

POST MORTEM FINANCIAL PLANNING

MINTO LAW GROUP, LLC
SUITE 2025, TWO GATEWAY CENTER
603 STANWIX STREET
PITTSBURGH, PA 15222
412-201-5525

POST MORTEM PLANNING.

We are going to cover six different items today:

1. Planning for annuity payments.
2. Planning for revocable trusts.
3. Cash flow planning for tax payments.
4. Funding of trusts - or - is the funding of a testamentary trust a taxable event?
5. Trust investments – when to begin treating estate assets as estate assets and not the decedent's assets.
6. Development of the estate and trust investment plan.

Planning for annuity payments.

After the death of the decedent there is at least one election that must be made within a relatively short period of time.

Section 72(h)

A TRAP FOR THE UNWARY ADVISOR

- **(h) OPTION TO RECEIVE ANNUITY IN LIEU OF LUMP SUM**
- **If--**
- **(1) a contract provides for payment of a lump sum in full discharge of an obligation under the contract, subject to an option to receive an annuity in lieu of such lump sum;**
- **(2) the option is exercised within 60 days after the day on which such lump sum first became payable; and**
- **(3) part or all of such lump sum would (but for this subsection) be includible in gross income by reason of subsection (e)(1),**
- **then, for purposes of this subtitle, no part of such lump sum shall be considered as includible in gross income at the time such lump sum first became payable.**

Section 72(h)

What does this mean?

If the contract allows the beneficiary to take the proceeds as an annuity, in lieu of a lump sum settlement, and such person makes an election to do so within sixty days of the owner's death, then the annuity will be taxed to the beneficiary under the regular annuity rules. If the election is not made within 60 days from the owner's death, then the proceeds are entirely taxable, to the extent they exceed the investment in the contract, in the year of the owner's death regardless of the method of distribution chosen by the beneficiary.

Section 72(h)

- There is a lot of argument over the real application of section 72(h) but the best advice is to simply be aware of the provision and make sure that the election is made within 60 days of the owner's death and thereby eliminate any potential problems.

Planning for revocable trusts.

Internal Revenue Code section 645 allows the decedent to elect to treat a revocable trust as a part of the decedent's estate for federal income tax purposes.

Timeliness: The election must be made on the first tax return of the estate, including extensions and is irrevocable.

Why is this important?

1. Allows the use of the fiscal year election of the estate for federal income tax purposes.
2. Allows the estate to qualify as an eligible Subchapter S shareholder.
3. Recognizing losses with the satisfaction of pecuniary bequests with assets having a basis less than fair market value.
4. Waiver of the active participation rule for two years following the date of death.

Cash flow planning for tax payments.

One of the most important aspects of estate and trust planning is the determination of which assets should be sold and when they should be sold to not only satisfy tax obligations, but also for the payment of funeral expenses, to provide the decedent's spouse with living expenses during the period of uncertainty after the decedent's death and to make distributions to heirs, etc.

Cash flow planning for tax payments.

Estate taxes are due within nine months from the date of death, but many other taxes can be due much sooner and the burden can be heavy, the prepayment of the Pennsylvania Transfer Inheritance Tax is due within 90 days of the date of death and federal and state income taxes can come due much sooner if the decedent dies after year end but before federal tax returns are due. These are just a couple of the examples.

As the financial advisor of the decedent you should make it a point, in writing, to meet with and discuss, in detail, these issues with both the estate attorney and accountant. The last thing you need is to receive a call a day before a tax payment is due asking for more funds than are readily available. This is just poor planning on everyone's part.

Funding of trusts - or - is the funding of a testamentary trust a taxable event?

Please see the attached opinion letter.

Trust investments – when to begin treating estate assets as estate assets and not the decedent’s assets.

This relates back to the immediately two preceding issues presented here.

Immediately upon the decedent’s death the nature of the type of investments allowed immediately changes. Regardless of what type of investment the decedent maintained, from a purely certificate of deposit to short selling pork belly futures, the investment parameters must be immediately examined very closely.

Trust investments – when to begin treating estate assets as estate assets and not the decedent’s assets.

It must now absolutely be remembered that the executor/executrix can be personally surcharged if the investment portfolio loses money, even if they were the same investments held by the decedent for years. This is true even if the will says that the executor is not to be surcharged. Courts simply look past this language and hold the executor accountable.

Trust investments – when to begin treating estate assets as estate assets and not the decedent’s assets.

The problem of the correct type of investments is compounded by the recent decisions of the Commonwealth of Pennsylvania courts.

As an example, let’s examine a recent case:

In re Schiedmantel, Appeal of Trustee Sky Trust, N.A. This is a decision handed down on January 5, 2005.

Trustee Investments

The facts are as follows: The trustee, after acquiring the assets from the estate, decided to diversify the trust holdings from a very large position of the stock of Sky Trust. It viewed the holding both as a conflict (holding a large position in stock of its parent company) and as a non-diversification problem (holding a large portion of the trust in only one stock).

The trustee, therefore, sold off the concentrated stock position, and, with the proceeds, acquired its proprietary mutual funds that had appreciated from the date of acquisition to the date of the lawsuit.

The trust explicitly granted the trustee absolute discretion over investment decisions and exculpated the trustee from liability except in the case of “gross negligence”.

Trustee Investments

Notwithstanding these issues, the court found that Sky Bank had violated its fiduciary duties to the beneficiaries and surcharged the bank for losses that had occurred as a consequence of the sale and reinvestment. The court looked at many factors in rendering its decision. These are beyond the scope of this discussion. This case is raised simply to present the point that what seems to be correct at the time may turn out to not be the case in the future and a trustee, who decides to invest funds on behalf of the trust, **must** understand the legal ramifications of these actions. Failure to understand these ramifications can easily result in personal liability.

Development of the estate and trust investment plan.

One of the most important things an executor or trustee can do is develop a written investment policy statement, one that considers all of the various factors that go into administering the trust investments and that is communicated to the beneficiaries on a regular basis.

Development of the estate and trust investment plan.

There is a five step process recommended by the Foundation for Fiduciary Studies. It is as follows:

1. Analyze the current position of the fiduciary's investments.
2. Diversification and allocation of the portfolio.
3. Create a formal investment policy.
4. Implement the investment policy statement.
5. Monitor and supervise the performance.

Thanks for attending!

Please fill out the questionnaire.