

THE SHAPE OF THINGS TO COME: THE MODERN PRACTICE

By **Avi Z. Kestenbaum**

Educating Clients Before It's Too Late

Thoughts on accomplishing a complex mission

It seems to me that this publication, as well as others, has recently started to place more emphasis on the “softer side” of the practice, by which I mean the non-tax-related issues, such as the psychological and emotional aspects. For example, in “Filling in the Gaps,” Marvin E. Blum encourages clients to create a “red file” that contains their wishes for future care, financial intentions and a list of personal information in the event of incapacity.¹ After all, transfer taxes before and after death, with inclusion of potential federal and state gift, estate and generation-skipping transfer taxes, will at most help evaporate approximately 40 percent to 50 percent of an estate, but estate disputes, waste, greed and the destruction of the family business could wipe out much more and leave behind terrible family scars and relationships that will never totally heal. The industry is now recognizing the importance of non-tax issues because of: more frequent and bitter estate disputes; lower transfer tax rates and higher exemptions; greater potential for estate tax repeal; and a more enlightened society regarding dealing with personal and family psychology and dynamics. It seems we live in this age of entitlement in which many of us deal with our own family members who feel everything is deserved and coming to them, yet these same individuals don't have the ability to handle or appreciate what they'll receive.

Human Capital

In a previous article, “Rethinking the Fabric of Estate

Planning: Have We Gotten It Wrong?” my co-author and I discuss how large transfers of wealth can have the potential to create future generations who are unmotivated and immature and have poor self-esteem.² The article concludes that the most successful estate plans transfer not just monetary assets but also human capital, meaning the client transfers his skills and knowledge so that the future generation is prepared to perform in the world and produce economic value.

In “Changing the Playbook,” another article by Blum, he discusses “now planning” as one strategy for transferring this human capital.³ Under this strategy, a system is established “through which family members may grow to understand the responsibilities of ownership.”⁴ This can include creating open dialogue among family members, scheduling annual family meetings, involving family members in community matters or involving family members in the family business at a young age. By participating in “now planning,” the next generation is able to gain human capital from the previous generation before it's too late.

Solving the Impossible

Yet, when clients, who are already in their 60s, 70s and 80s, come to me for estate-planning advice and ask me about potential family sensitivities and conflicts (or when they don't ask, and I offer my input anyway), I often feel like I can place Band-Aids on the issues, but I can't ever really solve them. How can I solve impossible issues such as how to divide the family business among the children or make descendants like and respect each other and be happy and satisfied with what they will or won't receive? Many of the deeper emotional and psychological issues involved likely have persisted for decades, maybe even since the children were very young, and relate to how their parents raised them. Some may involve individual mental health issues that

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even psychologists and therapists can't solve. Perhaps we can state that part of these issues is "nature" and the other part "nurture," but in either case, the estate-planning professional can only do so much, especially so late in the game.

Getting to the Root of It

Many of my clients are (or at least should be) worried about future estate disputes, the success of their businesses, waste and squandering of assets by spoiled descendants and how their children will get along when the clients are no longer living. Often, to help deal with these issues, we create legal structures like partnerships, draft key employee and company operating agreements and all sorts of types of trusts, such as incentive, marital, discretionary, support and asset protection and focus on who will serve as trustees and their powers to help deal with these issues. Don't get me wrong. The wise and empathetic estate planner can certainly help minimize the potential for, and the effects of, a later dispute or problem and help descendants to become more productive as well as protect their assets. However, as my own still-young children and I grow older, I realize that these structures and documents don't get to the root of the issues. What's really needed is teaching the next generation to be self-sufficient, productive, grateful, self-fulfilled, loving and happy people. Obviously, when substantial money is involved (or conversely, sometimes if too little money is involved and there's tremendous hardship), it's much more difficult to inculcate higher ideals and values.

So, what's the solution? Well, certainly as Blum points out in his "Playbook" article, it's education and preparedness starting at a young age.⁵ We can't just start educating our loved ones in the later years of our lives. It's likely too late if our children are already grown. We also have to start leading by example, and it has to start much earlier. However, to convey this message to relatively young or new parents who may not yet be visiting an estate-planning attorney, there must be far greater understanding and collaboration among all the financial professionals including insurance, banking, brokerage, accounting, legal and perhaps the educational and mental health communities as well, to truly get this important message across. I certainly welcome feedback

and advice from the readers of this article as to how to accomplish this extraordinarily complex mission. 

Endnotes

1. Marvin E. Blum, "Filling in the Gaps," *Trusts & Estates* (February 2017), at p. 38.
2. Avi Z. Kestenbaum and Amy F. Altman, "Rethinking the Fabric of Estate Planning: Have We Gotten It Wrong?" *Trusts & Estates* (February 2016), at p. 32.
3. Marvin E. Blum, "Changing the Playbook," *Trusts & Estates* (February 2016), at p. 34.
4. *Ibid.*
5. *Ibid.*



SPOT LIGHT

Color Wheel

Automne by After Sonia Delaunay-Terk sold for \$56,250 at Doyle's Prints & Multiples auction on Nov. 1, 2017 in New York City. Delaunay-Terk is known for her use of bold colors and geometric shapes, as seen in this hand-woven Aubusson wool tapestry by Pinton Frères. Delaunay-Terk was the first living female artist to have a retrospective exhibition at the Louvre in Paris.