

Estate Planning in South Carolina
Second Edition
Volume III

Table of Contents

CHAPTER 1

PLANNING FOR CLOSELY-HELD BUSINESSES

| | | |
|------------|--|-----------|
| 1.1 | Introduction | 1 |
| ▶ 1.101 | Importance of Estate Planning for Closely-Held Business Owners | 1 |
| ▶ 1.102 | Lifetime and Post-Mortem Estate Planning | 2 |
| 1.2 | Selecting a Form of Ownership for the Closely-Held Business | 5 |
| ▶ 1.201 | Introduction | 5 |
| ▶ 1.202 | Sole Proprietorships, Partnerships, Limited Liability Companies and Corporations | 5 |
| ▶ 1.203 | Limited Partnerships | 8 |
| ▶ 1.204 | Limited Liability Partnerships | 9 |
| ▶ 1.205 | Limited Liability Companies | 9 |
| ▶ 1.206 | S Corporations | 12 |
| 1.3 | Shareholder Agreements | 17 |
| ▶ 1.301 | Purpose | 17 |
| ▶ 1.302 | Types of Shareholder Agreements | 17 |
| 1.4 | Valuation of a Closely-Held Business Interest for Estate Tax Purposes | 22 |
| ▶ 1.401 | Generally | 22 |
| ▶ 1.402 | IRS Position and Criteria for Valuation | 22 |
| ▶ 1.403 | Valuation Issues | 23 |
| ▶ 1.404 | Special Estate Tax Election to Value Real Estate Used in a Closely-Held Business or for Farming | 29 |

Table of Contents

| | | |
|---------------------|---|-----------|
| ▶ 1.405 | Making the Price Binding for Tax Purposes | 31 |
| ▶ 1.406 | Selecting the Method of Determining the Price | 32 |
| ▶ 1.407 | Paying the Purchase Price | 34 |
| ▶ 1.408 | Disadvantages of Buy-Sell Agreements | 37 |
| 1.5 | Use of the I.R.C. § 303 Redemption | 38 |
| ▶ 1.501 | Qualifying Under I.R.C. § 303 | 39 |
| ▶ 1.502 | Use of Proceeds | 40 |
| ▶ 1.503 | Traps for the Unwary | 40 |
| 1.6 | Elections to Defer Payment of Estate Tax with Respect to Closely-Held Business Interests | 41 |
| ▶ 1.601 | Introduction | 41 |
| ▶ 1.602 | General Requirements | 42 |
| ▶ 1.603 | Acceleration | 43 |
| ▶ 1.604 | Traps for the Unwary | 43 |
| 1.7 | Business Planning Options | 44 |
| ▶ 1.701 | In General | 44 |
| ▶ 1.702 | Outright Sales for Cash | 44 |
| ▶ 1.703 | Installment Sales | 45 |
| ▶ 1.704 | Dispositions by Tax-Free Merger | 47 |
| ▶ 1.705 | Transfers on a “Discounted” Basis | 48 |
| ▶ 1.706 | Buy-Sell Arrangements | 49 |
| ▶ 1.707 | Recapitalizations to Retain Voting Control | 49 |
| ▶ 1.708 | Grantor Retained Annuity Trusts | 50 |
| ▶ 1.709 | Charitable Bailouts | 51 |
| ▶ 1.710 | Private Annuities | 52 |
| ▶ 1.711 | S Corporation Issues | 53 |
| 1.8 | Estate Freezes | 56 |
| Appendix 1-1 | Shareholder Agreement Drafting Questionnaire | 59 |

CHAPTER 2
PLANNING FOR NEEDS-BASED GOVERNMENT BENEFITS

Part I - Planning for Government Benefits

| | | |
|-------------|--|----|
| 2.1 | Introduction | 65 |
| 2.2 | Is Planning to Qualify for Medicaid Legal? Is It Ethical? | 66 |
| 2.3 | Medicaid vs. Medicare | 69 |
| 2.4 | Other Needs-Based Government Benefits | 70 |
| | ▶ 2.401 Supplemental Security Income (“SSI”) Benefits | 70 |
| | ▶ 2.402 Veterans Benefits | 72 |
| 2.5 | Government Benefits Planning in Traditional Estate Planning | 72 |
| | ▶ 2.501 Testamentary Trusts for Persons Who Are Disabled | 74 |
| | ▶ 2.502 Non-Testamentary Third-Party Trusts | 76 |
| | ▶ 2.503 Existing Trusts | 78 |
| 2.6 | Trusts Established with Property Belonging to the Disabled Person | 79 |
| | ▶ 2.601 The 42 U.S.C. § 1396p(d)(4)(A) “Payback” Trust | 80 |
| | ▶ 2.602 The Pooled Fund Trust | 81 |
| | ▶ 2.603 Medicaid Income Trusts | 82 |
| 2.7 | Third-Party Liability Claims in Personal Injury Settlements | 83 |
| | ▶ 2.701 Structured Settlements in Personal Injury Cases | 84 |
| 2.8 | Drafting and Administration of a Special Needs Trust | 85 |
| 2.9 | Estate Planning for the Spouse Who Is Disabled | 88 |
| 2.10 | Spousal Impoverishment | 89 |
| 2.11 | Estate Recovery | 92 |
| 2.12 | Transfers of Assets | 93 |
| 2.13 | Nursing Home Medicaid Services | 95 |
| 2.14 | South Carolina Department of Disabilities and Special Needs (“SCDDSN”) Medicaid Waiver Programs | 96 |
| 2.15 | Gifting to Qualify a Parent for Medicaid | 97 |

Table of Contents

2.16 Long-Term Care Insurance 98

2.17 Summary for Part I 99

Part II - Powers of Attorney

2.18 Introduction 99

2.19 Capacity 100

2.20 Durability 101

2.21 Termination 102

2.22 Powers in General 103

2.23 Successors 104

2.24 Gifting Powers 104

2.25 Multiple Agents 105

2.26 Compensation 105

2.27 Out-of-State Documents 106

Part III - Advance Health Care Directives

2.28 The South Carolina Death with Dignity Act 106

2.29 Statutory Health Care Powers of Attorney 107

2.30 Combined Powers of Attorney 108

2.31 Adult Health Care Consent Act 109

2.32 Questions about Priority 110

Appendix 2-1 Letter Advising Client of Medicaid Penalty 111

Appendix 2-2 Sample Special Needs Trust 112

Appendix 2-3 Sample Standby Special Needs Trust 115

Appendix 2-4 Sample *Crummey* Withdrawal for
Special Needs Trust 116

Appendix 2-5 Sample Assignment Language 118

Appendix 2-6 Sample Income Trust: Disabled Person Income Trust .. 119

Appendix 2-7 Trust Committee 125

Appendix 2-8 Testamentary Special Needs Trust for Spouse 127

Appendix 2-9 Spousal Impoverishment 129

Appendix 2-10 Excluded Resources and Income 131

Appendix 2-11 Sample Language for Special Trustee 135

CHAPTER 3
CHOOSING FIDUCIARIES

3.1 Fiduciaries Generally 137

- ▶ 3.101 Types of Fiduciaries 137
- ▶ 3.102 Personal Representative 138
- ▶ 3.103 Testamentary Trustees and Trustees of Established Trusts
to Which a Devise or Bequest Is Made 140
- ▶ 3.104 Guardian and Conservator of Person and
Estate of Minor Children 141
- ▶ 3.105 Attorneys-in-Fact and Trustees of Inter Vivos Trusts to
Which No Testamentary Transfer Is Made 142

3.2 Standards of Judgment, Duties and Obligations 143

- ▶ 3.201 Standards of Judgment for Fiduciaries 143
- ▶ 3.202 Specific Duties and Obligations 148

3.3 Fiduciary Choices Available 157

- ▶ 3.301 Individual 157
- ▶ 3.302 Corporation 159
- ▶ 3.303 Co-Fiduciaries 159

**3.4 Issues to Consider in Selection of
Personal Representative and Trustee** 160

- ▶ 3.401 Professional vs. Non-Professional Fiduciary 160
- ▶ 3.402 Individual vs. Corporate Fiduciary 161
- ▶ 3.403 Trustees of Qualified Domestic Trust (“QDOT”) 162
- ▶ 3.404 Ethical Considerations:
The Attorney-Draftsmen as Fiduciary. 163
- ▶ 3.405 Tax Considerations 164

**3.5 Issues to Consider in Selection of Guardian of Person
and Trustee for Minor Children** 168

- ▶ 3.501 Generally 168

Table of Contents

| | |
|---|------------|
| ▶ 3.502 Guardian as Trustee | 168 |
| 3.6 Issues to Consider in Selection of Attorney-in-Fact | 169 |
| ▶ 3.601 Generally | 169 |
| ▶ 3.602 Tax Consequences to Attorney-in-Fact | 169 |
| ▶ 3.603 Conflicts of Interest | 169 |
| 3.7 Agent Under Health Care Power of Attorney and Advance Medical Directives | 170 |
| 3.8 Selection and Appointment of Successor Fiduciaries | 170 |
| 3.9 Compensation of Fiduciaries | 170 |
| ▶ 3.901 Personal Representatives' Commissions | 170 |
| ▶ 3.902 Trustees' Commissions | 171 |

CHAPTER 4

TRANSFERRING ASSETS OUTSIDE OF PROBATE

| | |
|--|------------|
| 4.1 Introduction | 173 |
| 4.2 Nature of Non-Probate Assets | 173 |
| ▶ 4.201 Distinction Between Probate and Non-Probate Assets | 173 |
| ▶ 4.202 Common Examples of Non-Probate Assets | 174 |
| ▶ 4.203 Advantages of Non-Probate Assets | 175 |
| ▶ 4.204 Disadvantages of Non-Probate Assets | 177 |
| 4.3 Estate Plan Integration | 180 |
| ▶ 4.301 Will | 180 |
| ▶ 4.302 Tax Planning | 180 |
| ▶ 4.303 Asset-by-Asset Review | 181 |
| ▶ 4.304 Information Gathering | 181 |
| 4.4 Jointly Owned Property | 182 |
| ▶ 4.401 Introduction | 182 |
| ▶ 4.402 Types of Joint Ownership | 182 |
| ▶ 4.403 How Created | 183 |
| ▶ 4.404 Multiple-Party Depository Accounts | 184 |

| | | |
|------------|--|------------|
| ▶ 4.405 | Reasons to Use Joint Ownership | 186 |
| ▶ 4.406 | Federal Estate and Gift Tax | 187 |
| ▶ 4.407 | Income Tax | 192 |
| ▶ 4.408 | Estate Plan Coordination | 194 |
| 4.5 | Payable on Death (POD) and Transfer on Death (TOD) Accounts | 197 |
| ▶ 4.501 | Payable on Death (POD) Accounts | 197 |
| ▶ 4.502 | Uniform Transfers on Death (TOD) Security Registration | 199 |
| ▶ 4.503 | Reason to Use | 200 |
| 4.6 | Life Insurance | 201 |
| ▶ 4.601 | Introduction | 201 |
| ▶ 4.602 | Types of Insurance | 201 |
| ▶ 4.603 | Reasons to Use | 203 |
| ▶ 4.604 | Taxation | 207 |
| ▶ 4.605 | Estate Plan Coordination | 217 |
| 4.7 | Qualified Retirement Plan Benefits | 223 |
| ▶ 4.701 | Introduction | 223 |
| ▶ 4.702 | Types of Plans | 223 |
| ▶ 4.703 | Plan Distributions | 229 |
| ▶ 4.704 | Taxation | 241 |
| ▶ 4.705 | Naming a Beneficiary | 256 |
| 4.8 | Powers of Appointment | 266 |
| ▶ 4.801 | Basics | 266 |
| ▶ 4.802 | Reasons to Use | 270 |
| ▶ 4.803 | Federal Estate and Gift Tax | 275 |

CHAPTER 5

EXECUTION AND SAFEKEEPING OF DOCUMENTS

| | | |
|------------|----------------------------|------------|
| 5.1 | Overview | 279 |
| 5.2 | Review of Documents | 279 |
| ▶ 5.201 | By Client | 279 |

Table of Contents

| | | |
|---------------------|---|------------|
| ▶ 5.202 | By Corporate Fiduciary | 279 |
| ▶ 5.203 | By Attorney | 280 |
| 5.3 | Execution of Estate Planning Documents | 280 |
| ▶ 5.301 | Legal Capacity of the Client | 280 |
| ▶ 5.302 | Execution of Wills | 282 |
| ▶ 5.303 | Execution of Trusts and Powers of Attorney | 284 |
| ▶ 5.304 | Suggested Procedures for Execution of Documents | 285 |
| 5.4 | Safekeeping of Estate Planning Documents | 290 |
| ▶ 5.401 | Client's Safe Deposit Box | 290 |
| ▶ 5.402 | Client's Home or Office | 290 |
| ▶ 5.403 | Attorney's Office or Safe Deposit Box | 291 |
| ▶ 5.404 | Corporate Fiduciary's Vault | 291 |
| ▶ 5.405 | Relative or Other Individual | 292 |
| Appendix 5-1 | Testimonium and Attestation Clauses for Will | 293 |
| Appendix 5-2 | Sample Bequest of Tangible Personal Property by Separate Writing | 294 |
| Appendix 5-3 | Separate Writing Disposing of Tangible Personal Property | 295 |
| Appendix 5-4 | Self-Proved Will Form for Simultaneous Use | 296 |
| Appendix 5-5 | Self-Proved Will Form for Subsequent Use | 298 |
| Appendix 5-6 | Suggested Form for Certificate of Trust | 299 |
| Appendix 5-7 | Form for Execution/Attestation of Durable Power of Attorney | 301 |
| Appendix 5-8 | Suggested Form of Safe Deposit Box Log | 302 |

CHAPTER 6

TERMINATING THE REPRESENTATION

| | | |
|------------|---|------------|
| 6.1 | Overview | 303 |
| 6.2 | Completion of Work | 303 |
| 6.3 | Importance of Terminating the Representation | 304 |

| | | |
|---------------------|--|-----|
| 6.4 | How to Terminate the Representation | 305 |
| ▶ 6.401 | Termination at Completion | 305 |
| ▶ 6.402 | How to Terminate an Incomplete Matter | 306 |
| 6.5 | Retrieval System | 307 |
| ▶ 6.501 | Importance of Being Able to Retrieve Closed Estate Planning Files When Client or Family Calls | 307 |
| ▶ 6.502 | Ability to Contact All or Certain Clients in the Future | 307 |
| 6.6 | Ethical Issues Regarding Contacting Former Clients | 308 |
| ▶ 6.601 | Solicitation | 308 |
| ▶ 6.602 | Affirmative Duty to Contact Former Clients | 308 |
| 6.7 | Ethical Issues Regarding Maintaining Closed Estate Planning Files | 309 |
| Appendix 6-1 | Sample Letter to Client Sending Executed Documents and Terminating Representation | 311 |
| Appendix 6-2 | Sample Letter to Corporate or Other Professional Fiduciary Sending Executed Documents for Safekeeping | 312 |
| Appendix 6-3 | Sample First Letter to Client Who Fails to Re-Contact Attorney | 313 |
| Appendix 6-4 | Sample Letter Terminating Relationship with Client Who Fails to Re-Contact Attorney | 314 |
| Appendix 6-5 | Ethics Advisory Opinion 92-19 | 315 |
| Appendix 6-6 | Rule 1.15(i), RPC, Rule 407, SCACR | 317 |
| Appendix 6-7 | Ethics Advisory Opinion 92-37 | 318 |
| Index | | 321 |

Table of Contents
