



The Report of My Practice's Death Was an Exaggeration

The Healthy Prognosis for Estate Planning in Tennessee

Estate planning attorneys have long encountered a definition problem. Too many potential clients and referring professionals, including other attorneys, equated estate planning with estate tax planning (and planning for Tennessee inheritance tax and state and federal gift tax,

*“Have they repealed
my practice?”*

*— Estate Planning seminar
presenter, on the prospect
of federal estate tax repeal*

all such taxes referred to in this article as “transfer taxes”). Many new clients have begun conversations with the assertion, “I need a will, but I don’t have enough to need estate planning.”

This narrow definition was not a significant problem as recently as 2008, when the federal estate tax exemption was \$2 million and the Tennessee inheritance tax exemption was \$1 million. Estate planning (EP) attorneys found substantial work motivated by transfer taxes and could educate clients about the myriad of other issues to be addressed in estate planning.

Well, if transfer tax planning were all that EP attorneys did, they would need to retool their careers. Tennessee repealed its gift tax effective this year and is phasing out its inheritance tax over the next three years.¹ The federal estate tax exemption currently is \$5.12 million per decedent and “portable” (transferable) between spouses. Accordingly, single persons with estates² under \$5.12 million and married couples with estates under \$10.24 million have a reasonable likelihood of needing no transfer tax planning.³ In an era of contracted or stagnant wealth and diminished optimism about the financial future, a significantly smaller percentage of Tennesseans will hire EP attorneys for transfer tax planning.⁴

What will Tennessee EP attorneys do if few clients need transfer tax planning?

The answer is that EP attorneys will do what they’ve done for generations. Transfer taxes, while the best known part of what EP attorneys do, were never the sole motivation for clients to come and rarely even the primary motivation. Estate planning has always been and will continue to be about much more than transfer taxes.

Estate planning is about people.

Clients enlist EP attorneys as confidants and counselors to address areas of deep emotional and aspirational importance. EP attorneys help clients care for themselves and their loved ones: spouses, children, grandchildren, parents and friends. EP attorneys are called upon to create plans that facilitate family harmony, mentor emerging adults in how to approach money, and anticipate and prevent problems in the management and transfer of family wealth. EP attorneys must ask the right questions, offer helpful answers, guide clients to appropriate strategies, and then create well-drafted documents to implement the plan.

Estate planning is about aging. The “sandwich generation” must care for parents and young adult children while planning for their own retirement and aging. EP attorneys help clients create structures to meet their needs as they age and can help them address these

issues with their parents, as well. Powers of attorney and advance directives are essential to appoint the persons who will handle financial matters and drive the client's health care decisions when the client cannot. With increasing life expectancies and the resulting sensitive and complex end-of-life situations families face, standard forms must give way to more individually tailored provisions.

Estate planning is about the orderly transfer of wealth. EP attorneys draft wills and revocable trusts that define who will benefit from estates at death and on what terms, and work together to make the process as private, simple, and painless as possible. EP attorneys counsel clients on saving for children's and grandchildren's college. EP attorneys address policy options for life insurance, withdrawal rules and strategies for retirement assets, and appropriate beneficiary designations on both as part of the overall estate plan. EP attorneys help clients create trusts and business entities to provide structures and processes for stable and cooperative management of family wealth.

Estate planning is about extraordinary family circumstances. EP attorneys craft trusts to provide for special needs beneficiaries and spendthrift children, prenuptial agreements to help clients protect against divorce, and plans tailored to address the needs of nontraditional families, domestic partnerships, and same-sex marriages.

Estate planning is about risk management. For most of my career my clients generally were confident that their estates would grow, and saw postmortem transfer taxes as the greatest risk to their wealth. In the last four years, clients have become increasingly concerned about risks to their wealth during their lifetimes. Developers, physicians, business owners, and land owners are focusing on creditor and liability threats that might reduce or eliminate their estates. EP attorneys work through these issues with clients by discussing liability insurance, liability protection entities (LLCs, limited partnerships, corporations) to hold land and operate business enter-

prises, and domestic and offshore asset protection trusts.

Estate planning is about the future of the business. Successful business owners become successful by focusing on their businesses, but too often they focus on the immediate future without creating a plan for succession of leadership and ownership. EP attorneys help clients plan for healthy succession through frank conversations about the strengths and interests of the next generation and through the use of buy-sell agreements, recapitalizations, and lifetime gifts to children and trusts.

“Clients enlist EP attorneys as confidants and counselors to address areas of deep emotional and aspirational importance.”

Estate planning is about causes I want to benefit. Estate planning for many clients involves significant time and energy devoted to knowledgeable and meaningful charitable giving during life and at death. EP attorneys help their clients consider the related tax and non-tax issues and help clients implement charitable trusts, donor-advised funds at national financial institutions and community foundations, and family foundations.

Estate planning is about healthy estate and trust operation. Even the best of estate plans need guidance and support as they are implemented. EP attorneys represent fiduciaries and beneficiaries in probate and trust administration, interpretation, and litigation. EP attorneys are particularly well-suited to help clients work out difficult trust situations, without going to court, through trust “decanting,” modification, and nonjudicial settlement agreements under the Tennessee Uniform Trust Code.⁵

Estate planning is still about taxes,

including transfer taxes. While there is bipartisan support for a portable federal estate tax exemption of at least \$3.5 million, experienced tax-watchers have given up trying to predict anything other than unpredictability. Some clients are planning for the worst (a return to the non-portable \$1 million exemption) by pursuing aggressive estate tax planning. Even with higher and portable exemptions, EP attorneys help estates file federal estate tax returns to elect portability in case the surviving spouse gains unanticipated wealth. EP attorneys counsel on income tax issues, represent individuals and fiduciaries before the Internal Revenue Service and the Tennessee Department of Revenue, and help clients navigate the strange world of the generation-skipping transfer (GST) tax and its non-portable exemption.

Estate planning attorneys do have challenges ahead. The demographics of our aging population suggest that, as Baby Boomers move from work to retirement to the end of life, increasing life expectancies and the massive transfer of wealth from that generation will increase overall demand for estate planning. However, the increased commoditization of basic planning (think LegalZoom) could push, and price, Tennessee EP attorneys out of much of that work. For attorneys whose practices have relied heavily on transfer tax planning for estates between \$1 million and \$7 million, that portion of their practice might no longer be relevant. The changing shape of estate planning, or the lure of other ways to make a living, will drive some EP attorneys to other areas of the law or out of law practice altogether.

For most EP attorneys and their clients, however, a reduced focus on transfer taxes will increase the focus on people, aging, charitable causes, the future of the family business, extraordinary family situations, and all the other deeply personal and broadly meaningful things EP attorneys and their clients have talked about for generations. Transfer taxes or no transfer taxes, the

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WHERE THERE'S A WILL

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prognosis is good for estate planning practice in Tennessee. ¹

Notes

1. In 2012, the Tennessee General Assembly passed and Gov. Haslam signed into law one bill that repealed the state gift tax retroactively to Jan. 1, 2012, and one bill that phased out the state inheritance tax on the following schedule:

In the Case of a Decedent Dying	Exemption Amount
In 2012	\$1,000,000
In 2013	\$1,250,000
In 2014	\$2,000,000
In 2015	\$5,000,000
In 2016 and thereafter	Tax Repealed

2012 Tenn. Pub. Acts 1085 (gift tax) and 1057 (inheritance tax).

2. A decedent's "gross estate" for federal estate tax purposes includes not only the fair market value of all current assets, but also the proceeds on all life insurance on the decedent's life, if the decedent possessed any "incidents of ownership" of the policy. Internal Revenue Code §2042.

3. The federal estate tax is set to return in 2013 to a \$1 million exemption that is not portable between spouses. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312. If the exemption returns to \$1 million, then estate planners will see little difference in their estate tax planning practice. However, there is bipartisan support for a higher, portable exemption. President Obama advocates a portable exemption of \$3.5 million, with a 45% tax rate on amounts in excess of the exemption. See "General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals," Dept. of Treasury, February 2012, available at <http://www.treasury.gov/>

resourcecenter/tax-policy/Documents/General-Explanations-FY2013.pdf

4. The estimated number of federal estate tax returns filed in Tennessee dropped from 631 in 2008 (with 253 estates owing estate tax) to 124 in 2010 (with 40 estates owing tax). SOI Tax Stats – Estate Tax Statistics Filing Year, Table 2 – Estate Tax Returns Filed in 2008 and 2010, by State of Residence, available at <http://www.irs.gov/uac/SOI-Tax-Stats-Estate-Tax-Statistics-Filing-Year-Table-2>.

v. Tenn. Code Ann. §35-15-101 et. seq. See, especially, Tenn. Code Ann. §§ 35-15-111, 35-15-411, and 35-15-816(b)(27).

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abandon home mortgage lending because the capital requirements providing a cushion for those types of loans will be just too high. At a time when our national government has not developed a long-term solution to housing finance, Basel III, according to the CSBS, would "further stifle mortgage lending by traditional depository institutions."³

A few years ago, a very young staffer for the United States Treasury was delivering a lecture to a group of Tennessee bankers, a few of us lawyers, and the commissioner on the efficacy of having only one regulator for all banks. Think of the efficiencies. Think of the consistency of regulation. As we were filing out of the room at Treasury in Washington, I shook hands with the lad, apologized in advance for my comment, but said, "Son, I have shoes older than you are. This might have been a fine term paper, but in our world, the

thought of having one all-powerful regulator with no checks and balances is worse than scary — I trust that Congress won't be that irresponsible." He smiled, called me ma'am, and continued his Ivy League of Your Own discourse. One of these days, maybe this young man will be a member of the Basel XIV Committee. ⁴

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Notes

1. Oct. 3, 2012 Statement on Federal Banking Agencies' Proposed Capital Rules, Conference of State Bank Supervisors.

2. International Convergence of Capital Measurement and Capital Standards — revised, June 2006 and Enhancements to the Basel II framework, Revisions to the Basel II market risk framework and Guidelines for computing capital for incremental risk in the trading book, July 2009.

3. Oc. 3, 2012 Statement on Federal Banking Agencies' Proposed Capital Rules, Conference of State Bank Supervisors.