By Michael Gilfix, CAP, Fellow

Multi-Generational Planning: Opportunities Abound

Multi-generational planning can be a "win-win" for clients who have trusting, mutually supportive relationships with children and grandchildren.

The traditional approach of elder law and estate planning attorneys is to focus on the legal planning needs of the individual client with whom a meeting takes place, replete with duties of loyalty and confidentiality. Among other things, this approach views the client's children as secondary participants, at best, excluded from the legal planning process. There is an alternative approach which is often more appropriate — one that focuses on quality of life and the sharing of diverse responsibilities among two and perhaps three generations. This approach, however, can only work when there is harmony, shared values, and trust among all generations. When it is applied, dual representation agreements must be executed along with other measures to ensure that conflicts of interest are avoided.

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Special Needs Planning

Many NAELA members probably include a focus on special needs planning in their practices. Trust, public benefits, and tax issues abound, creating an abundance of planning opportunities. Opportunities, however, can be lost. Consider a typical situation involving a young man, Adam, on the autism spectrum living in a subsidized group home and receiving Supplemental Security Income (SSI) and Medicaid benefits. His parents, aware of the benefits of special needs trusts, met with an attorney who included special needs planning in her areas of expertise. The attorney drafted a revocable living trust to hold all their non-retirement assets, which also specified that the share of the estate set aside for their son would be managed in a special needs trust incorporated into their revocable living trust in a separate article. The special needs trust would be activated and funded upon the death of both parents.

Adam's grandparents expressed a desire to leave a portion of their estate for their grandson. They were inclined to leave money directly to him, but fortunately their son learned about their intentions and asked them to leave the inheritance to a special needs trust instead to preserve Adam's eligibility for government benefits. The problem was that a special needs trust did not yet exist. In this scenario, particularly given the presumption that the grandparents would pass away first, there was no free-standing special needs trust that could be the recipient of the grandparents' bequest.

The parents' attorney did not ask about the desire of other family members (such as grandparents, aunts, and uncles) to leave a portion of their estate to the child who was receiving and would continue to need government benefits. Had she done so, she no doubt would have received permission to communicate with the grandparents to provide them with representation or, at minimum, to educate them about this issue so they could speak with their own estate planning attorney. Ideally, and particularly in light of the grandparents' intentions, the attorney could have prepared a free-standing special needs trust to which anyone could leave assets without having to create a new special needs trust — an option

which was ultimately presented by the grandparents' attorney.

In the end, Adam's parents went to another attorney, also retained by the grandparents, who created a free-standing special needs trust and also modified the parents' revocable living trust to provide for the distribution of their son's share to the special needs trust. Another thing to consider is that the child with a disability may also become a client. Where capacity exists, the preparation of a durable power of attorney and an advance directive often eliminates the need for a guardianship or conservatorship. Special needs planning always involves two generations. In so many matters, it should involve three generations and possibly other family members as well. The family is better served by the attorney who proactively addresses multi-generational planning.

Reverse Mortgages and Long-Term Care

To some, it will seem odd to identify reverse mortgages as a financial and legal planning tool that raises multi-generational issues and opportunities. Every older individual considering a reverse mortgage should be educated about the following planning considerations and, ideally, involve members of the next generations.

I once attended a talk by a reverse mortgage broker who said there is "virtually no downside" to this approach for older homeowners. However, consider the example of Mrs. L., an independent woman 88 years of age who divorced her husband many years ago. She had modest income, limited assets, and a home valued at approximately $1.4 million for which the cost basis was only $10,000. As time passed, her health and mobility challenges increased. Although she was advised by her doctor and children that care in a facility would be better for her, she was adamant about staying at home. While her mobility needs were limited, she did not satisfy the "activities of daily living" (ADL) requirements for such programs as In-Home Supportive Services (IHSS). It was unclear whether or not she even knew about such government programs. She needed approximately 30 hours of help each week. The cost through her chosen agency would be more than $40,000 per year, but she was determined to not put burdens on her children. She did not even want them to know about her circumstances. Sound familiar?

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She asked her estate planning attorney about a reverse mortgage and was told that, indeed, it might be the best option for her. She was referred to a reverse mortgage broker and obtained a reverse mortgage which distributed funds to her for the next 24 months to pay for home care services. With loan costs and interest, the debt was approximately $140,000. Subsequently, her health further declined and nursing home placement was unavoidable. The cost would be over $9,000 per month. Since she had permanently moved out of her home, the loan had to be repaid. There was no other option. Sale of her home netted $1,210,000. Her California and federal capital gains tax was approximately $300,000. Even after her $250,000 protection from capital gains tax exposure, her gain was approximately $950,000 in the bank to pay for care. She no longer owned a home that was exempt for Medi-Cal/Medicaid eligibility purposes in the state of California. Over the balance of her lifetime, she exhausted another $215,000 to pay for her nursing home costs. Upon her death, approximately $540,000 had been lost from her estate due to a combination of capital gains taxes, funds representing the costs of the loan and accrued interest, and the cost of skilled nursing care paid out of her own pocket.

What might she have done differently? Ideally, her children would have been involved. In many such instances, facilitated arrangements may be employed whereby a financially able child or children help their parent with the cost of care. This could be in the form of a gift, partially recovered by claiming the parent as a dependent for income tax purposes, or it could be in the form of a loan whereby the children are repaid upon their mother's passing. Had they coordinated their planning, a reverse mortgage would have been unnecessary.

- There would be no reverse mortgage repayment responsibilities.
- The home would not have been sold, so there would have been no capital gains tax.

- Medi-Cal/Medicaid benefits would have been obtained immediately upon entry to the skilled nursing facility.
- There would have been a "stepped-up basis" when the home was sold after her passing, so all capital gains taxes would have been avoided.

Using the multi-generational approach would have saved this family over $500,000.

Estate and Related Tax Planning

The benefit of multi-generational planning is perhaps most evident in the context of planning to avoid or minimize estate tax exposure. With the current high level of estate tax protection — $12.92 million per person in 2023 — this is a concern for only a small sub-set of clients. In 2026, when the level of estate tax protection drops to perhaps half the current level, estate taxes will affect far more individuals than one might suspect. There are countless communities around the country where home ownership alone can propel an individual to the point where estate tax exposure is a reality. Many techniques can be used to substantially reduce estate tax exposure. The purpose of this article is not to delineate or explain these options. Rather, it is to emphasize that the involvement of the next generation — as gift recipients, participants in family limited partnerships and other entities, and perhaps sharing control of assets — is wise, if not essential.

Dynasty Trusts

It should be emphasized that "dynasty" trusts are not only for the very wealthy. They are appropriate for the vast majority who want to ultimately protect assets for their grandchildren and beyond. It brings to mind the insightful advice from Gore Vidal: "Don't have children, have grandchildren." In addition to avoiding inclusion in a child's taxable estate, the distribution of assets to a properly drafted dynasty trust provides protection from divorce and a very high level of protection in the event that a child is ever sued. All these protections can be lost if assets are left directly to a child or children.

Conclusion

Always think about what role parents, grandparents, and grandchildren may favorably play as work is done for an individual client. Multi-generational planning is appropriate for countless clients who have trusting, mutually supportive relationships with children and grandchildren. It is a "win-win." It is a win for clients because attorneys more comprehensively advise them, capturing benefits that would otherwise be lost. It is a win for the estate planning and elder law professional who will provide better and more impactful services. ■