

Estate Planning in South Carolina
Second Edition
Volume II

Table of Contents

CHAPTER 1
INTERVIEWING THE CLIENT

1.1	Introduction	1
1.2	Overview of the Estate Planning Process	1
	▶ 1.201 Outline	1
	▶ 1.202 Goal Setting	2
	▶ 1.203 Fear	4
	▶ 1.204 Office Staff	5
	▶ 1.205 Timing	5
	▶ 1.206 Fees	5
	▶ 1.207 Referral Acknowledgment	6
1.3	The Estate Analysis Checklist (“EAC”)	7
	▶ 1.301 Estate Analysis Checklist	8
	▶ 1.302 Children	9
	▶ 1.303 Your Parents	10
	▶ 1.304 Any Expected Inheritances	12
	▶ 1.305 Armed Forces Service	12
	▶ 1.306 Other Personal Data	14
	▶ 1.307 Bank Accounts and Savings Accounts	15
	▶ 1.308 Real Estate	16
	▶ 1.309 Your Life and Accidental Death Insurance	17
	▶ 1.310 Business Interests	18
	▶ 1.311 Community Property	19

Table of Contents

▶ 1.312	Other Assets	20
1.4	The Personal Objectives Chart	21
▶ 1.401	Estate Planning Goal Clarification - Married Couple	21
▶ 1.402	Estate Planning Goal Clarification - Single Person	23
1.5	A Use of Diagrams to Explain the Plan	24
▶ 1.501	Typical Married Plan	26
▶ 1.502	All Property Does Not Pass Under the Will	26
▶ 1.503	Consequences of Joint Account with One Child	27
▶ 1.504	Beneficiary Designations Must Coincide with the Estate Plan	28
▶ 1.505	All to Surviving Spouse, and at the Second Death, to Children or Others Outright	29
▶ 1.506	All to Surviving Spouse, Then to Trust for Children	30
▶ 1.507	The Problem of Ultimate Beneficiaries Not Being the Same in Husband's and Wife's Wills	31
▶ 1.508	All to Trust for Children	32
▶ 1.509	Skipping the Second Tax Estate Plan	33
1.6	Charitable Gifts Under the Will	34
1.7	Conflicts and Mutual Representation	34
1.8	A Word About Digital Assets	35
1.9	Where the Problems Typically Exist	36
▶ 1.901	Typical Problem Areas	36
▶ 1.902	Steps to Reduce Malpractice Claims	37
Appendix 1-1	Estate Analysis Checklist ("EAC")	41

CHAPTER 2 ETHICAL CONSIDERATIONS

2.1	Scope of Coverage	55
2.2	Rules of Professional Conduct	55
2.3	Inadequacy of the Rules in Relation to Estate Planning Practice	56

2.4	General Duties Applicable to Common Lawyer-Client Relationships	56
▶ 2.401	Overview	56
▶ 2.402	Duty of Competence	57
▶ 2.403	Duty of Diligence	58
▶ 2.404	Duty to Communicate	58
▶ 2.405	Duties Regarding Fees	60
▶ 2.406	Duty of Loyalty	62
▶ 2.407	Safekeeping and Accounting	64
▶ 2.408	Exercising Independent Judgment	66
2.5	Situations Involving Estate Planning Lawyers' Duties to Clients	67
▶ 2.501	Lawyer or Member of Lawyer's Family as Beneficiary or Donee	67
▶ 2.502	Lawyer as Fiduciary	69
▶ 2.503	Multiple Representation	69
▶ 2.504	Duty to Maintain Confidences	70
▶ 2.505	Clients of Questionable Capacity	71
▶ 2.506	Former Clients	73
▶ 2.507	Fiduciary as Client	74
▶ 2.508	Estate Planner as Witness	75
▶ 2.509	Unauthorized Practice of Law	76
▶ 2.510	Declining or Terminating Representation	77
2.6	Further Guidance	78

**CHAPTER 3
MAPPING THE PLAN**

3.1	Introduction	79
3.2	Forms of Ownership	81
▶ 3.201	Fee Simple	81
▶ 3.202	Tenants in Common	81

Table of Contents

▶ 3.203	Joint Tenants with Right of Survivorship	81
▶ 3.204	Tenants by the Entirety	82
▶ 3.205	Community Property	83
▶ 3.206	Payable on Death (“POD”) Accounts	84
▶ 3.207	Transfer on Death (“TOD”) Ownership of Securities	84
3.3	The Probate Process: A Brief Overview	85
▶ 3.301	Probating the Will	85
▶ 3.302	Qualifying the Personal Representative and Trustee of a Testamentary Trust	86
▶ 3.303	Fiduciary Bond and Surety on the Bond	86
▶ 3.304	Filing the Inventory	87
▶ 3.305	Accounting by the Personal Representative	87
▶ 3.306	Settling the Estate	88
3.4	The Elective Share of the Surviving Spouse	89
▶ 3.401	Surviving Spouse’s Right to Elect a Share of Decedent’s Estate	89
▶ 3.402	Description and Timing	89
▶ 3.403	Property Included in the Probate Estate	89
▶ 3.404	How the Elective Share is Satisfied	90
▶ 3.405	Effect on Federal and State Estate Taxes	91
3.5	Other Rights	91
▶ 3.501	Omitted Spouse	91
▶ 3.502	Exempt Property	92
▶ 3.503	Homestead Allowance	92
3.6	Reasons for Having a Will	93
▶ 3.601	To Dispose of Property	93
▶ 3.602	To Reduce Estate Taxes	93
▶ 3.603	To Name Fiduciaries	94
3.7	Comparison of Testacy and Intestacy	94
3.8	Types of Trusts	95

3.9	Uses of Trusts	97
▶ 3.901	Avoiding Probate	97
▶ 3.902	Managing Assets	98
▶ 3.903	Tax Savings	99
▶ 3.904	Trusts for Minor Children	101
▶ 3.905	Providing for Minors and Other Persons Under a Disability	102
▶ 3.906	Providing for Spendthrifts	102
▶ 3.907	Providing for a Spouse While Controlling the Disposition of the Remainder	103
3.10	Alternatives to Trusts	106
▶ 3.1001	Uniform Gifts to Minors Act (“UGMA”)	106
▶ 3.1002	POD Bank Accounts, Savings Accounts and United States Savings Bonds, and TOD Investments	106
▶ 3.1003	Survivorship	107
▶ 3.1004	Simultaneous Death Act	107
▶ 3.1005	Limited Partnerships and Limited Liability Companies	108
3.11	Other Types of Documents	108
▶ 3.1101	Durable Powers of Attorney	108
▶ 3.1102	Advance Medical Directives	109
▶ 3.1103	Anatomical Gifts	109
3.12	Transfer Tax Considerations	110
▶ 3.1201	Overview of the Federal Gift Tax	110
▶ 3.1202	Overview of the Federal Estate Tax	112
▶ 3.1203	Lifetime Versus Testamentary Gifts	115
▶ 3.1204	Estates Potentially Subject to the Federal Estate Tax	115
▶ 3.1205	Overview of the Federal Generation-Skipping Transfer (“GST”) Tax	116
▶ 3.1206	Estates Potentially Subject to the Generation-Skipping Transfer Tax	118
▶ 3.1207	Recent History of Federal Transfer Taxes	118

Table of Contents

3.13	Planning For Married Couples	120
▶ 3.1301	Marital Agreements	120
▶ 3.1302	Surviving Spouse’s Elective Share of the Decedent’s Probate Estate	121
3.14	Implementing the Plan	121
▶ 3.1401	Need for Additional Information and Documents	121
▶ 3.1402	Checklist for Preparation of Documents	122
3.15	Conclusion	123
▶ 3.1501	Careful Review of All Information	123
▶ 3.1502	Coordination with Other Professionals	123
▶ 3.1503	Coordination with Existing Plan Documents and Transfers	124
▶ 3.1504	Coordination with Estate Plans of Other Family Members When Appropriate	124
▶ 3.1505	Following Up with the Client	124

CHAPTER 4

A PRACTICAL GUIDE TO DRAFTING WILLS AND TESTAMENTARY TRUSTS IN SOUTH CAROLINA

4.1	Introduction	125
▶ 4.101	What is a Will?	125
▶ 4.102	The Function of a Will.	126
4.2	Drafting the Will	127
▶ 4.201	Describing the Devised Property in General	127
▶ 4.202	Checklist for Identifying and Providing for the Property Devised	127
▶ 4.203	Checklist for Identifying and Establishing the Recipients or Devisees of a Specifically Devised Asset.	137
▶ 4.204	The Personal Representative	142
▶ 4.205	Protecting Devisees with Special Problems or Circumstances.	145
▶ 4.206	Litigious Devisees	148
▶ 4.207	Protecting the Small Devisee	149

▶ 4.208 Protecting the Devisee’s Right to a Specific Devise 149

4.3 Preparing Testamentary Trusts 150

▶ 4.301 Commonly Created Testamentary Trusts 150

▶ 4.302 Residue Trust 151

▶ 4.303 Other Trusts 154

▶ 4.304 Miscellaneous Drafting Considerations 155

CHAPTER 5

DRAFTING THE REVOCABLE LIVING TRUST

Introduction and Scope: First Edition 161

5.1 Introduction and Scope: The New Era of Estate Planning 162

▶ 5.101 Changes and Improvements: Great for
the Trusts and Estates Lawyer 163

5.2 Revocable Living Trust: What is It? 172

5.3 Living Trust as a Will Substitute 175

▶ 5.301 The Administrative Trust 175

▶ 5.302 Income Tax Considerations: Administrative Trusts
and the “Estate” 175

5.4 Reasons For Using a Revocable Living Trust 176

▶ 5.401 The SCTC 176

▶ 5.402 Management of Assets 177

▶ 5.403 Avoiding Probate 179

▶ 5.404 Privacy 179

▶ 5.405 Ease of Administration 180

▶ 5.406 Trust Situs 180

▶ 5.407 Receipt of Contractual Benefits 181

5.5 Estate Planning: Ownership of Assets is the Key 182

5.6 The New Era of Estate Planning 183

5.7 Preparation and Implementation of the Plan 184

**5.8 Revocable Trusts as the Dispositive Instrument:
Settled Questions and Open Issues in South Carolina 187**

▶ 5.801 Settled Issues 187

Table of Contents

▶ 5.802	Previously Unsettled or Open Issues, but Now Settled	190
5.9	Basic Revocable Trust Provisions and Annotations	201
▶ 5.901	Preamble and Declaration of Trust	201
▶ 5.902	Description of Property Transferred: Funding the Trust	202
▶ 5.903	Trustee Provisions	206
▶ 5.904	Provisions During Grantor’s Life	212
▶ 5.905	Administration Upon Death of Grantor	220
▶ 5.906	Distributions at Settlor’s Death	234
▶ 5.907	Designing the Trust for the Surviving Spouse in the New Era	236
▶ 5.908	Drafting for Generation Skipping and With Formulas in the New Era	246
▶ 5.909	Drafting With Formulas for “Two Trust” or “Two Share” Dispositions	247
▶ 5.910	Exemption Equivalent or Unified Credit (Bypass) Trust for Formula Bequests	260
▶ 5.911	Ultimate Distributions	264
▶ 5.912	Trustee Powers	266
Appendix 5-1	Understanding the “Estate”	273

CHAPTER 6 TAX PLANNING

6.1	Overview of the Re-Unified Transfer Tax System	275
▶ 6.101	Federal Estate Tax	275
▶ 6.102	Federal Gift Tax	276
▶ 6.103	Transfer of Unused Exemption to Surviving Spouse - “Spousal Portability”	276
▶ 6.104	Generation-Skipping Transfer Tax	278
▶ 6.105	Estate and Gift Tax Exemptions and Computations	278
▶ 6.106	Basis Adjustment	280
6.2	Determining Property Subject to Estate Tax	280
▶ 6.201	Property Owned at Death	280

▶ 6.202	Other Property Included in the Gross Estate	280
▶ 6.203	Valuation of Property Included in the Gross Estate	281
6.3	Estate Tax Marital Deduction	282
▶ 6.301	Background of the Federal Estate Tax Marital Deduction	282
▶ 6.302	Requirements for the Marital Deduction	282
▶ 6.303	General Power of Appointment Trust	285
▶ 6.304	Estate Trust	286
▶ 6.305	Qualified Terminable Interest in Property (“QTIP”) Trust . .	286
▶ 6.306	Optimum Use of the Marital Deduction	288
6.4	Selecting and Funding Marital Deduction Formulas	291
▶ 6.401	General Purpose of Formula	291
▶ 6.402	Types of Formulas	291
6.5	Other Deductions from the Gross Estate	298
▶ 6.501	Federal Estate Tax Charitable Deduction	298
▶ 6.502	Funeral Expenses, Costs of Administration, and Claims Against the Estate	298
▶ 6.503	Estate Tax Exclusions for Qualified Conservation Easements	298
6.6	Taxation of Gifts	299
▶ 6.601	Definition of Taxable Gift	299
▶ 6.602	Concept of Completed Gifts	299
▶ 6.603	Gifts Made Within Three Years of Death	299
▶ 6.604	Gifts Made More Than Three Years Before Death	299
▶ 6.605	Gift Tax Annual Exclusion	300
▶ 6.606	Educational/Medical Gift Tax Exclusion	301
▶ 6.607	Gift Tax Marital Deduction	301
▶ 6.608	Valuation of Gifts	301
▶ 6.609	Income Tax Basis Considerations	302
▶ 6.610	Benefits of Lifetime Transfers	303

Table of Contents

6.7	Generation-Skipping Transfer Tax	303
▶ 6.701	Generation-Skipping Transfer Tax Concepts	303
▶ 6.702	Tax Base	305
▶ 6.703	Gift-Splitting	306
▶ 6.704	Reverse QTIP Election	306
▶ 6.705	Downstream Split	306
▶ 6.706	Separate Share Rules	307
▶ 6.707	Effective Dates	307
▶ 6.708	Generation-Skipping Transfer Tax Planning Principles	307
▶ 6.709	Post-Mortem Generation-Skipping Transfer Tax Planning	310
6.8	Chapter 14—Special Valuation Rules	318
▶ 6.801	Revenue Reconciliation Act of 1990	318
▶ 6.802	I.R.C. § 2702: Special Valuation Rules for Transfers of Interests in Trusts	319
▶ 6.803	Private Remainder Trusts ("GRATs" and "GRUTs")	324
▶ 6.804	Personal Residence Trusts	325
6.9	Disclaimers	329
▶ 6.901	In General	329
▶ 6.902	What May Be Disclaimed?	329
▶ 6.903	Use of Disclaimers in Post-Mortem Estate Planning	330
▶ 6.904	Use of Disclaimers in Inter Vivos Estate Planning	330
▶ 6.905	Disclaimers Before 1976	330
▶ 6.906	Effect of State Law	330
▶ 6.907	Requirements of a Qualified Disclaimer	331
▶ 6.908	Writing Requirement	332
▶ 6.909	Delivery Requirement	332
▶ 6.910	Timing Requirement	332
▶ 6.911	Timing Requirement and QTIP Trusts	334
▶ 6.912	Timing Requirement and Joint Property	334

▶ 6.913	Disclaimant Must Not Have Accepted Any Benefits of the Disclaimed Property	335
▶ 6.914	Disclaimed Property Must Pass Without Direction by the Disclaimant	336
▶ 6.915	Disclaimer of Less Than an Entire Interest	337
▶ 6.916	Disclaimers That Reduce the Disclaimant's Estate	339
▶ 6.917	Disclaimers That Increase the Marital Deduction	339
▶ 6.918	Disclaimers by a Fiduciary	340
▶ 6.919	Disclaimers Under the Generation-Skipping Transfer Tax.	340
▶ 6.920	Use of Disclaimers as an Estate Planning Device	341
▶ 6.921	Drafting a Disclaimer Trust – Deferring the Decision	341
▶ 6.922	Drafting for Deaths in Close Sequence	341
6.10	Saving Taxes with Charitable Gifts	342
▶ 6.1001	Overview of Tax Rules – Applicable Internal Revenue Code Sections	342
▶ 6.1002	Income Tax Charitable Deduction	342
▶ 6.1003	Estate and Gift Tax Rules	343
▶ 6.1004	Valuation Tables	343
▶ 6.1005	Methods of Giving and Tax Consequences	344
▶ 6.1006	Bargain Sales	345
▶ 6.1007	Bequests and Other Testamentary Transfers	345
▶ 6.1008	Charitable Remainder Trusts	345
▶ 6.1009	Pooled Income Funds	346
▶ 6.1010	Charitable Gift Annuities	346
▶ 6.1011	Remainder Interests in Personal Residences and Farms	347
▶ 6.1012	Charitable Lead Trusts	347
▶ 6.1013	Techniques for Special Assets	348
▶ 6.1014	Private Foundations	350
▶ 6.1015	Techniques for Special Situations	351

Table of Contents

Index 355