
Four Weeks & A Funeral

Consideration for the Two Weeks Prior to Death and the Two Weeks After Death

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This presentation is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients.

Introduction/Context

- Checklist
- Top 20 List
- References to Outline on Slides

1. Who can I talk to prior to a client's death?

- **Client's legal representative**
- **Get pre-authorization from client (HIPAA Release for Attorneys)**
- **MRPC Rule 1.14 Client With Diminished Capacity**

1. Who can I talk to prior to a client's death? (cont.)

MRPC Rule 1.14 Client With Diminished Capacity:

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

2. Authority under Power of Attorney

- A version of The Uniform Power of Attorney Act (UPOAA) has been adopted by 37 states.
- Authority to “do all acts that the principal could do”: UPOAA §§201(c) and 203
- Hot powers: UPOAA §201
- Examples of ambiguity in hot powers

3. Gifting under Power of Attorney

- **Gifting Power Nuances: UPOAA §§201(a), 201(c) 213, & 217**
- **“Authority” carve backs**
- **Case Law**
 - Estate of Casey v. Comm’r, T.C. Memo. 1989-511, rev’d, 948 F.2d 895 (4th Cir. 1991).
 - Estate of Ridenour v. Comm’r, T.C. Memo. 1993-41, aff’d, 36 F.3d 332 (4th Cir. 1994).
- **Gifting from revocable trust**

4. Access To Digital Assets under Power of Attorney

- **47 states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) or the Uniform Fiduciary Access to Digital Assets Act (UFADAA), a prior version of RUFADAA**
- **General grant for disclosure of digital assets.**
 - RUFADAA §10 and UFADAA §6(b)
- **Specific grant for electronic communications of principal**
 - RUFADAA §9; UFADAA §6(a) ; and UPOAA §201(a)(8)

4. Access To Digital Assets under Power of Attorney (cont.)

- **Cryptocurrency Language in Hot Powers:**

“To have access to and authority over the content of my electronic communications as provided by RUFADAA §9, which authority shall include, but shall not be limited to . . . cryptocurrency owned by me, any program or account that holds cryptocurrency owned by me, other online accounts, and similar digital or comparable items that currently exist or may exist as technology develops.”

“To purchase, sell, trade, or invest, directly or indirectly, in any form of cryptocurrency.”

5. Probate Avoidance

- Oftentimes, the easiest and most impactful actions that can be taken pre-death
- Confirm and verify ownership and titling of the client's assets.
- Review beneficiary designations, transfer on death designations, and payable on death designations.
- Avoiding Ancillary Probate
- Consider conveying out of state real property into revocable trust or entity

6. State tax considerations

- **Consider residency of Trustee for state fiduciary income tax**
- **Consider state estate/inheritance tax planning options**

7. Threshold Tax Planning Issues

- **Transfer tax and income tax**
- **Effect on Dispositive Plan**
- **Fiduciary Authority/Risk**

8. Transfer Tax Planning

- Maximize valuation discounts, devalue estate
- Value in spousal trust planning (whether A-B or marital) despite portability
- Utilizing GSTT exemption
- Powell case issues

9. Simple Gifting Techniques

- Utilize Annual Exclusion; issue with equality
- Gifts to non-charitable beneficiaries by check must have cleared before death: Rev. Rul. 96-561
- Estate of Demuth v. Commissioner, T.C. Memo 2022-72.
- Utilize unlimited exemption for direct payment of education and medical expenses, can prepay tuition: TAM 199941013
- Gifting high basis assets

10. Income Tax Planning

| 2025 Federal Tax Brackets | |
|---------------------------|------------------------|
| Tax Bracket/Rate | Married Filing Jointly |
| 10% | \$0 to \$23,850 |
| 12% | \$23,850 to \$96,950 |
| 22% | \$96,950 to \$206,700 |
| 24% | \$206,700 to \$394,600 |
| 32% | \$394,600 to \$501,050 |
| 35% | \$501,050 to \$751,600 |
| 37% | \$751,600 or more |

- **Rev. Proc. 2024-40**
 - **Exhibit B**

10. Income Tax Planning (cont.)

- **Pick the taxpayer**
- **Accelerating Income (retirement assets)**
- **Accelerating Deductions**

11. Basis Planning

- **Minimize valuation discounts**
- **Consider a trust distribution or termination to a dying client to receive the basis step-up in the assets**
- **Consider an asset swap of low basis assets for high basis assets in a trust in which the grantor has a swap power**

12. I.R.C. § §1014(e) and 1015

- Unrealized loss preservation
- Consider Ricochet Gift to obtain step-up in basis
- Appreciated property acquired by a decedent does not receive a basis adjustment when such property:
 - (1) passes to an individual from whom or from whose spouse the decedent acquired property by gift within one year before the decedent's death; and
 - (2) the fair market value of the property exceeds its adjusted basis.

13. End-of-life Medical Decisions

- **Absence of advance medical directive**
- **Conflict between agent's healthcare decisions and principal's healthcare instructions**
- **DNRs & POSTs**
- **HIPAA: sharing of medical information prior to principal being deemed incapable of making an informed decision**

14. Immediate Post-Death Issues

15. Who can I talk to after a client's death?

After client's death prior to qualification

The ACTEC commentaries to the MRPC state, “A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would **promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention**. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.” The ACTEC Commentaries on the Model Rules of Professional Conduct, 5th Ed. (2016).

*Reminder that Agent's authority under power of attorney ceases upon death. UPOAA §110(a)(1)

16. Burial & Funeral Issues

- **Who has authority to make decisions?**
- **Defining Next of Kin under State Law**
- **Burial Directives**
- **Funeral Expenses**

17. Authority & Control of Assets Following Death

- **Authority to File and Pay Income Taxes**
 - **I.R.C. §6012(b)(1): “If an individual is deceased, the return of such individual . . . shall be made by his executor, administrator, or other person charged with the property of such decedent.”**
- **Successor Trusteeship of Revocable Trust**
- **Preserving Property of Decedent**

18. Pre-Qualification Powers of a Personal Representative

- **Uniform Probate Code § 3-701**

“The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to the decedent’s body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.”

- Nineteen states have enacted some form of the UPC

19. Venue for Probate

Uniform Probate Code §§3-201 through 3-204:

“Venue for the first informal or formal testacy or appointment proceedings after a decedent’s death is: (1) in the [county] where the decedent was domiciled at the time of death; or (2) if the decedent was not domiciled in this state, in any [county] where property of the decedent was located at the time of death.”

Consistent definition of Domicile?

Domicile versus residence for income tax purposes?

20. Conflict of Laws

- **Uniform Probate Code §3-202:**

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.

- **Overlapping Venues**

21. Disclaimers and Insolvency

To qualify as a valid disclaimer for federal tax purposes and state law purposes, the disclaimer “cannot be made with respect to any interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer.” Treas. Reg. §25.2518-2(d)(1).

Disclaiming to Avoid Application of IRC §1014(e)

Ability of an agent to disclaim for principal under power of attorney

UPOAA §§201(a)(9); 211

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