

ZOLLA LAW FIRM

December 2021 Newsletter

It's been a difficult year for many, but I am grateful for the Covid vaccine and hopeful that life will go back to normal soon. I wish you all a very happy holidays!

There have been some inflation adjustments in estate and gift tax:

The estate tax exclusion for 2022 is \$12.06 million; and
The annual gift tax exclusion is \$16,000.

Although President Biden's original infrastructure proposal would have been paid for partially with an increase in the estate tax, that component will not likely be in the final federal tax bill. Income tax and capital gains rates may change in the near future, but the estate tax exclusion amount is not scheduled to change until January 1, 2026, when the amount will drop by half.

Delays in Court Procedures

Our local courts have had many issues this year, primarily due to Covid. Although we have shifted most of our hearings to Microsoft Teams and most filings are handled through an e-filing portal, ultimately many people are needed to review the paperwork and the court is understaffed. This Fall in the Santa Clara County probate department, it's taken more than a month for documents submitted for e-filing to be reviewed by a clerk for scheduling. And, then the matter is scheduled for six or eight weeks in the future. This means once a client signs the court paperwork, it can take up to three months for a judge to review the matter! Living trusts, powers of attorney, and advance health care directives are great ways to help avoid complications, minimize (or eliminate court involvement), and ensure that your wishes are carried-out. I strongly urge you to review your signed paperwork, and make sure you are still happy with your listed fiduciaries and beneficiaries. And, if you've been delaying signing your paperwork, please make it your New Years' resolution to finalize your estate plan in the new year.

Ethical Issues

As the pandemic continued throughout 2021, we've all gotten a little "on edge". I've tried my best to show patience and be as accommodating as possible to clients. If appointments need to be moved at the last minute, or there's some confusion in instructions, I gladly work to make sure my clients get the best results with their estate planning. But, there have been two ethical issues that came up very frequently this year, which I feel the need to address: (i) divorcing clients and (ii) clients with diminished capacity.

Divorcing Clients

When I first represent a married couple, I send them an engagement letter that (i) goes over my fees, but also (ii) states my responsibility to the couple. I write that there can be no confidentiality between the three of us in the matter. I say that if I get an email from one client, I can reply to both clients' email addresses. And I state that I cannot be an advocate for one spouse against the other (say in figuring out what is separate property and what is community property).

When clients divorce, I am prohibited by California legal ethics rules from representing either or both spouses without the written consent of both of them. I also could be required to turn over my file to either spouse's divorce attorney.

This year, I've had multiple clients complain because I cannot represent them without their former spouse's consent. Unfortunately, under California law there is no amount of time that can override the conflict and it doesn't matter if I knew one client before the couple got married. This conflict must be waived by both spouses. I hate to lose clients who would prefer to work with me, but if it's an acrimonious divorce and a spouse won't agree to the continued representation, it really would be better if both former spouses started fresh with independent attorneys.

Clients with Diminished Capacity

The other issue that has come up many times this year is handling clients with diminished capacity. In all of these instances, an adult child (who is not a client in their own right) has called me to tell me that the client wants to change their estate plan and wants the child to schedule the appointment. Then the child drives the client to the appointment and tells me that the client wants to either (i) name that particular child as the trustee or (ii) give that child a larger share of the estate.

Please understand that I have been doing this work for 25 years and I am on high alert for undue influence as soon as the child makes the appointment. In my experience, a person who really wants to change their estate plan is capable of scheduling the appointment themselves. But, I do try to keep an open mind and talk with the client privately about what they want to do.

In most cases, after the client's child leaves the room, the client immediately tells me exactly what the child wants. I'm sure the client was "primed" before the appointment. So, I try to continue the conversation for about ten minutes, asking the client about their living situation, family circumstances, financial concerns, and time and place. (I actually had one client tell me, "She [my daughter] didn't tell me you would ask me this." I had asked her what day of the week it was!) I also ask the client multiple times about what they want to change. If the client can't tell me what the documents currently state, or give me a clear answer or explain why they want to change the paperwork, I refuse to modify the estate plan.

Believe me, I am not trying to trick the client, and it pains me to see a client lose their capacity and memory, but I also have to serve as my client's advocate at all costs and I cannot stand idly by and draft documents for a person who clearly doesn't understand them. This year marked the first time that the children of clients actually yelled at me for a refusal to create new documents! In one instance I was actually fearful of my personal safety.

I've been told I'm not a doctor and I don't have the right to assess capacity. But, I do know the base level of understanding that a person must have to create a will or a trust. And if a client can't answer basic questions and doesn't know why they're in my office, they are not in a position to execute new paperwork. The sad truth is the child will likely be able to find another attorney to assist them in changing the client's documents, and if not the child will probably draft the paperwork themselves and find a notary who will acknowledge the client's signature. Under California law, I'm not allowed to call Adult Protective Services or alert my client's other children of my concerns, and I can't send an email out to the attorneys of the Silicon Valley Bar Association telling them to avoid client's child like the plague (or like Covid). I just have to stand back and watch it play out, and know that if it goes to litigation, I'll be a witness and have to explain to a judge my concerns.

Funding Your Trust

I am thrilled that so many of my clients have "funded" their trust by retitling their financial accounts and updating the beneficiaries of their retirement plans. But, for every ten clients who have completed the paperwork, I come across one or two who have done no funding, other than the transfer of their home into their trust as a part of their initial estate planning.

If you transfer your assets into your trust at your death, you make a huge gift to your trustee and family members. A successor trustee can step in as soon as they obtain a death certificate, and can start handling accounts, fix up and list your home for sale, and tackle numerous minute transactions to clean up your affairs. But, if your assets do not have a listed beneficiary and are not in your trust, and if they total more than \$166,250 in value, it will be necessary to file a petition in probate court to move those assets in your trust. In Santa Clara County, given the current scheduling issues with the court, this could mean at least a six month delay. And, if the asset is a vacation home or other real estate out of California, this will likely require a probate in the other state, and therefore at least a year of court paperwork.

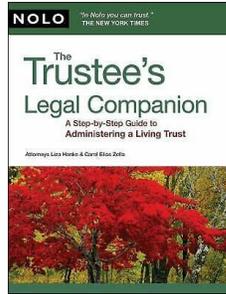
If you have any questions about funding your trust, I highly suggest looking through your blue estate planning binder. And, if you need any specific assistance about forms or requirements, please do not hesitate to contact me directly.

Client Workflow/Vacation

I am incredibly grateful to many of you who have referred your relatives, neighbors, and friends to me over the past year. However, to manage a decent work-life balance there some cases I simply cannot take, even though they fit within the practice area of "estate planning". I am typically in the office from 8:30-5:30 M-F, and schedule my workflow to fit within that timeframe. I am happy to

discuss with you before you make the referral. Thankfully, there are many attorneys in the Silicon Valley Bar Association who should be capable of taking the case.

I will be working limited hours until January 3. During my break, I will be returning emergency messages and scheduling appointments for January. Have a wonderful Holiday, and I'll look forward to speaking with many of you in the New Year.



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