# THE PRACTITIONER'S PERSPECTIVE: INSIGHT FROM ESTATE PLANNING ATTORNEYS

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PROFESSOR VOLKMER:

We are moving in the direction from an academic level of discussion to more of what I would call the real world discussion. Estate planning is very practical. It is about people, it is about their wealth, and it is about decision making. As well as, if you will, the big picture policy decisions. So we are moving in the direction of the trenches in the practitioner level. And we have three very distinguished practitioners from the fields of estate planning and wealth transfer. And I think you will see in some of the discussions we have had a little preview among ourselves about what our commentators are going to say and I think you see us leading into a discussion similar to that of our TePoel lecturer, Professor Caron, with regard to the estate tax uncertainties. I think you may get a little preview of that in some of the comments of our presenters upcoming. I cannot resist saying, with regard to the last presentation, that my brother-in-law, a 1962 Creighton law grad, has been exclusively involved in representing defendants in criminal tax prosecutions. And at least in my day of law school, which was many years ago, the question was asked what is the difference between tax evasion and tax avoidance? And in my day we had a simple answer: ten years in jail. I realize that is oversimplifying that topic.

I would like to introduce our panel today. You can see from the program that you were given that they have varying backgrounds in the field of estate planning work. Mary Donovan is an attorney with the Koley Jessen law firm here in Omaha. Ms. Donovan practices in the areas of business securities law, tax charitable giving non-profit organizations, etc. I might have mentioned that all three of our speakers are Creighton University School of Law graduates whom we are

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very proud. Next will be John Sulentic, senior vice president and fiduciary tax director at Wells Fargo bank. John comes at this topic more or less from a particularly fiduciary tax standpoint, which again in terms of Professor Caron's lecture, I think you will find that this is presenting issues peculiar to that area of estate planning. Finally, Craig McGarry, currently serving as president of Bulk Trade, a financial services consulting firm, former senior vice president of Wealth Management Group First National Bank of Omaha, having previously served in leadership positions in several banking organizations. So we have a very well qualified group coming, as I say, from an estate planning perspectives—from varying perspectives, and so I would like Mary Donovan to begin our discussion

MS. DONOVAN:

Thank you. The first topic I want to discuss I am actually throwing in, that is, I had not told Professor Volkmer about it. Listening to Professor Wendell's discussion reminded me of a good case that we had in the last couple of years relating to adult adoptions. And I thought it would be interesting to talk about that with a Nebraska case compared to the issues Professor Wendell brought up.

The case involved a Nebraska resident who died and had left a trust for his two children. The trust was split into equal shares for his children but was to be held in trust for his lifetime with discretionary distributions to them during their lifetimes. Upon their deaths, the daughter's shares was to distributed to her issues if she had any and if not it would go over to her brother or her brother's issue. The daughter did not have any natural children. The brother had natural children. The trust goes on for a number of years, the daughter did not have any children and decided that she wanted to do an adoption so that she could leave the half that had been delegated to her to who she chose as family–instead of going to her brother and her brother's children because she had issues with them and did not care for them. The daughter was a resident of California. Nebraska would not have allowed such an adult adoption. The daughter had moved to California which did allow adult adoptions. She was a resident of California and she wanted to adopt her adult cousin. The cousin was related to the testator but the testator had not specifically provided for him in his trust. But the daughter wanted to adopt her adult cousin. She cared for him. There was a family relationship. She cared for his children and wanted to help with their education expenses. So, she went through the process in California and was granted an adult adoption. So fast forward several years—like twenty years. The daughter dies and it is a Nebraska case the trust was established by a Nebraska

decedent. The trustee was uncomfortable with just distributing the remaining shares to the adult cousin even though the trust specifically said that adoptions counted in terms of who the daughter's issue would be. The brother's children challenged the trust, stating they wanted to receive that share because Nebraska did not recognize adult adoptions and therefore such a distribution would be against public policy. They further argued that it would be against the intent of the testator. Well, the Nebraska Supreme Court looked at those arguments, saying there was not an issue of public policy and not an issue of intent of the testator in this case. Further, because of the adult adoption judgment in California, the Court was obligated under the Full Faith and Credit Clause to recognize the judgment of the California adoption and therefore ruled that the share went to the adult cousin.

This is a little different case than what Professor Wendel was speaking about because the Court did not discuss intent as their opinion rested on the Full Faith and Credit Clause. In doing some research, there are some cases in other jurisdictions where courts looked into the intent of the testator and did not allow the inheritance to go to the adult adoptive party. But in those cases, the relevant inheritance tax statutes prohibited the inheritance from going to adult adoptions. And that is a statute that does not fall under the Full Faith and Credit Clause. Here, the adoption was a result of a California judgment and the Nebraska statute did not prohibit inheritance going to the adult adopted child as it just prohibited adult adoptions in Nebraska–a family law issue. Thus, the Full Faith and Credit Clause had to be upheld and that is what the Nebraska Supreme Court ruled.

The next thing I thought I would touch on is related to the issue of our keynote speaker, Congress's failure to fill the gap and allowing the estate and generation-skipping tax to be temporary repealed for decedents dying in 2010. While there are many issues from a substantive standpoint to discuss on that topic, I thought I would kind of touch on the topic here of ethical considerations and the estate planning and discuss the issue that we were addressing in our office–do we have an ethical duty to contact our clients that are dormant estate planning clients? That is, where lawyers in our firm did clients' estate plans maybe ten or twenty years ago, do we have an ethical duty to contact those clients and let them know that this huge tax development has occurred and it could greatly affect their estate plans if they did not act? Well, we did not think about that too hard because we wanted to do it from a client relationship standpoint. So we definitely did—we did a letter to all of our estate planning clients letting them know what was going on and warning them what type of estate plans that might be most greatly affected and they may need to act.

Looking at the Nebraska rules of professional conduct there is the rule 3-501.4, which regards communication, it requires lawyer to keep the client reasonably informed about the status of the client's matter and explain the matter to the extent reasonably necessary for the client to make an informed decision. Well, if you are looking at it and you are in the middle of case, that rule clearly applies. But does that rule really apply to dormant estate plans? Is there an ongoing duty to keep estate planning clients, which you have finished their estate plan years ago, informed of current tax laws? The comments to the Nebraska Supreme Court rule do not specifically address dormant estate planning clients, but the American College of Trust and Estate Counsel ("ACTEC") has commentaries to the model rules, and the relevant comment says, "In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise a client of the effect that it changes in the law or the client's circumstances might have on client's legal affairs." So, based on that comment, maybe it depends on what type of agreement you have with your clients about whether you will update them in the future.

There is a New York case that I came across that did hold that if the lawyer tells the client that they will advise of a future change in the tax law, then the lawyer can be liable for failure to do so. So you would have to be very careful about what you tell your clients about whether you tell them you will keep them informed. It is very easy when they have executed their documents and you are chit-chatting on your way out the door, "Oh yeah we will keep you informed." Well, you have to be careful about that. In our office, what we have been doing for years is at the signing of the estate planning documents, we have this one page document that we call an engagement agreement and it essentially states, "(1) Our engagement is completed the effect of your estate plan, (2) we do encourage you to review your estate plan periodically, (3) we have enclosed some guidelines about when you might want to review your estate plan, (4) we do have a database where we would like to know if you would like us to send you a reminder kind of like when the dentist sends you a reminder for your appointment, and (5) we will just simply send you a reminder that says you asked us to send you a reminder every two years to review your estate plan, but we will not be reviewing your estate plan unless you proactively contact us." We think that engagement agreement sets the tone that encourages them to consider that a review might be necessary, but we do not have an obligation to contact them even though we might, like we did in this case, from a client relationship standpoint. We do not want that requirement out there.

We are also moving more towards doing engagement letters—that is, a full engagement agreement for estate planning matters. We have done it a long time for estate administration manners, but we are moving more towards—especially with bigger estate plans—doing it just to be very clear with the client. You know the rules do—the Nebraska Supreme Court rules–do require that you at least communicate orally and encourage that you do so in writing at least the terms of engagement, the terms of scope, the fees, and the costs that might be involved. But based on this dormant estate plan rule, it might be prudent to also have that in your engagement letter. And the other thing that we focus on in our engagement letter is conflicts of interests. There are lots of areas that can have conflicts of interests in estate planning. And so we specifically say that if a conflict arises, we may need to withdraw representation. We need to clearly state who we represent because there are many misunderstandings on which individual you actually represent, for example, in an estate administration. You know, normally the lawyer represents the personal representative and not the individual beneficiaries. You need to be clear because there is lots of confusion in that area. And that is all I have.

MR. VOLKMER:

Thank you, Mary. John.

MR. SULENTIC:

Alright. Thank you. My primary responsibility is in tax compliance. At Wells Fargo, we are responsible for tens of thousands of trusts. We probably have a few hundred estates concerning 2010 deaths and we are at a loss of what we are doing today, so that is what I am going to be addressing. As part of the repeal of the estate tax, they have implemented a carry-over basis that is problematic when you are trying to find what is the decedent's basis in the assets. Locating that information can be difficult. This was actually enacted in the past, during the 1920s. Congress had a carry-over basis. Again in 1976 they tried this, and it was repealed in 1980 before it could take effect. The main reason that was cited for the repeal in 1980: unreasonable administrative burden on estates, heirs, and the Treasury Department. They just could not figure out how to make it work. The person with all the information is now gone. Where do we go? In trying to tie this into the topic of today's seminar, I kind of questioned is it moral or ethical what Congress and the Senate did by letting this lapse and leaving us in this position. To enact a law that would allow this to go into effect—that has failed in the past.

I also regularly meet with a group of my peers, tax directors at major banks and trust companies around the country, we discussed this topic and it is a great concern. Basically, we are all on hold. We are trying to do a stalling tactic on estate administration. We are just not sure what to do. There is uncertainty. We want to do the right thing. As a corporate trustee or a corporate P.R., we want to avoid being sued. Unfortunately, we are right in the middle of a minefield right now. It is difficult to plan. It is uncertain. We are dealing with rumors. We listened to rumors in December that something was going to be done. They would never allow the estate tax to be repealed. Then there were rumors that the Senate was going to act early in the year. They did not. We had rumors in February that said that something was going to be done. Most of my colleagues have given up listening to the rumors. Even the rumors have started to slow down. We just do not know what to do. The Internal Revenue Service ("IRS") is in the same position as us. As part of the carry-over basis, there is a reporting requirement for how do we do the allowed step up and carry-over basis. My sources are telling me that the IRS is not even begun working on the form to report this. They are kind of counting on the Senate to act and do something. We may find ourselves when these forms become due in 2011 just making up our own. Again, uncertainty in tax is not a good situation. We are starting to get some relief, not from Congress, but from the states. In the last few weeks several states have enacted statutes to fill the gap. Nebraska, I believe, just last week enacted a statute that the governor signed into law to give us some guidance about how to interpret a document that has references to an estate tax that no long exists. The states are stepping up. They recognize this problem, and we are getting some relief from them. We deal in multiple states and only a hand full of states has addressed this and it is still a big issue.

Another issue is that the generation-skipping tax ("GST") is gone. Some view this as a great win. This is the time to transfer assets to younger generations and avoid taxation. This may very well be a great opportunity to do this, but, again, we have the specter of retroactive legislation pending. You get caught and have to pay tax later if you transfer assets now. One of the issues that I am dealing with is GST taxable termination where, in this case, the trustee is liable for the GST tax. So now we have a situation that has – actually we have several of these – where a skip person is entitled to the assets. The law today says there is no generation-skipping tax, and he says he wants his money. As a trustee, we are very clear we do not know what to do. If we give them all the money and distribute the assets and then Congress enacts a retroactive legislation, we may be left holding a big tax bill and trying to chase the beneficiary—wherever he is—to

recover the money. Given that the last GST tax rate was forty-five percent, this could be a rather hefty burden on trustees around the country. So that is leaving us with lots of questions. What are we doing about this? We are being honest in communicating with our clients. We are talking to the beneficiaries, explaining the situation that we are in, and we are being ready to act. If we hold the assets waiting for Congress and we get into 2011, then we blown it because the GST tax comes back in 2011 and we will be subject to the tax. So, we have to distribute these assets in 2010 and try to protect ourselves. So, what we are doing is working with the clients, their attorneys, and their accountant advisors and we are distributing the assets to them. But we are working out a relationship where they immediately contribute a safe amount, forty-five percent or fifty-five percent, it is just a guess, of the assets back into a restricted investment management account so the assets are held at the bank and we can access them if we have to pay tax, but they actually belong to the clients. So, in effect we have distributed them and avoided the GST tax, but we are trying to protect our interest and the client's. They do not want the bank to chase them on a later date. Again, it is just the confusion the Congress and Senate have left. We are struggling to do what we can. And as I was sitting listening to the other speakers and trying to figure out how this fitted into the topic of the day: moral, religious, and ethical prospective, it dawned on me there is a religious perspective to all of this: we are praying for an answer.

MR. VOLKMER:

Thank you very much, John. Craig McGarry.

MR. MCGARRY:

I guess if I was going to put a heading on mine, I would put a caption over it "random thoughts." Three things I wanted to share with you. As John said, these are very interesting times. Most of you have heard the purported Chinese curse: may you live in interesting times. Well, from my perspective the interesting times started back in the fall of 1976. It was senior year of law school and we started learning estate and gift tax from Professor Birmingham. About six weeks into the semester, Congress in its wisdom changed the law, as you may recall the title: the "Tax Reform Act of 1976." That was that fall and we started over to learn the law in about half of a semester.

There have been several periods since then where we have been in periods of transition, during these periods a tool came into existence and was fairly frequently used–that tool is the disclaimer trust. I would suggest to you that it may be a tool whose time has returned, if

you will. The reason why the disclaimer trust had been so effective is because it was about simplicity and flexibility. What is it? If you do not know what a disclaimer trust is, it is basically a situation where a surviving spouse or executor P.R. can disclaim some asset or portion of assets. And those assets subsequently, without direction from the surviving spouse, end up in a trust, which the surviving spouse might receive income and/or even discretionary principal distributions. It is this ability to leave the spouse a solution, in a situation where not knowing what the law would be at the time a death occurs, that may make this once again a practical and useful tool. It was viewed in its use in the past as significantly less complicated and onerous than dealing with formulas whether pecuniary or fractional share formulas. I am not suggesting this a cure all for all situations, but I think in the right situation where you are looking for flexibility and simplicity and there is a stable family situation it probably can be a useful tool. Where you have blended families and/or contentious relationships, it is probably a tool that is fraught with peril. I just offer that as an idea to think about as a tool here.

A second observation in my work, and I am seeing it now having spent thirty plus years in the administration side in building trust departments and administering customer accounts, I now see in the work I am doing with trust departments and organizations fine tuning and growing trust departments that most trust departments have as a matter of policy included in their policy statements as to how fees will be charged in trustee verses co-trustees situations. In the past, it has always been the case that corporate fiduciaries typically want the ability to control the assets and produce accounting. Because they are accountable, they want to make sure that everything is under their control. Where there is real estate, especially commercial real property, there is concern about inspections and tainting of property. Thus, there is really a tight effort to manage risk and most corporate trustees, where they are serving as a co-trustee with a spouse or some other family member, expect to perform all of the functions they would have performed as sole trustee. Additionally, they will be required, as a matter of reality, to coordinate everything they can do and communicate on a regular basis with a family co-trustee. So, instead of where logic would say I can have a spouse, for instance, serve as co-trustee and therefore split the cost or cut the cost back a bit using a co-trustee, the reality is that for a corporate fiduciary it is probably more work. I would suggest that there are plenty of good reasons to use a corporate fiduciary but saving dollars because a spouse is going to perform some of those functions probably is not one.

Third observation. Thirty plus years in this business and the past couple doing consulting, I have noticed an acceleration in a trend that

is to me a troubling trend. Some organizations, none that we have worked for, are shying away from accepting some smaller trusts, or establishing minimum fees that may on the surface seem confiscatory for certain sized trust relationships. Now, if you think about it, if you can not get a certain amount of revenue for a certain amount of work, then there is some logic in it–I would not suggest otherwise, from a strictly economic perspective it makes sense. What if you had a doctor say, "Well I do not treat minor things that are under what I would like to be addressing." I mean all organizations want to have the biggest and best customers, right? Nobody wants to pay the price of an appendectomy to have a cold treated, right? I think it is a situation now where there are some community banks, especially in smaller communities, that are kind of taking advantage of this situation. The frank reality is there are many people with modest $100,000, $200,000, $300,000, or $400,000 in assets who really do not have any family member or close relationship to help to step in, and yet we are seeing a trend away in the willingness of organizations to serve for smaller customers like this. I would suggest that you, as practitioners, have the opportunity to reward organizations that are willing to step in and say, "I will get some big ones, I will get some small ones, and maybe we will not make money on the small ones, but by golly, we are in an industry that throws up significant roadblocks to easy entry to that industry, and there ought to be a price with that roadblock to easy entry." There are little customers out there, frankly, that need to be taken care of and frankly some community banks are jumping into the fray and taking advantage of that opportunity.

I started off by mentioning a purported Chinese curse—may you live in interesting times. I do not know if any of you have ever looked online or chased it down. If you do a little homework on it, what you will find out is that it is clearly not a Chinese curse. The closest anyone can come up to anything that suggests that it is a Chinese curse would be one that goes something to the effect, "It is better to be a dog in peaceful times than a person in chaotic times," but that is not quite the same. There is no appearance of this ancient Chinese curse prior to the late 1930s—somewhere between 1936 and 1939. That is about when it starts appearing, but there is another interesting version of this curse that goes to the effect, "May you live in interesting times and come to the attention of important people." Well, as long as the important people are not the enforcement division of the Internal Revenue Service, then I wish you interesting times. Thanks.

PROFESSOR VOLKMER:

Thank you very much. Well in accord with our mini tradition of this afternoon, I get to ask the first question, and Professor Caron will be going back to the topic of the estate tax and I would like, as kind of a property based person, to ask our panel about what I think, in terms of estate planning today, in terms of a challenge is where persons are living longer the capacity issue and dealing with clients who are either close to being incapacitated or are likely to be incapacitated in the future–I was wondering if there was any perspectives from the practicing folks who are out there in the real world on any ideas about the challenge of incapacity that they would like to offer.

MS. DONOVAN:

Professor Volkmer is right. We have noticed in our practice that it is becoming more and more frequent that we have these issues, especially when we have a long-term client that we have represented and have a long-standing relationship with. We know them well and observe that perhaps they are starting to deteriorate in terms of their mental capabilities. Along the years, we have helped them implement their estate plan and so of course we have financial powers of attorney and healthcare power of attorney in place, so there can be someone that they know and trust step in and help them deal with their financial or healthcare issues. But the problem is that there is always that gap period where the client thinks they are still competent and the family member holding the power does not. It is funny, I had the daughter of a client call up, complaining that her dad would not, although he owns millions and millions of dollars, pay for a housekeeper or a home healthcare person to take care of the house. Another client called up about her father and her complaint was that her dad has a housekeeper and he wants to give all his money away to her–so, there was a contrast of different issues having to do with housekeepers. Those are the kind of things we are getting and the question is–what do you do?

If you look at the Supreme Court rules, there is a rule on incapacity and it does say you can work through those things and give time to see if they resolve themselves—if the client comes around—and if you get to the point where there is a threat to the client you can help them get some kind of protective help in place. What we have found is that you try and manage that as much as you can but at some point there is a conflict between whether you are representing the long time estate planning client or the agent under the dual power of attorney who is the one that needs to be acting? They could have conflicting concerns. When it gets to that point I think it's best to have the agent

under the power of attorney get separate counsel and get a determination that the client is in fact incapacitated. That agent comes back to you as their counsel, and you can deal with the agent and not be concerned about the duties to the now incapacitated client.

MR. SULENTIC:

The biggest issue I see is when we have individuals and their estate plan has not been fully completed or implemented at the time when they become incapacitated and that just leaves a lot of indecision at work. If I had one bit of advice, it would be to make sure the clients you are working with, if they show signs of dementia or early onset, get everything done and documented while you can. I am not trying to make this a plug, but there are services out there and the bank has one, elder services, where they do take care of the elderly and step in more than just an investment advisor or trustee and provide complete service whether it is calling the client daily, taking them or arranging transportation to doctors' appointments, and watching their financial records for financial abuse. It is a broad ranging service and we found that it is very helpful in today's environment where people may have aging parents in one state and they are in a busy career in another state. There are services out there, so if you are representing a client you may want to look for a similar service to help them. I have seen that it is a very well received service that helps people as they age.

MR. VOLKMER:

We are kind of running out of time here. I am sorry we will not have any time for questions from the audience, but I am sure if you have a question for one of the panelists as we are departing from our podium that they would be happy to answer them. When John talked about the watching over the finances, I could not help but think of the front-page story about the conservatorship and the alleged protection with court oversight–what a sad situation that is from a systemic standpoint. I know there are no easy answers when it comes to people who are durable power holders or holders under the power of a revocable trust or conservators or guardians. I know there is no magic bullet in terms of trying to prevent the looting that goes on. But I do think from a societal, systemic standpoint that we have to think more seriously about how systemically we put things in place and what John indicated about oversight and watching the finances, again, I think that from my perspective, and it is probably because I am getting

older but I'll admit that, these issues about capacity and dealing with incapacity are particularly important. So, I want to thank our panelists again for their great presentation. Thank you very much.