Estate Planning

Estate planning for 2022: Questions to ask your clients.

By Marvin E. Blum, JD, CPA

It's a whole new world of estate planning. From an all-time high estate tax exemption that soon sunsets in half, to the prospect of higher taxes, larger inheritances, complicated family dynamics, rising rates of divorce and litigation, electronic data, the list goes on and on.

Against this backdrop of uncertainty, below is a list of ten questions that every client should be asked to identify areas that need attention. The answers almost always lead to a serious estate planning update.

1 Do you own anything in your name (other than retirement accounts)?

Besides retirement accounts, are any assets directly owned by the client? If assets are titled in the client's name, it generally reveals two things: the assets likely are exposed to claims of creditors, and if the estate is above the exemption, the assets likely will be exposed to a 40% estate tax.

Once these assets have been identified, the first step should be to examine each asset to determine if it is "safe" or "risky." Risky assets (such as real estate or oil and gas) can give rise to claims. Address this exposure by putting an entity wrapper—a limited partnership or limited liability company—around each risky asset, so creditors can only reach the one risky asset and can't reach other assets outside the entity.

The second step is to protect all assets from being exposed to the owner's personal creditors (such as a tort creditor) by transferring both safe assets and risky asset entities to a family limited partnership (FLP).

Finally, the third step is to transfer the FLP units to an irrevocable trust to add another layer of asset protection and to remove assets from the taxable estate.

2 After you're gone, will your retirement assets be protected?

Who are the beneficiaries of the client's retirement accounts? Naming children as outright beneficiaries puts the assets at risk. Instead, naming a trust as beneficiary places the funds outside the reach of creditors or divorce. Also, any funds remaining in the trust when the beneficiary dies may avoid estate taxes.

Normally, when a trust is named as beneficiary, the payout is subject to a five-year rule requiring the individual retirement account be distributed (and taxed) to the trust beneficiaries within five years of the death of the IRA owner. However, a special trust called an accumulation trust achieves the asset protection qualities inherent to trusts while also "stretching out" the payout period. With an accumulation trust, IRA amounts must be paid out to the trust within 10 years. The funds can then be held in the trust and dribbled out to the beneficiary as needed.

3 If you died right now, would your children's inheritance become divisible upon a divorce?

Remind clients that any asset owned by either spouse may be "marital property." Moreover, marital property may be presumed to be community property, and the burden of proof is on the party claiming an asset is separate property. Income from separate property may also be community property, depending on state law.

On the other hand, none of the assets owned by a properly structured irrevocable trust is marital property. Therefore, assets held in such a trust cannot be community property, do not generate community property income, and are not divisible upon divorce. Accordingly, planners should strongly urge clients to leave the inheritance to dynasty trusts for the benefit of heirs.

4 Have you taken advantage of the doubled estate tax exemption?

We have a limited "use it or lose it" opportunity to utilize the doubled estate tax exemption before it sunsets in half on December 31, 2025 (or sooner). To lock in the benefit of the doubled exemption, a couple has to transfer $23.4 million out of their estate. The most popular way for married couples to use each spouse's exemption is for each spouse to create a spousal lifetime access trust (SLAT) for the benefit of the other. When appropriately structured, SLATs allow clients to take full advantage of the increased exemption yet retain access to the assets.

5 Can you have your cake and eat it too?

If clients desire to transfer appreciating assets out of their estate but retain access to trust assets and control of trust investments, consider a Section 678 trust. Essentially, a §678 trust allows a beneficiary to be treated as the owner of the trust for income tax purposes but not for estate tax purposes.

With a §678 trust, a client can retain access to the trust's funds for health, education, maintenance, and support and also can serve as trustee of the trust.

Moreover, upon the client's death, the trust assets will not be subject to estate taxes. In addition, assets owned by the trust are generally not subject to the claims of creditors. State laws vary regarding creditor protection.

6 Do you have any low basis assets?

It is important to identify any assets that have appreciated significantly. If the client has low-basis assets, consider "upstream" planning.

If the client's parent has unneeded exemptions, the client could gift the asset to a parent outright or, even better, to a trust for the parent and give the parent a general power of appointment (GPOA) over the assets. The GPOA would cause the assets to be included in the parent's estate.

In the parent's will, the GPOA could be exercised to leave the assets to a trust for the client, thereby acquiring a stepped-up basis for the assets when the parent dies.

7 Do you love your grandkids equally?

Most people love their grandchildren equally. With a traditional per stirpes inheritance, grandchildren with more siblings receive less than grandchildren with fewer siblings. For instance, assume Generation 1 (G-1) has a son with two children, a daughter with four children, and a $12 million estate. After G-1 dies, the son and daughter (G-2) each receive $6 million. However, after G-2 dies, the son's children each receive $3 million while the daughter's children each receive $1.5 million.

To lessen this blow on the cousins, the client could take out a life insurance policy that goes to all the grandchildren (G-3) per capita. The rest of the estate plan remains intact. This creates new assets to use for gifting to G-3 without disrupting G-2's inheritance.

8 Do you have a "red file?"

People in seemingly excellent health can pass unexpectedly. If the client dies suddenly or becomes incapacitated, do loved ones have all the information they will need? Encourage clients to create a "red file" for what estate planning documents don't cover:

- Section 1 – Centralized file of personal information: passwords, contacts, listing of assets, location of documents.
- Section 2 – Business continuity plan: A will directs who will own the business, but not who will manage it. Clients should provide management succession guidance to facilitate the transition when they're gone.
- Section 3 – Plan for incapacity: preferred care providers, caregiver compensation, living preferences, general preferences

(favorite TV shows, movies, colors, foods).

- Section 4 – Legacy plan: document the "heart" side of an estate plan—information on ancestors, meaningful memories, lessons learned, values, and goals for the family.

9 Do you have a business succession plan in place?

As baby boomers age, many seem to think they're going to live forever and accordingly have done no business succession planning. To start, form a planning team (CPA, attorney, financial advisors) and bring all the key stakeholders to the table to develop a plan and implement the succession process.

When thinking about succession planning, searching for a solution involves evaluating a toolbox of planning options to find what works best. There are three primary choices in the toolbox:

1. Transfer the business to family;
2. Sell the business to people within the business; or
3. Sell the business to an outside party.

Every family is different—there's no single succession plan that works for all families.

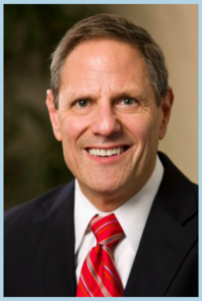
10 Are you worried an inheritance will ruin your children?

We have all witnessed the disaster when an inheritance passes into unprepared hands. Families who succeed engage in best practices like family meetings and family education, all aimed at preparing heirs to be responsible inheritors.

A family advancement sustainability trust (FAST) equips your family to remain strong and connected through the generations.

In a nutshell, a FAST is an add-on to a traditional estate plan, often funded with life insurance, that does two things. First, it provides funds to pay for family enrichment and education activities such as family retreats, travel, and preserving the family's heritage, as well as maintaining legacy real estate assets passing down to future generations. Second, it appoints trustees/committees who are paid to do the legwork in planning these activities and making sure they happen. The end result is a gift to your family of a meaningful and lasting legacy.

In conclusion, asking effective questions is the gateway to creating an effective estate plan. With these ten questions as a guide, planners can navigate the current climate to identify their clients' most pressing needs.



Marvin E. Blum, attorney and CPA, established The Blum Firm more than 40 years ago, specializing in the areas of estate planning and probate, asset protection planning, planning for closely held businesses, tax planning, tax controversy, and charitable planning. The company is now the largest group of estate planning attorneys in the state of Texas. He is board certified in estate planning and probate law and is a Fellow of the American College of Trust and Estate Counsel. Blum was chosen as one of the "Nation's Top 100 Attorneys" by New York's *Worth* magazine and selected by his peers for inclusion in *The Best Lawyers of America – Trusts & Estates.*