FOULSTON
ATTORNEYS AT LAW

ESTATE PLANNING & PROBATE

OVERVIEW

Foulston Siefkin estate planning attorneys at our three offices in Wichita, Topeka, and Kansas City handle the entire breadth of estate planning, probate and trust services.

The attorneys in our estate planning department work with clients to craft estate plans tailored to meet their individual estate planning situation, including planning for a disability, maximizing family harmony, minimizing taxation and administrative costs, providing for asset protection, maximizing governmental resources such as social security and Medicaid, and properly planning for the succession of ownership of farms and closely held businesses. Due to having some of the most advanced “in house” created estate planning documents to be found regionally or nationally, as well as a firm-developed efficient document assembly system and a large staff of specialized legal assistants and secretaries to assist at all levels of the estate planning process, we are able to cost-effectively deliver comprehensive estate plans to our clients which meet their needs, goals and personal values. Besides advising clients on developing their own estate plans, we also represent fiduciaries and beneficiaries of trusts and estates.

As members of the largest law firm in the state of Kansas, Foulston Siefkin estate planning attorneys bring a special wealth of knowledge, experience and peer recognition in representing our clients in the estate planning, probate and trust area. Our attorneys have been named in “Best Lawyers in America” and “Super Lawyer” lists both regionally and nationally, have been prominent in regional and national estate planning lawyer associations such as the American College of Trust and Estate Counsel (ACTEC) and National Academy of Elder Law Attorneys (NAELA), have served as adjunct professors in estate planning at three law schools, have been among some of the most frequent speakers at estate planning seminars sponsored by the Kansas Bar Association and other prominent regional professional groups for the last several decades, have authored numerous estate planning related articles for regional and national legal publications, and have actively participated in both drafting-and lobbying for a substantial portion of the significant Kansas probate, trust and other related estate planning legislation furthering the best interests

of the general public.

AREAS OF REPRESENTATION

Property Transfers at Death and Disability Planning

The two most basic aspects of the estate planning process are providing for the proper disposition of one's property at death and planning for a disability. Our attorneys are highly knowledgeable and experienced in properly planning for both such eventualities.

Transfers at Death

The proper focus in providing for the disposition of property at death to beneficiaries of one's estate or trust is doing so in the most efficient and cost-effective manner possible while not detracting from other very important estate planning goals, such as preserving family harmony (as further discussed below), minimizing taxes and administrative costs, maximizing governmental resource benefits such as Medicaid and Supplemental Security Income (SSI) for beneficiaries of their estates and trusts, and protecting property passing to the beneficiaries of one's estate from the claims of their creditors and spousal claims in the event of a divorce or upon their subsequent death. In accomplishing our clients' goals through well-drafted estate planning documents, our attorneys are highly knowledgeable in the use, limitations, and benefits and detriments of Wills as the primary document for passing property at death to family members or other beneficiaries, as well as the alternative probate avoidance techniques of using Revocable Trusts, joint tenancy ownership and beneficiary designations.

Disability Planning

Although a disability can occur at any age, as the average age of our population has continued to rise, so has the frequency of disabilities. Our estate planning department advises our clients on properly and comprehensively planning for a disability which may leave them with insufficient mental capacity to manage their property or health needs. In the absence of a then existing estate plan which adequately addresses such circumstance, a judicial guardianship (with regard to personal care) or conservatorship (management of assets) proceeding is likely to be required before any other person or entity (such as a bank or trust company), including a spouse, would possess the legal authority to act on such disabled person's behalf in their personal care and financial matters. Such proceedings can be quite expensive, typically require an annual fee for posting an insurance bond with respect to the management of the disabled person's property, are a matter of public record, can create considerable anxiety and divisions among family members in the judicial process required to appoint a guardian or conservator, and demand annual accountings and reports to the court regarding the appointed guardian's and conservator's exercise of their duties.

To avoid such undesirable and costly consequences, our attorneys assist clients in planning for such an eventuality through a revocable trust or Durable Power of Attorney for Financial Decisions, appointing a Trustee of the Revocable Trust and Financial Agent, respectively, to attend to property matters on the disabled person's behalf, and a health care agent under a Durable Power of Attorney for Health Care to act on such disabled person's behalf with respect to personal care decisions. When comprehensively drafted to cover the financial and personal circumstances which might arise with respect to such disabled

persons, such instruments ensure persons or parties of our clients' choosing are legally authorized and entrusted with the management of their property and proper health care needs in the event of their disability without having to resort to the courts to secure such authority or having their actions subject to on-going and costly judicial supervision.

Finally, we advise clients on provisions in Living Wills to incorporate their wishes should they wish to have no health care applied or medically assisted nutrition or hydration in the event they are unable to competently make that decision themselves and their health has deteriorated to where they have no quality of life from their particular perspective, e.g., terminally ill with no hope of improvement, a persistent vegetative state (PVS) or permanent coma, and even should they desire, a dementia or Alzheimer's condition in which they consistently fail to recognize family or friends. Individuals in such conditions often desire to execute a Do Not Resuscitate (DNR) directive should they be in such a condition.

Minimizing Family Disharmony in the Process

Most families value family harmony as their most valuable "asset," having a value far greater than all of their worldly goods. Consequently, clients normally do not want to incur any significant risk of damaging or destroying this "asset" in the estate planning process or in the passing of their property at death to the beneficiaries of their estate. Yet, in planning for property transfers at death and planning for a disability, there is little question but that the vast majority of estate plans are devised in a manner that gives little to no significant thought to this issue, let alone providing a comprehensive plan to address it. As a result, most estate plans put family harmony at an acute risk of being lost following a death or disability of a family member, particularly with respect to a death or disability involving a parent or step-parent.

The estate plan of a parent which leaves a legacy of family disharmony for a surviving spouse or their children is not only likely to permanently destroy family relationships, it can result in high economic costs as well should such disharmony result in the incurring of significant attorney fees and administrative costs, as it typically does, in resolving contentious issues that develop in the administration of a spouse's or parent's estate. Although analytical studies on the degree of this risk are lacking, informal surveys and anecdotal accounts of estate planning attorneys (including those in our estate planning department) tend to indicate that estate plans which do not properly plan for such risk have between a one-third and seventy percent risk of creating significant family disharmony with respect to estates and trusts having at least one step-child or more than one child who are beneficiaries of the estate.

Our estate planning attorneys have been nationally prominent on this issue, having written regional and national professional articles on the importance of estate planning considerations which promote family harmony as well as having presented numerous seminars to attorneys and other professional groups emphasizing the importance of this largely ignored issue. Practicing what we preach, our attorneys employ leading edge techniques and strategies which greatly reduce the risk of family disharmony in administering an estate or trust by an estimated two-thirds, and perhaps as much as ninety percent. Such techniques include: having mediation and arbitration provisions in estate planning documents; selecting the proper Executor or Trustee to manage their estate or trust that minimizes such risk; ensuring that there are proper provisions in Wills or Revocable Trusts to properly adjust the interests of beneficiaries for any property which might pass outside such provisions through joint tenancy and beneficiary designations; providing procedures for the distribution of tangible personal property items among children which minimize the risk of contentious disputes; allowing family members to change trustees of revocable trusts in certain circumstances; proper treatment of lifetime loans to beneficiaries; providing disincentives for any specious

challenges by beneficiaries to the provisions of wills and trusts; and counseling clients to advise other family members of their estate planning provisions only when there are compelling reasons or beneficial purposes in doing so.

Gift and Death Tax Planning

Our attorneys have a vast amount of knowledge and expertise in advising clients how to structure their gifts both during their lifetime and passing property at their deaths so as to minimize gift taxes during their lifetimes and the so-called “death taxes” of inheritance, estate and generation-skipping taxation following their deaths. As Kansas has repealed both its inheritance tax and estate tax it imposed in the past, and federal gift and death taxation has been reduced in its application to only the very largest of estates encompassing less than 1% of the population, most estates need not be concerned with minimizing such taxation. However, for those that do, every dollar subject to such taxes at the federal level is taxed at a very high rate of taxation demanding sophisticated estate planning techniques beyond provisions in Wills and Revocable Trusts to minimize its impact. Such techniques involve making non-taxable medical and educational gifts, and annual exclusion gifts to children and descendants, both outright and to irrevocable trusts for family members which are not subject to gift tax. They also include utilizing lack of marketability and lack of control discounting of assets to decrease the value for estate tax purposes of assets held in entities such as corporations, family limited partnerships (FLPs), and limited liability companies (LLCs) to minimize gifts, estate and generation-skipping transfers with respect to lifetime and post-death transfers of property. They further include techniques which “freeze” the value of taxable estates such as provided by self-cancelling installment notes (SCINs), private annuities, and transfers and sales to intentionally defective grantor trusts (IDGTs).

Income Tax Estate Planning

Although only a very small minority of estates are currently subject to gift and estate taxation, following death all estates and Revocable Trusts are subject to federal and state income taxation. Yet the vast majority of estate plans fail to properly plan to minimize its impact. This can result in a very large amount of federal and state income taxes being unnecessarily paid following death in the administration of estates and Revocable Trusts, by trusts and trust beneficiaries individuals create under the provisions of their Wills and Revocable Trusts for the beneficiaries of their estates, and by the beneficiaries themselves when they sell property left to them outright. The net effect of such failure is to frequently reduce by a substantial amount the amount of after-tax property passing to the beneficiaries of trusts and estates.

Consequently, a major emphasis of our estate planning attorneys is the minimization of such income tax liability. As an example, we advise married clients of lifetime division of ownership techniques and incorporating sophisticated estate planning provisions in Revocable Trusts which have the capability of significantly reducing the amount of “built-in” capital gain in stocks, real estate and other investments passing to the beneficiaries of their estate upon their death. We also advise clients in the structuring of trusts in which they pass property to the beneficiaries of their estate as to provisions which can minimize the income taxation of the trust and its beneficiaries. As a further example, we advise fiduciaries of estates and trusts as to administrative techniques, including the timing of the payment of expenses and distributions, which can significantly reduce their income taxation. A final example is planning for distributions from qualified retirement plans and IRAs, which due to their complexity and substantial income tax impact on clients and the beneficiaries of their estates, is discussed as a separate category below.

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Planning for Qualified Retirement Plans (QRPS) and IRAS

A very large proportion of the population have a substantial amount of assets in QRPs and IRAs. In a high percentage of situations, such assets constitute their largest investment. Because in most situations the distributions from such assets constitute taxable income, minimizing such taxation is normally an overarching estate planning goal. Estate planning for such assets requires a very high level of knowledge, skill and experience with respect to guiding clients through the maze of statutory and regulatory distribution rules governing distributions therefrom, as well as employing strategies and making appropriate elections which minimize required distributions from QRPs and IRAs both during the client's lifetime and following death. Our estate planning lawyers are very knowledge in this highly technical and specialized area in not only maximizing the substantial income tax benefits of minimizing such required distributions and the proper "tax timing" of permissible withdrawals, but also in utilizing such tax-deferral techniques of spousal "roll overs" and "roll overs" from IRAs to QRPs, converting regular taxable IRAs to non-taxable Roth IRAs, and leaving assets in QRPs and IRAs in trust for family members in a manner which does not jeopardize the ability of the Trustees of such trusts to "stretch out" required distributions from such assets over the life expectancy of the beneficiaries of estates or trusts.

Charitable Planning

Despite the large increase in the value of estates subject to federal gift and estate taxation, and the substantial reduction of income tax rates at both the federal and state levels in recent years, both of which have significantly reduced the benefits of gift, estate and income tax deductions for property given to charities, charitably minded individuals continue to give substantial amounts to charities for non-tax reasons. However, as one would expect, they normally would desire to give to their favorite charities in the most tax advantageous manner possible.

Our estate planning attorneys are highly qualified to do so, advising clients on the advantage of utilizing certain types of property to minimize after tax costs of charitable gifts, as well as employ certain charitable giving techniques in charitable giving such as charitable remainder unitrusts (CRUTs), charitable remainder annuity trusts (CRATs), charitable lead unitrusts (CLATs), charitable lead annuity trusts (CLATs), pooled income funds, gift annuities, private foundations, and community foundations which can minimize gift and estate taxation, as well as income taxation both during their lifetime and following their deaths.

Generally speaking, such techniques minimize taxation by avoiding capital gain on property contributed to charities, deferring income taxation on property contributed to charitable trusts, and leverage income, gift and charitable deductions. By reducing the actual "after tax cost" of charitable gifts by virtue of such tax benefits, the net effect is that the government is indirectly contributing part of the gift to charities. And because the "after tax cost" of the gift to the donor is less, the donor may choose to increase the amount of gifts the donor might have otherwise made.

We also advise individuals on the advantages of giving to community foundations or setting up a private foundation as recipients for their gifts. Further, we counsel numerous charitable entities with respect to operational issues, tax returns, and maximizing the benefits of charitable giving by their donors.

Asset/Spousal Claim Protection Planning

We unquestionably live in an increasingly litigious society that exposes a person's assets to the claims of creditors, spouses, tort plaintiffs, and the claims of governmental entities such as state and federal taxing

authorities. Our attorneys assist clients in protecting their assets from the claims of creditors and spouses through a variety of estate planning techniques. With respect to protecting their assets from the claims of their spouses, we advise clients with respect to both pre-marital and post-marital agreements to protect against a spousal claim upon a divorce or other dissolution of marriage from a claim for alimony or division of marital property, as well as an inheritance claim following death.

Our estate planning attorneys have a high level of expertise in counseling clients on how they can protect their assets from the claims of their creditors during their lifetime and from spousal and third party claims of beneficiaries with respect to the recipients of the assets they leave the beneficiaries of their estate following their death. During lifetime, such asset protection techniques include advising clients as to assets which are exempt from the claims of creditors, changing ownership of assets between spouses to minimize the amount of assets held by the spouse most vulnerable to creditor claims, using limited liability companies (LLCs) for asset protection, purchasing “umbrella policies” for liability protection, transferring assets by both spouses to irrevocable trusts for each other, and the advantages of out of state and out of the country irrevocable trusts for asset protection. Regarding asset protection against creditor claims against their estates following death, our attorneys have extensive experience in the use of probate avoidance techniques coupled with irrevocable trusts to provide asset protection against claims of a creditor against the estates of our clients while achieving all other estate planning goals. With regard to protecting the beneficiaries of our clients’ estates against creditor and spousal claims, our attorneys have substantial expertise in the benefits of leaving property in trust for beneficiaries to provide asset protection from the claims of their creditors and spouses for the remainder of their lives without substantively reducing the amount of desired control such beneficiaries have over the trust estate.

Governmental Resource Planning

With a burgeoning aging population comes the increasing specter of long-term care and its substantial attendant costs. The fact is there is a very significant risk that an individual who lives to their life expectancy will spend at least some time in a long-term care facility, the costs of which average hundreds of dollars per day and the average stay of which is several years. Unless an estate is properly planned for such eventuality prior to incurring a disability, the costs incurred for long-term care can unnecessarily exhaust estates and leave little assets not only for the long-term care resident, but also at death for his or her spouse and children. Yet, as is the case with the vast majority of other important issues noted above and below, most estate plans do not adequately address this issue, if it is even addressed at all.

Our estate planning department has a wealth of expertise in this area of maximizing governmental resource planning, which now comprises a substantial portion of our estate planning practice. This includes not only planning for our elderly clients to minimize the amount of assets they have to spend on long-term care prior to qualifying for Medicaid benefits which pay for such care, it further includes reducing the risk of “estate recovery” of Medicaid benefits paid by the government against the remaining assets of Medicaid recipients and their surviving spouses following their deaths. It additionally includes advising clients with respect to making the correct option elections to maximize their social security benefits so as to minimize the risk our clients will “outlive their money.” Finally, it additionally includes planning to ensure that the assets our clients leave their spouse or other beneficiaries do not disqualify such beneficiaries from Medicaid benefits or Supplemental Security Income (SSI) benefits they are currently receiving or might otherwise be entitled to in the future.

Second Marriage/"Blended Family" Planning

A fundamental demographic of our society is the increasing percentage of married persons who have children from prior marriages or relationships. This aspect injects a layer of complexity not found in other estate planning contexts that has a highly increased risk of family disharmony and disputes as to the disposition of property and parental care following a disability or death of either parent, and most markedly, following the death of the surviving parent.

Without proper planning, in a high percentage of such situations, such resultant disharmony can not only create family disputes and confrontations which are economically costly, it can also irrevocably damage family relationships among children from both sides of the family, as well as between a step-parent and step-children. This is one of the most litigious of the estate planning scenarios. In addition to pre-marital and post-marital agreements defining and limiting spousal property rights in the event of a divorce or inheritance rights as a surviving spouse, our estate planning attorneys also utilize advanced family harmony techniques in conjunction with advanced estate planning strategies to ensure that the property of both spouses or relationship partners adequately provides for the survivor, passes at their death to their children at their deaths in the manner they desire, all the while achieving their other estate planning goals and not damaging family harmony in the process.

Family Farm and Business Succession Planning

There is hardly any estate planning task that is more emotion-laden and complex than succession planning in the passing of family farms and other businesses to family members both during lifetime and at death. It involves the use of extensive and creative estate planning and business planning techniques that ensure continuity of the business enterprise in a manner that is efficient, preclude unwanted individuals or parties from participating in the farm or business decisions, and achieve other estate planning goals and maintain family harmony in the process. Our attorneys are quite knowledgeable and highly experienced in this area. Frequently, entities such as limited liability companies, buy/sell agreements, and mediation and arbitration provisions are essential components of this process.

Representation of Fiduciaries

In addition to drafting estate planning documents appointing fiduciaries to manage property (e.g., agents under financial power of attorneys, trustees of revocable trusts and executors under a will) and personal health care (agents under health care powers of attorney), our estate planning attorneys also have extensive experience in advising fiduciaries in the proper exercise of their legal duties. This can involve advising them as their duties in the post-death administration of trusts and probate estates, as well as representing them in any estate or trust litigation related thereto. We also represent such fiduciaries before tax agencies and tribunals, such as the Internal Revenue Service (federal tax issues), the Kansas Department of Revenue (Kansas tax issues), the Kansas Division for Children and Families (Medicaid issues), the United States Tax Court (federal tax issues), state and federal district courts and courts of appeal (tax and non-tax issues), all of which our estate planning attorneys have had a vast amount of experience. Finally, with respects to guardianships and conservatorships, we have extensive experience in both advising guardians and conservators and representing them in judicial proceedings.

Estate and Trust Disputes/Litigation

Our attorneys not only represent fiduciaries, but also beneficiaries of estates and trusts in issues involving other beneficiaries or fiduciaries of estates and trusts. Such representation includes such issues as contesting the distribution of assets, challenging to the appointment of a fiduciary, the interpretation of

provisions of trusts and wills, the management of probate estates and trusts by Trustees and Executors, and personal claims against a probate estate or trust, be it on behalf of a creditor or a surviving spouse claiming an inheritance right.

Our attorneys also have experience in serving as mediators in assisting in the non-judicial resolution of disputes between fiduciaries and beneficiaries of an estate or trust, as well as disputes solely between beneficiaries of an estate or trust. With respect to such issues which are not resolved through negotiation and settlement negotiations, or through mediation, our attorneys are prepared to utilize their extensive trial experience to diligently litigate our clients' interests in the proper venue, be it probate court or in state or federal district courts and appellate courts.

EXPERIENCE

The firm has represented a great number of business owners, corporate executives, physicians, retirees and other individuals who have needed estate planning advice in the following areas:

- Family income shifting
- Generation skipping
- Traditional bypass trust and marital deduction planning
- Life insurance trusts
- Charitable lead trusts
- Charitable remainder trusts
- Tax planning
- Medicaid planning
- Asset protection
- Planning for qualified and non-qualified employee benefits including rollover IRAs, the excise tax on distributions from large plans, and suitable payouts and beneficiary designations
- Estate freezing
- Estate tax treaties
- Advice to resident and non resident aliens on estate and income tax matters
- Qualified domestic trusts
- Structuring of investments
- Estate and gift taxation
- Situs wills
- Family partnerships (FLPs) and limited liability companies (LLCs)
- Intentionally defective grantor trusts
- International jurisdictions

We have performed extensive work in the administration of large estates and trusts including:

- Post mortem income tax planning
- Controversies with the Internal Revenue Service
- Will contests
- Will and trust construction suits
- Settlement of complex estate matters

We have assisted clients with minimizing income taxation of:

- Individuals
- Family businesses
- S corporations
- Closely held C corporations
- Partnerships, including dealing with problems related to passive losses, investment interest, partnership allocations, installment sales, family partnerships and deferred compensation

Foulston Siefkin has provided advice regarding marital property issues, including:

- Planning for community and separate property
- Negotiation and drafting of premarital (or prenuptial) agreements
- Tax planning for marital separation and divorce

PUBLICATIONS

2023
Consideration of Mediation and Arbitration Provisions in Wills and Trusts
-The Journal of the Kansas Bar Association

2021
Tax-Efficient Strategies Create Win-Wins for Donors and Charitable Organizations

2020
Coronavirus: Evaluating Your Estate Planning Strategies

2019
Kansas Supreme Court Ruling Uncaps Damages for "Pain and Suffering"

RELATED LINKS

- The American College of Trust and Estate Counsel (ACTEC)
- National Academy of Elder Law Attorneys (NAELA)
- Internal Revenue Service
- ABA Section of Real Property, Probate and Trust Law

- ABA Tax Section
- Social Security Administration
- AM Best's Worldwide Insurance Directory
- Chicago Title's 50-state title insurance survey

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