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BARONLAWLLC

# DOLLARS & SENSE™

THIS ISSUE: ESTATE PLANNING, BUSINESS, AND ASSET PROTECTION

VOLUME 1



**4** DO YOU  
NEED A  
TRUST?

**6** BUSINESS  
GROWTH IN  
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# Changes in Ohio Power of Attorney Laws

*Concerned with estate plans or medical care of a loved one?  
Get to know Ohio's power of attorney laws.*

BY ALLISON MIEDL

If you haven't had your estate plan reviewed in the last five years, you might consider having it looked at. Since March of 2012, Ohio adopted new laws regarding the language required in your power of attorney ("POA"). Ohio's Uniform Power of Attorney Act, or UPOAA, adopted these laws with the intention of preventing financial elder abuse. Unfortunately as a result, the new law has defeated the entire purpose of what a POA is intended to accomplish in the first place – grant your agent the authority to act on your behalf when you're incapacitated or unable to make decisions on your own.

## THE PROBLEM

Although the legislature's motives were well intended, the laws have now created a great deal of stress and challenge for those holding a POA, specifically what's called a "general power of attorney." Prior to 2012, nearly everyone had a general POA because it encompassed the authority granted to your agent in one simple phrase: "I give my agent authority to make all financial decisions on my behalf." The problem is that using this broad authority of financial power generated identity theft which led to the creation of stricter Ohio POA requirements. Ohio eliminated the general POA authority and now requires specific language. This solution led to new problems, however, because now financial institutions and banks are able to deny the rights of your agent unless the POA specifically authorizes them to engage the specific activity they wish to participate in. Thus, the changes defeat what the POA was intended to accomplish in the first place.

## THE SOLUTION

Fortunately, the new language can be found in Ohio Revised Code 1337.60. The form lists actions that an agent may or may not take and includes a section called



"Important Information for Agent." The principal can simply check the box of the powers he or she wishes to designate. However, having this language could circumvent the goal of an individual's will, trust, or estate plan. Therefore, it's important to consult with an attorney when implementing one of these forms so that you don't unintentionally make that mistake.

In summary, if your power of attorney was created before March 22, 2012 it will still be valid; however, have an attorney review it in light of the current law and consider using the 2012 statutory POA form. Because financial POA documents give significant powers to another person, they should be granted only after careful consideration. Never give your agent the POA form. Instead, keep the document in a safe place and let your agent know where to find it in case of an emergency. For more information or to speak with an estate planning attorney, contact Baron Law LLC at 216-573-3723.



ALLISON MIEDL

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# Do You Need a Trust?

*MOST PEOPLE MISTAKENLY BELIEVE THAT YOU HAVE TO BE RICH TO HAVE A TRUST. THE MAJORITY OF TRUSTS, HOWEVER, ARE CREATED FOR NON-MONETARY REASONS THAT SOLVE COMMON CONCERNS OF THE AVERAGE FAMILY.*

DAN A. BARON, ESQ.

When creating an estate plan, the biggest mistake people make is thinking they need to be rich in order to have a trust – that is completely false. If you're not Warren Buffet, you may still have other non-monetary reasons for creating a trust such as asset protection, control, tax savings, Medicaid planning, and/or litigation and creditor protection. Even if your estate is worth less than \$100,000, you may still be in an ideal situation to protect your nest egg and what you've spent a lifetime trying to build.

Although the situations of needing a trust are infinite, here are a few most common scenarios where you might benefit from creating a trust. You can also take a one-

minute trust questionnaire at [www.Dolneedatrust.com](http://www.Dolneedatrust.com) to find out more specifically whether a trust is right for you.

## SECOND MARRIAGES

With divorce rates over fifty percent, the most common reason for creating a trust is where an individual is in their second marriage. In this scenario, there is nothing preventing the remaining spouse from disinheriting children from a prior marriage. Consider this example: Husband and Wife are in their second marriage. Wife has two kids from a prior marriage. Husband has no kids except for step-children of current marriage. Wife passes away and leaves everything to



Husband, remainder to two kids. Five years later, Husband meets a much younger Pamela Anderson and gets married. Husband creates a new estate plan naming Pamela Anderson as primary beneficiary of his estate, remainder to two step-children. Husband dies. Pamela then creates a new estate plan, disinheriting children.

**Famous Last Words, "I WOULD NEVER GET REMARRIED!"**

As you can see, this is a very typical example of where some level of control and strategy is needed. A trust in this example would solve the wife's concerns entirely. Here, Wife could have created what is known as a QTIP trust. In a nut shell, the QTIP would give Husband income from Wife's estate, plus five percent (5%) of principal each year. When Husband dies, the estate MUST be passed to children and cannot be passed to anyone else. In essence, Wife is able to control her estate even after she's passed. She has also ensured her children will never be cut out of the estate, even if it were the unintentional result of Husband. And if this were not a





second marriage, a trust might still make sense for couples wanting to keep the estate within the family and avoid remarriage concerns.

### TAX SAVINGS FOR CHILDREN

Receiving an estate may come with significant taxable consequences. Your estate may be taxed at forty percent (40%) if it exceeds the federal exemption limit. This obviously can result in a significant decrease in the value left to beneficiaries. The simple solution to avoid paying outrageous federal estate taxes is to create an A/B trust. With this trust structure, you can avoid federal estate taxes entirely, including any growth and accumulation placed in trust. You might also consider putting any tax burden on the trust itself. Here, the trust pays income taxes on gains and the children can enjoy a stream of payments over time.

### ASSET PROTECTION

Depending on the type of trust created, a trust can protect both the creator (you) and beneficiary of the trust. The most common asset protection trust is used for children

instead of the creator. This type of trust is known as a “revocable living trust.” This type of trust gets its name because the creator can revoke, change, or modify the trust at any time during his/her lifetime. After the creator passes away, the estate is placed in an “irrevocable trust,” where the trust now cannot be changed. In other words, the terms you’ve created in trust cannot be changed after you pass away. Usually the trust maker will set forth terms that would pay children and/or beneficiaries payments over their lifetime. So long as discretion given to the trustee (usually a trusted family member or attorney), the money remaining in trust cannot be attacked by creditors or litigation. In other words, if a child ends up in a lawsuit, the trustee can cease payments to the child so that the money is protected from the lawsuit. The same outcome would apply if the child ends up in bankruptcy or owes creditors.

### DIVORCE

In Ohio, assets accumulated during marriage are split 50/50 in a divorce. It doesn’t matter whether one spouse cheated or did something horrible to the other. Ohio courts will divide all assets 50/50, including an inheritance, if the inheritance is comingled in a joint account. So, if your child inherits \$1 million dollars from your estate, and then deposits the money in their joint investment account, the ex-spouse could receive \$500,000. Using the same example above, you can protect your child’s

inheritance by creating a revocable living trust. Here again, the trustee can turn off the income stream to prevent a disgruntled son-in-law from receiving his unearned share.

### CONTROL

No matter how they’re raised, it’s not uncommon for children to be irresponsible or need at least some level of guidance. With a trust, you can create payment terms so that children don’t blow their inheritance on impulsive purchases. For example, many trusts stipulate that children may only use funds for “health, maintenance, education, and support” until they reach the age of X, thereafter payments made over time to protect against divorce, litigation, and creditors. This method is very common and puts parents at ease even with responsible children.

You don’t have to be rich to protect what you’ve spent a lifetime trying to build. To find out whether a trust is right for your family, take the one-minute trust questionnaire at [www.DolneedATrust.com](http://www.DolneedATrust.com). There are a number of different trusts available and the choices are infinite. With every scenario, careful consideration of every trust planning strategy should be considered for the maximum asset protection and tax savings. For more information, you can contact Dan A. Baron of Baron Law LLC at 216-573-3723. Baron Law LLC is a Cleveland, Ohio area law firm focusing on estate planning and elder law. Dan can also be reached at [dan@baronlawcleveland.com](mailto:dan@baronlawcleveland.com).



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# Business Growth in Cleveland: Dr. Frank's Story

*CLEVELAND NATIVE, "DR. FRANK," EXPLAINS HOW HIS BUSINESS HAS GROWN WITH UNIQUE TREATMENTS THAT CURE COMMON BACK-PAIN WHILE ALSO AVOIDING INVASIVE SURGERIES.*

BY ALLISON MIEDL

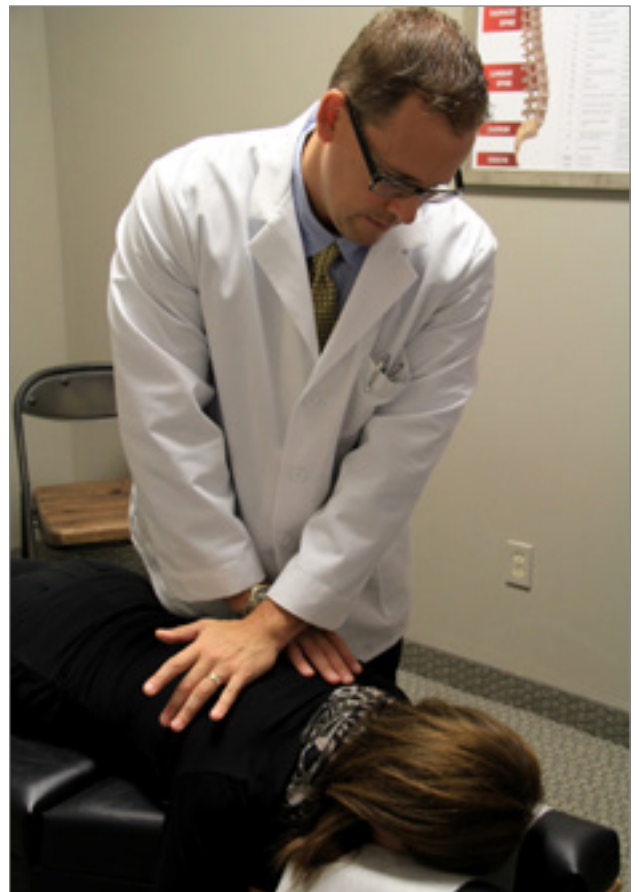
Dr. Frank Dachtler, owner of Broadview Chiropractic and Health Center, explains how his unique medical techniques and special collaboration with Baron Law LLC has blossomed into one of Cleveland's fastest growing health centers. When Dr. Frank started out as a pre-med student in his undergraduate studies, he soon realized that he had a passion for other areas in the medical field. Often times he found himself in disagreement with the medical philosophy of physicians, especially when doctors would by protocol resort to surgeries and prescription medications. Specifically, he realized that there were better, less risky, and healthier ways to treat pain and injuries. His beliefs led to the opening of several practices throughout northeast Ohio which focus on advanced chiropractic and health care as opposed to invasive surgery.

At a young age, Dr. Frank first realized that chiropractic care could remedy chronic pain and health issues when he began seeing a chiropractor himself. Through personal experience, he saw results that far exceeded risky surgical or out-patient procedures. After

chiropractic school, he began working for a high-volume practice, and within that first year opened his own practice, Broadview Chiropractic and Health Center. At Broadview, he has implemented a unique spinal decompression system that has proven to help more than 95% of his patients – far exceeding dangerous surgeries that have merely a 60% success rate. People suffering from lower disc injuries and stenosis rave about the results his cutting-edge decompression system brings and, moreover, the level of service his staff achieves. In addition to relieving back pain, he developed an innovative weight loss program focusing on doctor monitored progress. Over the last several years, his program has proven (and guaranteed) to shed 20-40 pounds in the first six weeks. Additionally, Dr. Frank

stresses that his methodology teaches patients to keep the weight off after the program.

Broadview Chiropractic and Health Center is now the twelfth location





# BroadView

## CHIROPRACTIC & HEALTH CENTER

*"Move Right, Eat Right, Think Right"*

run by Dr. Frank. In expanding his business, he has worked closely with Baron Law LLC to get his businesses legally up and running while also creating strategic business succession plans. Dr. Frank exclaims,

***"Proper business formation has been essential to my company's success. I've learned the hard way the importance of having these things in order."***

Dr. Frank realized that each one of his ventures has its own legal issues inherit with opening a business. Simple tasks like forming an LLC, creating articles of incorporation, and registering with the state of Ohio were nothing new to Dr. Frank. However, he didn't realize the essential and imperative responsibilities that, if not taken care of, could devastate his business and/or family such as the death of partner, buyouts, buy-sell agreements, and succession (estate planning) strategies.

Dr. Frank worked closely with Baron Law LLC to get his business properly created and legally formed. In

addition, Baron and team created succession strategies congenial to all partners and family members in the event of death, dissolution, divorce, and/or buyout. He mentions that he has expanded his business many times, but would never feel comfortable doing it without a professional to consult with. "Anybody that tries to do so is essentially setting themselves up for failure," he says.

Dr. Frank and his staff firmly advocate for the principles mentioned in their tag line, "move right, eat right, think right." When you visit Broadview Chiropractic and Health Center, you will have a one of a kind experience. He refers to it as a concierge service-type practice, in that they stress training and customer service while always



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ensuring to do and recommend what is right and most beneficial for the patient. Their treatments go as far as rehabilitating the problem area, working to prevent future problems, and even exploring the nutritional aspects of patients' issues. Dr. Frank takes pride in the fact that his practice truly looks at the person as a whole and this is where his practice began to incorporate weight loss plans into some chiropractic treatment options.

Dr. Frank and his partner Dr. Matt look forward to opening additional practices in the near future. They would also love to create an opportunity for more chiropractors to be trained within their practice and allow them to later have their own private practices. He is currently working on creating a program aimed at treating patients who suffer with ADHD by implementing newly studied nutrition and neurobiofeedback. He plans on using Baron Law LLC to implement these new medical ideas through a number of newly formed business locations. To learn more about Broadview Chiropractic and Health Services and/or Dr. Frank, call his main office at (440) 230-1113.

# Business Succession

*YOU'VE SPENT A LIFETIME BUILDING YOUR BUSINESS AND NOW ITS TIME FOR RETIREMENT.  
WHERE DO YOU START?*

BY NICOLE HAMED

You've spent a lifetime building your business and now it's time for retirement. So, where do you begin? When developing your business succession plan, it's important to consider all of your options because they each will have a significant impact on your estate plan, taxes, family, and financial well-being. Here are a few helpful tips to get started.

## VALUATION

Regardless of whether you sell to your family, third-party, or employee, you will need a comprehensive valuation of your business. Many business owners commonly overvalue their business because they place an emotional value on the blood, sweat, and tears they've spent working instead of what the company is actually worth in the marketplace. To avoid this common misstep, it's imperative to get a third-party analysis to better understand what your company is actually worth, and who is willing to pay for it.

When evaluating, a third-party attorney or financial planner will consider several approaches to your

**SELLING AND/OR TRANSFERRING YOUR BUSINESS WILL HAVE SIGNIFICANT IMPLICATIONS ON YOUR ESTATE PLAN, TAXES, FAMILY, AND FINANCIAL WELL-BEING. THERE ARE SEVERAL OPTIONS BUSINESS OWNERS HAVE WHEN SELLING THEIR BUSINESS.**

company's worth:

- Market Approach – Revenue Growth, Profitability, Company size, and Liquidity
- Income Approach –Revenue Growth, Profitability, Cost of Capital, Leverage; Working Capital Efficiency; Low Capital Expenditures
- Asset Approach –Asset Intensive, Leverage, Scarcity, Time

After using all or one of these valuation strategies, you then must consider the most tax efficient method of selling while also providing a secured payment structure.

Let's consider the following options:

## LUMP SUM

Selling your business for millions of dollars is every business owners dream. However, this may not be a viable option for a number of reasons. First, if selling to employees or family, the buyer will likely not have enough capital or credit to purchase your business'





asking price. In addition, selling your business outright will result in a large capital gain and tax consequence compared to taking payments over time. Most notably, it could actually place you in a different tax bracket entirely. Thus, when considering selling for a lump sum, you should weigh the tax consequences of a lump sum with the potential stream of income over time.

### LUMP SUM + INSTALLMENTS

If a lump sum will create an unfavorable tax consequence, then you can structure the deal to take a smaller lump sum up-front, and then payments over time. Most commonly sellers will take a lump sum that is just under the threshold of a tax bracket. Installments can be made over a number of years that is consistent with your retirement plan. Here you can increase the number of buyers by avoiding a high-cost lump sum for buyers. In doing so, this may entice inside employees and/or family members who have worked hard within the company but cannot afford your asking price. And because there is a partial payment up-front, buyers are motivated by their initial investment.



### INSTALLMENTS ONLY

If selling to family and/or employees, installment payments are an affordable way to sell your business and avoid a lump sum tax burden. However, business owners are often still involved using this method because employees don't have as much "skin in the game." This method often requires the owner's expertise in maintaining operations. In other words, you won't get paid unless the business is able to sustain itself with its successors. This strategy is recommended for smaller companies where the owners are able to work part-time and still have some degree of authority. It's recommended that certain provisions be implemented that would cease payments in the event of a "dead beat" buyer/employee.

### SELF – CANCELLING INSTALLMENT NOTE

You can give your employees

a business in exchange for a promissory note by using a "self-cancelling installment note." The promissory note is usually coupled with a personal guarantee signed by the employee. Payments are then made over time but cease when the business owner passes away. This option reduces capital gains and estate taxes. However, the payments made will be set at a premium set by the IRS mortality tables to account for the business owners' lifetime. If the business lives past this time, the payments cease. If the owner dies before this timeline, the payments cease.

For more information or to request a free consultation with a business attorney, call Baron Law LLC at 216-573-3723 or dan@baronlawcleveland.com. Additional information on valuations can be found with Strategic Wealth Partners at <https://swpconnect.com/sellability-score/>



**NICOLE HAMED**

Nicole Hamed is the primary paralegal and client liaison for Baron Law LLC. As a Cleveland native, Nicole has worked in the legal community for over fifteen years. Nicole and her team strive to provide seamless client service while considering asset protection, client control, and tax savings with every estate plan. Nicole can be reached at [nicole@baronlawcleveland.com](mailto:nicole@baronlawcleveland.com).

# Successful Probate Avoidance Strategies



BY NICOLE HAMED

If saving time, money, and court supervision is right for your family, then avoiding probate is right for your estate plan. There is a common misconception that having a will avoids probate - that is completely false. Having a will does NOT avoid probate. However, there are many simple ways to avoid probate and some strategies that even offer asset protection for you and family members. But regardless of what estate planning method you choose, avoiding probate will avoid prolonged court proceedings and costly fees for your family. Here are a few helpful methods to consider.

## JOINT OWNERSHIP

Joint ownership is the most common method of probate avoidance and is very simple to set-up. Here, assets are owned by more than one person resulting in the survivor taking ownership. Joint ownership examples might include a joint bank account

or marital home. This is significantly beneficial when avoiding probate for a residence because the transfer of assets is immediate and does not require a court approved transfer. If you have a joint bank account, most banks require a simple death certificate and identification to transfer the account to the remaining account holder. In lieu of a trust, the downside of joint ownership is that it does not offer asset protection. Creditors may still attach their interest in a residence or asset of a jointly held account.

## BENEFICIARY DESIGNATIONS

If you have an occupation with benefits or are engaged with a financial planner, you've probably filled out a beneficiary designation form. These are very common with retirement accounts (401(k), 403(b), IRA, etc), life insurance, annuities, and other assets. Here you simply designate the names of those you wish to receive the assets after

your death. Beneficiary designations are a great way to avoid probate and keep your estate private. The transfer of assets is swift and does not require court approval. If you name minor children as beneficiaries, it is recommended that you take addition estate planning measures with an attorney to appoint a guardian – minor cannot take control of such an account. Once again, however, the downside to beneficiary designations is that these assets are not protected against divorce, creditors, and/or litigation. For example, if your children inherit an IRA but then get divorced, the ex-spouse will receive half of the retirement assets. (See trusts below for retirement asset protection planning)

## TRANSFER-ON-DEATH

A transfer on death affidavit works just like a beneficiary designation. Here the "TOD" allows you to designate the person or entity to receive your assets upon death. Just like a beneficiary designation, the TOD avoids probate while transferring assets swiftly and without court approval. This method saves time and money for commonly titled assets like a home, automobile, boat, and more.

## PAYABLE ON DEATH

Similar to Transfer on Death Accounts, a "POD" also transfers assets seamlessly through naming a beneficiary. Here the difference is that a POD usually refers to checking accounts, savings, and certificates of deposit while a TOD refers to brokerage accounts, stocks, securities,



and mutual funds. Unfortunately both TOD's and POD's do not offer asset protection.

## TRUSTS

The single best way to avoid probate while also providing asset protection is the creation of a trust. A properly drafted trust is completely private, avoids probate, provides asset protection, and is advantageous for tax purposes (for larger estates). The biggest mistake people make is thinking they need millions of dollars to have a trust – that is completely false. Regardless of the size of your estate, there are numerous trust planning strategies available that can protect your assets while also avoiding probate.

The various types of trusts are infinite. For example, some trusts

may be changed or modified during your lifetime (called revocable living trusts) or may not be changed (called irrevocable living trusts). Other trusts might pay taxes on the money

### THE BIGGEST MISTAKE PEOPLE MAKE IS THINKING THEY NEED MILLIONS OF DOLLARS TO HAVE A TRUST – THAT IS COMPLETELY FALSE.

invested in trust while other trusts allow the trust beneficiary to pay taxes. Some provide income to the creator and some do not. Regardless of what trust strategy is used, a



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properly drafted trust will ensure that your children and/or beneficiaries receive asset protection, favorable tax considerations, and probate avoidance.

To learn more about probate avoidance and/or trust planning strategies, contact an attorney at Baron Law LLC at 216-573-3723 or [nicole@baronlawcleveland.com](mailto:nicole@baronlawcleveland.com). Baron

Law LLC is a Cleveland, Ohio area law firm providing legal services in the areas of estate planning, probate, wills and trusts, Medicaid planning, and more.

# Responsibilities Being Named Executor of a Will

BY AMY KALAL

Being named and then carrying out the duties of an executor can be one of life's most frightening tasks, however; keep in mind that this is also an honor. An Executor of an estate shows that the person naming you has entrusted you with the great responsibility of making sure their last wishes are granted with respects to the settlement of their property and assets. Fundamentally, an executor of any will is responsible for making sure that any and all debts and creditors of the deceased are paid off, and that any remaining money and/or property of the estate is distributed according to the

decedent's wishes.

Bear in mind that the law does not require an executor to be a lawyer or for that matter a financial expert. However, it does require that every executor fulfill their duties with the utmost honesty and attentiveness. In other words, according to law, you have a "fiduciary duty," that as the executor, you are going to act in good faith with regards to a person's will.

As the executor, generally you are not entitled to proceeds from the sale of any property of the estate. However, the executor is entitled to a fee as

compensation for administering the will. The fees could be mandated that it be reasonable depending on the size or involvedness of the will. The duties normally include but are not limited to:

## FINDING THE ASSETS

The executor is responsible for finding all the decedent's assets and for keeping the assets safe until they can be appropriately dispersed to those named in the will and/or to creditors and debtors. This controlling of assets can include upon deciding which types of assets to sell as well

as what kinds of assets to keep.

### **WINDING UP THE DECEDENT'S AFFAIRS**

This can cover a multitude of items to be dealt with including closing bank accounts, running a business, informing creditors, selling property, closing business deals, etc.

### **CANCELING DEBT AND CREDIT CARDS**

Here the Executor must do a number of things including:

- Notify banks and other financial institutions about the death of the individual
- Notify brokerage or financial advisors overseeing investments
- Contact the Social Security Administration if the decedent was collecting Social Security Benefits
- Contact any and all life insurance carriers to claim death benefits to add to the assets of the estate
- Cancel home and auto insurance carriers to cancel policies once the estate has settled or property sold
- Contact utility companies if services are no longer needed

### **LOCATE AND COMMUNICATE WITH HEIRS**

An executor must locate and contact those who have been named and who are supposed to inherit money and/or property. This can be extremely difficult for the executor because many family members cannot be found. If the will has not been updated, people may have moved so you, the executor, will need to be vigilant in finding all the heirs listed.

### **DECIDING WHETHER PROBATE IS NECESSARY**

Probating a will is the process

of getting a court to approve the legitimacy of the will. In many cases however, property can avoid probate even though it is named in the will. If property is jointly titled, or is a TOD, POD, or trust, it can avoid probate entirely. It's important for the executor to understand the mechanics of each of these probate avoidance methods to ensure he/she is not wasting time in court.

### **VERIFYING WILL IS PROPERLY FILED**

The Executor must ensure they are filing the will in the proper court of jurisdiction.

### **SEPARATE BANK ACCOUNT FOR THE ESTATE**

Since it is wise not to co-mingle the Executors funds and the deceased party's funds, the executor is typically required to keep the estate's money separate from their own funds. Opening a bank account in the name of the estate makes paying off creditors and the heirs much easier. It also helps establish what went and came out of the estate until such time it has been completed.

### **PAY ONGOING REQUIRED PAYMENTS**

Monies in the estate's bank account are used for making mortgage, insurance and any additional ongoing payments that need to be paid during the management of the will until the estate is settled with all property being sold.

### **PAYING FINAL INCOME TAXES**

You know that there are two things certain in life – death and taxes. It is the responsibility of the executor of a will to make sure that the decedent's income taxes are paid for the last year they were alive.

### **DISTRIBUTING DECEASED'S PROPERTY**

If listed in the will that certain property goes to certain heirs, the job of the Executor is to make sure that it gets to the rightful heirs and recorded that it was given to the appropriate party. If there is other property that is not named in the will, it should pass according to the laws of the State of Ohio. If no will is in place, the party in charge is typically called the administrator and will be responsible for reviewing the state law to see who the estate's property will pass to in "intestate succession."

As illustrated above, having a qualified and diligent Executor is important to carry out the affairs of your estate. Most executors, however, will hire an attorney to assist with the above tasks. Fortunately, Ohio requires that there is no out-of-pocket expense to the executor when hiring an attorney. Instead the attorney is paid from a fractional percentage of the estate. For more information or to speak with a probate attorney at Baron Law LLC, you can contact Amy Kalal at 216-573-3723 or amy@baronlawcleveland.com.



**AMY KALAL**

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# Planning for Married Couples Using Portability and Bypass Trusts

ALSO PUBLISHED IN THE CMBA BAR JOURNAL

DAN A. BARON, ESQ.

Significant expansion of the federal estate tax exclusion has dramatically changed how estate planning professionals plan for married couples. In 2000 when the federal estate tax exclusion was merely \$675,000 and federal tax rates peaked at fifty-five percent (55%), bypass trusts or “credit shelter trusts” were a popular means of sheltering wealth to preserve assets for a surviving spouse and children. Today however, the exclusion amount has grown to an astounding \$5.49 million per spouse which is now “portable” and can be carried over to the surviving spouse’s estate. Thus, significant changes in recent years have compelled estate planning attorneys to consider

the concept of portability versus bypass trusts.

## WHAT IS A BYPASS TRUST?

Bypass trusts are historically an effective tool designed to minimize estate taxes by sheltering wealth into a trust. The concept is pretty straightforward: every individual is afforded an exemption amount that permits their estate to transfer to a surviving party without suffering loss to federal estate taxes. Conversely, before portability, married couples would lose one of these exemptions at the death of the first spouse. At the death of the second spouse, if the value of the

estate exceeded the surviving spouse’s exemption, it would be taxed at the federal estate tax rate. For example, when the exemption amount was \$675,000 in the year 2000, a person dying with \$1 million in his or her estate would result in \$178,750 in federal estate taxes because the remaining \$325,000 over the exemption is taxed.

Married couples could avoid these tax implications by directing some of their estate to a bypass trust that would support the needs of the surviving spouse, while also sheltering that portion of the estate from unnecessary taxation. This may be accomplished by dividing the estate into two portions.

Instead of leaving the entire estate to a surviving spouse, the deceased spouse leaves assets for their children in one trust account and a separate trust account for the surviving spouse's benefit. Assets placed in the separate trust account for children reduce, if not eliminate, estate taxes entirely.

to pass. Portability is not available for the generation-skipping tax exemption thus, portability would simply not work.

### PROVIDING ASSET PROTECTION

Aside from the tax implications, asset protection will sometimes compel the

relevant at nearly all levels of net worth if the driving reason for the trust is a non-tax concern.

### DISADVANTAGES

Bypass trusts serve an important and necessary purpose to preserve an estate against creditors and divorce. However, for smaller estates, this protection comes with taxable consequences. Unlike the use of portability, there is no second step-up in basis at the death of surviving spouse. For smaller estates, this could leave beneficiaries paying a great deal in income tax upon the disposition of the asset. Further, undistributed income of the trust can be subject to higher income tax rates than individuals. In addition, although minimal, there may be an added annual expense of filing a trust tax return. Finally, the use of bypass trusts will require the retitling of assets which can sometimes be tedious and relatively costly.

### WHAT IS PORTABILITY?

The American Taxpayer Relief Act of 2012 has been a game changing concept when planning for married couples. Since the Act, portability is now a permanent part of the federal estate tax system, which means each spouse's estate tax exclusion that is unused at death is portable and can be carried over to the surviving spouse. It has effectively doubled the exemption amount for combined assets of married couples to over \$10 million. With portability, assets are stepped up in basis at the death of the first spouse, and then are stepped up again at the death of surviving spouse. For families with larger retirement assets, portability has proven to have several advantages.

### ADVANTAGES OF PORTABILITY

The biggest advantage for using portability, especially for smaller to



### ADVANTAGES FOR LARGER ESTATES USING BYPASS TRUSTS

With larger estates, bypass trusts may be a better planning option when considering the financial and tax implications for married couples. By far the greatest advantage is that appreciation of the trust assets and undistributed income will not be subject to federal estate tax upon the surviving spouse's passing. This is especially important for assets in the decedent's estate that may appreciate drastically before the surviving spouse's death. In addition, if intergenerational planning is important, bypass trusts are likely a better option over portability because they allow for use of the generation-skipping tax exclusion of the first spouse

need for establishing a bypass trust over portability. If properly drafted, the trust creates a certain level of asset protection for children and a surviving spouse. Coupled with credit shelter spendthrift provisions, the trust may preclude the assets from being attacked by the creditors of trust beneficiaries. This form of asset protection is particularly important and commonly used for beneficiaries who are in a "shaky marriage" and/or who have spending issues. While a surviving spouse may not have obvious significant creditor or litigation risks (like being a surgeon or professional athlete), creditor protection should always be on the horizon. When compared to portability, the fact remains that estate planning using bypass trusts can remain

medium estates, is the use of step-up in basis. This is in contrast to using a bypass trust, where the assets are stepped up at the death of the first spouse, but not at the death of the second spouse. Compared with bypass trusts, there is no need to retitle assets or divide assets into separate trust shares when using portability. For the most part, portability is simple and can be utilized even in lieu of estate planning prior to death.

**DOWNSIDE TO PORTABILITY**

If the client’s goal is to protect assets of beneficiaries from remarriage, creditors, and/or divorce, then portability is probably not the only planning tool that should be considered. With portability, a portion of inherited assets are subject to the surviving spouse’s present and future creditors, as well as creditors in bankruptcy and, if the surviving spouse remarries and then divorces, to ex-spouses. Additionally, portability is not available for the generation-skipping tax exemption. Although retitling of assets is not required, the use of portability is not automatic. Timely estate tax returns must be filed and may require additional cost from tax professionals.

**A QUICK COMPARISON**

Let’s assume Ken and Kathy have a combined net worth of \$10.98 million. Ken dies in 2016 and Kathy dies in 2026. During this 10-year period we will assume the federal estate tax rate will be forty percent (40%) and they live in a

|  | Portability    |                 |                 |
|--|----------------|-----------------|-----------------|
|  | Ken            | Kathy           | Total           |
| Value of Estate at Death               | \$ 5,490,000   | \$ 5,490,000    | \$ 10,980,000   |
| Marital Deduction                      | \$ (5,490,000) | \$ (5,490,000)  | \$ -            |
|  |                | \$ 10,980,000   | \$ 10,980,000   |
| Appreciation in Estate at Second Death |                | \$ 6,900,000    | \$ 6,900,000    |
| FMV of Estate at Second Death          |                | \$ 17,880,000   | \$ 17,880,000   |
| Less: Estate Tax Exclusion             |                | \$ (10,980,000) | \$ (10,980,000) |
| Taxable Estate                         |                | \$ 6,900,000    | \$ 6,900,000    |
| Federal Estate Tax at 40%              |                | \$ 2,760,000    | \$ 2,760,000    |

state with no estate or income tax.

**USING PORTABILITY**

Ken forgoes setting up a trust and instead relies on portability. Let’s assume that over the ten-year period after Ken’s death, the total estate grows at a modest five percent (5%) annually.

|  | Bypass Trust |              |               |
|--|--------------|--------------|---------------|
|  | Ken          | Kathy        | Total         |
| Value of Estate at Death               | \$ 5,490,000 | \$ 5,490,000 | \$ 10,980,000 |
| Marital Deduction                      | \$ -         | \$ -         | \$ -          |
|  | \$ 5,490,000 | \$ 5,490,000 | \$ 10,980,000 |
| Appreciation in Estate at Second Death | \$ 3,450,000 | \$ 3,450,000 | \$ 6,900,000  |
| FMV of Estate at Second Death          | \$ 8,940,000 | \$ 8,940,000 | \$ 17,880,000 |
| Less: Estate Tax Exclusion             | \$ 8,940,000 | \$ 5,490,000 | \$ 14,430,000 |
| Taxable Estate                         |              | \$ 3,450,000 | \$ 3,450,000  |
| Federal Estate Tax at 40%              | \$ -         | \$ 1,380,000 | \$ 1,380,000  |

This would yield a total combined estate of \$17.88 million when Kathy dies in 2026. Not taking into account inflation, Kathy’s total estate tax exclusion will be both Ken’s unused portion plus her own, totaling \$10.98 million. Consequently, the total amount subject to estate tax is \$6.9 million (\$17.88m – \$10.98). At



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a forty percent (40%) tax rate, the possible resulting federal estate tax is \$2.76 million.

**USING BYPASS TRUST**

Now let’s assume that Ken created a bypass trust which at death would become irrevocable and funded the family trust account to its maximum of \$5.49 million. When Kathy dies 10 years later, all of the appreciation within the family trust will escape estate tax. Here, the resulting taxable estate is \$3.45 million opposed to \$6.9 using portability. Kathy still maintains her \$5.49 exclusion resulting in the total estate tax of \$1.38 million.

In sum, portability has the benefit of simplicity and \$5.49 million of a portable exemption. For smaller estates without intergenerational or asset protection concerns, portability appears to be the better option. On the other hand, regardless of the size of the estate, bypass trusts remain effective at all levels of

net worth if the driving reason is non-tax related. Estate planning goes well beyond the comparison of portability versus bypass trusts and careful consideration of the client’s needs should be implemented into every plan.

# Upcoming Workshops

BY DAN A. BARON ESQ.



Unsure how to handle your estate or asset protection plan? Join Attorney Dan A. Baron and distinguished

guests at upcoming workshops at the Crown Center in Independence. Learn how to seamlessly transfer your assets through our basic estate planning workshop. Protect your estate through advanced asset protection methods and learn how to shield your estate in our Medicaid

asset protection workshop. Learn how a simple estate plan coupled with a testamentary trust can protect your children's interests in our children's seminar. Learn these estate planning tips and more by registering for one, or all, of the following free seminars.

Workshops are held in the lower level auditorium of the Crown Center, 5005 Rockside Road, Independence, Ohio 44131.



**1/30** BASIC ESTATE PLANNING WORKSHOP

Join us for this free workshop January 30th at 6 PM. Learn the basics of what every family should have to protect their home, retirement, and children. Learn how to avoid probate and pass on a legacy you've spent a lifetime trying to build. This workshop will focus on a number of estate planning topics such as: Financial Power of attorney, Healthcare Power of Attorney, Last Will and Testament, Ohio Legacy Trusts, Irrevocable Trusts, Revocable Trusts, and more. Workshops typically last 45-60 minutes. RSVP is required.

**2/15** CONTRACTS, HIRING & FIRING FOR BUSINESS OWNERS

Having solid contracts and understanding the law is paramount to running a good business and avoiding devastating lawsuits. Under Ohio law, business owners may be personally subjected to 3x the cost of a contract for failing to include the right consumer language and procedures. Join us February 15, 2018 at 1pm and learn the elements of a good contract and how to avoid litigation. In addition, we will discuss the importance of a solid employee handbook and methods of fighting unemployment.

**4/24** PROTECTING YOUR CHILDREN THROUGH PROPER ESTATE PLANNING

Do you have a family trust? Do you need one? Join us for this free seminar April 24th and learn how to protect your family through proper estate planning. Learn the benefits of having a testamentary trust built into your will and explore the pros and cons of a family trust. Without proper planning, your children may be left out of your estate. Don't let the state take control over your assets. Sign up for this free seminar and learn how to protect your children through a few simple steps.



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