The Golden Age of Estate Planning

By Richard A. Behrendt, JD

The demand for the services and expertise of estate planners will be greater than ever in the coming years.

The enactment of the American Taxpayer Relief Act (ATRA) in early 2013 gave the vast majority of U.S. taxpayers a reason to breathe a collective sigh of relief. Among ATRA's more important changes, the $5 million federal estate tax exemption was made permanent, with an inflation adjustment setting the exemption at $5.25 million in 2013, followed by incremental increases each subsequent year. For the first time in more than 12 years, there is a reasonable degree of clarity and certainty about the federal estate tax system, and more importantly, an estimated 99.8% of all U.S. taxpayers are now shielded from the dreaded "death tax."

Ironically, while most Americans cheered ATRA's permanent relief from federal estate taxes, these tax law changes were met with a mixture of fear and self-doubt by one small segment of the population. Quietly, a group consisting of attorneys, accountants, financial advisors and insurance agents fretted that if fewer people in the United States are going to be subject to federal estate taxes, fewer clients and prospects will need the services and expertise of estate planners. Think of it as the "Maytag repairman syndrome" for estate planning professionals.

The truth, however, is quite the opposite. The demand for the services and expertise of estate planners in the United States will be greater than ever in the coming years and decades. In fact, we may be about to enter the Golden Age of Estate Planning.

TABLE 1:

U.S. Resident Population
65 years and over[2]

2010	40 million
2020	56 million
2030	73 million
2040	80 million

The graying of the baby boom generation

The sweeping demographic changes spreading throughout the United States have been aptly described as the "silver tsunami." The influential group of Americans known as baby boomers, people born in the United States between 1946 and 1964, are starting to enter the retirement phase of the life cycle. According to the Pew Research Center, the oldest baby boomers officially began reaching age 65 on January 1, 2011, and approximately 10,000 more boomers are expected to cross that threshold every day for the next 17 years.[1] Over the 30-year period ending in 2040, the total number of U.S. residents age 65 and over is expected to double from 40 million to 80 million.

At the same time that the size of the 65-and-over population increases in the coming decades, the average life expectancy of seniors will continue rising. The average life expectancy of today's 65-year-old is 83.6 (82.2 for men and 84.9 for women), while the average life expectancy of today's 75-year-old is 86.7 (85.6 for men and 87.5 for women).[3] In other words, not only will there be more people age 65 and older, but this segment of the population will be living longer due to a combination of advances in health care and healthier lifestyles.

The 65-and-over population will need a multitude of services that are routinely provided by estate planning professionals. These services include drafting or revising estate planning documents, incapacity planning, asset protection planning, insurance planning, retirement income planning and much more.

Creating and reviewing estate plans

Every adult should have an estate plan. Yet it is estimated that fewer than half of all Americans have even a simple will, and even fewer have a comprehensive set of estate planning documents, which typically also includes a revocable living trust, a durable power of attorney and advance health care directives. The importance of having an estate plan becomes even more important for people age 65 and over who experience a greater incidence of cognitive or physical impairments.

Estate planning documents should be reviewed by a qualified estate planning attorney every three to five years, or if any of the following events occur:

Death of a spouse or family member. The death of a spouse or other family member should prompt a thorough review of all bequests and beneficiary designations, as well as the designations of executors, personal representatives, trustees, health care proxies, guardians, etc.

Changes in domicile. A move to another state of residence requires a thorough review of all estate planning documents to ensure that changes in state law are accounted for.

Change in marital status. A divorce or remarriage also requires a thorough review of all estate planning documents as well as

[1] http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly.

[2] U.S. Census Bureau, Population Division.

[3] http://www.agingstats.gov/agingstatsdotnet/Main_Site/Data/2010_Documents/Docs/OA_2010.pdf.

beneficiary designations of qualified retirement accounts, life insurance policies and annuities.

Disability or infirmity. Declining health or diminishing mental capacity should also prompt a review of estate planning documents, and may require consultation with family members to coordinate caregiving strategies.

Incapacity planning

As our senior population grows, the number of individuals experiencing diminished capacity will also grow. A recent study at the Rand Corporation predicted that the number of people aged 71 and older who suffer from some form of dementia will grow from about 3.8 million currently to more than 9 million by 2040. This trend highlights the importance of older individuals executing a durable power of attorney, which designates an attorney-in-fact, or agent, to help manage the principal's financial affairs.

Similarly, the creation and funding of a revocable living trust can often avoid the need for a cumbersome and costly conservatorship or guardianship in the event of incapacity. In many cases, the combination of both a revocable living trust and a durable power of attorney for financial matters will be better than either of the two individual documents separately.

Asset protection planning

Older clients are growing increasingly concerned about asset protection planning for themselves as well as their eventual heirs. As diagnoses of dementia and Alzheimer's disease continue to rise, seniors become increasingly vulnerable to predators who seem to develop a tireless array of credit card and Internet scams. At the earliest stages of cognitive impairment, financial management and control should be relinquished in favor of a responsible family member or corporate fiduciary.

Also, wills and trusts are more frequently being drafted to include asset protection planning for future generations to protect against not only predators but also divorce and spendthrift concerns. Several states have adopted statutes to make it easier to protect inherited assets by establishing asset protection trusts that can continue over multiple generations.

Insurance planning

Life insurance will continue to be a key component of legacy and estate planning for many individuals and families. Life insurance can provide secure funds for income replacement, tax and debt payment, education funding for younger heirs and charitable legacy planning. For the baby boomer retiree who may be worried about health costs and other expenses eroding a planned legacy for future generations, life insurance can provide the "leave-on asset" that may provide financial security for children and grandchildren.

More recently, planning for long-term care expenses has become an important component of comprehensive financial and estate planning. The amount and type of coverage needed will vary depending on each client's health, net worth, financial goals and other factors. Of course, insurability will be a key factor in long-term care planning, and a timely review process, preferably prior to the client reaching age 65, will be important in many cases.

Estate planners will also need to be familiar with Medicare benefits, which provide a basic level of health insurance to retirees and other qualified recipients.

Retirement income planning

The increased longevity of our senior population will put a tremendous strain on their financial resources. For many, the fear of outliving their assets is greater than the fear of dying. Estate planners will be increasingly involved in coordinating retirement income planning with other estate planning goals and objectives. Strategies for successful retirement income planning may include some or all of the following:

Social Security. Maximizing Social Security benefits requires a careful analysis of when to start taking benefits and how income taxes can impact a benefit payment.

Qualified Retirement Accounts. Retirement plans such as 401(k)s, IRAs, Roth IRAs and others all have different rules regarding how they are funded as well as how withdrawals can and should be made to maximize the deferral of income taxes.

Annuities. Annuitization strategies can alleviate the risk of outliving financial resources by providing a consistent, guaranteed income stream for the life of a retiree.

Other estate planning opportunities that will keep estate planners busy in the coming years and decades include charitable legacy planning, planning for state death taxes, Medicaid planning, pre-planning funeral arrangements and planning for same-sex couples. So, while it may be true that fewer U.S. taxpayers are likely to need the more advanced and exotic wealth transfer planning strategies, such as discounted family limited partnerships and sales to intentionally defective grantor trusts, there should be little doubt that the services and expertise of estate planning professionals will be in greater demand than ever before for many years to come. Carpe diem!

ABOUT THE AUTHOR:

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Prior to joining Baird in 2006, Rich spent 12 years as an estate tax attorney with the Internal Revenue Service. Rich has contributed estate planning articles to numerous publications and is frequently invited to speak to lay and professional groups on various estate planning topics. He taught an adjunct course at the University of Wisconsin law school from 2007 to 2011.

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