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EstatePLANNING

If it sounds too good to be true, it might be

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Some recent situations that prove the maxim:

"The funds you have in your daughter's Uniform Transfers to Minors Account (UTMA) are hardly earning anything. You should transfer them to an annuity in your name with a guaranteed rate of return."

Too good. It may be true that the UTMA account is earning very low interest and that you could do much better with another form of investment. However, even though you contributed it, the money in an UTMA account is not your money. It is your daughter's money. You can transfer it to a 529 college savings plan, but you cannot take the money back.

"If you title everything in joint name, you can avoid probate."

This is true. You can also cause more taxes to be paid at the death of the surviving spouse and put the entire family's assets at risk of creditors' claims or dissipation by nursing home bills or the expenses of a new spouse, including nursing home bills and elective share rights.

"You can create an irrevocable trust and retain the right to change the provisions at any time."

Marginally true. As a practical matter, "irrevocable" means you cannot change the provisions. In a rare instance you may be able to retain the authority to make changes to a few of the nondispositive provision. For example, if you are the grantor and trustee of a charitable remainder trust, you may retain the right to modify the trust provisions to ensure qualification as a charitable trust.

"I can give $13,000 per year to my children and grandchildren to 'protect' the funds from nursing home bills."

Maybe. If you make the gift within five years of applying for Medicaid, the transfer will be treated as a resource of yours which must be spent before you qualify for Medicaid. On the other hand, if you apply for Medicaid more than five years after making the gift(s), they will not affect your qualification.

"If I move to Florida I must sell my home/cottage in New York to avoid being treated as a New York resident and pay New York estate taxes."

Too good. Two major factors affect New York estate taxation in these circumstances. First and foremost you must establish yourself as a Florida domiciliary. Your Florida (home/apartment) is your permanent residence. (How to do that is not within the scope of this article.) Second, your New York real estate and tangible personal property (things) will be subject to New York estate tax.

However, if you transfer ownership of those assets to an entity, such as a limited liability company, partnership or corporation, they will not be subject to New York estate tax. Beware that New York may follow Massachusetts' lead and ignore the entity and still tax the real estate.

"If I give away enough money before I die so that I have less than $1,000,000 when I die, New York will not collect any estate tax."

Maybe and maybe not. As a broad generalization, if you make gifts of more than $13,000 per year per recipient, you may still have to pay a New York estate tax unless your estate has to pay an estate tax on the assets you retain without regard to the gifts.

"My mother named me as her power of attorney, so I can make gifts to family members to reduce estate taxes."

Maybe. Only if you are specifically authorized to do so by the power of attorney document. You must read it carefully to be sure of your duties and limitations. If you are uncertain, seek legal advice.

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Continued ...

"My agent told me that life insurance is not taxable."

This is true and false. As a general rule, life insurance is not income taxable. As a general rule it is estate taxable.

"I have been taking care of my father, and I am entitled to be paid something for all this work."

Too good. Generally, services rendered to a relative are treated as being made out of love and affection. If you want to be paid for these services, then you need to have a written agreement with your father (in this example). The agreement is more likely to be upheld if the signing occurs in front of a disinterested witness who can testify that this is what your father wanted.

"My wife died and left me some money. Most of what she had is in a trust for me and I am the trustee. I have been using the trust fund to take vacations and to upgrade my house and other things. I would rather spend her money than mine."

This is a problem. If the assets are in a trust, they are really not your assets. Ultimately, they will pass to your children when you die. A trust for a surviving spouse is generally created to provide income for the survivor and access to principal for the survivor's extraordinary expenses.

The trust generally results in reduced estate taxes, protection of the assets from the survivor's creditors, including nursing homes, and protection from the claims and debts of a new spouse. If the surviving spouse/sole trustee starts using the assets for purposes not permitted by the Trust provisions, all of the protections sought may be lost. I strongly counsel clients not to have the beneficiary of a trust be the sole trustee of the trust to avoid the above risks.

David C. Pettig, principal with Pettig Torres PC, has been practicing trust and estate law for more than 30 years. He can be contacted at dcpettig@pettig.com or (585) 586-1430. If you have similar experiences or if you have suggestions for other articles, please forward them to info@pettig.com.

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