierge” helps seniors and their families to monitor and coordinate on-demand services. Such services include medication pick up, grocery delivery, and in-home errands and care. Envoy can also provide limited in-home assistance for those who do not yet need professional at-home caregivers, on a relatively low-cost basis. The service is currently available in only selected markets but, like others in this space, it aims to roll out nationally. It behooves estate planning attorneys and family advisors to keep track of these emerging services. They can be a godsend to struggling client families.

**Providing help.** There is another side to the new or “sharing economy” of which attorneys, as family advisors, should be aware. Some elderly clients are highly independent. They are retired, but have expertise, energy, and resources—either assets or skills—that can be leveraged to provide additional income, provide a continued sense of self-worth, and help defray the future cost of long-term care. Retired seniors can greatly benefit by participating as providers in the new economy. Attorneys can help to advise them on options for how to do this. This can be hugely valuable to seniors who have limited income, and who fear the future costs of long-term care.

A recent PricewaterhouseCoopers study estimated that while around 7% of Americans consider themselves to be providers in the “sharing economy,” the figure is 25% for those over age 55.<sup>5</sup> Able seniors can participate as drivers for Uber or Lyft. They can rent unused bedrooms or entire properties through Airbnb (Airbnb.com). They can provide dog-sitting services in their homes through DogVacay (www.dogvacay.com).

The opportunities to earn additional income on a flexible basis are virtually endless. Indeed, a different PricewaterhouseCoopers study predicts that the sharing economy, which was estimated at \$15 billion in 2014, could grow to \$335 billion by 2025.<sup>6</sup>

Understanding the implications of the new economy in the aging and long-term care space can seem daunting. As estate planning attorneys look to enhance the security and well-being of their client communities, it is critical that they accept the challenge and be up-to-date about emerging resources. Connecting clients and their families with relevant services and technologies, either on the “getting

help” or “providing help” side can provide immense value. Simply making them aware of such options is a palpable, valuable service. Providing guidance and expertise in these areas can help to further differentiate an estate planning attorney from auto-pilot planners. It can deepen relationships with families across multiple generations.

### **Illustrations of positive multigenerational planning**

In countless contexts, multigenerational planning is critical to achieving an optimal solution for a client and his or her family. Here are some specific examples with fictitious client names.

#### **Special needs planning**

Autism, bipolar disorder, Down syndrome, and so many other disabilities affect families across America. They discriminate neither for nor against the wealthy, the poor, a particular race, or individuals living in a particular community. They can afflict anyone. The authors have been drafting effective special needs trusts since the mid-1980s and have come to appreciate *the multi-generational planning needs* in this rather complicated area of law.

#### **Consider all sources of funds.**

Mr. and Mrs. Tyler planned carefully for the benefit of their severely disabled child, Fred. He received a monthly check through the Supplemental Security Income (SSI) program. Much of his health-care was paid for by the Medicaid program. Fred lived in a group home that was substantially subsidized.

<sup>5</sup> Zipkin, “The Sharing Economy Attracts Older Adults,” NY Times, 9/25/2015.

<sup>6</sup> “The Sharing Economy—Sizing the Revenue Opportunity,” www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html (last visited 4/29/2016).

<sup>7</sup> 15 U.S.C. section 1648.

A direct bequest by the Tylers to Fred would eliminate his eligibility for these very important programs. Therefore, they prepared a carefully structured special needs trust that would receive a significant portion of their estate upon their passing. The Tylers' attorney incorporated special needs planning into their revocable trust. It provided, in summary, that half of their estate would be retained in a reasonably detailed special needs trust. They did not prepare an independent, free-standing special needs trust (SNT).

When the grandparents of the disabled individual expressed a desire to leave a portion of their estate directly to their disabled grandchild, they faced a challenge and a dilemma. Because of the approach chosen by their son (i.e., the parent of the disabled grandchild), there was no SNT in existence and to which they could leave a bequest. Grandparental efforts to provide for their grandchild were therefore stymied. Their choices were limited:

1. They could leave nothing to their disabled grandchild.
2. They could leave assets directly to their disabled grandchild, creating problems with eligibility for government benefits.
3. They could prepare a SNT to receive assets they would leave their grandchild. None of this should be necessary.

The Tylers then revised their estate plan in a way that was "multigenerationally sensitive." It included a free-standing SNT. The grandparents were able to provide for their loved, disabled grandchild by directing a \$75,000 distribution to the SNT on their passing.

Mr. Tyler's parents are living, in good health, and blessed with a reasonably large estate. Mr. Tyler

developed serious health problems, making it likely that he would predecease his parents.

The grandparents therefore made other changes that were necessary in light of their family's needs. Their previous trust contained two standard provisions. If their child, Mr. Tyler, predeceases them, his share of the estate would go directly to his two children. If this happens, Fred would inherit money, lose eligibility for government benefits and face multiple planning challenges. The Tylers' special needs planning would be undermined.

The authors advised the Tylers to communicate this problem to his parents, as well. Their trust now provides that the share that would go to Fred will instead go to his SNT.

By involving both the parents and grandparents in the planning process, beneficiary designations for life insurance policies were modified. IRA beneficiary designations were modified. Planning steps were taken to preserve the grandparents' convenient, one-story house to be preserved for the disabled grandchild. They were disappointed with their estate planning attorney, who was well aware of their grandchild's status and challenges, yet took no planning steps to take them into account.

### Reverse mortgage

Reverse mortgages are much publicized. In newspapers, advertisements routinely embed a photograph of Ronald Reagan, who signed federal legislation providing for federal guidelines and protections for home equity conversion mortgages (HECM) in 1988.<sup>7</sup>

The advertisements, which also and routinely appear on television, explain the ease with which lump-sum payments or monthly distributions can be made. "If you own a home, you can obtain a reverse

mortgage." It is nirvana, the Holy Grail of long-term care planning. Far too often, however, reverse mortgages have unintended, catastrophic consequences.

**Loss of the family home.** Mrs. Lee was a very proud woman who wanted to stay in her home. She and her long-deceased husband purchased the property in 1964 for \$10,000. They divorced years ago, and she became the sole owner of her home. By geographical happenstance, the property was worth \$1.4 million when her planning needs recently became acute. Her only income was from Social Security. Her modest savings totaled no more than \$40,000.

As she approached her 80<sup>th</sup> birthday, severe arthritis and other health challenges made it very difficult, even dangerous for her to remain alone at home. Her doctors told her that they would insist on

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## EXHIBIT 1 Client Checklist for Multigenerational Planning

1. Describe your family.
  - Do children or grandchildren have disabilities?
  - Do they face financial challenges (i.e., are they spendthrifts or exhibit other financially dangerous behaviors)?
  - Do any family members face divorce?
2. Do you have long-term care insurance?
3. Do your parent's have long-term care insurance?
4. Have you prepared dynasty trusts for your children?
5. Do you face any serious health problems (directly or indirectly, ask about forgetfulness, dementia)?
6. Do your parents face any cognitive issues?
7. Have you made plans for your own long-term care if the need arises?
8. Have your parents planned to pay for the cost of long-term care?
9. How important is it to you that you avoid being in a long-term care facility and that you stay at home?<sup>11</sup>
  - Do you plan on using the equity in your home to pay for such care?
10. Do your parents want to stay at home and avoid being in a long-term care facility?
  - If so, do they have the financial resources to pay for home care?
  - Have they taken any steps to obtain a reverse mortgage?
11. If you plan on leaving assets directly to your children, are you highly confident that they will properly manage and protect inherited assets?
12. Do you plan to provide for your existing or future grandchildren in your planning?
13. Are you aware of the estate planning approach chosen by your parents?
  - Are you aware of the size of their estate and how much you might inherit?
  - Do they provide for a direct distribution to you or would it be held in a dynasty or other trust?
  - Do you have property such as a cabin in the mountains or lake house that you want to keep in the family for future generations?

a move to a nursing care facility unless she obtained at least 30 hours of care per week. The cost for this service through an agency would approach \$40,000 per year.

Although Mrs. Lee had two children who were in solid financial help, she did not want to worry them. Classically, she said "I don't want to be a burden to my children."

Her very fundamental estate plan was done by a local attorney. At a senior center, Mrs. Lee heard about reverse mortgages. She asked her attorney about it. Her attorney offered to review the reverse mortgage contract to be sure that there were no pitfalls or surprises.

Mrs. Lee obtained a reverse mortgage. Given the value of her home, she was convinced that she would have sufficient funds to pay

for needed home care for the rest of her life.

For the next two years, Mrs. L used monthly distributions from the reverse mortgage lender to pay for home care services. She was very pleased. The debt to the lender soon exceeded \$140,000, partly because she incurred significant costs in establishing the loan. A high but not unreasonable interest rate was charged and compounded.

Mrs. Lee's health significantly deteriorated, to the point where placement in a skilled nursing facility was unavoidable. The cost would be \$9,000 per month.

The terms of her reverse mortgage provided that a permanent move out of her home compelled repayment of the loan. This was not a surprise to Mrs. Lee. As she

reluctantly moved into a skilled nursing facility, she put her home on the market. Net proceeds from the sale of her home totaled \$1,210,000. Given her extraordinary low cost-basis of \$10,000, she had \$1.2 million in capital gain.

She was able to protect the first \$250,000 of capital gain from tax exposure.<sup>8</sup> This left her with \$950,000 of unprotected capital gain. Her capital gains tax was approximately \$300,000.

Mrs. Lee was unaware of the fact that, had she retained ownership of her residence in California, she would have immediately qualified for Medi-Cal, California's version of the federal Medicaid program.

<sup>8</sup> Section 121(b).

<sup>9</sup> Cal. Code Regs., title 22, § 50425.

Medi-Cal would have been available to pay for approximately 90% of the cost of nursing home care.

This is possible because a residence is an “exempt resource,” which means that its value is not counted in determining eligibility for Medi-Cal.<sup>9</sup> In virtually every other state in the country, a residence is exempt only if an unmarried individual is not living in the property and it is valued at no more than approximately \$850,000. California, however, is an exception to this rule. California currently has no cap on the value of an exempt residence.

Because Mrs. Lee sold her home, she netted just over \$900,000 after taxes were paid. She was not eligible for Medi-Cal because of her liquid assets. She commenced paying \$9,000 per month for nursing home care. Two years later, her death occurred. During those years in the skilled-nursing facility, she used approximately \$215,000 from her savings. Only then, did her children understand steps she took—or failed to take—as she planned for her final years.

**Downside of reverse mortgages.** In Mrs. Lee’s situation, as is so often the case, the reverse mortgage was an arguably avoidable, extraordinarily expensive exercise. When the home was sold, Mrs. Lee lost \$300,000 to capital gains taxes. Of the money repaid to the reverse mortgage lender, \$38,000 represented costs of the loan and accrued interests. She also spent \$215,000 on the cost of skilled nursing care. This represents a loss or reduction in her estate of approximately \$540,000.

**Alternatives to reverse mortgage—multi-generational planning.** Had Mrs. Lee communicated with her children and shared her circumstances, a dramatically different

option was available to her. Both of Mrs. Lee’s children cared deeply for her. They tried to help her, but she would not allow it. They also had very strong feelings about the family home in which they were raised and that was a major part of their lives. They wanted to preserve it.

**The reverse mortgage was an arguably avoidable, extraordinarily expensive exercise.**


Mrs. Lee’s son and daughter were financially able to pay the cost of home care for their mother, had she allowed them to do so. Her children could have paid these costs either in the form of a loan—to be secured by the residence—or by simply supporting their mother. Had they taken the latter course, one of them could have taken their mother as a dependent for income tax purposes and perhaps deducted a portion of the cost of care as a medical expense on their income tax returns.

Had they planned together and understood the options, a reverse mortgage would not have been

obtained. This means, in turn, that the rather expensive reverse mortgage loan would not have existed, and there would be no repayment responsibilities. Also, the home would not have been sold when Mrs. Lee moved to a skilled nursing facility. Furthermore, she would have qualified for Medi-Cal, which would have paid almost the entire cost of skilled nursing care for the rest of her lifetime. With competent planning, a payback or reimbursement to the state Medi-Cal program could have been entirely avoided. Finally, a stepped-up basis would have occurred upon her passing, allowing the children to retain the home or sell it without incurring any capital gains tax whatsoever.

All combined, well over \$500,000 could have been saved for the next generation. Had the children assisted their mother financially, this would have been the best investment they made in their entire lifetimes.

Planning for Mrs. Lee and her family requires knowledge of diverse tax issues and Medicaid eligibility criteria. Given the dollar values involved, it is no surprise that the number of attorneys developing expertise in this area is growing dramatically. Nevertheless, far

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too many estate planning attorneys remain woefully unaware.

### Dynasty trust planning

Gore Vidal, the iconic writer, noted for his acerbic wit, once famously quipped: “Don’t have children, have grandchildren.” As was usually the case, Mr. Vidal captured a widespread sentiment. Individuals can see the flaws and failings in their children, but their grandchildren are perfect.

Rare is the grandparent who does not want to provide protectively for their grandchildren. They may not enunciate this objective, but it lurks barely below the surface. Yet, how many estate planning attorneys guide clients to provide rather simply for the direct distribution of the estate to the children? The typically unstated hope is that the children will take care of the grandchildren. But what if they do not?

Anyone can face a devastating illness, a serious accident, divorce, bankruptcy, or premature death. Assets inherited from parents may not necessarily be there for the next generation.

Perhaps the most obvious of multi-generational planning is the inclusion of dynasty trusts in estate plans for the benefit of future generations. Mothers (grandmothers, particularly) appreciate the fact that assets inherited in such a trust are presumptively protected in the event that a child ever endures a divorce. Such trusts often enjoy a rather high level of protection from litigious attacks. This substantially increases the likelihood that assets will be there for the next generation. Where the child or children are not capable money managers, responsible fiduciaries can be named as trustees to protect and preserve assets, as well as make them available for use by future generations.

Best known, of course, is the generation-skipping tax benefit. For the vast majority of families, assets left in such trusts can grow without limit and pass intact—and without exposure to estate tax—to the next generation. In California, for instance, this is limited to two or three generations by the Rule Against Perpetuities. Many states, including Nevada and South Dakota, have abandoned the rule and allow such trusts to act for multiple generations.

**Recommend to clients who have living parents a review of the estate plans put in place by their parents.**

*Planning tip.* Consider taking this approach one step further: Recommend to clients who have living parents a review of the estate plans put in place by their parents. At minimum, obtain permission to inquire of their parents or their parents’ attorney about the existence or non-existence of dynasty trust planning.

If the client has a potentially taxable estate, an inheritance exposes those assets to estate tax upon the client’s passing. If the client’s parents modify their estate plan to leave assets for their children and grandchildren in dynasty trusts, estate tax exposure by inherited assets can be avoided, perhaps saving 40 cents on the dollar. The savings can be significant. The satisfaction can be overwhelming.

On one level, such multigenerational planning is obvious. Routinely involving multiple generations and planning for disabled individuals, however, is very much out of the ordinary.

### Multigenerational checklist

Estate planners should use a multigenerational checklist for every client. As the extraordinarily impactful work of Atul Gawande teaches in the world of medicine,<sup>10</sup> everyone needs a step-by-step checklist if no issues are to be missed and if no opportunities are to be lost.

Exhibit 1 contains a sample checklist of questions to ask clients when initiating multigenerational planning. This list is not intended to be exhaustive. Rather, it includes multi-generational planning issues that most typically present themselves. Each of the questions suggests the issues that are to be discussed if there is an affirmative response.

### Conclusion

Multigenerational planning is not for everyone. But it is for those clients who enjoy positive, supportive relationships with their children and grandchildren. The benefits—in terms of asset protection, quality of life, and pure satisfaction—are bountiful.

It is also a “win-win.” By nurturing involvement of younger generations in the planning process, services and technologies emerging in the new economy will be more readily adopted. Myriad tax, long-term care, and other planning challenges can be addressed with greater success. The client communities, therefore, win.

It is also a win for estate planning professionals who will provide better, more comprehensive service and be a part of the new economy rather than a victim of the new economy. ■

<sup>10</sup> Gawande, *The Checklist Manifesto* (Henry Holt and Company, 2009).

<sup>11</sup> For discussion of such planning see Gilfix, “Estate Planning for Clients Who Want to Stay Out of a Nursing Home,” 32 ETPL 29 (November 2005).