LEGAL MATTERS WHEN A LOVED ONE DIES

Nothing can be more stressful and heartbreaking than the loss of a loved one. Even worse can be the legal and financial matters left behind after their passing. Discover what can be done to ease this transition and secure your financial future.

Kenneth J. Simmons, Jr. & Marco A. Schiavo,
with Craig R. Hersch

THE ESTATE SETTLEMENT PROGRAM™
Expertise. Comfort. Clarity.

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Published and printed in the United States of America

ISBN-13: 978-1974222858
ISBN-10: 1974222853

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 For information, please contact the Authors by email to Kenneth J. Simmons, Jr. at ksimmons@sslawoffices.com or by mail Kenneth J. Simmons, Jr., Esquire, Simmons & Schiavo, LLP, 400 TradeCenter, Suite 4800, Woburn, MA 01801, or by email to Marco A. Schiavo at mschiavo@sslawoffices.com or by mail to Marco A. Schiavo, Esquire, Simmons & Schiavo, LLP, 400 TradeCenter, Suite 4800, Woburn, MA 01801. You can also contact the co-author by email at craig@4freedompractice.com or by mail at Craig R. Hersch, The Freedom Practice, 9100 College Pointe Court, Forty Myers, FL 33919.

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Preface

It is never easy losing somebody that you love. Even worse, when a spouse, father, mother, or other loved one dies, there are legal matters to take care of. The attorney tells you that a probate may be necessary, or if a revocable living trust is in place, there will be trust administration matters to tend to.

The CPA wants to speak to you about tax strategies while your financial advisor has IRA required minimum distribution, capital gain, and asset reallocation issues that she wants to implement.

It's all so overwhelming—especially during a time of great stress.

Where do you turn?

Who should you trust?

What about the bills that have to be paid?

It's enough to make even the strongest-willed person want to crawl into bed and pull the covers tight over one's head.

That's where this book comes in.

During the course of our professional careers, which began in 2002, we've represented hundreds of families, administering their loved one's estates. We not only understand how all three sides—legal, tax, and financial—of a probate or trust administration should interact, but we've also served in the trenches helping families arrive at smooth and successful outcomes.

Our goal, therefore, in writing this book is to first arm you with general information that you will need when you work with your attorney, CPA, and financial advisor after the loss of someone dear to you. After that, we'll review our firm's unique process—The Estate Settlement Program™— that provides comfort and clarity when dealing with the legal, tax, and financial issues following a loved one's death.

Now that we've told you what this book is, please allow us to tell you what this book is not. It is not a "how-to probate manual." We believe one should surround oneself with a team of qualified professionals who each understand their respective roles and can work together to get the job done right.

There is simply too much information one needs to know and too many traps for the unwary for anyone to successfully navigate this on their own—especially in a time of grief. We have therefore boiled the essentials down so that you can understand the big picture. For us to write something that would cover each possible scenario and the details that one would have to understand for a successful outcome would result in not one book, but in several volumes of legalese.

You wouldn't have the time or stomach to read that anyway.

So if you are reading this book, we assume that you may have recently lost a loved one. Allow us to express our condolences. We've all lost loved ones; it's part of being human. But that doesn't take away the pain. Not only have we personally suffered the loss of loved ones—but our legal practice also involves interacting with people just like you every day.

You'll survive this moment. Our hope is that these words provide a ray of comfort and clarity in what may feel like the darkest night.

Since we are Massachusetts attorneys, this book is written with Massachusetts law in mind. Each state's laws are different, so you will want to check with a qualified lawyer in your jurisdiction before acting. This book is not intended to convey specific legal advice to you or to form an attorney- client relationship. No such relationship can be formed with us or our firm without a written engagement agreement. Therefore, any email, telephone, written, or other communication with our office prior to a formal engagement would generally not be governed by any attorney- client privilege.

While every effort was made to convey current information at the time that we wrote these chapters, probate, trust, and tax laws change constantly. Because we intended for this book to be a broad overview of the issues families face when a loved one dies, we intentionally omitted many of the details, caveats, and exceptions to the general rules that may apply to specific situations.

We welcome your comments, questions, and criticisms—and especially your kudos! Feel free to reach us at:

Kenneth J. Simmons, Jr., Esquire
Marco A. Schiavo, Esquire
Simmons & Schiavo, LLP
400 TradeCenter, Suite 4800
Woburn, MA 01801

ksimmons@sslawoffices.com
mschiavo@sslawoffices.com

www.simmonsandschiavo.com
Tel: 781-397-1700

Chapter One

Where to Start

It's always a difficult time when you lose a loved one. Usually, one of the first places one visits will be the lawyer's office that drafted the will or trust. The will or trust isn't usually read to a gathering of family "Hollywood style." Rather, the lawyer discusses the administrative steps that the personal representative (executor of a will) or trustee (of a trust) must take before distributions are made to the beneficiaries.

You don't want to wait too long before visiting with the attorney, since there are both legal and tax time deadlines. With that said, visiting the attorney's office during the immediate days following the passing isn't usually helpful either, as the shock of the loss numbs the senses. Our suggestion is to wait a week or more, unless the parties are only in town for a few days and need to initiate the administrative process prior to heading home.

The question therefore arises as to what you need to bring to the attorney's office when a loved one dies. The following is a laundry-list of items that will make that first meeting go more smoothly:

1. Original of the last will, revocable trust, and any codicils or amendments;
2. Certified copy of the death certificate;
3. Copies of most recent bank and brokerage statements;
4. Certificate of Deposit statements;
5. Savings bonds;
6. Copies of deeds to real property;
7. Copies of stock certificates;

8. Most recent Form 1040 Income Tax Return;
9. Federal Gift Tax Returns Form 709s previously filed;
10. Estate Tax Return Form 706 for predeceased spouse, if any;
11. Information related to any unreported taxable gifts;
12. Information regarding loans, notes, mortgages, and indebtedness;
13. Most recent credit card statements;
14. Amounts paid or forwarded for burial, clergy, service, and reception;
15. Addresses and contact information of family members who may be beneficiaries, as well as those serving as co-personal representative and/or trustee;
16. Names and contact information of financial advisors, insurance agents, CPAs, tax return preparers, and other such professionals;
17. Copies of ownership interests in closely held businesses and any shareholders or partnership agreements that the deceased may have been a party to;
18. Prenuptial or postnuptial agreements, if any;
19. Copies of trusts and related account statements of which the deceased was a beneficiary at the time of his or her death;
20. Copies of irrevocable trusts that the deceased created, such as an Irrevocable Life Insurance Trust, Grantor Retained Annuity Trust, Qualified Personal Residence Trust;
21. Copies of account statements, deeds, Crummey notices and other such relevant information if decedent created an irrevocable trust;
22. Tangible personal property lists signed by the deceased that directed the distribution of such;
23. Automobile titles;
24. Information related to any safety deposit box leased;
25. Life insurance policies and statements, including copies of the beneficiary forms;
26. Annuity information, including gift annuities;
27. Beneficiary claim forms for IRAs, 401(k)s and annuities.

Each situation is different, so there may be items that we have not included on this list that are pertinent. Certainly not everyone will have all of the suggested items, and it will almost always take time to marshal all of this information.

The more information that you can quickly provide your attorney, the better.

You may have questions about what bills to pay and from what source. When a spouse survives the deceased and there are joint bank accounts, normally bills can continue to be paid from the joint account.

If there is no surviving spouse, or in second marriage situations where the couple kept separate finances and have separate beneficiaries in their estate plans, bills would generally be paid from the deceased's assets. The deceased's durable power of attorney ceased at death, so that authority terminated. So bills may be paid from funds inside of a revocable trust (discussed in Chapter Four) or if the accounts are all titled in the deceased's name individually, from an estate account once a probate is opened (discussed in Chapter Two).

If there is a possibility that the deceased's assets are less than the sum total of all of his or her debts and obligations, don't pay anything until you meet with the probate attorney. This is due to laws that govern which bills should be paid first, and in what proportion. If you simply write checks until all of the deceased's assets are exhausted, you may end up being personally liable to pay some of the deceased's creditors from your own pocket.

You should also know that the deceased's estate/trust pays the attorney's fees and costs associated with the administration of the estate, including the priority of paying the deceased's bills. Attorney fees are also tax deductible to the estate and/or trust. So don't be afraid to seek legal advice.

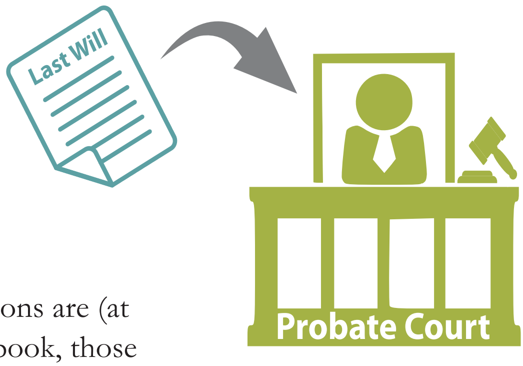
Next, we'll review what exactly it means to probate a will.

KEY TAKEAWAYS

- DON'T WAIT TOO LONG TO VISIT THE ATTORNEY FOLLOWING THE DEATH OF A LOVED ONE
- YOU WILL NEED TO BRING A NUMBER OF DOCUMENTS TO THE ATTORNEY TO MAKE THE MEETING GO MORE SMOOTHLY
- THE DECEASED'S ESTATE/TRUST PAYS THE ATTORNEY'S FEES AND COSTS ASSOCIATED WITH THE ADMINISTRATION OF THE ESTATE

Chapter Two

What is Probate?



Many people who visit us in our office are under the misimpression that all Wills avoid probate. False. Some people believe that if their estate is less than whatever the Massachusetts or federal estate tax exemptions are (at the time that we wrote this book, those exemptions stood at $2.0 million and $13.99 million respectively), then there won't be a probate. That's false too.

Almost any asset that is subject to disposition by your loved one's Will is actually distributed by the probate process. Understanding what probate means is therefore crucial to understanding these issues.

Probate is a legal process under which the deceased's assets are transferred to their beneficiaries. The Last Will is filed with the probate court in the state and county in which the decedent resided at the time of his or her passing. This is known as the "domiciliary estate." The personal representative (executor) in the Will petitions the court for "Letters of Authority" which gives the personal representative the authority to transact business on the estate's individually held accounts.

It does not matter whether bank and brokerage accounts are held in the same state in which the probate is opened. A bank account in New York, for example, is governed by the probate court in Massachusetts.

If, however, the decedent owned real property in his or her individual name in another state, then an "ancillary probate administration" must usually be opened in that state. If the real estate is held in a trust, corporation, partnership, LLC, or in joint name, then the ancillary administration is usually not necessary.

Why is probate necessary? It's not just for attorneys to make fees, as many might expect. The probate process actually "protects" both the beneficiaries of your estate, as well as any potential creditors and of course, the taxing authorities.

Imagine that there was no probate process. Suppose in a codicil to his Will your Uncle Ed left you his entire estate. But what if Uncle Ed dies and your cousin brings a copy of his old Will into the bank and asks that his accounts be distributed to him pursuant to the Will. How does the bank know that this is really Uncle Ed's Last Will? What if your cousin beat you to the bank and you didn't realize it? What recourse would you have once the bank distributed everything to your cousin? The probate process protects against just this scenario and many others.

If you submit a Will as the Last Will of Uncle Ed to the court and someone else submits a codicil to the Will to the same court, we now have a centralized system that can ensure Uncle Ed's wishes are carried out. The personal representative marshals all of the assets of the deceased and files an inventory with the court so all interested parties can determine in full light what the estate is worth. They can also question if the inventory is complete or may be missing assets.

Massachusetts law provides that creditors have one year from the date of death to file a valid claim against the estate. There are laws that deal with creditors, how they are to make claims, and how the personal representative may object to any such claim. The personal representative must satisfy certain requirements to make sure creditors are made aware of a decedent's passing and have an opportunity to file a claim. We discuss this in more detail in Chapter Three below.

Once all of the creditor claims have either been dealt with and all tax clearances have been obtained, the personal representative submits an accounting of the estate to the court. All of the income and expenses are listed, as are items of capital gain and loss. The personal representative presents a schedule of proposed distributions pursuant to the terms of the Will.

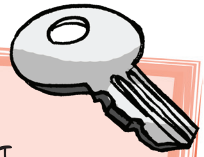
The distributions may be to beneficiaries, to trustees of testamentary (after death or continuing) trusts established under the terms of the will or, in the case of a pour-over will, to the decedent's trust that was created during his or her lifetime.

All of the beneficiaries have the chance to object to any item listed in these petitions, and can appear before the court. A judge decides if any objection has merit.

Once all of the distributions have been made, the personal representative petitions to close the estate and be discharged from further obligations as a fiduciary for the estate.

As you can see, probate is actually a strictly supervised court (public) process. It is very hard for any "monkey business" to get by a judge. We'll compare this process to a trust administration in Chapter Four.

In the next chapter we'll review the duties that you may have if you are named and choose to accept the responsibilities of the office of personal representative of your loved one's estate.



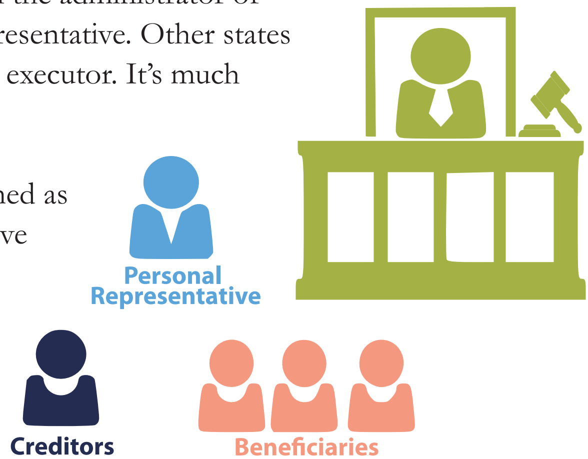
KEY TAKEAWAYS

- PROBATE IS A LEGAL PROCESS WHERE:
  - WILL IS ADMITTED TO PROBATE COURT AS MOST RECENT VERSION
  - COURT APPOINTS PERSONAL REPRESENTATIVE
  - ASSETS MARSHALED
  - CREDITORS NOTIFIED AND PAID
  - TAXES PAID
  - ACCOUNTINGS FILED
  - DISTRIBUTIONS COMPLETED
  - PERSONAL REPRESENTATIVE DISCHARGED

Chapter Three

Acting as the Personal Representative

In Massachusetts, we call the administrator of the will the personal representative. Other states refer to this office as the executor. It's much the same thing.



Just because you are named as the personal representative in your loved one's will does not necessarily mean that you must serve. Before acting in this capacity, understand that the role is a fiduciary one—meaning that you have a duty to act impartially when administering the estate. This means that the personal representative has a legal duty to treat all of the other beneficiaries of the estate, as well as the creditors of the estate, fairly and in accordance with the law.

Often, the surviving spouse, an adult child, or other family member is named to serve in the role as personal representative, and that person may also be a beneficiary. A beneficiary serving as the personal representative has a "conflict of interest" since they have a personal stake in the handling of their fiduciary responsibilities.

We are not suggesting that as a beneficiary, a spouse, child, or other loved one should not serve. What we are saying is that one must be especially conscious of this conflict, and should work closely with their attorney to ensure that they fulfill the responsibilities without prejudice. Usually this is accomplished just fine and without problem.

When acting as the personal representative, you will be interacting with the estate's professional team, including the attorney, CPA, and financial advisor. The personal representative's first course of action would be to provide the attorney the asset information for the estate as we described under Chapter One. If you have the original will, you will need to give that to the attorney, who will file that with the probate court, along with the Petition for Probate admitting the will into probate and requesting the Letters of Authority be issued granting you the authority to serve.

Once you have the authority, then you (or your attorney's office) will provide certified copies of the Letters of Authority to the various banks and brokerage firms to transfer the assets into the estate name. You may also open an estate checking account from which you can write checks and pay the deceased's bills. In Chapter Nine, we discuss the decedent's and estate's bank accounts.

The personal representative has a legal duty to preserve the value of the estate's assets. When cash and investments are a part of the estate, the "prudent investor rules" apply. If the estate assets should drop in value significantly during the course of the administration and the personal representative did not follow the "prudent investor rule," then the personal representative could be liable to the estate beneficiaries who are adversely affected. In Chapter Eight, we discuss how you should work with the financial advisor to limit this liability.

In Massachusetts, the personal representative has a formal duty to directly notify known creditors of the decedent's death. In addition, creditors (known and unknown) are put on notice by requiring the personal representative to publish notice one time in a local newspaper. Creditors may include mortgage lenders, doctors, hospitals, ambulance services, credit cards, car loans and such other debts that your loved one may have had at the time of his or her death.

Creditors have a period of one year from the date of death to file a claim against the estate. If they fail to file a claim within the statutory (legal) time period, they are forever barred from collecting their debt— unless they are a secured creditor such as a mortgage lender or qualify for one of a limited number of statutory exceptions.

We are often asked whether the personal representative or the beneficiaries are personally responsible for the decedent's debts and obligations. The general answer to that question is "no," so long as the legal creditor's notice requirements are satisfied, and the person so inquiring is not a joint obligor under the account or debt in question.

But the general rule is thrown out the window if the legal requirements are not satisfied. That is when you may have to pay a valid creditor of the estate from your own pocket. Administrative trustees of a revocable trust should also pay close attention to the creditor notice requirements, as we detail more fully in Chapters Four and Five.

Another creditor question relates to invoices or bills in dispute. The probate court provides a venue to object to an incorrect or disputed bill. The personal representative generally has an opportunity to file an objection to a creditor claim. A valid reason for the objection must be alleged in the objection. If the creditor wishes to pursue the claim, then he or she may proceed forward and file a lawsuit against the estate.

If a creditor's claim is filed and an objection is not filed within the legal time period, the claim is presumed valid.

Once the creditor's notice period expires and all creditor claims are satisfied or otherwise dealt with, the personal representative should work with the estate's CPA or tax return preparer to ensure that all proper income and estate tax returns have been filed, and that reserves to pay any tax due and preparation fees are accounted for.

If a federal estate tax return (Form 706) or Massachusetts estate tax return (Form M-706) is due, the estate must file it and pay the taxes due within nine months of the date of the decedent's death. We review taxes in greater detail in Chapter Ten.

Once the creditor claims and taxes are finalized, the personal representative must provide an accounting to the estate's beneficiaries. Usually, the personal representative will give this information to the attorney, who will put it in the proper legal form to file with the court and serve on all of the beneficiaries. The accounting includes the following:

1. The date of death value of the assets subject to the estate administration;
2. Capital gains or losses on the sale or disposition of the assets;
3. Income earned during the administration;
4. Expenses paid or reserves set aside to pay expenses;
5. Professional fees (legal, accounting, tax);
6. Personal representative fees;
7. Costs of the administration;
8. Funeral and other related costs;
9. Specific distributions or bequests;
10. Amounts available for final distribution after specific distributions;
11. Proposed final distribution to the beneficiaries or to establish testamentary trusts as provided under the will (Chapters Eleven & Twelve)

The beneficiaries may choose to assent (agree in writing) to the account, have a stated period of time in which to object to the accounting, or may even waive a formal accounting. Once the accounting process is completed, the personal representative will petition the court to close the estate and discharge the himself or herself from further responsibilities.

As you can see, this is a big job with a lot of responsibility. Massachusetts law entitles the personal representative to take a fee for his or her services. A reasonable fee is prescribed under the statute. The fee would be reported as ordinary income subject to income tax, the same as when professionals must pay income tax on the fees they receive. Depending upon the circumstances of the estate in question, the personal representative may or may not wish to take a fee.

In addition to fees, the personal representative may be reimbursed for any costs that he or she forwarded on behalf of the estate (see Chapter Seventeen). Costs include travel, hotels, meals, rental car, gas, phone, clergy tips, funeral expenses, reception costs, and such other reasonable expenses paid out of the personal representative's own pocket. Cost reimbursement is not taxable as income to the personal representative, but is a valid deduction for the estate.

We are often asked whether other family member's costs of travel to the funeral can be reimbursed as an estate expense. The general answer to this question is "no." The exception is when the family member is acting as an agent of the estate to assist the personal representative with a duty or obligation. An example of this would be to help the personal representative clean out the house, dispose of personal effects (covered in Chapter Fifteen) that have little or no value, or such similar duties. Keep in mind that any reimbursements or fees paid to agents who assist with these endeavors must be reasonable and will be reported on the final accounting, which all of the other beneficiaries will be entitled to review and object to.

Now that you understand the basics of a probate administration, let's compare that to when your loved one dies with no assets in his or her individual name, but instead has their assets funded into a revocable living trust.

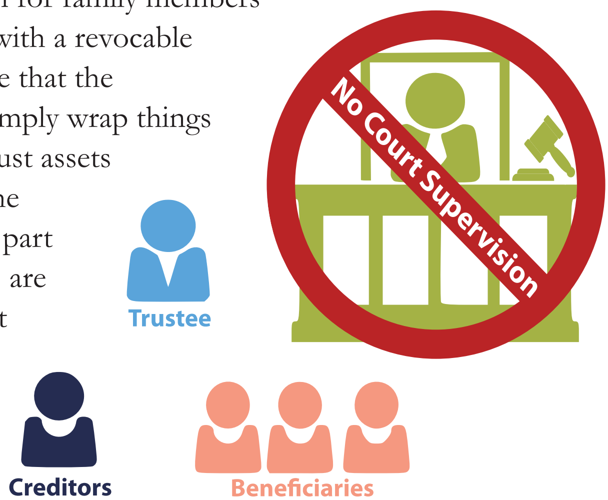
KEY TAKEAWAYS

- PERSONAL REPRESENTATIVE IS A FIDUCIARY OF THE ESTATE AND MUST ACT IMPARTIALLY
- DUTIES INCLUDE:
  - WORKING WITH THE ESTATE'S LEGAL, TAX AND FINANCIAL TEAM
  - NOTIFYING CREDITORS AND PAYING CLAIMS FROM ESTATE ASSETS
  - PRUDENTLY INVESTING ASSETS DURING ADMINISTRATION
  - FILING TAX RETURNS AND PAYING TAXES
  - PROVIDING ACCOUNTINGS
  - MAKING DISTRIBUTIONS

Chapter Four

What is a Trust Administration?

There's much confusion for family members when a loved one dies with a revocable trust. Often they believe that the successor trustee can simply wrap things up and distribute the trust assets right away. That's not the case. When all or some part of the decedent's assets are held in a revocable trust at the time of his or her death, then the successor trustee (see Chapter Five) has many of the same duties that the personal representative has when probating a will, as we described in Chapter Two. Simply said, whoever is serving as trustee must, under Massachusetts law:



1. Marshal the assets of trust—change title of the accounts from the decedent as the original trustee of the trust to whomever is acting as trustee of the administrative trust;
2. Obtain date of death values of the trust assets;
3. Preserve the trust assets (prudent investor rule) during the trust administration;
4. Ensure that all of the decedent's creditors are paid;
5. File all necessary tax returns and ensure that taxes are paid;
6. Prepare and file accountings to the beneficiaries; and
7. Make distribution to the beneficiaries or establish the testamentary trusts (Chapters Eleven & Twelve) created under the terms of the trust.

With that said, there are significant differences between a trust administration and a probate administration.

First, a trust administration is removed from the oversight and costs of the probate court, absent litigation. With a probate administration, everything is overseen by a court of law and must await a judge's order to act. Further, to open a probate administration requires the filing of a rather hefty filing fee with the Probate Court. Consequently, probates are often more time consuming and more expensive than a trust administration.

Directly related to this is the difference in timing with how quickly action can be taken by the fiduciary. In a trust administration, the authority of the administrative trustee is immediate. The person designated in the Trust document has authority right away and can begin to take steps to protect and preserve the assets and begin the administration process. On the other hand, with a probate administration, it can easily take up to three months before the court can issue Letters of Authority to the personal representative to allow the personal representative to begin taking action.

Determining the most recent (and therefore governing) trust document and any amendments is yet another difference. Recall our "Uncle Ed" story in Chapter Two where the probate court ruled which of Uncle Ed's wills and codicils controlled the disposition of his estate assets. In a trust administration, the trustee must have confidence that she is operating with the most recent document. That is why it is important for the trustee (through her attorney) to notify all interested parties and provide the key components of the trust document that apply to them. This gives all the right to present any other trust document that may amend or otherwise conflict with the documents that the trustee is aware of.

One final significant difference between a probate administration and a trust administration is with regard to privacy. In a probate administration, all beneficiary's information, the decedent's assets and their values are public information and are readily viewable and available for anyone to see. This often results in beneficiaries receiving letters and solicitations from predatory companies looking for access to the inheritance. Unfortunately, we have seen many instances where unsuspecting beneficiaries are taken advantage of and their inheritance quickly lost. When the assets are administered through a trust, and avoid the probate system, everything remains private. Who the beneficiaries are and what they are receiving never becomes part of the public record.

After filing the necessary tax returns and either making payment of or reserving sufficient funds for taxes, the trustee must work to prepare accountings to the beneficiaries, and eventually make distribution of the assets.

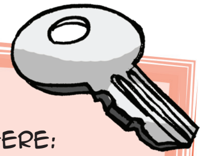
Revocable trusts commonly contain testamentary trusts that benefit the surviving spouse for the rest of his or her life (marital trust) or a continuing trust for children or other family members. Here, the trustee will transfer the assets from the administrative trust to the trustee of the continuing trusts.

Since there is no court to discharge a trustee like there is in a probate to discharge a personal representative from liability, it is important for the trustee to obtain consents and waivers from the trust beneficiaries indicating that they have had the opportunity to review the trust, to verify the trust inventory, and to approve or waive any objection to the accounting.

One final comment—sometimes there are assets in the trust as well as in the decedent's name individually. When this happens, you have a simultaneous probate and trust administration. This isn't the best situation, and usually happens because a revocable trust was only partially funded during the grantor's lifetime. Here, there are laws that serve to coordinate the actions of the trustee and the personal representative.

Often these are the same individuals, but there are reasons where it may be more efficient to have a different person for each role.

Next, we'll review the duties that you may have if you are named and choose to accept the responsibilities of the office of trustee for your loved one's trust.



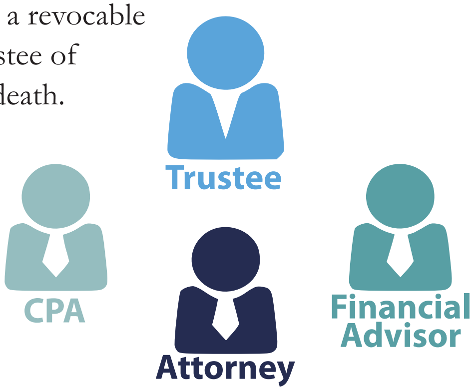
KEY TAKEAWAYS

- TRUST ADMINISTRATION IS A PRIVATE PROCESS WHERE:
  - TRUST DOCUMENT AND ANY AMENDMENTS ARE FORWARDED TO INTERESTED PARTIES TO ENSURE PROPER GOVERNING DOCUMENTS ARE ADMINISTERED
  - PERSON NAMED AS TRUSTEE ACCEPTS OFFICE
  - ASSETS MARSHALED AND VALUED
  - CREDITORS PAID
  - TAXES PAID
  - ACCOUNTINGS FILED
  - WAIVERS AND CONSENTS OBTAINED WITH STATUTORY LIMITATION LANGUAGE APPLIED
  - DISTRIBUTIONS COMPLETED

Chapter Five

Acting as Administrative Trustee

The original grantor (creator) of a revocable trust will usually serve as the trustee of the trust until their disability or death. Upon the grantor's death, an "administrative trustee" serves to perform all of the necessary functions we described in Chapter Four. This role may also be referred to as a "successor trustee."



Just because you are named as the administrative trustee in your loved one's trust does not necessarily mean that you must serve. Before acting in this capacity, understand that the role, like that of a personal representative, is a fiduciary one—meaning that you have a duty to act impartially in administering the trust.

Like the personal representative of a probate estate, the trustee of a trust is a fiduciary. He or she has a duty to act impartially for all interested parties of the trust, including the decedent's creditors, as well as the trust beneficiaries.

The trustee of the trust is often a spouse, child, or other family member who is also a beneficiary of the trust. Just like our discussion in Chapter Three, the trustee could have a conflict of interest and should be careful to work with their attorney to ensure that they don't act in their own beneficial self-interest. Usually this is accomplished just fine and without problem.

When acting as the administrative trustee, you will be interacting with the trust's professional team, including the attorney, CPA, and financial advisor.

Similar to a probate, the trustee's first course of action would be to provide the attorney the trust's current asset information as we described under Chapter One. The original trust is not filed with any court.

If there already isn't a trust checking account with the administrative trustee named as the account holder, a trust checking account will be opened to pay the deceased's bills. In Chapter Nine, we discuss the decedent's trust bank accounts.

During the administration of the trust, the trustee must follow the prudent investor rules to preserve and protect the trust assets. If the value of the trust assets should plunge under the trustee's watch as a direct consequence of the trustee's failure to follow the prudent investor rules, then the trustee can be held individually liable to the beneficiaries for the amount of such loss. In Chapter Eight, we discuss how you should work with the financial advisor to limit this liability.

The trustee has the same responsibility to pay off any debts and obligations of the decedent, but there isn't any formal notice procedure available (no publication is required). The Trustee is protected by the same one year creditor statute that applies to a personal representative.

The trustee should discuss his risk tolerance with the attorney, as well as his knowledge of the decedent's affairs. If the trustee wants to play it safe, he will direct the attorney to open an "empty probate" to trigger the running of certain statutes of limitations.

Another creditor question relates to invoices or bills in dispute. The probate court provides a venue to object to an incorrect or disputed bill. In a trust administration, there is no such venue. Typically, a creditor may threaten or file a lawsuit. Here, a careful review of the statute of limitations and the prospect of liability should be discussed between trustee and attorney.

Like the probate estate, the trustee will work with the trust's CPA to ensure that all taxes are properly paid. If a federal estate tax return is due (Form 706) or Massachusetts estate tax return is due (Form M706) the estate must file it and pay the taxes due within nine months of the date of decedent's death. We review taxes in more detail in Chapter Ten.

Once the creditor claims and taxes are finalized, the trustee must provide an accounting to the trust's beneficiaries. Usually, the trustee will give this information to the attorney, who will put it in the proper legal form to serve it on all of the beneficiaries. Since there is no court overseeing things, the attorney will work to utilize the Massachusetts trust administration statutes to minimize the trustee's liability and to limit the amount of time that the beneficiaries have to object to the accounting. The accounting includes the following:

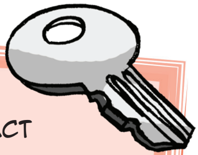
1. The date of death value of the assets subject to the trust administration;
2. Capital gains or losses on the sale or disposition of the assets;
3. Income earned during the administration;
4. Expenses paid or reserves to pay expenses;
5. Professional fees (legal, accounting, tax);
6. Trustee fees;
7. Costs of the administration;
8. Funeral and other related costs;
9. Specific distributions or bequests;
10. Amount available for final distribution;
11. Proposed final distribution to the beneficiaries or to establish testamentary trusts as provided under the trust (Chapters Eleven & Twelve)

As you can see, this is a large job with significant responsibilities. Massachusetts law entitles the trustee to take a fee for his or her services. A reasonable trustee's fee is not, however, expressly prescribed under the statute. Comparing the trustee's responsibilities to that of a personal representative, one might surmise that the fees should be comparable.

A trustee's fee would be ordinary income subject to income tax, the same as when professionals must pay income tax on the fees that they receive. Depending upon the circumstances of the estate in question, the trustee may or may not wish to take a fee.

In addition to fees, the trustee may be reimbursed for any costs that he or she forwarded on behalf of the estate. Costs include travel, hotels, meals, rental car, gas, phone, clergy tips, funeral expenses, reception costs, and such other reasonable expenses paid out of the trustee's own pocket. Cost reimbursement is not taxable as income to the trustee, but is also a valid deduction for the estate.

The same question regarding reimbursement of other family member's costs of travel to the funeral as a trust expense applies as what we wrote in the prior chapter.



KEY TAKEAWAYS

- THE TRUSTEE IS A FIDUCIARY OF THE ESTATE AND ACT IMPARTIALLY WHEN:
  - WORKING WITH THE ESTATE'S LEGAL, TAX AND FINANCIAL TEAM
  - DEALING WITH CREDITORS WITHOUT A FORMAL VENUE SUCH AS WHAT YOU FIND IN A PROBATE OR BY CREATING SUCH A VENUE WITH AN EMPTY PROBATE
  - PRUDENTLY INVESTING ASSETS DURING ADMINISTRATION
  - FILING TAX RETURNS AND PAYING TAXES
  - PROVIDING ACCOUNTINGS
  - PROTECTING FROM FURTHER LIABILITY USING STATUTORY NOTICE PROVISIONS
  - MAKING DISTRIBUTIONS

Chapter Six

Federal and State Estate Taxes

When we take on a new estate planning client, we have them complete an organizer that, among other things, asks the new client to highlight areas of concern. Estate taxes are almost always one of them. To address that concern we will often utilize planning strategies, typically using one or more trusts, designed to reduce or eliminate estate taxes when the client passes away. However, the successful implementation of these planning tools occurs at the time of death and a personal representative and/or trustee must take certain steps, including meeting strict filing deadlines, making proper tax elections and allocation of assets to proper marital/family trusts, to ensure the success of the planning.

A federal estate tax return is required only when the estate's value (plus gifts that the decedent made during his lifetime that exceed "annual exclusion gifts"—those annual gifts to any one beneficiary in excess of $19,000 under 2025 law) exceeds the exemption amount—$13.99 million in 2025.

Consequently, most estates won't have to file a federal estate tax return. However, on some occasions, the estate will want to file a return even when the estate value is less than the exemption amount. This is due to a concept called "portability", which means that any unused exemption can be transferred to a surviving spouse. But in order to transfer the exemption, one needs to file the estate tax return, even if no estate tax will be due.

So if it's possible that the surviving spouse's taxable estate might exceed whatever the federal exemption amount might be, then it likely makes sense to file the return on the first decedent spouse's estate.

Allow us to illustrate by example. Assume that Roger died with a taxable estate of $8 million in a year when the federal exemption was $13.99 million. Roger made no taxable gift transfers during his lifetime. Assume that Roger's surviving spouse Susan has assets that exceed $15 million. Here, Susan will want to file Roger's estate tax return so that the unused portion of his estate tax exemption ($13.99-$8.0 = $5.99 million) would be added to her exemption ($13.99 + $5.99 = $19.98 million), thereby minimizing or eliminating her federal estate tax when she dies.

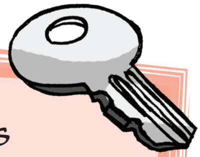
The Massachusetts estate tax is a state-level tax imposed on the value of a decedent's estate if it exceeds a specific exemption threshold. This tax is entirely separate from the federal estate tax and can apply even if no federal tax is owed. As of October 4, 2023, Massachusetts significantly updated its estate tax rules by increasing the exemption threshold to $2 million (retroactive to January 1, 2023). This means that estates valued at less than $2 million are generally no longer subject to the tax. Notably, for estates that do exceed the threshold, only the portion of the estate above $2 million is now subject to taxation—a departure from the prior rule under which the entire estate was taxed once it surpassed the exemption.

The Massachusetts estate tax uses a graduated rate structure, with tax rates ranging from 0.8% to 16%, depending on the size of the taxable estate. The larger the estate above the $2 million threshold, the higher the rate applied to the excess amount. If the estate exceeds $2 million, the personal representative must file Massachusetts Form M-706, the state estate tax return. This form is due within nine months of the decedent's death. While an extension to file can be requested using Form M-4768, any estate tax owed must still be paid within the nine-month deadline to avoid penalties and interest.

The estate includes all assets the decedent owned or had an interest in at the time of death. This typically comprises real estate, investment and retirement accounts, bank accounts, life insurance (if owned by the decedent), personal property, and business interests. Debts and certain expenses—such as funeral costs and legal fees—can be deducted from the gross estate to determine the taxable estate. Accurate valuations are essential to ensure compliance and minimize disputes with tax authorities.

To prepare the return, the executor must gather thorough documentation, including financial statements, real estate appraisals, retirement account balances, and life insurance information. They'll also need a copy of the death certificate and any prior gift tax returns. If any part of the estate is owned jointly or held in trust, that information must also be included. The complexity of this task often requires the help of the accountant or estate attorney to ensure everything is reported correctly.

The tax itself is paid from the estate before distributing assets to beneficiaries. If the estate does not have sufficient cash to cover the liability, the personal representative or trustee may need to sell property to raise funds. Not until the return is filed and the tax is paid should the personal representative and trustee proceed with settling the rest of the estate, including making final distributions to beneficiaries.



KEY TAKEAWAYS

- ESTATE TAXES ARE A CONCERN FOR MANY FAMILIES
- THE CURRENT FEDERAL ESTATE TAX DOES NOT IMPACT MANY ESTATES BECAUSE OF THE HIGH EXEMPTION AMOUNT
- MASSACHUSETTS HAS A SEPARATE AND MUCH LOWER EXEMPTION AMOUNT CAUSING MANY ESTATES TO OWE A STATE ESTATE TAX
- ESTATE TAX RETURNS REQUIRE VERY DETAILED DOCUMENTATION OF WHAT THE DECEDENT OWNED AND THE VALUE OF THOSE ASSETS
- PROPER STEPS NEED TO BE TAKEN BY THE PERSONAL REPRESENTATIVE AND TRUSTEE TO AVOID COSTLY MISTAKES POTENTIALLY RESULTING IN PAYING EXCESS TAXES, ALONG WITH INTEREST AND PENALTIES

Chapter Seven

Automobiles and Tangible Personal Property

In Massachusetts, if there is no surviving spouse, motor vehicles are subject to the probate process.

In many instances it may be possible to utilize a "Voluntary Administration Statement" to probate the vehicle. This abbreviated probate process can be utilized when the assets subject to probate are below $25,000, plus the value of one automobile of any value. If the probate assets exceed this value, then either a Formal or Informal Probate proceeding would be required.

The major exception to probating an automobile is when there is a surviving spouse. Under Massachusetts law, unless stated otherwise in the decedent's Will, an automobile is considered jointly owned with a surviving spouse, regardless of how the title reads. A surviving spouse can transfer title to himself or herself directly through the Registry of Motor Vehicles and without involvement from the Probate Court.

Other vehicles, such as motor homes, boats, and large trucks must either be probated or are titled in a revocable trust to avoid the probate process. Since these assets all have a certificate of title to claim ownership, the family will need to follow some sort of legal process to distribute the asset to the intended beneficiary.

Tangible personal property, such as rings, watches, jewelry, china, baseball card collections, etc., may be distributed pursuant to a separate list outside of the will or trust, so long as that list is referenced in the will or trust, the property is reasonably described, and is not used in a trade or business. The law requires that the list simply be signed and can be created either before or after the will or trust is made.

One of the more difficult questions involves the cost of shipping tangible personal property to the beneficiary. If the will or trust specifically addresses this question, then there is no issue. But where the will or trust is silent, the personal representative or trustee can spend a reasonable sum shipping the items and charge the costs against the estate.

How about the shipment of a grand piano? Here it is probably reasonable for the beneficiary receiving the item to pay for some part or all of the cost of shipping. Otherwise, the remaindermen beneficiaries (those beneficiaries who receive a percentage of the estate after all of the specific bequests are made) indirectly bear the burden of the cost of shipment.

When there is no tangible personal property list, then the estate's attorney should review the will and/or trust to determine the process under which the personal representative/trustee should offer and dispose of the property. Here, it is going to be important to have a valuation specialist identify tangible personal property assets that have any value, and to place a value on those assets.

In estates that must file a federal estate tax return, this is vitally important. Even though the tangible personal property may not be subject to the probate process, it remains an asset of the estate that should be valued and should therefore appear on the federal and Massachusetts estate tax returns.

The personal representative/trustee may decide to hold a "round robin" selection, allowing each beneficiary to choose an item then rotate until everyone has an opportunity to make selections. The total value of the assets selected would then be counted as a distribution, and other assets such as money, stocks, bonds, and such can be adjusted so that at the end of the administration, all beneficiaries are treated fairly so that each ends up with the proper proportion of the value of the estate after considering all items inherited.

Usually, the estate will have a significant amount of tangible personal property that doesn't have any value to anyone. Clothes, old furniture, costume jewelry, food, makeup, supplies, and similar items are more of a burden to dispose of than holding any value. After asking any of the beneficiaries if there are any such items that they would like, it makes sense to donate the bulk of it to charity. Another alternative is to seek an auctioneer or a consignment store to see if the estate can reap any value from these items.

More expensive items that none of the beneficiaries want should be auctioned or sold. Valuable artwork and jewelry, for example, can be valued and sold or consigned rather easily. So can automobiles that none of the beneficiaries desire.

Keep in mind that one of the main duties of the personal representative and trustee is to preserve the value of the assets of the estate. In the next chapter, we'll review how a personal representative of the probate estate or the trustee of a trust should interact with the estate's financial advisor.

KEY TAKEAWAYS

- AUTOMOBILES ARE SUBJECT TO PROBATE UNLESS THERE IS A SURVIVING SPOUSE
- TANGIBLE PERSONAL PROPERTY MAY BE DEPOSITED OF BY A SEPARATE WRITING OR LIST
- IF THE WILL OR TRUST DOES NOT DICTATE HOW TANGIBLE PERSONAL PROPERTY SHOULD BE DISPOSED, THE PERSONAL REPRESENTATIVE/TRUSTEE SHOULD DISTRIBUTE FAIRLY
- VALUATION OF TANGIBLE PERSONAL PROPERTY IS IMPORTANT, PARTICULARLY WHEN A FEDERAL ESTATE TAX RETURN WILL BE DUE

Chapter Eight

Working with the Financial Advisor

We mentioned earlier that the personal representative of a probate estate and the trustee of a trust have a duty to protect and preserve the assets during the estate administration, as well as following the "prudent investor rule."

So what does this really mean? Should the personal representative/ trustee invest all of the money in the stock market? Should they instead convert everything to cash? How does one satisfy the "prudent investor" standard?

The first thing to do is to meet with the estate's financial advisor. This usually means to meet with whomever the decedent employed as his or her financial advisor, but it can be anyone that you have trust in. Our thought is if the decedent's financial advisor did a good job, there's good reason to stay with that professional at least through the administrative process.

It becomes more difficult when the decedent managed his own investments without the help of a professional financial advisor. Many individuals open accounts through discount and online brokerage houses such as Fidelity, Vanguard, E*Trade, and others.

When this is the case, we suggest that the successor trustee or personal representative find a reputable advisor who is willing to review the portfolio to determine if there are any glaring problems. The advisor can be paid from estate assets for his expertise, and it is well worth the liability protection, because simply "staying the course" with what the decedent owned may not be the prudent thing to do.

Why might that be? Several reasons, actually.

First, the decedent may have retained certain stocks or mutual funds because selling them would have resulted in the recognition of capital gains, and hence the payment of income tax on those gains. Generally speaking, however, these unrealized capital gains vanish on the death of the account owner.

The reason the capital gains vanish is due to something in the tax code known as the "step-up in tax cost basis." This is best explained by example. Assume that Jim bought Coca Cola stock at $1/share and that over the course of several years, the stock increased to $11/share. If Jim sold the stock during his lifetime, he would have recognized a capital gain of $10/share ($11 selling price minus $1 cost basis), and paid tax on the capital gain.

That capital gains tax served as a disincentive for Jim to sell the stock, even if the stock grew to an abnormally large holding in his portfolio. Generally speaking, a portfolio should not have too many eggs in any one stock-holding basket. Ask anyone who owned a great deal of Enron stock in the 1990s. Many held on to the stock during its rise, only to see the value of their portfolio diminish to nothing. The fall of Enron made many one-time millionaires penniless.

Returning to the concept of "step-up in tax cost basis," when Jim died, his estate/trust received a step-up under the tax code to the date of death fair market value of the stock, in my example $11. So if the personal representative/trustee sells the stock the next day, there is no capital gain recognized ($11 selling price minus $11 new tax cost basis).

What this means is that the personal representative/trustee is not constrained by taxes to act as a prudent investor would and therefore has the opportunity to diversify holdings that might otherwise constitute too large of a percentage of a portfolio.

Another reason to review the holdings is that the personal representative/trustee's duty is to preserve and protect the assets in the estate/trust. They do not have a duty to maximize return during the administration, although they may have to generate income for a surviving spouse or other beneficiary.

Here, the advice of a good investment professional can help the personal representative/trustee determine the proper holdings during the period of administration to achieve the goals of the beneficiaries while at the same time guarding against a drop in the market during the relatively short time period required to complete the administration.

Finally, the personal representative/trustee may have to liquidate portions of the portfolio to pay for estate taxes, professional fees, real estate carrying costs or to meet such other expenses that may be necessary during the administrative period. Good professional advice may be worth its weight in gold to determine which assets might best serve to pay these expenses.

Don't underestimate how good advice can actually save a great deal of money in the long run.

Next, we'll review the bank accounts that the personal representative/trustee may open, close, or retain during the probate and trust administration.

KEY TAKEAWAYS

- FINANCIAL ADVISORS ASSIST IN SATISFYING THE PRUDENT INVESTOR STANDARD
- CAPITAL GAINS TAXES ARE MINIMIZED AT DEATH DUE TO STEP-UP IN TAX COST BASIS RULE
- PERSONAL REPRESENTATIVE/TRUSTEE SHOULD WORK WITH A FINANCIAL ADVISOR TO DETERMINE WHETHER THE PORTFOLIO NEEDS ADJUSTMENT TO MEET ESTATE/TRUST BENEFICIARY NEEDS

Chapter Nine

Bank Accounts

When opening a probate estate or trust administration, the personal representative/trustee needs to open an estate checking account or a trust checking account, respectively. This account will receive the income earned and pay all the expenses incurred during the administration.

Running all of the income and expenses through one checking account will make it simpler to compile the accountings that the personal representative/trustee must report to the beneficiaries as described in Chapters Two and Four.

By having the CPA or attorney reconcile the monthly checking account, the accountings will be readily available when necessary. Accountings are usually provided at the end of the calendar year or at the end of the administration, depending upon the preferences of the beneficiaries.

In order to open a bank account for a probate administration, the personal representative will need to present a copy of the Letters of Authority (granting the personal representative authority to act on behalf of the estate), and a taxpayer identification number. The attorney's office will usually assist the personal representative in obtaining the taxpayer identification number.

In order to open a bank account for a trust administration, the trustee should present a copy of the trust instrument indicating his or her appointment as successor trustee, the death certificate that serves to verify that the original grantor/trustee is no longer serving, as well as a taxpayer identification number.

If there is no probate administration and instead there is a trust administration, the trustee will simply use the trust checking account the same way that a personal representative would use an estate checking account.

The account can be opened in the jurisdiction where the estate administration is conducted or it can be opened in a bank branch near wherever the personal representative/trustee is located. It really doesn't matter.

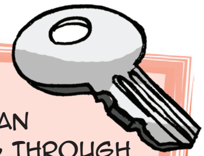
Surviving spouses often ask us whether they should close joint accounts. Especially when there isn't a probate estate open, our general advice is to retain the joint accounts for at least one year. From time to time, the surviving spouse may receive a check in the decedent spouse's name. Without a joint account to deposit the funds to, a probate might have to be opened just to take care of the check. The fees and costs of the probate don't usually justify opening for a check or two, so otherwise the money would be lost.

Another common question concerns joint accounts—especially those with adult children. A client will often open a joint checking or savings account with a child with rights of survivorship or as a pay on death account to the child with the intent that the account be used for funeral expenses or such other expenses incurred immediately after death. The problem is that the child really has no legal obligation to use the account for those expenses. Further, the joint account circumvents the provisions of the will or trust that direct all assets be split among the beneficiaries in the stated percentages.

When an adult child asks what they should do with the account, we tell them that if their parent had them on the account for convenience purposes and not necessarily to take the account as their own, then they should consider abiding by their parent's wishes and use the account as it was intended.

Another question is what to do with the automatic payments that are scheduled out of the account, such as mortgage, electric, and the like. If that regular account is closed and the payments still need to be made, then it will be important to remember to change those account setups before closing the old account.

In our next chapter, we'll review the CPA/tax return preparer's role in the estate and trust administration, including the information they'll need to do their job.



KEY TAKEAWAYS

- PERSONAL REPRESENTATIVE/TRUSTEE WILL OPEN AN ESTATE ACCOUNT TO RUN IN COME AND EXPENSES THROUGH
- ONE ESTATE CHECKING ACCOUNT FACILITATES PREPARING THE ACCOUNTINGS WHEN NECESSARY
- JOINT ACCOUNTS INTENDED TO BE USED FOR ESTATE EXPENSES MAY BE SO USED IF CO-OWNER WAS ON THE ACCOUNT FOR CONVENIENCE PURPOSES
- KEEP JOINT ACCOUNTS WITH SPOUSE OPEN FOR A YEAR FOR A PLACE TO DEPOSIT CHECKS TO DECEDENT

Chapter Ten

Income Taxes and Working with the CPA/Tax Return Preparer

When it comes to estate settlement, in addition to estate taxes (covered in Chapter Six), there are a myriad of other tax issues, most of them related to income. If not handled properly, these other tax issues can create significant liability for the personal representative and trustee. Working with a certified public accountant (CPA), tax attorney, or enrolled agent can help ensure that all deadlines are met and that the returns are filed correctly, minimizing the risk of penalties or audits.

When a person dies, their financial obligations do not end with their life. Among the most important matters to address are the income tax requirements for both the decedent and their estate. These requirements involve filing a final individual income tax return for the decedent and potentially filing one or more income tax returns on behalf of the estate.

The final individual income tax return for the decedent is filed on IRS Form 1040. This return covers the portion of the tax year from January 1 up to the date of death. If the decedent had income above the standard IRS filing thresholds (which vary depending on age, filing status, and type of income), a final return is required. This return includes all sources of income, such as wages, interest, dividends, pensions, and capital gains that the decedent earned or accrued before death. The return is generally due by April 15 of the year following the year of death, although an extension can be requested.

Responsibility for filing the final income tax return typically falls to the decedent's personal representative. If the decedent was married, a surviving spouse can often file a joint return for the year of death, simplifying the filing process. In cases where a refund is due, the personal representative or spouse may also need to complete Form 1310 to claim the refund on behalf of the deceased taxpayer. In addition, there will be similar filing obligations for Massachusetts or other states where the decedent earned income.

After death, the decedent's estate becomes a separate legal and taxable entity. This means that any income generated by the estate—such as interest on bank accounts, dividends, rental income, or gains from the sale of estate assets—must be reported and may be taxed. This is done using IRS Form 1041, the U.S. Income Tax Return for Estates and Trusts. A return must be filed if the estate earns more than $600 in gross income during the tax year, even if that income is later distributed to beneficiaries. Similarly, any trusts created after the death of the decedent are also separate legal and taxable entities that will be required to file separate income tax returns on IRS Form 1041. This would include marital and family trusts for a surviving spouse along with continuing trusts established for other beneficiaries.

Unlike individual income tax returns, which use the taxpayer's Social Security number, estates and trusts must obtain separate Employer Identification Numbers (EIN) from the IRS. This EIN is used to identify the estate and trust in all tax filings. The estate's first Form 1041 must be filed within 4.5 months of the end of its chosen tax year. The estate can choose either a calendar year or a fiscal year, giving the personal representative some flexibility in timing. Trusts are generally done on a calendar year basis similar to personal income taxes. Once again, there will be similar filing requirements and obligations to Massachusetts or other states where the estate or trust may earn income (such as from an out of state rental property).

Estate and trust income taxes are assessed on the income that the estate or trust retains, rather than distributes to beneficiaries. When income is distributed to beneficiaries, the estate or trust can take a deduction for those distributions, and the recipients then report that income on their personal tax returns using a Schedule K-1, which the estate or trust provides to them. This mechanism prevents double taxation—income is taxed either at the estate/trust level or the beneficiary level, but not both.

To prepare accurate returns, the personal representative and trustee should gather all relevant financial records, including W-2s, 1099s, account statements, and documentation related to estate and trust assets and debts. It may also be necessary to obtain appraisals of property and valuations of other estate assets.

If the decedent owned any IRA, 401(k), or similar retirement accounts, the CPA will need to know the date of death balances of those, and who the beneficiary of each account might be.

In addition, the CPA will also need a few other odds and ends that are not ordinary, including funeral expenses, attorney and trustee professional fees (as those are all deductible), and IRA required minimum distribution (RMD) information, to ensure that the proper RMDs have been made to avoid the excise penalty tax.

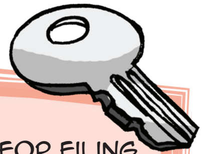
The date of death value of the decedent's assets will also be important to adjust the tax cost basis of those assets as we described in Chapter Eight. The beneficiaries of those assets will want to know how much to report as capital gains if and when they sell those assets, and because following the decedent's death the new tax cost basis will be the date of death value, this information is necessary. That usually means that real estate will have to be appraised as well.

If there are any ongoing trade or business assets, including S Corporation stock, certain elections need to be made and/or certain distributions need to be made within definite time deadlines. Failure to make the election or distributions could result in the loss of S Corporation status and the imposition of a corporate layer of income tax. To avoid this adverse result, it will be important to advise the CPA of any and all business holdings and to discuss the various options that the personal representative/trustee may have to minimize adverse tax consequences.

In most cases, the decedent had a CPA or other tax return preparer that he or she used and relied upon over the years. Especially in the case of decedents who filed their own tax returns or who have used discount storefront tax return preparers (H&R Block, Jackson-Hewitt, and Liberty Tax are common examples), it's usually a good idea to engage the services of a knowledgeable CPA. As you might surmise from this Chapter, not filing the proper returns or not making timely tax elections where necessary can lead to significant tax liability and losses.

No one wants to pay more taxes than they have to. Paying a good CPA usually results in overall savings.

In conclusion, income tax responsibilities do not end with a person's death. Personal representatives and Trustees are tasked with ensuring that the decedent's final income tax return is filed and that any taxable income generated by the estate and trust is properly reported and paid. While this process can be complex, especially in larger or more complicated estates, proper planning and the guidance of tax professionals can help fulfill these obligations while honoring the decedent's financial legacy.

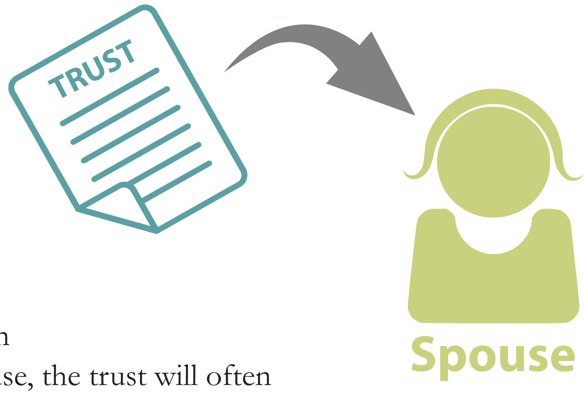


KEY TAKEAWAYS

- THE PERSONAL REPRESENTATIVE IS RESPONSIBLE FOR FILING THE DECEDENT'S FINAL PERSONAL INCOME TAX RETURN
- ESTATES AND TRUSTS ARE SEPARATE LEGAL ENTITIES AND ARE REQUIRED TO FILE SEPARATE INCOME TAXES (FORM 1041)
- DATE OF DEATH VALUES ARE IMPORTANT TO COLLECT, EVEN WHERE THERE IS NO ESTATE TAX RETURN
- INCOME TAX RETURNS ARE GENERALLY MORE COMPLICATED AFTER A LOVED ONE DIES AND THE SERVICES OF A QUALIFIED CPA MAY RESULT IN TAX SAVINGS
- WHEN S CORPORATIONS ARE PART OF THE HOLDINGS, CERTAIN TAX ELECTIONS AND DISTRIBUTIONS MUST OCCUR WITHIN A STATED TIME PERIOD OR ADVERSE TAX CONSEQUENCES COULD RESULT

Chapter Eleven

Continuing Trusts for Spouse



Once the creditors have been taken care of and tax returns filed, it's time to move out of the administrative phase and start distributing assets. When there is a surviving spouse, the trust will often continue for his or her benefit. These after death trusts are known as "testamentary trusts." When there is a testamentary trust for the surviving spouse's benefit, the trustee will "fund" assets into a "credit shelter/bypass" and/or "marital" trust.

A credit shelter trust is also known as a "bypass trust"—both serve the same function; to consume the decedent spouse's federal and/or state estate tax exemption. Depending on the circumstances, to the extent that the decedent spouse has exemption available, that amount is often transferred to the credit shelter/bypass trust to exempt those assets from future federal and state estate taxes. So if the decedent died with $3 million of assets and his available Massachusetts estate tax exemption was $2 million, then $2 million could be funded into the credit shelter/bypass trust and escape estate tax at both deaths.

If the decedent's trust was more than whatever the available exemption amount is, then that overage is usually transferred to one or two separate "marital trusts" (one for federal purposes and one for Massachusetts purposes) that will qualify for the unlimited estate tax marital deduction, thereby deferring any estate tax until the surviving spouse's death.

There are always exceptions to the above scenarios. In 2010, the estate tax law was changed to allow for "portability," which means that any unused exemption for one spouse can be used for the other, so long as a timely federal estate tax return is filed. What this means is that there may be less use of credit shelter/bypass trusts and more use of marital trusts to get two step-ups in tax cost basis (discussed in Chapter Eight) for the same assets—one on the first spouse's death and then another step-up on the surviving spouse's death.

In larger estates where the generation-skipping tax exemptions are being used, there could be a further subdivision of the trust held for the surviving spouse. We discuss these trusts in greater detail in Chapter Twelve.

These are all fairly advanced topics that we are not going to cover in great detail here. Our firm's probate and trust administration process, The Estate Settlement Program™, that we describe in Chapter Eighteen will work to help the client both understand and make decisions that should result in the best tax outcome for the family.

Once the spouse's trust is funded, then certain things need to happen:

1. The attorney or CPA will typically apply for a new taxpayer identification number for the testamentary trust;
2. The financial advisor will work with the trustee (in many cases, the surviving spouse serves as trustee) to discuss which assets are funded into what testamentary trust, and will also discuss whether the mix of assets is appropriate;
3. A final accounting describing the income, expenses, capital gains and losses, as well as other significant items will be prepared and signed off by the surviving spouse and the remaindermen beneficiaries (the beneficiaries who inherit when the surviving spouse dies—typically the children, but also see Chapter Twelve below).

From this point forward, the trust will benefit the surviving spouse for the rest of her life. Income is usually distributed and paid to her for her normal everyday living expenses. If the income is insufficient for her needs, and if the testamentary trusts provides for principal distributions, then additional amounts may be distributed for her health, maintenance, and support.

How the credit shelter/bypass or marital trust is administered from this point forward is unique to its provisions. A marital trust, by definition, only benefits the surviving spouse for the rest of her life. A credit shelter/bypass trust, however, may benefit a group of beneficiaries including surviving spouse, children, and grandchildren. When a group of beneficiaries all benefit from a trust, then it will be important for the trustee to meet with his or her team of professionals to determine when and how distributions should be made. Annual accountings should be sent to the remaindermen beneficiaries.

Keep in mind that the trustee still has the duties to administer the trust impartially as (discussed in Chapters Three & Four) as well as following the prudent investor rules. A conundrum for the surviving spouse who is serving as trustee is the balance between maximizing her income and growing the assets for the remaindermen beneficiaries.

An income tax return should be filed annually, although when the trust distributes out all of its income, then no tax is paid by the Trust. Instead, the beneficiary (the surviving spouse) who receives the income will pay the income tax at his or her own rates.

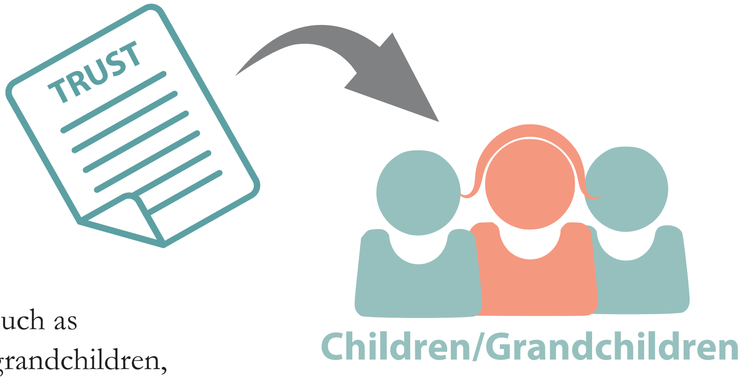
Next, we'll discuss when a trust leaves continuing trusts for children and grandchildren.

KEY TAKEAWAYS

- THE ADMINISTRATIVE TRUST IS DISTRIBUTED TO A TESTAMENTARY TRUST FOR SPOUSE
- SPOUSE'S INCOME AND PRINCIPAL NEEDS TO BE DETERMINED
- TRUSTEE MUST DETERMINE WHICH ASSETS TO FUND INTO WHICH TRUST, THE BALANCE OF INVESTMENTS AND MAKE DISTRIBUTION DECISIONS
- ANNUAL ACCOUNTINGS AND TAX RETURNS ARE USUALLY REQUIRED

Chapter Twelve

Continuing Trusts for Children, Grandchildren and Others



While many trusts distribute assets outright to other beneficiaries such as children and grandchildren, others direct for a distribution into a continuing testamentary trust for the benefit of children, grandchildren, and other beneficiaries. Often times, these distributions don't occur until the surviving spouse is deceased and the marital trust distributes out to the children/grandchildren, but in some cases, the children/ grandchildren trust shares are created immediately upon the Grantor's death.

The segregation of various assets into the children/grandchildren's shares must be carefully considered. If there is a home or other property that one child wants to have that the others do not, then the property must be appraised so that when all of the shares are ultimately distributed, every beneficiary is treated fairly and receives value in proportion to the relative percentages that the trust document provides.

As an example, assume that Sally and Stan are both named as equal beneficiaries of Mother's trust. Mother's trust owns a residence worth $800,000 and also has $900,000 of stocks, bonds, and mutual funds. Sally wants Mother's residence as part of her share, and Stan is fine with that arrangement. In the end, the trustee will distribute the $800,000 residence to Sally, along with $50,000 of the stocks, bonds, and mutual funds. Stan receives $850,000 of the stocks, bonds, and mutual funds so that they are treated equally.

The above example is an oversimplified version of the decisions that the trustee, attorney, and CPA for the file must make. The trustee must, for example, consider factors other than fair market value to ensure that the beneficiaries are being treated fairly. One example of those considerations is the tax costs associated with the assets being distributed to the different shares.

We discussed the "step-up in tax cost basis" briefly in Chapter Eight. So you may be wondering why don't all of Mother's assets in our example have no capital gains to consider. The reason rests in Chapter Eleven, where we discuss ongoing trusts for the surviving spouse. If the children/ grandchildren are receiving assets from a trust held for the surviving spouse that does not qualify for the marital deduction (a Family Trust/ Credit Shelter Trust is a good example of this), then there won't be a step-up at Mother's death.

If Mother's residence and her stocks, bonds, and mutual funds all have a different tax cost basis, then that may alter which assets are to be distributed to each beneficiary. When we refer to "tax cost basis," we are pointing to unrealized capital gains that will be taxed when the assets are ultimately distributed. The trustee must fairly allocate the unrealized gains between Sally and Stan's shares so as not to give one of the beneficiaries a materially larger tax burden than the other, unless the beneficiaries agree to a different arrangement.

So before making distribution of the assets of the estate or trust to the children/grandchildren's shares, it will be important for the trustee to prepare an accounting and schedule of proposed distribution that details all relevant income, expenses, capital gains, and other material items. The trustee would want all of the beneficiaries to consent to the accounting and schedule of proposed distribution, and waive any objection to it prior to making distribution.

A trustee who goes ahead with the distribution before obtaining all consents and releases runs the risk that a beneficiary may file a lawsuit against the trustee after the assets and money leave the trustee's control. The beneficiary may claim that they didn't receive everything that they were entitled to, or that the distribution schematic was unfair to that beneficiary.

If the trustee has not yet made distribution, then the trustee has the opportunity to consider the objection and change the schedule if that is appropriate. If the trustee doesn't believe that the objection has any validity, then at least he still has the funds to pay legal, accounting, and other expenses associated with the investigation, defense, and resolution of any such challenge. If, on the other hand, the trustee has already made distribution, then the trustee could be in the undesirable position of either having to defend the lawsuit out of his or her own pocket, or actually having to seek a refund of amounts that were made to other beneficiaries wrongly, if that turns out to be the case.

Even more troubling, if the trustee is determined to have made a wrongful distribution, the trustee may have to satisfy any damages out of their own pocket. So for these reasons, it is imperative that before making final distribution, or making distribution into a trust created for the beneficiaries, that waivers and consents be obtained.

Once the amounts that are to be transferred from the decedent's revocable trust to the children's trust shares are determined, the actual transfer must be made. Like the marital trust, the trustee must apply for a taxpayer identification number(s) and typically uses those numbers to establish bank or brokerage accounts for the trust. If real property is being distributed, then deeds must be prepared.

The trustee must be careful to reserve amounts to pay final professional fees (accounting, legal, and other such fees that may apply), taxes, and expenses before transferring assets into the children/grandchildren's trust shares.

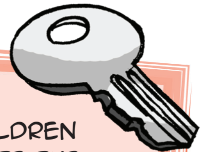
In larger estates that may be federally taxable, it may be important to segregate the children/grandchildren's trust shares into "exempt" and "non-exempt" shares. Hopefully, the trust document either directs the trustee to so segregate or allows the trustee to do this on his own.

The "exempt" and "non-exempt" portions refer to an exemption from the generation skipping transfer tax (GSTT). The GSTT is a penalty tax imposed on top of the estate tax when amounts above the GSTT exemption amount are distributed to individuals who are two or more generations below the Grantor's of the Trust. The idea behind the tax is to only allow a certain amount of assets to be held in estate-tax free trusts that avoid taxation as each generation of a family dies off.

We are not going to go into all of the nuances of the GSTT here, except to say that if it applies to a situation, it is vital that qualified professionals are involved in the segregation of the assets and the transfer of those assets to the trusts shares in order to minimize or avoid the application of the GSTT to the given situation.

In many cases, the administrative trustee of the decedent's trust will transfer the assets to another trustee who will be the trustee who administers the children's/grandchildren's trust. Oftentimes, it is the child/grandchild himself who is the trustee for his or her own share. Sometimes, however, it might be a bank, trust company, or other trusted relative. A common example of this is when a decedent's child is named as the trustee for amounts that are to be held in a continuing trust for a grandchild.

The terms of each trust share will govern the distributions going forward. Like the marital trust discussed in Chapter Eleven, an income tax return should be filed annually, although when the trust distributes out all of its income, then no tax is paid by the Trust. Instead, the beneficiary (the child/grandchild) who receives the income will pay the income tax at his or her own rates. Annual accountings should be sent to the beneficiaries.



KEY TAKEAWAYS

- THE TRUST SHARES FOR THE CHILDREN/GRANDCHILDREN ARE DETERMINED AND THE TRUSTEE MUST ALLOCATE THE ASSETS TO EACH SHARE FAIRLY
- FAIR MARKET VALUE, INCOME, CAPITAL GAINS, ESTATE AND GENERATION SKIPPING TRANSFER TAX ISSUES MUST BE CONSIDERED BEFORE MAKING DISTRIBUTION
- THE TRUSTEE SHOULD OBTAIN CONSENTS AND WAIVERS TO THE TRUST ACCOUNTING AND SCHEDULE OF PROPOSED DISTRIBUTION
- ANNUAL ACCOUNTINGS AND TAX RETURNS ARE USUALLY REQUIRED THEREAFTER

Chapter Thirteen

Life Insurance and Annuities

Life insurance and annuities are examples of assets that may fall outside of the estate and trust administration. This is due to the fact that these assets are generally distributed pursuant to a designation of beneficiary established on the account.

Life insurance is typically owned by the decedent, but may be owned by the decedent's spouse, children, or by an irrevocable life insurance trust (ILIT). First, we'll review what happens when the decedent or a family member owns the life insurance; after that, we'll review the ILIT.

When the decedent or a family member owns a policy and a family member designated as the beneficiary of a life insurance policy insuring the life of the decedent, then a claim form must be filed with the company. The company will typically ask you to submit the original life insurance policy itself, along with the claim form and a long form death certificate (showing cause of death). Once processed, the company will then issue checks to the beneficiaries in the percentages indicated on the designation of beneficiary document.

When the decedent's estate is taxable, it will be important to request an IRS Form 712 from the life insurance company when making the claim on the policy. This is an important document that you will want to give to your attorney or CPA who will be preparing the Federal Estate Tax Return Form 706 and/or Massachusetts Estate Tax Return Form M706.

While life insurance is usually income tax free, it is not always estate tax free. That is why the Form 712 is necessary. Failure to file a Form 712 when one is necessary greatly increases the likelihood of an IRS audit on the Federal Estate Tax Return and the assessment of additional taxes, interest, and penalties.

Life insurance can be more difficult if the decedent owned the policy, but was not the insured. An example of this is when Mother owns the policy on Father's life, but Mother dies first. The policy is not ripe to make a claim since the insured (Father) is still alive. But now Father can't transfer the policy or change the beneficiary designations, borrow against the policy, or cash it out, as Mother, who is now deceased, owns the policy.

In this situation, the life insurance policy will be a probate asset, subject to the terms of Mother's will. If Mother's will gives everything to Father, then when the probate court process is complete, Father will now own the policy on his life and can do with it as he pleases. If instead Mother's will is a pour-over will (typical with those who also have revocable living trusts), then the policy will end up with the trustee of the trust for distribution in accordance with the trust terms.

Irrevocable Life Insurance Trusts (ILITs) that own life insurance policies are also quite common. Here, the ILIT owns the life insurance policy and is almost always also the beneficiary of the policy. Even though the policy is not owned by the decedent, when the decedent has a taxable estate, it will be important for the ILIT trustee to obtain a Form 712 when making a claim on the policy as described above.

The issues surrounding ILITs could fill up another book (and we do plan to write such a book in the future), so we won't go into all of the details that your attorney should lead you through when engaged to assist the ILIT trustee with the claim, accountings, taxes, and distributions. It is important to note, however, that the beneficiaries of the ILIT may or may not be the same as the beneficiaries of the will or the revocable trust. Similarly, the trustee may or may not be the same as the trustee named in the revocable trust.

Nonetheless, it's important for the trustee of the ILIT to coordinate efforts with the attorney and CPA for the estate to make sure that all necessary reporting requirements are satisfied and that the beneficiaries are properly notified of the insurance claim, income earned, taxes and expenses paid, and schedule of proposed distributions consented to before final distributions are completed.

Unlike life insurance that is generally income tax free, annuities are not and therefore pose several challenges when administering an estate or trust. Most annuity contracts feature tax-deferred growth of principal, meaning that when one invests in the contract, it grows tax deferred; when distributions are made, there is an element of return of principal (income tax free) and income/growth (subject to income taxation).

Legal, tax, and financial professionals refer to these types of assets as "Income with Respect to a Decedent (IRD)" assets. Annuities, Individual Retirement Accounts (IRAs), and 401(k) accounts are all IRD assets. We review IRA, 401(k), and other retirement account assets below in Chapter Fourteen. IRD assets do not enjoy a "step-up" in tax cost basis (described in Chapter Eight) as do traditional investment accounts that contain stocks and mutual funds.

Unlike IRAs and 401(k)s that are all governed by standard laws regarding their distributions and income taxation, annuity contracts can all be very different. Some annuity contracts terminate at death with no benefits, while others may continue on for a surviving spouse and/or other beneficiaries. Some require a lump sum distribution of benefits at death, while others can continue on for a term of years or for the lifetime of the beneficiary. Still others contain tax-free life insurance as a death benefit.

Which options are available and what options are chosen may have a real economic effect on the annuity's beneficiaries. While one option may look more appealing from a distribution standpoint, it may also have more significant adverse income tax consequences. While no one knows what the future brings, an assessment of the family's needs and concerns should be carefully evaluated.

When an annuity names a testamentary trust as the beneficiary, the income tax effects should be closely evaluated. The trustee may be able to mitigate the tax consequences by making what are known as "conduit" distributions, meaning that whatever the annuity distributes to the trust, the trust distributes to the income beneficiary. Doing this, however, fails to preserve the principal or corpus of the annuity for the remainderman beneficiaries. The relative tax consequences and needs of the income and remainderman beneficiaries should be considered prior to making distribution decisions.

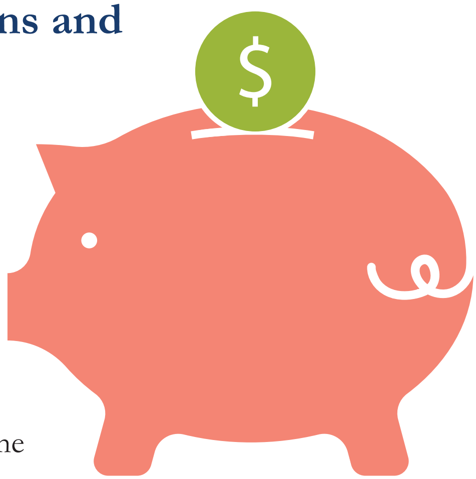
For all of these reasons, it's a good idea to engage the services of your attorney, CPA, and financial advisor to determine the options associated with any given annuity and to advise as to which distribution election to choose and how to report the annuity on the decedent's and estate/trust tax returns.

KEY TAKEAWAYS

- LIFE INSURANCE IS USUALLY INCOME TAX FREE, BUT MAY NOT BE ESTATE TAX FREE
- IRREVOCABLE LIFE INSURANCE TRUST (ILIT) TRUSTEES HAVE ADDITIONAL DUTIES WITH CLAIMING, DISTRIBUTING AND REPORTING LIFE INSURANCE
- ANNUITIES ARE INCOME WITH RESPECT TO A DECEDENT (IRD) ASSETS AND POSE ADDITIONAL CHALLENGES DUE TO THE INCOME TAXES THAT MUST USUALLY BE PAID ON DISTRIBUTIONS

Chapter Fourteen

IRAs, 401(k)s, Pensions and Profit Sharing Plans



On its face, you would think that "Retirement Accounts" such as IRAs, 401(k)s, pensions, and profit-sharing plans would be the easiest part of a loved one's estate to administer. The beneficiary should just make a claim, a withdrawal, or roll over the account, right?

Actually, a lot of thought should go into the choices that are made prior to acting.

"Retirement Accounts" pose definite challenges to an estate and trust administration due to the income tax consequences, the interaction of the estate tax if that is an issue, as well as the beneficiary and distribution rules. It's easy to slip up, resulting in additional tax burden or financial difficulties that otherwise would not be a problem if you let your professionals guide you through the process.

Like annuities, these assets are IRD and therefore do not receive a step-up in tax cost basis (described in Chapter Eight). Withdrawals from Retirement Accounts generally create taxable income. And just like a tube of toothpaste—once you squeeze out the toothpaste, it is impossible to get it back in the tube—the same holds true for Retirement Accounts. Once you make a taxable distribution, even if by mistake, it is impossible to reverse the mistake.

For these and related reasons, there is a lot of confusion regarding Retirement Accounts. This confusion is justified because Retirement Accounts are subject to a plethora of complicated rules. When and how a Plan Participant must take distributions from Retirement Accounts differs from the rules governing spouses who inherit Retirement Accounts.

And those rules differ for non-spouse beneficiaries who inherit Retirement Accounts.

In order to both thwart that outcome and to better protect IRA inheritance from a beneficiary's divorcing spouse, creditors, or predators, IRA trusts are sometimes used. When a trust is named as the beneficiary of an IRA, the trustee must be careful to ensure that the "identifiable beneficiary" IRS rules are satisfied to ensure that the IRA withdrawals aren't further accelerated. Those rules require:

That the trust is valid under state law;

The trust is irrevocable or by its terms will become irrevocable upon the death of the IRA owner;

The beneficiaries of the trust are identifiable; and

A copy of the trust instrument is provided to the IRA custodian by October 31 of the year following the IRA owner's death.

If one of these terms are not met, then depending upon the age of the Plan Participant when he or she died, the untaxed income inside of the IRA could all be taxed within five years (or sooner depending upon the Custodial Agreement) of the Plan Participant's death.

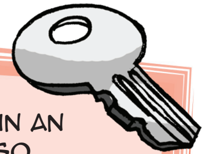
IRA trusts may also be used in situations where the deceased hoped to split the IRA interest between a current income beneficiary and remaindermen who would inherit after the income beneficiary's death—in other words, to provide both for the decedent's spouse and the decedent's children in second marriage situations.

When this happens, there could be a struggle between distributing the income all to the spouse or accumulating the income inside of the trust to preserve it for the next generation. Since accumulating income inside of a trust usually increases income taxes, these issues should be discussed during the loved one's estate administration to ensure that everyone is on the same page.

The rules are so vast and complicated that there are entire books written on this subject. We can't possibly cover all of the tax rules and options available to the family in one chapter of a book intended to provide a broad overview of the estate and trust administration process when a loved one dies. We have written whitepapers on the subject that you may find on our law firm's website. These rules are constantly changing, so this topic is an important one to cover during the administration process.

Suffice it to say, therefore, that before taking any action with any Retirement Account that will be inherited either by a spouse or any other family member, consultation with knowledgeable tax professionals is important.

While we don't wish to knock on professionals in the financial field, we are going to offer a word of warning. While many financial professionals are excellent at managing investments, many do not know or understand the complicated tax and trust rules that apply to Retirement Accounts when a loved one dies, such as with the very few examples we offer in this chapter. Please make sure that you have assembled a good team that includes a knowledgeable attorney and CPA.



KEY TAKEAWAYS

- THERE MAY BE COMPLICATED INCOME TAX ISSUES IN AN IRA, 401(K) PENSION OR PROFIT-SHARING PLAN, SO CAREFUL THOUGHT SHOULD BE PUT INTO THE POST-MORTEM PLANNING BEFORE TAKING DISTRIBUTIONS OR ROLLING OVER A RETIREMENT ACCOUNT
- WHERE THERE IS A TRUST INVOLVED, A KNOWLEDGEABLE ATTORNEY SHOULD ASSIST WITH THE REQUIREMENTS OF SATISFYING THE "IDENTIFIABLE BENEFICIARY RULES" UNDER THE IRS TREASURY REGULATIONS OR ADVERSE TAX PROBLEMS MAY ARISE
- NON-SPOUSE BENEFICIARIES CANNOT ROLLOVER A RETIREMENT ACCOUNT INTO THEIR IRA, AND ONCE DISTRIBUTIONS ARE MADE–EVEN DUE TO AMISUNDERSTANDING–THEY ARE NEARLY IMPOSSIBLE TO REVERSE

Chapter Fifteen

Safe Deposit Box & Personal Effects

We thought that we would add a quick note about safe deposit boxes. When someone dies with a safe deposit box in their name individually, about the only way to open the box and remove its contents is through a court order. Hopefully, your loved one put someone else on as a signor on the box so that it can be accessed. But if that isn't the case, you need to notify the estate attorney and let him know to get the court order to open the box and remove the contents.

After the court order is obtained, you will have to open the box with the decedent's key. If the key can't be located, then arrangements will have to be made, and the court order should mandate that the box be drilled open.

Moreover, it will be important to inventory the box with a disinterested person. Many banks require a bank officer to be present. It's therefore probably a good idea to schedule the date and time to open the box and remove its contents, including having a bank officer assist in creating an inventory of the contents (most banks have forms for this). The inventory should then be filed with the court.

Not only is creating a formal inventory of the safe deposit box good legal practice, it serves to protect the person opening the box from accusations of fraud or theft.

Consider the time that we once assisted in opening a bank deposit box of one of our deceased clients. We took the key and the court order to the bank with the trustee of our client's trust—and we had a bank officer sit in on the entire process. When we arrived at the bank, we discovered that the bank deposit box was rather large. We put our key into the box, as did the bank officer (most boxes require two keys to open—one from the box holder and the other by the bank).

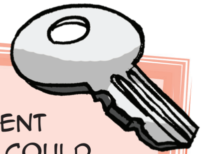
The box was extremely heavy. The sound of coins jingling inside was evident. We struggled to lift the box onto the table. Inside was several thousand dollars' worth of Krugerrand gold coins.

The trustee wondered if the Krugerrands needed to be reported on the federal estate tax return.

"Undoubtedly yes, they do need to be reported," we answered. "The Federal Estate Tax Return Form 706 requires with a check box whether the decedent had a safe deposit box. If the decedent did rent such a box, then the IRS expects a full inventory. Not reporting valuable items that you know exist would likely constitute fraud and may include both civil and criminal penalties."

Moreover, we were glad that the bank officer was present. We carefully catalogued the inventory of the box, and the bank officer signed off on it. We quickly then secured safe storage for the contents, which were eventually sold and made a part of the trust. Whenever we open a safe deposit box, we don't want anyone to ever accuse us of fraud or theft. Sometimes, family members expect certain valuables to be in the box when the box only includes legal documents like a copy of the will. "Mom told me that her diamond jewelry was in that box!" is something that we've heard on more than one occasion, when in fact the person opening the box told us that no such valuables were inside.

So be careful with safe deposit boxes and their contents. Take adequate precautions to ensure that you have independent parties present to catalogue and inventory the box at all times.



KEY TAKEAWAYS

- OPENING A SAFE DEPOSIT BOX WHERE THE DECEDENT WAS THE ONLY OWNER AND SIGNOR FOR THE BOX COULD REQUIRE A COURT ORDER
- SAFE DEPOSIT BOXES POSE A SIGNIFICANT THREAT OF ACCUSATIONS OF FRAUD OR THEFT SINCE NO ONE KNOWS WHAT WILL BE FOUND INSIDE THE BOX UNTIL IT IS OPENED
- FOR BOTH LIABILITY AND TAX REPORTING PURPOSES, IT IS GOOD PRACTICE TO HAVE AN INDEPENDENT PARTY–INCLUDING A BANK OFFICER–PRESENT WHEN OPENING A BANK DEPOSIT BOX OF A DECEDENT AND HAVE THAT BANK OFFICER SIGN OFF ON AN INVENTORY OF THE BOX'S CONTENTS

Chapter Sixteen

Challenges to a Will or Trust

From time to time, the personal representative, trustee, or one of the beneficiaries expresses concern that the will or revocable trust will be challenged. This is not a common occurrence, as it happens infrequently, but can be serious when a challenge does arise. Since a will or trust cannot be challenged until the person who has created and signed the document has died, he or she obviously cannot speak for him or herself, so prosecuting a challenge or defending it can become problematic.

So it becomes important to understand how a will or trust can be challenged. There are generally three main avenues to challenge a will or trust. The first (and less frequent method) is to allege that the documents were not properly signed and witnessed in accordance with the state law where they were signed. This is usually a factual based challenge—and one that is more black and white than the other two avenues.

Improper execution is more common in instances where people created their own wills or trusts, including using online services. The proper signing of a will or trust requires witnesses who sign in the presence of the testator and of each other. Sometimes these requirements aren't met and therefore the will or trust may be invalid.

Another improper execution occurs when the Testator/Settlor attempts to change documents by lining through and adding provisions on their own. These changes are usually not valid as well, and are ripe for challenge.

The second most common challenge is to allege that the decedent lacked capacity at the time that he or she signed the will and/or trust. This method most frequently occurs when the decedent suffered from a mental disability such as dementia or Alzheimer's disease at the time any will, trust, amendment, or codicil was created. It also may occur when the decedent signed documents in a hospital or under hospice care while heavily sedated.

In this instance, there are usually depositions and discovery related to the decedent's condition at the time of the creation of the document under review. A judge will ultimately determine the outcome, or the parties to the dispute may settle rather than going through prolonged litigation that can take years and result in thousands of dollars of attorney fees and costs.

The third challenge has to do with undue influence. This means an individual exerted inappropriate pressure upon the testator (Will) or Grantor (trust), causing him or her to draft or alter the document in a way they would not have otherwise and which benefits the individual exerting the influence (or his or her family). Family members can wield undue influence, but so can someone who suddenly comes into the testator's/grantor's life in his or her final days, like a neighbor or caregiver.

With all of that said, keep in mind that challenges to a will or trust are rare. But if one does arise, we will discuss the necessary steps that the trustee/personal representative should take.

KEY TAKEAWAYS

- WILL AND TRUST CONTESTS ARE RARE, BUT WHEN THEY DO ARISE, THE ALLEGATIONS GENERALLY INCLUDE ONE OR MORE OF THE FOLLOWING:
  - IMPROPER SIGNING OF THE DOCUMENT IN ACCORDANCE WITH STATE LAW
  - LACK OF CAPACITY TO UNDERSTAND WHAT TESTATOR WAS SIGNING
  - TESTATOR WAS UNDULY INFLUENCED
- IF A CHALLENGE ARISES, THEN THE PERSONAL REPRESENTATIVE/TRUSTEE WILL MEET WITH THE ATTORNEY TO DISCUSS THE PROPER LEGAL STEPS TO ANSWER THE ALLEGATIONS

Chapter Seventeen

Professional Fees, Costs, & Reimbursement of Expenses

A common and very reasonable question to ask in any estate and/or trust administration is "How much will this cost?" There will likely be a number of professionals involved in the estate/trust administration, including attorneys, accountants, and financial advisors. It is not uncommon to have a real property appraiser required to determine the value of real estate and the appropriate "step-up" in tax basis so as to minimize capital gains taxes.

In more complicated administrations, there may also be appraisers for business interests and personal effects if the assets of the estate so warrant, as well as auctioneers, surveyors, and a variety of other professionals.

In most circumstances, the professional and the personal representative/ trustee will have a formal written engagement outlining the scope of responsibilities, as well as the fee for those responsibilities. Many probate and trust administrations have common ordinary elements, many of which are discussed here in many of the chapters of this book. As we're sure you appreciate now that you have finished this book, the attorney will guide the personal representative/trustee through the choices that must be made, as well as make sure that the personal representative/ trustee has satisfied all legal requirements prior to making distribution of the estate/trust. This serves to minimize the chances that the personal representative/trustee will violate one of his or her fiduciary obligations and therefore end up with personal liability.

In general, the attorney will review the known facts and circumstances of a probate administration and base the fee upon the factors that are present. Depending on the law firm, some firms will quote a fixed fee for a large portion of the work, but exclude unanticipated issues such as litigation.

Some clients ask about an hourly fee being associated with a given file. If the attorney is willing to work under an hourly fee basis for a given file, this would be an "open ended" fee, meaning that however many hours the file takes to complete is what will be billed. The personal representative/trustee is not in control of the hourly fee, as the attorney will bill for any and all time associated with his work in the file. When the CPA calls with a question, or the financial advisor needs a new taxpayer identification number for the file, these are calls that come in and are part of the hourly calculation.

Finally, some law firms will utilize a hybrid-fee model where they utilize a combination of a fixed fee and hourly fee model.

Trustee and personal representative fees may also be charged. When a bank or trust company serves in this capacity, a normal schedule of fees applies. Moreover, when a family member serves, they may also charge a "reasonable fee". What is reasonable is based on a variety of factors including: time incurred, size and complexity of the estate, and the skills and ability of the fiduciary. The fee must ultimately be approved by the beneficiaries, or if no agreement can be reached, then by the probate court.

When a family member takes a personal representative or trustee's fee, they should know that this is taxable income that will be reported on their 1040 at the end of the year. Some family members will serve in this role without taking a fee, although I would say that until one sees the amount of work involved, my recommendation is not to promise that a fee won't be taken unless and until one understands the scope of work, the responsibility, and the liability involved.

Reimbursement of Expenses

A common question that we're asked involves which expenses the estate can and should pay when a loved one dies. The question sounds something like this: "My father just died and I'm his personal representative. I'm flying in my wife and children; my sister and her family are all coming too. Can I pay for all of the travel, hotel, food, and other expenses from Dad's checking account? That's what he would have wanted."

Sounds reasonable, but unfortunately one has to be careful when paying for family travel expenses to attend a loved one's funeral. First, let's discuss what expenses are properly paid from the estate. Any reasonable travel expenses incurred by the representative/trustee are proper tax deductions from the estate, and so long as the will and/or trust does not conflict, these can be paid from estate funds.

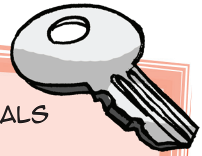
Cleaning up the deceased's home, costs associated with taking care of the remains, paying clergy for the service, and other such expenses are also all valid items that can be paid from the estate. The same goes for costs associated with a reasonable reception for those attending the funeral or related services. This is true even in situations where there is a service in two different locations, which may be common for those who maintain two residences.

Paying for other family members' travel expenses, however, is generally not a valid charge against the estate and is therefore not a valid tax deduction item either. Many times, this result strikes the family as unfair. In these situations, we suggest that the beneficiaries can agree to use part of their beneficial interest to pay for these types of expenses, although it should be agreed upon in writing beforehand. The agreement should lay out specifically whose beneficial interest will pay for which travel expenses. Everyone should understand that the payment of these expenses for anyone other than a personal representative or trustee is not tax deductible. Each beneficiary would be paying for these items with "after tax" dollars.

Can a will or trust be drafted to include a provision to pay for travel expenses of family members? It can. If you want such a provision, we would suggest a cap on the expenses be put in place. Even if such a provision exists, the dollars would still be "after tax" expenses. In other words, the provision does not make these amounts tax deductible.

Allow us to elaborate on the payment of expenses for a reception or a wake. The IRS generally does not challenge "reasonable" expenses for these items. What's reasonable is subject to interpretation. One would rightfully expect Walter Cronkite's funeral reception to be more expensive than, let's say, one of ours. Therefore, his family would likely be able to deduct a greater amount for a reception (so long as they could document the amounts spent) than our family would be able to. But one should always exercise conservative discretion to make sure that you don't arouse IRS scrutiny.

KEY TAKEAWAYS



- THERE WILL LIKELY BE A NUMBER OF PROFESSIONALS INVOLVED IN THE ESTATE/TRUST ADMINISTRATION
- SUCH PROFESSIONALS MAY INCLUDE ATTORNEYS, ACCOUNTANTS, AND FINANCIAL ADVISORS, AS WELL AS APPRAISERS
- A FORMAL WRITTEN ENGAGEMENT TYPICALLY WILL OUTLINE THE PROFESSIONAL'S SCOPE OF RESPONSIBILITIES, AS WELL AS THEIR FEE
- ATTORNEY FEES CAN EITHER BE FIXED OR HOURLY
- PERSONAL REPRESENTATIVES AND TRUSTEES ARE ENTITLED TO REASONABLE COMPENSATION FOR THEIR SERVICES
- ONLY CERTAIN EXPENSES CAN BE PAID FROM ESTATE FUNDS

Chapter Eighteen

The Estate Settlement Program™

As this short book has illustrated, there are many decisions that have to be made in a typical probate or trust administration. Whenever we lose a loved one, legal, tax, and financial decisions must be made—and many of those decisions are time sensitive. This interferes with the normal grieving process, and these important decisions become that much more difficult as our judgment is certainly clouded by grief and other emotions.

That's where The Estate Settlement Program™ helps to provide comfort and clarity during a most troubling time. The Estate Settlement Program™ is a unique process that we designed and that is used by attorneys within our law firm.

The Estate Settlement Program™ is a seven-module process that keeps you in control of all major decisions, while delegating the administrative work to the proper legal, tax, and financial professionals that will identify the issues and lead you to make the best choices possible. We'll go over many of the issues that we addressed in this book. In fact, we wrote this book as a primer so that when we begin discussing the important issues present in your loved one's estate, you will at least have had some frame of reference to fall back upon.

With that said, no one expects you to memorize the lessons that we have written about. It's been our experience that merely reading about the process helps you understand what's about to take place. This is especially true if we helped your loved one draft his or her legal documents, and provided that he or she kept them up to date with us, the estate and trust administration should be smooth, as we will be implementing the good planning that took place back when the documents were signed in our office.

So allow us to explain each step of the process. This is a general review. Your situation may call for one or more of these modules to be modified:

1 Snapshot

The first step involves becoming familiar with your role and responsibilities when administering your loved one's estate. The Snapshot is an overview of the legal, tax and financial road that we will travel together following the loss of your loved one. We'll help put everything in order so we can begin the administration process. Upon completing this step, you'll have begun to delegate the worries to those that have experience dealing with these problems. If you are going to serve as the trustee and/or personal representative (executor), we can accomplish the following steps with you locally, or if you live in another community, we can communicate with you over the telephone and through the mail.

We'll find out what your expectations and goals are in administering your loved one's estate. We'll help you consider matters germane to your loved one's estate, including many of the issues that we reviewed in the preceding chapters. These may or may not include some of the following questions:

- Do you understand the will and trust documents? We'll walk through them with you so you know how they work and what they mean;
- How do any marital trusts for the surviving spouse and any children's trusts/distributions work and how is this all accomplished:
- Does the will or trust provide for these multiple generations of the family, and are there any "competing" interests? If so, how do you best promote family harmony?
- Who has the position of authority as personal representative (executor) or trustee, and what obligations does that person have to carry out the administration of the estate?
- What opportunities are there to save taxes?
- What do you do with joint accounts or property?
- Will the surviving spouse lose his or her homestead?
- What do we do if someone should challenge the will or trust?
- When are you supposed to make distributions to the beneficiaries?
- Is the estate illiquid, meaning that we may have to sell certain properties to pay ongoing living expenses or taxes? If so, what assets do you deem the best to consider for such sale?
- Are there any retirement accounts, pensions, or life insurance policies and how do they fit into this picture?
- Are any of the beneficiaries or their spouses spendthrifts who may blow through their inheritance, and if so, is there anything we might do about that?
- How do you deal with cars, boats, or mobile homes?

We've dealt with all of these and other issues countless times, and have the proven experience to guide you through the solution that is right for your situation.

2 Legal

In any estate administration, the legal documents govern the wishes of the deceased and determine the ultimate outcome of who benefits from the estate/trust. Moreover, a myriad of notices and other court documents must be filed under Massachusetts law. This module of The Estate Settlement Program™ serves to organize these important documents. These governing documents, such as the will and trust legal filings and official documents, are necessary to properly administer your loved one's estate/trust. We'll help you gather these documents and take note of important information such as the beneficiaries of the estate and any creditor notices.

As mentioned in Chapter Two and Chapter Three, the marshalling

3 Assets

and identification of all of your loved one's assets is paramount to the administration of the trust/estate. This includes those owned individually, in trust or in joint name with someone else. Implementation of new tax cost basis and discussion of prudent asset management during the course of the administration with members of your financial team is very important. One of the first responsibilities of the personal representative/trustee in an estate administration is to marshal the assets, obtain date of death values (for tax reporting purposes) and to determine whether the assets and portfolio should be adjusted to meet the needs of the estate and its beneficiaries. Where the assets are located, how they are titled (owned), and what they consist of drives almost all of the decisions to be made during the course of the administration.

4 Creditors

Our office has extensive experience administering estate and trust proceedings in accordance with Massachusetts law. We know when we have to open a probate proceeding, and when an abbreviated proceeding is adequate. As we reviewed in Chapters Four and Five, the law imposes requirements on personal representatives and trustees of revocable living trusts, and we guide you through that process, if appropriate. We know how to clear the creditors of the deceased, and to ensure that you can't be held personally responsible for any "surprise" bills that come after the estate has been distributed. The identification of any reasonably ascertainable creditors, the legal notifications required to those creditors, and the clearing of any claims that they may have is important when moving forward with the administration of the estate. The personal representative/trustee has a primary duty to first notify and clear creditors prior to making distributions to beneficiaries. This stage of the process leads you through the legal requirements to satisfy one of the most important obligations.

This stage of the process concentrates on a very important element of

5 Taxes

any estate administration - the proper reporting and payment of taxes. This module includes the identification of any gift, estate and income tax returns that may be necessary to be filed, as well as planning for any required minimum distributions due. Further, coordination with the CPA and financial advisors is implemented to minimize taxes and achieve objectives. It will be important to have a qualified tax return specialist on the professional team – preferably a Certified Public Accountant (CPA) who is well versed with income, gift, estate and generation skipping transfer tax reporting.

6 Distributions

In order to protect the personal representative/trustee from liability, and to comply with the law, an accounting is prepared and is delivered to the beneficiaries. The beneficiaries are asked to review and approve the accounting, from which point distributions are made. Some distributions may be outright where others may be held in continuing trusts. This module of the Estate Settlement Program™ serves to lead you through this process. It may include both ongoing and necessary income distributions to the surviving spouse (if applicable) and/or other beneficiaries during the course of the administration. The distribution of specific bequests, including tangible personal property, and ultimate distribution of the estate/trust to the beneficiaries and/or establishment of continuing trusts for their benefit are all facets of this penultimate module.

Upon completion of the estate and trust administration, we will review

7 Wrap Up

any "wrap up" items or help you consider whether your own estate plan might need an update. We will explain the maintenance of any testamentary trusts that were established under your loved one's will or trust and can serve as an ongoing legal representative for those matters. You may wish to consider revisiting your own estate planning with The Family Estate & Legacy Program™ offered through our office.

Piecing Your Life Back Together

It is our sincere hope that The Estate Settlement Program™ process helps you piece your life back together and that you will no longer worry about the legal, tax, and financial concerns that you may have had just after your loved one's passing. Keep in mind that this is a journey that will last several months, and that we will be there for you every step of the way. Once we have had our initial conversation, our office will put together our firm's engagement letter outlining both your and our responsibilities, including the price that the estate will pay for our services. All of the professional fees and costs associated with this administration will be paid from your loved one's estate and/or trust assets and should be tax deductible on either the estate or income tax returns. We'll review your choices with you to ensure that you and your family are treated fairly for the work that will be necessary to take you through this process.

Thank you for taking the time to read this book. We hope that it was helpful. We look forward to serving you.

About the Authors

Kenneth J. Simmons, Jr.

Attorney Kenneth J. Simmons, Jr. is one of the founding partners of Simmons & Schiavo, LLP. He has been helping families with their estate planning needs since 2002. Ken handles all levels of estate planning ranging from basic plans requiring wills, health care proxies and durable powers of attorney to more complex multi-million dollar estates involving marital deduction trust planning, irrevocable life insurance trusts, stretch IRA inheritance trusts, multi-generational dynasty trusts and intentionally defective grantor trusts. Ken's estate planning work also involves the use of limited liability companies to implement gifting programs, charitable remainder trusts, supplemental needs trusts and a number of other complex trust planning vehicles. Over the past decade, Ken has expanded his practice to include elder law and probate administration. Ken counsels his clients in all aspects of long term care planning, including advising on how to properly protect assets from the costs of long term care, explaining the benefits of Irrevocable Income Only Trusts, and helping clients to understand the implications of gifting assets. Ken's elder law work also includes completing and filing MassHealth Long Term Care Applications for clients entering or already in a nursing facility or who have a spouse entering a long term care facility.

Ken obtained his Juris Doctorate from Suffolk University Law School in 2001 where he graduated cum laude in the top 6% of his class. Ken is a member of the Massachusetts Chapter of the National Academy of Elder Law Attorneys and a member of the Boston Estate Planning Council.

Ken lives in Arlington with his wife and three children. Ken and his family enjoy snowmobiling, hiking, fishing and Friday night game nights.

About the Author

Marco A. Schiavo

Attorney Marco A. Schiavo is one of the founding partners of Simmons & Schiavo, LLP and has focused his practice on estate planning and estate administration. In guiding his clients after the loss of a loved one, Marco has personally witnessed the unfortunate impact that the lack of an estate plan can have on families. These experiences continually reaffirm his strong belief in the countless benefits of a well-drafted and well-implemented trust-based estate plan. A proper estate plan provides for a smooth transition of control in the event of a person's disability and provides privacy and ease of property distribution at death by avoiding the costs and delay of the probate court. Marco's primary focus is assisting his clients in preserving the wealth that they have accumulated so that they may pass it on to their loved ones through the use of creditor protection trusts, estate tax minimization techniques, business succession planning and Medicaid/long term care planning. Marco handles all levels of estate planning ranging from basic plans to complex multi-million dollar estates involving marital deduction trust planning, irrevocable life insurance trusts, stretch IRA inheritance trusts, multi-generational dynasty trusts, gifting strategies, charitable remainder trusts, special needs trusts and a number of other advanced trust planning vehicles.

Marco has a passion for business; he received his Bachelor of Science Degree from Babson College with a double major in Finance and International Business Studies. At Suffolk University Law School, Marco focused his law school studies on Estate Planning and Real Estate Law.

Marco lives south of Boston with his wife and three daughters. Marco is fluent in Italian and Spanish. His interests include traveling, home improvement projects, hiking, and most of all, spending time with his family.

About the Author

Craig R. Hersch

Craig R. Hersch is a Florida Bar Board Certified Wills, Trusts & Estates attorney, CPA, and was a founding shareholder and originating board member of a private trust company in Fort Myers, Florida. Mr. Hersch is the senior partner of Sheppard Law Firm, which was originally established as Sheppard & Woolslair in 1924.

The Sheppard Law Firm's Client Care Program boasts over 1,300 individuals at the time of this publication.

Hersch has published seven books, numerous professional articles and several whitepapers, educating clients and attorneys in the estate planning field. He serves on the editorial advisory board of Trusts & Estates Magazine, a leading trade journal for estate planning attorneys, CPAs, trust officers and financial advisors throughout the United States.

Craig and his wife Patti have three adult daughters, Gabrielle, Courtney and Madison, of whom they are very proud.

THE ESTATE SETTLEMENT PROGRAM™

Expertise. Comfort. Clarity.

Whether the loss was the result of a sudden calamity or from prolonged illness, the grieving process after losing a loved one leaves little room for the many major decisions thrust upon you. Attorneys ask you to sign legal papers, CPAs present tax returns and financial advisors suggest portfolio adjustments. These are the people that you want to deal with the least. This book explains the issues families are likely to face and the steps you can take to ease the transition following a loved one's passing.

Kenneth J. Simmons Jr. is a Massachusetts wills, trusts & estates attorney who handles estate planning ranging from foundational probate avoidance plans to complex multimillion-dollar estates with a focus on long-term wealth preservation.

Marco A. Schiavo is a Massachusetts wills, trusts & estates attorney whose primary focus is assisting his clients in preserving the wealth they have accumulated so they may pass it on to their loved ones.

Craig R. Hersch is a Florida board certified wills, trusts & estates attorney and CPA who has three decades of experience helping families achieve their estate planning goals.

For more information about probate and trust administration:
781.397.1700
www.simmonsandschiavo.com