

By Avi Z. Kestenbaum & Rachel D. Mansdorf

It's Personal

The best estate planning takes into account clients' intimate individual and family matters. We lawyers should be better trained in the psychological

As estate-planning attorneys, we often find ourselves forced to act as family counselors for our clients—despite our lack of formal training for this role. In fact, the psychological aspects of our job are often overlooked and misunderstood, although they're arguably more important than the complicated tax planning, asset protection advice and legal services we provide.¹

Our own practices impress upon us the estate planner's need to address the psychological. In just two days, one of us recently was in all of these situations: meeting with two different client families to mediate estate disputes; celebrating a client's wedding; attending a client's funeral; paying a shiva² call for another deceased client; assisting in the hospital signing of "deathbed" estate-planning documents; and participating in a fundraising event for a client charity.

Most estate-planning attorneys learn legal and tax-saving techniques through reading, training and being mentored by senior attorneys. It's far more difficult to learn the skills required to become a trusted advisor and family counselor. Yet, in the grand scheme, it's only as trusted family counselors that we can truly influence and nurture.

Estate-planning attorneys have a great responsibility. If our guidance is wise and our documents well drafted, we help foster healthy family relations for generations. If our guidance is poor, disaster and litigation result. We have the capability to provide, or deny, hope to those who may need it the most, including the elderly, young, ill and people with special needs.

We recommend that family dynamics be more fully, directly and formally discussed at estate-plan-

ning conferences and in-house at law firms. Our profession should consider mandatory training so that estate-planning lawyers can be certified in subjects related to client care, such as mediation, pastoral care, basic psychology of family dynamics, etc. Such expertise could help slow the probate and fiduciary litigation explosion we've been seeing. Also, lawyers should consider engaging trained psychologists in complicated planning situations to help better identify and address individual and family dynamics.

But also all of us, no matter how senior, can better educate ourselves. Let's start simply by raising our awareness, then perhaps move on to further readings and studies.

A Profound Responsibility

It could be argued that the role of estate-planning attorneys is to merely create the will, trust agreements and other significant documents.³ But experienced practitioners know that our clients often want more. Clients routinely ask: "What would you do in my situation?" And: "What do most clients do in these circumstances?" They need answers more complete than mere advice on technical provisions and tax savings.

Yet the answers we provide can change family dynamics forever. Here are complicated but common examples: A client tells us she has two children and asks: Should she leave the less successful child more money than the more successful one? Or perhaps a client wants to know whether to leave the child with more offspring more assets than the child who has less offspring.

Is it even appropriate for an attorney to offer opinions on such non-legal matters that could have significant long-term effects, both monetary and psychological, to multiple generations and change the course of the family dynamics forever? We all know that many estate disputes have less to do with money per se and more to do with feelings of being unloved or disfavored, which we have a



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direct role in creating or negating.

How comfortable and skilled are we in handling potentially volatile personal issues?

The consequences of mortality are a main focus of our work. Yet broaching the subject of mortality with our clients is never easy. While everyone associates the phrase “bedside manner” with the medical profession, it’s probably as important for the estate-planning attorney. In fact, the estate-planning lawyer probably needs greater finesse. Because it’s the estate planner, not an illness, forcing clients to contemplate their deaths. Worse, the lawyer is asking clients to address two unpleasant certainties at the same time: death and taxes. And often times, the lawyer is asking the client to think about these matters for the first time.

To complicate matters further, estate planning is truly a family matter. Responsible and caring attorneys explore with clients the effect that estate plans will exert on family dynamics, both pre- and post-mortem. They work with clients to craft the type of plan that fosters the brand of family relations that clients ideally envision and desire. That is why it’s critical that lawyers’ inquiries into the client’s personal life delve into not just finances and family structure, but also family dynamics, history and relationships.

Every attorney asks her client about the client’s children and assets, but a truly skilled attorney also asks important questions and similar follow-up questions based on the client’s initial responses:

- Do all of your children and grandchildren get along with one another?
- Do any of your children or grandchildren have substance abuse problems or any other issues that might impair their judgment?
- If a child is married, how long has the child been married and is his or her marriage stable?
- Is there an income and asset differential between your children?
- Has a particular child invested a disproportionate amount of time or money in a family business that is an asset of your estate?
- Are all of your children born of the same marriage?
- Are any of your children adopted?
- Did you make any significant gifts during your lifetime to less than all of your children?
- Do any of your children or grandchildren have current or potential business problems, creditors or special needs?

Clients often feel uncomfortable raising issues related to family dynamics. Even answering direct questions on these matters may be difficult for clients during a first or second meeting with their lawyer. It can remain difficult if a long-standing lawyer does not promote empathy and merely acts like a tax consultant and draftsman. That said, some clients may be reluctant to share such personal information with an attorney who’s not licensed in psychology or a related area.

Ultimately, it is the attorney’s responsibility to make the client feel comfortable enough to participate in a truly open conversation about deeply private matters. Anything short of complete transparency can result in an estate plan that falls short of the client’s vision for his family’s future.

When the client feels comfortable and divulges the necessary personal information, the attorney is in possession of a sacred trust. But the attorney should not feel that he must be able to solve all of the issues on his own. If the client has a trusted family or business advisor with whom he wants the attorney to consult, take advantage of the insight that this individual might offer, while being aware of any personal interests the outside advisor might have.

Of course, the attorney also must be sensitive to attorney-client confidentiality.

The attorney might ask the client whether he wishes to consider a family meeting or session with a trained mediator or psychologist.⁴

Moreover, doctors often consult with their peers for second opinions. Attorneys should do the same. For example, attorneys who specialize in estate administration may have a better grasp of how certain provisions will play out post-mortem than attorneys who concentrate in planning.⁵

Of course, despite an attorney’s best efforts, there are some clients who’ll take the attitude “Let them fight. I’ll be dead.” But most don’t want contention among their progeny. And as lawyers, we can help them avoid that.

Case in Point

Prime examples of how estate-planning attorneys can save families endless aggravation occur with elderly, young, ill and special needs clients and beneficiaries. Our firm recently assisted a client who’d been confined to a hospice and was in the final stages of terminal cancer. Let’s call her Sally.

Sally’s adult children were handicapped and had special needs. Sally’s primary asset was her home, which she wanted to make sure would always be available as

Getting Psych-Savvy

Experts recommend a little reading

We asked a few experts to refer us to psychologists who deal with the wealthy, then asked those psychologists to recommend some reading material for wealth advisors who wish to familiarize themselves with some of the psychological issues involved in estate planning. The result is this starter list. We have not vetted these selections and welcome your comments on which prove helpful. — *Trusts & Estates* editors

Bonnie Brown Hartley, president, Transition Dynamics Inc., a consulting firm specializing in business family and organizational transitions, based in Venice, Fla., recommends:

- James E. Hughes, Jr., *Family: The Compact Among Generations*, Bloomberg Press (2007); and
- Lee Hausner, *Children of Paradise*, Tarscher (1990).

Lee Hausner, president, First Foundation Advisors, an Irvine, Calif.-based national consulting and wealth-planning firm, recommends:

- Barbara Blouin and Katherine Gibson, *The Legacy of Inherited Wealth: Interviews with Heirs*, Trio Press (1995);
- James E. Hughes, Jr.'s Family book (see Hartley's recommendations);
- Judy Martel, *The Dilemmas of Family Wealth: Insights on Succession, Cohesion, and Legacy*, Bloomberg Press (2006)
- Jacob Needleman, *Money and the Meaning of Life*, Broadway Business (1994)
- Thayer Cheatham Willis, *Navigating the Dark Side of Wealth*, New Concord Press (2005).

Judith Stern Peck, director of the Money and Family Life Project at the New York-based Ackerman Institute for the Family, a family therapy institution, recommends:

- Scott C. Fithian, *Values-based Estate Planning: A Step-by-step Approach to Wealth Transfer for Professional Advisors*, Wiley (2000);
- Kelin E. Gersick, John A. Davis, Marion McCollom Hampton and Ivan Lansberg, *Generation to Generation: Life Cycles of the Family Business*, Harvard Business School Press (1997);
- James E. Hughes, Jr.'s Family book (see Hartley's recommendations); and
- Judith S. Peck, *Money and Meaning: New Ways to Have Conversations with Clients about Money*, Wiley (2007).

Fredda Herz Brown, a principal of Relative Solutions, LLC., a family business-consulting firm, recommends:

- Katharine Gratwick Baker and Fredda Herz Brown, "The Human Dimension of Financial and Estate Planning," *American Institute of Certified Public Accountants Journal* 2003;
- Fredda Herz Brown, "Need Advice?" *Families in Business*, March/April 2005;
- Fredda Herz Brown, "The Softer Side of Consulting," *Family Business Review*, September 1998; and
- Fredda Herz Brown, "A Road Map: Choosing Advisors To Help Your Family With Governance and Dynamics," *Institute for Private Investors Report* 2007.

a residence to her children. A previous attorney, in an attempt to provide a quick fix for a terminally ill woman, advised Sally to deed the house to her brother to avoid the probate process. The attorney prepared a simple will to deal with Sally's other assets.

Clearly, this plan was flawed. It utterly failed to ensure that Sally's wishes and objectives would be fulfilled after her death. While Sally trusted her brother, there was no way to guarantee that he, as the sole owner of the house, would make sure the residence would always be available for her children. What if he died, became ill or had a creditor? Also, although the transfer of the house would avoid probate, the income tax basis of the house would not receive a step-up at the client's death, which potentially would result in a high income tax liability upon its later sale. Finally, the client had

additional assets that would require the probating of the will. With disabled beneficiaries requiring guardians ad litem, this probate would have been a time-consuming and expensive process.

Obviously, the proper approach was to transfer Sally's assets to a revocable trust for the benefit of her children. This technique eliminated the need for probate, created sound income tax planning, and ensured that the client's children would be cared for as she desired.

Because of the client's deteriorating condition, the new documents, along with the revocable trust, deed to transfer the house, and transfer documents for the other assets to the revocable trust, as well as a "pourover will" (in the event that any assets were not transferred), were all completed in one day. On Thanksgiving Day, one of the firm's attorneys brought the documents to the hospice so that Sally could sign them. She died only a few days later.

At Sally's funeral, her brother thanked us repeatedly for finally giving his sister the peace of mind that she needed before dying.

From a technical standpoint, this planning was not nearly as complicated as other estate planning techniques we recommend and use, such as freeze partnerships or foreign trusts.

What it did require, though, were skills and devotion not taught in law school or legal tomes. Listen to the client's real needs and act swiftly and carefully to fulfill them.

Too often, lawyers push their clients toward a solution that fits form documents and planning. But, fortunately, our clients' lives are rich and varied and it's our job to ensure that our counsel fits their unique situation. Of course, finding the best fit requires that we know how to ask the right questions, understand the answers we receive, and handle the information with sensitivity.

This is why all of us, no matter how experienced, should keep asking ourselves, "What can I do to make myself a better *counselor*?" **TE**

Endnotes

1. See Avi Z. Kestenbaum and Rachel D. Mansdorf, "True Counselor," *The New York Law Journal* (Jan. 2009) for another article on this topic.
2. "Shiva" is the seven day mourning period many Jewish people observe during which time friends and family visit the bereaved.
3. Gary D. Williams, "Weighing the Costs and Benefits Of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation," 16 *Ohio State Journal on Dispute Resolution* 819 (2001).
4. *Ibid.*
5. Actually, we believe that to be an effective estate planner, one must also have experience with estate administration.