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ESTATE PLANNING AND ADMINISTRATION

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Lifestyle Analysis in Divorce

BY VICKI VIRAMONTES-LAFREE

In some divorces, the family law attorney may have concerns about an opposing spouse who is not forthcoming about income or the existence and value of assets. In some cases, the attorney may need to use cash flow to establish the couple's marital standard of living. This article addresses these issues, highlighting a book by Tracy Coenen, *Lifestyle Analysis in Divorce Cases: Investigating Spending and Finding Hidden Income and Assets,* Second Edition (American Bar Association 2020).

What is a Lifestyle Analysis?

Coenen defines lifestyle analysis as the "process of tabulating and analyzing the income and expenses of the parties." This analysis includes tracking missing documents, identifying regular and one-time family expenses, tracing cash flow, calculating gross and after-tax income and projecting future income and expenses. A lifestyle analysis may also uncover credit card debt, loans, refinancing, and assets liquidated during the marriage.

A lifestyle analysis may be useful to establish the standard of living when the divorcing couple has a high income and a lavish lifestyle. It may be helpful for the stay-at-home spouse when the other spouse managed the family's finances, when spending appears to exceed family income, when a spouse has (or may have) overseas assets, or when a spouse is a business owner. The lifestyle analysis can assist counsel in developing legal strategies when alimony, child support, and division of property are at issue.

What Type of Financial Expert Conducts a Lifestyle Analysis?

In complex financial cases, it is not unusual for parties to hire a financial professional for litigation or settlement negotiations. A financial expert may be a certified public accountant, a forensic accountant, a certified divorce financial analyst, or a financial planner. Prior to hiring a financial professional, counsel must determine whether the expert will serve as a consulting or a testifying expert. A consulting expert is hired in anticipation of litigation or in preparation for trial but is not expected to testify. The consulting expert assists counsel to understand the technical financial aspects in a case, reviews and analyzes information

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Is Your Estate Plan Consistent with the Terms of Your Premarital Agreement?

BY STEPHANIE PERRY

A premarital agreement addresses a couple's rights and obligations to one another when their marriage ends by divorce or death. A recent Virginia Circuit Court case, ***In re:*** *Algabi v. Dagvadorj, et al.*, highlights the importance of ensuring that a decedent's estate plan is consistent with the terms of his or her premarital agreement; or, in the case where a decedent intends to depart from the terms of his or her premarital agreement, the importance of making this intent clear in the testamentary document. In *Algabi v. Dagvadorj*, the parties executed a premarital agreement in which they each waived all claims to the other's estate at death. After the parties were married, the husband executed a will under which he arguably intended to leave a share of his estate to his wife. However, because the will was not clear, the Circuit Court held that the husband's entire estate should be distributed to his brother; the wife got nothing.

It is not uncommon for a couple's premarital agreement to include a waiver of all spousal property rights at the death of either spouse. Such a waiver allows the parties to achieve certainty with respect to their obligations to one another. When a waiver is included, it may simply be left at that; neither party is obligated by the terms of the agreement to leave any property to the other. Alternatively, the agreement may include a waiver and also go on to provide that either or both parties are obligated to provide for certain assets to be distributed to the other party upon death. Common examples: the agreement may provide for the parties' primary residence, titled in the sole name of one party, to be retitled in the parties' joint names within a certain time period after the marriage, so that the surviving party will automatically become the owner of 100% of the property upon the death of the other party; or for a certain percentage of a party's estate to be distributed outright or held in trust for the benefit of the other party; or for the surviving spouse to be designated as beneficiary of a certain dollar amount of life insurance.

Even when there is a complete waiver, or a limited obligation to a surviving spouse, a party may voluntarily provide for greater benefits for his or her surviving spouse than what is required under the agreement. It is important to understand that a premarital agreement sets forth the parties' minimum rights and obligations to one another; it does not prohibit the parties from being more generous if they wish to do so.

If you are the party who is obligated to provide for certain property to be distributed to your surviving spouse, or if you are providing for your surviving spouse in a manner that is more generous than what is required under your premarital agreement, make sure the terms of your estate plan are consistent with the terms of your agreement and consistent with your wishes. If you are the party who is to be the recipient of certain property under the terms of a premarital agreement, it is important that you protect your rights. Request a copy of your spouse's estate plan and any other relevant documents (*e.g.*, beneficiary designations) and ask your attorney to review the documents on your behalf.

Understandably, after executing a premarital agreement, oftentimes a couple would rather forget about the process and move on to the marriage. However, there are often post-execution issues, like updating one's estate plan, that need to be addressed. Don't neglect these issues. The objective is for your premarital agreement and your estate plan to be prepared in a manner that facilitates the efficient administration of your estate and avoids litigation between your surviving spouse and other beneficiaries. If you have yet to address your estate plan after the execution of your premarital agreement and marriage, or if you question whether your or your spouse's estate plan is consistent with your premarital agreement or your wishes in general, you should arrange for your attorney to review your premarital agreement and your or your spouse's estate plan to ensure that your estate plan does not violate the terms of your premarital agreement and that it carries out your wishes. ■

The SECURE Act: Elimination of the Stretch Option for Certain Beneficiaries of Inherited Retirement Assets

BY MICAH G. SNITZER

The Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act") took effect January 1, 2020, revising federal rules that govern the administration of qualified retirement plans (*e.g.*, 401(k) and 403(b) plans) and IRAs. Among the changes effected by the new law is the shrinking of the class of beneficiaries who can stretch out their required minimum distributions (RMDs) from such accounts over their expected lifetime. This stretch of RMDs was a tax benefit, because it allowed the beneficiary to defer income tax, keeping assets in the tax-favored vehicle as long as possible, where they could grow without diminishment; it is only upon distribution that the assets would be subject to income tax.

The SECURE Act imposes a maximum 10-year payout rule for retirement accounts inherited from someone dying in 2020 or later, unless the named beneficiary (i) is the surviving spouse of the deceased owner, (ii) is disabled, (iii) is chronically ill, (iv) is not more than 10 years younger than the deceased owner, or (v) is a minor child of the deceased owner. In the case of a minor child or a trust for the benefit of a minor child, the 10-year payout rule does apply, but that clock does not begin to tick until the child reaches the age of majority.

A beneficiary subject to the 10-year payout rule has some flexibility in timing distributions. In contrast to a beneficiary utilizing the lifetime stretch, who will have to take an annual RMD, a beneficiary subject to the 10-year payout rule is not required to take an annual RMD over the 10-year period. Instead, the beneficiary may wait until the last day of the 10-year payout period to take any distribution at all, as long as the entire inherited account is distributed to the beneficiary by the end of the tenth year after the death of the owner.

The lifetime stretch option for RMDs, more broadly available under prior law, is now available only to the surviving spouse of the deceased owner or to a beneficiary who is disabled, chronically ill, or not more than 10 years younger than the deceased owner. Except for trust beneficiaries falling into this preferred class, the inclusion of special language in a trust's governing instrument no longer facilitates the RMD lifetime stretch-out for retirement accounts payable to a trust.

Should you panic? No.

Although many notices and alerts in our industry call for everyone to rethink their retirement account beneficiary designations and the language of their estate planning documents, for most clients the SECURE Act does not require any revision to their estate planning documents to achieve or preserve the best available tax efficiency.

Many IRA owners name their spouse, individually, or a charitable institution as beneficiary of retirement assets; no change to these arrangements is necessitated by the SECURE Act.

Often IRA owners name a child or grandchild, individually, as beneficiary; in most cases, the beneficiary will no longer be able to stretch the RMDs over his or her expected lifetime. However, unless that fact prompts the account owner to want to change his/her beneficiaries altogether, s/he need not revise anything in reaction to this law change, either.

Some IRA owners name a trust for an individual as beneficiary of a retirement account. Often such a trust will have been drafted with special ("conduit") language in order to qualify, under the old rules, for the RMD stretch-out based upon the life expectancy of the individual trust beneficiary. The downside is that a conduit trust requires all amounts distributed to the trust from a retirement account be, in turn, distributed from the trust to the individual trust beneficiary. That downside of the special conduit language was tolerated by IRA owners under the old rules because of the ability to stretch out the RMDs over the expected lifetime of the individual trust beneficiary. However, now that not every individual who is the beneficiary of a trust is eligible to stretch out the RMDs over the

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STAFF SPOTLIGHT: Mollie Meyer

The extent of Bookkeeping Assistant Mollie Meyer's reach at our Firm is not obvious to outsiders. After having started at our reception desk almost 17 years ago and serving in other roles around the Firm, she knows her way around the office. This longevity and familiarity with our practices allows Mollie to step in and add value at a moment's notice on a variety of projects. Her role in bookkeeping has been her longest-tenured, which suits her eye for detail. Not only are her ledger entries impeccable, but she is an excellent proofreader, probably stemming from her days reviewing scientific papers of the Oceanography Department at Texas A&M. While we could not imagine Mollie anywhere but here now, she has had other fascinating jobs, like blackjack dealer and lab technician in various academic departments in subject matters as diverse as histology and animal science. She lived in Cambridge, England, for a year in her 30s while her then-husband was doing doctoral research. Though the pandemic was as challenging for Mollie as it was for everyone else, she was grateful that her young grandkids learned how to use FaceTime and were in constant contact. She was also pleased to get to know her neighbors better as they exchanged misdirected packages. Mollie's superpower is making deep connections with co-workers; she has a network of current and former colleagues whom she can call on just as easily for a happy hour as a comedy show. We are so grateful for Mollie's keen eye for detail, can-do attitude, and relatability. ■

The SECURE Act: Elimination of the Stretch Option for Certain Beneficiaries of Inherited Retirement Assets

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beneficiary's life expectancy (*e.g.*, an adult child who is not disabled or chronically ill), some IRA owners may prefer to have the trust accumulate amounts from retirement accounts, retaining them in the trustee's hands rather than distributing them out to the individual beneficiary. These clients may wish to consult their estate planning attorney to discuss revising the trust.

The SECURE Act may make a Roth conversion or obtaining additional life insurance more appealing to certain clients, or it may prompt some to direct more retirement assets to charity. At your next periodic review with your estate planner, you may wish to explore whether these options make sense for your plan. ■

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to inform the legal strategy, and identifies red flags. Such an expert may communicate ideas about strategy with counsel; these communications with counsel are not discoverable by the opposing party.

By contrast, a testifying expert may perform the same tasks as the consulting expert but is expected to testify in a deposition or trial. The testifying expert's notes, opinions, and communications with counsel are discoverable. Counsel should proceed with caution and consider early on whether the expert's testimony will be needed so as to avoid unplanned disclosure of litigation strategy.

What Documents Are Needed?

To conduct a lifestyle analysis, the lawyer will need complete disclosure of the divorcing couple's earned and unearned income, assets, and liabilities. Counsel may initially get information from the client-spouse to evaluate the marital estate and resources, such as: income tax returns and schedules; W-2s, K-1s, and 1099s; current pay statements; statements for checking and savings accounts, credit cards, non-retirement investments, and retirement assets; house deed, current mortgage statement, and recent appraisals. Sometimes the client-spouse may not be in control of the finances and may have limited access to necessary documents.

In any event, counsel may need to seek an informal exchange of documents prior to a party filing for divorce. In the event a lawsuit is filed, each side may require a formal document exchange ("discovery"). A financial expert can help the attorney in formulating formal and informal discovery requests. Cooperative counsel can reduce the time spent on discovery and thereby reduce the cost of this phase of the case.

What are the Protocols in Conducting a Lifestyle Analysis?

With the financial information in hand, the expert reviews the documents, prepares spreadsheets of the parties' historical family expenses, current and future gross income and after-tax projections, future expenses, and a spouse's post-divorce needs. The financial expert then uses the data from the lifestyle analysis to determine the parties' standard of living.

Historical and Projected Future Expenses. The preparation of a detailed budget is at the core of an alimony or high-income child support case. The budget forms the basis of the spouse's support need and the payor-spouse's ability to pay. Generally, the budget includes customary expenses averaged over a 12-month period, if possible, with a portion allocated to the payee-spouse and a portion allocated separately to the minor children. It includes current gross and after-tax income, and current balances for assets and liabilities. The expert reviews the parties' bank and credit card statements, usually over a 3-year period to capture regular and routine expenses and non-recurring expenses. The expenses are identified, categorized by expense for the spouse and for the child, and then summarized. The expert makes adjustments to exclude one-time or non-recurring expenses. The historical and projected future expense analysis is useful for comparing and revising budgets and identifying questionable items in the opposing spouse's budget.

Earned and Unearned Income. Earned income is compensation from employment. Unearned income includes pensions, trust distributions, interest, dividends, and capital gains. When a spouse is not a W-2 employee, has variable income, or income is not easily ascertainable from income tax returns, the expert may need to review more documents covering a longer period, such as five years. Income can be complicated to determine if a spouse receives executive compensation in various forms and over different vesting periods, such as employee stock purchase plans and restricted stock units. The expert must determine whether to treat executive compensation as income or as an asset to avoid double-counting.

According to Coenen, in conducting a lifestyle analysis there are four primary methods to determine income:

(1) "specific items" summarizes and analyzes cash inflow transactions from bank, credit card, and

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investment account statements to locate specific income sources;

(2) "bank deposits" identifies all cash deposits in bank accounts, as well as summarizes and analyzes the total deposits excluding non-income transfers between accounts or other sources that are not income;

(3) "expenditures" traces every expense from bank, credit card, and investment account statements, and summarizes and tabulates them to determine the total income necessary to pay the expenses; and

(4) "net worth" looks at changes in an individual's net worth and compares to known sources of income and known expenditures.

Depending on the case, the financial expert may use some combination of these methods. The expert then reviews and determines the cash used to fund the parties' lifestyle and whether the funds came from earned income or unearned income. The analysis may confirm that a spouse's after-tax income is sufficient, or not, to support the same lifestyle enjoyed before the divorce.

Resources to Fund the Lifestyle. Some couples use only earnings to pay family expenses and fund their lifestyle. Some may liquidate assets from non-retirement investment accounts to pay expenses. Some couples fund their lifestyle with credit card debt or a line of credit against the equity of the marital home. In some instances, one or both spouses have non-marital assets (gifts or inheritances) that they use to enhance their lifestyle. What happens when a couple divorces?

The financial expert's detailed lifestyle analysis may identify known and unknown circumstances bearing on the standard of living. For example, the expert may find assets that are depleted or encumbered with substantial debt. A spouse may learn for the first time that the parties' financial situation is not what he or she believed it to be. Even if one spouse was not fully aware of the facts, a judge could find that the parties' standard of living is not sustainable going forward. A court will not necessarily order an amount of support that would force the payor-spouse to liquidate assets to maintain the prior standard of living.

Where and How the Expert Finds Hidden Income and Assets?

When a spouse is self-employed, works in a family business, or is a member of an entity with real estate holdings, it can be challenging to find all amounts and sources of income and to get complete and accurate information in discovery. The non-business owner spouse may have suspicions about the other spouse's business dealings but may not have access to relevant information. The protocols used in the personal lifestyle analysis may also be used by the expert to find business income and assets. If the expert suspects understated business income, a detailed review of bank, investment, and credit card statements may direct the expert to other income sources. Specific line items in personal tax returns contain valuable information, such as interest and dividends (Schedule B), retirement plan distributions, rental income, investment income (Schedule D), and itemized deductions that may give clues to understated income, hidden or dissipated assets, and may reveal other red flags. The expert may find information about overseas income and assets. In this case, the client-spouse may need a private forensic investigator who specializes in finding offshore accounts. Of course, the cost of such investigation should be balanced against the potential value of finding any assets.

Conclusion

Divorce is fraught with uncertainty and financial stress. There may be anxiety over whether there is sufficient income and assets to maintain a customary lifestyle for both spouses and their children after divorce, or whether a spouse has hidden assets or income. A financial expert to conduct a lifestyle analysis may be appropriate in some cases. Such an expert can prepare financial reports and schedules, and make the data understandable by clients, attorneys, and judges. In mediation, the expert can be available to answer questions regarding the parties' income, cash flow, tax projections, and property division to assist in settlement. In litigation, the expert can testify about his/her findings about the couple's lifestyle as it relates to alimony, child support, and property division. ■

P&F NEWS

Partner **Stephanie Perry** was sworn-in as President-Elect of the Bar Association of Montgomery County in April. Her term as President will begin in 2022.

Partner **Anne Coventry** has been nominated as a Fellow of the Maryland Bar Foundation for 2021. Bar Foundation Fellows "expand access to justice in local communities and maintain the honor and integrity of the legal profession."

The P&F Family expanded by one more small face: Domestic & Family Law Paralegal **Cassie Murphy** and her husband Mike welcomed daughter Charlotte Ellinor Murphy in January.

Stephanie Perry has been inducted as a Fellow of the Bar Leaders of the Montgomery County, Maryland Bar Foundation. Bar Foundation Fellows are dedicated to furthering the high ideals of the legal profession.

Anne Coventry's year as Chair of the Estate & Trust Law Section of the MSBA wrapped up June 1, after 11 years serving on Section Council. Anne notes that the highlight of her term was "building our diversity and inclusion initiatives into the bylaws so that they will continue beyond the tenure of current leadership."

Partners **Stephanie Perry** and **Adam Swaim** spoke before the MSBA Study Group of the Estates & Trusts Section on the topic of *Planning for Today and for the Future: The Importance of Building Flexibility into an Estate Plan.*

Associate **Micah Snitzer** has been elected to the Section Council of the Estate & Trust Law Section of the MSBA.

Of Counsel **Oren Goldberg** became a member of the selective Washington, DC Estate Planning Council.

Partner **Linda Ravdin** has been elected to a second term as Vice-President of the Round House Theatre Board of Trustees. Linda has been a trustee of Round House for nine years, is a lover of theatre in general and Round House in particular. The Firm is proud to join Linda in supporting the artistic work of our neighbor in Bethesda. We most recently supported its Free Play ticket program, which gave out more than 3,000 free tickets to high school students to Round House's fall and winter productions.

Stephanie Perry spoke before the Fairfax Bar Association's Family Law Section on estate and tax planning in the drafting of premarital agreements.

Partner **Jan White** presented as part of a panel on the new Virginia Uniform Collaborative Law Act to the Collaborative Professionals of Northern Virginia.

Stephanie Perry has participated in video discussions relating to estate planning and increasing diversity in the field. Stephanie is encouraging diverse law school candidates to enter the trust and estate practice and suggesting ideas to trust and estate attorneys as to how they can support this important goal.

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Heads up! We will be moving our offices at the end of September 2021.

We will continue to service our beloved Bethesda community from just a few blocks away—nothing will change other than our address. We can't wait to welcome you in-person to our new space.

As of October 1, 2021, you can reach us at
7101 Wisconsin Avenue, Suite 1025, Bethesda, Maryland 20814